EC TAX REVIEW 2025–3

Guest Editorial

The Role of the Court of Justice in Enhancing Tax Fairness in the EU

Koen Lenaerts[*, **]

This Guest Editorial takes stock of ongoing efforts to enhance tax fairness within the European Union (EU), a challenge exacerbated by legal fragmentation across Member States and the limitations of EU primary law in the area of tax harmonization, and delves into the specific role played by the Court of Justice in this context. In particular, four key areas are examined: (1) the fight against abusive tax avoidance practices, particularly in VAT and corporate taxation; (2) the prevention of selective tax advantages granted to undertakings; (3) the promotion of cross-border cooperation between tax authorities; and (4) how to reconcile the promotion of tax fairness with the EU's constitutional framework. The Editorial *highlights how disparities in national tax regimes, while permitting economic operators to seek advantageous tax outcomes, may constitute fertile ground for tax evasion and competitive distortions.* The *Court of Justice however* has an important *role* to play *in addressing that risk, in particular by ensuring the* effet utile *of EU legislative measures aimed to fight unfair tax practices by economic operators even beyond the conceptual framework of fraud and abuse. While progress has already been made in this respect, the Editorial concludes that achieving tax fairness requires sustained coordination between EU and Member State actors. Such coordination is key to reconcile the operation of the internal market with the EU's broader social and economic objectives, and thus to preserve the trust placed by citizens in the ability of the Union to bring about social progress.*

Keywords: Tax fairness, Social market economy, Corporate tax avoidance, Tax evasion, Abusive practices, Anti-Tax Avoidance Directive (ATAD 1), Parent-Subsidiary Directive, Cross-border tax cooperation, Selective tax advantages, Legal fragmentation, Multi-level fiscal governance.

1 Tax 'fairness' in the EU: Achieving social progress in a highly competitive social market economy

The extent to which the European Union (EU) can ensure that the development of the internal market is accompanied by enhanced tax 'fairness' has long given rise to lively debates.[1] An essential issue that arises with regard to that fairness relates to the existence of appropriate legal instruments and effective action by competent authorities tackling abuses of fundamental freedoms for the purpose of tax avoidance and the granting of discriminatory tax advantages to undertakings operating in the internal market. That increased fairness has a positive impact on the 'sustainable development of Europe' based in particular on 'a highly competitive social market economy, aiming at full employment and social progress', which is one of the fundamental objectives conferred upon the Union by the Treaties.[2] Increased tax fairness is not only necessary to reduce distortions of competition between undertakings. It also encompasses the interests of taxpayers in general. Fiscal revenues, including those generated by corporate tax, contribute significantly to the financing of welfare policies.[3] The EU, which has not only an economic purpose, but also a social objective,[4] bears a responsibility, within the limits of its competences, to avoid erosion of such revenues. That responsibility echoes citizens' increased expectations that the EU should effectively stimulate social progress within a social market economy. This conception of the internal market is in line with the fundamental value of solidarity reflected in Article 2 TEU, which characterizes the society in which the EU develops, and with the recognition in the Charter of Fundamental Rights of the EU of a series of individual social rights, ranging from access to healthcare[5] to the entitlement to social security and social assistance benefits.[6]

[*] All opinions expressed are personal to the author. This guest editorial is inspired in part by the following article: K. Lenaerts, S. Adam, 'The contribution of the Court of Justice to a "fairer" internal market in the areas of social law and tax law', *Liber amicorum Nils Wahl*, to be published (Springer). Email: Koen.Lenaerts@curia.europa.eu.

[**] *President of the Court of Justice of the European Union and Professor of European Union Law, Leuven University.*

[1] *See also* for a critique of the very concept of 'tax fairness', R. De La Feria, *Editorial. What is Tax Fairness?*, 33(4) This Rev. 142–145 (2024), doi: 10.54648/ECTA2024018.

[2] Article 3(3), first subparagraph, TEU.

[3] Together with social security contributions.

[4] Judgments of 21 Dec. 2016, *AGET Iraklis* (C-201/15, EU: C:2016:972), paras 76 and 77, and of 4 Oct. 2024, *Lithuania and Others v. Parliament and Council (Mobility package)* (C-541/20 to C-555/20, EU:C:2024:818), para. 263.

[5] Article 35 of the Charter.

[6] Article 34 of the Charter.

Numerous measures adopted at EU level over the past decade testify to the EU legislature's determination to reinforce tax fairness in the internal market. A first example is the Anti-Tax Avoidance Directive (ATAD 1).[7] The ATAD 1 followed the 15-Point Action Plan of the Organization for Economic Co-operation and Development (OECD) and the G20 against base erosion and profit shifting (BEPS).[8] It lays down rules aimed at 'strengthen[ing] the average level of protection against aggressive tax planning in the internal market', by limiting the erosion of tax bases in the internal market and the shifting of profits out of the internal market. One of its most emblematic provisions is the general anti-abuse rule contained in Article 6 ATAD 1, which requires Member States, for the purposes of calculating corporate tax liability, to 'ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances'.[9] However, the ATAD 1 explicitly confirms the principle, resulting from well-established case-law,[10] that taxpayers must have the right to choose the most tax efficient structure for their business activities.[11]

Another striking example was the introduction in the Parent-Subsidiary Directive,[12] in 2014, of the so-called 'subject-to-tax clause', which aimed to avoid double non-taxation. That amendment, which followed a Commission recommendation on aggressive tax planning,[13] concerned hybrid financial instruments within the EU, i.e., instruments 'for which at least two jurisdictions take mutually incompatible positions regarding the qualification of this instrument, so that a deductible payment of the payer is not treated as taxable income of the payee (deduction/non-inclusion)'.[14] The objective of the Parent-Subsidiary Directive is 'to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company'.[15] The initial version of Article 4(1)(a) of that Directive thus provided, in particular, that where a parent company receives distributed profits, the Member State in which it is established must 'refrain from taxing such profits'. Exemption from taxation on dividends and profits received by parent companies in the EU was not subject to the condition that the corresponding profits were non-deductible – and thus taxed – at the level of the subsidiary. The Directive's objective was to avoid double taxation in the context of cross-border profit distribution within groups of companies, but not to generate unintended tax benefits for them. In order to avoid 'situations of double non-taxation deriving from mismatches in the tax treatment of profit distributions between Member States',[16] the Directive was amended and provides now that only profits which were *not* deductible by the subsidiary – i.e., they were taxed – should be exempted from tax at the level of the parent company.[17] That 'subject-to-tax' clause is now supplemented by Article 9 of the ATAD 1, which addresses more generally 'hybrid mismatches' resulting in either double deduction or deduction without inclusion, i.e., double non-taxation.[18]

More recently, the Global Anti-Base Erosion Directive[19] was adopted with a view to ensuring a global

[7] Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (*O.J.* L 193, at 1). That instrument was later supplemented by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD 2).

