



ARTICLES

SPECIAL SECTION – REGULATORY COMPETITION IN THE EU: FOUNDATIONS, TOOLS AND IMPLICATIONS

edited by Francesco Costamagna

REGULATING TAX COMPETITION IN THE INTERNAL MARKET: IS THE EUROPEAN COMMISSION FINALLY CHANGING COURSE?

PIETER VAN CLEYNENBREUGEL*

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ABSTRACT: The establishment of an internal market has not only increased cross-border mobility, but also triggered more direct tax competition between EU Member States. Relying on national tax laws in an attempt to attract businesses and investment benefitting from free movement rights under EU law, Member States have been willing to lower their tax rates and to offer specific advantages to incoming businesses. In an attempt to avoid Member States’ competitive dynamics from resulting in a race to the fiscal bottom, the European Union responded to those tendencies by proposing different steps to curb harmful tax competition. This *Article* offers an overview of the different regulatory responses put in place at EU level to address and regulate tax competition, prior to calling for a more integrated Commission approach governing tax competition in the internal market.

KEYWORDS: European Union – internal market – regulatory competition – state aid – tax harmonisation – budgetary policy coordination.

* Professor of European Union law, Faculty of Law, Political Science and Criminology, Université de Liège, Belgium, pieter.vancleyenbreugel@uliege.be.

I. INTRODUCTION

The establishment of an internal market has facilitated the free movement of goods, services, capital and persons between the different EU Member States. The kind of enhanced cross-border mobility promoted by the internal market is conditioned upon Member States abolishing rules that restrict individuals' and businesses' movement to other Member States. Although the abolition of such rules is in no way absolute, it cannot be denied that European Union law limits Member States' abilities to impede the exit of businesses and individuals from their territories.¹ The possibility for businesses or individuals to exit a Member State also implies that they can decide to relocate to a Member State with a more advantageous regulatory or fiscal framework.² As a result, Member States have been challenged to find legal ways either to keep or to attract businesses and individuals in their territories. The field of taxation has offered significant opportunities in that regard, giving rise to a competition between EU Member States using their tax system as a means to attract or keep individuals and businesses within their territories.

From the EU's point of view, the issue of tax competition, albeit controversial, has long been considered an unfortunate collateral side-effect of the EU's internal market ambitions.³ The financial and sovereign debt crises, an increasing global competition between the European Union as a whole and other nations, trade or political blocs as well as specific tax practices tailored to the likes of big businesses have nevertheless put the issue of tax competition more prominently on the political agenda. As a result, the Commission,

¹ See for authors recognising that tendency, T. HEREMANS, *Professional Services in the EU Internal Market*, Oxford: Hart, 2012, p. 177. More specifically, see also N. REICH, *Competition Between Legal Orders: a New Paradigm of EC Law?*, in *Common Market Law Review*, 1992, p. 861 *et seq.*; J. SUN, J. PELKMANS, *Regulatory Competition in the Single Market*, in *Journal of Common Market Studies*, 1995, p. 67 *et seq.*, S. DEAKIN, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, in *European Law Journal*, 2006, p. 440 *et seq.*, C. RADAELLI, *The Puzzle of Regulatory Competition*, in *Journal of Public Policy*, 2004, p. 1 *et seq.*

² This relates to so-called theories of economic federalism, as developed most notably by C. TIEBOUT, *A Pure Theory of Local Expenditures*, in *The Journal of Political Economy*, 1956, p. 416 *et seq.*; W. OATES, *The Theory of Public Finance in a Federal System*, in *The Canadian Journal of Economics*, 1968, p. 37 *et seq.*; W. OATES, *On Local Finance and the Tiebout Model*, in *The American Economic Review*, 1981, p. 93 *et seq.*; W. OATES, *Toward a Second-Generation Theory of Fiscal Federalism*, in *International Tax and Public Finance*, 2005, p. 349 *et seq.* See for more EU law attuned perspectives, T. HEREMANS, *Professional Services*, *cit.*, p. 91; G. HERTIG, *Regulatory Competition in EU Financial Services*, in *Journal of International Economic Law*, 2000, p. 349 *et seq.*; K. RIESENHUBER, *A Competitive Approach to EU Contract Law*, in *European Review of Contract Law*, 2011, p. 115 *et seq.*; R. SEFTON-GREEN, *Choice, Certainty and Diversity: Why More is Less*, in *European Review of Contract Law*, 2011, p. 134 *et seq.*

³ For critiques and calls to address the issue more explicitly, see among many others, C. PINTO, *Tax Competition and EU Law*, Amsterdam: Springer Netherlands, 2003, p. 453 *et seq.*, for a complete overview and for literature references. See also G. DAVIES, *The Process and Side-effects of Harmonisation of European Welfare States*, in *Jean Monnet Working Paper*, no. 2, 2006, for a critical perspective. For a more nuanced perspective, see in particular J. HINES JR., *Harmful Tax Competition and Its Harmful Remedies*, in *British Tax Review*, 2006, pp. 309-312.

supported by the political rhetoric of Member States' political leaders,⁴ has taken or proposed to take action against certain types of harmful tax competition practices.

This *Article* analyses the measures put in place at Commission level to address and counter harmful tax competition within the EU internal market. To that extent, it offers a summary of the reasons for and extent of tax competition rendered possible under the EU legal framework in place (II), followed by an overview of recent policy measures taken to tackle the excesses of such tax competition (III). Although the Commission's proposals show that tax competition is taken ever more seriously, the proposals should only be considered a starting point for a much wider and more transparent debate on tax competition within the EU internal market (IV).

At the outset, it is important to understand that this *Article* does not wish to take a position on the desirability, as such, of tax competition within the EU internal market. Although sound reasons can be offered from a normative point of view, whether or not grounded in empirical evidence, both to justify its existence and to advocate its complete abolition,⁵ the ambitions of this paper are much more modest. Its only aim is to document the European Commission's increased awareness of the excesses of tax competition within the EU internal market, prior to analysing the Commission's regulatory and policy responses taken in light of such awareness. In doing so, the *Article* will critique for the Commission for not taking this awareness more seriously by developing a more integrated approach to tax competition. Acknowledging and trying to address tax competition are only starting points for more fine-tuned policy developments in which the abolition or diminution of tax competition is to take centre stage.⁶

II. TAX COMPETITION AND THE EU INTERNAL MARKET: FROM BENEFICIAL TO EVER MORE DANGEROUS

Although concerns of tax competition and the lack of EU action in that field are being voiced rather frequently,⁷ the scope and extent of such tax competition is often unclear. To clear the ground in that regard, this part of the *Article* therefore briefly revisits the role of tax law in the EU internal market set-up (II.1), prior to defining in a more precise way the contours of the current tax competition reality (II.2) and the Commission's rela-

⁴ The French President Emmanuel Macron has been most vocal in this regard, in his famous speech on Europe delivered at the Sorbonne on 26 September 2017, available at www.elysee.fr.

⁵ See N. REICH, *Competition Between Legal Orders*, cit.; S. DEAKIN, *Legal Diversity and Regulatory Competition*, cit.; W. OATES, R. SCHWAB, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, in *Journal of Public Economics*, 1988, p. 333 *et seq.*

⁶ For a similar example, see recently J. SNELL, J. JAAKKOLA, *Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context*, in *European Law Journal*, 2016, p. 772 *et seq.*

⁷ To take a recent example that goes beyond scholarly discussions, L. BERSHIDSKY, *EU Tax Competition is Unfair and Inefficient*, in *Bloomberg Opinion*, 31 May 2017, www.bloomberg.com.

tively recent acknowledgement of instances of “aggressive” tax competition (II.3). That analysis allows to conclude that current policy debates on tax competition above all identify or address a competition to lower corporate tax rates in an attempt to attract or retain multinational businesses’ establishments. Other fields of taxation, like customs duties or consumer-imposed taxes, such as excise duties or value-added taxes, and even personal income taxes do not generally feature in discussions on tax competition within the EU internal market.

