How to Cope with Harmful Tax Competition in the EU Legal Order: Going Beyond the Elusive Quest for a Definition and the Misplaced Reliance on State Aid Law

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The European Union relies on two legal instruments for limiting harmful tax competition: the Code of Conduct for Business Taxation and state aid law. This article analyses their role in the fight against harmful tax competition, assessing their suitability and effectiveness, and proposes an alternative approach to tackle this issue. In particular, in light of the impossibility of effectively defining harmful tax measures, the article calls for abandoning the traditional approach, shifting the focus from control over the measures adopted by Member States to the limitation of incentives that encourage undertakings to use aggressive tax planning and profit-shifting strategies. The introduction of a Common Consolidated Corporate Tax Base could be a suitable instrument for that purpose. The current crisis, triggered by the COVID-19 pandemic, is presented as an example that highlights the drawbacks of relying on state aid law for limiting the implementation of harmful tax measures.

Keywords: tax competition, harmful tax measures, state aid law, COVID-19 crisis, temporary framework, CCCTB

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I. INTRODUCTION

Tax competition refers to jurisdictions competing with one another, usually to attract foreign investment and capital.[1] In particular, it consists in national authorities reducing taxes with the main aim of attracting the most mobile tax bases.[2] Scholars do not have a uniform position on the economic assessment of the effects of tax competition. While some consider it a good way to limit 'the governments' biases towards increasing their budgets beyond efficient levels',[3] according to others, the resulting 'tax dumping' can seriously impair governments' capacity to maintain an efficient economic system.[4] Tax competition, which can be observed both at global and regional level, is fostered by the high mobility of capital stemming from increasingly

1 Christian Keuschnigg, Simon Loretz and Hannes Winner, 'Tax Competition and Tax Coordination in the European Union: a Survey' (2014) Working Papers in Economics and Finance (University of Salzburg, Department of Social Sciences and Economics) 4/2014 <www.econstor.eu> accessed 19 January 2021, where the authors underline that the notion of tax competition was 'originally based on the analysis of optimal tax assignment in federal states as developed by Oates [Wallace E. Oates, *Fiscal Federalism* (Harcourt Brace Jovanovich 1972)] and the subsequent research on fiscal federalism, showing that tax rates on mobile factors might end up at inefficiently low levels. Subsequent theoretical developments extend this approach to competition between independent jurisdictions, with widely varying policy implications depending on the particular assumptions made. ... this notion of intercountry competition ... [defines] tax competition in a broad sense and along the lines of Devereux and Loretz [Michael P. Devereux and Simon Loretz, 'What Do We Know about Corporate Tax Competition?' (2013) 66 National Tax Journal 745] as "... the uncooperative setting of taxes where a country is constrained by the tax setting behaviour of other countries"'.

2 Pietro Boria, *Diritto Tributario Europeo* (Giuffrè Editore 2010) 239-240.

3 Alexander Haupt and Wolfgang Peters, 'Restricting Preferential Tax Regimes to Avoid Harmful Tax Competition' (2005) 35 Regional Science and Urban Economics 493, 494; cf Keuschnigg, Loretz and Winner (n 1) 10.

4 Ibid; Richard Teather, 'Harmful Tax Competition?' (2002) 22 Economic Affairs 58; Adina Violeta Trandafir, 'Tax Competition – Beneficial or Harmful? How Various Tax Measures Affect the Allocation of Resources?' (2010) 15 Studies and Scientific Researches Economic Edition 173.

high levels of economic integration.[5] States are forced to take into account factors that can influence the choice of location of undertakings, with tax policies playing a key role in this respect. The European Union's (EU) internal market provides an interesting context within which to analyse the functioning of tax competition, as it is a legal environment where interjurisdictional competition is stimulated and facilitated by the four freedoms.[6]

In recent years, harmful tax competition and aggressive tax planning have become key issues in the European legal and political debate. Fair taxation is central for the EU since it leads to sustainable revenues, a competitive business environment, and a stable economy based on growth, jobs, and investment.[7] The coronavirus crisis has returned the matter to centre stage, since the relaxation of state aid rules, combined with fiscal asymmetries among Member States and very limited control powers over tax competition at the European level, can lead to competitive distortions within the internal market. In ordinary times, the application of strict state aid rules also has the *de facto* aim of limiting competitive practices among Member States. Therefore, the relaxation of control over them could ease the implementation of harmful tax measures. Moreover, the attention paid to fair taxation will be increasingly important in the years ahead since it will allow a swift and sustainable recovery from the fallout of the COVID-19 crisis, as stressed in the Commission Communication 'Europe's Moment: Repair and Prepare for the Next Generation'.[8] The current situation highlights that the fight against harmful tax competition is one of the most important challenges that the EU will have to face to prove its standing as a political actor and not just as a mere economic union.

Against this backdrop and in light of the current context, characterised by the loosening of state aid rules for the COVID-19 crisis, this article casts a critical eye on the recourse to state aid law as an instrument for tackling

5 Haupt and Peters (n 3) 493-494.

6 Keuschnigg, Loretz and Winner (n 1) 3.

7 Commission, 'Communication on Tax Good Governance in the EU and Beyond' (Communication) COM (2020) 313 final, 1.

8 Commission, 'Europe's Moment: Repair and Prepare for the Next Generation' (Communication) COM (2020) 456 final.

harmful competition. The position supported builds on the findings of some recent scholarly work that has questioned the effectiveness of a wide use of state aid law against harmful tax competition and the risk of 'tax harmonization through the backdoor',[9] also taking into consideration the current regulatory framework prompted by the coronavirus outbreak. Departing from these premises, the article contends that the problem could be tackled better through tax harmonisation,[10] and more specifically through the belated introduction of a Common Consolidated Corporate Tax Base. From a methodological point of view, this article analyses the current European regulatory framework concerning harmful tax competition, discusses its flaws, also in light of the COVID-19 pandemic, and proposes a preventive approach towards this issue. In particular, it critically engages with the main instruments adopted by the EU concerning tax competition (section II), focusing on the analysis of the issues related to the application of the Code of Conduct for Business Taxation (section III) and state aid law (section IV). Specific attention is paid to the effects of the Temporary Framework for state aid measures – a soft law instrument adopted by the Commission to allow national support to the economy in the context of the coronavirus outbreak – in relation to the implementation of harmful tax measures (section V).[11] Based on this analysis, the article identifies a number of policy solutions (section VI), while the final section draws some conclusions (section VII).

A key contention of the article is that state aid rules are ill-suited as an instrument to deal with harmful tax measures. The discussion will focus on the aim pursued by this set of rules, paying specific attention to the measures targeted and the sanctions provided in case of implementation of unlawful

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9 Dimitrios A. Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15(3) European State Aid Law Quarterly 428, 436. The expression has been recently proposed again in Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In Search of Rationality' (2019) 28(1) EC Tax Review 6.

10 Sandra Marco Colino, 'The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance' (2020) 44 Fordham International Law Journal (forthcoming).