[8] *See* in this respect E. C. C. M. Kemmeren, *Editorial. Where is EU Law in the OECD BEPS Discussion?*, 23(4) This Rev. 190–193 (2014), doi: 10.54648/ECTA2014017. The author argued that certain rules of EU law might create difficulties for implementing that Action Plan within the EU.

[9] *See* for a comparative analysis between that clause and the case-law of the Court of Justice on abuse of EU law, L. De Broe & D. Beckers, *The General Anti-abuse Rule of the Anti-tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law*, 26(3) This Rev. 133–144 (2017), doi: 10.54648/ECTA2017015.

[10] *See* s. 2.

[11] Recital 11.

[12] Council Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (*O.J.* L 345, at 8).

[13] *See* for a commentary of the general subject-to-tax clause which the Commission recommended the Member States to incorporate in double-taxation convention, C. Marchgraber, *The Avoidance of Double Non-taxation in Double Tax Treaty Law: A Critical Analysis of the Subject-to-Tax Clause Recommended by the European Commission*, 23(5) This Rev. 293–302 (2014), doi: 10.54648/ECTA2014027.

[14] L. De Broe, *At Last, Some Output on the Fight Against Double Non-taxation*, 23(6) This Rev. 310 (2014), doi: 10.54648/ECTA2014029.

[15] Recital 3.

[16] *See* recital 3 of Council Directive 2014/86/EU, of 8 Jul. 2014, amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (*O.J.* 2014, L 219, at 40).

[17] Article 4(1)(a) of the Parent-Subsidiary Directive. That legislative amendment 'put […] an end to scholarly debates as to whether the (literal wording of the) original proposal actually included an obligation or a mere possibility to tax' (De Broe, *supra* n. 14, at 311).

[18] The ATAD defines a 'hybrid mismatch' as a situation between a taxpayer in one Member State and an associated enterprise in another Member State or a structured arrangement between parties in Member States where the following outcome is attributable to differences in the legal characterization of a financial instrument or entity:

(1) a deduction of the same payment, expenses or losses occurs both in the Member State in which the payment has its source, the expenses are incurred or the losses are suffered and in another Member State ('double deduction'); or
(2) there is a deduction of a payment in the Member State in which the payment has its source without a corresponding inclusion for tax purposes of the same payment in the other Member State ('deduction without inclusion').

[19] Council Directive (EU) 2022/2523 of 14 Dec. 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (*O.J.* L 328, at 1).

minimum level of taxation for multinational groups active in the EU.[20] Of particular relevance for tax fairness within the EU are the Income Inclusion Rule (IIR) and the Undertaxed Profit Rule (UTPR). Pursuant to the IIR, a parent entity of an multinational enterprise (MNE) group or of a large-scale domestic group computes and pays its allocable share of an additional amount of tax (a 'top-up tax') in respect of the low-taxed constituent entities of the group, whereas pursuant to the UTPR, a constituent entity of an MNE group has an additional cash tax expense equal to its share of top-up tax that was not charged under the IIR in respect of the low-taxed constituent entities of the group.[21] The top-up tax should be collected each time that the effective tax rate of an MNE in a given jurisdiction is below 15%.[22]

Recent case-law demonstrates that the Court, within the limits of its judicial task, also contributes in various ways to the reinforcement of fair corporate taxation in the internal market. That contribution essentially covers four areas that (1) will examine below: the fight against abusive or fraudulent behaviour and other forms of illegitimate tax avoidance practices in the field of VAT (2) and of taxation on profits (3), the granting of selective advantages to undertakings through tax measures (4), and the promotion of cross-border cooperation between administrative tax authorities in the Member States (5). Some of the judgments that I shall use as illustrations also shed light on the Court's responsibility of ensuring that the pursuit of greater tax fairness at EU level aligns with the latter's constitutional framework.

2 The fight against abusive or fraudulent practices in the field of VAT

The Court has consistently held that the pursuit by a taxpayer, including a company, of the tax regime most favourable to it cannot, as such, lead to a general presumption of fraud or abuse depriving the taxpayer of the enjoyment of free movement rights or other advantages resulting from EU law.[23] However, taxpayers cannot enjoy such rights or advantages arising from EU law in situations where they are unable to put forward any valid commercial reasons justifying a given transaction.[24] That is so when that transaction is disconnected from any economic reality and has as its sole purpose the reduction of the tax burden.

Those principles were initially applied in VAT cases. In these cases, the Court held that preventing possible tax evasion through abuse or fraud is an objective recognized and encouraged by the Sixth Directive.[25] As a result, the general principle that abusive practices are prohibited must be relied on to refuse an advantage on the basis of EU provisions governing VAT in a situation where the taxpayer has artificially created the conditions for it to apply.

It was not yet entirely clear from the wording used in the initial judgments whether the interpretation of EU law merely created a possibility or an obligation for national administrations and courts. In the *Schoenimport 'Italmoda'* judgment, the Court held that it is, in principle, 'the responsibility of the national authorities and courts to refuse the benefit of the rights laid down by the Sixth Directive when they are claimed fraudulently or abusively'.[26] Since the absence of fraud or abuse is one of the conditions for obtaining an advantage under the Sixth Directive, it was logical to consider that when such fraud or abuse is established, the advantage in question *must* be refused.[27] Those principles remain unchanged in the regime established by the VAT Directive, which replaced the Sixth Directive.[28]

Thus, national authorities and courts must refuse the benefit of advantages provided for in the field of VAT where an operator indulges in abusive practices intended to benefit from such advantages, *even in the absence of specific national provisions to that effect.* This concerns in particular the general rights to VAT deduction, exemption or refund.[29] The Court has consistently held that a taxable person who has created the conditions for obtaining a right by means of fraudulent or abusive transactions cannot successfully

[20] *See* on that Directive, K. Pantazatou, *Pillar 2 and EU Law*, in *The 'Pillar Two' Global Minimum Tax* 304–324 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Elgar Tax Law and Practice series, Elgar Publishing, Cheltenham 2024).