II.1. THE PLACE OF TAX PROVISIONS IN THE EU INTERNAL MARKET’S LEGAL SETUP

Upon first glance, the EU internal market envisages to a large extent the harmonisation or streamlining of Member States’ tax law provisions. Throughout the Treaty on the Functioning of the European Union, different provisions can be said to removing the competitive playing field for Member States to use tax law as an instrument to attract or keep businesses and, to a lesser extent, workers or other professional individuals.

First, Art. 30 TFEU establishes a customs union characterised by the complete abolition of all kinds of customs duties on imports and exports of goods as well as charges having an equivalent effect to such duties. The Court of Justice has interpreted that notion to the largest extent possible, effectively eliminating all kinds of customs, excise or other duties that apply on the occasion of crossing a border between two Member States or between parts of a single Member State.⁸ As a result, Member States have lost all powers to lower or modify customs tariffs in order to stimulate the export or import of goods in (parts of) their territories, effectively removing all kinds of regulatory competition that could take place between Member States. Although the complete removal of tax competition only applies to the narrow field of customs duties, Art. 110 TFEU extends the same philosophy to more general fiscal measures such as excise duties or other taxes imposed particularly on goods. Per that provision, no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. In the same way, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products. The Court of Justice interpreted those provisions widely, leaving Member States little room for tax competition by means of taxing goods from different

⁸ See among others, Court of Justice, judgment of 1 July 1969, joined cases 2/69 and 3/69, *Diamantarbeiders*, paras 28-32; judgment of 9 September 2004, case C-72/03, *Carbonati apuani*. See, to that extent, also M. GRAVE, *L’interdiction des taxes d’effet équivalant à un droit de douane: un élément fondamental de l’union douanière au service du marché intérieur et de la politique commerciale commune*, in *Revue des Affaires européennes*, 2005, p. 621 *et seq.*

Member States differently.⁹ The removal of such competition is further enhanced by the adoption of a common customs tariff at EU level, applicable to goods entering and leaving the territory of the internal market as a whole. Art. 31 TFEU states that a common custom tariff duties are to be fixed by the Council. At this time, indeed, a common tariff system has been put in place Regulation 2658/87.¹⁰ On top of that, the European Union has adopted a Union Customs Code by virtue of Regulation 952/2013.¹¹ As far as the flow of goods is concerned, tax competition is therefore significantly reduced and almost completely removed by virtue of European Union law.

Second, in relation to the free movement of capital, Art. 63 TFEU recognises explicitly that restrictions on capital movements between Member States and between Member States and third countries are to be removed. That provision particularly allows for the transfer of money and investments in other Member States. Art. 65 TFEU nevertheless acknowledges that Member States have the right to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested and, additionally, to take measures to prevent the infringement of their legislation or to tax capital movements to third countries.¹² In so stating, the fact that capital movements are to be permitted under EU law, does not require Member States directly or automatically to modify their tax regimes or to enter into a competitive race with other Member States in order to prevent the exit of capital from their territories. Quite on the contrary, in terms of capital, investments and profits derived from such investments can still be taxed by the Member State concerned, either upon exit from the territory of that Member State or – in cases where the person or business concerned remains established in that Member State – as part of overall tax payment obligations. As such, the liberalisation of capital movements is not meant to trigger a competitive dynamic between Member States seeking to lower taxes to prevent the exit of capital from their territories.¹³

⁹ For an overview, see S. VAN DEN BOGAERT, P. VAN CLEYNENBREUGEL, *Free Movement of Goods*, in F. AMTENBRINK, D. CURTIN, B. DE WITTE, P.J. KUIJPER, A. McDONNELL, S. VAN DEN BOGAERT (eds), *The Law of the European Union*, Den Haag: Wolters Kluwer, 2018, pp. 529-538.

¹⁰ Council Regulation (EEC) 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.

¹¹ Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

¹² See for an example Court of Justice, judgment of 14 February 1995, case C-279/93, *Schumacker*, paras 30-31.

¹³ As will be made clear *infra* in this section, it can nevertheless be argued that the fact that Member States can apply their tax laws stimulates businesses to move their capital to another Member State. In that case, the first Member State can tax capital upon its departure, but cannot impede the movement to another Member State. From that point of view, free movement of capital does not as such limit tax competition as a potential side-effect of free movement.

Third, the founding EU Treaties offer legal bases to harmonise Member States' tax legislation. Allowing for harmonising legislation, the Treaty thus offers significant opportunities to replace diverging Member States' tax systems by an EU-wide and coordinated fiscal system. From the early stages of European economic integration onwards, calls have been made for a more streamlined approach in that regard. The 1962 Neumark Report presented a first opportunity, in which the European Commission not only called for the harmonisation of indirect (value-added) taxes, but also in the realm of personal and corporate taxes, giving rise to 1967 legislative proposals to that extent.¹⁴ Art. 113 TFEU requires the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. On the basis of that provision, the European Union has set up a harmonised value-added tax (VAT) system, which operates in a streamlined and mandatory way across the different Member States.¹⁵ In the same way, the European Union has relied on that legal basis to harmonise the structure and operations of excise duties on alcoholic and tobacco products as well as on energy and electricity.¹⁶ On top of that, Arts 192 and 194 TFEU allow the EU to adopt fiscal measures taking the shape of similar indirect taxes or excise duties to support the EU's environmental and energy policies; measures in those fields have nevertheless been based predominantly on Art. 113. The adoption of those measures also requires unanimity within the Council. Arts 115 or 352 TFEU equally requiring unanimity, also could serve as legal bases to harmonise tax legislation in this context. In theory, harmonisation measures in the realm of personal income or corporate taxation could therefore also see the light of day. Just like the other tax instruments based upon secondary legislation, however, their adoption requires the Council to reach unanimous agreement on the scope, contents and functioning of the tax measure at hand.

The different provisions thus identified could create an impression that the founding fathers of the EU directly or indirectly wanted to avoid tax competition taking place in the internal market. However, the EU legal framework also potentially limits further

¹⁴ European Commission, *Rapport du Comité fiscal et financier*, 1962, p. 32, available at publications.europa.eu. Proposals adopted focused on value-added tax only, see Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes.

¹⁵ As the most recent elaboration of that mechanism, see Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

¹⁶ See for an overview of legal instruments in this field, ec.europa.eu.

prospects at tax harmonisation in three ways. As a result, a more nuanced picture of the role of tax within the EU internal market legal set-up appears.

First, the TFEU explicitly limits in certain ways harmonisation in the field of taxation. Art. 114 TFEU, which allows the Council – through qualified majority voting – and Parliament to adopt measures to make the internal market function (better) explicitly excludes fiscal provisions from its scope of application. As a result, only Arts 113 and 115 TFEU can be relied on, requiring the unanimous agreement of all EU Member States. As the Neumark report forecasted, initiatives had to be taken in the realm of personal and corporate taxes to avoid competitive dynamics from taking shape.¹⁷ Those proposals – as well as similar proposals in the 1970s, 1980s and 1990s¹⁸ – did not materialise, however, since no unanimous agreement could be found between the Member States, as required by Art. 113 TFEU. It thus shows that the unanimity requirement constitutes an impediment to further harmonisation, making tax competition easier to take shape. In the same way, prior to the entry into force of the Lisbon Treaty, Member States explicitly had to enter into negotiations to abolish double taxation between Member States.¹⁹

Second, the TFEU contains only specific provisions on the (indirect) taxation of products. No provisions on corporate tax or personal income tax have been inserted in the Treaties, giving the impression that those matters remain the province of the EU Member States. As such, the Treaty creates the impression that Member States remain free to adapt their fiscal systems in order to attract businesses from other Member States, triggering a potential competitive race grounded in fiscal competition. The same goes for initiatives aimed at stimulating industrial policy across the European Union.²⁰ Although the EU may take coordinating measures in that regard, it cannot – under the banner of industrial policy – decide to lower corporate tax rates across different Member States.²¹ One or more Member States, however, would remain at liberty to take this kind of action, to the extent that they respect other EU rules on free movement and undistorted competition. From that point of view, the Treaty set-up of the internal market would indeed contribute to putting in motion a competitive dynamic between the different Member States, competing for businesses by means of tax policies.

