CHAPTER 6

State-Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax Policy in Disguise?

Edoardo Traversa & Pierre M. Sabbadini

§6.01 INTRODUCTION

From the early days of European integration, Member States have been very reluctant to transfer powers to the European Union (EU) level in the area of taxation, in particular corporate and income taxes, which remain within their exclusive competence. Unlike Member States, EU institutions are, therefore, unable to introduce their own taxes or to determine their own tax policy, aiming to strike the right balance between budgetary, redistributive, economic, social, and environmental aims. The Court of Justice of the European Union (hereinafter, collectively, with its predecessor-in-interest the European Court of Justice, 'the Court' or 'the CJEU') has consistently stated that the powers retained by the Member States, must nevertheless be exercised consistently with EU law.[1] Those limits set by EU law on the Member States' taxing powers are essentially motivated by the objective of achieving the Internal Market and include (i) the prohibition of fiscal State aid, (ii) the freedom of movement and the principle of non-discrimination and (iii) the competence conferred by the Treaty to the Council to adopt secondary legislation aiming at the harmonization or the approximation of national tax laws.

In the area of State aid, the European Commission – subject to review by the CJEU – is free to determine its own policy and does not depend on the Council for its

1. *Commission* v *France ('Avoir Fiscal')*, Joined Cases C-6/69 and C-11/69, Judgment, EU:C:1969:68 [hereinafter '*Avoir Fiscal*, C-6/69'], para. 17; *Schumacker*, C-279/93, Judgment, EU:C:1994:391.

implementation, as is the case for the adoption of secondary tax legislation.[2] However, although the Court clarified, very early, that the concept of State aid could potentially encompass tax measures,[3] it took a long time before the Commission started to use its powers to monitor Members States' tax rules, and even longer to consolidate its practice and develop a 'fiscal State-aid policy'. Some authors tend to explain the Commission's reserve by the inherently sovereign nature of tax measures, which implement national economic, financial, and social policies and address market failures.[4]

The first wave in the Commission's momentum occurred at the end of the 1990s. While the Member States had endorsed the Code of Conduct in the area of business taxation, the Commission adopted its Notice on the Application of State Aid Rules to Measures Relating to Direct Business Taxation (the 'State-Aid Business Tax Notice').[5] It then launched several investigations against favourable tax measures adopted by Member States, mostly in order to attract foreign investment, many of them ending with a negative decision. A second wave started a few years ago and is still ongoing. The Commission started investigating individual tax rulings obtained by multinational companies, mostly concerning the application of double taxation conventions and transfer pricing rules. This chapter explores, whether – as it has been sometimes argued – the Commission is currently using its powers in the area of State aid as an instrument for carrying out not only a fiscal State-aid policy, but a genuine tax policy through State aid control, as an alternative to traditional harmonization and coordination via secondary law instruments, which the Commission is unable to get through the Council due to the unanimity rule and the opposition of the Member States.

§6.02 ACT I: THE 1997 MONTI PACKAGE COMMUNICATION AND THE STATE-AID BUSINESS TAX NOTICE

This section provides a description of the European approach to tax measures via State aid rules and notably important milestones such as the Communication to the Council and Parliament that included 'a package to tackle harmful tax competition',[6] also called the 'Monti Package' named after Commissioner Mario Monti (the '1997 Monti Package Communication') and the State-Aid Business Tax Notice.

In 1996, the Commission launched an initiative to comprehensively review the taxation policy of the EU, with an objective of better achieving the internal market, but

2. On these issues, see also Edoardo Traversa & Alessandra Flamini, *Fighting Harmful Tax Competition through EU States Aid Law: Will the Hardening of Soft Law Suffice?*, 2015 Eur. St. Aid L. Q. 323, 325 (2015).
3. *De gezamenlijke Steenkolenmijnen in Limburg*, 30/59, Judgment, EU:C:1961:2; *Italy* v *Commission*, C-173/73, Judgment, EU:C:1974:71; *Banco Exterior de España* v *Ayuntamiento de Valencia*, C-387/92, Judgment, EU:C:1994:100.
4. Claire Micheau, *Droit des Aides d'État et des Subventions en Fiscalité* 47 (2013).
5. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, OJ C 384/3 (1998) [hereinafter, the 'State-Aid Business Tax Notice'].
6. *Ibid.* at 564.

also of stabilizing national fiscal systems and easing the tax burden on employment to stimulate growth and employment.[7]

The Commission justified the need for coordination, notably, by the fact that, while tax competition was generally to be welcomed because of its benefits for citizens (consumers) and its downward pressure on government spending, it also jeopardized efforts of Member States to reduce their budget deficits and to comply with other EU commitments contained in the Maastricht criteria[8] and in the Stability and Growth Pact.[9] The Commission wished to emphasize the link between national tax policies and European objectives in the context of the single/internal market and the European Monetary Union. Eliminating regulatory barriers made differences between tax systems more visible and reinforced the influence of national taxation policy choices on strategic decisions by economic actors (e.g., on allocation of capital and investment).

The Commission acknowledged in the 1997 Monti Package Communication[10] that, between 1981 and 1995, an increase in the tax burden on labour of seven percentage points of the implicit tax rate had occurred,[11] while for other factors of production (including capital, self-employed labour, energy and natural resources) had been subject in the same period to a decreasing rate of more than ten percentage points of the implicit tax rate.[12] The representation of the combination of, on the one hand, the increase of taxation on employed labour and, on the other hand, the decrease of taxation on self-employment and capital was named the 'Monti Cross' because of its graphic resemblance.[13] In addition, the Commission noted that another important factor of job creation: small- and medium-sized enterprises ('SMEs') were penalized in comparison to larger companies that had better access to benefits resulting from tax differentials and tax competition.[14] The Commission elaborated on this shift by explaining that the high rate of mobility of certain tax bases could have forced Member States to impose a lower tax rate than desired and to compensate it with increased

7. European Commission, Taxation in the European Union: Discussion Paper for the Informal Meeting of ECOFIN Ministers, SEC(96) 487 (1996); and Taxation in the European Union: Report on the Development of Tax Systems (Second Report of the Monti Group), COM(96) 546 (1996).
8. The so-called 'Maastricht Criteria' are named after the Treaty on European Union (TEU) signed in Maastricht on 7 Feb. 1992 which provided that, under Art. 121(1), four criteria (regarding price stability, government finances, exchange rates and long-term interest rates) must be met for Member States to participate in the third stage of Economic and Monetary Union.
9. The Stability and Growth Pact is a set of rules designed to ensure that EU Member States pursue sound public finances and coordinate their fiscal policies. The current legal bases are Arts. 121, 126 and 136 of the Treaty on the Functioning of the European Union ('TFEU') as well as Protocol 12 of the Treaty on the Excessive Deficit Procedure.
10. Communication from the Commission to the Council: Towards Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union, COM(97) 495 (1997) [hereinafter the '1997 Monti Package Communication'], para. 4.
11. The implicit tax rate is the result of the division of tax revenues by the appropriate base. *See also*, Carlo Pinto, *Tax Competition and EU Law* 437 (2003).
12. Furthermore, the Commission noted that within the labour factor, the tax burden was shifting to the least skilled and less mobile category, while the highly-skilled employees were increasingly mobile and responsive to tax differentials.
13. Pinto, *supra* n. 11, at 35–37.
14. Communication from the Commission to the Council: Towards Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union, COM(97) 495 (1997) [hereinafter the '1997 Monti Package Communication'], para. 4.

taxation on other, less-mobile bases. The Commission concluded that there was a need to reverse this trend, which had proved to have a negative effect on the level of employment and growth in Europe.

Based on the foregoing, the Commission outlined in the 1997 Monti Package Communication possible components of a package to tackle harmful tax competition, including the adoption of: (i) a code of conduct for business taxation in parallel with a Commission communication on fiscal state aids, (ii) measures to eliminate distortions of the taxation of capital income, (iii) measures to eliminate withholding taxes on cross-border interest and royalty payments between companies, and (iv) measures designed to eliminate significant distortions in the area of indirect taxation.

After a debate with Member States and stakeholders, the Commission published the '1997 Monti Package Communication'). The Commission stated that the Monti Package offered a real prospect of agreement between the Member States, provided that the spirit of compromise it had witnessed over the months of negotiation was maintained.[15] The objective of the final version of the Monti Package proposed by the Commission was to implement a new European tax strategy based on (i) a code of conduct for business taxation, (ii) a European solution in the area of taxation of income from savings, and (iii) measures to eliminate withholding taxes on cross-border interest and royalty payments between companies.[16]

On 1 December 1997, a code of conduct for business taxation ('Code of Conduct') was incorporated in a Council resolution to secure the commitment of Member States to respect the principles of fair competition by undertaking to roll back existing measures that constituted harmful taxation and to refrain from introducing similar tax measures in the future.[17] The Code of Conduct targeted tax measures originating from legislative, regulatory, and administrative action that had, or may have had, a significant impact on the location of businesses in the EU. The criteria established by the Code of Conduct for identifying potentially harmful measures included: (i) an effective level of taxation that is significantly lower than the general level of taxation in the country concerned; (ii) tax benefits reserved for non-residents; (iii) tax incentives for activities that are isolated from the domestic economy and, therefore, have no impact on the national tax base; (iv) granting of tax advantages even in the absence of any real economic activity; (v) the basis of profit determination for companies in a multinational group departs from internationally accepted rules, in particular those approved by the OECD; and (vi) lack of transparency.