[21] Article 1(1) of the Directive.

[22] Article 27(1) of the Directive, read together with its Art. 3(15).

[23] Judgments of 12 Sep. 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, para. 50, of 29 Nov. 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, para. 84, of 24 Nov. 2016, *SECIL*, C-464/14, EU:C:2016:896, para. 60; of 26 Feb. 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, para. 109, and of 4 Oct. 2024, *X (Intérêts relatifs à un emprunt intragroupe)*, C-585/22, EU:C:2024:822, para. 59.

[24] Judgments of 9 Mar. 1999, *Centros*, C-212/97, EU:C:1999:126, para. 24 and the case-law cited; of 21 Feb. 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, para. 68; *Cadbury Schweppes and Cadbury Schweppes Overseas*, *supra* n. 23, para. 35; of 22 Nov. 2017, *Cussens and Others* (C-251/16, EU:C:2017:881), para. 27.

[25] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (*O.J.* 1977 L 145, at 1). That Directive was replaced by Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax (*O.J.* 2006 L 347, at 1) (the 'VAT Directive'). *See* judgments in *Halifax and Others*, *supra* n. 24, para. 71; of 6 Jul. 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446), para. 54; and of 21 Jun. 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), para. 41.

[26] Judgment of 18 Dec. 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, para. 49.

[27] *Ibid.*, para. 57.

[28] *See* to that effect, judgment of 4 Oct. 2024, *UP CAFFE* (C-171/23, EU:C:2024:840), para. 43.

[29] Judgments in *Schoenimport 'Italmoda' Mariano Previti*, *supra* n. 26, para. 62, and *Cussens and Others*, *supra* n. 24, para. 33.

invoke the protection of legitimate expectations or legal certainty in order to oppose the refusal to grant the right in question.[30]

The range of situations where fraudulent or abusive behaviour that is incompatible with the objectives pursued by EU law must lead national authorities to refuse to grant the rights of deduction of, exemption from or refund of VAT have been defined broadly, which testifies to the importance attached by the Court to the integrity of the VAT system. Thus, such rights must be refused not only where tax evasion has been carried out by a taxable person itself, but also where that taxable person knew, or should have known, that it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain.[31] Therefore, the fraudulent nature of a chain of transactions as a whole justifies refusing the advantage at any level of that chain, at least in so far as the taxable person concerned can be reasonably held to know that it is participating in such a chain. Moreover, in the recent judgment in *UP CAFFE*, the Court confirmed that the principles stemming from *Schoenimport 'Italmoda'* and *Cussens* on the compulsory refusal of advantages in the field of VAT in cases of abusive or fraudulent behaviour also apply in a situation where a given exemption scheme is purely optional for the Member States.[32]

Of course, refusing the benefit of a right or advantage granted by EU law in a tax case is a radical measure – one might even call it a sanction – which cannot be applied 'lightly' by tax authorities or national courts. The prohibition of abusive practices is therefore not relevant where it can reasonably be established that the economic activity being carried on does not have as its sole aim to secure tax advantages.[33] In particular, an abusive practice in the field of VAT exists only if, first, the transaction concerned, notwithstanding the fact that the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing that directive formally apply, results in a tax advantage that is at odds with the purpose of those provisions and, second, a number of objective factors indicate that the transaction's *essential* aim is to obtain that tax advantage.[34]

Another important issue is whether EU law requires a certain level of 'proactivity' from national tax authorities in detecting such fraudulent or abusive practices. VAT constitutes an important part of the EU's own resources.[35] This means that a direct link exists between the collection of VAT in compliance with EU law and the availability of the corresponding VAT resources to the EU budget, since any lacuna in the collection of the first inevitably causes a reduction in the second.[36] Consequently, the obligation for the Member States, pursuant to Article 325 TFEU, to counter fraud and any other illegal activities affecting the financial interests of the EU is applicable. Accordingly, the Court has interpreted the VAT Directive, in conjunction with Article 4(3) TEU, to the effect that 'Member States are not only under a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory, but must also fight against tax evasion'.[37] It is reasonable to consider that the Member States must ensure that the national tax administrations have the necessary human and material resources to investigate cases of suspected fraud or abuse in the field of VAT effectively. In that way, they contribute to protecting the Union's financial interests and budget, which gives practical effect to the solidarity between the Member States as a foundational principle of the EU legal order.[38]

3 FRAUDULENT AND ABUSIVE PRACTICES IN TAXATION ON INCOME AND PROFITSS

In the field of income tax, more limited harmonization at EU level would appear to reduce the capacity of the Court of Justice to enhance tax fairness. Several

[30] *See* to that effect, judgments of 8 Jun. 2000, *Breitsohl* (C-400/98, EU:C:2000:304), para. 38, and in *Schoenimport 'Italmoda' Mariano Previti*, *supra* n. 26, para. 60. The Court has considered that such outcome is justified even with regard to transactions carried out prior to its judgment in *Halifax and Others* on abusive or fraudulent practices in connection with VAT (*see* judgment in *Cussens and Others*, *supra* n. 24, paras 40 to 42).

[31] *See* judgment in *Kittel and Recolta Recycling*, *supra* n. 25, paras 45, 46, 56 and 60, and judgments of 6 Dec. 2012, *Bonik* (C-285/11, EU:C:2012:774), paras 38 to 40, and of 18 May 2017, *Litdana* (C-624/15, EU:C:2017:389), para. 33.

[32] Judgment in *UP CAFFE*, *supra* n. 28, para. 24. That case concerned Art. 287 of the VAT Directive, which allows the Member States to exempt taxable persons with a limited annual turnover and is intended to relieve small undertakings and tax authorities from the administrative burdens of VAT liability where the tax amounts involved are small. In its judgment of 5 Jul. 2007, *Kofoed* (C-321/05, EU:C:2007:408) (esp. paras 38 and 48), the Court seems to have nuanced the requirements of combatting fraud and abusive practices based on the principle that a directive cannot of itself impose *obligations* on an individual and cannot therefore be relied on as such, by a Member State, against that individual. In *Cussens* and *UP CAFFE*, however, the Court explained that that reasoning only concerned the specific provision of the directive at issue in *Kofoed* and was therefore 'not applicable to the general principle of the prohibition of abusive practices' (*see* judgment in *UP CAFFE*, *supra* n. 28, para. 39 and case-law cited).

