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Monographic Section

Philosophical re-thinking of international tax law: an analysis of harmful tax competition

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Abstract. This study aims to re-think the harmful tax competition philosophically and through which to open a new route for further studies. With this aim, harmful tax competition is examined from epistemological, theoretical and methodological perspectives. As a result of this study, it is contended that the OECD failed to justify the assumption that tax competition under specified circumstances is regarded as "harmful" around the world in the same way and it harms global welfare. By doing this, the OECD does not take into account that the meaning of harmful tax competition can be constructed differently by different societies. In fact, based on the different meanings of construction, the same kind of tax competition may be regarded as "beneficial" by some states and "harmful" by others. Therefore, to understand the challenges on the definition of harmful tax competition and solve them, more philosophical analysis is needed.

Keywords: harmful tax competition, international tax law, epistemology, constructionism.

INTRODUCTION

The changes in international tax order bring new challenges and new measures should be taken to stabilize the international order. As it is evidenced, the unilateral and bilateral measures are not sufficient anymore to counter these challenges and a multilateral approach based on the cooperation among states is needed (Head 1993: 666, OECD 1998: 52). The OECD has been dealing with the harmful tax competition for a long time, but these challenges remain unsolved. The reason behind this may be regarded as the failure to determine the nature of the challenges due to the unnecessary excessive focus on technical issues such as the characterization of the harmful tax practices rather than the philosophical ones. Therefore, in this study, harmful tax competition will be analyzed from the perspectives of philosophical considerations focusing on epistemology, theory, and methodology. Within this scope, a constructionist approach will be fol-

lowed as the part of epistemology by applying the interpretivist approach as a theory and the research methodology will be based on the heuristic inquiry.

This study does not aim to argue that these chosen philosophical considerations are the most suitable ones in the international tax law study and should be followed. Rather the aim is to create an awareness to engage the philosophical thinking in the international tax law study, because it may bring new insights and may be helpful to counter the international tax law challenges. Additionally, this study does not offer to explain in detail what harmful tax competition is. This may be a subject for another study. Rather the aim of this study is to re-think the harmful tax competition philosophically considering epistemology, theory, and methodology. With this aim, this study asks the epistemological question of "how do we know that the tax competition is harmful?".

Therefore, the study begins with a general explanation of the change of the international order. Then, it follows with the philosophical considerations by giving a short explanation of the constructionism, interpretivism, and heuristic inquiry. This part does not constitute detailed information on the concepts, but it forms a basis for the following parts. The following section focuses on the detailed inquiry on the harmful tax competition by seeking an answer to the several questions presented. At the end of this section, it is aimed to find an answer to the questions raised in the study.

CHANGE IN THE INTERNATIONAL ORDER

The traditional understanding of international law centers the primacy of states and therefore, historically, it mainly consists of the consent-based body of norms (Head 1993: 619, E. Reynolds 2018: 662). However, this traditional understanding is currently under the transformation (Head 1993: 620). First, the change is realized gradually with the rise of international organizations in international law. Second, at the multilateral level, the new set of rules is established (Id. 621). Although the multilateral treaties are considered as consent-based norms, their consent-based characteristic is even changing towards the "mandatory multilateralism" (Criddle & Foc-Decent 2019: 274). Mandatory multilateralism stands as the lack of capacity by states to act unilaterally in international law due to the global concern of the subject matter (Id.). The reason behind this change may be considered as the inefficiency of solving international problems through the consent-based approach (Krisch 2014: 3). Mandatory multilateralism, on the other hand, may bring solutions equitable for all the contracting states (Criddle & Foc-Decent 2019: 276). The increasing political coordination among states and the non-state actors, economic integration, and global interdependence caused multipolarity in the international order which, in return, accelerated the internationalization of law (Varella 2014: 11-16).

The changing direction in the international order through departure from the consent-based approach and the internationalization of law caused also a considerable decline in state sovereignty. The traditional understanding of the sovereignty which prioritizes the individual states is no longer valid against the rapidly changing international order. The nation-states have common interests and goals in a globalized environment and international cooperation is needed to enable these common goals. Consequently, nation-states gradually join international organizations to fulfill their common aims, in return, they sacrifice their sovereignty at some level (Bello 1996: 1027; Koesrianti 2013: 267). Therefore, the traditional understanding of state sovereignty is in decline against the rapidly changing globalized, complex, and interdependent international order (Koesrianti 2013: 272; Higgins 1999: 82).

The changing order in international tax law is not much different than international law. The international tax law was mainly based on the bilateral tax treaties which reflect the consent and the primacy of states. However, with the rise of the OECD at the beginning of the 1960s as the international organization which has considerable influence on the tax norm development, the primacy of states weakened.[1] Especially together with the request by the G20 finance ministers from the OECD to develop an action plan to address the Base Erosion and Profit Shift-

[1] Christians (2010:14-15); Ault (2009:757-781) (stating the role of OECD with respect to norm developing in international tax law); Ring (2010:649-722) (examining the international tax policy formation through international tax organizations).

ing ("BEPS"). Upon the request by the finance ministers, the OECD published BEPS Action Plan on 19 July 2013 to identify actions needed to address BEPS related issues and introduced 15 different Action Plans to be taken to prevent BEPS (OECD 2013). As a result of the BEPS Project, the international tax law norms began to change direction towards multilateralism. All the measures, within this scope, such as drafting multilateral agreements (OECD 2015), developing guidelines, minimum standards, and establishing peer review (OECD 2017) of national practices show that the OECD norms have a law-like impact on international tax law (Christians 2016: 1608).

