ec TAX REVIEW 2021–1

# Editorial

## 'Tax Haven' Conditions Included in COVID-19 State Aid Schemes: Can They Be Tested?

**Eric Kemmeren***

### 1 Introduction

At the time of writing this editorial, the globe, including Europe, is in the second wave of the COVID-19 pandemic. People are suffering not only physically, but also mentally because of (partial) lock downs. Health care systems of many countries are under extreme pressure. Inter alia, due to the (partial) lock downs, economic activities have substantially decreased. In order to support their economies and to facilitate their recovery, the EU and its Member States have taken unprecedented action.[1] A number of State interventions are subject to the EU State aid rules.[2] A number of Member States made the granting of State aid dependent on the absence of links with countries which are frequently tagged as 'tax havens'. Examples are Belgium,[3] Denmark,[4] France,[5] The Netherlands,[6] Poland,[7] and Sweden.[8] For example, the European Commission has decided that the Polish conditions are consistent with EU law.[9] More in general, the Commission has recommended Member States to make State aid conditional to the absence of links with non-cooperative jurisdictions, frequently referred to as 'tax havens'.[10] Whether a country qualifies as 'tax haven', may differ Member State by Member State. Since the term 'tax haven' is often used in academic literature and the mainstream press, the author also uses this term here, but he will also explain this term in more detail within the context of the rules to be discussed.

In this editorial, the research question is twofold:

1. Can the condition of making COVID-19 State aid dependent on the absence of links to 'tax havens' (hereafter: tax haven condition) be tested against fundamental freedoms?
2. Should this question be brought to court?

In order to answer these questions, this editorial adheres to a traditional legal methodology. This methodology makes it possible to acquire a more complete understanding of the possible impact of fundamental freedoms on conditions to provide COVID-19 State aid, more specifically on tax haven conditions. For the descriptions, analyses, and evaluations, the author has used sources of law, including national tax law, treaties, global issues (e.g. global principles in redistributive justice), legislative history, technical explanations, case law, decisions, statements of practice, public rulings, and literature.

In order to answer the research questions, firstly, the Commission's Recommendation on making COVID-19 State aid conditional to the absence of links with non-

* Professor of international tax law and international taxation at the Fiscal Institute Tilburg of Tilburg University, The Netherlands. Email: kemmeren@tilburguniversity.edu. He is also a member of the board of the European Tax College, deputy justice of the Arnhem Court of Appeals (Tax Division), and of counsel to Ernst & Young Belastingadviseurs LLP, Rotterdam, The NetherInslands.

1 *See* for more details, e.g. T. Morales & J. Rogers-Glabush, *Emergency Tax Measures in Response to the COVID-19 Pandemic: The Full Picture in Europe*, 7 Eur. Tax'n (2020).

2 *See* e.g. Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak C/2020/1863, OJ C 911 (20 Mar. 2020), as amended on 3 Apr., 8 May and 29 June 2020 and Commission Recommendation of 14 July 2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions. *See* for more details, e.g. R. Luja, *EU Fiscal State Aid Rules and COVID-19: Will One Survive the Other?*, 4 EC Tax Rev. 147–157 (2020).

3 *See* e.g. F. Casano, *Covid-19 Aids: Difficult Time for Tax-Haven Companies*, 61 kli-innttax (2020), http://kluwertaxblog.com/2020/07/24/covid-19-aids-difficult-time-for-tax-haven-companies/#respond (accessed 18 Nov. 2020).

4 *See* e.g. Y. Lind, *Sweden and Denmark Incorporate Anti-Tax-Avoidance Rules Into Very Different COVID-19 Responses*, Tax Notes Int'l 1127 (8 June 2020); C. Brokelind & Å. Hansson, *COVID-19 Nordic Responses*, 48(8/9) Intertax 754–760; and A. Colón, *Denmark Nixes COVID-19 Relief for Companies in Tax Havens*, Tax Notes International 459 (27 Apr. 2020).

