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CORE ANALYSIS

Taming the Leviathan or dismantling democratic government? Evolving political ideas on spontaneous income tax integration in the European Union

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Abstract

By the turn of the 1990s, tax competition among national governments had emerged as a powerful law-making practice. The possibility of tax competition essentially depends on the design of transnational law, such as European law. This Article examines the change of economic, political, and legal ideas that have shaped responses by the European Communities and the European Union (EU) to income tax competition. It asserts that under the post-war settlement of embedded liberalism and moderate market integration, tax competition was not perceived as a fully developed phenomenon. Under increased cross-border economic mobility in the 1990s, tax competition became a critical concern but received a liberal and permissive reaction from the EU. In the 2010s, governing tax competition in the EU became a more vital topic. Still, in the contemporary EU, turning political ideas into legal rules capable of addressing tax competition remains hampered by the EU law requirement of unanimous decision-making. The European choice of whether and how to address tax competition involves profoundly contrasting ideas on the means by which to govern the socio-economic reality. The decision between spontaneous and regulated income tax integration is therefore a salient political question, but the unanimity rule undermines political contestation over tax competition and over the European model of fiscal federalism. The Article comes to a close by reflecting on whether the EU legal order offers means to overcome the deadlock of unanimity and whether it could accommodate a more properly political contestation over the Europeanisation of income taxation.

Keywords: tax law; tax competition; income tax integration; spontaneous integration; fiscal federalism

1. Introduction

By the turn of the 1990s, policy competition among national governments had emerged as a distinct and powerful phenomenon. From an academic reverie of neoliberal intellectuals, policy competition had turned into an actual political practice, invading policymakers' frame of reason. In seeking competitive policy advantage and luring migrant capital, governments espoused the mantric language of international competitiveness. This involved profound changes in the mode of exercising political authority and in the integrity of law, as policymakers commercialised their sovereign powers[1] and transformed legal orders into false commodities, to apply Karl Polanyi's vocabulary.[2] In introducing investment-friendly legal rules in return for the territorial presence of

[1]R Palan, 'Tax Havens and Commercialization of State Sovereignty' 56 (2002) International Organization 151.

[2]S Frerichs, 'Karl Polanyi and the Law of Market Society' 44 (2019) *Österreichische Zeitschrift für Soziologie* 197; AJ Menéndez, 'The False Commodity in the European Game of Legal Chairs: Between the Ideal of Regulatory Competition and the Practice of Capitalism Triumphant' 4 (2019) European Papers 127.

capital, states came to behave like market actors and follow salesman-like behaviour.[3] In such a role, policy competition gave leverage to the neoliberal aspiration of reinventing 'sovereign state authority in economically rational terms.'[4] Country-competitiveness became perceived as an apolitical boundary condition commanding deference from across the political spectrum, and in this sense, thinking in terms of competitiveness was associated with a broader 'generalisation of economic reason'.[5] Faced with economic imperatives and necessities prompted by global markets, the only economically rational choice for legislatures seemed to be to surrender to the demands of capital and transnational market citizens. Today, international competitiveness figures as one of the dominant policy-making rationalities, while devising laws as incentives for transnational capital migration has become an entrenched routine.

For governments, tax competition is one of the key avenues for pursuing competitiveness. In the European Union (EU), income tax competition among Member States is a particular instantiation of this. Tax competition among Member States has taken different forms but has typical properties that could be outlined analytically. To begin with, tax competition is an activity engaged in by national policymaking bodies, such as parliaments and governments. Second, policymaking bodies behave non-cooperatively or individually.[6] In contrast to pooling law-making powers and harmonising policies by concerted action, they operate in a non-centralised fashion. Third, as individual actors, they act with competitive intent. They look on foreign laws as benchmarks for their own choices and pursue rivalry with other countries. Fourth, policymaking bodies compete by means of tax laws. Tax competition may proceed via taxpayer-friendly enforcement of laws by tax authorities.[7] More typically, tax competition is carried out by lawmakers who pass statutes that demand less from taxpayers. In a substantive sense, this happens by relaxing administrative procedures, providing tax secrecy or – most importantly – reducing tax burdens. Tax competition shares much in common with other forms of policy competition (based, for instance, on company laws, environmental standards or industrial subsidies). However, using taxes as a means of competition makes up its specific difference. Finally, as a rule,[8] rival actors compete over internationally mobile tax items, such as investments, attempting to have them located in their jurisdiction. This usually happens for reasons of private economic activity, and typically involves the additional goal of increasing revenues or at least not compromising the existing tax take more than required by country-competitiveness. Rather than on genuine economic activities, rivals may also focus on 'paper items' reportable in their jurisdiction but having no real economic connection therewith.[9] In these cases, genuine economic effects tend to be scarce and the prime goal is often a fiscal one.