The growing importance of international organizations especially the OECD and consequently, the shift from the state-based approach in international taxation caused considerable discussions concerning tax sovereignty. In the literature, great importance is attributed to tax sovereignty, and especially the OECD is criticized on the grounds that it interferes with the tax sovereignty of states.[2] This concern is significant if the direct relevance of state sovereignty with the revenue collection and fiscal policy of the states is considered (Ring 2008: 158-159). Beyond the interference by the OECD to the tax sovereignty, it is also important to consider what happens if a state interferes with another state's tax sovereignty while fulfilling its tax policy. However, it is still not clear how such interference can be resolved because there is not established hierarchical order of sovereignty among states (Id. at 229). The new developments in the international tax order through increasing interactions not only between states but also between the non-state actors led to a change in the perception of absolute tax sovereignty (Christians 2009: 99). This shift does not mean that the tax sovereignty of states is not important anymore, but it only evolved throughout the time (Ring 2008: 183).

As a result of these changes in the international tax order, the international tax system which worked once is no longer working properly. The OECD is working on the challenges by offering international solutions. However, the solutions offered by the OECD usually ignores the interests of the developing countries (Baistrocchi 2012: 547-577; James 2002: 5). The BEPS Action Plan may be seen as a solution for international tax law (OECD 2013). However, it does not bring new subjects to be discussed, but rather it only repeats the same issues that have been discussed for a long time such as harmful tax competition (Gonzalez-Barreda 2018: 279-280). These discussions were not sufficient enough to solve the harmful tax competition problems in international tax law, because of the inconsistent methodological focus by the OECD (Id.). The reason behind this may be regarded as the failure to determine the nature of the challenges due to the unnecessary excessive focus on the technical issues. Therefore, to understand the change and the demands of the new international order, we need to focus more on philosophical considerations such as epistemology, theory, and methodology rather than the technical aspects of international taxation such as the criteria determined by the OECD with respect to qualifying a tax regime as "harmful" (Bhandari 2017:1; Oats 2012: 9-10; Engle 2008: 103).

PHILOSOPHICAL CONSIDERATIONS

Philosophical considerations are usually neglected by the researchers especially by those working on the areas which have a practical dimension such as tax law. However, it is important to consider philosophical perspectives. The philosophical questioning of a subject constitutes a process and each step in this process is interconnected. Therefore, an epistemological question should be asked at the beginning of the research that is how do we know that we know.[3] At this point, we try to find out the knowledge and the theory is used to determine the approach that we proceed to get that knowledge. During this process, we make assumptions about knowledge and justify the assumptions by using this theory (Crotty 1998: 7; Engle 2008: 103). The procedure that we adopt during the research constitutes the methodology of research that is the research design (Crotty 1998: 7).

The philosophical considerations are usually seen as time-consuming or unnecessary to develop the technical and practical issues such as the criteria developed to characterize the harmful tax practices. On the contrary,

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[2] *See e.g. in* Biswas (2002).

[3] Pollock (1968: 183); Cunningham&Fitzgerald (1996) (clarifying the epistemological considerations and the importance of knowing them for understanding a reading. With this aim they establish seven epistemological issues).

they are the building blocks of consistent practice to understand and tackle the global harmful tax competition challenge. Without a philosophical consideration such as epistemology or the theory behind the assumptions, the developed solutions may remain ineffective. Especially together with the changes in the current order, the theories may subject to change too, because they are usually inefficient in the changing order as they developed to justify the past assumptions.

In this paper, harmful tax competition will be considered from philosophical perspectives. Thus, the constructionist approach will be considered as epistemology, interpretivism will be used as the theory of this study and the research method will be considered as heuristic inquiry.

Epistemology: Seeking Knowledge through Constructionism

According to constructionism, there is no absolute truth, knowledge or meaning considered independent from the human being (Id.: 8-9). On the contrary of objectivism, which believes that the object is independent from any consciousness, constructionism accepts that there will never be an objective knowledge waiting outside in the world. Therefore, knowledge is not created by someone or something and waits to be discovered, but it is constructed (Id.: 43-44). Crotty gives the example of a tree (Id.) According to him, an object can be called as a tree because human beings construct the meaning. Therefore, the same object may not be called as "tree" by another human being, because she/he does not construct the meaning in the same way. Additionally, the same human being may not call a tree as "tree" after some years because the circumstances in which someone lives may be changed and the meaning of an object may no longer be constructed as "tree".

