Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice?

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This article illustrates how the use of the State aid control instrument to fight against harmful tax competition evolved during the last eighteen years. All the major steps of this story are presented: from the parallel genesis of a Code of Conduct for business Taxation and of the Notice on the application of State aid rules to measures relating to direct business taxation, to the Gibraltar case, to the recent opening decisions on preferential tax rulings. Lastly, some open reflections on those decisions from a tax law point of view are presented.

Keywords: Fiscal State aid, Harmful tax competition, Selectivity, Gibraltar, Amazon, Starbucks

I. Introduction

In a press statement dated December 2014 concerning the extension of the Commission's State aid enquiry on tax ruling systems to all Member States, Commissioner Vestager stated that "*We will use the information received in today's enquiry as well as the knowledge gained from our ongoing investigations to combat tax avoidance and fight for fair tax competition".*[1]

State aid control of fiscal measures is nothing new. The first time the Court of Justice applied State aid rules to a fiscal measure was back in 1961, under the European Coal and Steel Community Treaty.[2] Since then, the Commission and the Court have dealt with numerous cases involving domestic tax provisions resulting in a selective advantage to certain undertakings[3].

Fiscal State aid may take various forms.[4] Due to its peculiar nature, its assessment follows a specific pattern which focuses on the selectivity criteria. First, the Commission determines the common or normal tax regime applicable in the State concerned (or in exceptional cases, in a region of a Member State)[5]. That regime is used as a benchmark to evaluate the selectivity of the measure at stake. The underlying principle is that there cannot be discrimination among taxpayers in a comparable legal and factual situation, unless the differentiation is justified by the nature and overall structure of the system[6].

That said, what sounds peculiar in the recent fiscal State aid investigations is how the focus of the

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1 European Commission, Press release of 17 December 2014: "State aid: Commission extends information enquiry on tax rulings practice to all Member States" <http://europa.eu/rapid/press-release_IP-14-2742_en.htm> accessed 18 March 2015.

2 Case 30/59 (CECA) of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v. Haute Autorité, Rec.* [1961], p. 1.

3 Among the most significant ones: Case C-173/73 *Italy v Commission* [1974] ECR 709 (the "Italian textile" case); Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365; Case T-210/02 *British Aggregates v Commission* [2006] ECR II-2789, Case C-487/06 *British Aggregates v Commission* [2008] ECR I-10505 and Case T-210/02 RENV of 7 march 2012, *British Aggregates v Commission* (electronic publishing); Cases C-106/09 P and C-107/09 P *Gibraltar* [2011] I-11113; Case T-219/10 *Autogrill Espana v Commission* [2014] not yet published.

4 By way of example: tax deductions (*P Oy*, C-6/12 [2013]); tax exemptions (*Paint Graphos*, C-78/08 [2011]); tax rebates (*Adria Pipeline*, C-143/99 [2001]).

5 See Case C-88/03 of 6 September 2006, *Portugal v Commission* [2006] ECR I-07115, para. 56.

6 See Case T-219/10 of 7 November 2014, *Autogrill v Spain* [2014] not yet published, para. 33.

Commission seems to have shifted from selective preferential tax regimes clearly identifiable in the domestic tax legislation, to the apparently selective application of (more or less) general rules by tax administrations to international tax planning schemes set up by multinational groups of companies.

These schemes, which have been abundantly described and commented in the general press, take advantage of loopholes and mismatches caused by the absence of international coordination between the domestic tax systems and result in very significant overall losses in tax revenues for the states concerned. Sometimes, the states themselves consciously design specific tax regimes in order to favor those international tax planning schemes, therefore actively promoting through "*harmful tax practices*" what the OECD has called "*Base erosion and profit shifting*" (BEPS)[7]. Within the EU, this phenomenon is even more preoccupying because EU law, where the fundamental freedoms contained in the Treaties are in danger may hinder the capacity of the Member States to take appropriate actions, particularly in the form of anti-avoidance measures[8].