Third, and more fundamentally, the internal market is predicated upon a philosophy of cross-border movement. Individuals and businesses – just like goods – have to be able to

¹⁷ *Rapport du Comité fiscal et financier*, cit., p. 29.

¹⁸ In addition to the 1962 Report, the 1970 van den Tempel Report (European Commission, *Corporation Tax and Income Tax in the European Communities*, 1970, available at www.europarl.europa.eu) and the 1992 Ruding Report (European Commission, *Conclusions and Recommendations of the Committee of Independent Experts on Company Taxation*, 1992, available at publications.europa.eu) have pointed towards similar problems, the latter particularly in the realm of corporate taxation.

¹⁹ Art. 293 EC Treaty.

²⁰ See in general, P. JANSEN, *From Policy to Law? Industrial Policy Under European Union Law*, unpublished doctoral thesis, KU Leuven, 2018.

²¹ Art. 173, para. 3, TFEU.

move freely to other Member States. That means that not only the exit from one territory has to be facilitated, but also that Member States may tailor their policies to attract businesses to their territories. Although the TFEU – for instance in Art. 65 TFEU – does allow for Member States to subject the exit from their territory to certain conditions such as the payment of taxes due, the entire philosophy of the EU internal market is constructed around guaranteeing free movement. One important feature of free movement consists in attracting businesses and lowering taxes compared to other Member States could be seen as a viable and valuable policy option in that regard. As a result, the lowering of tax rates in an attempt to attract businesses would perfectly fit the philosophy of the EU internal market. The Court of Justice of the European Union has made an important contribution to this type of movement in the context of corporate law. It has confirmed indeed that individuals can decide to create a corporation in a Member State that imposes less administrative or capital requirements on the establishment of a legal person. Using the legal personhood accorded to that corporation, Arts 49 and 54 TFEU subsequently allow for that corporation to establish a branch or agency in another Member State and to conduct the majority or even all of its activities there.²² As EU internal market law allows Member States' corporate laws to be modified in order to attract businesses on their territory, nothing would seem to impede that those states also use tax laws as a subsidiary or alternative means to attract such businesses. The Court of Justice in this context stated that Member States can take measures to avoid the abuse of their (corporate or tax) laws, but did not specify how far Member States could go in that respect.²³ Quite on the contrary, it stated explicitly that "the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty."²⁴ As a result, the use of tax law as a way to attract businesses seems to have been validated as a viable policy option in the wake of this line of case law.

The picture that emerges from the foregoing overview is therefore rather ambiguous. On the one hand, the TFEU has eliminated or offered opportunities to eliminate tax competition in the realm of indirect taxation of goods. In the same way, it has allowed Member States to continue to tax capital leaving its territory upon exit. The adoption of EU secondary legislation in the realm of value-added tax and excise duties has also streamlined the approach to indirect taxation across the different EU Member States. On the other hand, however, the harmonisation of Member States' tax laws is subject to unanimity voting in the Council. Given that Member States consider personal income

²² Court of Justice, judgment of 9 March 1999, case C-212/97, *Centros*, para. 27. See also Court of Justice, judgment of 5 November 2002, case C-208/00, *Überseering*, para. 94; judgment of 30 September 2003, case C-167/01, *Inspire Art*, para. 105.

²³ *Centros*, cit., para. 25.

²⁴ Court of Justice, judgment of 12 September 2006, case C-196/04, *Cadbury Schweppes* [GC], para. 50, and references included therein.

and corporate taxation to be closely linked to their sovereignty, harmonisation initiatives have been limited in presence and scope in those fields. Coupled with an internal market philosophy aimed at stimulating free movement and attracting businesses or individuals from other Member States, it would therefore not seem unlikely that tax competition between Member States takes place against the background of the current EU internal market legal framework.

II.2. TAX COMPETITION WITHIN THE EU INTERNAL MARKET

It follows from the previous overview that tax competition between Member States is indeed a possibility under the current EU internal market legal framework. Although the EU has taken a uniform or harmonised approach to the indirect taxation of goods, personal income and corporate taxation vary significantly across different EU Member States. Against the background of the internal market's free movement philosophy, Member States have indeed not shied away from seeking to attract businesses by lowering corporate tax rates. When talking about tax competition within the internal market, the focus predominantly lies on a tendency consisting in the lowering of tax rates in an attempt to attract businesses to establish themselves on the territory of that Member State. The lowering of tax rates in that understanding is coined as a move to attract businesses and could result in a race to the bottom: in the attempt to attract or keep businesses, Member States would go so far as to almost lower tax rates to zero for corporate taxation in an attempt to enable businesses to establish themselves on their territory.²⁵ Although the occurrence of that extreme scenario remains contested among economists,²⁶ research in that field has shown that Member States have grown more than ever aware of the tax rates in force in their neighbouring countries.²⁷ A tendency can be noted that Member States are more consciously competing directly with those neighbouring Member States in an attempt to attract businesses to their territories.²⁸ Overall, it can therefore be deduced that the internal market and the possibilities for movement generated by it have effectively turned tax competition into a reality.

²⁵ See for that extreme scenario, W. OATES, *Fiscal Federalism*, New York: Harcourt, 1972.

²⁶ In contrast with C. TIEBOUT, *A Pure Theory of Local Expenditures*, cit., would argue the opposite. See to that extent also A. RAZIM, E. SADKA, *Tax Competition and Migration. The Race-to-the-bottom Hypothesis Revisited*, in *NBER Working Paper*, no. 16670, 2011. In the context of the EU in particular, S. KROSTRUP, *Are Corporate Tax Burdens Racing to the Bottom in the European Union?*, in *ERPU Working Paper*, no. 4, 2004.

²⁷ See G. NICODÈME, *Corporate Tax Competition and Coordination in the European Union. What Do We Know? Where Do We Stand?*, in C. READ, G.N. GREGORIOU (eds), *International Taxation Handbook. Policy, Practice, Standards and Regulations*, Oxford: CIMA, 2007, pp. 182-183.

²⁸ See J. HUNADI, M. ORVISKA, *The Empirical Evidence for Corporate Tax Competition Among the EU Member States*, in *Region Direct*, 2014, p. 105 *et seq.*, and references included therein.

Since the early 1990s, the EU institutions have acknowledged not only the possibility of such tax competition, but also its reality within the internal market. From 1996 onwards, the European Commission designed and developed plans of attack in order to tackle the issue of tax competition within the internal market.²⁹ In doing so, it recognised explicitly that regulatory competition was indeed taking place in this domain. Voicing the Commission's point of view, a study of the Directorate-General for Research of the European Parliament most readily acknowledged that

"the removal of legal and technical barriers to trade has made companies and their production bases more mobile: in theory (and subject to the constraints created by language and cultural differences), the whole Single Market can be supplied from one Member State. Tax has therefore become an important factor in location decisions, particularly for companies based outside the EU (e.g. the US computer companies recently established in Ireland). This, in turn, has encouraged national, regional and local authorities to compete in attracting firms to their areas through various 'tax breaks'- often in near-breach of Community competition rules".³⁰

Aligning itself with contemporary Organization for Economic Co-operation and Development (OECD) reports on harmful tax competition on an even more global scale,³¹ the Parliament effectively asked the Council and the Commission to take more concrete steps against such practices deemed harmful to the internal market.³²

Seeking to combat harmful tax competition within the EU internal market, the Council in 1997 adopted a Code of Conduct, through which Member States pledged to roll back harmful tax competition practices.³³ A non-binding instrument, the Council Code proposed a stand-still and rollback of such practices, most particularly in the realm of special tax arrangements.³⁴ According to the Council, a fiscal measure can be considered as triggering harmful tax competition in the following circumstances:

- an effective level of taxation which is significantly lower than the general level of taxation in the country concerned;
- tax benefits reserved for non-residents;

²⁹ Communication COM(96) 546 final of 22 October 1996 from the Commission on taxation in the European Union, and Communication COM(97) 564 final of 11 May 1997 from the Commission on a package to tackle harmful tax competition within the European Union.