A meaning, knowledge or truth may be constructed differently by human beings from different cultures. According to social constructionism, culture is an indispensable factor for shaping behavior, understanding, and thought (Id.: 53). Therefore, the knowledge that is constructed by human beings from different cultural backgrounds may be different. Social constructionism finds its place in international law as well. In the international order, the main actors are states and each state has different cultural features that shape the behavior of states (Krasner 2000: 97). Although the states are main actors on constructing common understandings or knowledge, other less powerful actors such as non-state actors, corporations or other groups have an influence on shaping the common understandings of states (Brunnee & Toope 2000: 70). If we think about a norm in international law, as a concrete example, we may take the customary international law. Is a customary international law posited somehow and has it been always there or is it constructed by states? Customary international law is formed through state practice and opinio juris. Therefore, a customary international law stands as a law in international law, not because a superior power posited it, but because it is constructed by the states as a law to be obliged and practiced for a long time.[4]

Instead of accepting something that we know is true, we should question how do we know that our knowledge is true. There should not be any absolute answer to this question, because it may differ based on the circumstances that it is constructed.

Theory: Justifying Assumptions with Interpretivism

The positivist approaches usually follow the natural science methods to understand and explain human behavior and there is no room for values in these approaches whereas, interpretivism examines the cultural and historical interpretations of social life incorporating the values (Crotty 1998: 67). Interpretivism in the legal context stands as the opposition to the theory of positivism which believes that the law is based only on the practice of the com-

[4] *But see*, Verweij (2009) (stating that cultural approach should be applied to international law which focuses on how the contradictions interact with each other, rather than a rational-choice and constructivist approach on the grounds that international law is contested rather than constructed).

munity.[5] According to the legal interpretivism, the nature of law constitutes interpretation in addition to the practice of the law by judges, officials, and others, because the law is an interpretive concept (Dworkin 1986; Stavropoulos 2016: 25-26). Dworkin contends that the law consists of the rules and also the values behind the rules so that the interpretation of the values and rules together constitute law.

Dworkin gives an example to clarify how the interpretation applies to understand what the law is. According to "the rules of courtesy", curtesy requires for the peasants to take off the hats to the nobility (Dworkin 1986: 47). This rule may change throughout time because people develop interpretive approaches on the rule of courtesy. They can attribute a different meaning to the rule or their opinions on the courtesy may change. Therefore, one day the understanding of the respected people may not be considered as social superiors but as the older people or another (Id.: 48). Based on this change, a different interpretation of the practice of "the rule of courtesy" may emerge. Dworkin believes that the law is constructive and through its interpretive nature, it brings the principles and the practice together by keeping in mind the past so that the interpretive approach aims to reach the best result (Id.: 413).

Although Dworkin did not design interpretivism as a theory for international law in the first place, interpretivism finds its place in the literature on the application to international law. For instance, Çalı, in her research, examines the relevance of interpretivism with international law and draws possible internal and external objections, as well as responses to those objections with respect to the applicability of interpretivism to international law (Çali 2009). In fact, Dworkin, in his later work also applied his theory as a moralized approach to international law (Dworkin 2013: 26). Therefore, despite the opposition exerted especially by positivists, interpretivism finds its place in international law theory.[6]

Methodology: Designing Research through Heuristic Inquiry

Heuristic inquiry as a research method is a process of "self-search, self-dialogue, and self-discovery" throughout the research based on inner awareness (Moustakas 1990:11). In the heuristic inquiry, a question or a problem presented by the researcher is intended to be answered by human experiences, beliefs or judgments (Id.: 15). Due to some subjective elements of heuristic inquiry, there are misconceptions[7] about the objectivity or reliability of the research. Nonetheless, heuristic also stands as a qualitative research method and a way of doing effective research (West 2001). Although the heuristic methodology in social sciences is generally used in psychology, it may be beneficial to apply heuristic inquiry to law studies as well.[8] In fact, the heuristic inquiry is needed for complex and uncertain circumstances and law aims to solve these kinds of problems. For this reason, the heuristic inquiry may be appropriate for law research to solve complex and uncertain issues (Engel & Gigerenzer 2006: 3-4). Especially in the adjudication, some cases are too complex to solve by only examining the law. As Dworkin states in "hard cases" finding the solution for the case needs a further interpretive approach by the judges considering the protected values behind a rule that is applicable to the case (Dworkin 1978). Therefore, it is inevitable for the judges[9] to apply heuristics because the decision will be made by considering also the moral values of the individual judges.

Although it is not that common to follow the heuristic inquiry methodology in law or international law, heuristics may bring new insights to already discussed subjects from a different perspective. For instance, in the international tax literature, Christians examined several studies in international tax law that apply the case study in

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[5] There are different legal positivist scholars who employ different ideas about the law. With this definition of legal positivism, the ideas of Hart is mainly employed. According to Hart, the law is based on "the rule of recognition" which indicates the acceptance by the society *see in* Hart (1994).