5 *See* e.g. Victor Mallet, *France Rules Out Coronavirus Aid for Tax-Haven Business*, Financial Times (23 Apr. 2020); and S. Paez, *Companies in Tax Havens Denied COVID-19 Relief*, TA-wtd 2020–15803 (24 Apr. 2020).

6 *See* Letter of the State Secretary of Finance of 19 June 2020, no. 2020–0000114039, to the Second Chamber of the Dutch parliament. *See also* e.g. K. Strocko, *Netherlands Puts Tax-Related Conditions on COVID-19 Aid*, Tax Notes Int'l 1539 (29 June 2020).

7 *See* European Commission Decision of 27 Apr. 2020, C(2020) 2822 final, State Aid SA.56996 (2020/N) – Poland COVID-19: repayable advance scheme for micro, small and medium-sized enterprises. *See also* e.g. Paez, *supra* n. 5.

8 *See* e.g. Lind, *supra* n. 4; and Marnix Schellekens, *COVID-19 Pandemic: Tax Authority Updates Guidance on Government Support for Companies*, IBFD Tax News Service of 16 Sept. 2020, 2020–09–16 se 1.

9 *See* European Commission Decision of 27 Apr. 2020, *supra* n. 7.

10 *See* Commission Recommendation of 14 July 2020, *supra* n. 2.

cooperative jurisdictions will be outlined. Subsequently, as an example, the Dutch tax haven conditions will be described. Thereafter, it will be discussed whether tax haven conditions as part of COVID-19 State aid can be tested against fundamental freedoms. Furthermore, the Dutch example will be tested against the outcomes of the previous point. With the results of these points, research question 1 can be answered. The question of whether the test of tax haven conditions to fundamental freedoms should be brought to court, will be discussed in the section 'Who dares to litigate?'. The author will close with the main conclusions by answering the research questions.

## 2 European Commission's recommendation on making COVID-19 State aid conditional on the absence of links to non-cooperative jurisdictions

The Recommendation sets out a coordinated approach to making the granting of financial support by Member States conditional on the absence of links between the recipient undertaking and jurisdictions which feature on the EU list of non-cooperative jurisdictions.[11] These are all third countries.[12] The Recommendation uses both the term 'tax haven' and the term 'non-cooperative jurisdictions'.[13] Non-cooperative jurisdictions are jurisdictions which have been blacklisted, because they fail to comply with the EU standards to prevent tax fraud and tax avoidance and to promote tax good governance.[14] These jurisdictions fail to meet the requirements of transparency, fair competition or real economic activity. That is to say, according to the EU, they do not comply with the international standards on exchange of information; they have harmful tax practices or regimes; they do not apply the OECD anti-Base Erosion and Profit Shifting (BEPS) minimum standards; or the country's tax rate encourages artificial tax structures.[15]

The Commission emphasizes that, not limited to COVID-19 related circumstances, the granting of financial support should address the need for tackling tax avoidance and fraud as well as the abuse of national and Union budgets at the expense of taxpayers and social security systems. It finds it equally important to cater for the proper functioning of the internal market. Therefore, the Commission asks for concerted action by the Member States. The black list has been designed to address threats to EU Member States' tax bases. Against this background, the Commission thinks that it is appropriate to recommend Member States to make their financial support to undertakings in the Union conditional on the absence of links between those undertakings and blacklisted jurisdictions. On the other hand, it also emphasizes that it is critical that Member States protect genuine economic activities in the blacklisted jurisdictions and that they guarantee that those economic activities are not inadvertently affected. It is recommended that Member States include appropriate exceptions in their laws in order to ensure that financial support is not prevented where there is real economic activity.

Undertakings that receive COVID-19 State aid should not:

1. be resident for tax purposes in, or incorporated under the laws of blacklisted jurisdictions;
2. be controlled, directly or indirectly, by shareholders in blacklisted jurisdictions, up to the beneficial owner, as defined in Article 3 point 6 of Directive 2015/849;
3. control, directly or indirectly, subsidiaries or own permanent establishments in blacklisted jurisdictions;
4. share ownership with undertakings in blacklisted jurisdictions.

The Commission has stated that Member States should agree to reasonable requirements demonstrating the absence of links to a blacklisted jurisdiction.

