The vagueness of tax fairness

A discursive analysis of the Commission's 'fair tax agenda'

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1. Introduction

Unless the Treaties are read in very liberal terms, the European Union (EU) is not competent for defining how a fair tax system should look like and determine who should pay taxes and in which proportion within the EU. Yet, the European Commission has increasingly been using references to tax fairness in its tax policy discourse. This raises questions on the future of EU tax law and the Commission's role in responding to European citizens' concerns and achieving tax fairness. Traditionally, EU tax law has not been characterized by the functions pursued by most domestic tax systems, specifically, budgetary and redistributive objectives.¹ Instead, the primary role of EU tax law has been to harmonize Member States' national tax systems in order to prevent disparities that affect the establishment or the functioning of the internal market and distort competition. This is fully in line with the mandate of the EU in tax matters. Article 113 of the Treaty on the Functioning of the European Union (TFEU) that provides for the legal basis to harmonize indirect taxes explicitly links the EU's tax competence with the need to 'ensure the establishment and the functioning of the internal market and to avoid distortion of competition'. The approximation of direct tax laws is justified in the same manner under Article 115 of the TFEU.² Therefore, it is not surprising that most of the past tax initiatives of the European Commission rely on a market-oriented approach.³

The analysis of past European tax directives emphasizes that this market-oriented approach has been given an economic meaning significantly related to the idea of free trade.⁴ In tax, the objective of fostering the common/single/internal market has been defined by reference to the following goals and principles: the free movement of goods and services (e.g. VAT and excise duty directives and directive on administrative cooperation), the removal of double taxation (e.g. VAT directive, directive on administrative cooperation, and tax merger directive), the principles of tax neutrality (e.g. VAT directive) and non-discrimination (e.g. excise duty directive and interest-royalty directive), and the need to guarantee the undistorted character of competition in the market (e.g. VAT directive, parent-subsidiary directive, tax merger directive)

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¹ On the objectives of taxation, see R.S. Avi-Yonah, *The Three Goals of Taxation*, 60 Tax Law Review 1 (2006) pp. 1-28.

² As explained by Panayi, this provision does not explicitly refer to tax, but it has been relied upon to harmonize matters related to direct taxation (C.H.J.I. Panayi, *European Union Corporate Tax Law* (Cambridge University Press, 2013), p. 4).

³ See European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, Towards a more efficient and democratic decision making in EU tax policy*, COM(2019) 8 final (15 Jan. 2019), p. 1: 'Initially, EU tax policy focused mostly on removing obstacles to the Single Market and on preventing distortions to competition'.

⁴ See Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1 (11 Dec. 2006); Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9/12 (14 Jan. 2009); Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1 (11 Mar. 2011); Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (29 Dec. 2011); Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310/34 (25 Nov. 2009); Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157/ 49 (26 Jun. 2003). From a temporal perspective, the author has analysed the first as well as the last versions of each directive.

in order to increase the productivity and competitive strength of European enterprises at the international level (e.g. parent-subsidiary directive, tax merger directive).⁵

This article highlights that this market-oriented approach has recently been complemented by a fairness-oriented approach that places the emphasis on new objectives for European action in the field of taxation.⁶ Before 2015, most proposals of the Commission in the field of taxation relied on a market-based approach, which appeared to be largely disconnected from European citizens' concerns. Post-2015, the Commission's new tax initiatives are increasingly framed as part of the solution to the EU's legitimacy crisis.⁷ To a certain extent, the Commission's new tax agenda echoes the traditional functions of tax systems, specifically, the revenue raising and redistributive functions. This evolution might be understood as a response to new developments in the global tax context that necessarily impact tax policy at both the EU and Member States' levels.

Although the EU does not – as such – have a legal mandate to integrate tax fairness into Member States' tax systems, the Commission has been able to justify its new tax initiatives by reference to the need of avoiding the fragmentation of the internal market that would be caused by Member States' uncoordinated actions. This contribution does not intend to analyse whether this justification is convincing from a legal perspective. This issue, which puts into question the legal basis of the EU's tax action under the European Treaties, has already been addressed in the literature.⁸ Moreover, this contribution does not discuss the philosophical issue as to whether the EU has a moral duty – beyond its legal mandate – to pursue tax justice objectives and, if so, how these objectives should be defined.⁹ Rather, this contribution analyses tax fairness in the specific context of the European Commission's new tax narrative and proposals. The objective is to provide a critical evaluation of this narrative, not to provide a comprehensive analysis of the concept of 'tax fairness' under economic, political, and philosophical theory.¹⁰

Whether or not the EU has a moral duty to pursue tax fairness, the European Commission has integrated tax fairness into its tax agenda. From this observation, the question arises as to whether the Commission is being serious about its new tax fairness objectives or whether it is rather using the idea of tax fairness as a rhetorical instrument. This question touches on the future and the fundamental role of EU tax law. A serious EU tax fairness agenda would include

⁵ Note that the directive on administrative cooperation in tax matters also refers to the prevention of budgetary losses which is not, as such, a market-based objective.

⁶ The inclusion of 'non-economic' values in internal market legislation is not specific to EU tax law. On this topic, see B. de Witte, *Non-market values in internal market legislation*, in *Regulating the Internal Market* (N.N. Shuibhne ed., Edward Elgar, 2006), pp. 61-86. In the global context, see D. Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist* (Oxford University Press, 2012).

⁷ See, among others, European Commission, *Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015) 302 final (17 Jun. 2015).

⁸ A few references are mentioned *infra*, section 3 (see, in particular under *infra* n. 73).

⁹ On this topic, see, among others, R. Bellamy, *Between Cosmopolis and Community: Justice and Legitimacy in a European Union of People*, in: *Nationalism and globalization* (S. Tierney ed., Hart Publishing, 2015), pp. 207-232; A. Sangiovanni, *Solidarity in the European Union* 33 *Oxford Journal of Legal Studies* 2 (2013) pp. 213-241. See also P. Van Parijs, *Bottom-up Social Europe. From subsidiarity to Euro-Dividend*, Plenary address at the Conference organized at the initiative of the Finnish Presidency of the European Union, (9-10 November 2006).

¹⁰ A theoretical analysis of tax fairness with references to the economic, philosophical and political understanding of the concept can be found in past work of tax scholars. See, among others, Y. Brauner & M.J. McMahon Jr. eds., *The Proper Tax Base: Structural Fairness from an International and Comparative Perspective – Essays in Honour of Paul McDaniell*, Series on International Taxation no. 39 (Kluwer Law International, 2012); I.J.J. Burgers & I.J. Mosquera Valderrama, *Fairness: A Dire International Tax Standard with No Meaning?* 45 *Intertax* 12 (2017) 767-783; F. Debelva, *Fairness and International Taxation: Star-Crossed Lovers?* 10 *World Tax Journal* 4 (2018); D. Duff, *Tax Fairness and the Tax Mix*, The Foundation for Law, Justice and Society (2008); J.C. Fleming, R.J. Peroni & S.E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income* 5 *Fla. Tax Rev.* 4 (2001), pp. 299-354; S.J.C. Hemels, *Fairness: A Legal Principle in EU Tax Law?*, in: *Principles of Law: Function, Status and Impact in EU Tax Law*, GREIT Series (C. Brokelind ed., IBFD 2014), pp. 413-437; P.B.W.L. Lamberts, *Fair Taxation: Truth is in the Eye of the Beholder* 45 *Intertax* 1 (2017), pp. 49-53; S.M. Sheffrin, *Tax Fairness and Folk Justice* (Cambridge University Press, 2013). See also H. Hammar and S.C. Jagers, *What is a fair CO₂ tax increase? On fair emission reductions in the transport sector*, 61 *Ecological Economics* 2/3 (2007), pp. 377-387. See also Cerioni who refers to the 'four canons of taxation', including equity (L. Cerioni, *The European Commission proposal for a 3% 'call rate' as a new suggestion for a EUCIT* 27 *EC Tax Review* 5 (2018), pp. 237-249).

measures aimed at achieving tax fairness objectives such as those generally discussed in political philosophy. Traditionally, tax fairness has been assessed from two main perspectives. First, distributive tax fairness refers to the substance of the tax system and its impact on people with regard to the allocation of resources. Distributive tax fairness raises the question as to whether and how the tax system should be used to provide equality (e.g. equal opportunities) to individuals. Second, procedural tax fairness relates to the legitimate and democratic character of the rules surrounding the decision-making process in tax matters. In a cross-border context, procedural fairness is concerned with rules aimed at enabling countries to make ‘fiscal choices about the size of the budget and the level of *domestic* redistribution’.¹¹ From this perspective, procedural tax fairness might be considered as a prerequisite for substantive, distributive tax fairness. Procedural fairness provides the ‘background’ to tax justice.¹² On this basis, a serious EU tax fairness agenda would imply that the EU’s tax policy is aimed at achieving objectives in terms of distributive justice (e.g. by using EU tax law to provide equal economic opportunities to European citizens) and/or procedural fairness (e.g. by making the decision-making process in tax matters more transparent, by reinforcing the role of the European Parliament, or by protecting Member States’ ability to levy taxes).¹³

