HARMFUL TAX COMPETITION IN A GLOBALIZED WORLD. DOES THE WORLD TRADE ORGANIZATION DEAL WITH THIS ISSUE?

ŠKODLIVÁ DAŇOVÁ SÚŤAŽ V GLOBALIZOVANOM SVETE. ZAOBERÁ SA TÝM SVETOVÁ OBCHODNÁ ORGANIZÁCIA?

Małgorzata Wróblewska
University of Gdansk

ABSTRACT
Multilateral measures against harmful tax competition have been taken at the Organization for Economic Co-Operation and Development (the OECD) and the European Union (the EU) activities. The aim of this article is to present whether the World Trade Organization (the WTO) regulations relate to the issue of harmful tax competition or not. The WTO is established to liberalize trade and remove barriers. It is worth emphasizing that the WTO is not a tax organization and consequently documents concluded under its auspices are not tax agreements per se. Nevertheless, some tax regulations do occur in these documents. The General Agreement on Tariffs and Trade (the GATT), the General Agreement on Trade Services (the GATS) and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), the WTO does include tax provisions. It is essential to identify which taxes (direct or indirect) these provisions affect and as a result to examine them from the perspective of harmful tax competition.

ABSTRAKT
Prijímanie multilaterálnych opatrení proti škodlivej daňovej súťaži je predmetom aktivít Organizácie pre hospodársku spoluprácu a rozvoj (OECD) a Európskej únie (EÚ). Cieľom tohto príspevku je prezentovať, či regulácia Svetovej obchodnej organizácie (WTO) sa týka aj škodivej daňovej súťaže. WTO bola založená za účelom liberalizácie obchodu a odstráňovania bariér. Je potrebné zdôrazniť, že WTO nie je daňovou organizáciou, a preto aj dokuemnty uzavreté pod jej patronátom nie sú same o sebe daňovými dokumentmi. Napriek tomu je možné nájsť v týchto dokumentoch aj ustanovenia daňovej regulácie. Všeobecná dohoda o clách a obchode (GATT), Všeobecná dohoda o obchodných službách (GATS) a dohoda o subvenciách a vyrovnávacích opatreiach (SCM) obsahujú daňovú reguláciu. Je nevyhnutné identifikovať, ktoré dane (priame alebo nepriame) ovplyvňujú tieto ustanovenia, a na základe toho ich skúmať z perspektívy škodlivej daňovej súťaže.

I. INTRODUCTION

The process of globalization has had a discerning influence on the evolution of the internal tax systems. Due to it, the EU tax issues as a regional character can easily became problems of a global meaning. This is amplified by the liberalization of trade flows and an increasing capital mobility. An example of this is the transfer of tax obligations to third parties and the existence of ring-fencing regimes. These phenomena not only occur in the case of business entities operating in the EU, but also effect citizens and businesses of other major economic

players who strive to manage the finances in a more effective manner by transferring the business activities or savings to countries which offer more favorable tax conditions. These conditions principally concern no or lower income tax rates and tax privileges. This state of affairs is commonly called harmful tax competition. In effect such a harmful tax competition takes on an international character, which means that any attempt to rein it in must be carried out on a global as well as the regional level. The former is represented by the Organization for Economic Co-Operation and Development (OECD) documentation and the latter by the EU regulations. Since the Member States of the EU are also Member States of the World Trade Organization (WTO) it is essential to identify whether the WTO recognizes the issue of harmful tax competition. Therefore the aim of this article is to pinpoint if indeed the WTO deals with this issue and if so whether this occurs in accordance with the regulations of the EU and the OECD. In answering this question it is vital to define first the concept of competition (harmful tax competition) and second to discuss the documents and regulations of the EU, the OECD and the WTO concerning this matter and finally to make a conclusion.

II. ESSENTIAL NOTIONS OF THE RESEARCH TOPIC

1.1. Competition

Nowadays the increase in competition amongst entrepreneurs and consequently amongst states is visible. The aim of this state of affairs is to create an adequate climate for investments. For this reason the crucial issue is to explain the notion of competition. The etymology of the word of competition (concurrence) is based in the Latin *concurrere* which means to run together[1]. This is closely related to the concept of markets and reflects the process of rivalry between the main protagonists. At present, the substantive meaning of this concept differs from the original meaning and now describes competition between rivals. Thus we can see that the phenomenon of competition has a long history and is visible in many spheres of life[2]. Moreover, the issue of competition is omnipresent in our life's today, functioning on different levels amongst entrepreneurs and between states. Competition does not exist in a vacuum but rather depends on the existence of an appropriate legal system. As an appropriate legal system is crucial to the smooth functioning of fair competition the relationship of these two concepts is of the at most importance appropriate to preserve competition and to operates favourably[3]. The main aim of the competition is to achieve the best conditions for the business activities and its existence therefore has a crucial influence on the form and development processes which characterize the free market economy.