The Commission also provides some carve-outs. Member States may disregard the existence of links to the blacklisted jurisdictions, when the undertaking provides evidence that one of the following circumstances is met:

A. where the level of the tax liability in the Member State granting the support over a given period of time (e.g. the last three years) is considered adequate when compared to the overall turnover or level of activities of the undertaking receiving the support, at domestic and group level, over the same period;
B. where the undertaking makes legally binding commitments to remove its ties to blacklisted jurisdictions within a short timeframe, subject to appropriate follow-up and sanctions in case of non-compliance;

[11] *Ibid.*

[12] For example, Casano, *supra* n. 3, seems to doubt of whether the Recommendation is restricted to third countries or that also so-called 'EU tax havens' have been included. She believes that it becomes difficult to justify the mindset of different treatment between companies located in an EU tax haven and companies located in a non-EU tax haven.

[13] *See* Commission Recommendation of 14 July 2020, *supra* n. 2, preamble, points (1) and (5)–(8).

[14] *See* e.g. Council conclusions of 8 Nov. 2016, 13918/16 FISC 182 ECOFIN 991 Criteria and process leading to the establishment of the EU list of noncooperative jurisdictions for tax purposes and Communication from the Commission of 21 Mar. 2018 C(2018) 1756 final on new requirements against tax avoidance in EU legislation governing in particular financing and investment operations. *See* for the latest list of non-cooperative jurisdictions, https://ec.europa.eu/taxation_customs/tax-common-eu-list_en (accessed 18 Nov. 2020).

[15] *See* e.g. A. Pirlot, J. Vella & R. Collier, *Tax Policy and the COVID-19 Crisis*, 8(9) Intertax 794–804 (2020) for critical observations in respect the composition of the list.

C. where the undertaking has substantial economic presence (supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances) and performs a substantive economic activity in blacklisted jurisdictions.

However, Member States should not apply the carve-outs if they are not in a position to verify the accuracy of the information. This could be due to the insufficient exchange of information on request with the third country concerned, in particular in the absence of a tax treaty allowing exchange of information or the lack of cooperation from the third country jurisdiction concerned.

## 3 The Dutch example

The Netherlands is one of the Member States that has made COVID-19 State aid dependent on the absence of links with tax havens, as the Commission's Recommendation suggests.[16] However, in this context, the term tax havens is wider than the term used in the Commission's Recommendation. In addition to the jurisdictions blacklisted by the EU, the Netherlands has produced its own list of 'low tax jurisdictions'. A jurisdiction qualifies as a low tax jurisdiction if on the October 1st preceding the relevant taxable year, entities are not subject to a profit tax or to a profit tax with a nominal tax rate less than 9%.[17] The low tax jurisdictions are listed by means of a ministerial decree.[18] In the context of the Dutch COVID-19 State aid and this editorial, the jurisdictions of both lists are considered to be tax havens, although this term, contrary to the European Commission, has not been used in the official language by the Dutch government.

As argued in the letter, the aim of the Dutch COVID-19 State aid is to provide support to individual undertakings that are in serious problems, because of the COVID-19 pandemic. It has also been stated that aid for individual undertakings will always be tailor-made. However, it has also been held that it is Dutch policy, that if an undertaking is financially aided by the government in hard times, that its profits should not be drained without taxation in better times. Therefore, COVID-19 State aid to an individual undertaking has been made dependent on a tax conditions. These conditions should be seen at the background of combatting tax avoidance and tax evasion in order to avoid that expenses for public expenditures are passed on to taxpayers who do not search for or exceed the boundaries of what is legally allowed. The State Secretary expects reciprocity from undertakings, that is to say, as he argues, that it does not fit, on the one hand, to receive aid financed by taxes and, on the other hand, to circumvent taxes in better times.