To ensure the effective implantation of the Code of Conduct commitments, a monitoring mechanism was established in the form of the so-called Primarolo Group,[18] which was entrusted with the task of reviewing domestic tax systems and identifying tax measures that might fall within the scope of the Code of Conduct: its task was to

15. *Ibid.* at 564, para. 6.
16. *Ibid.* at 564, para. 8.
17. Conclusions of the ECOFIN Council Meeting of 1 Dec. 1997 Concerning Taxation Policy – Resolution of the Council and the Representatives of the Governments of the Member States, Meeting within the Council of 1 Dec. 1997 on a Code of Conduct for Business Taxation - Taxation of Saving, OJ C 2/01 (1998) [hereinafter, the '1997 Code of Conduct Resolution'].
18. The group was named after its chairman, UK Paymaster General, Dawn Primarolo.

report, with the technical assistance of the Commission, to the Council. In its report issued in November 1999, the Primarolo Group identified sixty-six tax measures displaying harmful features.[19] Member States then revised or replaced those sixty-six measures, sometimes subject to a 'grand-fathering' clause under which beneficiaries of certain regimes benefited from a transition period. Thereafter, the Primarolo Group continued its work; for example, it reviewed the tax systems of the Members States that joined the EU in 2004.

Along with these EU efforts to tackle harmful taxation, parallel discussions were conducted under the auspices of the OECD to address certain special tax regimes (i.e., harmful tax practices in the form of tax havens and harmful preferential tax regimes). Harmful tax competition had been identified as one of the consequences of the globalization of the twentieth century,[20] as the OECD Committee on Fiscal Affairs acknowledged in its 1998 Report entitled 'Harmful Tax Competition: An Emerging Global Issue'.[21] The 1998 OECD Report provided a list of the harmful effects of preferential tax measures, such as:

> distorting financial and, indirectly, real investment flows; undermining the integrity and fairness of tax structures; discouraging compliance by all taxpayers; re-shaping the desired level and mix of taxes and public spending; causing undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property and consumption; and increasing the administrative costs and compliance burdens on tax authorities and taxpayers.[22]

The 1998 OECD Report further emphasized the link between the potentially harmful nature of a tax measure and its impact on the international allocation of taxable profits: 'If the spillover effects of particular tax practices are so substantial that they are concluded to be poaching other countries' tax bases, such practices would be doubtlessly labelled "harmful tax competition"'. Subsequently, a Forum on Harmful Tax Practices received a mandate from the OECD to monitor the situation and the implementation of the recommendations issued.

In its 1997 Monti-Package Communication,[23] the Commission had also indicated that many Member States had urged the Commission to re-examine its policy in the field of fiscal State aid to match its commitment to the political agreement of the Member States to the Code of Conduct. The Commission agreed that, on the one hand, it would review existing aid and, if necessary, propose that Member States make amendments or abolish aid. On the other hand, to make its enforcement policy as transparent as possible, thereby ensuring that its decisions would be predictable and equal treatment would be guaranteed, the Commission agreed to present a communication clarifying its policy on the application of the state-aid rules to fiscal measures in light of developments in the Single Market.

---

19. The geographic allocation of those measures was the following: forty in EU Member States, three in Gibraltar, and twenty-three in dependent or associated territories.
20. Carlo Pinto, *EU and OECD to Fight Harmful Tax Competition: Has the Right Path been Undertaken?*, 26 Intertax 386, 390 (1998).
21. OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998).
22. *Ibid.* at 16.
23. The 1997 Monti Package Communication, *supra* n. 14, para. 17.

In relation to its commitment regarding fiscal State aid accompanying its endorsement of the Monti Package and the Code of Conduct, in particular, the Commission stated in its November 1997 Communication,[24] that it had already begun its review of certain cases and was continuing to reflect on these issues in order to come forward with an indication of its position as a basis for the normal consultations with Member States on guidelines in the area of State aid in parallel with the implementation of the Package.[25]

Following the Council's adoption of the 1997 Code of Conduct Resolution, the Commission published its State-Aid Business Tax Notice,[26] in which the Commission contemplated the application of State aid rules in relation to the objective of tackling harmful tax competition as a complement to the Code of Conduct.[27] Regarding the relationship between State aid enforcement and the Code of Conduct, the State-Aid Business Tax Notice provided that the qualification of a tax measure as harmful under the Code of Conduct would not affect its possible qualification as State aid. However, the assessment of the compatibility of fiscal aid with the Internal Market must be made, according to the Commission, by taking into account, *inter alia*, the effects of aid that are brought to light in the application of the Code of Conduct.[28]

The State-Aid Business Tax Notice also framed the intervention of the Commission in the context of the completion of the single/internal market and the economic and monetary union by highlighting that 'account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States.'[29] In other words, the harmful effects of tax competition between Member States must be taken into account in the monitoring of fiscal State-aid measures. The State-Aid Business Tax Notice further indicated that, although it was published for guidance purposes and was not exhaustive,[30] the Commission intended to ensure that its decisions would be transparent and predictable and that its rules would be applied consistently and with a guarantee equality of treatment among Member States.[31] Finally, the Commission indicated that it intended to (re)examine, case by case on the basis of the State-Aid Business Tax Notice, existing tax arrangements in the Member States.[32]

The primary objective of the State-Aid Business Tax Notice was to clarify whether a tax measure could be qualified as State aid.[33] It is interesting to note that while the State-Aid Business Tax Notice focused on the application of State-aid rules, which by nature could only be applied to selective domestic measures, the Commission also

24. Communication from the Commission to the Council and the European Parliament – A package to tackle harmful tax competition in the European Union, 5 Nov. 1997, COM(97) 564 FINAL, p.
25. The 1997 Monti Package Communication, *supra* n. 14, para. 13.
26. The State-Aid Business Tax Notice, *supra* n. 5.
27. *Ibid.* para. 1.
28. *Ibid.* para. 30.
29. The State-Aid Business Tax Notice, *supra* n. 5, para. 3.
30. *Ibid.* para. 37.
31. *Ibid.* para. 4.
32. *Ibid.* para. 4.
33. *Ibid.* para. 2.

referred to other types of EU actions that could be taken against general measures impeding the functioning of the internal market, such as unanimously adopted harmonization directives or Council directives adopted by a qualified majority aimed to tackle disparities between planned or existing general provisions in Member States' domestic tax law that might distort competition and, thus, create distortions.[34]

The Commission began by reiterating that it does not actually matter that a measure be of a tax nature to qualify as State aid, if it meets the constituting conditions of an aid measure under Article 107 TFEU (ex-Article 92 TEC[35]). Building on the case law of the Court of Justice, the Commission then described the four cumulative conditions for a measure benefitting a recipient firm carrying on an economic activity to be found to be State aid within the meaning of Article 107 TFEU [ex-Article 92 TEC] considering the nature of tax measures.[36]

First, the tax measures must constitute an advantage that relieves the recipients thereof of tax charges or expenses the recipients would otherwise bear. The advantage can be provided in various ways, including: (i) a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements, or the entering of reserves on the balance sheet); (ii) a total or partial reduction in the amount of tax, such as exemption or a tax credit; or (iii) deferment, cancellation, or even special rescheduling of tax debt.[37]

Second, such advantage must be granted by the State through State resources. Provision 'by the State' can be achieved through tax provisions of a legislative, regulatory, or administrative nature, as well as through the practices of the tax authorities. As far as tax measures are concerned, a loss of tax revenue is equivalent to consumption of State resources in the form of a fiscal expenditure. It also applies to aid granted by regional and local bodies in the Member States.[38]

Third, the measure must affect competition and trade between Member States, which requires that the recipient firm carries on an economic activity involving trade between Member States. It is sufficient if the measure strengthens the firm's position compared with that of other firms that are competitors in intra-Community trade.[39]

Fourth, the measure must be selective based on its focus, so that it favours: certain undertakings or 'the production of certain goods',[40] by favouring: a specific sector or an entire section of the economy (e.g., manufacturing); national products that are exported;[41] all the sectors that are subject to international competition;[42] certain

34. *Ibid.* paras 6–7.
35. References to articles of the TEU in the State-Aid Business Tax Notice (*supra* n. 5) are references to the 1992 Maastricht Treaty on European Union (OJ C 191/1 (1992)), as the Treaty of Amsterdam only entered into force on 1 May 1999.
36. The State-Aid Business Tax Notice, *supra* n. 5, paras 8–12.
37. *Ibid.* para. 9.
38. *Ibid.* para. 10.
39. *Ibid.* para. 11.
40. *Ibid.* para. 18.
41. *Avoir Fiscal*, C-6/69.
42. Commission Decision, 4 Dec. 1996 Concerning Aid Granted by Belgium under the Maribel bis/ter Scheme, OJ L 95/25 (1996); and *Belgium* v *Commission*, C-75/97, Judgment, EU:C:1999:311.

types of undertakings (e.g., public undertakings[43]); or undertakings performing certain functions (e.g., intra-group, production, intermediation, or coordination).[44] A measure can also be selective because of its design: selectivity, thus, can be the result of an exception to tax provisions of a legislative, regulatory, or administrative nature or of a discretionary practice of the tax authorities.