The existence of competition has positive as well as negative effects. The positive effects include: lower costs and prices for goods and services as well as better quality, economic development and growth, more choices and variety, more innovation and stronger democracy[4]. Apart from the many positive aspects of competition, rivalry can also lead to disadvantageous outcomes, such as lower quality products resulting from inadequate safety standards and lowered business norms often without revealing this information to the final recipients. According to the OECD, economic competition is defined by the domestic economic level which reveal state's abilities to develop the strong international position for

1 WEEKLY, E. *An Etymological Dictionary of Modern English*. Courier Corporation. Vol.1, 2013, p. 345.

2 GRZEBYK, M., KRYŃSKI, Z. *Konkurencja I konkurencyjność przedsiębiorstw. Ujęcie teoretyczne*. Zeszyty Naukowe Uniwersytetu Rzeszowskiego nt. Nierówności społeczne a wzrost gospodarczy. Uwarunkowania sprawnego działania w przedsiębiorstwie i regionie, Rzeszów 2011.Vol. 20, p.107.

3 HAYEK, F. A. *The Road to Serfdom. Text and Documents – The Definitive Edition*, B. Caldwell [ed.] Routledge 2014, p. 87.

4 STUCKE, M. E. *Is competition always good?* Journal of Antitrust Enforcement, Vol. 1, 2013, iss.1, pp.165-166. TEATHER, R. *The Benefits of Tax Competition*. The Institute of Economic Affairs, London 2005, pp. 25 - 36.

the national companies. The strong entrepreneurs have an impact on the position of the state. Consequently, a high level of development leads to a rise in budget income, utilizes factors of production to an optimum and ensures low level of unemployment and improved social care. The rivalry between states limits unfavourable social trends which lead to an uncontrolled increase in prices and reduction in consumers´ purchasing power and an elimination of freedom of choice.

1.2. Tax competition

From the global perspective tax competition is a part of international competition *per se*. It is similar to the competition on the free market, where buyers make a decision to buy or not, comparing costs and product benefits. It is through these consumer choices and decisions that entrepreneurs produce more varied products to fulfil people's needs and expectations. With this in mind tax competition is very similar: by creating more favourable tax regulations politicians can encourage citizens and foreigners to invest their money within the borders of the state[5].

There is no precise understanding of the concept of tax competition and it is poorly defined with only two types identified in the literature. The first can be characterized as "vertical tax competition" and the second as "horizontal tax competition". This differentiation has crucial consequences. The former illustrates competition between authorities on various levels (e.g. states, local governments) and relies on the same tax base imposed by these different authorities. The latter is a type of competition between individual states aimed at creating profitable tax conditions to attract foreign capital and wealthy individuals which is so important in the globalized world. It is worth emphasising that horizontal tax competition does not result in cuts to all fiscal burdens but concerns those taxes which are most damaging to the economy[6]. This is important because of the increased mobility of capital and labour. Tax competition occurs when individual states reduce tax rates and introduce tax privileges in order to motivate domestic entrepreneurs and to attract foreign investors. The tax competition only appears as a "horizontal" and come into view at the international level. Tax competition can be defined as the setting of tax rates or subsidy policies by independent governments in connection with the allocation of employees, enterprises and capital in the regions represented by these governments[7]. Creating tax incentives is more characteristic for small states and emerging markets rather than for large and economically developed states. Regardless of whether the states is small or not, poor or fully developed, incentives which are part of the internal tax system result from the sovereign power of the state. Therefore each state can tailor its fiscal policies individually to meet the needs and expectations of the market.

