Articles

Are the EU Member States Still Sovereign States Under International Law?

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The Fight Against Harmful Tax Competition in the EU: A Limit to National Fiscal Autonomy?

Gabriella Perotto*

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Abstract: The present *Article* analyses the legal instruments used at the EU level to tackle harmful tax competition in order to consider whether the EU action in this field is an undue limitation to national fiscal autonomy. State aid rules are the only "hard law" set of rules that have been used until now. As the Court of Justice stated in the *Fiat* case, the extensive notion of State aid adopted by the Commission in the assessment of tax rulings is an attempt of "backdoor tax harmonisation" that violates the Treaty provisions and national prerogatives in tax matters. On the other hand, forms of coordination between fiscal authorities, such as the Code of Conduct for Business Taxation, are not sufficient and corporate tax harmonisation is not achievable at the moment because of the lack of political will. The key contention of this *Article* is that the strategies and instruments put in place by the EU to tackle harmful tax competition are inadequate and, in the case of State aid, unduly restrict Member States' fiscal autonomy.

Keywords: harmful tax competition – national fiscal autonomy – Code of Conduct for Business Taxation – fiscal state aid – tax rulings – corporate tax harmonisation.

I. Introduction

Taxation mostly falls in Member States' exclusive competence. Yet, when exercising it, they have to respect the limits posed by EU law. Indeed, European institutions, throughout the

* Postdoctoral Research Fellow in EU Law, Bocconi University, gabriella.perotto@unibocconi.it.

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exercise of their powers and the activities conducted for the development of European policies, limit Member States' discretionary power in this domain. Some examples are the case law of the Court of Justice concerning the application of the four freedoms and its impact on Member States' tax powers, the coordination of economic policies and the strong enforcement and wide interpretation of State aid law in cases concerning tax measures. Notwithstanding the progress made at the EU level to promote greater convergence in tax matters, the approach toward the regulation of this domain differs greatly between Member States.

Such a deep fragmentation is a breeding ground for the adoption of harmful tax measures by Member States and the development by companies of elusive practices such as aggressive tax planning and BEPS (base erosion and profit shifting) practices. These behaviours have negative consequences on different levels, from loss of revenues to the erosion of social cohesion and they are facets of a complex phenomenon called harmful tax competition.[1] Generally speaking, tax competition can be defined as a phenomenon whereby different jurisdictions compete with each other through the use of tax leverage to attract foreign investment and capital. For a while, in the EU it was not considered a distortive phenomenon but the mere consequence of the development of the internal market.[2] From the mid-1990s, awareness of the potential harmfulness of leaving tax competition unleashed increased.[3] The approach adopted by European institutions did not consist in condemning tax competition as such, but in tackling harmful tax measures distinguishing them from those that don't necessarily lead to negative effects.

Harmful tax competition is a phenomenon that is inextricably linked to the nature of the European Union. The emergence of a competitive dynamic between different jurisdictions through the use of tax leverage to attract foreign investment and capital is the consequence of two elements combined: on the one hand the retained power of Member States in tax matters and, on the other hand, the intense level of integration and mobility

[1] On the widespread negative effects of harmful tax competition, see also D Kyriazis, 'Fiscal State Aid Law as a Tool Against Harmful Tax Competition in the EU: Déjà Vu?' (2022) Yearbook of European Law 279, 281, where the author emphatically and rightly points out that: "[...] tax competition does not only concern undertakings and states; it also affects—indirectly but very profoundly—everyone's lives, since everyone living in a country that is involved in this race to the bottom is likely to bear part of the cost".

[2] P Van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' (2019) European Papers www.europeanpapers.eu 225, 226.

[3] On this point, see: Discussion Paper for the Informal Meeting of ECOFIN Ministers SEC (1996) 487 final from the Commission on Taxation in the European Union; Communication COM (1997) 495 from the Commission of 1 October 1997 'Toward Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union' (also known as "Monti Package"); Communication COM (1997) 564 final from the Commission of 5 November 1997 'A Package to Tackle Harmful Tax Competition in the European Union'; ECOFIN Council Conclusions of 1 December 1997 concerning taxation policy (hereinafter referred as "Code of Conduct 1997"). For an analysis of the development of the approach taken by the EU towards harmful tax competition by the use of State aid policy, see E Traversa and PM Sabbadini, 'State Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax policy in Disguise?' in W Haslehner, G Kofler and A Rust (eds), *EU Tax Law and policy in the 21st Century* (Kluwer Law International 2017) 107.

achieved at this stage of the EU integration process. The peculiar features of the internal market, characterised by high mobility of profit and investment, amplify the negative effects deriving from harmful tax competition. Therefore, it is necessary to introduce a common legal framework that can guarantee a level playing field for undertakings and Member States respecting, at the same time, national prerogatives[4] because, as it has been recently pointed out, “from a public interest point of view, one should not underestimate the need to counter the distortive effects on the functioning of the internal market which result from measures that allow multinationals to create value in one or more Member States whilst allocating the ensuing profits to entities they control elsewhere, in or outside the EU, that are merely empty shells and effectively exempt from tax”.[5]

The main element fostering tax competition is the lack of harmonisation of direct taxation on companies. Indeed, the introduction of a homogeneous approach in this field would be beneficial and could hinder the development of such negative practices.[6] There have been many attempts to introduce some forms of coordination and harmonisation in corporate taxation to obtain a common framework at the EU level. However, at the moment this result has not been attained yet. The difficulties in achieving an appropriate level of positive tax integration that avoids the creation of harmful competitive dynamics between Member States have led to prefer an approach based on tax coordination. In particular, through the use of the Code of Conduct for Business Taxation, a soft law instrument based on a review procedure and peer pressure between Member States. On the other hand, over the last few years, it is possible to register the tendency of using State aid rules to prohibit harmful tax measures. One of the main criticisms that have been raised against this widespread practice regards the broad interpretation of the notion of selective advantage and, consequently, of State aid, since it might entail the failure to respect State prerogatives in fiscal matters.