[3]PG Cerny, 'Paradoxes of the Competition State: The Dynamics of Political Globalization' 32 (1997) Government and Opposition 251; T Fougner, 'The State, International Competitiveness and Neoliberal Globalisation: Is There a Future Beyond "The Competition State"?' 32 (2006) Review of International Studies 165.

[4]W Davies, *The Limits of Neoliberalism. Authority, Sovereignty and the Logic of Competition* (Sage 2017) 116. See also A Supiot, *Governance by Numbers. The Making of a Legal Model of Allegiance* (Hart 2017) 103–63.

[5]E Christodoulidis, *The Redress of Law. Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2021) 297–326.

[6]P Dietsch, *Catching Capital. The Ethics of Tax Competition* (Oxford University Press 2015) 2, 36.

[7]In the EU context, advance tax rulings became a notorious example of how tax administrations do this (see European Parliament, 'Tax Rulings' in the EU Member States (Study for the ECON Committee by Directorate-General for Internal Policies, 2015)).

[8]I say 'as a rule' because policymakers may, by means of tax policies and for the sake of country-competitiveness, aim to support domestic firms even when these are not exactly internationally mobile. With tax cuts, for instance, governments may foster producers' international competitiveness with the goal of enhancing their export prospects and market shares in domestic consumption.

[9]Dietsch (n 6) 36–46; P Dietsch and T Rixen, 'Tax Competition and Global Background Justice' 22 (2014) Journal of Political Philosophy 150; J Jaakkola, M Ylönen and L Saari, 'Imaginary Capital Migration and the Competitive Politics of Corporate Taxation' 28 (2023) New Political Economy 13.

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Even if national policymaking bodies act as chief protagonists in policy competition, the possibility of competition depends on the design of transnational law, such as the law of the European Union, which may foster or inhibit competition. For competition to transpire, economic mobility across borders is needed, as is also non-harmonisation (margin of diversity) of national legal systems.[10] Jointly, these forge interdependencies between countries and facilitate competitive interaction between domestic legal orders. In particular, the post-1980s EU legal framework has been held constitutive for competition among Member States. In short, EU law has fostered cross-border market integration while leaving Member States' democratically salient policy fields largely non-harmonised legally, as paradigmatically diagnosed by Fritz W. Scharpf.[11] Income taxation has traditionally been one of the key non-centralised policy fields that have unfolded in the absence of common European standards, and integration has indeed proceeded with the 'fatal toleration of a fragmented tax culture in Europe'.[12] EU law has also made it difficult to harmonise tax policies, as EU constitutional norms favour unanimity in the field of tax. Even though income tax systems have long been adjusted to the market-making rationale[13] and recent tax policy trajectories have resulted in some harmonisation of income tax norms,[14] the EU multi-level legal structure still enables relatively open-ended income tax competition over footloose capital, firms, and also migrant individuals. In terms of income taxation, the asymmetric European legal structure thus instantiates an order of competitive fiscal federalism, a picture that has significantly outlived the transformative period of the 2010s Eurozone crisis.[15]

This Article concurs that the EU legal framework constitutes an order of competitive fiscal federalism conducive to income tax competition. This edifice, however, is not a fixed given. Rather than viewing European competitive federalism in terms of taxation as a static construction, the Article treats its key legal element – the degree of harmonisation of Member States' income tax systems – as a dynamic attribute and examines its historical development. The Article traces the changes and contexts that have underpinned the political choices relevant to the formation of European fiscal federalism. It attempts to discover how political, economic, and legal ideas on tax competition have framed and rationalised European political responses, as well as the absence of responses, to the expected acceleration of tax competition. Importantly, the competitive legal framework has not emerged as an unintended and unforeseen byproduct of cross-border economic mobility. On the contrary, in particular post-1980s endeavours at deepening the European market have prompted explicit reflections on the promises and pitfalls of tax competition. These reflections have not only been influenced by powerful intellectual traditions but have, in turning ideas into action, also re-articulated and added flesh to formative policy ideas. The multi-level EU polity provides an environment for examining how tax competition, as a disciplinary mechanism, is imagined as shaping national legal orders and their democratic

[10]S Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' 12 (2006) European Law Journal 440, 442–3; R Palan, *The Offshore World. Sovereign Markets, Virtual Places, and Nomad Millionaires* (Cornell University Press 2003); J Stark, *Law for Sale. A Philosophical Critique of Regulatory Competition* (Oxford University Press 2019) 17–25.