[6] Banteka (2018) (stating that Dworkin's interpretivism fits for explaining the customary international law due to its descriptive and normative nature. The writer applies the theory of interpretivism to identify the customary international law).

[7] *See in* Gigerenzer (2008) (misconceptions and the clarifications about the heuristic inquiry).

[8] *Contra* Korobkin (2004).

[9] He calls the judges for the hard cases as "*hercules*".

their researches to enhance the different theoretical, methodological approaches used by scholars in international tax law (Christians 2010: 349-351). Christians identified only one study following the heuristic inquiry methodology conducted a historical study based on one country's experience. The aim of the study was to show that the existing literature inadequately theorizes about the tax havens (Boise & Morriss 2009); Christians 2010: 350). Thus, I believe that heuristics may bring new perspectives to any areas of law and that applying heuristic methodology may lead to a totally different conclusion in order to solve problems related to the same subjects.

PHILOSOPHICAL RE-THINKING OF HARMFUL TAX COMPETITION

Seeking an Answer

Harmful tax competition is one of the frequently discussed issues both by scholars[10] and the OECD. If the harmful tax competition is a challenge for international tax law and if the OECD is working to solve this challenge for more than 20 years, why the OECD did not succeed? Is the OECD asking the wrong questions to detect the real reasons behind this challenge? Maybe the OECD is asking the right questions, but it may be looking at the answers in the wrong places. These are the questions that cannot be answered in this study yet.

According to the works of the OECD, in case that a country has a preferential tax regime offering a lower tax rate, it will most likely fall under the scope of "harmful" tax competition. If the OECD has an assumption with this regard, is the OECD able to justify its assumption through a theory? At this point, instead of directly accepting this assumption, I would like to question "how do we know that the tax competition is harmful?". Do we call tax competition "harmful" because it is objectively harmful independent from any consciousness or it is constructed during the time in this way? If the knowledge of harmful tax competition is constructed, is it constructed in the same way all around the world? Is it possible to construct the meaning for the exact same tax competition in different ways in different societies? Is it possible for the same society to qualify the same tax competition as "harmful" today and "not harmful" in the future because the value attributed to the tax competition changed?

These are neither an exhaustive list of questions nor all of them are aimed to be answered in this study. Rather these questions are presented to examine the harmful tax competition from a different perspective to reach the knowledge. Firstly, it is beneficial to examine the general historical background of harmful tax competition to question how the meaning has changed during the time if it has changed at all.

Historical Background of Harmful Tax Competition through the Lens of the OECD: From 1998 to 2015

Raise of the Discussions

OECD stands as the leading international organization with respect to international taxation issues. At the very beginning, the work of the OECD mainly focused on double taxation problems caused by the different laws of the different jurisdictions. Although the focus of the prevention of double taxation remains, the main focus of the OECD shifted towards the prevention of double non-taxation. Therefore, the discussions in the international tax law and the OECD currently concentrate on the restriction of the harmful tax competition.

However, this main focus has changed throughout the time from the prevention of double taxation to the restriction of the harmful tax competition (Morriss & Moberg 2012: 3). It is important to understand why and how this change occurred in the first place because a tax policy change develops throughout a process. In fact, there were three main economical changes in the world after the Second World War ("WWII") that enabled the increase in tax competition (Id.: 23). First, together with technological developments, the cost of international

[10] *See e.g.* Martin (1940); Avi-Yonah (2000); Roin (2000); Littlewood (2004); Keen & Konrad (2012); Kudrle (2017); Fellerr & Schanz (2017); Stewart (2018).

businesses decreased and the number of international transactions increased (Id.). Second, with the financial liberalization, capital markets internationalized and trade in capital goods became easier (Id.: 24). Finally, the development of new financial products enabled businesses easier access to credit and reduce their costs. All these factors enabled the businesses to engage in international transactions through structures that decrease their tax liability and consequently, states began to implement tax rules to prevent the decrease of tax liabilities of businesses.

Therefore, the competition between states to attract foreign investments increased and it enabled the shift of the investments from high-tax jurisdictions to low-tax jurisdictions. Finally, this shift impacted negatively tax revenue for the high-tax jurisdictions. Until this point, it is inarguable that the tax competition increased among states and some states benefited from this competition, while others not. However, the real issue which is debatable was whether this tax competition is "harmful" or not. From the lens of the OECD, the answer to this question would probably be yes.

In fact, in 1996 the G7 countries in the Lyon Summit issued an Economic Communique stating that besides the benefits of globalization, it creates new challenges by enabling the harmful tax competition between states.[11] Therefore, G7 countries requested from the OECD to work on this issue and prepared a report by establishing a multilateral approach so that the countries work individually and collectively to limit these practices. Although this was not the first time in the international tax history that harmful tax competition issues emerged[12], the G7 request accelerated the discussions on the topic. In fact, since then the OECD is the leading international organization working on the harmful tax competition.