On discretionary administrative practice, the Commission, based on the *Kimberly Clark Sopalin* case,[45] underlined that selectivity can arise where a general measure is individually applied not merely based on objective criteria but also by way of a discretionary power. For example, the Commission took the view that there is a presumption of State aid if the tax administration enjoys the discretionary freedom to set, firm-by-firm or sector-by-sector, different depreciation periods or valuation methods, or to handle fiscal debts on a case-by-case basis with an objective different from the objective of optimizing the recovery of tax debts from the enterprise concerned. The Commission went even further, indicating that unless administrative rulings merely contain an interpretation of general rules, there is a presumption of aid warranting a detailed analysis for every decision of the administration that departs therefrom. According to the Commission, that presumption is reinforced by the 'opaque' nature of the decisions and the breadth of discretion enjoyed by tax authorities.[46] The Commission concluded that such a presumption 'does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.'[47]

The Commission nuanced its stance on selectivity by explaining that Member States may first justify measures of a differential nature (i) when their economic rationale makes them necessary to the functioning and effectiveness of the Member State's tax system[48] or (ii) when they are based on the existence of objective differences between taxpayers.[49] Examples relating to the first category of justifications include: the progressive nature of an income-tax scale explained by redistributive purposes or the similar logic underlying certain specific provisions on the taxation of SMEs;[50] national calculation of asset depreciation and stock valuation methods; and arrangements for fiscal debt collection inherent in its national tax system.

According to the Commission, justifications based on the 'inherent' nature of objectives or the 'logic' of the tax system are limited to collecting revenue to finance State expenditure and having each firm pay tax only once, so that taxes paid in the State in which the firm is resident for tax purposes should be taken into account. Non-budgetary objectives (e.g., those of social, economic or regional nature) assigned to a tax scheme are, however, unlikely to justify selectivity. The Commission underscores

43. The State-Aid Business Tax Notice, *supra* n. 5, para. 19.
44. *Ibid.* para. 20.
45. *France* v *Commission*, C-241/94, Judgment, EU:C:1996:353.
46. The State-Aid Business Tax Notice, *supra* n. 5, para. 22.
47. *Ibid.*
48. Commission Decision 96/369/EC of 13 Mar. 1996 Concerning Fiscal Aid Given to German Airlines in the Form of a Depreciation Facility, OJ L 146/42 (1996).
49. The State-Aid Business Tax Notice, *supra* n. 5, para. 24.
50. *Ibid.* para. 27.

that more favourable treatment of non-resident companies compared to resident ones, or the grant of tax benefits to head offices or to firms providing certain services (for example, financial services) within a group, cannot be easily justified.

Regarding the second category of justification, which are those based on the existence of objective differences between taxpayers, the Commission accepts that foundations or associations – as non-profit undertakings – are specifically exempt from the national tax(es) on profits if they cannot in reality earn any profits or that cooperatives distributing all of their profits to their members are not taxed at the level of the cooperative, provided that tax is actually levied at the level of their members.

From a procedural point of view, the Commission reminds us that, subject to review by European courts, procedural requirements applicable to new State aid include (i) the obligation to notify proposed State-aid measures to the Commission and (ii) a stand-still obligation (i.e., not to put any proposed State-aid measures into effect until the Commission has approved them). A breach of those requirements implies an obligation to recover the amount, with interest, corresponding to the difference between the tax actually paid and the amount that should have been paid if the generally applicable rule had been applied, by the recipients, except where that would be contrary to a general principle of Community (now Union) law, such as legitimate expectations derived from the Commission's behaviour. Regarding existing State aid, the Commission pledges to keep under constant review all existing systems of aid in the form of tax measures and to require Member States to submit to the Commission annual reports on their existing State-aid systems, including an estimate of the any lost budgetary revenue.[51]

§6.03 ACT II: STATE-AID ENFORCEMENT FOLLOWING THE ADOPTION THE 1997 CODE OF CONDUCT AND OF THE STATE-AID BUSINESS TAX NOTICE

After the adoption of the Code of Conduct in 1997 and the issuance of the State-Aid Business Tax Notice in 1998, there were very few State-aid cases involving tax measures,[52] and little progress was made in the implementation of the package against harmful tax competition. Therefore, in 2000, after pointing out that it was 'disappointing that almost four years after the informal ECOFIN Council in Verona ... considerable uncertainty still surrounds the implementation of that package in spite of the determination shown by most Members States and by the Commission', Commissioner Monti instructed the Commission's Competition Department 'to examine all the relevant cases of fiscal state aids in business taxation', referring to the State-Aid Business Tax

51. *Ibid.* paras 34–36.
52. *See* Report on the Implementation of the Commission Notice on the Application of State Aid Rules to Measures Relating to Direct Business Taxation, paras 4 et seq. (C(2004)434) (2004) [hereinafter the 'Report on Implementing the State-Aid Business Tax Notice'].

Notice.[53] In July 2001, the Commission launched an investigation into fifteen regimes that had been listed among the sixty-six measures identified by the Primarolo Group as potentially harmful on the basis on the criteria laid down in the Code of Conduct.[54]

Four of those regimes had been previously vetted by the Commission under Article 107 TFEU, such as the Belgian Coordination Centres scheme. Under that regime, adopted in 1982, Belgium applied a special tax regime for approved coordination centres. This regime was scrutinized by the Commission in 1984 and, after a series of amendments, it was declared to be in-line with State-aid Treaty provisions.[55] In 1999, the Primarolo Group included it in the list of Member States' potentially harmful measures. The OECD did the same, by inserting the measure in its list of potentially harmful preferential regimes.[56] The Commission closed its reassessment of the measure in 2003, after concluding that it was incompatibility with State-aid provisions.[57]

The relevance of this Commission Decision in assessing the evolution in State-aid policy between 2001 and today is twofold. First, by referring to one of the OECD transfer pricing standards[58] (the cost-plus method[59])[60] as an appropriate guide for the assessment of transfer-pricing arrangements in intra-group transactions as a reflection of market conditions, it clearly indicates that domestic transfer-pricing practices can constitute State aid. Second, in its decision, the Commission stressed 'the parallels between the work of the code of conduct group and the Community's policy on State aid, both of which are aimed at eliminating those measures that distort or threaten to distort competition in the common market', and the relationship between the adoption of the Code of Conduct and the new orientation of State-aid control following the

53. European Commission Press Release, 23 Feb. 2000: 'Statement by Commissioner Monti Concerning the Control of Fiscal State Aids', http://europa.eu/rapid/press-release_IP-00-182_en.htm (last visited 10 Jan. 2017).
54. European Commission Press Release, 11 July 2001: 'Commission Launches Large Scale State Aid Investigation into Business Taxation Schemes', http://europa.eu/rapid/press-release_IP-01-982_en.htm (last visited 10 Jan. 2017).
55. For the background, see *Forum 187* v *Commission*, T-276/02, Order, EU:T:2003:151, para. 8 et seq.
56. *See* OECD, Progress Report in Identifying and Eliminating Harmful Tax Practices (2000).
57. Commission Decision, 17 Feb. 2003 on the Aid Scheme Implemented by Belgium for Coordination Centres Established in Belgium, OJ L 282/25 (2003) [hereinafter, the 'Belgium Coordination Centres Decision'].
58. The OECD work on transfer pricing was first addressed in a 1979 Report and followed by the publication Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. *See* OECD, *Transfer Pricing and Multinational Enterprises* (1979); subsequently the OECD issued its *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995), which were substantially revised in 2001 and again in 2010 [hereinafter, collectively, the 'OECD TP Guidelines']. *See also* a similar approach in Commission Decision, 2 Sep. 2002 on the Aid Scheme Implemented by Germany for Control and Coordination Centres, paras 22–28, OJ L 177/17 (2002); Commission Decision, 16 Oct. 2002 on the Aid Scheme C 50/2001 (Ex NN 47/2000) – Finance Companies – Implemented by Luxembourg, paras 43–44, OJ L 153/40 (2002).
59. The so-called cost-plus method consists of taking the costs incurred by the supplier of goods/services in a transaction between associated companies and then adding to those costs a cost-plus mark-up to obtain an appropriate profit in the light of the functions performed, assets used, risks assumed, and market conditions. *See* the OECD TP Guidelines, *supra* n. 58, and later updates.
60. The Belgium Coordination Centres Decision, *supra* n. 57, para. 95.

State-Aid Business Tax Notice.[61] The Commission had however clearly stated in the State-Aid Business Tax Notice that the review of domestic tax measures under State-aid rules had to be carried out independently from the Primarolo Group's conclusions,[62] which was later confirmed by the Court of Justice.[63]

The Commission had indicated, in its State-Aid Business Tax Notice, that it would conduct a review of its application two years after its publication. However, the Commission acknowledged that, since there were relatively few tax aid cases before 2001, it preferred to wait until February 2004 to produce a report (hereinafter, the 'Report on Implementing the State-Aid Business Tax Notice') on a larger set of cases.[64] The Report on Implementing the State-Aid Business Tax Notice was not designed to provide a list of all tax aid cases handled by the Commission, but provided an insight into how the principles enshrined in the State-Aid Business Tax Notice had been applied.[65]

Moreover, in the Report on Implementing State-Aid Business Tax Notice, the Commission, quoting the General Court,[66] emphasized that the State-Aid Business Tax Notice did not actually constitute a change in the State-aid approach in tax matters, but merely reflected a clarification, mostly based on the development of the Court's case law.[67] It also stressed that the concept of aid is an objective one, to be applied on the basis of principles falling outside the scope of the Commission's discretion, and reaffirmed the constitutive criteria of the notion of aid.[68] Then, the Commission provided, for each criterion, examples drawn from its decision practice and summarized its findings.