[33] *See* by analogy, judgment in *Halifax and Others*, *supra* n. 24, paras 74 and 75.

[34] *Ibid. See also* judgment in *UP CAFFE*, *supra* n. 28, para. 23.

[35] Article 2(1)(b) of Council Decision 2007/436/EC, Euratom of 7 Jun. 2007 on the system of the European Communities' own resources (*O.J.* 2007 L 163, at 17).

[36] Judgment of 26 Feb. 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), para. 26.

[37] *See* judgment of 8 Sep. 2015, *Taricco and Others* (C-105/14, EU:C:2015:555), para. 36.

[38] Judgments of 16 Feb. 2022, *Hungary v. Parliament and Council* (C-156/21, EU:C:2022:97), para. 129, and *Poland v. Parliament and Council* (C-157/21, EU:C:2022:98), para. 147. *See* on the contribution of those judgments to defining the legal implications of that principle, K. Lenaerts & S. Adam, *Sink or Swim Together: Solidarity Between the Member States as a Foundational Principle of the European Union*, in *Pursuit of Legal Harmony in a Turbulent Europe. Essays in Honour of Eleanor Sharpston* 52 and 53 (C. Barnard, A. Łazowski & D. Sarmiento eds, Oxford, Hart Publishing 2024).

judgments delivered in the past few years nevertheless demonstrate that the Court is involved in the fight against tax evasion here too.

The *N Luxembourg*[39] and *T Danmark*[40] cases concerned, respectively, the Interest and Royalty Payment Directive[41] (*N Luxembourg*), and the Dividends Directive,[42] which was replaced by the Parent-Subsidiary Directive (*T Danmark*).[43] The underlying objective of both directives is to avoid the double-taxation of such payments in the cross-border transactions which they regulate. In principle, payments covered by the Directives benefit from an exemption from all taxation in the Member State of origin in respect of the Interest and Royalty Payment Directive or from the payment of a withholding tax in the case of the Dividends Directive. In the case of the Interest and Royalty Payment Directive, this goal is achieved by allowing taxation only in the receiving Member State, thus eliminating possible taxation in the Member State of origin. In *N Luxembourg*, however, the companies receiving the interest and dividends paid by their Danish subsidiaries paid almost all of them to their own parent companies under complex arrangements, sometimes involving several successive payments of virtually identical amounts within the same group. The amounts were subsequently transferred to tax havens such as the Cayman Islands and Bermuda. The result of this scheme was that, ultimately, taxation of the payments within the EU was avoided altogether. The referring courts had doubts whether such a situation could arise from the proper application of EU law.

The Court of Justice decided in the first place that the concept of 'beneficial owner of the interest', within the meaning of the Interest and Royalty Payment Directive, must be interpreted narrowly as designating only an entity which *actually benefits* from the interest that is paid to it.[44] According to the Court, this can only be the case if the entity receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorized signatory, for some other person. Mere 'letter-box entities' certainly do not fulfil this criterion. Even more importantly, the Court decided, in the second place, that Member State authorities do not only have the *possibility*, but a legal *obligation* to refuse to grant a right or an advantage arising under EU law, irrespective of whether national (tax) law formally contains an anti-abuse provision, where the provisions of EU law are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefitting from that right or advantage even though the conditions for benefiting from that advantage are fulfilled only formally.[45] This obligation reflects the general EU law principle of sincere cooperation between Member States and the EU, which is essential to prevent EU law from being deflected from its real objectives.

In its more recent *Viva Telecom Bulgaria* judgment, the Court has confirmed the interpretation of the concept of 'beneficial owner' under the Interest and Royalty Payment Directive that it had given in *N Luxembourg*.[46] It has also confirmed in the *X BV* judgment that the effective fight against abuses or fraud in the field of direct taxation may constitute a legitimate ground for the Member States to justify limitations of fundamental freedoms.[47]

4 Tax fairness in the context of state aid discipline

State aid law also protects fair competition, which can be undermined inter alia by the granting of selective advantages to certain undertakings through tax measures.[48] In this respect, the Court has developed a three-step test, offering guidance not only to the Commission but also to national administrations and courts.[49] A recurring question in that context is whether the general prohibition of state aid in Article 107 TFEU is an appropriate instrument for achieving 'tax fairness' despite the absence of EU harmonizing measures on a given aspect of direct taxation.

A sequence of landmark judgments of the Court offers a nuanced answer. Thus, the *Commission v. Poland* and *Commission v. Hungary*[50] judgments concerned,

[39] Judgment of 26 Feb. 2019, *N Luxembourg 1 and Others, supra* n. 23.

[40] Judgment of 26 Feb. 2019, *T Danmark and Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135).

[41] Council Directive 2003/49/EC of 3 Jun. 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (*O.J.* L 157, at 49).

[42] Council Directive 90/435/EEC of 23 Jul. 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (*O.J.* L 255, at 6).

[43] *See* footnote 12. *See* already, on those judgments, K. Lenaerts, *Le juge de l'Union, promoteur de la lutte contre l'abus de droit en matière fiscale*, Revue Générale du Contentieux Fiscal (6) 433–449 (2019).

[44] That was confirmed in the judgment of 24 Feb. 2022, *Viva Telecom Bulgaria* (C-257/20, EU:C:2022:125), paras 48–56.

[45] Judgment of 26 Feb. 2019, *T Danmark and Y Denmark*, *supra* n. 40, para. 72.

[46] *See* judgment of 24 Feb. 2022, *Viva Telecom Bulgaria, supra* n. 44, paras 51–53.

[47] Judgment of 4 Oct. 2024, *X (Intérêts relatifs à un emprunt intragroupe)*, *supra* n. 23. Thus, '[w]hilst the pursuit by a taxpayer of the tax regime most favourable for him or her cannot, as such, set up a general presumption of fraud or abuse, the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned' (para. 59 and case-law cited).

[48] In its judgment of 2 Jul. 1974, *Italy v. Commission* (173/73, EU:C:1974:71), the Court considered that 'the […] fiscal nature […] of the measure in issue cannot suffice to shield it from the application of [what is now] Article 107 [TFEU]'.