It is therefore not surprising that specific initiatives aiming at curbing harmful tax competition between Member States have been taken at the EU level: this is the case in particular for the 1997 Code of Conduct in the area of business taxation[9] and, to a lesser extent, for the Commission's proposal of a common consolidated corporate tax base[10]. The use of the State aid instrument in this strategy, although not completely new, raises however specific issues. While the possible State aid nature of a fiscal measure is implied in the very definition of State aid under article 107 TFEU ("*(...) through State resources in any form whatsoever (...)*"), the reason why the fight against tax avoidance and for a fair tax competition should come under the scope of State aid control is indeed not self-evident.

This article aims at providing an historical perspective of the convergent evolution of the international tax law concept of harmful tax practices on one side and of the European State aid control of fiscal measures on the other side. The attempt is to illustrate how, over the years, the European Commission and the Court of Justice seem to have blurred the distinction between the International soft law concept of harmful tax competition (among Member States) with those of State aid and unfair competition (among undertakings)[11].

The first section is dedicated to the notion of harmful tax competition as refined back in the 90s by the OECD and the European Union. The second section focuses on the resolution for a Code of Conduct and on the Notice on fiscal State aid and on their complementary nature. The third section illustrates how the two concepts developed in a parallel fashion over the years. The fourth section analyses the point reached with the *Gibraltar* case and the fifth section discusses the recent juxtaposition of the notion of Fiscal State aid with the one of harmful tax practices in the tax ruling investigations in light of the OECD recent actions.

II. The Definition of a Strategy to fight harmful Tax Practices

At an international level, harmful tax competition has been identified as one of the consequences of 20th century globalization[12]. In 1998, the OECD Committee on Fiscal Affairs issued a Report on "*Harmful tax Competition: an emerging global issue*"[13]. The Report came as a reaction to the input the Ministers gave to the OECD in 1996 to "*develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases*"[14]. The Report listed a series of harmful effects tax measures can have: "*distorting financial and, indirectly, real investment flows; undermining the integrity and*

7 OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, Paris.

8 See V. R. Almendral, "Tax avoidance, the 'Balanced Allocation of Taxing Powers' and the Arm's Length Standard: an odd Threesome in need of clarification", in I. Richelle, W. Schon, E. Traversa (ed.) *Allocating taxing powers within the European Union* (Springer 2013), pp. 145 et seq.

9 Council of the European Union and the Representatives of the Governments of the Member States, *Resolution on a Code of Conduct for business taxation*, OJ C 2 [1998] pp. 1 et seq.

10 European Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM/2011/0121 final.

11 For an overview on the interrelation among the two concepts of competition see A. Carlos do Santos, *L'Union Européenne et la régulation de la concurrence fiscale* (Bruylant 2009), p. 34.

12 C. Pinto, "EU and OECD to Fight Harmful Tax Competition: has the Right Path been Undertaken?" (1998) n. 26 issue 12 *Intertax* , p. 390.

13 OECD (1998), *Harmful Tax Competition: an emerging global issue*, OECD Publishing.

14 *Ibid*, p. 7.

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"[15]. It stressed that whether a measure can be considered harmful is a matter of evaluating and balancing those effects, bearing in mind that "*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'* ". It then gave mandate to a Forum on Harmful Tax Practices to monitor the situation and the implementation of the recommendations issued.

At the EU level, instead, the question has been dealt with as a matter of EU integration. In 1962, several experts from the then six founding Member States got together to reason out the impact national taxation may have on the establishment of the Internal Market. Their mandate included the study of differences in place among the six tax systems[16]. Harmful tax competition was not mentioned in the Report as such, nevertheless the experts already warned against the fiscal and budget differences among Member States that could lead companies, capitals, work force and businessmen to choose for their business a place different from the one naturally and technically more suitable[17].