By means of six case studies, this article explains how the tax narrative of the European Commission has evolved to integrating fairness as a multidimensional concept (*section 2*). The Commission uses fairness to cover three main types of objectives including objectives that differ from what has traditionally been linked to tax fairness in the political philosophy literature (*section 3*).¹⁴ The six case studies help to emphasize the vagueness and ambiguity of the Commission’s discourse, which might indicate that it is not taking tax fairness – as a procedural and/or distributive issue – seriously.¹⁵ This claim is then further analysed by means of an evaluation of the European Commission’s recent tax initiatives and proposals. Building upon the work of legal scholars and economists, this article argues that most of the Commission’s proposals are unlikely to achieve their tax fairness objectives (*section 4*). Again, this analysis suggests that tax fairness has not yet been given a serious place in the EU’s tax agenda and that, thus far, the tax fairness rhetoric might have prevailed over a genuine substantive tax fairness agenda. At best, the Commission’s agenda will achieve objectives in terms of procedural fairness. From this perspective, this article contributes to the deconstruction of the discourse of the Commission by demonstrating that the concept has been used loosely in order to justify action in the field of tax.¹⁶

¹¹ P. Dietsch & T. Rixen, *Tax Competition and Global Background Justice* 22 *The Journal of Political Philosophy* 2 (2014), pp. 150-177, in particular section IV (p. 176: ‘(...) the idea of background justice emphasizes institutional reform over redistributive obligations. It favours preventive institutional reform to remedial redistribution of income’). In the tax scholarship, fairness among nations has been discussed under the ‘inter-nation equity’. See N. Kaufman, *Fairness and the Taxation of International Income* 29 *Law and Policy in International Business* (1998), 198. On global tax justice, see T. Dagan, *International Tax and Global Justice*, 18 *Theoretical Inquiries in Law* 1 (2017), pp. 1-35; T. Pogge & K. Mehta (eds.), *Global Tax Fairness* (Oxford University Press, 2016).

¹² See Dietsch & Rixen, *supra* n. 11 p. 177.

¹³ On the interaction between the concept of tax fairness and tax justice and the two dimensions (distributive and procedural) of tax fairness, see P. Hongler, *Justice in International Tax Law. A Normative Review of the International Tax Regime* (IBFD, 2019), in particular p. 5 (footnote 8) and chapter 6.

¹⁴ Discursive analysis sometimes makes use of natural language processing. Due to a lack of technical knowledge, this method was not used for this research. Further research on tax fairness in EU law could consider using natural language processing to provide a broader overview of how the concept of tax fairness is evolving in EU tax law. On the role of narratives in understanding European integration from institutional and non-institutional perspectives, see I. Manners and P. Murray, *The End of a Noble Narrative? European Integration Narratives after the Nobel Peace Prize* 54 *Journal of Common Market Studies* 1 (2016), pp. 185-202.

¹⁵ A similar approach has been used by Firat Cengiz to study EU competition law (F. Cengiz, *Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach* 54 *Journal of Common Market Studies* 4 (2016), pp. 826-845). Cengiz also used a discursive approach; she based her analysis on the coding of EU documents to empirically assess changes in the EU’s political discourse on competition law.

¹⁶ This article focuses on the use of tax fairness in the discourse of the Commission and does not provide an analysis of how this concept has been used by the other European institutions, in particular the Court of Justice of the European Union, which would require a separate analysis of the case law.

2. The integration of tax fairness objectives in recent European tax initiatives: six case-studies

This section highlights how the European Commission increasingly justifies its action in the field of taxation by reference to EU citizens' alleged preferences and the need to guarantee fairness in Member States' tax systems. This section analyses this new narrative in six different (but related) contexts: (a) the initial proposal in favour of a financial transaction tax (FTT); (b) the use of EU State aid law to counter favorable tax regimes that benefit multinational enterprises (MNEs); (c) the adoption of an anti-tax avoidance package, in particular, the two anti-tax avoidance directives (ATAD I & II); (d) the 2011 and 2016 proposals in favour of a Common Consolidated Corporate Tax Base (CCCTB); (e) the proposal on the taxation of the digital economy; and (f) the proposed changes to the EU's voting rules for tax matters. Readers who are familiar with EU tax law might decide to skip this section and move directly to *section 3*.

The six case studies present different types of intervention of the European Commission in the context of tax. Four of the case studies ((a), (c), (d), and (e)) are legislative proposals. Among these cases, only the directives that were proposed in the framework of the anti-tax avoidance's package have thus far been adopted. The State aid decisions and the recommendations regarding voting requirements differ from the other case studies since they are not part of a positive tax harmonization process. The State aid cases illustrate the power of the Commission to ensure that Member States do not violate the EU treaty provisions surrounding State aid law (Article 107 of the TFEU and following). The recommendations regarding voting requirements are part of a communication of the Commission and they do not require the adoption of a directive or a modification of the treaties. All case studies have been included in the analysis under this section because they provide excellent examples of how the Commission increasingly links its actions to tax fairness and citizens' concerns.¹⁷

This section does not discuss the technical details of the six case studies. The main objective is to show how they have been justified by the Commission by reference to the objective of integrating fairness in Member States' tax systems. The Commission's change of narrative appears to have been initiated in 2011 with the proposal for a FTT and later confirmed in 2015 in the Commission's work program.¹⁸

a) Financial transaction tax

The Commission made an early reference to the concept of tax fairness and citizens' concerns in 2011 in its initial proposal in favour of a FTT.¹⁹ The objective of this proposal, which was the Commission's 'fiscal response' to the financial crisis, was to 'ensure that financial institutions make a fair contribution to covering the costs of the recent crisis and to ensure a level playing field with other sectors from a taxation point of view'.²⁰ Otherwise stated, the

¹⁷ References to fairness can also be found in the Commission's communication on its action plan on VAT but not to the same extent, which is why the 2016 VAT Action Plan and the recent proposals of the Commission in the field of VAT were not included in this analysis. See European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT. Towards a single EU VAT area – Time to decide*, COM(2016) 148 final (7 Apr. 2016).

¹⁸ See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, A New Start*, COM(2014) 910 final (16 Dec. 2014). Before 2015, the Commission's work programs included reference to fairness but only in the context of 'fair competition'. As noted by Hemels, some earlier documents released by the European Commission also included references to the concept of fairness in the context of tax (Hemels, *supra* n. 10, pp. 413-437, footnotes 2 and 3 and section 18.6.4).

¹⁹ European Commission, *Proposal for a Council directive on a common system of financial transaction tax and amending Directive 2008/7/EC*, COM(2011/0594 final (28 Sept. 2011).

²⁰ European Commission, *supra* n. 19, Explanatory Memorandum, point 1.1.

reference to fairness in this context can be understood as a two-fold requirement on the financial sector: first, it should compensate the fact that the costs of the economic crisis have been substantially borne by governments and citizens and, second, it should contribute to States' revenue in the same way as the non-financial sectors.²¹

b) Tax rulings and State aid law

Beginning in 2015, the European Commission released decisions in which it concluded that tax rulings issued by Belgium, Ireland, Luxembourg, and the Netherlands were incompatible with EU State aid law.²² Although these decisions are fairly technical, they have received unprecedented media coverage, possibly due to the fact that some of the tax rulings had been granted to well-known US-based companies: Starbucks, Apple, and Amazon. Additionally, the extensive media coverage of these decisions can be explained by the efforts made by the European Commission to inform the general public.²³ Information has not been limited to competition and tax lawyers, and press releases have been illustrated for the public with simple charts.²⁴ Interestingly, Commissioner Margrethe Vestager emphasized the positive role that State aid law can play in fostering fairness in taxation.²⁵ For example, in a speech that she delivered in 2016, Vestager explained 'why fair taxation matters', stating as follows:

For me, that issue of fairness is the most important message from our enforcement of state aid rules in tax cases and it is my duty as Commissioner for competition to make sure that the rules apply in a fair manner to any company that does business in the EU's single market- regardless of size, sector or nationality. (...). Responsible taxpayers don't have to pick up the bill left by companies that avoid tax. And the public gains confidence that there's a fair chance for everyone, not just for a few well-connected companies.²⁶

c) Anti-Tax Avoidance Package

In January 2016, the European Commission introduced its 'Anti-Tax Avoidance Package' in which a 'fair and efficient corporate taxation' is described as a 'cornerstone of the Single Market'.²⁷ In its communication and accompanying document, the Commission justifies the need to target tax avoidance at the EU level by reference to the building of a 'stronger', 'well-functioning' and 'healthy' single market: 'In a Single Market founded on free movement of

²¹ See first recital of the proposal and point 1.1. of the explanatory memorandum. See also p. 46 of the 2013 impact assessment (European Commission, *Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax. Analysis of policy options and impacts*, SWD(2013) 28 final (14 Feb. 2013): 'Macro-economic effects of the tax could also be definitely positive if one took into account fairness and redistribution effects, which can typically not be modelled. Indeed, the objective that the tax should ensure that the financial sector makes a fair and substantial contribution to covering the cost of the crisis is not only based on efficiency grounds (...). This objective is also linked to the aim of closing a fairness gap. For as long as this gap was perceived of not having been (sufficiently) closed and, thus other would continue having to shoulder the burden, there remains the underlying risk of social tensions, general strikes and political instability'. See also the European Commission Press Release, *Financial Transaction Tax: Making the financial sector pay its fair share*, IP 11/1085 (2011).