On the basis of these considerations, two specific conditions for individual aid have been set. They deal with the place of establishment respectively transactions:

1. place of establishment: the (direct and indirect) subsidiaries, the direct shareholders of the undertaking asking for aid, or this undertaking itself are not established in tax havens[19]; shareholdings of less than 10% held by shareholders established in tax havens will not prevent the granting of State aid; subsidiaries established in tax havens carrying out genuine business economic operational activities (other than minimal ones) will not prevent the granting of State aid either[20];
2. transactions: the Dutch establishment of the undertaking asking for aid does not pay interest or royalties to group establishments in tax havens irrespective of the business reasons for the transaction or the level of substance of the undertaking in the tax haven in order to prevent that aid money or future profits will flow out of the Netherland to tax havens.[21]

According to the State Secretary, with these two conditions the Dutch government concretize its message not to give aid to undertakings that use undesirable tax structures. Given the fact that undertakings unexpectedly are in a difficult situation because of the exceptional circumstances of the COVID-19 pandemic which requires swift action, he allows undertakings to restructure within twelve months in order to satisfy both conditions.[22]

[16] *See* Letter of the State Secretary of Finance of 19 June 2020, *supra* n. 6.

[17] *See* Art. 13ab(3) Corporate Income Tax Act 1969 (*Wet op de vennootschapsbelasting 1969*). The rate of 9% links up with the lowest tax rate in Europe at the moment the bill was discusses. This has been done in order to avoid a potential inconsistency with EU law, because it is also the idea of the legislature to use the same list in the context of the conditional interest and royalty source tax as to be introduced as from 1 Jan. 2021. The use of the same list for both laws is assumed to be more practical for implementation purposes. *See* Memorandum in response to the second report, Parliamentary Papers Second Chamber (*Nota naar aanlelding van het tweede verslag, Kamerstukken II*), 2018/19, 35030, no. 7, at 8. The relevant EU blacklist is the latest list published in the calendar year preceding the relevant taxable year. A carve-out has been included: if according to the tax legislation of another State than the listed State, the entity is a tax resident for profit tax purposes of that other State, the entity is not considered to be a tax haven entity.

[18] *See* Decree low tax jurisdictions and non-cooperative jurisdictions for tax purposes (*Regeling laagbelastende staten en niet-coöperatieve rechtsgebieden voor belastingdoeleinden*). At this moments, the following jurisdictions have been listed: Anguilla, Bahamas, Bahrein, Barbados, Bermuda, British Virgin Islands, Guernsey, Isle of Man, Jersey, Cayman Islands, Turkmenistan, Turkish and Caicos Islands, Vanuatu and United Arab Emirates.

[19] This condition comes close to the Commission's Recommendation of which undertakings should be excluded from COVID-19 State aid schemes.

[20] Whether a genuine business economic operational activity in a tax haven is relevant must be assessed on a case-by-case basis. An example which meets, according to the State Secretary, this condition is an internationally operating group which has been established in the Netherlands and holds a subsidiary in a tax haven which produces goods commissioned by the headquarter with a large workforce. This carve-out is in line with the Commission's Recommendation to protect genuine economic activities in the blacklisted jurisdictions and to guarantee that those economic activities are not inadvertently affected.

[21] The author thinks that this policy is inconsistent with the Commission's Recommendation to protect genuine economic activities in the blacklisted jurisdictions and to guarantee that those economic activities are not inadvertently affected.

[22] This opportunity for restructuring is in line with the Commission's Recommendation.

## 4 Can tax haven conditions as part of COVID-19 State aid be tested against fundamental freedoms?

Now, we come to the main issue of this editorial: Can tax haven conditions as part of COVID-19 State aid be tested against fundamental freedoms? Can the State aid rules and fundamental freedoms coincide?[23]

Since tax haven conditions are part of State aid measures, the author thinks that the starting-point of the analysis should be the State aid rules: Do these rules allow that tax haven conditions can be separately tested against fundamental freedoms? The author thinks that it is possible, indeed. This position can be evidenced by settled case law of the CJEU, inter alia, by its decision in the *A-Fonds* case, more specifically paragraphs 47 and 48 [emphasis added]:

> 47 It is also clear from the case-law of the Court that a national court has competence to assess whether *the arrangements of an aid scheme comply with Treaty provisions which have direct effect*, other than those relating to State aid, *only* if those arrangements can be evaluated *separately* and thus, although forming part of the aid scheme in question, *are not necessary for the attainment of its objective* or *for its functioning* (see, to that effect, the judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14, and of 23 April 2002, *Nygård*, C-234/99, EU:C:2002:244, paragraph 57).
>
> 48 By contrast, *the arrangements* of an aid may be *so indissolubly linked to* the *object of the aid* that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU (see, to that effect, the judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14).