This concern became an actual one at the end of the 80s, when the Council issued the Directive for the implementation of free movement of capital[18]. With the completion of the Internal Market, a Committee was established to report on "*tax problems posed by the removal of barriers to the free movement of goods, persons, services and capital in the Community's endeavour to establish a single internal market*"[19]. The outcome of this work, the so-called Ruding Report of 1992[20], acknowledged the possible distortive consequences of tax differences among Member States in terms of "*intra-Community fairness*"[21]. Few years later, the Monti Report[22] explicitly addressed "*unfair competition in the tax area*" as a cause of concern for its potentially negative effects on tax revenues of Member States, on the efficient allocation of economic resources within the EU and on competitiveness and employment.[23] Eventually, the matter was the object of a Commission Communication of September 1997, titled "*A package to tackle harmful tax competition in the European Union*"[24]. The Communication stressed that "*the Single Market and EMU are essential for growth and prosperity; however, they also increase the importance of taxation as a competitive factor*"[25]. It reaffirmed the need for an action against harmful tax competition at a European level "*to reduce distortions to the Single Market; to prevent significant losses of tax revenue; and to reverse the trend of an increasing tax burden on labour as compared to more mobile tax base*"[26]. It also proposed to the Council a package to tackle harmful tax competition, which, among other things, included a draft Code of Conduct for business taxation and a Commission Communication on fiscal State aid[27].

III. State Aid Control and the Code of Conduct as Complementary Tools against harmful Tax Competition

The Council adopted the Code of Conduct in 1997[28], as a political commitment to assure a coordinated action to tackle harmful tax competition. The Code does not explicitly offer a definition of harmful tax competition. Nevertheless, the Code identifies as potentially harmful tax measures those which affect "*the location of a business activity in the Community*" by providing "*a significantly lower level of taxation (...)*

15 *Ibid*, p. 16.

16 Comité Fiscal et Financier, *Rapport du Comité Fiscal et Financier (Neumark Report)* Brussels 1962.

17 *Ibid*, p. 12.

18 Council of the European Communities, *Directive for the Implementation of Article 67 of the Treaty*, OJ L 178 [1988], pp. 5 et seq.

19 Ruding Committee, *Conclusions and Recommendations of the Committee of Independent Experts on Company Taxation (Ruding Report),* Brussels 1992, p. 17.

20 Ruding Committee, *Conclusions and Recommendations of the Committee of Independent Experts on Company Taxation (Ruding Report),* Brussels 1992.

21 *Ibid*, p. 21.

22 Monti Group, *Taxation in the European Union* (First Report of Monti Group), SEC(96)487 [1996].

23 *Ibid*, p. 2.

24 European Commission, *A package to tackle harmful tax competition in the European Union,* COM(97)564 [1997].

25 *Ibid*, para. 7.

26 *Ibid*, para. 2.

27 *Ibid*, para. 5.

28 Council of the European Union (n. 9).

than *those levels generally applied in the Member State in question*". The Code also lays down a list of criteria to assess the harmfulness of a tax measure. Among those criteria, one focuses on the risks associated with transfer pricing and indicates as a benchmark for the assessment of transfer pricing strategies the OECD standards: "*account should be taken of (...) whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD (..)*"[29].

The Code of Conduct was therefore conceived as a political agreement[30] that marked the acknowledgement by the Council of the necessity to limit tax competition among Member States for the benefit of the Internal Market. At the same time, the Commission adopted a Notice on the application of the State aid rules to measures relating to direct business taxation[31]. The Notice is an act of soft law as the Code of Conduct is; nevertheless, the discretion the Commission has in taking State aid decisions made the Notice a fundamental text[32] for fiscal State aid assessment[33], codifying the existing practice. This was not a coincidence: on their genesis, the Council's Code of Conduct and the Commission Notice are clearly expressions of the same political commitment to reduce Member States' room for manoeuvre in using their tax systems as an instrument of tax competition. The Commission undertook to better clarify its State aid policy towards fiscal measures in the same Communication where it urged the Council to adopt the Code of Conduct. Such undertaking is recalled in the introduction of the Notice, where it is also stated that "*State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition*". Moreover, at paragraph 3 the Commission confirms 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*".