1.3. Harmful tax competition

There are two main opposing theories about the phenomenon of tax competition with respect to the economy. The first perceives it as a positive factor comparable to perfect competition between entrepreneurs, whereas the second views it as a negative issue resulting in a budget resources deficiency making an individual state's public sector inefficient. Additionally, tax competition limits a government's ability to redistribute income effectively

[5] In 1956 economist Ch. Tiebout presented a paper about arguments for tax competition between states. He revealed that people who choose the most preferential tax system supply taxes which are spend efficiently.. SHAXSON, N., O' HAGAN, E.M. *A Competitive Tax System is a Better Tax System*. Tax Justice Network 2013. Available at: http://www.taxjustice.net/cms/upload/pdf/TJN_NEF_130418_Tax_competition.pdf [2015-05-15]

[6] EDWARDS, CH.R., MITCHELL, D. *Global Tax Revolution: The Rise of Tax Competition and the Battle to Defend it.* Cato Institute: Washington D.C. 2008, ISBN 978-1-933995-18-2, p. 8.

[7] This definition underline the notion of government which encompass local, state and provincial government within a country. WILSON, J.D. *Theories of Tax Competition*. National Tax Journal. Vol.52, 1999, no. 2, p.270.

creating a significant problem[8]. As a result these two opposing positions have encouraged the development of fair and unfair (harmful) tax competition issues. However, in a globalized world a precise distinction between these two factors is increasingly difficult as the definition of what is fair or not can change very quickly.

According to the OECD, there is no special reason why two countries should have the same elements and levels of tax rates. These results from the relevant fiscal authority which makes decisions on tax burdens and states formulate their regulations based on the domestic policies. States are free to do this and there is no reason to treat this as an example of unfair tax competition[9]. Furthermore, entrepreneurs are free to decide where to do business after taking into consideration tax planning. In addition there is no legal definition of harmful tax competition in literature. Neither OECD nor EU regulations include a legal term for this phenomenon, either, although the concept "unfair tax practices" does appear in these institutions' documents.

In the existing literature there is some controversy directed at the European state aid mechanism in the area of special tax facilities. Some authors state that prohibited tax measures which meet the conditions of Article 107 of the Treaty (TFUE) should be automatically treated as harmful tax competition. This approach is connected with the Iannelli case[10], where the EU Court of Justice ruled that state aid contravening specific provisions of the TFUE, other than Articles 107 and 108, may be so inseparably linked to the object of the aid that it is impossible to evaluate them individually. In my opinion that this academic deduction goes too far and it is not correct to say that prohibited State Aid measures under Article107 of the TFUE always create harmful tax competition. There are specific premises which should be fulfilled to conclude that prohibited State Aid has taken place. However, such premises are not sufficient to prove that harmful tax competition has occurred. It is crucial to point out that State Aid rules refer to domestic entrepreneurs and that tax incentives can be granted to both national and foreign investors[11]. Even though, their legal position are completely different stating that tax incentive measures are unlawful is not in accordance with the EU Code of Conduct[12] which deals with harmful tax competition.

III. THE ROLE OF THE OECD AND THE EU IN HARMFUL TAX COMPETITION INITIATIVES

In a globalized world many different tax systems exist, so measures taken against a individual state would not solve the problem of harmful tax competition. International organizations have seen the convergence of their roles in tax matters. The issue of harmful tax competition is being discussed in the OECD and the EU. The OECD in particular is a forum where major steps have been taken in this sphere. Initiatives reached on the international level by all industrialized countries of the world have a much greater chance of success than activities taken on the EU level. The OECD started to deal with harmful tax competition in 1996 and in 1998 the OECD's Committee on Fiscal Affairs produced a report entitled "Harmful Tax Competition: An Emerging Global Issue" (the 1998 report)[13].

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8 EDWARDS, CH.R., MITCHELL, D. *Global Tax Revolution: The Rise of Tax Competition*.., op.cit, p. 134.

9 LAMPREAVE, P. *Fiscal Competitiveness versus Harmful Tax Competition in the European Union.* Bulletin for International Taxation. Vol. 65, 2011, no. 6, p. 4. Available at: http://www.law.hku.hk/aiifl/wp-content/uploads/2012/05/Paper-Fiscal-Competitiveness-versus-Harmful-Tax-Competition-in-the-European-Union.pdf [2015-06-15].

10 Case 74/76 *Iannelli & Vopi v. Meroni*, ECR 1977, paragraph 14.

11 HEY, J. *National Report Germany* [in:] Tax Competition in Europe, W. Schon [ed.]. Amsterdam: IBFD Publications, 2003, p.253- 258.

12 Available at: http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm [2015-07-17].

13 *OECD, Harmful Tax Competition - An Emerging Global Issue*. Paris: OECD, 1998, pp. 1-80.