²² European Commission, *Commission Decision of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat*, C(2015) 7152 final (21 Oct. 2015); European Commission, *Commission Decision of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks*, C(2015) 7143 final (21 Oct. 2015); European Commission, *Commission Decision of 11 January 2016 on the excess profit exemption state aid scheme, SA.37667 (2015/C) (ex 2015/NN)*, C(2015) 9837 final (11 Jan. 2016); European Commission, *Commission Decision of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*, C(2016) 5605 final (30 Aug. 2016); European Commission, *Commission Decision of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon*, C(2017) 6740 final (4 Oct. 2017).

²³ See the webpage of DG competition devoted to tax rulings: European Commission, *Tax Rulings*, available at http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html (accessed 10 Jan. 2020).

²⁴ See, e.g., for the Amazon case: European Commission, *State aid: Commission finds Luxembourg gave illegal tax benefits to Amazon worth around €250 million*, Press Release (4 Oct. 2017) available at http://europa.eu/rapid/press-release_IP-17-3701_en.htm (accessed 10 Jan. 2020).

²⁵ Note that the Commissioner's speech includes other extracts that refer to fairness.

²⁶ Commissioner M. Vestager, "Why fair taxation matters", speech delivered at the Copenhagen Business School, (9 Sep. 2016).

²⁷ European Commission, *Communication from the Commission to the European Parliament and the Council, Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the UE*, COM(2016) 23 final (28 Jan. 2016), [hereafter: EU Anti-Tax Avoidance Package 2016].

goods, persons, services and capital, uncoordinated measures against profit shifting can do more harm than good.²⁸ Moreover, the Commission underscores its ‘priority to develop a deeper and *fairer* Internal Market, which is fundamental to delivering a thriving economy *that benefits all*’ (emphasis added).²⁹

The Commission’s communication and accompanying staff document also include several references to the concept of fairness: the tax system should be *fair*; ‘certain corporations avoid paying their *fair share*’ of taxes; and Member States have the opportunity to ‘help build a *fairer* (...) tax system in the EU’.³⁰ In this context, the concept of fairness can be understood as a requirement for everyone to pay taxes, including corporations.³¹ The Commission explicitly links this idea to citizens’ concerns, stating as follows:

As Europe emerges from a difficult economic crisis, citizens understandably resent having to carry a heavier tax burden while certain corporations avoid paying their fair share, with sometimes the voluntary or involuntary complicity of national governments. This uneven burden-sharing erodes fairness in taxation, reduces general tax-payer morale and threatens the social contract between citizens and their governments. The European Parliament, voicing the concerns of European citizens, has demanded that these practices should stop.³²

In May 2016, the directive on administrative cooperation was amended to include mandatory automatic exchange of country-by-country reports between Member States (Directive 2016/881).³³ A few months later, in July 2016, the first Anti-Tax Avoidance directive (ATAD I) was adopted. Council Directive 2016/1164 provides five rules ‘against tax avoidance practices that directly affect the functioning of the internal market’.³⁴ In July 2017, ATAD I was amended by a second directive (ATAD II) to broaden the scope of application of one of the anti-avoidance provisions (i.e. the provision on hybrid mismatches).³⁵ The recitals of these three directives are characterized by the same language as that in the European Commission’s Anti-Tax Avoidance Package. Harmonization is justified by reference to the objective of encouraging multinationals to ‘pay their fair share of tax in the country where profits are made’ (Recitals 4 and 8 of Directive 2016/881), the need to ensure and improve the ‘good functioning’ and the ‘resilience’ of the internal market (Recitals 8 and 10 of Directive 2016/881; Recitals 2, 3, and 16 of ATAD I; Recital 27 ATAD 2) as well as by reference to the ‘imperative to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty’ (Recital 1 of ATAD 1 and ATAD 2). The importance of citizens’ trust in tax systems is even mentioned as one of the expected results of the ATAD I.³⁶

²⁸ EU Anti-Tax Avoidance Package 2016, *supra* n. 27, point 2.

²⁹ EU Anti-Tax Avoidance Package 2016, *supra* n. 27, point 1.

³⁰ EU Anti-Tax Avoidance Package 2016, *supra* n. 27, for instance in point 7.

³¹ This idea does not make much sense from an economic viewpoint: only people ultimately bear a tax burden.

³² EU Anti-Tax Avoidance Package 2016, *supra* n. 27, point 1. See also the reference to the idea that ‘public trust’ should be reinforced in point 5 of the Communication. See also European Commission, *Commission Staff Working Document accompanying the document “Communication from the Commission to the European Parliament and the Council – Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU”*, SWD(2016) 6 final (28 Jan. 2016), point 3.1. (reference to ‘restore fairness’) and footnote 20 (reference to behavioral economics’ evidence of the role of fairness in taxation).

³³ Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146/8 (3 Jun. 2016).

³⁴ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (19 July 2016) [hereafter ATAD I]. As explained by Dourado, the provisions on exit taxation do not fit into this general objective; they are ‘aimed at preventing difficulty in collecting taxes’ (A.P. Dourado, *The EU Anti-Tax Avoidance Package: Moving Ahead of BEPS?* 44 Intertax 6/7 (2016) p. 441).

³⁵ Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144/1 (7 Jun. 2017).

³⁶ See European Commission, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, COM(2016) 26 final, (28 Jan. 2016), point 1.4.3. ‘The trust of the public, citizens and taxpayers in general to the fairness of the tax systems will be strengthened’.

d) Common Consolidated Corporate Tax Base

In 2016, the Commission relaunched its proposal in favour of a Common Consolidated Corporate Tax Base (CCCTB) that had first been introduced earlier in 2011 but had not been approved due to a lack of agreement among Member States.³⁷ In comparison to the 2011 proposal, the 2016 proposal is divided in two steps beginning with the adoption of a common corporate tax base (CCTB) to be followed by a consolidation stage (CCCTB).

From 2011 to 2016, the rationale underlying the Commission's proposals has strongly evolved. Back in 2011, the Commission's justification for its proposal to harmonize some aspects of Member States' corporate income tax system was to 'tackle some major fiscal impediments to growth in the Single Market'.³⁸ The general objective of the proposal was to make the EU a 'more attractive place to operating a business' and enhance 'fair competition in the internal market'.³⁹ Among the specific goals of the proposal, the Commission staff working document accompanying the proposal included the following objectives: the 'reduction of additional corporate tax related compliance costs for companies', the 'elimination of double taxation for companies operating in the EU Internal Market' and the 'elimination of the over-taxation on cross-border economic activity'.⁴⁰ These objectives all mimicked the goals that have been pursued by past directives in direct taxation.

In 2016, the language of the Commission completely changed. The emphasis is now placed on the role of the CCCTB for increasing the fairness of tax systems. References are made to the need to 'eliminate both double taxation and double non-taxation' and to the fact that the 'corporate tax environment in the Union should be shaped in accordance with the principle that companies pay their fair share of tax in the jurisdiction(s) where their profits are generated' (Recital 2 of the 2016 CCTB and CCCTB proposals).⁴¹ In the 2016 Commission Staff Working Document accompanying the proposals, the original market-oriented goal of the Commission has been pushed into the background and replaced by the general objective of 'enhancing the fairness of the tax system'.⁴² Similarly, new specific objectives that strongly contrast with the objectives that were mentioned in the 2011 impact assessment have been added to the 2016 impact assessment. The 2016 proposal is intended to 'reduce cross-border tax planning possibilities', 'ensure that companies pay a fair share of the tax burden', and 'enhance general tax payer morale, which is currently seriously undermined by a strong perception that international players are largely escaping taxation'.⁴³ Explicit references are made to citizens' perception of the tax system as unfair.⁴⁴ The 2016 impact assessment states as follows:

³⁷ See the webpage of DG Taxud devoted to the CCCTB: Commission, *Common Consolidated Corporate Tax Base (CCCTB)*, available at https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en (accessed 10 Jan. 2020).

³⁸ European Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM(2011) 121/4, (16 Mar 2011), p. 4 ('1. Context of the proposal'). Hemels criticized the lack of references to fairness between businesses and taxpayers in Hemels, *supra* n.10, section 18.6.2.