11 Commission, 'Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 1863 final and subsequent amendments.

state aid, on the broadening of the scope of application of article 107(1) of the Treaty on the Functioning of the European Union (TFEU) and related problems concerning the respect of national powers in tax matters. The current crisis exacerbates such drawbacks and reveals the urgent need for a comprehensive and effective approach towards harmful tax competition. The article will underline that looking for a clearer definition of what constitutes a harmful tax measure is not a viable approach since it would undermine national discretionary tax power, a very sensitive domain for Member States. Therefore, there is a need for a change of perspective, shifting the focus from control over the measures adopted by Member States to the limitation of the incentives that encourage undertakings to plan aggressive tax strategies and profit-shifting practices. In particular, the implementation of a Common Consolidated Corporate Tax Base or, at least, an increase in tax coordination between Member States, would be an important step forward in the fight against harmful tax competition.

II. Tax Competition Between Member States

In the early years of the European integration process, tax competition was considered a controversial but unavoidable consequence of the development of the internal market.[12] The rationale behind the creation of 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' was the enhancement of cross-border movement.[13] The use of fiscal policies as a tool to attract businesses did not seem to conflict with this objective, particularly in light of Member States' retained power in this domain. In fact, direct taxation is a field that is not even mentioned in the Treaties because, first of all, it has always been considered fundamental to pursue domestic social and economic objectives and, secondly, in the early stages of the European integration process, harmonisation in this sector was not perceived as an indispensable tool to build the internal market.[14] On the

[12] Pieter Van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' (2019) 4(1) European Papers 225, 226.

[13] Article 26(2) TFEU. Ibid 231-232.

[14] Lukasz Adamczyk and Alicja Majdanska, 'The Sources of EU Law Relevant for Direct Taxation' in Michael Lang, Pasquale Pistone, Josef Schuch and Claus

other hand, the attention paid to indirect tax harmonisation reflects the free-trade area origins of the EU, with the more complex issue of direct taxation and its distortive effects becoming salient only at a later stage.[15] As integration increased, the line between EU and Member States' powers in the field of taxation became more blurred.[16] Some voices are currently calling for a more efficient and democratic decision-making process in EU tax policy matters and proposing, in particular, to adapt the decision-making process by abandoning the unanimity requirement that is hindering progress in this field.[17] However, at the moment, this matter is still subject to procedures guided by intergovernmental logics and European action is limited and mainly confined to indirect taxation.

Awareness of the potential harmfulness of unsupervised tax competition in Europe began in the mid-1990s,[18] with concerns being raised not just over the consequences of tax dumping but also about other aspects such as tax evasion, tax avoidance and aggressive tax planning.[19] Nevertheless, European

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Staringer (eds), *Introduction to European Tax law: Direct Taxation* (5th edn, Spiramus 2019) 9.

[15] Ben J. M. Terra and Peter J. Wattel, *European Tax Law* (6th edn, Wolters Kluwer Law & Business 2012) 13.

[16] Lena Boucon, 'EU Law and Retained Powers of Member States' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 171.

[17] Commission, 'Towards a More Efficient and Democratic Decision Making in EU Tax Policy' (Communication) COM (2019) 8 final.

[18] For a thorough analysis of the development of the approach taken by the EU towards harmful tax competition by the use of State aid policy, see Edoardo Traversa and Pierre M. Sabbadini, 'State-Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax policy in Disguise?' in Werner Haslehner, Georg Kofler and Alexander Rust (eds), *EU Tax Law and policy in the 21st Century* (Kluwer Law International 2017) 107-134.

[19] Aggressive tax planning strategies are intended to minimise effective taxation of the business income and they often entail the use of different methods such as borderline interpretations of the applicable provisions and the exploitation of loopholes in national tax law or deriving from the lack of coordination between different jurisdictions. For an extensive analysis of the notions of tax evasion, tax avoidance and tax planning, see Paulus Merks, 'Tax Evasion, Tax Avoidance and Tax Planning' (2006) 34(5) Intertax 272. Moreover, specifically on the issue of

institutions have never openly condemned tax competition in itself, believing that it can also have positive effects (like greater transparency among Member States and some convergence of their tax regimes), with intervention being limited to tackling measures falling within the narrower notion of harmful tax competition.[20] Tax competition is not problematic *per se*, but in a single market where the Treaty freedoms increase the mobility of profits and investment there need to be common rules on the extent to which Member States can use their tax regimes and policies to attract businesses and profits.[21] In any case, Member States' exercise of powers must comply with EU law such as state aid rules, as will be discussed extensively in the following sections. Striking a balance between the conservation of a fair and competitive environment in the internal market and the respect of national discretionary power in tax matters is one of the most controversial and important challenges for the EU.

The debate on this topic was triggered by the so-called Monti Package,[22] encouraged by a previous Commission proposal for creating a comprehensive European tax strategy,[23] which acknowledged the existence of harmful tax competition within the EU. In these documents, the Commission showed how tax competition can be harmful for the internal market in terms of significant losses of tax revenues and of an increasing tax burden on labour compared with more mobile tax bases.[24] In fact, as integration increased, the liberalisation of goods, services, and capital markets translated into an increase in tax competition that has been working as a driving force in the direction of lower taxes on capital.[25] Because of this, the Commission drew

aggressive tax planning in the EU, see Franklin Cachia, 'Aggressive Tax Planning: An Analysis from an EU Perspective' (2017) 26(5) EC Tax Review 257.

20 Van Cleynenbreugel (n 12) 235.

21 Communication on Tax Good Governance (n 7) 3.

22 Commission, 'Toward Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union' (Communication) COM (1997) 495.

23 Commission, 'Taxation in the European Union – Discussion Paper for the Informal Meeting of ECOFIN Ministers' SEC (1996) 487 final.

24 Toward Tax Coordination in the European Union (n 22) 2.

25 Commission, 'The Contribution of Public Finances to Growth and Employment: Improving Quality and Sustainability' (Communication) COM (2000) 846 final, 30.

up its proposal for a package to tackle harmful tax competition in the EU,[26] which was subsequently adopted in a resolution issued by the ECOFIN Council and included in the conclusions of the ECOFIN Council meeting concerning taxation policy.[27] The package consists of a Code of Conduct for Business Taxation (Code of Conduct) and measures to eliminate distortions in the taxation of capital income and to phase out withholding taxes on cross-border payments of interest and royalties between companies.

The Code of Conduct covers 'those measures which affect, or may affect, in a significant way the location of business activity in the Community' and specifies that 'tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful'.[28] If a measure is considered potentially harmful, it can be submitted to a review process to identify the presence of features that qualify a measure as harmful in terms of tax competition. The Code of Conduct specifies that, when assessing the harmfulness of tax measures, some of the aspects that should be taken into account are:

> 1.whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
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> 2.whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
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> 3.whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or
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> 4.whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or

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26 Commission 'A Package to Tackle Harmful Tax Competition in the European Union' (Communication) COM (1997) 564 final.