Following the 1998 report the OECD created a special forum called "the Forum on Harmful Tax Practices". This was focused on international endeavours to eliminate detrimental practices by the middle of 2003 and to adopt a package of recommendations. The OECD report concentrated on direct taxation of geographically mobile activities, including financial and other service activities, and on the provisions of intangibles. A very important issue is that the OECD report for the first time identified a legal framework for analyzing in which jurisdiction harmful tax practices should be treated. There is a distinction between jurisdiction called tax havens[14] and potentially harmful preferential tax regimes in OECD countries and non-OECD economies (preferential tax regimes) [15]. My aim is not to take into consideration these differences and similarities[16], but to pinpoint that the OECD report deals with harmful tax competition in the meaning of tax havens and preferential tax regimes and that it has been trying to eliminate both types of practices.

According to the 1998 report measures adopted to eradicate harmful tax competition can be divided into unilateral, bilateral and multilateral aspects. Unilateral measures are undertaken by states individually to protect their tax base against harmful tax competition. These measures include fiscal transparency and transfer pricing rules. It also includes regulations which relate to countries without a sufficient exchange of information. The OECD encourages states to undertake a variety of measures such as tax rulings or transfer pricing rules. Bilateral measures mean that countries have agreed in a two-sided agreement to, for instance, exchange information or anti-abuse rules. Measures taken on the unilateral or bilateral level are not efficient enough on a global level and therefore it is crucial to take initiatives involving a large number of countries. Multilateral measures are adopted by countries to cooperate jointly. The 1998 report is such an example. More than five years since the first report was published, the OECD produced a new one in 2000: *Towards Global Tax Co-Operation: Progress in Identifying and Eliminating Harmful Tax Practices* (the 2000 report)[17]. This 2000 report published forty seven jurisdictions so-called tax havens which refused tax co-operation. The 2000 report also identified preferential tax regimes. The OECD's next step in fighting harmful tax competition was to adopt the *Agreement on Exchange of Information in Tax Matters* (the Agreement)*[18]*, whose purpose was to promote international co-operation in tax matters through the exchange of information. The Agreement is not a binding instrument but includes two proposals of bilateral agreements adopted according to the OECD commitments. Since the publication of the 2000 report positive changes have been passed in individual countries.

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[14] The concept of tax havens is described by using four features such as: no or only nominal taxes on relevant income; lack of effective exchange of information, lack of transparency between tax authorities; lack of transparency in the operation of the legislative, legal or administrative provisions; absence of an additional requirement such as substantial of undertaken activity. The first feature is crucial and may be sufficient to identify whether is tax haven or not in the OECD report meaning. Everything depends on particular situation. The importance of rest features should be consider on the background of the particular tax case. Ibidem, p. 44-56.

[15] The preferential tax regimes are identified by using four factors, which are very similar to tax haven factors. It includes: low or zero effective tax rate on the relevant income, "ring-fencing" on regimes which means that preferential tax regimes are in whole or in part are secluded from internal markets of the country providing the regime; lack of transparency and lack of effective exchange of information but the OECD report admits the existence of other grounds.

[16] The main difference between them is that tax havens could impose no or only nominal tax on mobile financial and service activities, whereas preferential tax regimes gather substantial revenue from such activities taxing them. BLUMBERG, M. T*he OECD Report on Harmful Tax Competition: Is "Harmful Tax competition "Actually Harmful?* Available at: http://www.globalphilanthropy.ca/images/uploads/Harmful_Tax_Competition_and_the_OECD.pdf [2015-06-30 2015].

[17] *Towards Global Tax Co-operation. Report to the Ministerial Council Meeting and recommendations by the Committee on Fiscal Affairs. Progress in Identifying and Eliminating Harmful Tax Practices*. Available at: http://www.oecd.org/ctp/harmful/2090192.pdf [2015-07-15].

[18] *Agreement on Exchange of Information on Tax Matters*. Available at: http://www.oecd.org/ctp/harmful/2082215.pdf [2015-07-15].