³⁰ See B. PATTERSON, A. MARTINA SERRANO, *Tax Competition in the European Union*, in *European Parliament Working Paper*, no. ECON 105, 1998, p. 4.

³¹ Organization for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue*, Paris: OECD Publishing, 1998.

³² European Parliament Resolution C4-0333/98 of 18 June 1998 on the Commission Communication "A package to tackle harmful tax competition in the European Union".

³³ Council Conclusions of 1 December 1997 concerning taxation policy.

³⁴ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council on a code of conduct for business taxation, annexed to the Council Conclusions of 1 December 1997, cit., points C and D.

- tax incentives for activities isolated from the domestic economy and therefore have no impact on the national tax base;
- tax advantages even in the absence of any real economic activity;
- the basis of profit determination for companies in a multinational group deviating from internationally accepted rules or standards;
- lack of transparency regarding the application of the tax laws concerned.³⁵

As a follow-up, the Council tasked a Code of Conduct group with the identification of different potentially harmful practices. That identification would be a starting point in effectively requiring Member States to stop extending them and to roll them back. The group effectively identified those practices in the then-15 Member States and tasked the Commission with monitoring their rollback.³⁶ In addition, the Commission committed to applying its State aid rules to special tax arrangements that were considered harmful to competition within the EU internal market.³⁷

Despite acknowledging the potential of harmful tax competition, the Council and Parliament also maintained that tax competition taking place within the EU internal market is not in itself problematic. Both institutions indeed did not shy away from acknowledging both the positive and negative effects that tax competition can produce.³⁸ In terms of positive effects, they noted that Member States have become ever more aware of each other's tax systems, resulting in a larger amount of transparency regarding tax rates and tax structures in force. Increased transparency between Member States can, according to the EU institutions, contribute to better streamlining and converging of Member States' tax regimes.

The reality of tax competition within the EU internal market being acknowledged, the European Commission has above all highlighted the potentially beneficial effects of tax competition.³⁹ Limiting the need for intervention to instances of harmful tax competition, discussions on the abolition of such competition have in that regard have centred mainly on so-called special tax arrangements crafted by individual Member States.⁴⁰ The clearest example of such arrangements can be found in the context of so-called tax

³⁵ Resolution annexed to the Council Conclusions of 1 December 1997, cit., point B.

³⁶ See for the 1999 Report containing an overview of those measures, ec.europa.eu. For a critical assessment, see W.W. BRATTON, J.A. McCAHERY, *Tax Competition and Tax Coordination in the European Union. Evaluating the Code of Conduct on Business Taxation*, in *Common Market Law Review*, 2001, p. 677 *et seq.*

³⁷ See the 1998 Commission notice on the application of the State aid rules to measures relating to direct business taxation. For a comment in that regard, see W. SCHÖN, *Taxation and State Aid Law in the European Union*, in *Common Market Law Review*, 1999, p. 911 *et seq.*

³⁸ European Parliament Resolution C4-0333/98, cit., point D; Council Conclusions of 1 December 1997, cit., points C and D *a contrario*.

³⁹ Communication COM(96) 546, cit., p. 3.

⁴⁰ B. PATTERSON, A. MARTINA SERRANO, *Tax Competition in the European Union*, cit., p. 20.

rulings.⁴¹ Beyond those specific examples, however, the overall abolition of all kinds of tax competition was not considered seriously in the late 1990s and early 2000s.

II.3. CURRENT POSITION: “AGGRESSIVE” TAX COMPETITION CALLS FOR EU INTERVENTION

In light of the ever increasing coordination of budgetary policies in the wake of the 2010 sovereign debt crisis,⁴² the Commission has emphasised more than ever the need to coordinate Member States’ competitive dynamics and to address ways to overcome so-called aggressive kinds of tax competition taking the shape of “aggressive tax planning” strategies maintained by Member States.⁴³ Aggressive tax planning refers to a strategy maintained by some Member States seeking to attract businesses by lowering corporate taxes to a significant extent.⁴⁴ Confronted with increasing tax avoidance tendencies and increasing mobility on a more global level, the Commission has called for ways to contain the excesses of tax competition and tax evasion within the European Union, as the next section will show.

On a more general level, one can infer from the discourse currently in place at the European Commission that its take on tax competition has become more nuanced over the last twenty years.⁴⁵ Whereas, in 1996, the Commission proudly highlighted the positive effects tax competition within the internal market brought about, its current practice is much more nuanced if not ambivalent. The Commission has not abandoned completely its position that tax competition is indeed beneficial to the internal market, but at the same time, it cannot be excessive. As a result, it is at present not entirely clear what kinds of tax competition would still be deemed to bring about positive effects. Hence, the EU’s strategies to overcome “aggressive” tax competition do not always appear as streamlined as they could be.

III. OVERCOMING “AGGRESSIVE” TAX COMPETITION: A CHANGE OF COURSE

In the wake of the sovereign debt crisis, the European Commission has now taken the firm position that aggressive tax competition needs to be controlled in some way and

⁴¹ According to the 2016 Commission notice on State aid, a tax ruling is meant to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally, see 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, para. 169.

⁴² In the same way argued by J. SNELL, J. JAAKKOLA, *Economic Mobility and Fiscal Federalism*, cit., p. 773.

⁴³ For a document clearly containing that kind of discourse, see ec.europa.eu.

⁴⁴ See also the OECD’s discourse focused on aggressive tax planning, at www.oecd.org.

⁴⁵ At the same time, however, the Commission keeps relying on the narrative of harmful tax competition as a means to bring attention to an otherwise neglected policy domain, see for that point of view, C. RADAELLI, *Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions*, in *Journal of Common Market Studies*, 2002, p. 661 *et seq.*

that EU law can play a role in that regard. Until most recently confronted with a lack of willingness by Member States in harmonising certain features of their personal income and corporate tax regimes – although the tide recently seems to have been turning in this respect (III.1) –, the Commission has had to make use of alternative legal instruments to confront the excesses of tax competition within the internal market. Two policy instruments have been relied on in doing so. On the one hand, the use of State aid rules to curb the practice of granting advantageous corporate tax rulings to individual businesses. Although those provisions can indeed play a role in this respect, that role is limited at best (III.2). In the realm of both corporate and personal income tax competition, the Commission now increasingly relies on its newly enhanced budgetary policy coordination powers conferred in the wake of the sovereign debt crisis. Albeit imperfect, the Commission appears convinced that such coordination also serves as a tool to diminish aggressive tax competition within the internal market (III.3).

III.1. HESITANT STEPS TOWARDS HARMONISATION

The harmonisation of diversified national (corporate or personal income) tax regimes has been considered ever since the 1960s. In the 1962, 1970 and 1992 Reports mentioned above,⁴⁶ Commission-designated experts have proposed some kinds of harmonisation of Member States' tax regimes. Political sensitivities, however, have resulted in those propositions never materialising.

In the wake of the 1997 Council Code of Conduct, the Commission decided to take more concrete actions in this regard. Its preferred way forward has been to propose tax law harmonisation, albeit in a most gradual way. Two related steps can be distinguished in this regard.

Firstly, the European Commission proposed additional measures calling for increased transparency and the abolition of further obstacles posited by tax laws across the European Union. In the shadows of its ambitious financial services action plan (FSAP),⁴⁷ harmonising the provision of financial services within the internal market, the Commission also presented a communication on preventing and combating corporate and financial malpractice.⁴⁸ In this Communication, the Commission called for increased transparency in the exchange of information regarding taxes due by businesses.⁴⁹ In creating transpar-

⁴⁶ See *supra*, references in footnote 18.