With respect to the existence of an advantage, the Commission stated that, to determine whether a tax scheme derogation from the normal system constitutes State aid, 'it must be established whether the resulting tax burden is lower than that which would have resulted from application of the relevant Member State's normal taxation method'.[69] The Commission noted that an advantage could take many forms (e.g., a reduction in the tax base or in the amount of tax, an exemption from property tax or a withholding tax, or a partial exemption from an annual flat-rate tax.[70] Referring to the

61. The State-Aid Business Tax Notice, *supra* n. 5, paras 1, 4, 5.
62. *Ibid.* para. 33.
63. *Belgium* v *Commission*, C-182/03, Judgment, EU:C:2006:89, para. 151: 'The conclusions of the Council … could in no event bind the Commission in the exercise of its own powers, which are conferred on it by the Treaty in State aid matters'.
64. The Report on Implementing the State-Aid Business Tax Notice, *supra* n. 52, para. 4.
65. *Ibid.*
66. *Diputación Foral de Guipúzcoa e.a.* v *Commission*, Joined Cases T-269/99, T-271/99 and T-272/99, Judgment, EU:T:2002:258, para. 79.
67. The Report on Implementing the State-Aid Business Tax Notice', *supra* n. 52, para. 3.
68. It is interesting to note that affecting trade within the EU is presented in the Report on Implementing the State-Aid Business Tax Notice as the third criterion, while in the 2003 landmark *Altmark* case, the Court analysed the cumulative conditions to establish the presence of State aid in a different order. *See Altmark Trans et Regierungspräsidium Magdeburg*, C-280/00, Judgment, EU:C:2003:415, para. 75.
69. The Report on Implementing the State-Aid Business Tax Notice', *supra* n. 52, para. 16, box 1.
70. *Ibid.* paras 14–15.

Belgian coordination centres and *US sales corporations*[71] cases, the Commission also stressed that State aid could result from the selective application of alternative methods of computation of the corporate tax base, such as the use of a particular transfer-pricing method (in that case, the cost-plus method). While the Commission acknowledged that such methods are not, as such, caught under the prohibition of State aid, an advantage could still arise from its application if 'the economic reality of the transactions' is not properly considered (e.g., the exclusion of certain expenditures of the tax base or use of arbitrary levels of profit margins, etc.).[72] The Report on Implementing the State-Aid Business Tax Notice also addressed cases concerning measures intended to avoid international double taxation, particularly, the switch from the credit to the exemption method for foreign income in certain circumstances (repatriation for investment intended to create or safeguard employment).[73]

As to 'selectivity', the Commission distinguished between material selectivity and geographic selectivity. For material selectivity, the Commission emphasized that, next to situations where a measure is restricted to a certain economic sector or type of company, there are also situations where eligibility criteria, in practice, restrict the potential number of recipients (e.g., if the benefit of a measure requires a given economic strength that, in practice, is only available to large multinational groups of companies).[74] The Commission also elaborated on the ability to justify a measure of a differential nature by the nature or general scheme of the system, which would only apply if the measure is linked to intrinsic features of the system concerned, as the Commission acknowledged in two cases dealing with (i) a tax exemption for agricultural land, when compared to the standard land tax, justified by the specific role of land in agricultural production and (ii) a transaction –consisting of the mere transformation of public undertakings with special status into joint stock companies – being exempted from transfer taxes typically applicable to the creation of a new economic entity, based on the principle of tax neutrality.[75]

The Report on Implementing State-Aid Business Tax Notice also provided a list of justifications that were not accepted by the Commission, such as the need to make certain companies more competitive.[76] The Commission also indicated cases where it found the measures to be compatible State aid, although it acknowledged that it was not the purpose of either the Report on Implementing the State-Aid Business Tax Notice or the State-Aid Business Tax Notice.[77] Furthermore, the Commission recalled that the EU principle of the protection of legitimate expectations, which could bar the Commission from ordering recovery of unlawful State aid, should be applied restrictively according to the CJEU's case law.[78]

71. For examples, see the Report on Implementing the State-Aid Business Tax Notice, *supra* n. 52, para. 13.
72. The Report on Implementing the State-Aid Business Tax Notice, *supra* n. 52, paras 10–13.
73. *Ibid.* para. 16.
74. *Ibid.* paras 25–33.
75. *Ibid.* paras 34–37. *See* Cases N20/2000 (Netherlands) and N53/99 (Denmark) available on the website of DG Competition.
76. The Report on Implementing the State-Aid Business Tax Notice, *supra* n. 52, paras 39–42.
77. *Ibid.* paras 42–50.
78. *Ibid.* paras 57–63.

§6.04 ACT III: FROM HARMFUL TAX COMPETITION TO AGGRESSIVE TAX PLANNING – STATE-AID POLICY AND RULINGS IN THE BEPS ERA

[A] The Stage: The ECJ *Gibraltar* Case and the Media Leaks

The recent evolution of State-aid control as a tool in the fight against harmful tax competition has to be understood in the light of the extremely plastic nature of the State-aid concept, which leaves the Commission and the Court broad powers of interpretation as to its ultimate meaning and extent.[79] Over the last decade, the Commission has extended the concept of 'selectivity' of fiscal measures far beyond what some might have expected, despite the notion of harmful tax measures developed in the Code of Conduct.[80] A turning point was the adoption, in 2004, of the Commission's decision in the *Gibraltar* case.[81] After having been targeted by the Primarolo Group, Gibraltar redesigned its corporate tax system, instituting three general, and apparently independent, business taxes (i.e., a payroll tax, a business property occupation tax, and a – very modest – business registration fee). The Commission challenged the reform under State-aid rules, finding that it would result in a tax-free regime for offshore companies, who would be, de facto, exempt from corporate taxation[82] due to their small physical presence, in terms of employees and properties, in Gibraltar.

Because the measure was designed to apply, in principle, to almost all Gibraltar companies, it did not fit within the classic assessment used to identify a selective advantage, which was acknowledged by both the General Court, who annulled the Commission's decision on the grounds that it failed to identify a derogation from the common or 'normal' tax regime,[83] and the Advocate General of the Court of Justice on appeal, who expressed doubts regarding the extension of the reach of State-aid control: 'harmful institutional or tax competition between Member States clearly does not fall within the mechanism for controlling State aid established by the Treaty',[84] therefore 'if the tax system is of a general character, it falls outside the application of Article [107 TFEU]'.[85]

---

79. Francesco Nanetti & Giovanni Mameli, *The Creeping Normative Role of the EC Commission in the Twin-Track Struggle Against State Aids and Harmful Tax Competition*, 11 EC Tax Rev. 185, 188 (2002).
80. Leigh Hancher, Tom Ottervanger & Piet Jan Slot, *EC State Aids* s.10 (5th ed., 2016).
81. European Commission, Commission Decision, 30 Mar. 2004 on the Aid Scheme which the United Kingdom is Planning to Implement as Regards the Government of Gibraltar Corporation Tax Reform, OJ L 85/1 (2004).
82. *See* Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* 336 (2014).
83. *Government of Gibraltar* v *Commission*, Joined Cases T-211/04 and T-215/04, Judgment, EU:T:2008:595, para. 145 [hereinafter 'GC *Gibraltar* Judgment'].
84. *Commission and Spain* v *Government of Gibraltar and UK*, Joined Cases C-106/09 P and C-107/09 P, AG Opinion, EU:C:2011:215, para. 134 [hereinafter 'CJEU *Gibraltar* AG Opinion'].
85. *Ibid.* para. 140.

However, the Court of Justice ruled that the measure constituted selective aid because 'its very application resulted in a different tax burden for different undertakings'[86] and deemed it to be incompatible with State-aid rules. The Court used, as the reference framework, a corporate tax system, of which those three taxes were an integral part and whose aim was to tax all corporations.[87] The Court's *Gibraltar* judgment has been criticized on the grounds that the Court substituted its own logic or rationale for the one used by Gibraltar's government to determine the personal and material scope of Gibraltar's domestic tax system,[88] which was exactly what the Advocate General had warned against.[89] In any event, the case laid the foundations for subsequent evolutions of the notion of State aid towards becoming the ultimate weapon against (harmful) tax competition.

A different opportunity to further develop State-aid control was given by the wave of revelations concerning strategic international tax-planning by multinational groups of companies, which triggered (negative) reactions from, first, the public, various interest groups, and the media and, then, from governments at the global level,[90] which movement lead to the OECD BEPS Action Plan[91] and its implementation through several EU directives and recommendations.[92] It also drew the attention of the Commission on specific types of tax deals, the details of which were made public during hearings in the UK's House of Commons (2012) and the US Senate (2013),[93] as well as through information revealed by journalists, particularly the LuxLeaks investigation by the International Consortium of Investigative Journalists.