The OECD has been monitoring jurisdictions including tax havens which have used both bilateral and multilateral measures. Thus, the list of countries which have agreed to co-operate according to the OECD standards is periodically updated. Following an extensive analysis in 2004 the OECD issued *The OECD 's Project on Harmful Tax Practices: The 2004 Progress Report* (2004 report)[19], and in 2006, *The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries*[20], which were concerned with achieving a global level playing field in the areas of transparency and an effective exchange of information for tax purposes. In 2013 the OECD produced an *Action* on *Base Erosion and Profits Shifting* (BEPS)[21] to counter harmful practices more efficiently. Action 5 of BEPS requires an improvement in transparency including a compulsory spontaneous exchange on rulings related to preferential regimes. Multilateral measures have also been taken at the EU level. In 1997 the Council of Economics and Finance Ministers (ECOFIN) adopted the Code of Conduct for business taxation[22]. The Code is not a legally binding instrument but it clearly does have political force. According to the EU Code of Conduct, Member States that lower the effective tax burden from the normal tax burden in that state may be identified as using harmful tax practices. A low tax burden can result from a special tax rate, tax base or other premises. The provisions of the EU Code of Conduct are very similar to the OECD regulations and therefore my aim is not to treat them separately but to discuss harmful tax competition.

IV. THE ROLE OF THE WTO IN HARMFUL TAX COMPETITION INITIATIVES

The WTO is an international organization whose aim is to foster trade liberalization and its role is not to be underestimated. The WTO is a forum for governments to negotiate trade agreements and to settle trade disputes. It is worth emphasizing that the WTO is not a tax organization and consequently documents concluded under its auspices are not tax agreements *per se*. Nevertheless, some tax regulations do occur in these documents. The question arises as to whether they can be analyzed in the sense of harmful tax competition as defined by the OECD or the EU. This issue is crucial because there are 28 members of the EU and all of them are also the members of the WTO[23]. To answer whether the WTO in fact focuses on this issue the following agreements need to be presented. There are three pillars of the WTO: goods, services and intellectual property. This division is reflected in 3 multilateral agreements: the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). The first two concern tax regulations, solely. There is also the Agreement on Subsidies and Countervailing Measures (SCM Agreement) which refers to taxes. None of these agreement however include a definition of harmful tax competition. Hitherto this issue has not been taken into consideration during Rounds negotiations but it is vital to conclude if there is any relationship between WTO and OECD tax regulations in this matter.

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[19] *The OECD 's Project on Harmful Tax Practices: The 2004 Progress Report*. Available at: http://www.oecd.org/ctp/harmful/30901115.pdf [2015-07-15].

[20] *The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries*. Available at: http://www.oecd.org/tax/harmful/37446434.pdf [2015-07-15].

[21] Available at: http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm, [2015-07-15].

[22] *Resolution of the Council and the representatives of the Governments of the Member States meeting within the Council of 1 December 1997 on a code of conduct for business taxation*. OJEC C2 January 6 1998, Vo. 41, pp.2-6.

[23] Only 6 states of the EU are not a member of the OECD. These are: Bulgaria, Croatia, Cyprus, Latvia, Lithuania, Malta and Romania.

1. The GATT and the GATS tax regulations

The GATT and the GATS tax regulations will be analyzed in the same point because their fiscal norms are very similar, though not identical. This results from the fact that the GATT applies to goods, whereas the GATS focuses on services and service suppliers. However, both Agreements include a non discrimination principle which will be considered in the harmful tax competition aspect. This principle covers the Most Favoured Nation Treatment (MFN) and the National Treatment (NT). The MFN is provided in Art. I of the GATT[24] and Art. II of the GATS[25]. The MFN is identified as a treaty obligation employed in international trade relations. This principle reflects the blanket standard, which means it does not give any particular privileges or concessions. It applies only to the external relations of the Member States and means that they shall give equal benefits immediately and unconditionally to like products, services and service supplies regardless of their provenance. To consider whether the GATT regulations refer to harmful tax competition it is necessary to identify what type of tax the Agreement concerns. From my point of view, the MFN under the GATT provisions relates only to indirect taxes[26]. This approach is justified with the objective scope of this Agreement and not its subjective.

In accordance with Article I paragraph 1 the MFN applies to "any kind of charges" and "any provisions" which relate to the import or export of goods. This could lead to the conclusion that the GATT includes not only indirect taxes. However, according to the Vienna Convention on the Law of Treaties, the meaning of Article I paragraph 1 should be interpreted in its literal meaning. Therefore the provision of "any kinds of duties", which is presented at the beginning and relates solely to goods suggests that the latter regulation "any kinds of charges" is similar. For this reason it is difficult to assume that the provisions of the MFN under the GATT apply to direct taxation. In addition, the GATT rules are related to the import and export of goods, where the provisions of income taxes do not apply. Consequently the harmful tax competition issue which is presented in the OECD and the EU regulations does not apply to Article I paragraph 1 of the GATT.