⁴⁷ Communication COM(1999) 232 final of 11 May 1999 from the Commission, *Implementing the Framework for Financial Markets: Action Plan*, p. 3. The Commission maintained that with the introduction of the euro, a unique window of opportunity existed to equip the EU with a modern financial apparatus in which the cost of capital and financial intermediation are kept to a minimum, see Communication COM(1999) 232, cit., p. 5.

⁴⁸ Communication COM(2004) 611 final of 27 September 2004 from the Commission on Preventing and Combating Corporate and Financial Malpractice.

⁴⁹ Communication COM(2004) 611, cit., p. 6.

ency, complex and multinational businesses would be taxed more fairly and correctly. A 2009 Good Governance Paper suggested Member States what steps they could take in that regard. Although not directly addressing tax competition as such, the Commission seemingly believes that more transparency might diminish Member States' appetite for competitive initiatives in the realm of taxes.⁵⁰ At the same time, however, no binding legal instruments had been adopted in the early 2000s in this context.

Secondly, the Commission has taken also more direct steps proposing to harmonise the corporate tax base for multinational businesses within the EU internal market. Starting with communications in 2001,⁵¹ 2003,⁵² 2005⁵³ and 2007,⁵⁴ the Commission in 2011 proposed a harmonised or common consolidated corporate tax base. According to that proposal, cross-border companies will only have to comply with one, single EU system for computing their taxable income.⁵⁵ More particularly, businesses would be able file one single tax return for all of their EU activities. They would also be able to offset losses in one Member State against profits in another. The consolidated taxable profits were then to be shared between the Member States in which the group is active, using an apportionment formula, allowing each Member State will then tax its share of the profits at its own national tax rate.⁵⁶ The proposal would result in the elimination of most corporate tax competition between Member States, as it provides a single EU system for companies to calculate their taxable income and a "one stop shop" to file a tax return for all their EU activity.⁵⁷ At the same time, however,

"the common approach proposed would ensure consistency in the national tax systems but would not harmonise tax rates. Fair competition on tax rates is to be encouraged. Differences in rates allows a certain degree of tax competition to be maintained in the internal market and fair tax competition based on rates offers more transparency and

⁵⁰ Communication COM(2009) 201 final of 28 April 2009 from the Commission on promoting good governance in tax matters.

⁵¹ Communication COM(2001) 582 final of 23 October 2001 from the Commission, *Towards an Internal Market Without Tax Obstacles - A Strategy for Providing Companies with a Consolidated Corporate Tax Base for their EU-wide Activities*.

⁵² Communication COM(2003) 726 final of 24 November 2003 from the Commission, *An Internal Market Without Company Tax Obstacles: Achievements, Ongoing Initiatives and Remaining Challenges*.

⁵³ Communication COM(2005) 330 final of 20 July 2005 from the Commission, *Common Actions for Growth and Employment: The Community Lisbon Programme*.

⁵⁴ Communication COM(2007) 223 final of 16 September 2009 from the Commission, *Implementing the Community Programme for Improved Growth and Employment and the Enhanced Competitiveness of EU Business: Further Progress During 2006 and Next Steps Towards a Proposal on the Common Consolidated Corporate Tax Base (CCCTB)*.

⁵⁵ Commission Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121 final, p. 5.

⁵⁶ See the explanations by the Commission in the accompanying memorandum, available at europa.eu.

⁵⁷ Communication COM(2011) 121, cit., p. 6.

allows Member States to consider both their market competitiveness and budgetary needs in fixing their tax rates".⁵⁸

Seeking to eliminate anticompetitive mismatches between national systems, preferential regimes and hidden tax rulings, which tax avoiders exploit, the proposal contained strong anti-abuse provisions.⁵⁹ At the time, however, Member States were not willing to move forward with this proposal. Given that unanimity was required in order for the measure to be adopted, failure to have all Member States on board practically implied the end of the proposal.⁶⁰

More recently, however, the European Commission took up once more the two harmonisation proposals (increasing transparency and a common corporate tax base), seeking to move forward once more. This time, progress seems to have been made in the realm of increased transparency, thus also giving way to new steps in the harmonisation of the corporate tax base across the EU Member States. In particular, the Commission in 2015 proposed its anti-tax avoidance package,⁶¹ containing, *inter alia*, a proposal for a Directive on tax avoidance. That Directive has been adopted by the Council in July 2016.⁶² The Directive contains four sets of rules aimed at countering aggressive tax planning. Firstly, "[e]xceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortisation".⁶³ Secondly, a taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes when transferring the head office or permanent establishment in another Member State.⁶⁴ Thirdly, the Directive puts in place a foreign-controlled company rule. According to that rule, Member States shall tax – to a more or less significant extent – the activities of that controlled company on their territory.⁶⁵ Fourthly, the Directive also contains a more general anti-abuse clause. According to that clause, "a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part." Not genuine are measures,

⁵⁸ *Ibid.*, p. 4.

⁵⁹ *Ibid.*, p. 47.

⁶⁰ See for background, M.F. DE WILDE, *Tax Competition Within the European Union. Is the CCCTB Directive a Solution?*, in *Erasmus Law Review*, 2014, p. 24 *et seq.*

⁶¹ See ec.europa.eu.

⁶² Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

⁶³ *Ibid.*, Art. 4, para. 1.

⁶⁴ *Ibid.*, Art. 5, para. 1.

⁶⁵ *Ibid.*, Art. 7.

which are not put into place for valid commercial reasons, which reflect economic reality.⁶⁶ The Directive only harmonises the minimum requirements and does not preclude application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases.⁶⁷ In doing so, the Council nevertheless aims to limit the scope of harmful corporate tax competition. The Directive is currently being transposed: Member States have until 1 January 2019 to implement its provisions.⁶⁸ It remains to be seen if and how the Directive will be applied and enforced on a day-to-day basis. It can be presumed that its implementation and correct application will take some time before completely resulting in a diminution of corporate tax competition among EU Member States.

Concerning the harmonisation of the consolidated corporate tax base, the Commission in 2016 relaunched its 2011 proposal. Proposing a common corporate tax base Directive as well as a common consolidated corporate tax base Directive,⁶⁹ both proposals are currently being discussed by the Council. It remains to be seen whether the proposals will be adopted and, if so, when they will be implemented and applied at Member State level.⁷⁰ On 19 June 2018, however, France and Germany have proposed a common position paper on this subject, hoping to move forward and reach a deal on a harmonised consolidated corporate tax base by mid-2019.⁷¹

Although recent legislative initiatives and proposals at EU level have shown an acute awareness at EU level that aggressive tax competition requires regulatory steps, the harmonising measures taken so far have been relatively modest. In obliging Member States to take action against corporate tax avoidance strategies, the EU institutions nevertheless give a clear signal that tax avoidance – and especially aggressive tax competition – is no longer deemed acceptable within the EU internal market. It remains to be seen to what extent the proposals or Directive will succeed in bringing about real change. All of that will naturally depend on the vigorousness with which the new Directive will be enforced and the degree to which it will be supplemented by additional harmonising instruments.

⁶⁶ *Ibid.*, Art. 6.

⁶⁷ *Ibid.*, Art. 3.

⁶⁸ *Ibid.*, Art. 11.

⁶⁹ Commission Proposal for a Council Directive on a common corporate tax base, COM(2016) 685 and Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final.

⁷⁰ For a preliminary analysis, see M.F. DE WILDE, *The CCCTB Relaunch: A Critical Assessment and Some Suggestions for Modification*, available at papers.ssrn.com.

⁷¹ The paper is available at www.economie.gouv.fr. In essence, it proposes to move forward as a way to increase tax transparency between Member States. See also, www.euronews.com.