86. *Commission and Spain* v *Government of Gibraltar and UK* Joined Cases C-106/09 P and C-107/09 P, Judgment, EU:C:2011:732, para. 93 [hereinafter 'CJEU *Gibraltar* Judgment'].
87. CJEU *Gibraltar* Judgment, para. 101. *See* Edoardo Traversa, *State Aid and Taxation: Can an Anti-Avoidance Provision Be Selective?*, 13 EStAL 518, 521 (2014).
88. John Temple Lang, The Gibraltar State Aid and Taxation Judgment –A 'Methodological Revolution'?, 11 EStAL 805, 810 (2012).
89. CJEU *Gibraltar* AG Opinion, para. 202.
90. *See* the Declaration of the G20 Leaders in Los Cabos, 19 June 2012, http://www.g20.utoronto.ca/2012/2012-0619-loscabos.pdf (last visited 23 Mar. 2017). For a comment, see Edoardo Traversa & Alessandra Flamini, *The Impact of BEPS on the Fight Against Harmful Tax Practices: Risks … and Opportunities for the EU*, 2015 Brit. Tax Rev. 396 (2015).
91. *See* OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) available at http://dx.doi.org/10.1787/9789264202719-enat (last visited 24 Mar. 2016).
92. *See, e.g.*, Communication from the Commission to the European Parliament and the Council of 28 Jan. 2016 - Anti-Avoidance Tax Package: Next Steps Towards Delivering Effective Taxation and Greater Tax Transparency in the EU, COM/2016/023; Council Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (2016).
93. Johannes Laitenberger, Dir. Gen. of DG COMP, ICF St. Gallen (20 May 2016), http://ec.europa.eu/competition/speeches/text/sp2016_06_en.pdf (last visited 28 June 2016). *See*, *e.g.*, Minutes of Evidence, Oral Examination of Witnesses in HC 716, UK Public Account Committee Meeting 12 Nov. 2012 (representatives of Starbucks, Amazon, & Google), http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm (last visited 28 June 2016); Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.): Hearings Before US Permanent S. Subcomm. on Investigations, 113th Cong. (21 May 2013) (testimony of Apple, Inc.), http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part-2 (last visited 24 Mar. 2016).

The reaction of the Commission was prompt and resolute. It publicly responded by announcing, on the one hand, the start of work related to the fight against base erosion and the transfer of profits (BEPS) through increased transparency and tax harmonization[94] and, on the other hand, by confirming that such now-public information was going to feed the work of DG Competition. In 2013, Belgium, Cyprus, Ireland, Luxembourg, Malta, the Netherlands and the United Kingdom received information requests from the Commission concerning schemes or specific tax rulings. Tension between Luxembourg and the European Commission followed, during which the former refused to provide the requested information and lodged an appeal against two injunctions before the General Court[95] before eventually withdrawing those appeals and agreeing to submit the requested information. Between June and October 2014, the Commission successively decided to open State-aid examination procedures against Ireland, the Netherlands, and Luxembourg to analyse – in detail – certain tax rulings awarded to Apple, Amazon, Starbucks, and Fiat Finance companies on the basis of State-aid rules.[96] The Commission also decided to extend its requests for information to all Member States to obtain the names of companies that had benefited from tax rulings between 2010 and 2013.

In 2015 and 2016, the Commission opened a review procedure against Luxembourg for tax rulings granted to McDonald's and GDF Suez (Engie) companies and against Belgium for its excess-profit tax-ruling aid scheme.[97] The Commission has, to date, issued final decisions in the cases against the Netherlands (Starbucks), Ireland (Apple), Luxembourg (Fiat Finance), and Belgium (excess profits),[98] concluding that tax incentives granted by the public authorities in each of these cases constituted State aid that was incompatible and had to be recovered from the beneficiaries.

94. *See* European Commission, *The Anti-Tax Avoidance Package – Questions and Answers*, http://europa.eu/rapid/press-release_MEMO-16-160_fr.htm (last visited 23 Dec. 2016).
95. *Luxembourg* v *Commission*, T-258/84, Order, EU:T:2015:22.
96. Case SA.38373, *Ireland – Alleged Aid to Apple*, Commission Decision to Initiate Investigation Procedure, 11 June 2014, C(2014) 3606 final; Case SA.38375, *Luxembourg – Alleged Aid to FFT*, Commission Decision to Initiate Investigation Procedure, 11 June 2014, C(2014) 3627 final; Case SA.38374, *Netherlands – Alleged Aid to Starbucks*, Commission Decision to Initiate Investigation Procedure, 11 June 2014, C(2014) 3626 final; Case SA.38944, *Luxembourg – Alleged Aid to Amazon*, Commission Decision to Initiate Investigation Procedure, 7 Oct. 2014, C(2014) 7156 final.
97. Case SA.37667, *Belgium – Excess Profit Tax Ruling System*, Commission Decision to Initiate Investigation Procedure, 3 Feb. 2015, C(2015) 563 (final); Case SA.38945, *Luxembourg – Alleged Aid to McDonald's*, Commission Decision to Initiate Investigation Procedure, 3 Dec. 2015, C(2015) 8343 final; Case SA.44888, *Luxembourg – Possible State Aid in Favour of GDF Suez*, Commission Decision to Initiate Investigation Procedure, 19 Sep. 2016, *C*(2016) 5612 final.
98. Case SA.38374, *Netherlands – Implemented State Aid to Starbucks*, Commission Decision Finding State Aid, 21 Oct. 2015, C(2015) 7143 final; Case SA.38373, *Ireland – Implemented State Aid to Apple*, Commission Decision Finding State Aid, 30 Aug. 2016, C(2016) 5605 final; Case SA.38375, *Luxembourg – Granted State Aid to Fiat*, Commission Decision Finding State Aid, 21 Oct. 2015, C(2015) 7152 final; Case SA.37667, *Belgium – Implemented an Excess Profit Exemption State Aid Scheme*, Commission Decision Finding State Aid, 11 Jan. 2016, C(2015) 9837 final.

[B] The Commission's 'New' Approach: An Overview of Ongoing Cases

As indicated above, the Commission opened formal State-aid investigations against Ireland, Belgium, the Netherlands, and Luxembourg regarding tax measures benefitting Apple, Amazon, Starbucks, Fiat Finance, McDonald's, GDF Suez (Engie) and several undertakings based on Belgium's excess profit tax scheme.[99]

Regarding Ireland, the Commission concluded, in August 2016, that certain Irish subsidiaries of the Apple group had received illegal and incompatible State aid through tax rulings and sought recovery thereof. The Commission decided that the effect of the rulings was to determine, in advance, the percentage of the net profit to be allocated to the Irish subsidiaries of Apple, so that the level of taxation applied to them was inferior to the amount that, according to the Commission, they should have paid under the ordinary Irish tax rules. Those rulings had been granted in a context, in which the particular subsidiaries were not considered resident anywhere because of a discrepancy between the Irish and US tax rules.

According to Irish tax laws applicable at the time, a company incorporated under Irish law was in principle considered a tax resident in Ireland, even if managed and controlled outside of Ireland. However, under the "relevant companies" exception – which applied to Apple's two subsidiaries ASI an AOE, a company incorporated in Ireland with a trading activity in Ireland but ultimately controlled by a resident of a EU Member State or tax treaty country (such as the US) was not considered as Irish resident if managed an controlled from outside Ireland. In addition, there was no requirement that the companies had a tax residence in another tax jurisdiction.

From a US point of view, since ASI and AOE's activities, including their head offices, lacked any physical presence and employees, they did not have a taxable presence in the US (or in any other jurisdiction), which made them "stateless" from a tax perspective.[100]

The Commission did not directly address this issue but nevertheless concluded that the Irish rulings resulted in incompatible State aid based on a presumption of selectivity[101]. According to the Commission, the attribution of profits to the Irish branches of these stateless subsidiaries in the rulings granted to Apple resulted in a reduction of the tax burden that should have been normally borne under market conditions by Apple's subsidiaries. This amounted to a derogation from the reference framework constituted by ordinary Irish tax rules applicable to resident companies. The Commission relied on the case-law of the Court of Justice in the Belgian coordination centres cases[102] to find that a method of profit allocation had to be based

99. Investigation of State Aid SA.38944 – Luxembourg/FFT, *supra* n. 96; Investigation of State Aid SA.38945 – Luxembourg/McDonald's, *supra* n. 97; Investigation of State Aid SA.44888 – Luxembourg/GDF Suez, *supra* n. 97. *See* the status board on DG COMP's website regarding on-going cases regarding tax rulings, http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html (last visited 16 Feb. 2017).
100. Ireland – Implemented State Aid to Apple, Commission Decision Finding State Aid, 30 Aug. 2016, C(2016) 5605 final, paras 48–52.
101. *Belgium* v *Commission*, C-270/15 P, Judgment, EU:C:2016:489, para. 49.
102. *Belgium* v *Commission*, Joined Cases C-182/03 and C-217/03, Judgment, EU:C:2006:416.

on the ‘arm’s length’ principle and added that it is not bound by the relevant OECD TP Guidelines, even though they generally constitute a useful source of information.[103]

Regarding the Netherlands, the Commission scrutinized an advance transfer-pricing agreement (‘APA’) concluded between the Dutch tax authorities and Starbucks Manufacturing EMEA BV (‘SMBV’), concerning, *inter alia*, the deductibility of SMBV’s payment of a specific level of royalties to a related entity, resulting in a reduction in the tax base of SMBV. The Commission concluded that there had been illegal and incompatible State aid requiring recovery because it identified a derogation from the reference system of ordinary Dutch tax rules that could not been justified. The derogation arose from the fact that the valuation methodology chosen in the transfer pricing report in support of the APA was inadequate and did not reflect normal market conditions. According to the Commission, if the arm’s length principle would have been properly applied, no royalties should have been paid at all (or the deductible amount of the royalty payments should have been equal to zero). The Commission also compared Starbucks’ situation to that of a company that did not outsource its coffee-roasting function to third parties, but to a group company designated as a toll manufacturer that did not pay any royalty for the use of the intellectual property or the know-how used in the roasting process.