Against this backdrop, the present contribution aims to consider whether it is possible to look at the attempts of the EU to control harmful tax competition as an undue limitation to Member States’ fiscal autonomy. In light of the perspective chosen to analyse the phenomenon of tax competition, three aspects will be explored: the current legal framework concerning the EU action against harmful tax measures and the recent reform of the Code of Conduct for Business Taxation (section II), the attempt to use State aid law as an instrument to tackle this kind of measures given the latest case-law of the Court of Justice of the European Union on the matter (section III) and the possibility to prevent such phenomenon through harmonisation (section IV). Finally, some conclusions will be

[4] Communication COM (2020) 313 final from the Commission on Tax Good Governance in the EU and Beyond, 3.

[5] Editorial Comment, ‘Protecting the EU’s Internal Market in Times of Pandemic and Growing Trade Disputes: Some Reflections About the Challenges Posed by Foreign Subsidies’ (2020) CMLRev 1365, 1374.

[6] The present contribution builds upon previous findings (see G Perotto, ‘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’ (2021) European Journal of Legal Studies, 309) providing updates and an analysis through a different perspective.

drawn concerning the relationship between the EU approach toward harmful tax competition and the limits to its action deriving from national tax autonomy (section V).

II. The EU control of harmful tax measures: the Code of Conduct for Business Taxation and other forms of cooperation between tax authorities

At the EU level, the main instrument identified to address the challenges posed by harmful tax competition is the Code of Conduct for Business Taxation (Code of Conduct). It is part of a wider package which has been adopted by the ECOFIN Council through a resolution and included in the conclusions of the ECOFIN Council meeting concerning taxation policy.[7] The Code of Conduct is a political intergovernmental commitment aimed at providing for coordinated action at the EU level concerning taxation policies to reduce distortions and prevent significant losses of tax revenues.[8] The Code was adopted in 1997 and it is still in force, even though it has recently been amended to meet new challenges "as efficiently as possible in an increasingly globalised and digitalised economic environment".[9]

The proposal for the amendment introduced in November 2022 can be traced back to the "Package for Fair and Simple Taxation" issued on 15 July 2020 by the Commission and, in particular, to the "Communication on Tax Good Governance in the EU and Beyond", which had the purpose of reforming and modernising the Code of Conduct.[10] This Communication highlights the urgency to adapt to new forms of tax competition and the challenges that they entail, also in light of the factors that intensified the pressure on States to use taxation to compete over the past two decades.[11] The Commission proposed to extend the scope of application of the Code of Conduct "to cover further types of regimes and general aspects of the national corporate tax systems as well as relevant taxes other than corporate tax [since] under the current scope of the Code, there are too many types of harmful regimes that can escape assessment".[12] Moreover, it suggested adjusting the criteria used when assessing the harmfulness of national tax measures and

[7] Code of Conduct 1997 cit. The package consists of a Code of Conduct for Business Taxation 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.

[8] Council Conclusions on the reform of the Code of Conduct for Business Taxation of 8 November 2022, Annex I 'Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a revised Code of Conduct for Business Taxation' (hereinafter referred as "Code of Conduct 2022"), 3. See WW Bratton and JA McCahery, 'Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation' (2001) CML Rev 677.

[9] *Ibid.* 4.

[10] Communication COM (2020) 313 final cit. 3.

[11] *Ibid.*, where it is stated that those factors are: globalisation, digitalisation, the growing role of multinationals in the world economy, the increased importance of intangible assets, and the reduction of barriers for business.

[12] *Ibid*. 4.

improving its governance by introducing qualified majority voting, more transparency in the procedures and effective consequences for Member States that do not comply. As it will be shown below, the problem concerning the scope of application has been partially addressed and mild improvements can be observed regarding the second issue. The revised Code of Conduct entered into force on the 1st of January 2023 but, concerning tax features of general application defined therein it is applicable from the 1st of January 2024 and only for measures enacted or modified on or after the 1st of January 2023.[13]

The amended version of the Code of Conduct concerns “those preferential tax measures and tax features of general application which affect, or may affect, in a significant way the location of business activity in the Union”.[14] Compared to the previous version, the scope of application has been extended and clarified. Indeed, the previous text did not distinguish between preferential tax measures and tax features of general application, but it was referring to measures affecting the location of business activity. Then, the “old” Code of Conduct, specified 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”.[15] Under the provisions of the Code of Conduct of 1997, if a measure is considered potentially harmful, it can be submitted to a review process to assess the actual harmfulness of such measure considering, inter alia, the following aspects:

> “1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
> 2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
> 3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or
> 4. whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD, or
> 5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”.[16]

On the contrary, the current text distinguishes between preferential tax measures and tax features of general application, providing for each type of measure a non-exhaustive list of features that should be assessed. The definition of preferential tax measures is the same as the one provided in Code of Conduct of 1997, namely “tax measures which provide for a significantly lower effective level of taxation, including zero

[13] Code of Conduct 2022 cit., let. P.
[14] *Ibid.* let. A.
[15] Code of Conduct 1997 cit., let. B.
[16] *Ibid*. let. B.

taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful".[17] Also the elements that should be taken into account in the assessment are quite similar.[18] Concerning tax features of general application, the Code of Conduct provides that they "create opportunities for double non-taxation or that can lead to the double or multiple use of tax benefits, in connection with the same expenses, amount of income or chain of transactions" and that "such effects may occur by virtue of any relevant feature of a Member State national tax system that leads to lower tax liability, including no tax liability, other than the nominal tax rate or deferred taxation as a feature of a distribution tax system".[19] Moreover, the Code specifies that,

> "when assessing whether a tax feature of general application of a Member State is harmful, account should be taken of the following cumulative criteria and the existence of a direct causal link between them:
> 1) the tax feature of general application is not accompanied by appropriate anti-abuse provisions or other adequate safeguards and as a result, leads to double non-taxation or allows the double or multiple use of tax benefits in connection with the same expenses, amount of income or chain of transactions;
> 2) the tax feature of general application affects in a significant way the location of business activity in the Union. When evaluating whether the tax feature is a significant factor in determining the location of business activity in the Union, the Code of Conduct Group (...) should take into account the fact that the location of business activity can also be influenced by circumstances other than tax features".[20]

Being a soft law instrument, the Code of Conduct does not lay down any obligations to Member States with binding effects. However, it provides for a standstill and a rollback clause against which Member States undertake not to adopt or keep in force harmful tax measures.[21] The control over the respect of the Code is based on peer pressure. For this

[17] Code of Conduct 2022 cit. let. B.1.

[18] *Ibid.* It provides that "When assessing whether such measures are harmful, account should be taken of, inter alia: 1. whether advantages are ring-fenced de facto or de jure from the domestic market, *e.g.*, they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base, or 2. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or 3. 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 4. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way".

[19] *Ibid*. let. B.2.

[20] *Ibid.*

[21] Code of Conduct 1997 and 2022 cit. let. C and D. The Standstill and Rollback clauses in the new version are identical to those in the previous one. However, the Rollback clause now includes a passage stating that Member States commit to implementing anti-abuse provisions or other adequate safeguards to address harmful tax measures. For an overview of preferential tax regimes examined since 1998, see www.consilium.europa.eu.

purpose, the ECOFIN Council resolution adopting the Code also created the “Code of Conduct Group”, a Council preparatory body composed of high-level taxation experts of the Member States. It has been entrusted with the task of assessing tax measures that may fall within the scope of the Code and supervising the provision of information concerning those measures.[22] Regarding the assessment procedure, it is important to point out that in the new version of the Code of Conduct, some amendments (points from E to I) have been introduced which makes it more structured. However, the review procedure conducted under the Code is still weak due to the non-binding nature of this instrument. It is interesting to note the emphasis the Code of Conduct puts on its strictly political nature and that it does not affect Member States’ rights and obligations or the respective spheres of competence resulting from the Treaties.[23] It shows the persisting lack of political will to introduce binding provisions at the EU level to (explicitly) tackle harmful tax competition by limiting Member States’ discretion in this domain. Its assessment thus results in political rather than technical-legal scrutiny. In this regard, the very nature of the Code of Conduct Group, which could be described as “diplomatic”, results in a working method that is often based on the confidentiality of the respective member States' positions, which leads to serious problems of transparency in the decision-making process and, more generally, in the work of the Group. The recent reform of the Code of Conduct allows to better tackle harmful tax measures and it should be welcomed as an improvement. However, its soft law nature, the consequent opacity in procedures and enforcement and the difficulty of defining harmful tax measures are not (and cannot be) overcome.

Concerning EU legal instrument for cooperation between national tax authorities, the Commission engaged in putting in place a broad European strategy aimed at making corporate taxation in Europe more efficient, fairer, more responsive to the needs raised by the new challenges in the field, and addressing the problems posed by tax evasion and avoidance. It led to the adoption of several directives aimed at increasing the level of transparency[24] and cooperation between tax authorities by amending and supplementing Directive 2011/16/EU on administrative cooperation in the field of taxation, commonly known as the DAC (acronym for Directive on Administrative Cooperation).[25] More-

[22] *Ibid.* let. H.

[23] Code of Conduct 2022 cit. 2, 3 and 5.

[24] See F Başaran Yavaşlar and J Hey (eds), *Tax Transparency* (IBFD 2019).

[25] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 2); Council Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 3); Council Directive 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 4); Council Directive 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (DAC 5); Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of

over, also the Country-by-Country Reporting Directive (CBCR) regarding disclosure of income tax information by certain undertakings and branches has recently been adopted amending the previous Directive 2013/34/EU[26] The introduction of these instruments aimed at enhancing tax transparency is crucial from the perspective of tax competition, as they allow to minimise aggressive tax planning practices and harmful tax competition. Finally, in line with the commitments undertaken within the OECD BEPS project, directives have been adopted to combat tax abuse through the introduction of common rules on the limitation of the deductibility of interest expenses, on the treatment of foreign subsidiaries in low-tax jurisdictions, on anti-abuse rules and on rules to counter the use of instruments and hybrid entities for avoidance purposes. The most recent is Council Directive 2022/2523 adopted on the 14th of December 2022 following the agreement reached at the OECD/G20 Inclusive Framework on BEPS that aims at ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. The legal instruments briefly enlisted are certainly useful tools against the adoption of harmful tax measures. However, they should be further enhanced to be more effective against harmful tax competition.

The actions included in the Fiscalis programme support the implementation of all these measures. It is governed by Regulation 2021/847 which covers the period between 1 January 2021 and 31 December 2027. It is intended to provide Member States with an EU framework to develop cooperation activities in the field of taxation. In particular, this programme is aimed at supporting tax policy and the implementation of Union law relating to taxation, preventing and fighting tax fraud, tax evasion, aggressive tax planning and double non-taxation, reducing unnecessary administrative burdens for citizens and businesses in cross-border transactions, supporting fairer and more efficient tax systems, achieving the full potential of the internal market and fostering fair competition in the Union.