There is no doubt that the GATS relates to income taxes. The MFN principle under the GATS is not unconditional. According to Art. II paragraph 2 of this Agreement, any Member State may maintain measures inconsistent with MFN clause provided that such measures are listed in the Annex to Art. II Exemptions. As soon as the GATS comes into force every Member State specifies a list of exceptions. These exceptions are be reviewed and in principle should not be kept for more than 10 years. The list of exceptions for each Member State is attached to the Agreement. More than 400 measures have been submitted, but only 17 member states have reported tax exemptions[27]. The Republic of Poland did not submit any, but some countries did[28]. Those specified by the United States are broad and concern direct taxes in all sectors for an undetermined period. Regardless of the character of tax exemptions, a Member State which implements them is permitted to treat any other Member State in a

[24] According to Art. I of the GATT, with respects to custom duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments, and with respect to the method of leving such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantages, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[25] According to Art. II paragraph 1 of the GATS, with respect to any measures covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.

[26] This issue is disputable. HOFBAUER, I. *To What Extent Does the OECD Harmful Tax Competition Project Violate the Most Favoured Nation Obligations under WTO Law?* European Taxation, Vol. 44, 2004, no. 9, p. 401.

[27] FARRELL, J.E. *The Interface of International Trade Law and Taxation*. Amsterdam: IBFD, 2013. p. 185.

[28] Except the United States countries reported narrow tax exemptions, Ibidem.

different way. For instance if country A grants a lower tax rate for service suppliers from country B, like service suppliers from country C are not entitled to take advantage of this favourable rate. The harmful tax competition under the OECD and the EU provisions rely on granting some tax benefits but only to an entitled person. The same situation can take place in accordance with Art. II paragraph 2 of the GATS and the WTO law. Therefore the harmful tax competition complies with the MFN principle[29]. The National Treatment (NT) principle constitutes one of the basic principles of the multilateral GATT/WTO system and reflects the avoidance of protectionism. It recognizes that imported manufactured goods, services and service suppliers should be treated no less favourably than that domestic ones. This does not signify that imported and domestic goods must be treated equally[30]. The NT principle in tax matters is included in Art. III paragraph 1,2 and 4 of the GATT[31] and Art. XVII of the GATS[32]. In contrast to the GATT, the GATS does not include a NT principle which relates to all Member States and all service sectors. Because of this fact the NT principle in the GATT is a general rule, whereas the NT principle in the GATS is a Specific Commitments[33]. If it the above statements are assumed to be truth, that the GATT does not relate to direct taxes and the NT principle concerning the harmful tax competition aspect is not taken into consideration. In turn the GATS applies to direct taxes. Therefore if whatever Member State A accords to foreign services and service suppliers of Member State B tax treatment no less favourable than accorded to its own service suppliers, it is in accordance with the OECD and the EU regulations. There are two options in which way Member State A shall treat foreign entities or activities. The first tax base shall be equal and the second shall be more favourable. Tax havens levy no taxes or lower taxes on local and foreign taxpayers and tax preferential regimes exempt or reduce taxes only on foreign entites or activities. Therefore, generally, tax havens and preferential tax regimes are in accordance with the NT principle[34].

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[29] LU, L. *WTO - Compatibility of Harmful Tax Practice* [in:], The relevance of WTO Law for Tax Matters J. HERDIN-WINTER, I. HOFBAUER (ed.). Wien: Linde, 2006. p. 398.

[30] STINGH, CH. *Non-Discrimination in Tax Matters in the GATT- National Treatment* [in:] The relevance of WTO Law..., op.cit. p. 51.

[31] Under Art. III .1 of the GATT the contracting parties recognize that the internal taxes and other internal charge, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production ,
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph1.
4.The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

[32] Under Art. XVII.1 of the GATS in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like service suppliers.
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any Member, either formally different treatment to that it accords to its own like services and service suppliers.
3.Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like service suppliers of any other Member.

[33] THIEL, S. VAN. *General Report* [in:] WTO and Direct Taxation, M. Lang, J. Heredin, I. Hofbauer (ed.). Wien: The Linde, 2005. p. 35.

[34] LU, L. *WTO- Compatibility of Harmful Tax Practices* [in:], The relevance of WTO...op. cit, p. 399.