Regarding Luxembourg, the Commission investigated a tax ruling granted by the tax authorities to an entity providing financing and treasury services to the Fiat Chrysler group of companies (Fiat Finance and Trade Ltd. S.A. or ‘FFT’), which ruling accepted a valuation method allowing a profit distribution favourable to the Fiat Chrysler group of companies. The Commission identified a derogation from the reference system of ordinary Luxembourg tax rules in the form of an inadequate choice of method-of-assessment and of other indicators (e.g., risks incurred by FFT and rate of return on capital) intended only to create a situation that reduced the tax burden on the Fiat Chrysler group. The Commission also compared the indicators used to support the ruling, particularly the reference for the estimated level of remuneration of capital, to indicators observed in the market, to come to the conclusion that the accepted indicators did not result in a reliable approximation of a market-based outcome. The Commission ultimately concluded there was a need to recover illegal and incompatible State aid.

Another pending investigation by the Commission relates to a 2003 tax ruling granted by Luxembourg in favour of Amazon EU S.à.r.l., (a Luxembourg-based subsidiary of the US parent company Amazon.com, Inc., NYSE publicly traded corporation incorporated in the State of Washington), that records the largest part of Amazon’s European profits. The ruling allows it to pay a tax-deductible royalty to another Luxembourg-based Amazon limited liability partnership (Lux SCS) that is not subject to corporate taxation in Luxembourg. The Commission has taken the preliminary view that the amount of the royalty, which ultimately allows Amazon EU S.à.r.l. to lower its taxable profits every year, might not reflect market conditions and, thus, constitutes illegal and incompatible State aid.

103. OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010 408 (2010); *see also* OECD, Model Tax Convention on Income and on Capital 2014 (2015).

As for Belgium, the Commission analysed an alleged State aid scheme based on an arm's length provision modelled after Article 9 of the OECD Model Treaty. In 2004, Belgium introduced Article 185§2 Belgian Income Taxation Code (BITC), making it possible for multinational enterprises to obtain an advance ruling on profit allocation and/or on the arm's length character of pricing arrangements in the framework of cross-border related-party relationships. It also permits downward adjustments to the taxable income tax base of Belgian companies, on assumption that it would entail an excess profit (i.e., the amount of profit that exceeds the profit that would have been realized by the Belgian company under arm's length conditions and that result from group synergies). The Commission deemed the excess-profit tax-ruling scheme to be illegal under EU State-aid rules, pointing to inconsistencies in the choice of transfer pricing methodologies made by the Belgian tax authority (e.g., the fact that exempted profit did not have to be included in the tax base of an associated foreign-group entity in another tax jurisdiction, nor did that profit have to be effectively taxed by that other jurisdiction); it further contested the Belgian tax authority's assertion that the scheme was an application of the arm's length principle.

[C] The Incorporation of the 'New' Approach in the 2016 Commission Communication on the Notion of Aid

In 2012, the Commission launched its State Aid Modernisation initiative ('SAM'), which was intended to provide legal certainty and cut red tape for public authorities and companies, as well as to help the Commission focus resources on enforcing State-aid rules in cases with the biggest impact on the Single Market. SAM updated all major State-aid guidelines and simplified the rules, so that unproblematic State aid measures could be implemented without prior Commission scrutiny. Thereafter, in mid-2016, the Commission issued its Notice on the Notion of State Aid[104] (the 'NofSA Notice') as the final piece of its SAM initiative: the NofSA Notice replaced the State-Aid Business Tax Notice, discussed above.[105]

Although any attempt to comment on the NofSA Notice would exceed the scope of this chapter, it is worth noting that its Section 5.2.3 on the condition of selectivity, addresses the issue of discretionary administrative practices[106] and states that if general measures apply, *prima facie*, to all undertakings, but are otherwise limited by the discretionary power of the public administration (i.e., if meeting the given criteria does not automatically result in an entitlement to the measure), the exercise of such discretion is deemed selective.

Further, Section 5.2.3. deals with how it will assess the material selectivity of measures mitigating the normal charges of undertakings, that is to say, when Member States adopt broader measures applicable to all undertakings fulfilling certain criteria that mitigate the charges that those undertakings would normally have to bear (e.g.,

104. European Commission, *Commission Notice on the Notion of State Aid as Referred to in Art. 107(1) TFEU*, OJ C 262/1 (2016), particularly s. 5 [hereinafter, the 'NofSA Notice'].
105. *Ibid.* para. 239.
106. *Ibid.* s. 5.2.3, para. 123–125.

tax or social security exemptions for undertakings fulfilling certain criteria): it explains that such measures will be subject to a three-step analysis.[107]

In addition, Section 5.4 of the NofSA Notice addresses specific issues concerning tax measures (cooperatives,[108] undertakings for collective investment,[109] tax amnesties,[110] tax rulings and settlements,[111] depreciation and amortization rules,[112] regimes that fix basis for specific activities,[113] anti-abuse rules,[114] excise duties[115]) and highlights that, while Member States are free to spread the tax burden as they see fit across the various factors of production, they must exercise that competence in accordance with Union law.[116]

On the specific issue of administrative tax rulings, the NofSA Notice acknowledged that, for reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally, particularly how 'arm's-length profits' will be set for related-party transactions. The Commission emphasized that such administrative ruling practices are best if they are transparent and the rulings made public and, indeed, that the grant of a tax ruling must, in all cases, respect the State-aid rules.

In this regard, the Commission specifically indicated that tax rulings confer a selective advantage on their addressees, particularly when the administration applies a 'more favourable' tax treatment when compared to other taxpayers in a similar factual and legal situation, for example, by accepting a transfer-pricing arrangement that is not at arm's length because (i) the methodology endorsed by the ruling produces an outcome that departs from a reliable approximation of a market-based outcome or (ii) the ruling allows its addressee to use alternative, more-indirect methods for calculating its taxable profits (e.g., the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing) when more direct methods are available.

The Commission defined the arm's length principle as the way to establish whether the taxable profit on the corporate income of a company that is part of a group has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. The Commission indicated that, independently of whether or in what form a Member State has incorporated it into its national legal system, the arm's length principle applies to national tax rules and binds the Member States, such that and it necessarily forms part of the Commission's assessment of tax measures granted to group companies, particularly in the form of transfer-pricing rulings.

107. *Ibid.* s. 5.2.3.3, para. 138–141.
108. *Ibid.* s. 5.4.1.
109. *Ibid.* s. 5.4.2.
110. *Ibid.* s. 5.4.3.
111. *Ibid.* s. 5.4.4.
112. *Ibid.* s. 5.4.5.
113. *Ibid.* s. 5.4.6.
114. *Ibid.* s. 5.4.7.
115. *Ibid.* s. 5.4.8.
116. *See Glaxo Wellcome*, C-182/08, Judgement, EU:C:2009:559, para. 34, and the case-law cited therein.

On the question of how to apply the arm's length principle, the Commission stated that it may, but is not obliged to, look at OECD guidance, particularly the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. The Commission recognized that those guidelines do not deal with matters of State aid as such, but that they materialize the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a particular transfer-pricing methodology produces an outcome in line with market conditions.

Therefore, the Commission took the view that if a transfer-pricing arrangement complies with the guidance provided by said OECD Transfer Pricing Guidelines, including its guidance on the choice of the most appropriate transfer-pricing method to lead to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.

In addition to the NofSA Notice, in the framework of the High Level Forum on State-Aid Modernisation held in Brussels on 3 June 2016, the Commission published a six-page Working Paper on State Aid and Tax Rulings (the '2016 Working Paper'), which contained a summary of the its preliminary review of more than one thousand tax rulings, notably those endorsing transfer-pricing arrangements and the 'Lux Leaks' rulings.[117] In that 2016 Working Paper, the Commission noted that recourse to

the arm's length principle to determine whether a fiscal measure prescribing a method to establish the taxable profit of a company forming part of an integrated group gives rise to a selective advantage for the purposes of Article 107(1) TFEU was endorsed by the CJEU in its 2006

Forum 187

decision.[118]

The Commission added that it will focus on cases where there is a manifest breach of the arm's length principle.[119]

§6.05 A CRITICAL APPRAISAL OF THE COMMISSION'S RECENT APPROACH

The Commission's recent investigations seem to indicate that its focus has shifted from preferential tax regimes whose selectivity clearly results from criteria contained in the tax legislation of Member States (e.g., size, nature of the activity, and prior authorization) to administrative decisions on the application of (more-or-less) general rules or principles whose effects are to validate complex, international tax-planning schemes set up by multinational groups of companies that ultimately result in a very low level of overall taxation.

117. DG Competition–Internal Working Paper–Background to the High Level Forum on State Aid of 3 June 2016 available at http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf, (last visited 10 Feb. 2017) [hereinafter, the '2016 Working Paper'].
118. *Belgium* v *Commission*, Joined cases C-182/03 and C-217/03.
119. The 2016 Working Paper, *supra* n. 117, para. 23.