³⁹ See European Commission, *Commission Staff Working document, Impact Assessment, Accompanying document to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, SEC(2011) 315 final (16 Mar. 2011), p. 16 (3. Objectives) [hereafter: CCCTB Impact assessment 2011].

⁴⁰ CCCTB Impact assessment 2011, *supra* n. 39, p. 16 (3. Objectives).

⁴¹ Note that a reference to double non-taxation was also used in Recitals 2 and 3 of the Council Directive 2014/86/EU of 8 July 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, OJ L 219/40 (25 Jul. 2014).

⁴² See European Commission, *Commission Staff Working Document, Impact Assessment. Accompanying the document, Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB)*, SWD(2016) 341 final (25 Oct. 2016), p. 23 ('3.1. General Objectives') [hereafter: CCCTB Impact assessment 2016].

⁴³ CCCTB Impact assessment 2016, *supra* n. 40, p. 23 (3.1. General Objectives).

⁴⁴ The impact assessment also implicitly links citizens' negative perceptions on taxation to tax leaks. CCCTB Impact assessment 2016, *supra* n. 40, p. 35: 'Over the past years, more and more large-scale tax avoidance cases have become publicly known.' The Luxembourg leaks took place in 2014. The Panama Papers were released in 2016 and the Paradise Papers in 2017.

(...) citizens perceive tax systems as unfair since some corporate taxpayers might be able to avoid taxation by exploiting tax planning strategies. This perceived lack of fairness threatens the social contract between governments and their citizens and may impact overall tax compliance.⁴⁵

e) Taxation of the Digital Economy

The initiatives of the European Commission in the field of digital taxation rely on the idea that current corporate tax rules – designed to apply to businesses with some sort of physical presence – have become inadequate for coping with the challenges of the digital economy.⁴⁶ These tax rules are deemed to distort competition, create opportunity for tax avoidance, and lead to a risk of fragmentation of the internal market if Member States unilaterally decide to reform their tax system to address the challenges of the digital economy.⁴⁷ The Commission proposes to intervene in two steps: first, to adopt a digital service tax in the short term and as an interim measure (defined as a ‘tax on gross revenue levied on digital activities relying strongly on user contributions’) and, second, to design new rules to capture ‘digital presence’ in the longer term.⁴⁸

The impact assessment as well as the two proposals of the Commission include several references to ‘social fairness’. For instance, the impact assessment states as follows:

Lower (or even no) taxes paid on profits from digital activities puts at risk the sustainability of public finances. It results in unfair burden sharing across taxpayers, constraints the financing of our social models and ultimately weakens our social contract. (...) The perception of the social fairness of the tax system suffers if companies do not contribute their 'fair share' to budgets. Digital businesses conducting sizeable activities in a jurisdiction will usually also benefit from the public infrastructure offered by that jurisdiction. (...) 14 out of 21 tax administrations as well as 67% of respondent agree that ‘social fairness is impacted because some digital companies do not pay their fair share of taxes’.⁴⁹

In this quote, fairness is first defined by reference to the primary role of tax measures, specifically, their budgetary role, which is to generate sufficient revenue. Second, the Commission seems to define social fairness by reference to the benefit principle, which is used in tax policy to justify taxation by assuming that taxes should be paid in compensation for the benefits derived from the State. Aside from the benefit principle, the other principle used to justify taxation is the ability-to-pay principle which implies that everyone should pay taxes according to their taxable ‘capacity’.⁵⁰ The Commission does not explicitly refer to this other

⁴⁵ CCCTB Impact assessment 2016, *supra* n. 40, p. 23, p. 4. A similar quote can be found in European Commission, *supra* n. 7, p. 2.

⁴⁶ European Commission, *Commission Staff working document, Impact assessment, Accompanying the document, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, SWD(2018) 81 final/2 (21 Mar. 2018), p. 4 [hereafter: Digital Economy Impact Assessment 2018].

⁴⁷ See Digital Economy Impact Assessment 2018, *supra* n. 46, p. 16-20.

⁴⁸ Digital Economy Impact Assessment 2018, *supra* n. 46, p. 7.

⁴⁹ Digital Economy Impact Assessment 2018, *supra* n. 46, p. 19. See also the webpage devoted to EU Commission proposals on the taxation of the digital economy: European Commission, *Fair Taxation of the Digital Economy*, available at https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en (accessed 10 Jan. 2020). The Commission also refers to ‘rising inequalities’ and ‘perceptions of a lack of social justice’ in the European Commission, *Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy*, COM(2018) 146 final (21 March 2018).

⁵⁰ On the benefit and the ability-to-pay principle, see, among others, Debelva, *supra* n. 10 and Duff, *supra* n. 10. See also E.C.C.M. Kemmeren, Chapter 1. *The CJEU and the Internal Market Concept in Direct Taxation*, in: *EU Tax Law and Policy in the 21st Century* (W. Haslechner, G. Kofler & A. Rust eds., Kluwer Law International, 2017), p. 3, at p. 10-11; S. Utz, *Ability to Pay*, 23 Whittier L. Rev., (2001-2002) pp. 867-950.

principle, although it could be argued that the reference to a ‘fair share of tax’ is an implicit reference to the ability-to-pay principle.

f) Qualified majority voting requirements in the field of taxation

In 2019, the Commission released a communication in which it argues for a ‘more efficient and democratic decision making in EU tax policy’.⁵¹ In this document, the Commission provides argument in support of moving to qualified majority voting on certain tax matters. According to the Commission, such a move does not require the modification of the TFEU.⁵² The Union could simply rely on the ‘passerelle clauses’ (Articles 48(7) TEU and 192(2) of the TFEU), which already allow using a qualified majority under certain circumstances.⁵³

The Commission provides three main arguments in support of its recommendation. First, it considers that ‘taxation cannot deliver its full potential to help preserve and deepen the Single Market and to support inclusive growth across countries because of unanimity’.⁵⁴ This first objective echoes the traditional market-oriented approach that has guided the Commission in its past tax initiatives. Second, the Commission justifies its recommendation by reference to the need to protect national tax sovereignties. Although EU tax policy has traditionally been regarded as putting limits on Member States’ fiscal autonomy, the Commission contends that EU tax policy is a prerequisite to protect Member States’ tax sovereignty in the context of the globalized economy.⁵⁵ Third, the Commission considers that qualified majority voting would lead to ‘better decision-making for better decisions and stronger democratic legitimacy’.⁵⁶ Qualified majority voting would reinforce the role of the European Parliament, which has only a consultative role under Articles 113 and 115 of the TFEU.⁵⁷ In its communication, the Commission supports the role of the European Parliament in the context of the European democratic deficit, stating as follows: ‘Excluding the directly elected European Parliament from decision-making in such an important policy area as taxation, is at odds with the democratic goals of the Union. A move to the ordinary legislative procedure would close this democratic deficit.’⁵⁸

The Commission frames most of these objectives by using the concept of fairness, making reference to the need to ensure a ‘fair tax environment for all’, a ‘fairer and more stable environment for businesses’ with a ‘a modern, business-friendly and fair corporate tax system for the entire EU’ where ‘multinationals paid a fair share of tax proportionate to where they generate their profits’ and where the ‘fairness of Member States’ tax systems’ is not undermined by tax competition.⁵⁹ The relevance of these references can be questioned. The Commission’s recommendation concerns the EU’s institutional rules and cannot, as such, have any direct substantial impact on tax fairness. It could, however, have an impact on procedural fairness. At best, the Commission’s recommendation on voting rules will have a direct impact on procedural tax fairness and an indirect one on distributive tax fairness by facilitating the decision-making process in tax matters.⁶⁰

⁵¹ European Commission, *supra* n. 3.

⁵² European Commission, *supra* n. 3.

⁵³ European Commission, *supra* n. 3, in particular p. 10.

⁵⁴ European Commission, *supra* n. 3, section 2.1, pp. 3-6.

⁵⁵ European Commission, *supra* n. 3, section 2.2, pp. 6-7.

⁵⁶ European Commission, *supra* n. 3, section 2.3., pp. 7-8 and p. 2.

⁵⁷ European Commission, *supra* n. 3.

⁵⁸ European Commission, *supra* n. 3, p. 2.

⁵⁹ European Commission, *supra* n. 3.

⁶⁰ *Infra*, section 4.

3. From a market-centric to a vague fairness-centric approach

The six initiatives and/or proposals analysed above (*section 2*) highlight that the Commission repeatedly exploits the concept of fairness to justify its recent initiatives in the field of taxation. Recurring references are made to citizens' perception of Member States' tax systems as unfair and on the role of various European tax initiatives in restoring the confidence of EU citizens in the effectiveness of EU and national tax policies. This section argues that the Commission uses the fairness concept somewhat loosely, following a similar approach as the OECD.