[11]FW Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford University Press 1999) 43–120.

[12]J Leaman, 'The Fiscal Lessons of the Global Crisis for the European Union. The Destructive Consequences of Tax Competition' in J Leaman and A Waris (eds), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (Berghahn 2013) 79, 86.

[13]P Genschel and M Jachtenfuchs, 'How the European Union Constrains the State: Multilevel Governance of Taxation' 50 (2011) European Journal of Political Research 293; AJ Menéndez, 'Neumark Vindicated: The Three Patterns of Europeanisation of National Tax Systems and the Future of the Social and Democratic *Rechtsstaat*' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream. Adjusting to European Diversity* (Cambridge University Press 2016) 78.

[14]J Snell and J Jaakkola, 'Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context' 22 (2016) European Law Journal 772; P van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' 4 (2019) European Papers 225.

[15]In a broad perspective, see T Biebricher, *The Political Theory of Neoliberalism* (Stanford University Press 2019) 161–92.

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government. The Article maintains a focus on how ideas of tax competition have been articulated in the mode of political decision-making, not least as mediated by the European Commission. To put it bluntly, rather than a legal notion, tax competition is a political concept, for which reason its representations have chiefly been put forward by actors from whom political reasoning is expected.

In examining perceptions of policy competition with reference to European income tax law, this Article contributes to four broad lines of scholarship, whose relevance goes beyond tax and integration research. First, the Article throws light on the formation of policy ideas under the bifurcation of political and economic geographies. It considers tax competition as characteristic of the world in which market relations have become transnational and deterritorialised, whereas core sovereign powers and the salient aspects of law have remained formally national. It is a world 'marked by a growing distance between the economic reach of capital and the political dominion of any single nation state.'[16] Second, and relatedly, the Article looks at the development of fiscal federalism beyond the state. Since income taxation is a crucial component of the modern fiscal edifice, it offers a special perspective on how the structures of fiscal federalism emerge or fail to emerge beyond national polities. Third, the Article reflects on the constitutive and enabling – versus regulating and constraining – functions of transnational law in shaping the order of competitive fiscal federalism. It analyses the relevance of these functions for appraising contrasting legal paradigms or frameworks for European integration, and it elaborates on how these frameworks foster alternative ways of ordering socio-economic reality. Fourth, the Article recognises the normative premises underlying contrasting conceptions of policy and especially tax competition. It explores whether the choice between competition-enabling and competition-constraining legal frameworks can be made solely by reference to enhancing aggregate political capacities or whether this choice unavoidably entails a commitment to a substantively determined perception of the role that democracy and market forces are, from a normative perspective, expected to play in governing socio-economic reality. Overall, in the particular European context of tax competition, the Article explores the extent to which the socio-economic reality ought to be organised through competition among individual actors or through collective democratic government.

The rest of the Article is arranged as follows. Section 2 looks at two opposite political philosophies of tax competition that entail different legal frameworks for a transnational polity such as the EU. The philosophies are identified as *evolutionist* and *interventionist* traditions. While they often deal with policy competition in general and without specifying its particular form, they are also helpful in understanding the specific phenomenon of income tax competition. Section 3 moves on to analyse how the legal frameworks yielded by European integration, in its different historical phases, conform to those entailed by these philosophies. The Section also explores what type of political, economic, and legal ideas of tax competition have been formative for the EU legal framework. The analysis divides integration into three periods, with each period viewed as reflecting the broader trajectories of economic globalisation. First, early integration proceeded under the settlement of embedded liberalism, combining national income tax autonomy with relatively moderate economic integration. Second, 1990s integration was framed by a shift towards neoliberal policy ideas and resulted in deep market integration without notable income tax harmonisation, which kept tax competition in operation. Third, post-financial crisis integration witnessed an unprecedented salience of governing tax competition beyond the state and balanced market integration with new elements of income tax harmonisation, although the legal outcomes did not fully match the ideational change. The concluding Section 4 reflects on whether EU law could better accommodate political contestation over tax competition in Europe and over the European model of fiscal federalism.