III.2. STATE AID RULES

Awaiting the transposition of more specific rules on tax avoidance, the Commission has not refrained from using an alternative legal instrument in an attempt to counter aggressive tax competition. Ever since the 1990s, the Commission has indeed stated it may use its enforcement powers in the realm of State aid in order to condemn and prohibit special tax arrangements that distort or threaten to distort competition in the internal market.⁷² The State aid provisions offer a useful – if only limited and supplementary – instrument in that regard.

According to Art. 107 TFEU, any advantages given by or imputable to a public authority of an EU Member State to preselected businesses or groups of businesses that appreciably affect trade between Member States are considered as aid incompatible with the EU internal market. Such aid cannot be granted to beneficiaries, unless the Commission has given an explicit authorisation to that extent or unless a legal instrument specifically allows for its granting.⁷³ Advantages granted by public authorities do not necessarily need to take the format of a direct subsidy. Any loss of income by the public authority can also qualify as an advantage. From that point of view, tax breaks or tax reductions have been considered to constitute advantages.⁷⁴ The State aid provisions – and accompanying prohibition to grant advantages qualifying as State aid – only apply to so-called “selective” measures. Measures in principle are selective if they apply to a single company, a specific economic sector or a specific part of the territory of a Member State.⁷⁵ Measures applying to all economic actors and to the territory of a Member State as a whole are not selective. From a tax law point of view, that means that general reductions in corporate tax rates, of which every corporation established or wanting to get established on the Member State’s territory can benefit, are not considered State aid measures targeted by Art. 107 TFEU.⁷⁶

Against that background, the role of State aid provisions is both limited and specific. It only envisages a limited number of tax arrangements proposed at Member States’ levels and, in addition, only focuses on those that could be deemed to comprise selective advantages. In the Commission’s current enforcement practice, attention has predominantly focused on so-called tax ruling practices of Member States. As Commissioner for Competition Vestager said in a speech of October 2017, “EU State aid rules help to ensure that companies can compete on the merits within the Single Market. The rules prevent Member States from giving unfair advantages only to selected companies. For

⁷² See the 1998 Commission notice on the application of the State aid rules to measures relating to direct business taxation, cit.

⁷³ See Art. 108, para. 1, TFEU.

⁷⁴ 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, cit., para. 68.

⁷⁵ *Ibid.*, para. 117 *et seq.*

⁷⁶ *Ibid.*, para. 118.

example, a Member State cannot give tax benefits to multinational groups, which are not available to local businesses. That distorts competition. It is illegal under EU State aid rules".⁷⁷ Since 2013, the European Commission has therefore taken an increasing interest in Member States' practices of granting tax benefits to mainly multinational undertakings by means of individual tax rulings or specifically tailored tax agreements. In this respect, the Commission in October 2015 found that the Netherlands has given unlawful aid to Starbucks and Luxemburg to Fiat Chrysler.⁷⁸ In January 2016, it held that Belgium give advantages to at least 35 undertakings benefiting from an excess profit ruling regime.⁷⁹ In August 2016, Ireland was condemned for having granted over €13 billion tax advantages to Apple.⁸⁰ In October 2017, Luxemburg's treatment of Amazon was deemed also to constitute State aid.⁸¹ At this moment, Luxemburg's tax treatments of McDonalds⁸² and GDF Suez⁸³ are still under investigation, as is the United Kingdom's tax scheme for multinationals.⁸⁴ Member States having granted unlawful State aid by means of tax rulings have been required by the Commission to recover the advantages from the beneficiary undertakings concerned. At present, numerous appeals are pending against Commission recovery decisions before the EU General Court.⁸⁵

⁷⁷ Statement by Commissioner Vestager of 4 October 2017 on illegal tax benefits to Amazon in Luxemburg and referring Ireland to Court for failing to recover illegal tax benefits from Apple, europa.eu.

⁷⁸ See europa.eu.

⁷⁹ See europa.eu.

⁸⁰ See europa.eu.

⁸¹ See europa.eu.

⁸² See europa.eu.

⁸³ See europa.eu.

⁸⁴ See europa.eu.

⁸⁵ Cases currently pending before the General Court in the specific context of tax rulings and also questioning the selectivity issue are: case T-755/15, *Luxemburg v. Commission*; case T-759/15, *Fiat Chrysler Finance Europe v. Commission*; case T-760/15, *Netherlands v. Commission (Starbucks)*; see also case T-636/16, *Starbucks and Starbucks Manufacturing Emea v. Commission*; case T-778/16, *Ireland v. Commission*; case T-783/16, *Government of Gibraltar v. Commission*; case T-892/16, *Apple Sales International and Apple Operations Europe v. Commission*; case T-131/16, *Belgium v. Commission*; as well as actions initiated by businesses having benefited from those rulings, see pending cases T-201/16, *Soudal v. Commission*; T-263/16, *Magnetrol International v. Commission*; T-265/16, *Puratos and others v. Commission*; T-278/16, *Atlas Copco Airpower e Atlas Copco v. Commission*; T-311/16, *Siemens Industry Software v. Commission*; T-319/16, *BASF Antwerpen v. Commission*; T-321/16, *Ansell Healthcare Europe v. Commission*; T-324/16, *VF Europe v. Commission*; T-335/16, *Esko-Graphics v. Commission*; T-343/16, *Trane v. Commission*; T-350/16, *Kinopolis Group v. Commission*; T-351/16, *Belgacom International Carrier Services v. Commission*; T-357/16, *Punch Powertrain v. Poland*; T-370/16, *Anheuser-Busch Inbev e Ampar v. Commission*; T-371/16, *BP Aromatics v. Commission*; T-373/16, *Victaulic Europe v. Commission*; T-388/16, *Eval Europe v. Commission*; T-420/16, *SJM Coordination Center v. Commission*; T-444/16, *Vasco Group and Astra Sweets v. Commission*; T-467/16, *Flir Systems Trading Belgium v. Commission*; T-637/16, *Wabco Europe v. Commission*; T-681/16, *Henkel Belgium v. Commission*; T-800/16, *Mayekawa Europe v. Commission*; T-832/16, *Celio International v. Commission*; T-858/16, *Dow Corning and Dow Corning Europe v. Commission*; T-867/16, *Nomacor v. Commission* in that respect. On 14 February 2019, the General Court

The State aid framework gives the European Commission a potentially powerful instrument to prohibit Member States' aggressive tax planning initiatives. At the same time, however, State aid provisions only provide a supplementary instrument to counter aggressive tax competition. Given that only selective measures can be prohibited, State aid provisions would not impede Member States to adopt an overall lenient or competitive corporate tax policy. From that point of view, the Commission has acknowledged explicitly that State aid constitutes a supplement to more harmonising measures. Although the threat of State aid repercussions may cause Member States to think twice when implementing a tax arrangement, the State aid provisions still leave a significant margin of discretion for Member States wanting to attract businesses to their territories.

III.3. BUDGETARY POLICY COORDINATION

Another mean through which the European Commission has also sought to speed up the harmonisation or convergence process of Member States' corporate tax regimes by means of its new powers in the realm of budgetary policy coordination. In the wake of the 2009-2010 sovereign debt crisis, the European Union set out to strengthen its surveillance over economic and budgetary policies of Member States, predominantly within, but also outside the Eurozone.⁸⁶

Imposing new budgetary obligations on the Member States, the EU particularly strengthened its budgetary supervision procedures through the so-called Six-Pack. The Six-Pack includes five regulations and one directive imposing stringent budgetary supervision requirements on the Member States.⁸⁷ Additionally, these measures were followed by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.⁸⁸ The framework was later complemented by a Two-Pack of regulations further

held in cases T-131/16 and T-263/16 that the Belgian excess profit ruling scheme was not to be considered an aid scheme, for the practice was not sufficiently systematic. As a result, the General Court annulled the Commission decision referred to in footnote 79. The General Court did not establish whether the Belgian regime was to be considered selective, it was just not a systematic aid scheme.