However, despite their historical and political intertwinement, the Code of Conduct and the State aid provisions are distinct both in their formal nature (different legal base, different institutions in charge of applying the rules)[34] and in their scope, as regards the measures they can be applied to. The Code of Conduct can tackle harmful tax measures beyond article 107 TFEU, and this is one of the reasons why it has been adopted.[35] That makes the two instruments complementary tools.[36]

This idea of a State aid control focused on the harmful nature of a measure for tax competition among Member States, rather than on its discriminatory (selective) character on undertakings of the same Member State, has been extensively debated by the doctrine. On the one hand, some authors read it as the affirmation of a new objective of the State aid control, absent in the Treaty, attesting the primate of the politic over the law, therefore almost resulting in a real *coup d'etat*.[37] A bit less radical, but still critical towards the Notice, other authors claimed that even if, in practice, the limitation of Member States' power to attract companies with harmful fiscal measures can be a consequence of the prohibition of State aid, it cannot be seen as its underlying objective . In fact, State aid provisions are not a suitable instrument for tackling harmful tax competition, not only because of the wording of article 107 TFEU, but also because of the nature of State aid control: namely, it is based on a case by case approach, it is limited to the territory of one Member State and it does not take into consideration other Member States' practices.[38] On the opposite front, other authors have tried to put forward the argument that harmful tax competition is covered by State aid provisions since, according to the crite-

29 *Ibid*, para. B n°4.

30 Gentlemens' agreement for somebody, see T. Lambert, "Marché Intérieur et évasion fiscale" (2002) *Les Petites Affiches* n°97, p. 39.

31 European Commission, *Notice on the application of the State aid rules to measures relating to direct business taxation,* OJ C 384 [1998], p. 3.

32 A. Fantozzi, "The applicability of State aid rules to tax competition measures : a process of « de facto » harmonisation in tax field?" in W. Schön (ed.) *Tax Competition in Europe* (IBDF 2003), p. 127.

33 As the Court pointed out: "*[the Notice] being an internal measure adopted by the administration, cannot be regarded as a rule of law, nevertheless forms rules of practice from which the administration may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment*" (*Gibraltar* [2011], para. 128).

34 E. Traversa, *L'autonomie fiscale des régions et des collectivités locales face au droit communautaire*, (Larcier 2010), p. 437.

35 See M. Monti, « How State aid affects tax competition » (1999) 4 *EC Tax review*, pp. 208 et seq., where the then Commissioner states: "*Until recently, only the state aid aspect had been considered, but we have now enlarged our approach to ensure that tax incentives which affect the location of business in the European Union are addressed*" (p. 209).

36 E. Traversa (n. 34), p. 438.

37 For a detailed commentary on the doctrinal debate see Dos Santos, *supra* note 12, pp. 432 et seq.

38 E. Traversa (n. 34), p. 437. See also R. Luja, "EU State aid rules and their limits" (2014) issue 4 *Tax Notes Int'l*, pp. 353 et seq: "*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*", p. 354.

ria laid down in the Code of Conduct, an harmful tax measure does always constitute fiscal State aid[39]. Such an approach seems to contradict paragraph 30 of the 1998 Commission Notice that 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 practical application of the Notice by the Commission and, eventually, a judgment of the Court further fuelled the debate on the overlap between harmful tax measures and prohibited fiscal state aid.

IV. State Aid Control and the Code of Conduct as Complementary Tools against harmful Tax Competition

As a matter of fact, in the years immediately following the Council resolution and the Commission Notice, there has not been a systematic State aid control of harmful tax measures[40]. As Commissioner Monti pointed out in a 2000 statement, "*It is of course 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*"[41]. That gave a new impulse to the fight against harmful tax competition via State aid control: in July 2001 the review of fifteen potentially harmful regimes was launched.[42]

Those fifteen measures were among the sixty-six identified by the Code of Conduct Group as potentially harmful, and included four measures already reviewed and accepted by the Commission under article 107 TFEU.