27 Council, 'Conclusions of the Ecofin Council Meeting on 1 December 1997 Concerning taxation policy' [1998] OJ C2/1.

28 Ibid, Annex 1, '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', lett A and B.

> 5.whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.[29]

The Code also provides for a standstill and a rollback clause in which the Member States commit themselves not to introduce or maintain harmful tax measures.[30] It is important to underline that the Code of Conduct is a soft law instrument, and that its functioning is based on peer review. In fact, the resolution issued by the ECOFIN Council also provided for the establishment of a group within the Council called – after the name of its chairman – the Primarolo Group, which was tasked with assessing the tax measures that may fall within the scope of the Code and to oversee the provision of information on those measures.[31]

The Code of Conduct makes explicit reference to state aid law,[32] noting that some of the tax measures covered by the Code of Conduct may fall within the scope of article 107 TFEU. In fact, a tax measure can be considered both harmful according to the Code of Conduct and state aid under article 107(1) TFEU. However, since the qualification of a measure as harmful or as state aid does not depend on the fulfilment of the same set of conditions, it is possible that a measure falls in just one of the two categories. Usually, the decisive feature that qualifies a measure as state aid is selectivity, while harmful tax measures can have general application. This distinction is very important because the consequence is the applicability of a binding and consolidated set of rules, namely state aid law, instead of having to rely on the Code of Conduct, a soft law instrument.

The discussion concerning tax competition in the EU revolves around two main issues: respect for Member States' discretionary power in tax matters and the possibility and effectiveness of using state aid law to limit the implementation of harmful tax measures in the internal market. Both of these issues touch on various matters that are closely intertwined, such as the difficulty of drawing a clear line between the powers conferred upon the EU and those retained by Member States in tax matters, as well as the definition

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29 Ibid, lett B.

30 Ibid, lett C and D.

31 Ibid, lett H.

32 Ibid, lett J.

of harmful tax measure and the differences between the latter and the notion of state aid.

III. The Code of Conduct and the Definition of Harmful Tax Measure

The Code of Conduct is still in force and the Primarolo Group regularly meets to select and review tax measures for assessment and transmits reports to the Council. However, the effectiveness of this instrument is doubtful for at least two reasons. Firstly, the review process conducted under the Code is weak because of its political and non-binding nature. Secondly, the definition of harmful tax measure is controversial, and the Code does not provide detailed conditions that would allow an easier and more transparent assessment. In that regard, the Code needs to be updated because 'the nature and form of tax competition have changed substantially over the past two decades and the Code has not evolved to meet the new challenges'.[33]

On 15 July 2020, the Commission proposed the Package for Fair and Simple Taxation, including the 'Communication on Tax Good Governance in the EU and Beyond', which has the purpose of reforming and modernising the Code of Conduct.[34] In the Communication, the Commission lists the main factors that intensified the pressure on states to use taxation to compete for foreign investments, namely digitalisation, the growing role of multinationals in the world economy, the increased importance of intangible assets, and the reduction of barriers for business.[35] To substantially enhance the effectiveness of the Code of Conduct, the Commission proposes to reform the scope and criteria provided therein and to improve its governance. Concerning the first aspect, the Commission considers that the scope of the Code should be widened

> to cover further types of regimes and general aspects of the national corporate tax systems as well as relevant taxes other than corporate tax

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33 Communication on Tax Good Governance (n 7) 3.

34 Ibid. For further information on the proposal, see Commission, 'Package for Fair and Simple Taxation' <https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en> accessed 19 January 2021.

35 Communication on Tax Good Governance (n 7) 3.

> [since] under the current scope of the Code, there are too many types of harmful regimes that can escape assessment.[36]

Regarding the governance improvement, the Commission envisages more transparency, the introduction of qualified majority voting in the Primarolo Group, and effective consequences for Member States that do not comply with the Group's decisions on time. If the modernisation process is successfully completed, it will certainly be an improvement for the effectiveness of tax competition regulation.

Broadening the scope of application of the Code of Conduct is an important step towards more effective action against harmful tax competition. However, this would require a clearer definition of what constitutes a harmful tax measure, which, quite regrettably, the modernisation process has so far carefully avoided. As noted in the previous section, the current version of the Code only provides a non-exhaustive list of requirements for the qualification of a measure as harmful. The definition of such measures has been kept vague because a stronger one might be seen as an attempt to shift the allocation of powers between the EU and Member States in the field of direct taxation. In fact, the notion of harmful tax measure is a litmus test for the willingness of Member States to grant more power to the EU in the taxation field. The introduction of a binding set of rules providing a clear definition of the requirements necessary to qualify a measure as harmful and a related sanction for their implementation is unlikely at the moment. Member States are not inclined to cede their power concerning taxation, including the possibility of using fiscal measures to attract foreign investments, and would perceive a binding regime as a threat towards their discretionary power. This conclusion is unavoidable considering how sensitive this domain is for Member States and the different perspectives they have on this issue. In that regard, it is sufficient to consider that what qualifies as a harmful tax measure for one Member State is an opportunity for another.[37]

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36 Ibid 4.

37 Paraphrasing the expression used by Catherine Barnard for describing another tricky notion, namely social dumping: 'What is social dumping to the losers (richer Northern European States) is economic opportunity to the winners (poorer Eastern European States)'. See Catherine Barnard, 'Fifty Years of

However, the suggestion of a hypothetical definition of harmful tax measure isolated from the current European context also does not seem possible, or at least not relevant. The attempt to distinguish harmful measures from lawful ones entails an assessment concerning the aim of the measure at stake that is extremely difficult to translate into a black-letter rule. Even assuming that it would be possible, the search for a clear definition would be a pointless endeavour comparable to a doctor who desperately tries to cure the symptoms without analysing and dealing with the root causes of the disease. In this case, the symptoms are aggressive tax planning and profit shifting practices implemented by undertakings that take advantage of the favourable tax measures adopted by Member States. The causes are the incentives that undertakings and Member States have to engage in these types of practices, namely the reduction of their tax burden for undertakings and the attraction of capital and investment for the state. Paradoxically, an issue caused by the level of integration of the internal market can be tackled effectively only through further integration. As will be contended in section VI, further harmonisation in the field of corporate taxation could actually limit the implementation of harmful tax practices. Trying to tackle tax competition following an approach based on the definition of what constitutes a harmful tax measure seems to be a difficult effort that cannot lead to a satisfying result and that, ultimately, is not useful for combating harmful tax competition.

IV. The Role of State Aid Law in the Fight Against Harmful Tax Competition

The reference made in the Code of Conduct to the possible overlap between the definition of harmful tax measure and the notion of unlawful state aid[38] prompted the Commission to draw up guidelines on the application of state

Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 311.