Without doubt, the fundamental freedoms have direct effect.[24] According to the author, from this case law, it follows that a separate test of arrangement of an aid against fundamental freedoms is possible if these arrangements are not necessary for the attainment of the aid scheme's objective or the aid scheme's functioning. However, a separate test is not possible if the arrangements are indissolubly linked with the aid scheme's object.

Therefore, it must be assessed of whether tax haven conditions can be considered 'arrangements of an aid scheme'. The author thinks that this is the case, because a number of Member States' COVID-19 State aid schemes make the aid dependent of the absence of links with tax havens. Therefore, tax haven conditions are an integral part of the individual State aid scheme of the Member State concerned.

Subsequently, the question arises of whether tax haven conditions are necessary for the attainment of the objective(s) of the COVID-19 State aid schemes of Member States or for the functioning of them. If a tax haven condition is indissolubly linked to the object of a COVID-19 State aid scheme, a separate test of this condition to fundamental freedoms will not be possible, but the condition can only be tested within the framework of the State aid rules. These questions will be answered with respect to the Dutch tax haven conditions, as an example, against the background of the Commission's Recommendation on making COVID-19 State aid conditional on the absence of links to tax havens.

## 5 Testing the Dutch example

If we have a closer look at the Dutch tax haven conditions, we see that with respect to condition 1 only shareholdings of 10% or more are taken into account in respect of direct shareholders in undertakings established in the Netherlands. This means that also a shareholder who does not have a definite influence over the undertaking's decisions and cannot determine its activities, is covered.[25] Therefore, the condition has not been restricted to cases to which only the freedom of establishment applies,[26] but the condition also applies to situations covered by the free movement of capital and the freedom of payment.[27] Next to this, the holding of subsidiaries in tax havens has also not been restricted to situations in which the undertaking established in the Netherlands has a definite influence over the subsidiary's decisions and that it can determine the subsidiary's activities. The latter is not the case if the undertaking asking for aid itself has been established in a tax haven, although it may also be true if it participates in, e.g. a transparent partnership which carries out the activities in the Netherlands.[28] The conditions of having a definite influence and the opportunity to determine the

[23] *See* for more detailed discussions, e.g. C. Micheau, *Fundamental Freedoms and State Aid Rules Under EU Law: The Example of Taxation*, 5 Eur. Tax'n 210–214 (2012); P. Rossi-Maccanico, *EU Review of Direct Tax Measures: Interplay Between Fundamental Freedoms and State Aid Control*, 1 EC Tax Rev. 19–28 (2013); P. J. Wattel, *Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters*, 1 World Tax J. 129–144 (2013); M. Staes, *The Combined Application of the Fundamental Freedoms and the EU State aid Rules: In Search of a Way Out of the Maze*, 2 Intertax 106–121 (2014); and R. Szudoczky, *Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms*, 3 Eur. State Aid L. 357–380 (2016).

[24] *See* e.g. CJEU (15 July 1964), case 6/64 (*Costa/Enel*), CJEU (28 Jan. 1986), Case 270/83 (*Avoir fiscal*), and CJEU 6 June 2000, Case C-35/98 (*Verkooijen*). *See* further, e.g. P. J. Wattel, O. C. R. Marres & H. Vermeulen (eds), *Terra/Wattel European Tax Law, Volume 1, General Topics and Direct Taxation*, Fiscale Handboeken 115–121 (2018).

[25] *See* e.g. (CJEU 3 Oct. 2012), Case C-282/12 (*Itelcar*), CJEU (11 Sept. 2014), Case C-47/12 (*Kronos*), and CJEU (13 Nov. 2014), Case C-112/14 (*European Commission v. United Kingdom*).