Based on the request of the G7 countries, the OECD prepared and published a Report on Harmful Tax Competition in 1998 ("1998 Report").[13] In this report, the OECD prepared a campaign to prevent harmful tax competition through tax havens and preferential tax regimes. The main aim of the OECD in this report seems to be the protection of the economic interest and revenues of G7 countries and the other OECD Member States (Littlewood 2004: 442). It is understandable that tax competition is "harmful" from the lens of the OECD because it is harmful to the OECD Member States and the OECD is there to protect the interests of them in the first place. Therefore, we may assume that under specified circumstances set by the OECD, tax havens and preferential tax regimes are constructed as "harmful". However, does it mean that the concept of harmful tax competition should be constructed in the same way all around the world, for instance also by non-OECD countries? This question should not be intended to answer now, but it should be kept in mind.

The OECD Work on Countering Harmful Tax Competition

The OECD issued two cornerstone reports on harmful tax competition.[14] The first one is the 1998 Report on Harmful Tax Competition and the second one is the 2015 Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance ("2015 Final Report") within the scope of the BEPS Action Plan. The main findings of these reports will be examined respectively. In these reports, the OECD mainly focused on the technical issues on the criteria of determination of the harmful tax practices without justifying why the criteria set under the reports should be accepted globally.

In the 1998 Report, the OECD focused on geographically mobile activities such as financial activities and aimed to develop a better understanding of tax havens and harmful preferential tax regimes. The report considered

[11] The Communique can be reached through <http://www.g8.utoronto.ca/>.

[12] *See e.g.* OECD (1987), Tax Havens: Measures to Prevent Abuse by Taxpayers, in International Tax Avoidance and Evasion: Four Related Studies, *OECD Publishing*; OECD (1987), Taxation and the Abuse of Bank Secrecy, in International Tax Avoidance and Evasion: Four Related Studies, *OECD Publishing*.

[13] OECD (1998), Harmful Tax Competition: An Emerging Global Issue, *OECD Publishing*.

[14] OECD has various researches and reports on the harmful tax competition. However, only two of the reports will be examined under this study, because they are seen as the most important ones in the international tax law history with respect to the harmful tax competition.

these two types of practice as "harmful tax practices" (OECD 1998: 8). In addition, in this report, the OECD stated these harmful tax practices erode the tax bases of other countries, distort trade and investments, affect the location of financial activities, diminish global welfare and damage the fairness (Id.). The OECD also aimed to include the non-member states for the cooperation to eliminate the harmful tax competition on the grounds that these practices are harmful not only for the OECD countries but also for non-member states. In the report, it is contended that the globalization also enabled the states to develop preferable fiscal regimes to attract investments to their countries (Id.: 13). Therefore, according to the 1998 Report, it could be said that globalization and consequently national states' behavior are primarily to be blamed for the emergence of harmful tax practices.

The OECD gives definition and lists some factors to identify harmful tax practices by differentiating between the tax havens and harmful preferential tax regimes. According to the 1998 Report, although a tax haven does not have a clear meaning, a country which operates its public services with no or nominal income taxes and offers the non-resident countries a place to avoid taxation is a tax haven (Id.: 20). The harmful preferential tax regime is defined as the regime which has significant income tax but it has also some features that enable the harmful tax competition (Id.). However, both of the definitions are vague and subjective to characterize a country as a tax haven and a country that has a harmful preferential tax regime (Littlewood 2004: 459). In fact, as per the 1998 Report, due to the broad characterization of the harmful tax competition, it can be stated that the OECD intended to label almost any tax competition as harmful (Id.: 465).

In addition to the general explanations, the OECD specified the factors to identify tax havens and harmful preferential tax regimes. Accordingly, no or only nominal taxes, lack of effective exchange of information, lack of transparency and no substantial activities are listed as the key factors identifying the tax havens (OECD 1998: 22). Key factors on determining the harmful preferential tax regimes are listed as no or low effective tax rates, "ring-fencing" of regimes, lack of transparency and lack of effective exchange of information (Id.: 26-28). The factors determining tax practices as "harmful" are too broad that almost any tax competition may easily fall under this scope.

The 1998 Report also emphasized the need for a coordinated approach at the international level to counter the harmful tax practices (Id.: 38). The OECD stressed that individual actions are not able to solve the problems completely, rather a multilateral approach is needed through cooperation and the OECD declared itself as the appropriate forum to undertake the task.[15] The OECD presented recommendations for the national level such as the adoption of CFC rules and the adoption of the exchange of information rules (OECD 1998: 40-46). At the bilateral level on the tax treaties, the measures proposed e.g. were a more efficient exchange of information between treaty partners, the revision of the entitlement of the treaty benefits, the consideration of the termination of the tax treaties with the tax havens, and the consideration of not entering into tax treaties with tax havens (Id.: 46-52). Finally, with respect to the multilateral level recommendations, the OECD presented the guidelines to apply a common approach to restrain the harmful tax competition and invite the member states to implement these guidelines (Id.: 56). The OECD also emphasized that non-member states should be kept in the dialogue to enable the expansion of global economic growth (Id.).