In the Commission's tax discourse, fairness means both fair tax and fair trade, which echoes the way the concept has been used by the OECD in the past. Indeed, reference to fairness are neither new nor specific to the tax discourse of the EU Commission.⁶¹ The concept of fairness has been used in the international tax discourse for more than twenty years. In 1998, the OECD issued a report on 'Harmful Tax Competition' that also included many references to fairness.⁶² These references primarily concerned fairness among businesses and among countries. The main idea was to promote tax systems allowing countries to compete on a 'fair' and transparent basis with no (unfair) tax advantages being granted to certain businesses. Stated differently, although fairness was used in a tax context, the idea was primarily to support 'fair trade' rather than 'fair taxation'. In the 1998 Report, only one brief reference was made to citizens' concerns in the following terms:

The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems (emphasis added).⁶³

More recently, more emphasis has been placed on the social dimension of fairness, specifically, fairness as experienced by citizens. In other words, tax fairness is now framed as a three-dimensional concept that is relevant to countries, companies, but also citizens. The 2013 OECD Base Erosion and Shifting Project (BEPS) Action Plan states as follows: 'citizens have become more sensitive to tax fairness issues', considering that our 'globally integrated' economy has created 'opportunities for MNEs to greatly minimize their tax burden'.⁶⁴ The Action Plan indicates that tax fairness is of importance for 'all parties', including 'governments' (as they 'have to cope with less revenue and a higher cost to ensure compliance'), 'individual taxpayers' (who have to 'bear a greater share of the [tax] burden'), and 'businesses' (as they 'may face significant reputational risk' or may be subject to unfair competition if they cannot enjoy the

⁶¹ As might be expected, there is a diversity of definition of the 'fairness concept' in the tax scholarship. On this topic, *see* the work of the authors mentioned in *supra* n. 10.

⁶² OECD, *Harmful Tax Competition. An Emerging Global Issue*, (OECD Publishing, 1998) [hereafter: OECD Harmful Tax Competition 1998]. *See*, para. 4, 8, 30, 112, 136, 145. For example, in para. 136: '(...) ensuring that no country gains an unfair competitive advantage by failing to comply with the Guidelines referred to above'. The same year, the EU issued its code of conduct for business taxation (Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 Dec. 1997 on a code of conduct for business taxation, OJ C 2/2, (6 Jan. 1998)). The first directive on administrative cooperation also contained a reference to 'fair taxation' (Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L 336/15 (27 Dec. 1977)).

⁶³ OECD Harmful Tax Competition 1998, *supra* n. 62, para. 4. At the EU level, in the conclusions of the ECOFIN introducing the EU's Code of conduct on business taxation, references can be found to the idea that employees should not bear an excessive tax burden in comparison to businesses (*see*, e.g., '(...) the need for coordinated action at European level to tackle harmful tax competition in order to help achieve certain objectives such as reducing the continuing distortions in the single market, preventing excessive losses of tax revenue or getting tax structures to develop in a more employment-friendly way' (emphasis added)).

⁶⁴ OECD, *Action Plan on Base Erosion and Profit Shifting*, (OECD Publishing, 2013), pp. 7-8 [hereafter OECD BEPS 2013].

same BEPS opportunities as MNEs).⁶⁵ Subsequent reports also recall the ‘urgent need to restore the trust of ordinary people in the fairness of their tax systems, to level the playing field among businesses, and to provide governments with more efficient tools to ensure the effectiveness of their sovereign tax policies’.⁶⁶

The Commission’s tax narrative follows a similar trend as the one that characterizes the international tax discourse. Each of the six case studies analysed above (*section 2*) contain references to fairness that can be linked to the ‘business’ dimension; the ‘state’ dimension,⁶⁷ and the ‘social’ dimension of fairness (*see the table at the end of this section*).⁶⁸ Only the two last dimensions are fully connected with the general understanding of the fairness concept in political philosophy. The business dimension is primarily related to fair trade rather than to fair taxation.

The ‘**business**’ objectives labelled under the fairness concept are not specific to EU tax law. They are the basis of EU trade policy and characterize other branches of EU law.⁶⁹ The idea of fair trade within and outside the EU requires all trade actors to ‘play by the rules’, including tax but also social, environmental, and international trade rules.⁷⁰ To ‘play by the rules’ can be understood from two main perspectives.

The first perspective focuses on the treatment of European enterprises vis-à-vis foreign enterprises and is associated with the market-centric approach. In tax, this approach requires the removal of fiscal obstacles to cross-border transactions in order to allow European enterprises to compete on a fair basis with foreign enterprises. Past tax directives largely follow this market-based approach.⁷¹ Their objective was to promote undistorted competition within the internal market in order to increase the productivity and the competitiveness of European enterprises. The CCCTB proposals and the recommendation for qualified majority voting also rely on this justification.⁷² Nevertheless, three of the case studies analysed in *section 2* (the FTT, the ATAD, and digital tax) follow a different logic, bringing a change in the understanding of this objective. They primarily aim at preventing that individual action at the Member State level leads to the fragmentation of the internal market. For instance, the ATAD directives do not remove tax obstacles but harmonize Member States’ action to counter tax avoidance

⁶⁵ OECD BEPS 2013, *supra* n. 64.

⁶⁶ OECD, *BEPS Project Explanatory Statement: 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project*, (OECD Publishing, 2016), para. 3.

⁶⁷ The shift from the market-centred to the state-centred approach was noticed earlier by some authors. See F. Vanistendael, *Fiscal Support Measures and Harmful Tax Competition* 9 EC Tax Review 3 (2000), pp. 152-161, at pp. 156-157, referred to in A. Maitrot de la Motte, *The Recovery of the Illegal Fiscal State Aids: Tax Less to Tax More*, 26 EC Tax Review 2 (2017) pp. 75-88, at p. 75). The EU’s external tax strategy confirms Vanistendael’s conclusions. See also Dourado, *supra* n. 34, p. 444).

⁶⁸ The Commission has presented its anti-tax avoidance package in three main blocks: (1) effective taxation (which can be linked to the social dimension of fairness); (2) tax transparency (which can be linked to the state dimension of fairness); and (3) better business environment (which can be linked to the traditional market-centric dimension of fairness). See European Commission, *Timeline for Action for Fair and Efficient Corporate Taxation*, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/fairer_corporate_taxation/tax_timeline_new.pdf (accessed 10 Jan. 2020).

⁶⁹ The objective of fair trade is mentioned in the preamble of the TFEU (with a reference to ‘balanced trade and fair competition’) and in Article 3, paragraph 5 of the TEU (with a reference to ‘fair trade’). On the use of fairness in the context of EU labor law (as a means to achieve ‘fair trade’), see the various references to social fairness in the 2018 Commission’s Social Fairness Package, including in the European Commission, *Proposal for a Council Recommendation on access to social protection for workers and the self-employed*, COM(2018) 132 final (13 March 2018). See also European Commission, *Reflection paper on harnessing globalization*, COM(2017) 240 final (10 May 2017), in particular on pp. 9, 15-16.

⁷⁰ See also *Editorial comments: Playing by the rules – Free and fair trade*, 55 Common Market Law Review 2 (2018), pp. 373-386, at pp. 375-376, quoting the European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Modern trade policy to harness globalization*, COM(2017) 492 final (13 Sept. 2017).

⁷¹ See *supra*, section 1. On a related topic, see Haslehner & Schwarz on how the EU ‘intends to favour [its] competitive advantage [...] vis-à-vis third countries’ (W. Haslehner & P. Schwarz, *Chapter 10: Harmful Tax Competition from the European Union towards Third Countries?*, in: *The External Tax Strategy of the EU in a Post-BEPS Environment* GREIT Series (D. Martin Jiménez ed., IBFD 2019), pp. 241-268).

⁷² European Commission, *supra* n. 3, p. 3. According to the Commission, ‘Taxation is central to building a strong and dynamic Single Market, which supports businesses, attracts investors and can compete with the strongest global markets.’

practices, which might seem to conflict with - or at least pursue a different goal than - the traditional objectives pursued by tax directives in the field of direct taxation.⁷³ This is why some authors have expressed doubts as to the compatibility of these directives with the treaties and their ability to effectively foster the functioning of the internal market. They argue that some provisions of the directives, including the provision on controlled foreign corporations (Article 7) and the general anti-abuse rule (Article 6) could conflict with past case law of the Court of Justice on the compatibility of Member States' anti-avoidance rules with EU fundamental freedoms.⁷⁴ Assuming that the Commission was competent to introduce these directives, it is difficult, if not impossible, in any case, to evaluate whether they were necessary to achieve the objective of limiting the fragmentation of the internal market. This objective relies on a series of assumptions that are difficult to verify, namely that, in the absence of a coordinated action, Member States would have adopted tax measures on a unilateral basis and that these unilateral actions would not have been struck down by the Court of Justice and, yet, would have created new obstacles to the internal market.