The first question that comes to mind when discussing this shift is: "To what extent should the fight against tax avoidance and the promotion of fair tax competition between EU Member States influence the nature and scope of State-aid control?" The doctrine has already been extensively debated: the rationale for State-aid control focused on the harmful nature of a measure that encourages tax competition among Member States, rather than on its discriminatory (i.e., selective) character compared to other undertakings in the same Member State. That approach is generally illustrated by the declarations of EU Commissioners who refer to 'fair tax competition' as 'essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level-playing field between our businesses'[120] or who suggest that negative decisions, such as the Commission decision in the Apple case, are 'a good thing because illegal state aid harms competition'.[121] According to this view, tackling (harmful) tax competition appears to be not only a (desirable) side-effect of State-aid control, but also its main driver. The most critical opponents of the Commission's approach argue that it embodies a concept of primacy of the political over the law and an affirmation of a new – and as-yet-absent from the Treaty – objective of State-aid control, which almost results in a real *coup d'état*.[122] Other authors take a critical-but-less-radical view, arguing that, while limitations on the power of Member States to attract companies via harmful fiscal measures may derive from the prohibition of State aid, it may constitute its underlying objective. They add, however, that State-aid control is not suitable for tackling harmful tax competition: first, because of the wording of Article 107 TFEU and, second, due to the case-by-case nature of State-aid control, which is limited to the territory of one Member State and does not take into account other Member States' practices.[123] Some authors have also raised the argument

120. European Commission Press Release, 11 June 2014 'State aid: Commission Investigates Transfer Pricing Arrangements on Corporate Taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)', available at http://europa.eu/rapid/press-release_IP-14-663_en.htm (last visited 8 Jan. 2017).
121. *See* Commissioner Vestager's statement concerning the Apple decision, 30 Aug. 2016, Statement/16/2926:

> Today's decision shows that we can act when a Member State gives illegal state aid to a company. This is a good thing since illegal state aid harms competition. Looking ahead, the ultimate goal should of course be that all companies, big or small, pay tax where they generate their profits. Enforcement of EU state aid rules alone cannot achieve this – that's why we need a change in corporate philosophies and the right legislation to address loopholes and ensure transparency.

122. For a detailed commentary on the doctrinal debate, see Antonio Carlos do Santos, *L'Union Européenne et la Régulation de la Concurrence Fiscal* 432 et seq. (2009); *see also*, more recently, N. Kroes, *Why EU State Aid is not the Right Tool to Fight Tax Avoidance*, The Guardian, 1 Sep. 2016.
123. *See also* Reymond Luja, *EU State Aid Rules and Their Limits*, 76 Tax Notes Int'l 353, 354 (2014): 'One cannot expect an EU member state to compensate for hybrid situations and foreign check-the-box regulations by giving up its own legal standards unilaterally'. *See also* Massimo Merola, *The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law*, 39 World Competition 533 (2016).

that harmful tax competition falls within the scope of the State-aid provisions because a harmful tax measure always constitutes fiscal State aid based on the criteria contained in the Code of Conduct.[124] However, this view seems to run counter to the statement contained in paragraph 30 of the 1998 Commission Notice, which reads: 'the qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid'.

The second range of issues raised by the Commission's 'new' approach is of a legal nature and concerns its compatibility with the wording of Article 107 TFEU. The decisions of the Commission concerning Apple (SA.38373),[125] Fiat Finance (SA.38375),[126] Belgian excess profits scheme (SA.37667),[127] and Starbucks (SA.38374)[128] have all been challenged before the General Court division of the CJEU.[129]

The first ground raised against the Commission's decisions is the lack of selectivity inherent in the nature of the rulings and the Commission's error in its identification of the reference framework. Secondly, the challengers criticize the Commission's use of the arm's length principle to assess a hypothetical advantage in favour of multinational companies, even challenging the existence of such a arm's length principle in EU law. Some of the challengers also disagree with the European Commission's analysis, as it rejected the methodological choices made by the taxing authorities and the relevant group of companies to simulate market conditions for setting prices in certain transactions. Finally, some challengers assert that the Commission has infringed on the principle of legitimate expectations because the approach developed in the Commission's decisions constitutes a departure from the OECD TP Guidelines, which the Commission had accepted in previous decisions.

Even though it will be up to the General Court – and, probably, the Court of Justice – to have the final say, it is already possible to comment on each of those three issues. First, because the existence of State aid has to be assessed based on its effects, the fact that the Commission targets measures that implement general principles of international tax law, such as transfer-pricing rules, cannot be used as a valid argument against its negative decisions on appeal. The same can be said for the fact that only certain companies or countries appear to be the object of State-aid scrutiny: such investigations always concern individual measures and the fact that, even from a tax-competition perspective, a coordinated removal of measures having similar effects

124. Ben J. Kiekebled, *Harmful Tax Competition in the European Union. Code of Conduct, Countermeasures and EU Law* 83 (2004).
125. This decision is currently subject to an appeal registered with the General Court as T-778/16 (*Ireland v Commission*).
126. This decision is currently subject to an appeal registered with the General Court as T-759/15 (*Fiat Chrysler Finance Europe* v *Commission*) and T-755/15 (*Luxembourg* v *Commission*).
127. Decision on SA.37667 Excess profit tax ruling system in Belgium, *supra* n. 98.
128. This decision is currently subject to an appeal registered with the General Court as T-760/15 (*Netherlands v Commission*) and T-636/16 (*Starbucks and Starbucks Manufacturing Emea* v *Commission*).
129. This section is based on information available on 26 Jan. 2017 on the CJEU's website.

in all Member States should be preferred, that cannot, in and of itself, prevent the Commission from acting, whenever possible, on a case-by-case basis. However, such investigations must take into account that tax sovereignty remains with the Member States and, therefore, the Member States remain free to deviate from international (OECD) standards or to even decide not to implement them at all, but such a Member State's tax policy choice should not influence the Commission's assessment of the existence of State aid.

Secondly, and in connection with the first issue, the question to be addressed is whether the arm's length principle can be found to have been naturally derived from Article 107 TFEU – that is to say, can it be found to be a particular expression of the general principle of non-discrimination, one that has been tailored to be an application of the Market-Economy Investor Principle ('MEIP'). If so, it remains to be seen what flexibility the Member States have in transposing that principle into their respective national laws[130] and what role, if any, is to be given to the OECD TP Guidelines. A fundamental preliminary issue to be addressed is whether multinational corporations and standalone companies are to be considered comparable in the application of transfer-pricing rules, which by their very nature are only applicable in a cross-border context between companies belonging to the same group.

In its *Belgian Coordination Centres* decision, the Commission acknowledged the relevance of transfer-pricing methods for the purpose of assessing certain measures regarding State-aid rules. The Commission recently went a step further, providing a comprehensive and extensive analysis of the methods used and accepted in the assessment of tax rulings in the framework of State-aid enforcement. For example, in its decision opening a formal investigation into an alleged illegal State aid given by Luxembourg to Amazon,[131] the Commission focused its evaluation notably on the effective use of one of the OECD-recommended methods. However, those methods were, in fact, just recommended, but the Commission seems to believe that departing from them is unacceptable without appropriate underlying reasons.[132] Similarly, the Commission indicated that it is ready to denounce any wrong choice of an OECD method instead of another (more-common) one without a proper justification[133] or even any incorrect application of the standard methods,[134] which it indicated would be considered enough to establish the selective character of the measure and, eventually, the State-aid nature of the practice. However, although OECD standards are non-binding rules that were not adopted through democratic procedures, the Commission seemed to rely on OECD standards and to request that Member States fully conform to them. One could claim that the Commission turned the political compromise concretized in the OECD standards at a given point in time into EU indirect (i.e., via

130. It is important to note that, in the area of transfer pricing, Member States adopted Convention 90/436/CEE on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L225/10 (1990). It is, therefore, a sensitive area when the Commission intervenes using other instruments, such as State-aid control.
131. Investigation of State Aid SA.38944 – Luxembourg/Amazon, *supra* n. 96.
132. *Ibid.* paras 64–65.
133. *Ibid.* para. 77.
134. *Ibid.* para. 68.

enforcement of individual cases) harmonization of Member States domestic tax provisions or their obligations deriving from international law, thereby affecting the exercise of their tax sovereignty. It seems, however, that this view does not exactly reflect the Commission's position, which, in its NofSA Notice appears to consider the OECD TP Guidelines as a 'safe harbour' by stating that:

> If a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.'[135]

Thirdly, as to the criticism relating to the absence of relevant precedents on which to ground the Commission's recent approach, it is worth recalling the decisions of the Court of Justice, first, in *Gibraltar,*[136] where the Court departed from its usual formal criterion of the three-step test to attack a policy designed to be selective and, then, more recently in *Santander*,[137] where the Court indicated that:

> a measure ... may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory.[138]

Those two cases seem to establish a rather direct link between the nature of a measure as State aid and its impact on cross-border (tax) competition, to the extent that it results in putting undertakings operating in an international context in a more favourable situation than those operating in a purely domestic context.