III. State aid law as a tool against harmful tax measures

A national tax measure can be considered unlawful State aid if it falls within the scope of art. 107(1) TFEU. In particular, the cumulative conditions laid down therein must be fulfilled: the beneficiary must be an undertaking, the measure must be selective, granted by a Member State and through State resources, it must provide an economic advantage to the beneficiary, distort or threaten to distort competition between undertakings, and it must affect trade between Member States. A national tax measure that falls within the scope of art. 107(1) TFEU may be also a harmful tax measure under the Code of Conduct,

taxation in relation to reportable cross-border arrangements (DAC 6); Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 7).

[26] Directive 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

as let. J explicitly envisages.[27] The Code of Conduct of November 2022 partially amended this provision in order to coordinate proceedings conducted under State aid rules and the one opened within the Code of Conduct Group. In particular, it provides that when the Commission opens State aid proceedings, the Group should suspend its examination of measures concerned until the end of the State aid procedure.

As Dimitrios Kyriazis pointed out, looking at the Commission decisions on national tax measures following the adoption of the Code of Conduct it is possible to distinguish two "waves": the first fiscal aid wave of the early 2000s and the second one, which is still ongoing.[28] In particular, since 2013, the Commission has been investigating national tax measures such as tax schemes and tax rulings also to tackle BEPS practices, in line with the Organisation for Economic Co-operation and Development's (OECD) BEPS Action Plan.[29] Thus far, the Commission issued several final decisions ordering the recovery of the aid concerning Luxembourg,[30] Ireland,[31] Belgium,[32] the Netherlands,[33] and the UK[34]

[27] Code of Conduct 1997 and 2022 cit., let. J. On this point, see also the Commission guidelines on the application of State aid rules to measures relating to direct business taxation and the report concerning its implementation: Notice from the Commission on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3 of 10 December 1998; Communication COM (2004) 434 from the Commission on the Implementation of the 'Commission Notice on the Application of the State aid rule to Measures Relating to Direct Business Taxation'. As noted therein, it is important to point out that, "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". 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" 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".

[28] D Kyriazis, 'Fiscal State Aid Law as a Tool Against Harmful Tax Competition in the EU: Déjà Vu?' cit.; D Kyriazis, *Fiscal State Aid Law and Harmful Tax Competition in the European Union* (Oxford University Press 2023).

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

[30] Decision 2019/421 of the Commission of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE; Decision 2018/859 of the Commission of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon; Decision 2016/2326 of the Commission of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat. Moreover, the Commission opened a formal investigation concerning a tax ruling granted to McDonald's but found that the measures did not constitute aid.

[31] Decision 2017/1283 of the Commission of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.

[32] Decision 2016/1699 of the Commission of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) 2015/NN) implemented by Belgium.

[33] Decision 2017/502 of the Commission of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks.

[34] Decision 2019/1352 of the Commission of 2 April 2019 on State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption. In this case, the decision is only partially negative.

while other formal investigations involving the Netherlands,[35] Luxembourg[36] and Belgium[37] are still pending. The recovery decisions concerned six individual aids (Fiat, Starbucks, Amazon, Apple and Engie) and two aid schemes (Belgian Excess Profit and UK CFC) while pending formal investigations only concern individual aids (Ikea, Nike, Huhtamäki) and *ad hoc* decisions concerning the Belgian Excess Profit. After challenges were lodged before the General Court by the Member States and undertakings involved,[38] some decisions are currently under scrutiny by the Court of Justice[39] while others have already been adjudicated (Magnetrol case concerning Belgium,[40] Fiat and Amazon cases concerning Luxembourg[41]). Moreover, Margrethe Vestager recently admitted that new State aid investigations may be opened following the outcomes of the in-depth inquiry into Member States' tax ruling practices conducted in the period 2014-2018.[42]

Regarding the relationship between State aid law and harmful tax competition, two main challenges arise from the decisions of the Commission and the case law of the Court of Justice. Firstly, the difficulties to make national tax measures at stake fit with the notion of State aid. Secondly, the suitability of this legal tool from a teleological point of view. For the purposes of the current analysis, the first aspect is the most relevant since it leads to considerations that are particularly relevant for assessing the impact on Member States' prerogatives in tax matters.

The requirements for qualifying a national tax measure as a State aid or a harmful tax measure are partially different. Usually, the defining characteristic of State aid is selectivity, whereas harmful tax measures can also have general application. Such qualification has important consequences. If a national measure is qualified as State aid, a set of binding and well-established rules can be applied instead of relying solely on a soft law

[35] 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), OJ C 121/30 of 6 April 2018; 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), OJ C 226/31 of 5 July 2019.

[36] 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), OJ C 161/3 of 10 May 2019.

[37] Commission, 'Decision to open in-depth investigations into individual "excess profit" tax rulings granted by Belgium to 39 multinational companies', State aid from SA.53964 to SA.54002, OJ C 288/1 of 31 August 2020.

[38] For a list of cases related to tax ruling decisions, see Commission, Tax Rulings ec.europa.eu.

[39] Case C-465/20 P *Commission v Ireland and Others*, pending (AG Pitruzzella's Opinion delivered on 9 November 2023); case C-454/21P *Engie Global LNG Holding and Others v Commission*, pending (AG Kokott's Opinion delivered on 4 May 2023); case C-555/22 P *United Kingdom v Commission and Others*, pending (AG Medina's Opinion delivered on 11 April 2024).

[40] Case C-337/19 P *European Commission v Kingdom of Belgium and Magnetrol International* ECLI:EU:C:2021:741.