38 Council, 'Conclusions of the Ecofin Council Meeting on 1 December 1997 Concerning taxation policy' Annex 1, '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', [1998] OJ C2/1 lett J.

aid rules to measures relating to direct business taxation.[39] The resulting notice clarified how state aid rules had to be applied in the tax field and was followed by a report concerning its implementation.[40] It is important to underline that, as noted therein, 'the Commission has adopted a number of decisions in which it found that measures classed as harmless under the code of conduct constituted aid' and that, '[c]onversely, it would be quite possible for a measure classed as harmful in the light of the code of conduct not to be caught by the concept of state aid'.[41] Moreover, the report underlines that 'the code of conduct is designed *inter alia* to prevent the tax bases of some Member States being eroded to the benefit of others, while the purpose of State aid control is to prevent situations where competition and trade between firms are affected'[42] and that 'state aid monitoring applies only to specific measures and thus cannot eliminate distortions of competition that might result from general rules … therefore {it} cannot replace efforts by the Member States to coordinate their tax policies with a view to abolishing harmful tax measures'.[43] However, the massive use of state aid control against tax ruling practices enacted by Member States in the following years suggests a change of stance by the Commission.

The Commission decisions on tax rulings are particularly interesting from the point of view of the interplay between state aid law and tax competition. These are administrative decisions that have the purpose of establishing how domestic tax provisions will be applied to a specific case. The use of these instruments is desirable in terms of legal certainty. Particularly in relation to advance pricing agreements (specific types of administrative decisions concerning the determination of transfer pricing for transactions between integrated companies), they can enhance transparency and predictability, and prevent double taxation. However, tax rulings can become unlawful state aid whenever the decision is based on non-objective or bespoke criteria or if

39 Commission, 'Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation', [1998] OJ C384/3.

40 Commission, 'Report on the Implementation of the Commission Notice on the Application of the State Aid rule to Measures Relating to Direct Business Taxation', (Communication) COM (2004) 434.

41 Ibid 66.

42 Ibid.

43 Ibid.

they do not reliably reflect what would result from the ordinary application of the tax regime, consequently lowering the addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation.[44] Therefore, since 2013, the Commission has been investigating tax ruling practices of Member States in order to fight so-called BEPS (base erosion and profit shifting) practices, in line with the Organisation for Economic Co-operation and Development's (OECD) BEPS Action Plan.[45] Thus far, the Commission decision-making practice on these issues has led to seven recovery decisions concerning Luxembourg,[46] Ireland,[47] Belgium,[48] the Netherlands,[49] and the UK[50] while four other formal investigations

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44 Commission, 'Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (Communication) COM (2016) 2946, para 170.

45 OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013).

46 *State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE* Commission Decision 2019/421 [2019] OJ L78/1; *State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon*, Commission Decision 2018/859 [2018] OJ L153/1; *State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat* Commission Decision 2016/2326 [2016] OJ L351/1.

47 *State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple* Commission Decision 2017/1283 [2017] OJ L187/1.

48 *The excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium* Commission Decision 2016/1699 [2016] OJ L260/61.

49 *State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks* Commission Decision 2017/502 [2017] OJ L83/38.

50 *State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption* Commission Decision 2019/1352 [2019] OJ L/216/1. It should be noted that in this case, the decision is only partially negative.

involving the Netherlands,[51] Luxembourg[52] and Belgium[53] are still pending. In each of its final decisions, the Commission ordered the recovery of the aid disputed arguing that those measures amounted to incompatible state aid since all criteria provided by article 107(1) TFEU were met. The decisions are currently under scrutiny by the Court of Justice, after challenges were lodged by the Member States and taxpayers involved.[54] While scholars have pointed out possible problems in relation to the stretching of these requirements – especially the selectivity of the measure – to make them fit for the particular type of measure at stake,[55] tax rulings also involve competitive fairness concerns. In particular, by offering extremely low levels of taxation, certain Member States are able to attract the relocation of multinational companies. Nonetheless, as Nicolaides rightly stresses,

> the Commission may be correct that multinational companies pay too little tax in relation to their ability to pay … {and it} may be both morally wrong

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51 Commission, 'State Aid SA.46470 (2017/C) (ex 2017/NN) — Possible State aid in favour of Inter IKEA' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2018] OJ C121/30 and Commission, 'State aid SA.51284 (2018/NN) — Possible State aid in favour of Nike.' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2019] OJ C226/31.

52 Commission, 'State aid SA.50400 (2019/C) (ex 2019/NN-2) — Possible State aid in favour of Huhtamäki' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2019] OJ C161/3.

53 Commission, 'Decision to open in-depth investigations into individual "excess profit" tax rulings granted by Belgium to 39 multinational companies' 16 September 2019, not yet published.

54 For a list of cases related to tax ruling decisions, see Commission, 'Tax Rulings' <https://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html> accessed 19 January 2021.

55 *Ex multis*: Liza Lovdahl Gormsen, ***European State Aid and Tax Rulings*** (Edward Elgar Publishing 2019); Adrien Giraud and Sylvain Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter' (2017) 16(2) European State Aid Law Quarterly 233; Amedeo Arena, 'State Aids and Tax Rulings: an Assessment of the Commission's Recent Decisional Practice' (2017) 1(1) Market and Competition Law Review 49; Theodoros Iliopoulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity' (2017) 16(2) European State Aid Law Quarterly 263; Thomas Jaeger, 'Tax Concessions for Multinational: In or Out of the Reach of State Aid Law?' (2017) 8(4) Journal of European Competition Law & Practice, 221; Dimitrios A. Kyriazis (n 9).

> and harmful to the European economy ... [but] not all social and economic problems can be solved by mobilising the EU's State aid rules.[56]

Indeed, the application of state aid rules to a wide range of national measures and the use of this control to limit the implementation of harmful tax measures raises several doubts. In particular, it is uncertain to what extent the stretching of the definition of state aid is limited by the respect for the retained power in tax matters. The effectiveness of this method for tackling harmful tax measures is also questionable. The *leitmotif* of the overall discussion concerning the relation between state aid law and tax competition is how to strike a balance between the respect for national discretionary power in tax matters and the protection of fair competition in the EU between undertaking and Member States. Therefore, it is interesting to consider how state aid law is applied to measures that fall within the scope of application of the Code of Conduct in order to check if this set of rules is suitable or not to tackle harmful tax competition.

The main issue is the purpose of the targeted measure. State aid rules look at measures of a single Member State, assessing whether they can distort competition and affect trade in the internal market by conferring a selective advantage to certain undertakings. Conversely, tax competition and the related profit-shifting practises implemented by undertakings are characterised by a strong cross-border dynamic that state aid law is not designed to catch. Therefore, because of its nature, state aid law is not fit to control and sanction the exploitation of tax loopholes created by national measures.[57] Moreover, the sanction – namely, the recovery of the aid – is ineffective considering the fact that harmful tax measures, by attracting investment from certain undertakings engaged in profit-shifting practices, are ultimately intended to confer an advantage on the Member State itself. It is clear that, in this case, it is a win-win situation for the state implementing these measures. State aid law is not suitable for limiting this type of harmful practice since the recovery of the aid is aimed at restoring fair competition at

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56 Phedon Nicolaides, 'Can Selectivity Result from the Application of Non-Selective Rules? The Case of Engie' (2019) 18(1) European State Aid Law Quarterly 15, 28.