⁸⁶ For an overview of measures, see V. BORGER, *The Transformation of the Euro: Law, Contract, Solidarity*, doctoral thesis, Leiden University, 2018.

⁸⁷ Adopted by the European Parliament and the Council on 16 November 2011, the six-pack comprises Regulation (EU) 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Regulation 1175/2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances, Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure and Council Directive (EU) 2011/85 of 8 November 2011 on requirements for budgetary frameworks of the Member States.

⁸⁸ Treaty of 1 February 2012 on Stability, Coordination and Governance in the Economic and Monetary Union.

solidifying Member State obligations.⁸⁹ In the case of Member States facing defaults, as was the case in Greece, the obligations thus imposed limit their autonomy to decide on the amount they can spend on certain policy domains.⁹⁰ Although Member States retain some autonomy in deciding how and where to spend money, their actions are increasingly embedded in an EU-wide budgetary supervision framework.⁹¹

As part of the upgraded legislative framework, a so-called ‘European Semester’ has seen the light of day. That Semester allows the Commission to set priorities on how Member States’ budgets have to be shaped. In November, these priorities are made public in a so-called autumn package, following which the Commission assesses the economic and social policies in place in the different Member States. Those Member States subsequently have to address their reform programmes to the Commission, which will adopt country-specific recommendations in May. In addition, an obligation for Member States to submit their draft budgets to the European Commission, which is required to review them and to offer country-specific recommendations in order to make economic and fiscal policies sounder at Member State level.⁹² The European Commission considers its country-specific recommendation and budgetary monitoring and oversight powers as supplementary tools of fiscal coordination within the EU internal market. On the one hand, the Semester analyses permit to highlight in a more specific way how Member States have to proceed in order to ensure the stability and shock-proof nature of their economies. On the other hand, the Commission can address specific recommendations to Member States in that respect, related to their budgetary policies and to ways in which transposition of EU law needs to be taken into consideration in those budgetary policy exercises. By way of example, the Commission’s Communication on the 2018 European Semester gave specific fiscal coordination nudges in that regard. According to the Commission,

“aggressive tax planning entails significant losses to European taxpayers; the transposition of EU legislation will help curtailing such practices. Revenue losses from profit shifting within the EU alone are estimated at EUR 50-70 billion. Aggressive tax planning distorts the playing field among companies, and unfairly diverts resources from governments’ spending objectives. Tax abuse can be reined in by strengthening national tax

⁸⁹ Adopted by the European Parliament and Council on 21 May 2013, it comprises Regulation (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, and Regulation (EU) 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

⁹⁰ F. FABBRINI, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*. Oxford: Oxford University Press, 2016, p. 56. For more information, see ec.europa.eu.

⁹¹ S. VAN DEN BOGAERT, A. CUYVERS, *Of Carrots and Sticks. What Direction to Take for the Economic and Monetary Union?*, in B. STEUNENBERG, W. VOERMANS, S. VAN DEN BOGAERT (eds), *Fit for the Future? Reflections from Leiden on the Functioning of the EU*, Den Haag: Eleven International Publishing, 2016, p. 122 *et seq.*

⁹² See for a summary in that regard, ec.europa.eu.

legislation, increasing transparency, and cooperation among governments. Belgium, Cyprus, Malta and the Netherlands are amending aspects of their tax systems that have facilitated aggressive tax planning. In Ireland, the recommendations of an independent review of the corporation tax code have been submitted to public consultation. By the end of 2018, Member States have to transpose the provisions of the Anti-Tax Avoidance Directive (ATAD) into their national law".⁹³

The Commission's ability to use the European Semester to highlight problems of tax competition and to nudge Member States to adapt their fiscal frameworks is promising in scope yet limited in scale. In terms of scope, country-specific recommendations are containing suggestions on how to make a budget sounder, generally in the context of a macro-economic imbalances procedure. As such, Member States budgetary and fiscal autonomy is placed ever more under the closer watch of the Commission. In terms of scale, however, the Commission's country-specific recommendations and compliance tools are not overly effective. In the context of the macro-economic imbalance procedure, the Commission's country-specific analyses may result in the conclusion that no imbalances, imbalances or excessive imbalances are present in a Member State's budget. In the excessive imbalances' situation a corrective procedure can be started, through which the Council adopts recommendations for corrective action. Persistent failure to comply with those recommendations may result in sanctions or fines being imposed in the case of Eurozone Member States.⁹⁴ The multiple layers of decision-making required before arriving at the imposition of sanctions as a means to force Member States into compliance demonstrate the limited potential of this procedure as a means to address tax competition within the internal market. That finding is even exacerbated in relation to Member States that are not having excessive imbalances or non-Eurozone Member States. In those instances, the possibility to impose fiscal corrections on Member States is even more limited. On a more general level, given their country-specific nature, recommendations cannot simply replace a full-blown harmonisation of corporate or other tax policies. From that point of view, budgetary control at best results in a supplementary and softer form of nudging Member States away from aggressive tax planning mechanisms. In doing so, the Commission may address aggressive tax competition, but only in an indirect and rather implicit way. As some Member States are not subjected to the budgetary compliance mechanisms to the same extent as others, their aggressive tax planning activities would risk to escape the Commission's scrutiny over their fiscal policies. This paradoxically could result in reducing aggressive tax planning strategies of Member States facing budgetary problems, but leaving similar strategies in other Mem-

⁹³ Communication COM(2018) 120 of 7 March 2018 from the Commission on 2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011, p. 10.

⁹⁴ See Regulation 1174/2011, to that extent.

ber States untouched. As a result, those Member States could even be more incentivised to engage in aggressive tax planning, seeking to attract businesses previously lured to those Member States now under closer watch of the Commission. From that point of view, the current legal framework governing economic governance hardly presents an effective instrument coherently to reduce tax competition across the internal market.

IV. CALLING FOR AN EVEN MORE EXPLICIT CHANGE OF COURSE

The previous section allows to conclude that the European Union in general and the European Commission in particular have not only recognised the vices of aggressive tax competition within the EU internal market, but have also developed three different strategies seeking to control or limit such competition. Seeking to correct the tax planning consequences the structure of the internal market has created, the Commission essentially proposes a soft convergence strategy (through budgetary policy coordination), a hard law enforcement strategy (State aid and recovery decisions imposed on Member States) and a classical harmonisation strategy, closing the gaps left in the absence of such harmonisation. Each of those strategies complements each other and has its merits. Despite their variety and complementarity, however, the approaches proposed or developed by the European Commission to deal with Member States' aggressive competition in the realm of corporate taxes are remarkable similar in ambition. It can be submitted that all three approaches essentially boil down to a so-called "corrective" approach to addressing excesses of the internal market setup. A corrective approach implies that the European Union wants to correct certain mishaps in the legal setup, without modifying, or even considering to modify the foundations of the legal framework in place. In proposing to use State aid, budgetary coordination and harmonisation, the EU only aims to ensure that the current setup does not result in disequilibria in the division of powers between the EU and Member States. Such disequilibrium would follow from the fact that tax competition could undermine the movement features on which the internal market has been built.

The EU internal market legal framework is indeed still conditioned upon the EU guaranteeing movement and Member States taking regulatory measures in the public or general interest protecting their territories. That setup remains fundamentally unchanged and unchallenged in the current EU aggressive tax competition debates. State aid enforcement only tackles selective measures that distort competition, budgetary policy recommendations only constitute recommendations and the current anti-tax avoidance Directive still leaves room for Member States to develop their own tax policy. From that point of view, the proposed strategies addressing aggressive tax competition instances all start from the same point: maintaining and enforcing the internal market legal setup as is presently in place.