[49] *See* judgments of 8 Nov. 2022, *Fiat Chrysler Finance Europe v. Commission* (C-885/19 P and C-898/19 P, EU:C:2022:859), para. 68, of 5 Dec. 2023, *Luxembourg and Others v. Commission* (C-451/21 P and C-454/21 P, EU:C:2023:948), para. 107, and of 19 Sep. 2024, *United Kingdom and Others v. Commission (Taxation of SEC Benefits)* (C-555/22 P, C-556/22 P and C-564/22 P, EU:C:2024:763), para. 93.

[50] Judgments of 16 Mar. 2021, *Commission v. Hungary* (C-596/19 P, EU:C:2021:202), and *Commission v. Poland* (C-562/19 P, EU:C:2021:201). *See* already, on those judgments, K. Lenaerts, *The Broadening of EU Competences Through the Case Law of the Court of Justice: Myth or Reality?*, 24(4) ERA Forum 597 (2023), doi: 10.1007/s12027-023-00775-4.

respectively, a Polish tax on turnover in the retail sector and a Hungarian tax on turnover linked to advertisements. Both tax regimes had two common characteristics: (1) they were based on turnover rather than profit and (2) they applied progressive rates. In its examination of selectivity, the Commission considered that the progressive structure of those taxes did not form part of the 'reference system'. It argued that progressive rates would favour undertakings with a low turnover by unjustifiably reducing the average tax rate applied to them compared with that borne by other undertakings subject to the higher levels of the scale of progressive rates. That advantage thus derogated from a reference system deemed to consist of a fictive flat-rate turnover tax. Both the General Court and the Court of Justice in the appeal proceedings disagreed with that assessment. The determination of the characteristics constituting each tax falls within the discretion of the Member States, as it falls within their fiscal autonomy when no EU harmonizing measures have been adopted. Therefore, they should be able to apply progressive rates to a turnover tax. The progressive structure of the tax regimes at issue thus formed part of the reference system and could be regarded as giving rise to a selective advantage.

That approach paved the way to the judgment in *Fiat Chrysler*,[51] where the Court essentially held that, in the absence of harmonizing measures at EU level, it is for the Member States alone to apply and to give substance to the 'arm's length principle'. The origin of the case was a tax ruling by the Luxembourg authorities addressed to Fiat Chrysler Finance Europe (FFT) concerning the calculation of a 'fictive' remuneration ('transfer pricing') for treasury services and financing provided by that company to the companies of the Fiat Chrysler group established in Europe. The objective of such transfer pricing is to ensure that intra-group transactions do not artificially benefit from a reduction of the tax burden compared to transactions between independent companies. The tax ruling at issue had been granted on the basis of a provision of the Luxembourg Tax Code and a ministerial circular. However, the Commission considered that those elements of national law, focusing on intra-group transactions, did not constitute the correct reference system. In its opinion, the correctly defined system was the general Luxembourg corporate income tax system, the objective of which was to tax the profits of all companies resident in Luxembourg. Against that background, it argued that the tax ruling at issue granted a selective advantage to FFT. The methodology applied for calculating transfer pricing departed from the 'state-of-the-art' methodology recommended by the OECD, which resulted, according to the Commission, in an unfair reduction in the tax liability of FFT compared to an independent company delivering the same type of services. Unlike the General Court, the Court of Justice held that the Commission failed to conduct an objective examination of the 'content, interaction and concrete effects' of the Luxembourg rules when defining the reference system.[52] In the absence of EU harmonizing measures, the detailed rules for the application of the arm's length principle must be determined exclusively by reference to national law. By relying on the OECD guidelines, the Commission disregarded both the principle of legality of taxation and the provisions of the TFEU relating to the adoption by the EU of measures for the approximation of Member State legislation relating to direct taxation.[53]

The respect due to the Member States' fiscal autonomy in the context of state aid was also centre-stage in the Court's judgment in *Engie*, which again concerned tax rulings granted by the Luxembourg authorities.[54] The tax rulings at issue concerned complex corporate and financial arrangements within the Engie group whereby income from participations in subsidiaries established in Luxembourg was exempted from tax. According to the Commission, those rulings had enabled that group to avoid taxation on almost all of the profit made by those subsidiaries. In order to define the reference system, the Commission interpreted Luxembourg law as making the possibility of a tax exemption for parent companies conditional upon the prior taxation of distributed income at the level of their subsidiaries, which had not been the case here.[55] Interestingly, it also considered that the selectivity of the advantage granted through the tax rulings resulted from the fact that the Luxembourg authorities omitted to apply a provision of Luxembourg tax law on abuse of law in taxation. Luxembourg argued that the relevant provisions of its tax law did not expressly make the exemption of income from participations at the level of a parent company dependent on the taxation of distributed profit at the level of its subsidiary. However, the Commission departed from that interpretation, finding that it was incompatible with the general objective of taxing all resident companies.[56] The Court held that approach to be incompatible with the scope of the Commission's powers in the field of state aid. In light of the principles of fiscal autonomy and legality in taxation, that institution is in principle bound by the interpretation of national law made by the Member State concerned.[57] Consequently, the Commission was entitled to depart from this interpretation only by providing 'reliable and consistent

51 Judgment of 8 Nov. 2022, *Fiat Chrysler Finance Europe v. Commission, supra* n. 49.

52 *Ibid.*, para. 92.

53 *Ibid.*, paras 93–97.

54 Judgment of 5 Dec. 2023, *Luxembourg and Others v. Commission, supra* n. 49.

55 *Ibid.*, para. 127.

56 There was no indication that the situation at issue fell within the scope of application of the Interest and Royalty Payment Directive and the Dividend Directive examined by the Court in the *T Denmark* and *N Luxembourg* judgments.

57 Judgment in *Luxembourg and Others v. Commission*, *supra* n. 49, paras 118–120.

evidence' demonstrating that another interpretation prevailed in national case law or administrative practice. Since the Commission had failed to do so, the Court rejected its analysis based on a reference system requiring a link between the tax advantage granted to the parent company and the tax burden borne by its subsidiaries.[58] As a result of that erroneous definition of the reference system, the Commission's subsidiary line of reasoning on selectivity based on an omission to apply a national anti-abuse provision was necessarily flawed too.[59]

The *Fiat Chrysler* and *Engie* judgments clearly indicate that the Member States' fiscal autonomy – given the division of competences between the Union and the Member States and in accordance with the Union's constitutional principle of conferral – limits the Commission's margin to tackle what it regards as 'unfair' tax treatments through Article 107(1) TFEU.