The 1998 Report created a long-lasting effect on the international tax law environment. Several reports and a number of discussions in the literature followed the 1998 Report.[16] The discussions, without even fading away, re-emerged in 2013 even stronger with the OECD BEPS Action Plan (OECD 2013). Upon the request of the G20 finance ministers from the OECD to develop an action plan to address BEPS issues, BEPS Action Plan was

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[15] *Id.* at 52; *contra* Persaud (2002:23-24) (questions the appropriateness of the OECD to develop an international regime concerning harmful tax practices and proposes that IMF or World Bank may be proper organizations as having more inclusive approach for developing countries); lewood (2004:481) (questions the appropriateness of the OECD to undertake this task and presents the UN as another and maybe a better organization to handle the harmful tax competition).

[16] *See e.g.* OECD (2000), Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, *OECD Publishing*; OECD (2001), The OECD's Project on Harfmful Tax Practices: The 2001 Progress Report, *OECD Publising;* OECD (2004), The OECD's Project on Harmful Tax Practices: The 2004 Progress Report, *OECD Publishing;* OECD (2006), The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries, *OECD Publishing.*

introduced to deal with the shortcomings of the competition-based actions of the states instead of the cooperative approach (Brauner 2014:58). Therefore the OECD developed 15 Action Plans and Action 5 was dedicated to "countering harmful tax practices more effectively, taking into account transparency and substance". Based on the BEPS Action Plan, the OECD published the 2015 BEPS Report[17].

The similarities between the 1998 Report and the 2015 BEPS Report are impressive and it is inevitable to question whether nothing has changed for almost 20 years, and we still stand in the same position with respect to the harmful tax practices.[18] In fact, there are not any substantial changes with respect to the countering harmful tax competition in the 2015 BEPS Report compared to the 1998 Report[19]. Therefore, the most considerable change was the states were held accountable causing the harmful tax competition due to their tax regimes in the 1998 Report, while the multinational enterprises were held accountable due to their aggressive tax planning in the 2015 Final Report. Besides this shift, the OECD has been dealing with the same issue for nearly 20 years and if the OECD changes nothing in its approach to tackle with harmful tax practices, it is more likely that the OECD and tax scholars will be dealing with the same subject for another 20 years or more.

Finding an Answer

In this part of the study, the previously presented questions should be revisited. The main epistemological question of this study was "how do we know that the tax competition is harmful?". Therefore, instead of accepting the proposition of the OECD with respect to the harmful tax competition as the only truth without questioning, the aim here is to re-think the harmful tax competition philosophically. The change in the international order affected the international tax order as well. For instance, bilateral treaties in international tax law were once sufficient enough to eliminate the challenges at the international level. However, these bilateral treaties are not sufficient enough anymore, and consequently, a multilateral and cooperative approach is needed to counter these challenges. Within this regard, the call of the OECD for a cooperative approach was totally right. However, the OECD failed to justify, through a consistent theory, the assumption that the criteria developed by the OECD to qualify the harmful tax practices applies to all countries regardless of their status of developing or developed (Dwyer 2000: 52).

The international tax order is not the same today as it was 50 years ago and it constantly changes. The new international tax order needs more inclusive approaches to encounter the challenges. However, the approach of the OECD with respect to the harmful tax competition remains the same which is the protection of the interest of its member states in the first place. This state-centric approach of the OECD should be enhanced with a more social constructivist approach and also the inclusion of the non-state actors to the process (Webb 2004). Therefore, the OECD should have been more inclusive especially for transnational private actors such as transnational corporations (TNCs)[20], accounting and law firms[21], and also non-governmental organizations (NGOs)[22] in the inter-

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[17] OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, *OECD Publishing.*

[18] *Contra.* Avi-Yonah (2009) (examining the 1998 Report since the commencement date and finding the work of OECD as success on the grounds that there was no decline in the tax revenues of OECD member countries.).

[19] Gonzalez-Barreda (2018: 279-280) (stating that the issues discussed in BEPS Action Plan have been analyzed since the beginning of the problems in international taxation at the OEEC/OECD level. Therefore, the writer contends that the topics are not new, and BEPS Action Plan does not offer any significant revelations with respect to the content. However, it brings new formal matters such as the multilateral instrument).

[20] Muchlinski (2010: 10) (stating that multinational enterprises have considerable influence on law-making processes through lobbying activities, even though they are not considered as law-makers under the traditonal international law); Webb (2004: 790) (stating that the structural power of the transnational corporations weakens the OECD's efforts on countering with harmful tax competition).

[21] Webb (2004: 794) (stating that the private actors such as transnational accounting and law firms provide adivce to the transnational corporations which leads the development of offshore financial centers and tax havens).

[22] Webb (2004: 794) (stating that although the NGOs may have considerable influence on the countering harmful tax competition initiative, the OECD usually does not consider them as part of the tax policy formation process); For instance as the non-profit

national tax order (Id.). For instance, the Business and Industry Advisory Council (BIAC) stands as one of the most important non-state actors concerning international taxation issues. The BIAC presented its opposition to the OECD's harmful tax competition project (BIAC 1998). Although the OECD was not completely responsive to this opposition, through the participation of the BIAC in the process, the OECD widened the scope of the determination of the legitimate tax planning (Webb 2004: 821). Therefore, the OECD accepted the inclusion of a private non-state actor to the norm making process. Nevertheless, the OECD should have more inclusive for the non-state actors as they may be considered as the representative of the social community which expresses the needs and thoughts of the important actors.