Among those four, one concerned the Belgian Coordination Centres. As per a Royal Decree of 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 in line with State aid Treaty provisions[43]. In 1999, the Code of Conduct 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[44].

The Commission reassessed the measure in 2003, this time finding it contrary to State aid provisions[45].

The Commission Decision is of particular relevance for two reasons. First, it includes a reference to the OECD standards as an appropriate guidance for the State aid assessment of transfer pricing arrangements[46]. Transfer pricing is one of the topics of the OECD work on taxation, and it has been firstly addressed in a OECD Report back in 1979, later followed by the publication of Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[47]. Over the decades, the OECD developed a complex system to establish the acceptability of intragroup transfers, by shaping several possible methods of transfer pricing that could assure the respect of market conditions in intragroup transactions. In acknowledging that "*the purpose of applying the OECD rules is to establish transfer prices that are close to the prices obtaining under conditions of free competition, in accordance with rules accepted by transnational corporations and the tax authorities of the Member States concerned*"[48], the Commission considered that Belgium did not apply correctly one of the methods recommended by the OECD to evaluate the correctness of a transfer pricing (in this case, the cost plus method), therefore conferring a selective advantage to the companies benefiting from the regime.

Secondly, the Decision marks a rethink of the Commission after the assessment of the Code of Conduct

39 B. J. Kiekebled, *Harmful Tax Competition in the European Union. Code of Conduct, countermeasures and EU law* (Foundation for European Fiscal Studies 2004), p. 83.

40 See European Commission, *Report on the implementation of the Commission Notice on the application of State aid rules to measures relating to direct business taxation*, C(2004)434, para. 4 et seq.

41 European Commission Press Release of 23 February 2000: "Statement by Commissioner Monti concerning the control of fiscal state aids" <http://europa.eu/rapid/press-release_IP-00-182_en.htm> accessed 18 march 2015.

42 European Commission press Release of 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> accessed 18 march 2015.

43 For the background see Case T-276/02 of 2 June 2003, *Forum 187 asbl v Commission*, ECR [2003] II-02075, paras. 8 et seq.

44 See OECD (2000), *Progress Report in Identifying and eliminating harmful tax practices*, OECD Publishing.

45 Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centers established in Belgium, n° 2003/755/EC, OJ L 282 [2003].

46 As it did in other decisions on coordination centers in the same period (see for example the decision on the German coordination centers of 2 September 2002 –OJ L 177/17 [2003], paras. 22-28; Luxembourg finance companies OJ L 152/40 [2003], paras. 43-44).

47 OECD (1979), *Transfer Pricing and Multinational Enterprises*, OECD Publishing; OECD (1995), *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD Publishing, substantially revised in 2001 and 2010.

48 Commission Decision (n. 45), para. 95.

Group. Interestingly enough, in its Decision declaring the regime incompatible with article 107 TFEU, the Commission seemed to distinguish the influence the Code of Conduct Group's work had on the reopening of the investigation from its reversal on the Treaty compatibility of the measure. The Commission linked its reassessment of the regime to the Code of Conduct Group's conclusions[49], while it justified its new position over the measure in light of its new orientation on State aid control following the Notice of 1998[50]. In other words, the Commission marked its independence from the Code of Conduct Group's conclusions, clarifying that a new outcome of the assessment was the consequence of the new approach the Commission itself took on State aid control.

This approach is in line with the Notice[51] and it is echoed in the 2004 Report on its Implementation: "*although they pursue the same general goal of reducing distortions of competition within the internal market, it must be borne in mind that the procedure for examining tax schemes from the state aid angle is distinct from the work in connection with the code of conduct*" and "*although the criteria laid down respectively in article [107 TFEU] and in the code of conduct are similar in a number of ways, they do not always overlap*"[52]. Finally, such approach has been acknowledged by the Court of Justice: "*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*"[53].

All this leads to the conclusion that fighting against harmful tax competition is indeed a legitimate goal of the State aid control, and therefore falls within the boundaries of article 107 TFEU.