In addition to this global trade and internal market perspective, a second approach to evaluate 'fair trade' focuses on the treatment of trade actors within the EU and the Member States. For tax, this implies that tax systems should allow corporations to compete on a fair basis, creating a level playing field, within the Union. This objective is also found in past actions of the Commission in the field of taxation, in particular the 1998 Code of Conduct and past State aid law investigations. But it is only recently that the Commission has included this objective in legislative proposals. Thus far, however, none of the proposals of the Commission go as far as to create a European-wide level playing field between businesses that operate within the single market. For example, the ATAD increases the chances that all enterprises are 'taxed somewhere once', however, it does not prevent that enterprises benefit from a more generous tax system by moving their activities to a location with a more favourable tax regime.⁷⁵ Similarly, because the CCCTB does not establish a common corporate income tax rate, companies located in different Member States will remain subject to different tax burdens.

The **'state' dimension of the fairness concept** can also be understood from two main perspectives. First, fairness among Member States means that they should be able to use their tax system to compete on a fair basis, in a transparent manner, without using harmful tax practices.⁷⁶ Second, a fair tax system should generate sufficient tax revenue to ensure sustainable public finance. This subdimension of the concept of fairness in the discourse of the Commission corresponds to the most traditional goal of tax systems, specifically, the objective of generating revenue to fund State and public services. In contrast to the Commission's objectives that are aimed at reinforcing fairness between businesses, the objectives related to fairness between and among Member States are genuine tax fairness objectives. Indeed, as

⁷³ See A. Cédelle, *The EU Anti-Tax Avoidance Directive: A UK Perspective*, 4 British Tax Review pp. 490-507 (2016), p. 494. See also L. Cerioni, Chapter 14: *Corporate tax harmonization – stage II: coordination to fight tax avoidance and harmful tax competition*, in: *Research Handbook on European Union Taxation Law* (C.H.J.I. Panayi, W. Haslehnner and E. Traversa eds., Edward Elgar, to be published in 2020), pp. 296-321; R. de la Feria, *Editorial Harmonizing Anti-Tax Avoidance Rules*, 26 EC Tax review 3 (2017), pp. 110-111; S. Peeters, *Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool* 26 EC Tax Review 3 (2017), pp. 122-132.

⁷⁴ See, among others, G. Bizioli, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?* 26 EC Tax Review 3 (2017), pp. 167-175; G. Bizioli, Chapter 11. *An EU Policy for the Future of International Tax Law*, in: *EU Tax Law and Policy in the 21st Century* (W. Haslehnner, G. Kofler & A. Rust eds., Kluwer Law International, 2017), p. 321, at pp. 253-254; Dourado, , *supra* n. 34, p. 445; P. van Os, *Interest Limitation under the Adopted Anti-Tax Avoidance Directive and Proportionality*, 25 EC Tax Review 4 (2016), pp. 184-198.

⁷⁵ D.S. Smit, *International Income Allocation under EU Tax Law: Tinker, Tailor, Soldier, Sailor*, 26 EC Tax Review 2 (2017), pp. 67-74, p. 70.

⁷⁶ On this narrative, see C.M. Radaelli, *Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions*, 27 Journal of Common Market Studies 4 (1999), pp. 661-682. See also W. Schön, *Taxing Multinationals in Europe*, Max Planck Institute for Tax Law and Public Finance Working Paper 11 (2012), p. 2 and p. 8, referring to the opinions of AG in C-196/04 and C-374/04 (in particular para. 55).

mentioned in the introduction, rules aimed at protecting countries' abilities to raise revenue in a cross-border context might contribute to procedural fairness.⁷⁷

Finally, the **'social' dimension of fairness** refers to citizens' (alleged) perception on the tax system.⁷⁸ This dimension is the most ambiguous in the Commission's recent initiatives. The Commission does not explicitly state what it means by 'social fairness' but only explains that its proposals should improve citizens' trust in tax systems. Implicitly, citizens' low confidence in tax systems is linked to recent tax scandals (such as Luxleaks). A tax system characterized as 'socially fair' appears to be defined as a tax system in which enterprises contribute their 'fair share' relative to the tax borne by individual taxpayers, which is extremely vague. Moreover, this definition of a 'fair tax system' seems to be more symbolic than operational: enterprises are legal entities that do not, as such, bear any tax considering that all taxes are ultimately borne by individuals. Therefore, a comparison of the taxes that are legally imposed on corporations and on individuals is not a good proxy for assessing whether a tax system is fair in terms of tax incidence. From the perspective of the EU's democratic deficit, the emergence of the third dimension of the fairness concept in the discourse of the Commission could be understood as an illustration of the Commission's attempt to reinforce the EU's legitimacy through its tax policies. The Commission no longer considers that tax harmonization is merely an instrument to establish an 'Internal Market as a space without tax borders'.⁷⁹ Instead, tax harmonization is described as an instrument to create an Internal Market that creates fair results for companies, Member States, and also citizens. This social dimension of tax fairness can be linked to the traditional understanding of the concept in political philosophy, allegedly to both its procedural and distributive aspects. Social fairness might require changes in the rules surrounding the decision-making process for tax matters at the EU level. However, it might also require a change in the role of EU tax law to include a redistributive function which, thus far, has never been directly exercised at the level of the Union.⁸⁰

Overall, fairness seems to be associated with vagueness in the tax discourse of the European Commission. The references to tax fairness to refer to objectives that should be better defined as trade objectives is confusing and possibly indicates that tax fairness is not yet taken seriously at the EU level. It is indeed puzzling that both the OECD and the EU have labelled tax objectives related to the creation of a level playing field among businesses as objectives necessary for the realization of a 'fair tax system'.⁸¹ Moreover, the new social dimension of the fairness concept remains ambiguous; thus far, the Commission has not been explicit as to how this dimension should be defined. This raises questions as to the ambitions of the Commission: 'Is the Commission trying to achieve fair trade, procedural fairness or distributive tax justice?'; 'Does the shift in the Commission's narrative from a market-centric approach to a more fairness-centric approach reflect a genuine ambition to achieve tax fairness?'

Business dimension	States dimension	Social dimension
Fair trade	Fair taxation	

⁷⁷ See Dietsch & Rixen, *supra* n. 11, in particular p. 177.

⁷⁸ On the understanding of tax fairness by the general public, see S.M. Sheffrin, *Tax Fairness and Folk Justice* (Cambridge University Press, 2013).

⁷⁹ This expression is borrowed from Schön in W. Schön, *Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?*, 69 *Bulletin for International Taxation* 4/5 (2015), pp. 271-293.

⁸⁰ In a trade document from 2017, the Commission suggests that the objective of achieving 'social fairness through taxation' should be achieved at the Member State level whereas the Union would be responsible for 'measures to ensure global tax justice and transparency' (European Commission, *supra* n. 69, p. 24, figure 8). However, it could be argued that the EU has already exercised part of this function in the context of the harmonization of indirect taxes (e.g. by providing Member States some room for manoeuvre with regard to the differentiated rates that can be provided in certain circumstances to mitigate the regressive characters of VAT).

⁸¹ Although the taxation of businesses might have redistributive effects, it is not clear how the promotion of EU businesses' competitiveness through EU tax policy will contribute to tax fairness.

	Internal market	Level playing field	Fair vs. unfair tax competition	Sufficient public revenue	'Social fairness'
FTT	Against fragmentation of potential (future) individual action	Financial vs. others		Additional public revenue	'Fair share'
Tax rulings		MNEs vs. domestic companies	Against unfair tax competition	(Recovery of unfair tax advantages)	'Fair share'
Anti-tax avoidance agenda	Against fragmentation of potential (future) individual action	MNEs vs. domestic companies	Resilience of internal market	Protection of national tax base	'Fair share'
CCCTB	Removing tax obstacles (+ Against fragmentation due to existing diversity of CIT systems)	(MNEs vs. domestic companies)	Fair competition through tax rates	Protection of national tax base	'Fair share'
Digital economy	Against fragmentation of potential (future) individual action	Digital vs. non-digital		Sustainable public finance	'Fair share'
Qualified majority voting	'Stronger and more competitive single market'		'Pooled sovereignty to protect national tax sovereignty'		'Bested decision-making for better decision and stronger democratic legitimacy'

4. A critique of the Commission's 'Fair Tax Agenda'

As already mentioned, the shift in the Commission's action in the field of taxation has been criticized by some tax scholars based on legal arguments. Beyond these legal arguments, one policy question emerges with regard to the suitability of the Commission's proposals to achieve their stated objectives in terms of fair taxation. If they are not, the EU's new tax initiatives will not reinforce the EU's legitimacy but possibly further contribute to the EU's democratic crisis. This section explores this question by building on the evaluations that have been made by the legal and economic scholarship on the case studies analysed in *section 2*.⁸² This section is structured around the State and social dimensions of tax fairness as they are the two dimensions that reflect the essence of the concept as generally understood in political philosophy. The business dimension is not analysed here as it relates to fair trade rather than fair taxation as explained above (*section 3*).