[41] Joined cases C-885/19 P, C-898/19 P *Fiat Chrysler Finance Europe v Commission* ECLI:EU:C:2022:859; case C-457/21 P *Commission v Amazon.com and Others* ECLI:EU:C:2023:985.

[42] European Commission, *EVP Vestager remarks at the State aid and tax conference: "EU State aid: strong principles, in crisis and in change"* ec.europa.eu.

instrument such as the Code of Conduct. In particular, if a national measure is a State aid incompatible with the internal market, it should be recovered by the Member State to restore the level playing field between undertakings. As it is clear from the remedy, the objectives pursued by State aid law and the Code of Conduct are partially different: State aid law is intended to identify national measures that are dangerous for the preservation of the level playing field between undertakings while the Code of Conduct aims at tackling distortive competitive dynamics between Member States.

Concerning the attempt to apply State aid law to measures that fit with difficulty into the narrow definition provided by art. 107(1) TFEU, the main issues pointed out concern the stretching of the notion of State. In particular, scholars claim an extensive interpretation of the requirements provided by art. 107(1) TFEU to make them fit the particular type of measures at stake, such as tax rulings.[43] The debate mainly focused on the so-called “selective advantage” requirement and the possibility of introducing the arm’s length principle as a parameter for its assessment.[44] As already pointed out, this aspect is particularly relevant for the current analysis because extending the scope of application of art. 107(1) TFEU means reducing Member States’ autonomy in tax matters. Therefore, the key issue is to understand how far State aid control, a strongly centralized EU power, can go without unduly limiting national tax powers.

The judgment of the Court of Justice in the *Fiat* case is ground-breaking for this purpose.[45] The measure at stake was a tax ruling adopted by the Luxembourg tax authorities in September 2012 in favour of Fiat Chrysler Finance Europe (at that time Fiat Finance and Trade Ltd, part of the Fiat/Chrysler automotive group). Through this decision, Luxembourg tax authorities bound themselves for the following five years to approve the

[43] *Ex multis* L Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019); A Giraud and S Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter' (2017) European State Aid Law Quarterly 233; A Arena, 'State Aids and Tax Rulings: an Assessment of the Commission's Recent Decisional Practice' (2017) Market and Competition Law Review 49; T Iliopoulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity' (2017) European State Aid Law Quarterly 263; T Jaeger, 'Tax Concessions for Multinational: In or Out of the Reach of State Aid Law?' (2017) Journal of European Competition Law & Practice, 221; DA Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) European State Aid Law Quarterly 428.

[44] The arms' length principle is a criterion that has been developed within the OECD to calculate the correct transfer price for intra-group transactions. In this context, it is relevant when assessing, under State aid law, tax rulings involving transfer pricing issues in intra-group transactions.

[45] On this judgment, see S Daly, ‘Fiat v Commission: A Misconception at the Heart of the Tax Ruling Cases’ (2023) ModLRev 1; AP Dourado, ‘Editorial: The FIAT Case and the Hidden Consequences’ (2023) Intertax 2; T Van Helfteren, ‘A Restriction on the Commission’s State Aid Enforcement in Fiscal Aid Cases: Fiat and Ireland V Commission’ (2023) Journal of European Competition Law & Practice 168; T G Iliopoulos, ‘The Fiat Case and a Judicial Epilogue in the Tax Rulings Saga (Joined Cases C-885/19 P, C-898/19 P Fiat Chrysler Finance Europe v Commission)’ (2023) European State Aid Law Quarterly 188; D Kyriazis, ‘The Court of Justice’s Judgment in the Fiat State Aid Tax Ruling case: Restoring Order’ (11 November 2022) EU Law Live eulawlive.com; N Bayón Fernández and R García Antón, ‘Final Judgment in Fiat: The Answers (not) Provided by the Court of Justice in its Second Chapter of the Tax Rulings Saga’ (2 December 2022) EU Law Live eulawlive.com.

method of profit allocation proposed by Fiat within the group and the determination of the amount of corporate tax to be paid to Luxembourg. In this context, the General Court considered the arm's length principle as a "tool" or, as the Commission stated in the decision at issue, a "benchmark" that enables to verify "whether the pricing of intra-group transactions accepted by the national authorities corresponds to pricing under market conditions, to establish whether an integrated company receives, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU".[46] However, the parties involved claimed that the inclusion of the arm's length principle in the assessment of art. 107(1) TFEU irrespective of whether this is also envisaged in the national tax system of reference is an attempt of tax harmonisation in disguise in breach of the fiscal autonomy of Member States.[47] While the General Court considered that the Commission did not exceed its powers, the Court of Justice annulled the contested decision arguing that the selective advantage cannot be proven on the ground of a reference framework that includes also the arm's length principle, being the latter not part of national tax law. Therefore, the general rule that can be derived is that parameters and rules external to the national tax system cannot be taken into account for the assessment of the existence of selective advantage in the meaning of art. 107(1) TFEU unless there is an explicit reference to them in the reference framework.[48] This finding is presented by the Court of Justice as an expression of the principle of legality of taxation, the general principle of EU law requiring that "any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by the law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable".[49] From the purposes of the present analysis, it is interesting to point out that the Court of Justice affirmed that, in doing so, the Commission "also infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular, Article 114(2) TFEU and Article 115 TFEU".[50] The Court of Justice also specified that the position expressed in this judgment does not exclude the possibility to consider tax measures such as tax rulings as State aid since Member States must always exercise their competence in the field of direct taxation in compliance with EU law.[51] However, the reference made to the risk of "backdoor tax harmonisation",[52] namely the attempt to circumvent the appropriate legal instrument for tax

[46] *Fiat Chrysler Finance Europe v Commission* cit. para. 31.
[47] *Ibid*. paras. 35 and 73.
[48] *Ibid.* para. 96.
[49] *Ibid.* para. 97.
[50] *Ibid.* para. 117.
[51] *Ibid.* paras. 65 and 119-121.
[52] The term is used by scholars to make reference to this implicit hamonisation process that exploits State aid law in order to circumvent Treaty rules for harmonisation since they require a unanimity vote that

harmonisation, means that introducing the arm’s length principle in the State aid assessment is a violation of national prerogatives in tax matters.