V. Embedding the Code of Conduct Principles in the Assessment of an Aid: the Gibraltar Case

What are the boundaries of article 107 TFEU? The Commission's almost unlimited powers of interpretation[54] on State aid are the key to understand the recent developments of State aid control in the fight against harmful tax competition: in the last decade, the Commission worked on the concept of selectivity of fiscal measures, using it as a key to give a broader interpretation to the wording of article 107 TFEU.[55]

In March 2004, one month after the publication of the Commission Report on the application of the Notice, whose second paragraph was devoted to the analysis of the relationship between State aid monitoring and harmful tax competition, the Commission took a decision on a case that would have been the new keystone in the State aid control of harmful tax measures.

Gibraltar wanted to implement a corporate tax reform, which would completely overhaul the precedent system, and would be formed of three apparently independent taxes, i.e. a payroll tax, a business property occupation tax based and a –very modest-registration fee. The Commission saw in such reform a State aid, as it would have resulted in a tax free regime (the "zero taxation" mentioned in point B of the Code of Conduct) for offshore companies, *de facto* exempted from corporate taxation[56] because of their little presence in terms of employees and properties in Gibraltar.

By way of its structure, that measure in principle applied to almost all Gibraltar companies, which made it conceptually impossible, for the Advocate General who issued an opinion in the relevant Court case, to consider it a selective advantage according to the classic assessment. In its opinion, the Advocate General adhered to the doctrine that was sceptical about the broadening of the scope of State aid control by explicitly stating that "*harmful institutional or tax competition between Member States clearly does not fall within the mechanism for controlling State aid established by the Treaty*"[57]. Hence, "*if the tax system is of a general character, it falls outside the application of Article [107 TFEU]*"[58].

Against the Advocate General opinion, the Court of Justice ruled in 2011 that the measure constituted

49 *Ibid*, para 1.

50 *Ibid*, paras 4 and 5.

51 European Commission Notice (n. 31), para 33.

52 European Commission Report (n. 40), para 64.

53 Case C-182/03 of 22 June 2006, *Belgium and Forum 187 v Commission*, [2006] ECR I-5479, para. 151.

54 F. Nanetti, G. Mameli, "The creeping normative role of the EC Commission in the twin-track struggle against State aids and harmful tax competition" (2002) 4 *EC Tax Review*, p. 188.

55 L. Hancher, *EU State Aids* (Sweet & Maxwell 2012), p. 361.

56 See A. Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart Publishing 2014), p. 336.

57 Opinion of the Advocat General Jääskinen of 7 April 2011 in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and UK* [2011] ECR I-11113, para. 134.

58 *Ibid*, para. 140.

a selective aid because "*its very application resulted in a different tax burden for different undertakings*"[59], irrespectively of its general character. In fact, the measure at stake did not define specific rules for a category of companies by departing from the general reference framework of Gibraltar: that measure, in defining the tax base for the corporate tax, *was* the general reference framework. Therefore, the Court implicitly substituted its own view of the logic or rationale of what companies should be taxed to the one of Gibraltar[60], by choosing as alternative reference framework a hypothetical comprehensive corporate tax system[61]; exactly what the Advocate General warned against[62]. Hence, the measure at stake was considered to be contrary to State aid rules. Quite impressively, while the opinion of the Advocate General was mainly devoted to showing why harmful tax competition should be kept aside in the State aid assessment, the judgment of the Court of Justice did not even mention a single time the issue of harmful tax competition, but only focused on the scope of the selectivity test. To use the wording of the Notice, one could say that the Court included the harmful tax competition assessment in the « *own mechanism* » of State aid Treaty provisions.

VI. Using State Aid beyond the Code of Conduct to fight harmful Tax Competition

In June 2014, the Commission announced the opening of in-depth investigations in three Member States' tax measures. Those measures are, in fact, tax rulings which the Member States concerned issued in favour of three multinationals, acknowledging the correctness of the companies' transfer pricing arrangements. A fourth investigation of the same kind was opened in October and others will probably come, as anticipated by the Commissioner[63].