57 Emily Forrester, 'Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) 27(1) EC Tax Review 19, 31.

the downstream level (competition between undertakings) and not to have an impact of the upstream level (competition between Member States).[58]

This explains the difficulties in tailoring the definition of state aid to the purpose of combating harmful tax competition. In fact, the requirements provided by article 107(1) TFEU are intended to identify measures that are potentially dangerous for downstream competition. They can also happen to affect upstream competition, but this is a secondary effect. The attempt to extend the notion of state aid to also capture harmful tax measures that traditionally did not fall into the scope of application of article 107(1) TFEU is therefore problematic in several ways.

The most relevant consequence of this evolution is the extension of the notion of selectivity. This trend can be identified in relation to the controversial application of state aid rules to tax rulings, but also with reference to the definition of fiscal aid in general. In fact, over the years, the decision-making practice of the Commission and the case law of the Court of Justice contributed to the development and to the extension of the notion of selectivity that has a decisive role in determining the scope of application of article 107(1) TFEU with regard to tax measures.[59] Selectivity is often the

58 The terminology used for distinguishing competition between undertakings and Member States (downstream and upstream competition) is borrowed from Alfonso Lamadrid de Pablo and José Luis Buendía, 'State Aid Asymmetries and the Covid-19 Outbreak- An Update and an Offer' (Chillin'Competition, 19 May 2020) <www.chillingcompetition.com> accessed 19 January 2021.

59 See, in particular, Case C-88/03 *Portuguese Republic v Commission of the European Communities* ECLI:EU:C:2006:511; Joined Cases C-428/06 to C434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* ECLI:EU:C:2008:488; Case C-487/06 P *British Aggregates Association v Commission of the European Communities and United Kingdom ECLI:EU:C:2008:757;* Case C-279/08 P *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:551; Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709; Joined cases C-78/08 to C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl, Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto* ECLI:EU:C:2011:550; Joined cases C-106/09 P and C107/09 P *European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2011:732; Case C-20/15 P *European*

crucial element in the assessment of tax measures and usually the most controversial. In this respect, in a recent editorial written by Andreas Bartosch, fiscal aids are defined as 'the intellectually most challenging aspect which the application of the Treaty´s rules on this pillar of EU competition law has to offer' and the criterion of material selectivity is compared to a jellyfish, meaning that 'in the very moment you have reached a level of sufficient confidence to finally grasp it, it slips out of your hands again'.[60] The distinction between general measures and selective measures determines the actual allocation of power,[61] and the broadening of the concept of selectivity has important effects in terms of power conferred to the Commission, which has a fundamental role in the assessment procedure of potential unlawful state aid. Therefore, the extension of the notion of selectivity (and state aid) means broadening the controlling power of the Commission over national choices in tax matters. As contended by the US Treasury in relation to the *Apple* case, there is a risk that the Commission will become a 'supra-national tax authority'.[62] Therefore, the central issue concerns once again the respect of national prerogatives. It has to be borne in mind that the Treaties do not confer upon the EU direct taxation competences and Member States retain the power to shape their own tax system,[63] including the issuing of tax rulings, on the condition that fiscal measures comply with EU law.[64]

Commission v World Duty Free Group SA and Others ECLI:EU:C:2016:981. For a comprehensive overview of the consolidated position of the Commission concerning the notion of State aid, see 'Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (n 44).

60 Andreas Bartosch, 'The Apple Ruling or the Destruction of the Ring to Bind Them All' (2020) 19(3) Editor's Note in European State Aid Law Quarterly 249.

61 Cees Peters (n 9) 10.

62 U.S Department of the Treasury, 'The European Commission's Recent State Aid Investigation of Transfer Pricing Rulings' White Paper of 24 August 2016, 9 <www.treasury.gov> accessed 19 January 2021.

63 Concerning the allocation of powers in the EU and the retained power of Member States, see Lena Boucon (n 16); In general, in relation to the notion of tax power, tax *compétence* and tax sovereignty, see Andréas Kallergis, *La Competence Fiscal* (Nouvelle bibliothèque de theses, Dalloz 2018).

64 Ben J. M. Terra and Peter J. Wattel (n 15) 36. In particular, concerning the compliance of national fiscal measures and state aid law, see: Cases C-182/03 and

V. Stepping Up Tax Competition in a Time of Crisis: the State Aid Temporary Framework and the Coronavirus Outbreak

It is dramatically evident that the COVID-19 outbreak is a full-blown crisis: beyond public health issues and social disruption, it is having a – presumably long-term – severe impact on the economy, acknowledged also by the Commission, which has been extremely swift and responsive. In terms of state aid, on 19 March 2020 the Commission issued a Temporary Framework,[65] the scope of which was subsequently broadened by a series of amendments.[66] Among the many consequences of the pandemic, loss of revenues and lack of liquidity for undertakings are some of the most immediate. According to the Commission, these conditions can be

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C-217/03 *Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities*, ECLI:EU:C:2006:416, para 81; Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA*, ECLI:EU:C:2012:184, para 25.

[65] Commission, 'Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 1863 final. It was anticipated by the Commission, 'Response to the COVID-19 Outbreak' (Communication) COM (2020) 112 final, which outlines the Commission's immediate response to mitigate the economic impact of COVID-19, including its commitment in making sure that 'State aid is effective in reaching those companies in need and that harmful subsidy races are avoided, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the EU' (see p. 9).

[66] Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 2215 final; Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 3156 final; Commission, 'Third Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 4509 final; Commission, '4th Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak and Amendment to the Annex to the Communication from the Commission to the Member States on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to Short-term Export-credit Insurance' (Communication) COM (2020) 7127 final.

considered an unforeseeable exceptional circumstance that not even sound undertakings could be prepared for.[67]

For the purposes of this article, the present crisis is the perfect example to show the limitations and risks inherent in the approach adopted by the EU in recent years towards the control of harmful tax competition. As pointed out in the previous section, relying on a set of rules intended for other aims and trying to adjust the definition of state aid in order to tackle harmful tax measures is neither adequate nor effective. The Temporary Framework offers a further argument in favour of the unsuitability of this approach. In this case, a loosening of the rules is perfectly in line with the rationale of state aid law. However, as previously contended, state aid control is not only intended to maintain a level playing field between undertakings, but also has a very important *de facto* role in limiting the implementation of harmful tax measures since the Code of Conduct is not effective. Therefore, there are reasons to fear that the loosening of state aid rules will entail the risk of increased implementation of harmful tax measures due to the greater flexibility for Member States in designing the aids and quicker checks by the Commission in order to allow for swift adoption. In the light of the lack of coordination in the tax domain, this crisis might even facilitate the implementation of such measures by deep-pocketed Member States.