As a matter of fact, inclusive concepts and theories are needed for a better understanding of the position of all participants in the global order (Noortmann 2011: 77). In the traditional international order, the main actors are accepted as states and the non-state actors are accepted as the objects that are subject to the consent of states (McCorquodale 2009: 142). However, rather than focusing on the subject or object division in the international order, all actors may be considered as "participants" which contribute to the processes in the international legal system at some level (Id.). The same considerations are directly applicable to the international tax order. The OECD as a leading international organization concerning tax matters follows a state-centric approach and fails to look from a cosmopolitan vision[23]. The OECD claims that the harmful tax competition is a concern at the global level and needs coordination, yet refrains from an inclusive approach that accepts the participation of all actors to the processes. If the harmful tax competition is a global challenge (maybe even crisis), it is not possible to find a solution with an approach that differentiates between states and the other actors, developing countries and developed countries or member states and non-member states. The OECD should be aware that the meaning can be constructed differently in different societies. If the OECD manages to construct the meaning of the harmful tax competition which is beneficial for all countries without differentiation between developing and developed countries through a common construction of the meaning, then the OECD may become successful in its work to counter the harmful tax competition as a global challenge.[24]

The main problem with respect to the OECD project was the objectivist epistemological approach to "harmful tax practices" on the grounds that countering harmful tax competition defined by the OECD fosters global welfare. However, the factors and definitions listed by the OECD are vague and variable for the different social, legal, and economic contexts (Townsend 2001: 254-256; Gonzalez-Barreda 2018: 280). The forms of tax competition, which enable the sector-specific tax privileges, amongst others, are usually accepted as harmful around the world, because they may lead to the misallocation of resources which is harmful under an international competition perspective (Trandafir 2010: 174-175; Teather 2002: 61). Besides these sector-specific tax competitions, the construction of other forms such as low tax rates, and even tax havens which do not offer sector-specific tax privileges are not perceived as "harmful".[25] Especially the less-developed countries aim to attract foreign investments through

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organisation the Center for Freedom and Prosperity (CF&P) had considerable work on fighting to preserve jurisdictional tax competition, fiscal sovereignty, and financial privacy *see* at https://archive.freedomandprosperity.org/Glance/glance.shtml.); Ring (2008: 188-196) (examining how the CFP used the tax sovereignty arguments for challanging the OECD initiative on cuntering harmful tax competition).

[23] Beck (2006: 7-8) (stating that cosmopolitan vision considers the differences, contrasts in the world society and by awareness of these finding the sameness among them and overcoming the boundaries between internal,- external, us-them and national-international.); Ring (2009: 586) (stating that although the cosmopolitan theory of justice underestimates some complexities, nuances and disagreements, it may still contribute to tax competition discussions through a deeper examination and extension of the concept).

[24] It should be clarified that the discussions with respect to the legitimacy of the OECD acting as a world tax organization and developing the international norms which as applicable not only the member states but also the non-member states are recognized, but disregarded from the discussion and consideration at this point.

[25] Trandafir (2010: 175); Dywer (2000: 48-69) (stating that tax havens do not always cause harmful tax competition as opposed to the OECD); Keen (2001: 762) (stating that allowing preferential tax regimes may be good for beneficial harmful tax competition and prohibiting them may cause to harmful tax competition); Desai et al. (2006) (stating that tax havens do not always cause to harmful tax competition); Dharmapala: (2008: 662) (stating that tax havens can be beneficial for the efficient tax competition); Teather (2002) (claiming that tax havens may lead to beneficial tax competition).

no or low tax rates to foster economic growth, enhance the employment and eliminate poverty (Littlewood 2004: 412-413).[26] The Declaration on the Right to Development states that the right to development is an inalienable human right and everyone has the right to enjoy economic, social, cultural and political development.[27] At this point, states have positive obligations to create conditions that are suitable for the development of the population and also the individuals. Thus, if the states have a positive obligation to foster the right to development and if they decide to do it through preferential tax regimes to attract the investment, is it logical to claim to remove these regimes because they are "harmful", even it is not constructed as "harmful" by the developing countries? The OECD initiative on countering harmful tax competition, by disregarding this fact, had negative effects on the economy of some developing countries which confutes the OECD's claim on global welfare (Townsend 2001: 256; James 2002: 5).