The recent judgment of the Court of Justice in the *Amazon* case is consistent with the *Fiat* judgment, confirming the same approach to the use of the arm's length principle for assessing the selective advantage of fiscal measures.[53] In this case, the measure at stake was a tax ruling issued in 2003 by Luxembourg tax authorities in favour of Amazon.com regarding the appropriate amount of royalty between two subsidiaries since it this calculation affected the corporate income tax that Amazon EU S.à.r.l. should have paid in Luxembourg. Therefore, the Commission looked at this transfer pricing agreement assessing its noncompliance with the arm’s length principles of the OECD. It is necessary to consider that OECD Guidelines provide different methods to calculate if a specific transition is at “arm’s length”. Relying upon different methods allows to have an approximation but it is possible to obtain divergent results, as happened in this case. According to the Commission calculation, the royalty should have been lower corresponding to a higher corporate income tax liability. Therefore, such tax ruling was considered as State aid. Referring to the *Fiat* judgment, the Court of Justice held that in EU law there is not an autonomous notion of arm's length principle that applies independently of the incorporation of that principle into national law for the purposes of examining tax measures in the context of the State aid assessment under art. 107(1) TFEU.[54] Moreover, the Court of Justice recalls that the OECD Guidelines are not binding on the member States of that organisation and, even if many national tax authorities follow them in the preparation and control of transfer prices, parameters and rules external and not expressly incorporated into the national tax system cannot be taken into account to establish the tax burden that an undertaking should normally bear.[55] The error in identifying the reference framework necessarily invalidates the entirety of the reasoning relating to the existence of a selective advantage on which the Commission decision was grounded.[56]

The introduction of the arm’s length principle in the State aid assessment is not the only problem deriving from the attempt to use these rules to tackle harmful tax measures.[57]

is difficult to achieve. For example see R Doeleman, ‘In Principle, (Im)possible: Harmonizing an EU Arm’s Length Principle’ (2023) EC Tax Review 93, 93; G Allevato ‘Judicial Review of the State Aid Decisions on Advance Tax Rulings: A Last Resort to Safeguard the Rule of Law’ (2022) European Taxation 1, 2; C Peters, ‘Tax Policy Convergence and EU Fiscal State Aid Control: In Search of Rationality’ (2019) EC Tax Review 6, 6; DA Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' cit. 428, 436.

[53] *Commission v. Amazon.com and Others* cit.

[54] *Ibid.* para. 42.

[55] *Ibid.* para. 44.

[56] *Ibid.* para. 57.

[57] For example, a major concern regarding the use of State aid law as a tool against harmful tax competition is that the remedy provided by the Treaties is not suitable for the purpose of sanctioning Member States

However, at the moment it appears to be an important obstacle to the use of this instrument for this purpose. Moreover, it is central to the contention of this *Article* since it strikes the balance between EU and Member States' powers in this area. The judgment of the Court of Justice in the *Fiat* case draws a line to the margin of appreciation of the Commission, confirmed in the recent *Amazon* case. Considering that there is not a unique method for assessing whether a transaction is at "arm's length" and that such methods are not even part of EU law, endorsing the Commission decision-making practice would have granted the latter wide discretion. This important judgment can certainly be considered a game changer in the "tax ruling saga". However, it cannot be denied that this is in line with the previous case law of the Court of Justice. Even in other recent cases involving turnover taxes in Poland[58] and Hungary[59], the Court of Justice has consistently maintained that the principle of national fiscal autonomy requires the Commission to assess measures under art. 107(1) TFEU exclusively on the ground of Member States' tax systems.[60] This renders even clearer that State aid rules are not suited to combating a phenomenon such as harmful tax competition without overstepping the limits of national fiscal autonomy.

IV. The rocky road to corporate tax harmonisation

The analysis shows that the "off-label" use of State aid law, the Code of Conduct and other forms of cooperation between tax authorities proved ineffective tools for tackling harmful tax competition in the EU. However, there is a further option: instead of focusing on an approach aimed at prohibiting harmful tax measures – necessarily stumbling over the difficulty of identifying an appropriate legal definition of the phenomenon – it would be more appropriate to opt for a preventive approach. In this case, in light of the factors that cause harmful tax competition in the EU mentioned above, it means harmonising corporate taxation or, at least, increasing tax coordination.

There have been many attempts to introduce some forms of coordination and harmonisation in corporate taxation to achieve a common framework at the EU level. The most promising option seems to be the introduction of a Common (Consolidated) Corporate Tax Base (C(C)CTB). This legal instrument aims at calculating the aggregate net income of the

that engage in harmful competitive practices. If the Commission finds out that a national measure is an unlawful State aid, the remedy is the recovery of the aid that is aimed at restoring the level playing field between undertakings. However, it does not have a sanctioning purpose against Member States. Another important criticism is that State aid assessment takes the national framework into account when deciding whether the measure is unlawful. However, harmful tax competition is necessarily a transnational phenomenon that State aid law cannot catch under its scope. See, *ex multis*, E Forrester, 'Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) EC Tax Review 19.

[58] Case C-562/19 P *European Commission v Republic of Poland* ECLI:EU:C:2021:201.