As the recent judgment in *Apple* demonstrates,[60] however, this does not mean that state aid law provides no useful basis for addressing unfair tax treatment. It can indeed fulfil that function provided that the Commission correctly identifies the reference system on the sole basis of national law. The case concerned two tax rulings granted by Irish tax authorities in favour of two non-resident Irish companies belonging to the Apple Group ('ASI' and 'AOE'). The Irish tax authorities excluded the profits generated by the intellectual property licences held by ASI and AOE from the tax base, on the ground that those companies' head offices were located outside of Ireland, and that the management of those licences depended on decisions taken by the Apple Group in the United States. The Commission, by contrast, based its analysis on an interpretation of a provision of Irish law concerning calculation of the tax base of non-resident companies, and considered that the Intellectual Property (IP) licences and related profits had to be allocated to the Irish branches of ASI and AOE. The Court upheld the appeal against the judgment of the General Court annulling the Commission's decision. It confirmed, in particular, that, under the relevant provision of Irish law relating to the calculation of tax payable by non-resident companies, the activities of the branches of ASI and AOE in Ireland had to be compared not to activities of other Apple Group companies, for example a parent company in the United States, but to those of other entities within those companies, particularly their head offices situated outside Ireland. Against that background, the Commission was able to consider, under its primary line of reasoning on selectivity, that the lack of active or critical functions performed by the head offices in relation to the IP licences and the multiplicity and centrality of the functions performed and risks assumed by the Irish branches should have led the Irish authorities to attribute the profits generated by those licences to the latter.

5 Promoting cooperation among national tax administrations

Numerous judgments reflect the Court's concern to protect the *effet utile* of cooperation mechanisms set up in this context, while ensuring that their implementation respects fundamental rights. It would, of course, go well beyond the scope of this *Guest Editorial* to provide an exhaustive picture of that case-law but I would like briefly to recall a few examples. The right to an effective judicial remedy against an 'information order' issued pursuant to the Tax Cooperation Directive ('DAC1')[61] however constitutes a first noteworthy illustration. That Directive, which does not apply to VAT,[62] established a system of cooperation between the Member States' tax administrations in order to address increasing difficulties encountered by them in assessing properly the taxes due as a result of the huge rise in the mobility of taxpayers and the number of cross-border transactions, as well as the internationalization of financial instruments.[63] A key condition for achieving that objective is the effective and timely execution of requests for information addressed by a tax administration of a Member State to that of another Member State, which may require the latter to adopt 'information orders' when it does not yet possess the requested information.[64] The Tax Cooperation Directive therefore requires the Member States to take all necessary measures to ensure the smooth operation of the administrative cooperation arrangements which it provides for.

The *Berlioz Investment Fund* case concerned the remedies that should be available to the addressee of an information order in the context of a penalty imposed for failure to comply with it.[65] The Directive does not specify the 'necessary measures' for the smooth operation of the administrative cooperation arrangements. The Court explained that they must include arrangements, such as pecuniary penalties, which ensure that there is sufficient incentive for the relevant person to respond to tax authorities' requests, and thereby enable the requested authority to fulfil its obligations towards the requesting authority.[66] As a Member State 'implements' EU law when adopting such a sanction, however, the person to which it is addressed is entitled to the right to an effective judicial remedy, as guaranteed by Article 47 of the Charter. The Court considered that that person must be able to

[58] *Ibid.*, paras 121 and 127–128.
[59] *Ibid.*, para. 173.
[60] Judgment of 10 Sep. 2024, *Commission v. Ireland and Apple Sales International* (C-465/20 P, EU:C:2024:724).
[61] Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (*O.J.* 2011, L 64, at 1).
[62] Article 2(2).
[63] Recitals 1 and 2.
[64] Article 5.
[65] Judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373).
[66] *Ibid.*, paras 36 and 38.

challenge *indirectly* the validity of the information order when it contests the penalty imposed on him.[67]

In the *État luxembourgeois (Right to bring an action against a request for information in tax matters)* judgment,[68] the Court went a step further and considered that Article 47 of the Charter additionally requires that a person who is subject to an information order without being the taxpayer under investigation may bring a *direct* action against that information order. Indeed, the essence of the right to an effective remedy guaranteed by that provision is not respected if a person first has to infringe an information order and thus be subject to the penalty attached to non-compliance with it before it can challenge the validity of that order.[69] By contrast, the Court considered that the fact that the taxpayer concerned by the investigation and third parties with whom that taxpayer had legal, banking, financial or economic relations were unable to bring a direct action against the information order addressed to the information holder did not violate their right to an effective remedy. That exclusion contributed to the speed and efficiency of cooperation between tax authorities[70] and was suitable for combating international tax fraud and tax evasion more effectively.[71] The Court concluded that the limitation on the right to an effective remedy was not disproportionate. A decision such as that at issue in the main proceedings did not place the taxpayer concerned under any legal obligation or at any risk of a penalty, and could be challenged by that taxpayer indirectly, in the context of an action against a subsequent correction or adjustment decision.[72] In the light of that reasoning, it seems that the taxpayer itself should also be entitled to challenge an information order directly before courts when that order is addressed to him or her.[73]

That judgment was followed by the *État luxembourgeois (Information on a group of taxpayers)* case.[74] The Court's ruling in that case again illustrates the importance of 'balancing' the legitimate objective of combating international tax fraud and tax evasion with respect for fundamental rights. In the main proceedings, the information holder, being unable to directly challenge the information order due to the aforementioned exclusion rule, had brought an action against the administrative fine imposed by the Luxembourg tax authority. The legality of the information order was then confirmed in the course of that action. This raised the question whether, in these circumstances, the taxpayer was entitled to a 'period of grace' to provide the information without being fined or whether, on the contrary, the administrative penalty operated *ex tunc*.[75] After recalling its previous case law, the Court considered that a new time limit was necessary in order to safeguard effectively the essence of the right enshrined in Article 47(1) of the Charter. That new time limit 'compensated' for the fact that the exclusion of a right to challenge the information order directly did not respect the essence of the right to an effective remedy as guaranteed by Article 47 of the Charter.[76]

A final series of illustrations concerns the reporting and notification requirements set out in the Tax Cooperation Directive. Following its amendment by Directive 2018/822 (the so-called 'DAC6'),[77] the Tax Cooperation Directive created an obligation for all intermediaries and, in their absence, the taxpayer involved in potentially aggressive cross-border tax arrangements capable of leading to tax avoidance or evasion, to report them to the competent tax authorities.[78] Those 'reportable arrangements' are defined by reference to a series of 'hallmarks', i.e., features of a cross-border arrangement that presents an indication of a potential risk of tax

[67] *Ibid.*, paras 55 and 56. That challenge may e.g., concern the 'foreseeably relevant' nature of the information requested for the administration and application of the tax legislation of the requesting Member State [Art. 1(1) of the Directive].