Besides the adverse effect of the OECD's project on the economy of developing countries, it is claimed that the OECD also interferes with the tax sovereignty of nation-states[28]. This claim is especially relevant to the countries which are not a member of the OECD. It may be questioned why a state cannot determine its tax policy (e.g. low income tax rate) independent from any other states' or international organization's reaction. However, whether the tax competition initiative of the OECD directly constitutes the interference to tax sovereignty is doubtful. The world is changing continuously and the meanings of the concepts are evolving according to the needs of the new order. Therefore, the traditional concept of the tax sovereignty which is considered as more likely as absolute, is no longer valid. In fact, in the literature, Ring claims that the tax competition discussion may enable acceptance of a new approach to tax sovereignty which includes the cooperation of states (Ring 2009: 560-561). Nevertheless, even if the OECD may not interfere with the tax sovereignty of states, it still ignores other participants of the international tax order and different possible meaning constructions by different societies due to a coercive state-centric approach

If the OECD follows a coercive approach and interferes with the tax sovereignty of states, it is questionable why the non-member countries began willingly to join the harmful tax competition project of the OECD, why they began to eliminate the low or no tax rates, and their preferential tax regimes. In the literature, it is claimed that the tax havens and other countries with preferential tax regimes began to comply with the recommendations of the OECD because the work of the OECD is seen as the form of soft international law and even the non-member states are willing to comply with them (McLaren 2009: 452-453). Another scholar considers the harmful tax competition initiative of the OECD which prioritizes the international community over the individual sovereignty of states constitutes an implicit global social contact (Christians 2009: 100). Therefore the non-member states may also comply with the OECD's initiative with the idea of responsibility towards forming a global economic order by sacrificing their tax sovereignty at some level (Id. 152).

Does the cooperative approach of the non-member states mean that the construction of the meaning for the harmful tax competition is changing and the project of the OECD is being successful? My answer to this question will be negative. The strategy of the OECD on the countering harmful tax competition is coercive[29] and state-centric as it is recommended in the 1998 Report to consider the termination of the tax treaties with the tax havens and consider not entering into tax treaties with the tax havens even with the ones that do not offer sector-specific

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[26] For the literature concerning the adverse effects of the tax competition on African countries which leads to poverty in those countries *see e.g.* Oguttu (2015: 528) (stating that the tax incentives offered to foreign investors to attract the investment are harmful to the African countries in the long term); Rixen (2011:452) (stating that the tax competition decrease the corporate taxation which is in fact an important instrument in African countries).

[27] G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

[28] *See e.g.* Townsend (2001: 254) (stating that the OECD initiative on harmful tax competition violates international taxation principles especially the national fiscal sovereignty); James (2002: 5) (stating that the measures developed in the OECD initiative had tremendously negative effects on non-member states' ability to maintain the tax sovereignty); Biswas (2002: 1-2) (stating that the OECD with its harmful tax competition project interferes the fiscal sovereignty which is protected both by the sovereign states and by the international law).

[29] Townsend (2001) (considering the OECD as "Bully" due to its coercive and deviant effort towards non-member countries to counter harmful tax competition).

distorting tax regimes. Within this scope, it is not a matter of the compliance of the international soft law or social contract, but it is a matter of the game theory between the powerful states and the less powerful ones. Most of the non-member states are now willing to comply with these recommendations because otherwise, they will be out of the game. In other words, the OECD's project on harmful tax competition eliminates the negotiation power of the non-member states (Townsend 2001: 254). This coercive negotiation strategy of the OECD may accomplish its objective in the short term, but the long term solutions for the countering harmful tax competition objective needs a real cooperative and inclusive approach (not being left only on the paper as the OECD did in its project). The approach and the success of the OECD on the countering harmful tax competition are questionable because the OECD stands today at the same place where it stayed at least in 1998. However, the world is changing and the OECD should understand the needs of the changing world. The OECD, by ignoring this fact continuously, imposes particular pressure on developing countries within the framework of cooperation to eliminate the low or no tax regimes for countering harmful tax competition. The OECD may change this position through a consistent, cooperative, and uniting project so that there will be not any outsiders (developing, non-member countries) or insiders (developed, member countries).

CONCLUSION

In this study, the concept of the harmful tax competition from the lens of the OECD is examined and rethought philosophically. The OECD has been dealing with this subject for a long time. However, agreement on the concept of harmful tax competition still remains an unsolved challenge. This study contended that the reason behind this may be regarded as the failure to determine the nature of the harmful tax competition due to the excessive focus on the technical issues by the OECD with respect to the determination of the "harmful tax competition". Therefore, this study considered harmful tax competition with philosophical perspectives through epistemology, theory, and methodology.

It is contended that the OECD failed to justify the assumption that tax competition under specified circumstances is regarded as "harmful" around the world in the same way and it harms global welfare. By doing this, the OECD does not take into account that the meaning of harmful tax competition can be constructed differently by different societies. In fact, based on the different meaning construction, the same kind of tax competition may be regarded as "beneficial" by different states, while the OECD regards it as "harmful". The OECD, by ignoring this fact, imposes particular pressure on developing countries within the framework of cooperation to eliminate the low or no tax regimes for countering the harmful tax competition and failed. Therefore, this study concludes that to understand and solve the real challenges, a philosophical rethinking of the concept of harmful tax competition is needed in the international tax law level.

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