[26] *See* Art. 49 TFEU. Compare also, e.g. Casano, *supra* n. 3.

[27] *See* Art. 63 TFEU.

[28] *See* e.g. CJEU (15 May 2008), Case C-414/06 (*Lidl Belgium*).

undertakings activities have not been included either in condition 2 in respect of making payments to group establishments in tax havens. Therefore, the author concludes that the free movement of capital and the freedom of payment apply to both tax haven conditions. This is, of course, extremely relevant, because all tax havens are third countries to which the freedom of establishment does not apply, but the free movement of capital and the freedom of payment do. This conclusion is also relevant in respect of other Member States which apply similar thresholds or no thresholds at all. So, if the Dutch tax haven conditions can be tested separately against fundamental freedoms, they can be tested against the free movement of capital and the freedom of payments.

On the basis of the analysis in the previous section, also the Dutch tax haven conditions should be considered arrangements of the Dutch COVID-19 State aid scheme.

Next to be assessed is of whether the tax haven conditions are necessary for the attainment of the Dutch COVID-19 State aid scheme's objective. As mutatis mutandis in many other Member States, the aim of the Dutch COVID-19 aid scheme is to support the Dutch economy and to facilitate its recovery by providing support to individual undertakings established in the Netherlands. The State Secretary of Finance has explicitly argued that the aim of the Dutch COVID-19 State aid is to provide support to individual undertakings that are in serious problems, because of the COVID-19 pandemic.[29] In this way, The Netherlands tries to save the continuity of these undertakings and to avoid, e.g. that big numbers of employees are laid off.[30] Taking into account this objective, the author thinks that it is hard to argue that the tax haven conditions are *necessary* to attain the objective of providing support to undertakings that are in serious problems, because of the COVID-19 pandemic. In general, whether an undertaking is in such problems does not depend on whether the undertaking asking for aid has been established in a tax haven, whether its direct shareholder has been established there, whether it holds subsidiaries in a tax haven, or whether it pays interest or royalties to a group establishment in a tax haven. Except with respect to the interest and royalty payments, the same can be held in respect of the Commission's Recommendation to exclude a number of undertakings from COVID-19 State aid schemes. As both the Dutch State Secretary and the Commission hold, the problems of individual undertakings are caused by the COVID-19 pandemic. Thinking the other way around, a number of undertakings which have been established in a tax haven, whose direct shareholder has been established there, which hold subsidiaries in a tax haven, or which pays interest or royalties to a group establishment in a tax haven may not be affected negatively by the COVID-19 pandemic at all. Examples of the latter category may be groceries, online sales companies, and take-away food undertakings. But even if undertakings operate in the same branch, it may be true that one undertaking may need or apply for COVID-19 State aid, whereas others do not need it or do not apply. These undertakings can keep up their structure with tax havens as they did before the COVID-19 pandemic. One may even wonder of whether the tax haven conditions really contribute to a level playing field in these situations.

Subsequently, it must be assessed of whether the tax haven conditions are *necessary* for the functioning of the Dutch COVID-19 State aid scheme. The author thinks that this is also hard to argue. The same COVID-19 State aid could be given without the tax haven conditions in order to save undertakings from the consequences of the COVID-19 pandemic. The results of aid with or without the tax haven conditions would likely be the same. Actually, the State Secretary himself admits that these conditions are not necessary for the functioning of the COVID-19 State aid scheme, since he holds that these conditions concretize the Dutch government's message not to give aid to undertakings which use *undesirable* tax structures. So, the tax haven structures may be undesirable from a (political) policy perspective, but that does not mean that removing them is *necessary* for the functioning of the Dutch COVID-19 State aid scheme. The same is true in respect of the tax haven condition included in the Commission's Recommendation.

On the basis of the arguments mentioned above, the author thinks that it is also hard to argue that the Dutch tax haven conditions are indissolubly linked with the Dutch COVID-19 State aid scheme's object, which is to provide support to individual undertakings that are in serious problems, because of the COVID-19 pandemic. The same is true for the tax haven condition included in the Commission's Recommendation.