[68] Judgment of 6 Oct. 2020, *État luxembourgeois (Right to Bring an Action Against a Request for Information in Tax Matters)* (C-245/19 and C-246/19, EU:C:2020:795).

[69] *Ibid.*, paras 68–69.

[70] The Court referred in particular to Art. 7 of the Directive, which states that 'the [requested] information […] must be provided as quickly as possible and, except in certain special cases, within two months or six months depending on whether the requested authority is or is not already in possession of the requested information'.

[71] *Ibid.*, paras 86–91, 103 and 104.

[72] The Court emphasized in that respect that a decision ordering information to be provided is adopted during the preliminary stage of the investigation concerning the taxpayer in question, whilst only the last stage of that investigation, which begins with the sending of a proposal for correction or adjustment to the taxpayer concerned, should be regarded as contentious for that taxpayer during which the latter is able to exercise his or her right to be heard (*see ibid.*, para. 81 and case-law cited).

[73] *See* in that sense, A. Antoniou, *Judicial Protection in Exchange for Tax Information Procedures: Why Ex Post Protection is Not 'Effective' Protection*, in *Exchange of Information in the EU. Taxpayers' Rights, Transparency and Effectiveness* 105 (M. Malmgrén, M. Serrat Romaní, J. Korving & M. Eliantonio eds, Elgar, Cheltenham 2024).

[74] Judgment of 25 Nov. 2021, *État luxembourgeois (Information on a Group of Taxpayers)* (C-437/19, EU:C:2021:953).

[75] *Ibid.*, para. 86.

[76] *Ibid.*, paras 89–95, 97 and 98.

[77] Council Directive (EU) 2018/822 of 25 May 2018 (*O.J.* L 139, at 1). DAC7 [Council Directive (EU) 2021/514 of 22 Mar. 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (*O.J.* L 2021, 104, at 1)] extended the automatic exchange of information amongst Member States to income earned through digital platforms by sellers performing commercial activities, while DAC8 [Council Directive (EU) 2023/2226 of 17 Oct. 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (*O.J.* L, 2023/2226)] introduced in particular new rules introduces new rules on the reporting and exchange of information on crypto-asset users and transactions, and on cross-border rulings concerning high-net-worth individuals.

[78] Article 8ab of the Tax Cooperation Directive. On the reporting obligations bearing on 'intermediaries' of financial transactions under the DAC6, including a comparative analysis of its implementation in various Member States, *see* M. Tofan & A. A. Arseni, *The Professional Conflict Pertaining to Confidentiality – the Obligation of Disclosure for Intermediaries of Financial Transactions*, 13(1) Laws 4–11 (2024/2), doi: 10.3390/laws13010002. Some authors have expressed criticism about the fact that Art. 8ab(5) of the Administrative Cooperation Directive leaves room for significant differences in the implementation of the waiver based on professional privilege among the Member States. *See* e.g., A. Bianco, *DAC6 and the Challenges Arising from Its Disclosure Obligation*, 30(1) This Rev. s. 4.2.2 (2021), doi: 10.54648/ECTA2021002.

avoidance. They all serve to apply the 'main benefit test', which has as its purpose ascertaining whether 'the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage'.[79]

In its *Orde van Vlaamse Balies and Others* judgment,[80] the Court had declared invalid the obligation to notify set out in Article 8ab(5) of the Tax Cooperation Directive, in so far as it applies to lawyers. According to that provision:

> Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6.

The Court considered that that notification requirement violated the legal professional privilege of the lawyer protected by Article 7 of the Charter.[81] It interfered with the secrecy of legal consultation in so far as it required the lawyer-intermediary to notify other intermediaries who are not his or her clients about their reporting obligations. That notification indeed meant that third-party intermediaries would 'become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement'.[82] A further breach of Article 7 of the Charter arose from the fact that third-party intermediaries were, in turn, required to disclose this information to the tax authorities, given that the identification of other intermediaries forms part of the reporting obligation under Article 8ab(1) of the Directive.[83] The Court accepted that the legal professional privilege granted by the Charter is not absolute and that combating aggressive tax planning and preventing the risk of tax avoidance and evasion constitute objectives of general interest recognized by the EU, which can justify limiting it. However, the notification requirement at issue failed to pass the proportionality test, considering the fact, in particular, that the waiver from the reporting obligation for the lawyer-intermediary is without prejudice to the same obligation bearing on other intermediaries and to the requirement for that lawyer-intermediary to notify without delay his or her client of his or her reporting obligations, and that disclosing the identity of the lawyer-intermediary and of his or her having been consulted is not such as to assist tax authorities because information covered by legal professional privilege cannot be communicated to them without the client's consent.

In the *Belgian Association of Tax Lawyers* case,[84] organizations representing lawyers and tax consultants, and various bar associations, argued in more general terms before the Belgian Constitutional Court that several provisions of the Tax Cooperation Directive, in particular the reporting obligation of any potentially aggressive tax-planning cross-border tax arrangements, violated the Charter and certain general principles of EU law. In a preliminary ruling delivered in the context of these proceedings, the Court upheld the validity of the provisions at issue.