As reported in the relevant press release, the then Commissioner for Taxation Semeta referred 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 »*[64]. Hence, the perspective adopted by some authors[65] seems overturned: tackling tax competition is not one of the possible effects of State aid control. Instead, it is the very aim of those investigations and it could possibly benefit, among other things, competition between undertakings.

The contested tax rulings represent the position of the tax administrations on tax implications of the cross-border structures put in place by some multinationals. In particular, the administrations were called to say if the intragroup allocations were carried out in line with the applicable domestic and international law provisions (double taxation conventions) and at market conditions. Comfort letters about a company's tax structure are a common instrument used by tax administrations to clarify how the corporate tax will be calculated or specific tax provisions will apply. This practice is of particular relevance for group companies: multinationals seek for approval of the prices charged for intragroup transactions as that influences the allocation of taxable profit.

The Commission saw in the contested rulings a potential State aid because the companies concerned were allegedly treated more favourably than other companies carrying out similar transactions (therefore in the same condition). It is, in fact, a matter of selective advantage, but of a specific nature: the advantage over a comparable company is supposed by observing the way intercompany transactions are assessed in the ruling, and taxed. Essentially, the Commission saw a selective advantage in the application of transfer pricing methods (see above).

As mentioned earlier[66] the Commission already acknowledged the relevance of transfer pricing methods in the State aid assessment of certain measures, as in the Belgian Coordination case. Still, with the new decisions the Commission brought the assessment to the next level, by providing a comprehen-

59 Joined Cases C-106/09 P and C-107/09 P of 15 November 2011, *Commission and Spain v Government of Gibraltar and UK* [2011] ECR I-11113, para. 93.

60 J. Temple Lang, "The Gibraltar State Aid and Taxation Judgment –A "Methodological Revolution"?" (2012) 4 *EStAL*, p. 810.

61 *Gibraltar* case, para. 101. See E. Traversa, "State aid and taxation: Can an antiavoidance provision be selective?" (2014) 3 *EStAL*, p. 521.

62 Opinion of the AG (n. 57), para. 202.

63 European Commission press release (n. 1).

64 European Commission Press Release of 11 June 2014 "*State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)*" <http://europa.eu/rapid/press-release_IP-14-663_en.htm> accessed 18 March 2015.

65 See above, section 2.

66 See above, section 4.

sive and extensive analysis of the methods used and accepted in the tax rulings.

The new approach followed by the Commission echoes the recent OECD policy developments. Until recently, the OECD fought for fair taxation on two battlefields: companies' tax avoidance via transfer pricing and countries' harmful practices via tax competition. In 2013, the OECD gave the transfer pricing matter a new vest by approving an Action Plan on base erosion and profit shifting (BEPS)[67]. In the BEPS project, transfer pricing is seen not only as a possible mean for tax avoidance, but also as a possible form of tax competition (Action 5). To put it simply, the two battlefields were merged into one. In fact, the BEPS project itself stems from the work on harmful tax practices undertaken by the OECD in the last 15 years[68]. As one can read in Action 5 of the Plan, the OECD objective in the framework of the BEPS project is to "*revamp the work on harmful tax practices*". Therefore, a new input has been given to the Forum on Harmful Tax Practices to review member countries' preferential tax regimes.

The European Union seems to have followed such new approach, but rather than updating the Code of Conduct, it used the more versatile instrument of State aid control. Updating the Code of Conduct would have required a consensus among the 28 Member States and the difficult definition of a practical system for revising not only "*rules for profit determination in respect of activities within a multinational group of companies [that] depart from (...) rules agreed upon within the OECD*" but also the misapplication of conforming rules.

In the decision to open a formal investigation for an alleged aid by Luxembourg to Amazon[69] the analysis of the Commission is a very technical one: it checks for the effective use of one of the methods recommended by the OECD, aksing for a proper motivation for departing from those standards[70], it investigates possible misapplications of OECD standard methods[71] or the choice of a method instead of another one without a proper justification.[72] All this is part of the assessment of a selective advantage.