In conclusion, the author thinks that the Dutch tax haven conditions can be separately tested against the free movement of capital and the freedom of payment.[31]

## 6 Who dares to litigate?

Despite the fact that the author thinks that strong arguments can be put forward for the position that tax haven conditions included in COVID-19 State aid schemes can be separately tested against the free movement of capital and the freedom of payment, one may wonder of whether this position will ever be brought to court. Which undertaking dares to do that in an era where the taxation of internationally operating undertakings is so heavily debated not only in tax literature, but also in

[29] *See* s. 3 of this editorial.

[30] Compare also, e.g. Brokelind & Hansson, *supra* n. 4.

[31] A number of tax experts have expressed (in the main press) their doubts of whether tax haven conditions are consistent with the free movement of capital without testing explicitly of whether such a test is possible. *See* e.g. D. Weber, *Onthouding coronasteun: politiek scoren in strijd met recht op vrij verkeer*, Financieel Dagblad 25 (23 June 2020); Laurens Berentsen, *Fiscalisten kritisch over koppeling coronasteun en belastingparadijzen*, Financieel Dagblad 5 (23 June 2020). referring to the Dutch tax experts/professors Sjoerd Douma, Raymond Luja & Dennis Weber; and Casano, *supra* n. 3.

the mainstream press and the global, European and national societies as a whole? What is the risk of reputation damage?[32] Is it worthwhile to challenge the Member States' and the Commission's positions? Is there a trade-off to be made between the tax benefits of tax haven tax structures to be given up and the amount of COVID-19 State aid to be received?

In any case, the analysis made in this editorial shows that a risk exists that Member States and the European Commission deploy legal instruments for which they have not been developed. This may also be risky from a good governance perspective. Is it allowed that Member States supported by the European Commission include conditions in COVID-19 State aid schemes which may be inconsistent with EU law, but which undertakings dare not to challenge because they are afraid of reputation damage? Therefore, the author thinks that Member States and the Commission should deploy other, appropriate legal instruments if they want to get rid of tax structures with tax havens.

Furthermore, it can also be challenged whether the (implicit) claims on tax jurisdiction made by Member States and the Commission can always be justified. It is beyond this editorial, which is already too long, to go in further details.[33]

To answer the second research question. The author believes that the question of whether tax haven conditions can be tested against fundamental freedoms should be brought to court, in order to allow the CJEU to discipline not only Member States and the Commission, but also internationally operating undertakings, if necessary. However, he believes that it may be very unlikely that this will happen in the end.

[32] Compare also, e.g. Casano, *supra* n. 3, who refers to the policy of 'listing and shaming'.

[33] *See* for more details, e.g. Eric. C. C. M. Kemmeren, *Principle of Origin in Tax Conventions, A Rethinking of Models*, Dissertation PhD thesis Tilburg University (2001), https://pure.uvt.nl/ws/portalfiles/portal/439888/87428.pdf.

## 7 Conclusions

The research question of this editorial was twofold:

1. Can the condition of making COVID-19 State aid dependent on the absence of links to tax havens (tax haven condition) be tested against fundamental freedoms?
2. Should this question be brought to court?

The author answers the first question in the affirmative. He thinks that there are strong arguments that tax haven conditions included in COVID-19 State aid schemes can be separately tested against the free movement of capital and the freedom of payment. That is also true in respect of the Dutch tax haven conditions which have been taken as an example.

The author also answers the second question in the affirmative. Then, the CJEU has the opportunity to discipline not only Member States and the Commission, but also internationally operating undertankings, if necessary. However, he believes that it may be very unlikely that this will happen in the end.

*Eric C.C.M. Kemmeren*

*Professor of international tax law and international taxation at the Fiscal Institute Tilburg of Tilburg University, The Netherlands.*

*Email: kemmeren@tilburguniversity.edu.*

*He is also a member of the board of the European Tax College, deputy justice of the Arnhem Court of Appeals (Tax Division), and of counsel to Ernst & Young Belastingadviseurs LLP, Rotterdam, The Netherlands.*