Firstly, the Court rejected the argument that that Directive infringed the principles of equal treatment and non-discrimination in so far as it did not limit the reporting obligation to corporate tax. In the light of the general objective of combating aggressive tax planning and preventing the risk of tax avoidance and evasion, corporate tax and other taxes such as income tax applicable to natural persons can be regarded as comparable. The reporting obligation's broad scope was not therefore manifestly inappropriate in the light of those objectives.[85]

Secondly, the Court considered that a number of concepts used in the Tax Cooperation Directive to define the scope of the reporting obligation, in particular the criteria for identifying aggressive tax planning arrangements subject to them, were sufficiently clear and precise to satisfy the general principles of legal certainty and legality in criminal matters. In particular, it does not appear particularly difficult for an intermediary or for the taxpayer to assess whether the main benefit or one of the main benefits that can reasonably be expected of the arrangement they design and/or use is fiscal in nature.[86] The Court held furthermore that the reporting obligation defined sufficiently clearly the information which it covers and that, therefore, the limitation which it entails in

79 *See* Annex IV of the Tax Cooperation Directive.
80 Judgment of 8 Dec. 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963).
81 Drawing inspiration from the case-law of the European Court of Human Rights on Art. 8(1) ECHR, the Court held that that Art. 7 of the Charter 'guarantees the secrecy of th[e] legal consultation, both with regard to its content and to its existence' and that individuals who consult a lawyer can therefore 'reasonably expect that their communication is private and confidential' [*ibid.*, para. 27, citing the judgment of the ECtHR of 9 Apr. 2019, *Altay v. Turkey (No 2)*, CE:ECHR:2019:0409JUD001123609, §49]. The legal professional privilege guaranteed in EU law for communication between lawyer and his or her client applies 'whatever the area of law to which [the legal advice] relates', including e.g., company law. *See* judgment of 26 Sep. 2024, *Ordre des avocats du Barreau de Luxembourg* (C-432/23, EU:C:2024:791), para. 51.
82 Judgment in *Orde van Vlaamse Balies and Others*, *supra* n. 80, para. 29.
83 *Ibid.*, paras 31 and 32.
84 Judgment of 29 Jul. 2024, *Belgian Association of Tax Lawyers and Others* (C-623/22, EU:C:2024:639).
85 *Ibid.,* para. 33.
86 *Ibid.*, para. 74.

respect of the private life of the intermediary and the relevant taxpayer is defined in a sufficiently precise manner.[87]

Thirdly, the Court explained that the declaration of invalidity affecting the notification requirement in the *Orde van Vlaamse Balies and Others* judgment was justified by the very specific protection that the relationship between a lawyer[88] and his or her clients warrants. That requirement is therefore valid, on the other hand, in so far as it applies to *other professionals* who may be authorized to ensure legal representation such as tax advisers, notaries, auditors, accountants or bankers. In the Court's view, exempting all those other intermediaries from the notification requirement would risk calling into question the effectiveness of the reporting mechanism.[89] The referring court also observed that the reporting obligation may concern cross-border arrangements that are lawful, genuine, non-abusive and the main advantage of which is not fiscal in nature. It had doubts whether the interference that that obligation entails with the right of taxpayers and intermediaries to a private life[90] was valid. The Court confirmed that the obligation did indeed constitute such an interference. The reporting obligation enables tax administrations to 'remedy promptly the regulatory disparities and loopholes on which the cross-border arrangements are based', and that is 'such as to reduce the interest for taxpayers in having recourse to tax arrangements the effective duration of which is likely to be correspondingly shortened'. Consequently, that obligation was such as to deter both those taxpayers and their advisers from designing and implementing cross-border, tax-planning mechanisms which, while lawful, are based on disparities between the various applicable national rules.[91] That interference with the right to private life at issue was nevertheless proportionate. The Court explained in that respect that the reporting obligation 'is a particularly effective means of combating aggressive tax planning and preventing the risks of tax avoidance and evasion'. Transmitting to the tax administration, at a very early stage, information on the cross-border arrangements containing one of the relevant hallmarks 'allows the Member States to react with precision and speed, if necessary in a coordinated manner, to aggressive tax-planning mechanisms, which the examination and monitoring of tax behaviour a posteriori does not allow quite as much'.

6 Concluding remarks

Enhancing tax fairness within the EU is not an easy task. That is, in particular, due to legal fragmentation across the EU in tax matters, which is difficult to overcome in light of the relevant rules of EU primary law governing harmonization in that area. The rationale underpinning the internal market implies that choices concerning whether and how to exercise, in particular, the freedom of establishment and the freedom to provide services, may legitimately be guided by the search for the most economically advantageous outcome, taking account of differences in the tax regimes of various Member States.[92] However, disparities between tax regimes applicable in different Member States undeniably constitute fertile ground for abusive or fraudulent practices aimed at tax evasion. The aggregate effects of such practices, which tend to proliferate in the absence of appropriate responses from the public authorities, not only create competitive distortions but also inevitably affect the ability of certain Member States to finance their public expenditure in general and the provision of high levels of social protection to the citizens in particular. In order to avoid a situation where the internal market gives rise to such collateral damage, sustained and coordinated efforts are required from different actors, both at EU level and Member State level. The examples used in this *Editorial*, which concern a variety of procedural settings and fields of EU law, demonstrate that the Court is fully conscious of the share of responsibility that it bears in that context. That responsibility includes, in particular, supporting the EU legislature's efforts in addressing unfair practices by economic operators in tax matters, even beyond the conceptual framework of fraud and abuse as such. The overall picture that emerges from the case-law examined is that of a Court contributing, within the limits of its judicial role, to a conception of the internal market which is consistent with the general objectives assigned to the Union, aiming in particular at 'the well-being of its peoples', a 'highly competitive social market economy' and 'social progress'.[93] The Court's role in promoting a 'fairer' internal market is not unlimited, however. The challenges arising in relation to multi-level fiscal governance within the EU must be addressed by taking duly into account the structural and substantive principles governing EU action, including the distribution of competences, the principles of subsidiarity, proportionality and institutional balance, and respect for fundamental rights as guaranteed by the Charter.

[87] *Ibid.*, para. 89.

[88] Within the meaning of Directive 98/5/EC of the European Parliament and of the Council, of 16 Feb. 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (*O.J.* 1998 L 77, at 36).

[89] Judgment in *Belgian Association of Tax Lawyers and Others*, *supra* n. 84, para. 99.

[90] In a nutshell, 'revealing to the administration the result of tax design and engineering work' (*ibid.*, para. 129).

[91] *Ibid.*, paras 130 and 131.

[92] In particular, as I recalled, EU law in principle does not preclude a taxpayer from searching the most favourable tax treatment, e.g., by choosing the most tax efficient structure for his or her business activities.

[93] Article 3(1) and 3(3) TEU.