[59] Case C-596/19 P *European Commission v Hungary* ECLI:EU:C:2021:202.

[60] N Bayón Fernández and R García Antón, 'Final Judgment in Fiat: The Answers (not) Provided by the Court of Justice in its Second Chapter of the Tax Rulings Saga' cit.

entire corporate group and providing an appropriate allocation formula that takes into account several factors. Different proposals of C(C)CTB have been put forward in 2011 and 2016 but without success. In September 2023, the European Commission proposed a new framework for corporate taxation called "Business in Europe: Framework for Income Taxation – BEFIT" (COM(2023) 532 final).[61] As the CCCTB, the BEFIT directive is based on a common consolidated tax base and a system for the allocation of profits between Member States. The objectives that the European Commission intends to pursue through the adoption of the BEFIT can be summarized as follows: to establish a single code of corporate taxation for the European Union allowing a fairer allocation of taxing rights between Member States, minimising the possibilities of tax avoidance and, at the same time, reducing administrative burdens and tax obstacles for businesses operating in the single market. This is complemented by the definition of a tax agenda that, following the July 2020 Tax Action Plan (COM(2020) 312 final), aims to promote productive investment and entrepreneurship, protect domestic revenues and support green and digital transitions.

The Treaties offer at least three possible legal bases that can be used for the adoption of a C(C)CTB-like measure. The most straightforward option is art. 115 TFEU, which is the one chosen for the current BEFIT proposal.[62] This legal basis can be used for the adoption of directives for the approximation of national "laws, regulations or administrative provisions" that directly affect the functioning of the internal market. However, the adoption procedure provided therein requires a unanimous vote within the Council and a marginal role for the European Parliament. On the one hand, unanimity renders the procedure burdensome. Particularly in this field, unanimity is very difficult to be achieved because Member States that benefit the most from tax competition are likely to veto proposals that limit their discretion. On the other hand, granting a more central role to the European Parliament would allow to put forward instances that are perceived by citizens as relevant such as the need to ensure that all companies in the EU pay their fair share of taxes and where profits are made.[63]

[61] The BEFIT proposal is part of a package aimed at simplifying tax provisions and reducing compliance costs for companies with transnational activities. It includes a proposal for a Council directive on transfer pricing (COM(2023) 529 final of 12 September 2023) and a proposal for a Council directive establishing a Head Office Tax system for micro, small and medium sized enterprises, and amending Directive 2011/16/EU (COM (2023) 528 final of 12 September 2023).

[62] Art. 115 provides that "Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market".

[63] An example of the extent to which this issue is perceived as relevant by European citizens is the strong media coverage of the LuxLeaks scandal. Moreover, also the Conference on the Future of Europe proposed the introduction of a common corporate tax base in the context of the promotion of cooperation between Member States. The proposal aims at "harmonizing and coordinating tax policies within the Member States of the EU in order to prevent tax evasion and avoidance, avoiding tax havens within the EU and

An alternative that would allow overcoming problems deriving from the unanimous vote within the Council and the limited role of the European Parliament (as provided by art. 115 TFEU) would be turning to art. 116 TFEU. The latter can be applied 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". This legal basis, interpreted extensively, seems the most promising option to adopt a measure intended at harmonising corporate taxation excluding the possibility for some Member States to veto the proposal.[64] Moreover, the adoption through the ordinary legislative procedure would allow a more decisive involvement of the European Parliament, overcoming the democratic deficit that characterizes this procedure.[65] The possibility of resorting to art. 116 TFEU is not excluded by the Commission which has stated its willingness to make best use of the instruments offered by the Treaties that allow the adoption of proposals in tax matters through the ordinary legislative procedure, including art. 116 TFEU.[66] The European Parliament shares the same position in this regard.[67] However, the use of art. 116 TFEU in this context may raise doubts concerning the respect of national prerogatives since it could be perceived as a way of circumventing the limits to the allocation of EU powers that the States agreed upon by ratifying the Treaties. Concerning this aspect, a broad interpretation of this article allows to include a wide range of harmful tax measures in its scope of application has also been countered by the difficulties in overcoming the *lex specialis* character of this provision.[68] Moreover, from a political perspective, such a change will not be welcomed by the Member States that are reluctant to lose their veto power. Therefore, it would be necessary to carefully explore the actual scope of application of art. 116 TFEU, also considering possible grounds for annulments that could be used by Member States contrary to the adoption of such measure.

targeting offshoring within Europe, including by ensuring that decisions on tax matters can be taken by qualified majority in the Council of the EU" (see Final report, Plenary proposals, p. 60 and 107).

[64] J Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' (2020) EC Tax Review 58, 61.

[65] On this point, see F Vanistendael, 'On Democratic Legitimacy of European Tax Law and the Role of the European Parliament', in P Pistone (ed), *European Tax Integration: Law, Policy and Politics* (IBFD 2018), 99 ff.

[66] See, for example, Communication COM(2019) 8 final from the Commission 'Towards a more efficient and democratic decision making in EU tax policy', 9, and Communication COM(2020) 312 final from the Commission 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy', 2.

[67] European Parliament legislative resolution of 15 March 2018 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)0683 – C8-0471/2016 – 2016/0336(CNS)), Amendment 4, Recital 4.

[68] M Nouwen, 'The Market Distortion Provisions of Article 116-117 TFUE: An Alternative Route to Qualified Majority Voting in Tax Matters?' (2021) Intertax 14, 14 ss; G Bellenghi, '116 Ways to Get Rid of Unanimity: Exploring the Potential of the Market Distortion Legal Basis' (2022) MCEL Master Working Paper.