[16]E Meiksins Wood, *The Origin of Capitalism. A Longer View* (Verso 2017) 181.

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2. Tax competition as a disciplinary constraint on democratic government

European integration involves vital articulations of political, economic and legal ideas on income tax competition. These ideas address whether and how competitive interaction between Member States' tax systems ought to be governed. To put the European politics of tax competition into a broader theoretical spectrum and to grasp its ideational implications more clearly, this Section looks at two post-war political philosophies of policy competition. These ideal types entail contrasting views on the role that transnational law is expected to play in organising the interplay between national legal orders and, in the end, between market mechanisms and democratic government.

The first political philosophy of policy competition is the *evolutionist philosophy*, which has its origin in liberal thought and especially in neoliberalism as its 20th-century variant. In general, neoliberals have endorsed market competition among private individuals as the primary means of organising the domestic economy. Yet, at the same time, neoliberals have considered market competition itself to be possible only within the framework of law; far from prevailing as a natural state of affairs, competition must be constituted and maintained through legal arrangements.[17] The extent to which competition requires embeddedness in law and what type of rules it necessitates have aroused controversy in the neoliberal tradition.[18] Commonly, neoliberals have focused on theorising the constitution-like order or otherwise fixed abstract rules that would protect the economy from democratic intervention and allow it to function as uninterruptedly as possible.[19] Rather than disrupting the logic of competition, constitutional rules should remain conducive to it. The rules favoured by the neoliberal tradition are economic liberties and other market-enabling rules that abstain from reshaping market-made outcomes.[20] In Friedrich Hayek's view, rules must not be drafted to realise democratically pre-conceived social models, such as fair distribution, but to preserve the open-ended competitive process in action.[21] Non-teleological and abstract rules of the competitive order should have 'nothing to do with any "will" aiming at a

[17]M Foucault, *The Birth of Biopolitics. Lectures at the Collège de France 1978–1979*, translated by G Burchell (Picador 2008) 75–184; W Bonefeld, 'Freedom and the Strong State: On German Ordoliberalism' 17 (2012) New Political Economy 633.

[18]Finding a proper legal framework for market competition was a key conundrum in early neoliberalism, which sought its path between 19th-century liberalism and 20th-century interventionism. Indeed, if 'all forms of planning were tantamount to totalitarianism, and 19th-century laissez-faire was a bankrupt ideology, how could one identify an appropriate scope of intervention for the state?' (A Burgin, *The Great Persuasion. Reinventing Free Markets since the Depression* (Harvard University Press 2012) 61–2.) In the 1930s and 1940s, some Anglo-American and continental neoliberals, several orboliberals among them, promoted not only rules protecting competition against concentration of market power but also social arrangements instrumental in generating popular acceptance of the market-based order (B Jackson, 'At the Origins of Neo-Liberalism: The Free Economy and the Strong State' 53 (2010) The Historical Journal 129). From the late 1940s onwards, as neoliberalism became more associated with the law and economics faction, the perceived role of law in sustaining competitive processes gradually decreased (R van Horn, 'Reinventing Monopoly and the Role of Corporations. The Roots of Chicago Law and Economics' in P Mirowski and D Plehwe (eds), *The Road from Mont Pelerin. The Making of the Neoliberal Thought Collective* (Harvard University Press 2015) 204; Davies (n 4) 73–110).

[19]Q Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 55–145; T Biebricher and R Ptak, *Soziale Marktwirtschaft und Ordoliberalismus. Zur Einführung* (Junius 2020) 28–76; Biebricher (n 15) 29–108.

[20]The rules are largely those that legal sociologists associate with a formal or liberal paradigm of law (for instance, see G Teubner, 'Substantive and Reflexive Elements in Modern Law' 17 (1983) Law and Society Review 239, 250–57; J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, translated by W Rehg (Polity 1996) 388–446).

[21]FA Hayek, 'The Principles of a Liberal Social Order' 31 (1966) Il Politico 601; FA Hayek, 'Arten der Ordnung' 14 (1963) *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 3. Here, as elsewhere, Hayek builds on Michael Oakeshott's differentiation between telocratic (outcome-oriented) and nomocratic (rules-governed) political systems, among which the former steers the society towards pre-determined outcomes and the latter merely provides legal conditions for societal self-organisation (M Oakeshott, *Lectures in the History of Political Thought* (Imprint Academic 2006) 471–3, 469–97).