Three remarks on the new approach can be made under a tax law point of view. First, the Commission seems to rely on OECD standards and to request Member States to fully conform to them. However, OECD standards are non-binding, changeable rules that, unlike domestic and even international law, are not adopted through democratic procedures. As a result, it could be claimed that unstable soft law affects the exercise of tax sovereignty.

Second, the differentiation among companies stemming from the misapplication of a rule, the discrimination operates between the specific company subject to the ruling and any other company: in other words, the selective factor does not lie in the identification of one or a group of beneficiaries, but on the way a general standard is applied in a single specific case. This could lead to systematically consider as prohibited State aid any wrong application of tax rules by tax administrations, which in complex matters such as the intercompany allocation of cross-border profits, inevitably happens, even without any intention to confer an advantage to the concerned taxpayers.

Lastly, the dimension of State aid control gets transnational: national tax schemes are not contested nor are national rules on transfer pricing; in fact, the practical application of the latter to transnational transactions is under scrutiny. As a consequence, one could imagine that in the case of misallocation of taxable items, the recovery of the unlevied tax by a Member State should then correspond to the restitution of the unduly levied tax by the other Member State involved in the transnational transaction. Unfortunately, at this stage the Commission has only the power to impose the recovery of the aid to the State condemned, but it has no power in adjusting the tax paid to the other State concerned. For example, in the *Starbucks* case, where the Commission contests to the Netherlands to have accepted an overestimation of the royalties to be paid by the Dutch company to the UK one[73], a confirmation of this charge would imply that the overestimated price paid to the UK company gets included in the tax base of the Dutch company. Nevertheless, having the group

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

68 J. Englisch, A. Yevgenyeva, "The 'upgraded' strategy against harmful tax practices under the BEPS Action Plan" (2013) 5 *BTR*, p. 620.

69 European Commission, State aid SA.38944 (2014/C) – Luxembourg, Alleged aid to Amazon by way of a tax ruling, JOCE C/44 [2015].

70 *Ibid*, paras. 64 and 65.

71 *Ibid*, para. 68.

72 *Ibid*, para. 73.

73 European Commission, State aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – NetherlandsAlleged aid to Starbucks, JOCE C/460 [2014], para. 115-123.

already paid taxes on that sum as IP related income in the UK, a recovery decision would theoretically lead to double taxation. If that is the case, State aid control of harmful tax measures may have a considerable side effect. It follows from these reflections that State aid control of harmful tax measures should be complemented by positive tax integration, for example by making international standards more binding (a thorough reshuffle of the Arbitration Convention could be considered) or by establishing a system to avoid double taxation as a consequence of State aid recovery.

VII. Conclusion

This article tried to mark the path of the State aid approach to harmful tax competition in the last twenty years. From a complementary tool to the Code of Conduct in the fight against harmful tax competition, year after year State aid control became a key area of the fight against harmful tax competition at the EU level. Such evolution required a remarkable hermeneutical effort by the Commission and the Court.

Still, the structure of an aid, as defined under article 107 TFEU, cannot be indefinitely stretched. The concept of State aid has indeed several inherent limitations, the most evident being its focus on a single Member State and not the EU as a whole: that can lead to distortions when international tax planning schemes are at issue. Furthermore, it can be discussed whether the stretching of the concept of selective advantage overruns national tax sovereignty: in principle, international (OECD) standards being mostly embedded in soft law, Member States remain free to adopt them or not and have a total discretion in implementing international tax concepts in their domestic order.

Moreover, it cannot be denied that a coherently implemented domestic legislation in line with State aid provisions does not prevent the risk of mismatches among Member States' tax regimes: again, State aid, alone, can do little to avoid tax erosion resulting from this lack of coordination.

State aid is a useful tool in the fight against harmful tax competition. Nevertheless, it cannot be intended as a full substitute for the positive approximation of the corporate tax system of the Member States.