2. The SCM Agreement tax regulations

The SCM Agreement is one of the most important agreements relating to subsidies[35]. It refers to the trade of goods, not to services. From the harmful tax competition aspect it is vital to answer what kind of taxes it refers to. There is no doubt that the provisions of the SCM Agreement include direct taxation[36] and therefore its regulations may be analyzed from the perspective of the compatibility of harmful tax practices. The definition of subsidy is included in Art. I of the SCM Agreement[37]. Tax subsidies are expressly an example of tax relief and are prohibited if they relate to the export activities or the use of domestic goods over imported ones. The issue arises as to whether prohibited subsidies create harmful tax competition or not as the SCM Agreement does not differentiate the fair from unfair tax competition[38]. The United States - Tax Treatment for "Foreign Sales Corporations" dispute (FSC)[39] is the first WTO case where prohibited export subsidies were treated in the light of harmful tax competition. According to the 2000 report the American FSC legislation is identified as a potentially harmful preferential tax regime. This results from the three main points of argumentation. Firstly, there is no effective tax rates on the foreign trade income. Secondly that the legislation creates a ring - fencing regime often described as domestic tax haven. Thirdly these provisions are not subjected to international transfer pricing principles[40].

V. CONCLUSIONS

In the globalized world harmful tax competition is regulated at the global and regional level. This is reflected in the regulations of both the OECD and the EU, which are strikingly similar. The WTO is an international organization which is gaining more and more importance on the international stage but does not address the issue of harmful tax competition directly. Furthermore The GATT, the GATS and the SCM Agreement do not cover such concepts as tax haven or preferential tax regime. However, some provisions of these agreements do relate to direct taxation and therefore they can be analyzed from the perspective of harmful tax competition. Nevertheless the link between the WTO provisions and direct taxation is not straightforward and sometimes disputable, for example the MFN principle in the GATT. Subsequently the WTO regulations do not deal specifically with this issue. Simultaneously, tax issues are associated with the sovereign power of states and as this is a sensitive matter it is difficult to address. In my opinion, even though the WTO does not deal directly with this problem, it certainly does not mean that harmful tax competition is not an issue it ignores. The main aims of the WTO are to adopt regulations ensuring that trade

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35 The GATS and the Agreement on Agriculture also relate to subsidies.

36 And also indirect taxation.

37 According to Art. I .1 For the purpose of this Agreement , a subsidy shall be deemed to exist if: (a) 1 there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreemnt as "government"), i.s. where:
(i) a government practices involves a direct transfer of funds (e.g. grants, loans and equity infusion), potential direct transfer of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that its otherwise due is foregone or not collected (e. g. fiscal incentives such as tax credits);
(iii) a government provides goods or services other than general infrastructure, or purchases goods;
(iv) a government makes payments to a funding mechanism, or entrust or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by govrernments; or
(a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994 and
(b) a benefit is thereby conferred.
1.2.A subsidy as defined in paragraph 1 shall be subjected to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article II.

38 FARRELL, J.E. *The Interface of International Trade*...op.cit, p.179.

39 WT/DS108R/,08/10/1999. Report of Appellate Body WT/DS108/AB/R, 24/02/2000.

40 LU, L. *WTO- Compatibility of Harmful Tax Practices* [in:] The relevance of WTO...op.cit, p. 403.

flows smoothly, predictably and freely as well as to support fair competition[41]. As harmful tax practices distort trade of goods and services and also have a negative influence on competitors, it is not in accordance with the goals of the WTO. This is particularly evident in the FSC dispute where the OECD 2000 report stated that the American legislation (FSC) constitutes harmful tax competition and therefore the WTO Panel clearly identified that it creates prohibited export subsidies. In my view this dispute should be the subject of wider discussions at WTO level in order to adopt provisions defining harmful tax competition.

KEY WORDS
harmful tax competition, the World Trade Organization (the WTO), the Organization for Economic Co-Operation and Development (the OECD), the European Union (the EU), indirect and direct taxation

KĽÚČOVÉ SLOVÁ
Škodlivá daňová súťaž, Svetová obchodná organizácia (WTO), Organizácia pre hospodársku spoluprácu a rozvoj (OECD), Európska únia, priame a nepriame zdaňovanie.

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CONTACT DETAILS OF AUTHOR

Małgorzata Wróblewska
University of Gdansk
Faculty of Law
Financial Law Department
Jana Bażyńskiego 6
80-980 Gdansk
Poland
E: mwroblewska1@tlen.pl