It would be easy to blame the European Commission for having chosen only to correct excesses of tax competition through regulation, soft law and enforcement. Howev-

er, one can say that it is the only possibility within its mandate as guardian of the Treaties.⁹⁵ As the Member States have set up an internal market that allows for tax competition in the corporate and personal income fields, the Commission would only be able to correct certain excesses that do not alter the foundations of the internal market as we know it. From that point of view, the Commission would likely be overstepping its mandate under the Treaties if it decided to take action beyond the corrective measures – harmonisation proposals included – developed at present. From that point of view, it can be maintained that the EU constitutional framework only offers a limited toolbox allowing the Commission to deal with the negative effects of tax competition. It would therefore be perfectly understandable for the Commission to limit its corrective measures to what is possible under the current EU Treaty framework.

The constitutional limits identified as justifying further Commission action notwithstanding, the fact remains that the European Commission could do more to effectively counter the vices of aggressive tax competition and to limit tax competition more generally within the framework of the EU internal market. Two steps can be envisaged in that regard.

Firstly, the Commission should be more explicit on whether tax competition is something that should indeed be part of the EU internal market functioning or something to be abolished (gradually or completely). The current Commission proposals and reforms do not allow to answer that question in a clear fashion. On the contrary, those proposals and reforms can indeed be understood in two rather opposite ways.

On the one hand, as current proposals made by the European Commission only seem to correct excessive instances of tax competition, the Commission could be understood to consider regulatory competition as something bad in the particular context of corporate taxes, without however fully detracting from the long-maintained position that regulatory competition also produces beneficial effects within the internal market. Commission proclamations are generally limited to calling for fair taxation across the European Union and for making sure that the internal market freedoms are not abused or confirm that tendency. If that is still the case, the Commission would not consider all kinds of tax competition to be necessarily a bad thing requiring correction, but only the most aggressive or excessive ones. The question then naturally arises what kinds of tax competition the Commission still considers as beneficial – for instance a certain kind of competition in personal income taxes to stimulate workers' mobility – and what measures are to be taken to stimulate such competition. At present, the Commission proposals only focus on correcting aggressive tax competition instances and fail to make clear whether other kinds of tax competition can still be envisaged. For Member States wanting to fine-tune their tax systems, also in the light of EU initiatives harmonising certain features of corporate taxation, it would be useful to understand where and how tax competition can still be at play and what limits EU law will put or considers put-

⁹⁵ As guaranteed by Art. 17, para. 1, TEU.

ting on those activities. It would also have to be mentioned that a shift in position by the Commission as such does not change the state of EU law. Only when harmonising legislation in other tax competition domains would be adopted or when the Court of Justice would declare Member States' competitive dynamics as incompatible with EU internal market law would this be the case. In any case, however, the current Commission proposals do not allow to paint a clear picture on how much competition is still being allowed for in the realm of taxes.

On the other hand, however, the Commission's clear stance on wanting to remove all kinds of aggressive tax competition could also be understood as taking a position that tax competition as such is considered a relic from the past, currently no longer tolerated as a matter of EU law. The fact that the Commission scrutinises Member States' budgets more explicitly could be interpreted as an indication of that tendency. In that understanding, the Commission's proposals would constitute a first step in the complete eradication and abolition of all tax competition instances. If that position were indeed taken, all kinds of tax differences aimed at luring individuals or businesses to a Member State's territory would be deemed incompatible with the Commission's current tax competition position. From the point of view of EU law as a whole, that sort of "policy" incompatibility would not be necessarily problematic. At the same time, however, it would most likely give rise to legal uncertainty and more litigation. It is indeed not unlikely that Member States would contest each other's tax incentive practices for natural persons or for corporations as being incompatible with the EU internal market, asking the Court of Justice to take a more explicit position on that matter.⁹⁶ To the extent that the Court of Justice considers those practices to be legal, a position that could be said to underlie the Court's current case law,⁹⁷ the Commission will most likely have to nuance its position on tax competition. To the extent that the Court of Justice would consider tax competition equally problematic,⁹⁸ the Commission would most likely be called upon to swiftly proceed in taking new legislative initiatives to avoid opening the floodgates of litigation concerning each time individual Member States' specific tax provisions. In either case, the Commission would be called upon to make its position regarding the continued relevance or permissibility of tax competition more explicit.

⁹⁶ By virtue of the procedure provided for in Arts 259 and 260 TFEU.

⁹⁷ As the line of case law following *Centros*, cit. in the realm of corporate mobility has not been overruled formally, it could be argued indeed that the Court thinks regulatory competition – also extended to the field of taxation – remains legal as a matter of EU internal market law. For lack of certainty on that point, however, a more explicit question is to be raised to that extent.

⁹⁸ One of the questions currently accompanying the tax ruling State aid litigation concerns the extent to which the Commission effectively changed position in the debate, triggering the invocation of EU law general principles such as the principle of legal certainty, see, to that extent, P. VAN CLEYNENBREUGEL, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations*, in *Market and Competition Law Review*, 2017, p. 15 *et seq.*

Secondly, it follows at least from the foregoing that, whatever the position is the Commission now seemingly takes, its recent proposals addressing aggressive tax competition most fundamentally and directly call for it also taking a more explicit position on fields where tax competition still fits the EU internal market and those where this is no longer the case. As such, the proposals made by the Commission directly call for a more explicit and holistic reflection on tax competition in the internal market. As such, reflections have been made at that more general level in the 1990s and it would be a good time to re-launch them. It would therefore fall upon the Commission in the very first place to clarify its position on tax competition in a more general communication explaining the scope, nature and impact of its different recent tax competition-countering initiatives. As a follow-up to that communication, it would not be entirely unimaginable to revive the code of conduct group set up by the Council in 1997 and to transform it in a group of EU institutions' representatives, experts, policymakers and parliamentary representatives, re-opening debates on the future of tax competition in light of the Commission's recent stance on aggressive tax competition. Doing so would allow to build upon the momentum created by the Commission's initiatives and to continue debates on and action against tax competition situations that are incompatible with the internal market.

Given that Member States' aggressive tax planning strategies are increasingly frowned upon by the European Commission, it seems to be that tax competition may become ever more undesirable. To the extent that the European Union aims to integrate different Member States and to create a level playing field both for its businesses and citizens, Member States' tax planning strategies are to be condemned even more explicitly and directly. The current strategies engaged in by the Commission hardly suffice to achieve that goal. Now would be a good time to come up with a more holistic tax competition removal strategy and a more in-depth reflection on the regulatory instruments needed to achieve that aim. It can only be hoped that the European Commission – especially the new one taking office in 2019 – will take upon that call and finally take even larger steps to remove tax competition from the EU internal market.

V. CONCLUSION

The internal market has turned movement between Member States into a reality. Such movement also incentivises Member States to take measures to attract or keep businesses within their territory. As a result, the setup of EU internal market law has given rise to so-called "aggressive" tax competition situations. Tax rulings tailored to multinational businesses constitute the most explicit expression of that tendency. Although the European Union has for a long time emphasised the positive effects tax competition could bring about, the sovereign debt and Eurozone crisis have definitely shifted the discourse in that respect. The current Commission has therefore made the combatting of aggressive tax planning instances one of its priorities. To that extent, three strategies have been pro-

posed, varying from soft convergence through budgetary recommendations over hard law enforcement by means of State aid to more nuanced harmonisation proposals.

Those three strategies neatly demonstrate that the Commission is aware of the aggressive tax competition problem and has taken steps to mitigate their prevalence. At the same time, however, this paper argued that those strategies reflect a rather limited toolbox for dealing with structural (fiscal) imbalances within the internal market and do not permit to clearly deduce the Commission's current take on the need for or continued relevance of tax competition within the internal market. It therefore invited the Commission to engage in a more general reflection, beyond the limited confines of corporate tax competition, on the virtues and vices of regulatory competition and the role of EU law in enabling or restraining such competition. Given that the Commission explicitly acknowledges the negative effects produced by tax competition, it was also suggested that a more fully developed plan aimed at reducing tax competition in the internal market and a reflection on regulatory instruments supporting it is overdue at this point in time.