There are several tools in the state aid framework allowing Member States to intervene and mitigate the negative effects of this crisis. Firstly, as in normal times, governments may adopt general measures falling outside the scope of state aid law provided that they are not selective regarding 'wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions, or financial support directly to consumers for cancelled services or tickets not reimbursed by the concerned operators'.[68] Moreover, Member States may implement measures falling within the scope of application of Block Exemption Regulations,[69] or measures that are under

67 Temporary Framework as amended on the 13th of October 2020, para 8.

68 Ibid, para 12.

69 Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1. The regulation covers several categories and types of aid measures (such as regional aids, aids to small and

the ceilings envisaged by the *de minimis* Regulation[70] without involving the Commission.[71] In order to meet acute liquidity needs and support undertakings in distress, governments may even adopt measures covered by article 107(3)(c) TFEU and the related rescue and restructuring state aid guidelines,[72] after duly notifying the Commission of the measures taken.[73]

Secondly, article 107(2)(b) TFEU provides that 'aids to make good the damage caused by natural disasters or exceptional occurrences' are presumed compatible with the internal market. This is a mandatory exception and the measures falling within its scope of application are always exempted from the general prohibition envisaged in article 107(1) TFEU. In particular, aid measures have to be notified pursuant to article 108(3) TFEU, but the Commission merely checks whether the conditions are fulfilled and, therefore, does not have discretion in the assessment of the compatibility of the aid.[74] Since, for the purposes of article 107(2)(b) TFEU, the Commission considers that the current crisis can be qualified as an 'exceptional

medium-sized enterprises and aids for research, development and innovation) exempted from the notification obligation as long as all the criteria provided are fulfilled. Moreover, see also Commission Regulation (EU) 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ L 193/1; Commission Regulation (EU) 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ L 369/37.

70 Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L 352/1. The *de minimis* Regulation covers small state aid amounts (200.000 euros for each undertaking over a 3-year period) that are exempted from state aid control as they are deemed to have no impact on competition and trade in the internal market.

71 Temporary Framework as amended on the 13th of October 2020, para 13.

72 Commission, 'Guidelines on State Aid for Rescuing and Restructuring Non-financial Undertakings in Difficulty' (Communication) [2014] OJ C 249/1.

73 Temporary Framework as amended on the 13th of October 2020, para 14.

74 Kelyn Bacon, *European Union Law of State Aid* (Oxford University Press 2013) 95.

occurrence',[75] Member States may compensate undertakings that suffered a damage directly caused by the COVID-19 outbreak.[76] However, being an automatic exception, eligibility conditions are rather narrow: the damage has to be a direct consequence of the 'exceptional occurrence' (requiring a causal link between the damage suffered by an undertaking and the COVID-19 outbreak), it has to be well-proven, and overcompensation is forbidden.[77]

Thirdly, pursuant to Article 107(3)(b) TFEU, aids granted by Member States can be declared compatible with the internal market when intended to remedy serious disruption to the national economy. On this ground, the Commission adopted the Temporary Framework, a soft law instrument that identifies a set of temporary measures deemed compatible with article 107(3)(b) TFEU so as to ensure a quick and more flexible approval procedure once it has been notified of a state aid measure.[78] It includes measures intended to tackle the difficulties suffered by undertakings, accelerate COVID-19 research and the development of relevant products.[79] Therefore,

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75 *SA.56685 (2020/N) State aid notification on compensation scheme cancellation of events related to COVID-19 (Denmark)* Commission Decision not to raise objections [2020] C125/1.

76 Temporary Framework as amended on the 13th of October 2020, para 15. Moreover, the Commission specifies that the principle "one time last time" (see section 3.6.1. of the Rescue and Restructuring Guidelines) does not cover aids compatible under article 107 (2) (b).

77 Jacques Derenne's speech during the webinar '#3 State aid in the COVID-19 contest' organized by Concurrences on the 14th of April 2020 in the context of the 'Concurrences Quarantine Webinar Series', transcript available at 'Webinar #3 State Aid in the Covid-19 Context (Concurrences) <www.concurrences.com> accessed 19 January 2021. See, in general, Kelyn Bacon (n 74) 98.

78 For an overview of the contents of the newly adopted Temporary Framework, see: José Luis Buendía and Angela Dovalo, 'State Aid Versus COVID-19. The Commission Adopts a Temporary Framework', (2020) 1 European State Aid Law Quarterly 3; Michel Debroux, 'State aid & COVID-19: A swift response to a massive challenge' (2020) e-Competitions Special Issue State aid & Covid-19 Concurrences <www.concurrences.com> accessed 19 January 2021; Andrea Biondi, 'State Aid in the Time of COVID-19' (EU Law Live, 25 March 2020) <www.eulawlive.com> accessed 19 January 2021.

79 The Commission lists a very broad range of measures deemed compatible: direct grants, repayable advances or tax advantages, guarantees on loans, subsidised interest rate for loans, guarantees and loans channelled through credit

the Temporary Framework does not introduce new grounds for assessing state aid compatibility, but it confirms the possibility to resort to article 107(3)(b) TFEU by specifically identifying the compatibility conditions to be applied by the Commission and complied with by the Member States, which will also have to demonstrate the necessity, proportionality and appropriateness of the measures to remedy the disturbance in the economy.[80] The Temporary Framework does not prevent Member States from using alternative approaches; therefore, notifications for both general and individual aid schemes are possible.[81] It is applicable until 30 June 2021, except for the section that aims to enable recapitalisation support, which will

institutions or other financial institutions and short-term export credit insurance. The amendment of 3 April 2020 extended the original five types of aid within the Temporary Framework to include aids for COVID-19 relevant research and development, investment aids for testing and upscaling infrastructure, investment aids for the production of COVID-19 relevant products, aids in form of deferrals of tax and/or of social security contributions, and aids in form of wage subsidies for employees to avoid lay-offs during the pandemic. On 8 May 2020, a second amendment was adopted which identifies additional state aid measures deemed compatible with the internal market. It sets out the criteria based on which Member States may provide public support in the form of equity, hybrid capital instruments, and subordinated debt to undertakings facing financial difficulties due to the COVID-19 outbreak. In particular, the Commission considered that recapitalisation must only be considered if no other appropriate measures can be found and, since such measures can be highly distortive for competition between undertakings, they must be subjected to stringent conditions as regards the state entry, remuneration and exit from the undertaking concerned and the governance. On 29 June 2020, the Commission adopted a third amendment to further extend the scope of the Temporary framework. It has been expanded to allow the grant of more support to micro, small and start-up companies and incentivise private investments. A fourth amendment was adopted on 13 October 2020. It prolonged and extended the scope of the Temporary Framework. In particular, it introduced new measures to support uncovered fixed costs of companies, adapted the conditions for recapitalisation measures and extended the temporary removal of all countries from the list of "marketable risk" countries under the short-term export-credit insurance communication.

80 Temporary Framework as amended on the 29th of June 2020, para 19.

81 Ibid, para 16.

be applied until 30 September 2021.[82] The provision of an extended deadline for the types of aid introduced by the second amendment of the Temporary Framework is due to the nature of such measures, which require a longer term to be implemented and effective. As expected, Member States are relying heavily on the Framework and the Commission is rapidly granting its approval to their measures.[83]

The Temporary Framework explicitly confirms the complementary function of state aid control stating that 'EU State aid control ensures that the EU internal market is not fragmented and that the level playing field stays intact. … It also avoids harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union'.[84] Although it refers in general terms to interjurisdictional competition, this statement is also applicable to the specific domain of tax competition, where state aid control can be used to avoid a race to the bottom. Moreover, the last amendment to the Temporary Framework introduced paragraph 16ter, providing that aids granted under this regime cannot 'be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid', since 'such condition would appear to be harmful to the internal market'.[85] It also specifies that this rule is applicable 'irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA'.[86] The statements are clear and straightforward and the insertion of an explicit prohibition to condition the grant of the aid to the relocation of the beneficiary is obviously an important limit to the introduction of harmful tax measures. However, it only captures measures that are explicitly conditioned on the relocation while subtler incentives could evade control.