First, it is unclear whether the European Commission's recent initiatives in the field of taxation will enable Member States to compete on a fair basis while allowing them to raise sufficient tax revenue. The idea of 'fair tax competition' appears to be inherently contradictory; considering that tax competition necessarily puts pressure on public revenue, the question arises as to whether tax competition can be *fair*. Two of the case studies that were analysed in *section 2* emphasize that the Commission perceives some tax schemes as 'unfair' (e.g. all of the fiscal mechanisms that the ATAD aims at preventing, such as hybrid mismatches) and others as 'fair' (e.g. competition based on tax rates, which the CCCTB proposal does not aim at harmonizing). Therefore, a number of the Commission's proposals might reduce some forms of 'unfair' tax competition between Member States as well as between the Union and the rest of the world. However, there is no reason to believe that the Commission's recent initiatives will release

⁸² On the FTT, see J. Vella, C. Fuest and T. Schmidt-Eisenlohr, *Response on EU proposal for a Financial Transaction Tax*, 6 British Tax Review (2011), 607-621; G. Maffini and J. Vella, *Evidence-based policy making? The Commission's Proposal for an FTT*, Oxford University Centre for Business Taxation Working paper series 15/15 (2015), available at <http://eureka.sbs.ox.ac.uk/6286/1/WP1515a.pdf> (accessed 10 Jan. 2020). On the Anti-Tax Avoidance Directive, see Cédelle, *supra* n. 73, pp. 490-507. On the digital economy, see M. P. Devereux and J. Vella, *Response to the EU Commission's Consultation*, (3 Jan. 2018); W. Schön, *Ten Questions About Why and How to Tax the Digitalized Economy*, Working Paper of the Max Planck Institute for Tax Law and Public Finance 11 (2017).

pressure on Member States' public budget by fully eliminating tax planning and the relocation of companies to a more favourable tax jurisdiction.⁸³

Yet, a move towards qualified majority voting as recommended by the Commission could assist the EU in achieving this objective. In its communication, the Commission seems to suggest that tax competition, even when it is 'fair', can be problematic due to its impact on Member States' tax sovereignty.⁸⁴ According to the Commission, qualified majority voting could 'help in mitigating the cross border effects of tax competition'.⁸⁵ As such, a change to voting requirements is a purely institutional matter that would not stop tax competition between Member States. However, it could be a step towards procedural justice, and the Commission is right in that, under qualified majority voting, individual Member States would no longer be able to obstruct the decision-making process.⁸⁶ Such an institutional change would, in theory, not alter the distribution of competences between the EU and Member States. However, assuming that Articles 113 and 115 of the TFEU are not interpreted too restrictively, the switch towards qualified majority voting could facilitate the adoption of fully harmonized tax measures that are less prone to tax competition.⁸⁷

Second, it is unlikely that the Commission will achieve its objective in terms of social fairness. As mentioned above, the substance of this social dimension of the fairness concept is not clearly defined. The Commission seems to define a 'socially fair' tax system as a tax system in which enterprises contribute their 'fair share' in comparison to the tax borne by individual taxpayers. Otherwise stated, this objective relates to the question of 'who bears the burden of the tax', which refers to the incidence of the tax system in economic terms. This question and the determination of who should bear the tax burden is eminently political. European citizens are unlikely to share common views on this issue. This makes it extremely complicated – if not impossible – for the EU to define how tax burdens should be shared between citizens.⁸⁸ Moreover, in practice, the allocation of tax burdens between citizens is of relevance primarily at the level of the Member States since it is directly linked to how much public revenue needs to be generated from taxes.⁸⁹ In the absence of a fiscal union, discussions on tax incidence can be meaningful only at the level of the Member States.⁹⁰

⁸³ Devereux and Vella consider that 'the downward spiral of corporate tax rates caused by tax competition will continue unhindered' (Devereux & Vella, *supra* n. 82, pp. 5-6). On the ATAD, see Cédelle, *supra* n. 73, p. 495. See also F.W. Scharpf, *Economic integration, democracy and the welfare state*, 4 Journal of European Public Policy 1 (1997), at p. 31.

⁸⁴ European Commission, *supra* n. 3, p. 7: 'Tax competition is not in itself a bad thing. However, in some cases, it may also reduce the policy choices of all Member States. For example, tax measures in one Member State aiming to attract mobile tax bases such as capital income tend to reduce the level of taxation on this kind of income in all Member States'.

⁸⁵ European Commission, *supra* n. 3.

⁸⁶ It could also be argued, following Dietsch and Rixen's argument, that it is a step towards more 'EU background justice' (see Dietsch & Rixen, *supra* n. 11).

⁸⁷ Note that the Commission has discussed taxes that are less prone to tax competition, such as the 'destination-based cash flow tax' in its communication (European Communication, *supra* n. 3, section 4). So far, however, not much attention has been paid to the DBCFT at the EU level. To this author's knowledge, explicit references were made to the DBCFT only in the 2018 impact assessment on the EU's proposal on the taxation of the digital economy (Digital Economy Impact Assessment 2018, *supra* n. 46, pp. 29-30, 34 and 143-144 (Annex)). The Commission recognizes that the DBCFT would bring 'fundamental reform' that has 'the potential to address the problems at their roots' (p. 34). Nevertheless, the DBCFT was discarded as a policy option, allegedly because Member States seemed to 'prefer to adapt the current system' (p. 34). On the DBCFT, see A. Auerbach, M.P. Devereux, M. Keen and J. Vella, *Destination-Based Cash Flow Taxation* Working paper series 01 (2017). On the interpretation of the provisions surrounding EU tax competences under the TFEU, see A.P. Dourado, *The Commission Proposal to Replace Unanimity with a Qualified Majority in the Case of Tax Matters* 47 Intertax 4 (2019), at p. 343.

⁸⁸ See G. de Búrca, Europe's *raison d'être*, in: *The European Union's Shaping of the International Legal Order* (D. Kochenov & F. Amtenbrink eds., Cambridge University Press, 2013), p. 24, referring to Nicolaidis & Lacroix's work on the 'rich diversity of narratives about the meaning and significance of Europe and the EU within different states and amongst different communities'. See also F.W. Scharpf, *Governing in Europe: Effective and Democratic* (Oxford University Press, 1999), pp. 22-23, who states that '(...) the legitimacy of politically salient European decisions depends on their effectiveness in achieving consensual goals – which implies that they cannot legitimately deal with highly controversial issues or with problems requiring zero-sum redistribution'.

⁸⁹ See the reference to taxpayers' perspective in High Level Group on Own Resources, *Future Financing of the EU, Final report and recommendations*, (Dec. 2016).

⁹⁰ Note, however, that the European Commission already provides recommendations on Member States' tax policy in the framework of the European Semester. For example, the Commission suggested to some Member States to 'shift the tax burden away from labour to encourage more sustainable economic growth' in its 2019 country-specific recommendations (see European Commission, *Communication from the*

Consequently, the question arises as to whether the Commission's objective is to actually have an impact on who supports the economic costs of taxes in Member States or whether it only intends to positively affect taxpayers' *perceptions* on the allocation of tax burden between citizens.⁹¹ Based on the analysis of the Commission's recent proposals (*section 2*), the latter hypothesis seems to be plausible.⁹² To achieve this goal, the Commission does not necessarily need to introduce changes that rebalance the incidence of the tax system; it could limit itself to influencing the factors that affect citizens' perceptions. Indeed, citizens' perceptions on who bears the tax burden may not correspond to economic reality.⁹³ If the Commission's objective is limited to affecting citizens' perceptions, its proposals could be sufficient to achieve its goal.⁹⁴ Nevertheless, in the longer term, assuming that citizens do not experience the positive social changes that they were expecting from the Commission's initiatives, they are likely to re-evaluate their position on what constitutes a fair tax system.⁹⁵ In this hypothesis, the Commission's new tax initiatives would not have a positive impact on the EU's legitimacy. They would not be perceived as effective which could potentially further contribute to the EU's democratic deficit.

From this perspective, the Commission's recommendation on the switch to qualified majority voting might, again, play a critical role in enhancing the EU's legitimacy and assist the EU in achieving social fairness.⁹⁶ Interestingly, in its communication, the Commission refers to a Eurobarometer survey that highlights that 'three quarters of the respondents cited the fight against tax abuse as a priority area for EU action'.⁹⁷ This suggests that the Commission is attempting to respond to citizens' actual concerns (and not just to their 'perception' or 'hypothetical' concerns) in the field of tax. A move towards qualified majority voting could be helpful in achieving this goal.⁹⁸ It would reinforce the role of the European Parliament in the decision making process which would allegedly lead to a more effective alignment of European tax policies with the concerns of the European citizens.⁹⁹ In the past, the EU's decision-making

Commission, 2019 European Semester: Country-specific recommendations, COM (2019) 500 final (5 June 2019). Dourado comes to a similar conclusion in A.P. Dourado, *Global Governance, Global Standards and Democracy in Taxes*, in: *Liber Amicorum Fasuto de Quadros* (M. Rebelo de Sousa & E. Vera-Cruz Pinto eds., Almedina, 2016), pp. 131-145, in particular p. 141 (on the 'fair distribution of tax burden') and p. 143-145 (on 'the need for a fiscal union').