The establishment of enhanced cooperation in this field would be another option. This alternative is formally viable and would facilitate the adoption of the measure allowing further integration between willing Member States while leaving the door open to others that might be willing to join at a later stage. However, enhanced cooperation does not appear to be fit for the aim pursued. Opting for this procedure, although sometimes envisaged as an intermediate step towards further integration for Member States that adopted the Euro,[69] does not seem appropriate in this context. Indeed, for the introduction of a common consolidated corporate tax base to be useful and effective also to combat harmful tax competition, it must be applied throughout the EU.

V. Is the EU overstepping its powers? Conclusive remarks

The analysis conducted shows that the instruments in place at the EU level are currently unsuitable to adequately address the harmful effects of tax competition because they are either not binding (Code of Conduct) or not fit for their intended purpose (State aid). On the other hand, the harmonisation process of corporate taxation still seems far off, although there have been steps forward such as the BEFIT proposal. Although these instruments are not effective in the current legal context in combating harmful tax competition, it is interesting to consider whether they unduly limit national tax autonomy.

In this regard, State aid law is probably the most controversial instrument to be used for hindering the adoption of harmful tax measures. Indeed, as it has been shown, such an extensive interpretation of the notion of State aid can lead to a limitation of national discretion in tax matters at least in two ways. Firstly, by departing from State aid rules and the well-established case law of the Court of Justice on State aid assessment and, secondly, through the violation of Treaty provisions that allow tax harmonisation. Concerning the first aspect, the European Commission is entrusted with the interpretation of the criteria provided by art. 107(1) TFEU. However, in doing so it should respect national prerogatives in tax matters. Referring to fiscal aids, it means that the reference framework against which assessing the selective advantage granted by a fiscal measure should

[69] European Parliament legislative resolution of 19 April 2012 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011)0121 – C7-0092/2011 – 2011/0058(CNS)), Amendment 6, Recital 4 a, where it is stated that "As the internal market encompasses all Member States, the CCCTB should be introduced in all Member States. However, if the Council fails to adopt a unanimous decision on the proposal to establish a CCCTB, it is appropriate to initiate, without delay, the procedure for a Council decision authorising enhanced cooperation in the area of the CCCTB. Such enhanced cooperation should be initiated by the Member States whose currency is the euro but should be open at any time to other Member States in accordance with the Treaty on the Functioning of the European Union" The same position was recalled in the European Parliament legislative resolution of 15 March 2018 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)0683 – C8-0471/2016 – 2016/0336(CNS)), Amendment 4, Recital 4, where the Parliament considered enhanced cooperation an adequate legal base. However, it should be considered a residual option compared to the adoption with the unanimity vote or through the ordinary legislative procedure as provided by art.116 TFEU.

be the national one. As the *Fiat* judgement recalls, the arm's length principle cannot be considered a corollary of art. 107(1) TFEU and, therefore, it is not possible to introduce it in the State aid assessment unless it is part of the reference framework at the national level. This statement is particularly relevant considering its impact on national discretion in tax matters, as it sets a limit to the Commission's power of interpretation that lies precisely on that autonomy. In relation to the second aspect pointed out, the attempt of "harmonisation through the backdoor" implies a violation of national prerogatives because Member States are deprived of their right to be involved in the adoption of measures that lead to *de facto* tax harmonisation. Moreover, it is also a matter of institutional balance since, in this way, the Commission was pursuing an objective that did not fall within its powers but within the legislative one.

As it has been claimed, the issues concerning the State aid assessment are not the only problematic aspect that shows the inadequacy of relying on State aid as an instrument to tackle harmful tax competition. Some examples are the difference between the notion of State aid and harmful tax measure, the fact that this instrument is not fit for addressing the negative effect of tax competition because of the remedy provided by the Treaty (the recovery of the aid) and the "national" logic behind the State aid assessment that is inconsistent with the nature of the harmful tax competition as a transnational phenomenon. Paraphrasing Phedon Nicolaides and Dimitrios Kyriazis, not every problem deriving from tax competition can be solved through the application of State aid law.[70] However, despite the critical aspects described, State aid law is currently the only hard law instrument that allows the EU to tackle (at least some) harmful tax measures. Therefore, it should be regarded as a complementary instrument to the Code of Conduct, to be handled with care without exceeding the scope of art. 107(1) TFEU.

On the other hand, notwithstanding its limited effectiveness due to its soft law nature, the recent reform improved the Code of Conduct. This should be welcomed as a step towards greater European-wide management and control of the complex phenomenon of harmful tax competition. In light of the context described, the most desirable solution is still the harmonisation of corporate taxation, but political will is perhaps more important than legal technicalities. Hopefully, after the ending of the "tax ruling saga" marked by the *Fiat* judgment, we will finally enter the era of corporate tax harmonisation.

[70] The reference is to: P Nicolaides, 'Can Selectivity Result from the Application of Non-Selective Rules? The Case of Engie' (2019) European State Aid Law Quarterly 15, 28, where the author, discussing about the *Engie* case, points out that: "the Commission may be correct that multinational companies pay too little tax in relation to their ability to pay. This may be both morally wrong and harmful to the European economy. However, not all social and economic problems can be solved by mobilising the EU's State aid rules" and D Kyriazis, 'The Court of Justice's Judgment in the Fiat State Aid Tax Ruling case: Restoring Order' cit., where the author, commenting the recent *Fiat* judgment, stated that: "A noble aim does not justify any means, and certainly does not justify a distortion of long-standing State aid doctrine in order to pursue the political objectives of the day. State aid policy is not a panacea and should, therefore, not be treated as such. The Grand Chamber's judgment is a victory for the rule of law and legal certainty in particular, as well as a positive development as regards the delineation of competences between the EU and its Member States".