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82 Ibid, para 93.

83 For an updated list of the measures approved under Article 107(2)b TFEU, Article 107(3)b TFEU and under the Temporary State Aid Framework, see Commission, 'State Aid Rules and Coronavirus' <https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html> accessed 19 January 2021.

84 Temporary Framework as amended on 13 October 2020, para 10.

85 Ibid, para 16ter.

86 Ibid.

Even if the pandemic has spread across the whole EU, the crisis will not affect each country and sector in the same way.[87] This is due not only to the fact that some Member States have been less affected by the virus, but also – and, to some extent, more importantly – to the different spending power of each of them.[88] Such asymmetry results in varying levels of firepower: wealthier governments will be able to support their domestic economy much better.[89] In the long run, this could lead to distortive effects on the competition among undertakings – since the beneficiaries of these measures will be in a much better position than their competitors based in other Member States – and on the stepping up of harmful tax competition, because such measures can have the ultimate result (or aim) of attracting foreign capital and investments, thus exacerbating the crisis in severely affected Member States with a limited budget.

Serious disruption to competition in the internal market may come from increasing state aid intervention possibilities for Member States.[90] In fact, as

87 See Luca Calzolari, 'L'influenza del COVID-19 sulla politica di concorrenza: difese immunitarie o anche altro?' (SIDIBlog - Forum COVID-19, 6 April 2020) <www.sidiblog.org> accessed 19 January 2021; François-Charles Laprévote and Georges Siotis' speech during the webinar '#3 State aid in the COVID-19 contest' organized by Concurrences on the 14th of April 2020 in the context of the 'Concurrences Quarantine Webinar Series', transcript available at 'Webinar #3 State Aid in the Covid-19 Context (Concurrences) <www.concurrences.com> accessed 19 January 2021.

88 Speech by President von der Leyen at the European Parliament Plenary on the new MFF, own resources and the Recovery Plan, Brussels, 5 May 2020. In particular, she remarked that 'the virus is the same in every Member State, but the capacity to respond and absorb the shock is very different' and 'that each Member State has a different fiscal space - so the use of state aid is very different'. Consequently, she considered that it is already possible to observe 'an unlevelling of the playing field in our Single Market'. See also 'Europe's moment: Repair and Prepare for the Next Generation' (n 8) 2, where it is stated that 'while the virus is the same in all Member States, the impact and the potential for recovery looks very different'.

89 José Luis Buendía Sierra, 'State Aid in Time of Cholera' (2020) 19(1) Editor's Note in European State Aid Law Quarterly, 2.

90 Alfonso Lamadrid de Pablo and José Luis Buendía, 'A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund', Chillin'Competition, 31 March 2020, accessed 11 November 2020, where the authors acknowledge the

pointed out by President von der Leyen, it is already possible to observe 'an unlevelling of the playing field in our Single Market'.[91] For example, Germany notified state aid measures amounting to more than a half of the total value of approved aids while other Member States such as France or Italy notified aids amounting to about one fifth of that value.[92] This situation certainly calls for a deeper intervention at European level and the position of the Commission is clearly stated in the communication concerning the second amendment to the Temporary Framework, which recalls the necessity of 'additional EU level support and funds ... to make sure that this global symmetric crisis does not transform into an asymmetric shock to the detriment of Member States with less possibility to support their economy and EU's competitiveness as a whole'.[93]

The Recovery Plan, which is based on the new instrument *Next Generation EU*, and which was proposed by the Commission and agreed upon by

unbalanced asymmetries among Member States and propose the amendment of the Temporary Framework in order to make the compatibility of State aid conditional on the provision of compensation for the competitive distortions that they create. Moreover, see also Lena Hornkohl and Jens van't Klooster, 'With Exclusive Competence Comes Great Responsibility: How the Commission's Covid-19 State Aid rules Increase Regional Inequalities within the EU' (VerfBlog, 29 April 2020) <www.verfassungsblog.de> accessed 19 January 2021.

91 Speech by President von der Leyen at the European Parliament Plenary on the new MFF, own resources and the Recovery Plan, Brussels, 13 May 2020.

92 See Sam Fleming, Jim Brunsden and Michael Peel, 'Crisis in Europe: von der Leyen's audacious bid for new powers' *Financial Times* (18 May 2020) <www.ft.com> accessed 19 January 2021. The chart shows that at the beginning of May the total value of approved aids amounted to almost 2 trillion of euros. Moreover, for more detailed data concerning the value of each aid measure approved classified on the ground of the notifying country, see Commission, 'State Aid Cases' <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases_en> accessed 19 January 2021.

93 Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 3156 final, para 8.

European leaders on 21 July 2020,[94] seems to go in that direction, admitting the existence of asymmetries and aiming at the restoration of a *level playing field (*for example through the new Solvency Support Instrument), besides the reinforcement of the long-term budget of the EU. Moreover, the discussion of own resources becomes central: the ceiling will be temporarily increased by 0.6 percentage points and the necessity of introducing new types of own resources is acknowledged.[95] The implementation of the instruments proposed by the Commission, which aim to compensate for the asymmetries among Member States, could actually reduce the distortive effects triggered by the loosening of state aid control. However, the fight against harmful tax competition should not be left to measures dictated by contingency, and state aid rules have proven not to be suitable for this purpose.

In a time of crisis like the one currently being experienced in Europe, greater and well-regulated public intervention in markets can be beneficial.[96] It also seems unavoidable when considering that, due to the limited size of the EU budget, the main fiscal response to the coronavirus will mainly come from Member States' national budgets, as the Commission admitted in its Communication concerning the coordinated economic response to the COVID-19 outbreak.[97] In this context, the loosening of state aid rules in the light of the current crisis and the resulting sudden reduction in control over harmful tax measures highlight the drawbacks of relying primarily on state aid law to exert control over tax competition.

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94 European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' EUCO 10/20.

95 Ibid, para A29 and 145-150.

96 In general, scholars agree on the necessity to react promptly to the crisis by allowing a conditioned and transparent but broader and more flexible intervention of Member States. For a partly divergent opinion based on the proposal of adopting a more prescriptive approach towards State aid and a more permissive policy towards mergers, see Jorge Padilla and Nicolas Petit, 'Competition policy and the Covid-19 opportunity', (2020) 2 Concurrences.