⁹¹ As pointed out by Auerbach, Devereux, Keen, and Vella (*supra* n. 87), only citizens, not corporations, ultimately bear the burden of taxes (p. 31): 'What ultimately matters for the fairness of any tax system, of course, is how it affects people; an corporations are not, in other than a legal sense, people. But how we tax corporations does have implications for the fairness with which the tax burden is shared, both within and across countries'.

⁹² There might be good reasons to ensure that citizens perceive the tax systems as fair since empirical evidence suggests that taxpayers who perceive the tax system as fair are less likely to evade taxes. See M.W. Spicer & L.A. Becker, *Fiscal Inequity and Tax Evasion: An Experimental Approach* 33 *National Tax Journal* 2 (1980), pp. 171-174. See also J. Farrar, D.W. Massey, E. Osecki & L. Thorne, *Tax Fairness: Conceptual Foundations and Empirical Measurement* *Journal of Business Ethics* (2018), pp. 1-17.

⁹³ For example, in the context of the FTT, see the conclusions of Vella, Fuest, and Schmidt-Eisenlohr on the incidence of the FTT (Vella, Fuest & Schmidt-Eisenlohr, *supra* n. 82, p. 6: 'There is the danger that the FTT will be sold to the public as a tax which punishes those who are responsible for the crisis while the true incidence falls on the consumers of financial services.'

⁹⁴ The popularity of Commissioner Vestager, who was at the forefront of the Commission's action in the State aid cases, could be an indication of this short-term effect.

⁹⁵ In that regard, see European Commission, *Commission Staff Working Document, Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/99/EEC*, SWD(2019) 327 final (12 Sept. 2019). On p. 26, the Commission comes to the conclusion that 'there is only limited evidence concerning the effectiveness of the intervention' with regard to the main objective of the directive, including its contribution 'to improve the perceived fairness of the tax system'.

⁹⁶ On the role of the institutional avenue as a way to reinforce the EU's legitimacy, see de Búrca, *supra* n. 88, at p. 31 and following. See also S. Collignon, *The Three Sources of Legitimacy for European Fiscal Policy* 28 *International Political Science Review* 2 (2007), pp. 155-184, p. 180; M. van den Brink, *Justice, Legitimacy and the Authority of Legislation with the European Union*, 82 *The Modern Law Review* 2 (2019), pp. 293-318.

⁹⁷ European Commission, *supra* n. 3, p. 3.

⁹⁸ See E. Traversa & A. Pirlot, *The UK Brexit Referendum: A Catalyst to Reform the European Union Institutional Architecture in Tax Matters?*, 44 *Intertax* 12 (2016), 878-881, p. 879.

⁹⁹ Based on Scharpf's work, it could, however, be argued that, unless European citizens largely agree on how the social dimension of tax fairness should be defined, which is very unlikely, at least in the short term, such a hypothetical tax reform will not strengthen the EU's legitimacy. See F.W. Scharpf, *De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe* 23 *Eur Law J.* 5 (2017), pp. 315-334, at p. 327. Note that Scharpf nevertheless argues in favour of a 'European-wide harmonization (...) of taxes on business and capital incomes' (Scharpf, *supra* n. 83, p. 34). See also F. Vanistendael, *Democratic Taxation: Necessity or Utopia for Euroland?*, 46 *Intertax* 4 (2018), pp. 342-351, at p. 350. On the role of the European Parliament in enhancing the EU's legitimacy, see D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 *The American Journal of International Law* 3 (1999),

process has been criticized due to the limited consultative role played by the European Parliament in the field of taxation.¹⁰⁰

This is not to say that a move towards qualified majority voting will necessarily contribute to procedural and distributive tax fairness at the EU level. The strengthening of the role of the European Parliament for which members are still elected at the level of each of the Member States and not through an EU-wide electoral constituency is not a guarantee of more EU legitimacy. It could even be argued that unanimity is a condition for procedural fairness as it protects the interests of the Member States that would be a minority if qualified majority voting rules were established. However, as already mentioned, a reverse argument could be used to support the switch to qualified majority voting rules; such a move would protect the interest of the majority of the Member States by preventing a minority from obstructing the decision-making process and undermining efforts to achieve consensus.¹⁰¹ Moreover, it could be argued that the interests of the minority are not at risk considering the possibility for national parliaments to oppose the move to qualified majority voting under Article 48, §7 of the TEU. Stated differently, a move towards qualified majority voting should not be assimilated to a move towards tax fairness. However, it could help to transition into this direction even though it is certainly not the only option.

5. Conclusion

The analysis of the tax discourse of the European Commission shows that tax harmonization is increasingly portrayed as a ‘protective shield’ for Member States against the risks of tax competition and tax avoidance. Moreover, the Commission targets European citizens in the way it describes its actions in the field of taxation, stating explicitly that it is committed to rejuvenating European citizens’ trust in tax systems. Despite this narrative shift, most of the Commission’s proposals are insufficient for the EU to achieve tax fairness.

Yet, fairness is likely to remain a key word in the EU’s tax discourse for a little longer.¹⁰² In her mission letter to the future Commissioner for the Economy, Ursula von der Leyen, the president of the European Commission called for ‘tax policies that increase fairness and reduce social inequalities’, emphasizing the social dimension of the concept of tax fairness and the redistributive role for EU tax law. The specific tax initiatives that she has announced include past proposals (such as the proposal for a fair European digital tax, the introduction of a consolidated corporate tax base and increased efforts to fight against tax fraud, tax evasion and avoidance) as well as new proposals such as the proposal for a carbon border tax.¹⁰³ It is uncertain whether any of the new proposals will allow the EU to align tax systems to what most European citizens consider to be socially fair. As previously mentioned, there might not even be a European-wide consensus on what is socially fair from a tax perspective.

pp. 596-634, at 615. See, also, Weiler’s views as to the role of the European Parliament as the ‘vox populi’ (J.H.H. Weiler, *In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration* 34 *Journal of European Integration* 7 (2012), pp. 825-841, at p. 830 & 836).

¹⁰⁰ So far, tax harmonization has been primarily shaped by the initiatives of the Commission (referred to as ‘positive’ integration) and the case-law of the Court of Justice (referred to as ‘negative integration’). See A.P. Dourado, *Chapter 10: No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes*, in: *Principles of Law: Function, Status and Impact in EU Tax Law*, GREIT Series (C. Brokelind ed., IBFD 2014).

¹⁰¹ Schön proposes a different solution to this problem. See W. Schön, *Facilitating Entry by Facilitating Exit: New Paths in EU Tax Legislation*, 46 *Intertax* 4 (2018), pp. 339-341.

¹⁰² In 2018, the Commission organized ‘fair taxation seminars’. See European Commission, *Fair Taxation Seminars 2016*, available at https://ec.europa.eu/taxation_customs/fair-taxation-seminars-2018-en_en (accessed 10 Jan. 2020).

¹⁰³ U. von der Leyen, President-elect of the European Commission, Mission letter to Paolo Gentiloni, Commissioner-designate for Economy, (10 Sept. 2019), p. 5.

As this article has emphasized, the EU Commission might reach its goal via a different avenue. In addition to its substantive proposals, Ursula von der Leyen has recommended to ‘make full use of the clauses in the Treaties that allow proposals on taxation to be adopted by co-decision and qualified majority voting’.¹⁰⁴ This recommendation confirms the 2019 Commission’s communication on qualified majority voting which – as has been argued - could reinforce both EU procedural and distributive tax fairness. Only the future will tell whether such a change in the voting rules for tax matters can help the EU to effectively make the tax system ‘socially fair’ and allow for redistribution to occur between citizens at the EU level and slowly moving towards a fiscal transfer union.¹⁰⁵ Such an evolution would allow the EU to pursue objectives that go beyond its past market-focused approach and integrate the traditional functions of tax systems, specifically, the revenue-raising and redistributive functions in European tax law.

¹⁰⁴ *Ibid.*, p. 6.

¹⁰⁵ See Dourado, *supra* n. 100, section 10.10; F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, 2016), pp. 178-180; F. Vanistendael, *Chapter 12. Does EU Tax Policy Require a New Treaty?*, in: *EU Tax Law and Policy in the 21st Century* (W. Haslehner, G. Kofler & A. Rust (eds.), Kluwer Law International, 2017), p. 321, at pp. 253-254.