Another question to be asked is whether – assuming that the Court accepts the Commission's approach – it does not introduce an element of novelty that, compared to previous practice,[139] could impact the recovery of State aid. As mentioned above, the recent Commission decision regarding tax rulings seems to show a shift in the enforcement of State-aid rules from selective, preferential tax-regimes that are clearly implemented in the tax legislation of Member States to administrative rulings on transfer pricing in the framework of tax-planning schemes set up by multinational groups of companies. One can wonder whether that shift also entails an evolution in the legal assessment of the notion of State aid by the Commission, which could not be foreseen when those rulings were granted. Moreover, for the future, applying an approach based on the way a general standard or rule is applied (or misapplied) in a

135. NofSA Notice, *supra* n. 104, para. 173.
136. *Gibraltar*, C-106/09 P.
137. *Commission* v *World Duty Free Group*, Joined Cases C-20/15 P and C-21/15 P, Judgment, EU:C:2016:981, annulling the GC's judgments in *Autogrill España* v *Commission*, T-219/10, EU:T:2014:939 and *Banco Santander and Santusa* v *Commission*, T-399/11, EU:T:2014:938.
138. *Commission v World Duty Free Group*, Joined Cases C-20/15 P and C-21/15 P, para. 119.
139. For the opposite view (i.e., there is nothing novel or unconventional in deployment of State-aid control in the manner adopted by the Commission in the recent cases involving tax rulings), see Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 Fordham Int'l L.J. 1017 (2015).

single specific case in order to assess a differentiation among companies (i.e., the specific company subject to the ruling and other companies) may entail great uncertainty. Such reasoning could lead one to conclude that State aid exists in any situation where the Commission may identify any wrong application of tax rules by tax administrations, which is inevitable in complex matters such as an intercompany allocation of cross-border profits, even without any intention to confer an advantage on the relevant taxpayer.

Fourthly, the Commission's strategy raises questions of a political nature, concerning not only the relationship between EU institutions and the Member States, but also third countries. Indeed, the selection of companies that were suspected of having benefitted from State aid in the form of favourable tax treatment triggered a strong political reaction in the United States. Although the investigations were technically opened against Member States and not against individual companies or group of companies, the typically American-based companies were the ones to face the negative consequences of recovery of State aid. Political reactions included that of US Treasury Secretary J. Lew, who formally expressed concerns about the issue of retroactivity, in letter and a white paper[140] addressed to President Juncker and Commissioner Vestager last February, in which he urged the EU Commission to reconsider its approach. In essence, Secretary Lew outlined four types of concerns, namely (i) the retroactive application of a new and expansive application of State-aid rules, (ii) the disproportionate selection of a number of US companies (three out of four closed investigations) among the beneficiaries of the tax practices under scrutiny, (iii) the lack of a legal basis on which to tax income of US multinational companies and (iv) the consequences of this policy on foreign direct investment and the rights of the US in tax treaties concluded only with EU Member States and not the European Union. Secretary Lew acknowledged that a serious problem exists, under the U.S. tax system, whereby income is only taxed upon repatriation and many US firms choose to defer tax liabilities by keeping income overseas in low-tax jurisdictions. To solve this issue, he mentioned the considerable efforts made in the framework of the OECD/G20 and the business-tax reforms prepared by the Obama administration to improve the repatriation of revenues of US companies to the US.

Competition Commissioner Vestager replied on behalf of the Commission that the EU was making full use of the tools at its disposal to drive the reform agenda against tax avoidance, namely its (i) legislative action (i.e., its March 2015 Tax Transparency Package and its January 2016 Anti-Tax Avoidance Package) and (ii) continued enforcement of EU State-aid rules intended to protect fair competition in the EU's Single

140. Letter of US Secretary of the Treasury Jacob J. Lew to Jean-Claude Junker, President of the EU Commission (11 Feb. 2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Letter-State-Aid-Investigations.pdf (last visited 24 Mar. 2017) and U.S. Department of the Treasury White Paper: The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings (24 Aug. 2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf last (last visited 24 Mar. 2017).

Market.[141] US legal scholars also commented on the approach of the Commission: Prof. Greenberg even suggested that the US Treasury should apply Section 981 of the US Tax Code against EU companies,[142] which allows, in situations where US corporations are subject to discriminatory tax treatment in a country, the US to double its income tax rates on foreign citizens and corporations.

Fifth, State-aid control is brought to a transnational dimension when the issue does not lie in national rules, but on their practical application to transnational transactions. A potential outcome may be counterproductive with respect to the political objective of avoiding double taxation. For example, in the Starbucks case, the fact that the Commission contested the Netherlands' acceptance of an overestimation of the royalties that the Dutch company should have paid to the UK company;[143] if the Commission's determination is confirmed, it would imply that the overestimated amount paid to the UK company should be included in the tax base of the Dutch company. Nevertheless, the enforcement of a recovery decision would theoretically lead to double taxation since the group already paid that sum in the form of IP-related income in the UK. One could also imagine a situation of misallocation of taxable items, whereby the recovery of the unlevied tax by one Member State should then correspond to the restitution of the unduly levied tax by the other Member State involved in the transnational transaction. However, this is not a result that the Commission can enforce, as it only has the power to impose the restitution of illegal State aid to the State having given it; it has no power to adjust the tax paid by the group to any other State. Although the Commission declared, after the Apple decision, that it would take into account any subsequent transfer-pricing adjustment by a Member State or even by a third country, in assessing the amount of the illegal State aid to be recovered by Ireland, that does not seem satisfactory in terms of legal certainty.[144]

141. Letter of EU Commissioner Vestager to Secretary Lew of the US Department of the Treasury (29 Feb. 2016), http://static.politico.com/cf/ba/b7725d194d84a1df018c28160048/margrethe-vestager-letter-to-secty-lew-on-eu-tax-investigations.pdf, (last visited 24 Mar. 2017).
142. *See, notably*, Itai Grinberg, *A Constructive U.S. Counter to EU State Aid Cases*, 2016 Tax Notes Int'l 167.
143. Investigation of State Aid SA.38374 – Netherlands/Starbucks, *supra* n. 98, paras 115–123.
144. According to the Commission:

> The amount of unpaid taxes to be recovered by the Irish authorities would be reduced if other countries were to require Apple to pay more taxes on the profits recorded by Apple Sales International and Apple Operations Europe for this period. This could be the case if they consider, in view of the information revealed through the Commission's investigation, that Apple's commercial risks, sales and other activities should have been recorded in their jurisdictions. This is because the taxable profits of Apple Sales International in Ireland would be reduced if profits were recorded and taxed in other countries instead of being recorded in Ireland … The amount of unpaid taxes to be recovered by the Irish authorities would also be reduced if the US authorities were to require Apple to pay larger amounts of money to their US parent company for this period to finance research and development efforts. These are conducted by Apple in the US on behalf of Apple Sales International and Apple Operations Europe, for which the two companies already make annual payments.

§6.06 CONCLUSION: SAFEGUARDING A EUROPEAN COMMON INTEREST OR THE COMMISSION'S ATTEMPT TO SAVE MEMBER STATES FROM THEIR OWN TAX AMBITIONS

As highlighted by different elements published by the Commission, the choice and complexity of a group of companies' corporate tax structures, which take advantage of loopholes and mismatches caused by the absence of international coordination among domestic tax systems, clearly appear to be motivated by attempts to reduce the overall corporate tax paid by the group. These schemes result in highly significant overall loss in tax revenues in the countries concerned. Member States' tax administrations (through individual advance tax rulings) or their specific tax regimes favour such international tax-planning schemes and, thus, actively promote – through 'harmful tax practices' – what the OECD has called 'base erosion and profit shifting' or BEPS.[145] Such exercises of Member States' taxing powers could jeopardize the Single Market and result in calls to strengthen the tools for tax harmonization and the fight against harmful tax competition in the European Union.

The Commission's recent wave of investigations into domestic-text tax rulings cannot be isolated from this context. However, it remains to be seen whether State-aid control is the most-suitable instrument to address those issues. From a legal perspective, there is, at the moment, considerable uncertainty as regards the approach adopted by the Commission through its various negative decisions adopted so far, in particular as regards the status of the arm's length principle in EU State-aid law. However, the evolution of the CJEU's case-law on fiscal State aid seems to support the Commission's current practice, which can be seen as natural (and certainly not surprising) in the light of the contextually international evolution from the approach adopted in the 1990s, when intra-EU tax competition concerns fuelled the first wave of State-aid infringement procedures against preferential tax regimes.

Nevertheless, the case-by-case dimension of State-aid enforcement, as well as the recovery obligation associated with negative decisions, creates a feeling of unfairness for some undertakings and the Member States concerned by the rulings (which, on the other hand, appear unfair to many). Although it is always risky to attempt to rewrite history, we can guess that those decisions, ultimately, might not have been required if the Member States had made greater efforts to coordinate their corporate tax systems, as they finally did with Directive 2016/1164, which addresses tax avoidance and other exchange-of-information instruments.[146] In that sense, the Commission, by using its powers in the area of State aid, has sent a powerful signal to the Member States that it

145. Press Release (30 Aug. 2016), IP/16/2923, para. 4, http://europa.eu/rapid/press-release_IP-16-2923_fr.htm (last visited 24 Mar. 2017). OECD, *Action Plan on Base Erosion and Profit Shifting* (2013).

146. *See* Council Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (2016). *See also* Violeta Ruiz Almendral, *Tax Avoidance, the 'Balanced Allocation of Taxing Powers' and the Arm's Length Standard: an Odd Threesome in Need of Clarification*, in *Allocating Taxing Powers within the European Union* 131, 145 et seq. (Isabelle Richelle, Wolfgang Schon & Edoardo Traversa eds., 2013).

is not acceptable to redirect and channel investments in favour of a single national economy to the detriment of other EU Member States and that the Internal market's objective is not the promotion of international tax competition. The future will tell if fiscal State-aid policy will have contributed to a renewal of European tax-policy.