97 Commission, 'Response to the COVID-19 Outbreak' (Communication) COM (2020) 112 final, 9.

VI. Prevention is Better than Cure: the CCCTB

The current crisis underlines once more the need for adequate instruments to tackle harmful tax competition. The tax ruling saga cannot be considered over yet, but a preliminary conclusion can be drawn from it: state aid rules are proving to be ineffective in tackling harmful tax measures. State aid control cannot replace the need for more coordination among Member States' tax policies to reduce or even eliminate harmful tax competition. Although the similarity between measures causing harmful tax competition and measures falling within the scope of application of state aid rules is clear, the two notions do not perfectly coincide and measures distorting competition among Member States do not necessarily amount to state aid.[98] In spite of its flaws, the consolidated set of rules governing European state aid law at the moment is still an important tool for the limitation of harmful tax competition in the Single Market. However, it should be considered a mere stopgap while trying to find a more comprehensive approach.

In light of the impossibility of defining an effective definition of harmful tax measure, the present article proposes a change of approach in the way the EU tackles harmful tax competition. Action at the European level should not be targeted towards the control over the measures adopted by Member States, because such an approach cannot be successful. Instead, it should focus on limiting the incentives that encourage undertakings to carry out harmful practices such as profit shifting and aggressive tax planning. In fact, the strategies put in place by undertakings and tax measures implemented by Member States are two sides of the same coin, which form the complex phenomenon of harmful tax competition.

As already mentioned, tax competition between Member States is the normal consequence of a system characterised by a lack of uniformity in this domain. Therefore, the introduction of binding legal instruments intended to increase tax coordination would be the best option. In particular, the implementation of a Common Consolidated Corporate Tax Base (CCCTB) could be a good way to tackle harmful tax competition by discouraging

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98 Commission, 'Report on the Implementation of the Commission Notice on the Application of the State Aid rule to Measures Relating to Direct Business Taxation', COM (2004) 434, para 64-67.

activities such as aggressive tax planning. The introduction of a CCCTB entails the calculation of the aggregate net income for an entire corporate group, followed by the apportionment of that income to each location where the group conducts business using a specific formula.[99] Article 116 TFEU, which applies when 'a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and [...] the resultant distortion needs to be eliminated',[100] could be considered a legal basis for the adoption of a CCCTB. An extensive interpretation of this article, including general but serious tax disparities in its scope of application, could be a good ground for pursuing the implementation of this project by overcoming the unanimity requirement.[101]

President von der Leyen expressly envisaged a new CCCTB in her political programme,[102] and the European Parliament has also expressed its support.[103] The Recovery Plan proposal drafted by France and Germany[104] included an explicit reference to the necessity of introducing a CCCTB, as part of a more general aim of improving the framework for fair taxation in the EU. The Commission acknowledged this proposal and, in its own Recovery Plan, stated that it will propose a set of new European own resources, including one based on the Emissions Trading Scheme, a Carbon Border Adjustment Mechanism, an own resource based on the operation of large companies, and a new digital tax, building on the work done by the OECD.[105] It is very

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99 Juho Mäki-Lohiluoma, 'The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy' (2019) 1 Helsinki Law Review 150, 154.

100 Article 116 TFEU.

101 Joachim Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' (2020) 29(2) Editorial in EC Tax Review 58, 61.

102 Ursula von der Leyen, 'A Union that Strives for More: My Agenda for Europe' Political Guidelines for the Next European Commission 2019-2024, July 2019.

103 European Parliament, 'Resolution on the new multiannual financial framework, own resources and recovery plan' 2020/2631(RSP), para 9.

104 Available at: German Federal Government (Bundesregierung), 'A French-German Initiative for the European Recovery from the Coronavirus Crisis' <www.bundesregierung.de> accessed 19 January 2021.

105 'Europe's Moment: Repair and Prepare for the Next Generation' (n 8) 4.

unfortunate that the European Council conclusions dodged this issue,[106] even though one can argue that this was just an act of political realism in light of the staunch opposition of some Member States that seem to see any action in this field as an attempt to curb their competitiveness.

VII. Conclusion

The global crisis caused by the COVID-19 outbreak is a turning point in many respects. From the perspective of tax competition between Member States, it raises the question whether we are going towards an increase of harmful tax competition or a more coordinated tax system. The disruption caused by sudden, great shocks like the one we are currently experiencing should be used as a chance to foster further integration and to improve fiscal coordination, paving the way to fiscal harmonisation, at least in the field of corporate taxation.

Various initiatives taken at European level during the last years have contributed to creating a fairer tax environment. There are attempts of coordination in this domain (such as the Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation),[107] but there are still important challenges that the EU has to face, and the regulation of tax competition needs to keep pace. The analysis conducted in this article shows the weaknesses of the current system to tackle harmful tax competition. As extensively discussed, relying on state aid law in order to avoid the implementation of harmful tax measures is not effective. The development of the notion of fiscal aids enabled some limitation of harmful tax competition, since measures falling within the scope of both the Code of Conduct and article 107(1) TFEU can be assessed by the Commission and

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106 'European Council conclusions (17, 18, 19, 20 and 21 July 2020' (n 94).

107 Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1; Council Directive (EU) 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1. See Pasquale Pistone and Rita Szudoczky, 'Coordination of Tax Laws and Tax Policies in the EU' in Michael Lang, Pasquale Pistone, Josef Schuch and Claus Staringer (eds), *Introduction to European Tax Law: Direct Taxation* (5th edn, Spiramus 2019).

qualified as incompatible state aids. However, this approach has several drawbacks and, since some measures do not qualify as state aid, they are subject to soft law only.

The current crisis exacerbates and renders more evident the issue highlighted above for at least two reasons. Firstly, the only binding set of rules applicable to harmful tax measures, namely state aid law, has been temporary loosened. Notwithstanding that a specific provision prohibits making the granting of aid conditional on relocation has been introduced, a more lenient control by the Commission can leave the door open to the implementation of distortive measures, even if not explicitly subject to a relocation condition. Resorting to state aid to support the economy and relieve the impact of such an unprecedented crisis is inevitable, at least as a first reaction. However, it is necessary to remember the rationale behind European state aid regulation: 'in the short term, we will need to prevent the ship from sinking, but we will need to remain vigilant to fix other distortions, or leaks, once the storm has settled'.[108] Secondly, the COVID-19 outbreak led to new asymmetries between Member States and intensified existing ones. The loosening of state aid control can be an incentive for deep-pocketed Member States to implement harmful tax measures, though the asymmetries existing between Member States are acknowledged and somewhat balanced by the Recovery Plan, an ambitious instrument that responds to the need for more solidarity in facing such an emergency.

Considering the context described, the risks concerning harmful tax competition resulting from the loosening of state aid rules are certainly mitigated. However, this crisis shows the importance of a better integrated Europe. The introduction of a Common Consolidated Corporate Tax Base would be an important step forward. As contended above, this would have important repercussions on tax competition, since undertakings will be less incentivised to plan profit shifting strategies. The fact that the European Council Conclusions do not mention this instrument does not mean that it is a project left aside.[109] However, it would have been a good sign to see the Common Consolidated Corporate Tax Base included, since this is one of the main steps that the EU could take to seriously address the issue of harmful

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108 José Luis Buendía Sierra (n 89) 2.

109 'European Council Conclusions (17, 18, 19, 20 and 21 July 2020)' (n 94).

tax competition between Member States. In the long run, greater coordination in fiscal policies will be fundamental for limiting harmful tax competition within the EU.