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particular objective.'[22] Spontaneous competition among individuals, not collective will formation relating to socio-economic outcomes, should be the means of ordering the economy. Instead of forging a democratic imagery of some proper social order, law should merely provide enabling framework conditions for market competition, which is perceived as the appropriate mechanism for shaping the economy.

In the neoliberal tradition, market competition has served as an ideal model of operation for various contexts that cannot be reduced to interaction among private economic actors, and also 'the overall exercise of political power can be modelled on the principles of a market economy.'[23] Policy competition among governments is a representative instance of this,[24] as exemplified especially in the works of Hayek and James M. Buchanan, which provide the evolutionist approach to policy competition.[25] In the evolutionist view, policy competition becomes operative under specific legal conditions that frame the exercise of political power. The evolutionist tradition endorses the multi-level federal structure involving 'the transference of some essential powers to a central government, while leaving the rest to the separate states.'[26] Centralised powers are essentially those that are needed to establish and preserve the competitive market economy among individuals. This division of powers 'requires the establishment of a strong but limited central authority, empowered to enforce the openness of the economy',[27] and the 'central government authority should be constitutionally restricted to the enforcement of openness of the whole nexus of economic interaction.'[28] The core means of realising the open economy are individual liberties allowing capital, goods, and market actors to migrate across borders. In contrast to market-enabling powers, market-correcting capacities, if existent at all, should be retained by lower-level units of a polity – be they states in a federation or nation states in an international organisation.[29] The competences of international bodies should be confined to the 'powers of the ultra-liberal *laissez-faire* state'.[30] In a federation, market-constituting and market-correcting capacities should thus be asymmetrically allocated to different levels of government. As a result, market-correcting rules cannot be politically harmonised in an economy arranged to operate across a territory beyond any individual state's control. Or, as evolutionists put it, political 'collusion' or 'cartelisation' among states would be inhibited.[31]

Jointly, economic mobility across a federation and the margin of legal diversity among states enable policy competition among individual governments. Economic liberties are constitutive preconditions not only for the international market regime but also for policy competition, as a spinoff of that regime.[32] Since economic liberties empower private actors to migrate across

[22]FA Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy. Volume 3: The Political Order of a Free People* (Routledge 2013 [1979]) 469.

[23]Foucault (n 17) 131. See also G Burchell, 'Liberal government and techniques of the Self' in A Barry, T Osborne and N Rose (eds), *Foucault and Political Reason. Liberalism, Neo-Liberalism and Rationalities of Government* (University College London 1996) 19, 27.

[24]For analysis, see Supiot (n 4) 105. See also Christodoulidis (n 5) 297–326.

[25]This went beyond the early ordoliberal configuration of neoliberalism, which had emphasised competition among private actors, not among legal systems (P Dardot and C Laval, *The New Way of the World. On Neoliberal Society* (Verso 2013) 210).

[26]FA Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960) 184.

[27]JM Buchanan, 'Federalism and Individual Sovereignty' 15 (1995) Cato Journal 259, 266.

[28]Buchanan (n 27) 265.

[29]Buchanan (n 27) 265. Similarly B Weingast, 'The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development' 11 (1995) Journal of Law, Economics and Organization 1.

[30]FA Hayek, *The Road to Serfdom* (Routledge 2001 [1944]) 238 and more extensively 225–44.

[31]For instance, see R Vaubel, 'Enforcing Competition Among Governments: Theory and Application to the European Union' 10 (1999) Constitutional Political Economy 327.

[32]ME Streit, 'Competition among Systems, Harmonisation and Integration' 8 (1998) *Journal des Economistes et des Etudes Humaines* 239; ME Streit and W Mussler, 'Wettbewerb der Systeme und das Binnenmarktprogramm der Europäischen Union' in L Gerken (ed), *Europa zwischen Ordnungswettbewerb und Harmonisierung. Europäische Ordnungspolitik im Zeichen der Subsidiarität* (Springer 1995) 75.

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jurisdictions and to shift capital across borders, governments face the pressure of tailoring laws to the preferences of mobile actors and aligning policies with choices by foreign governments. In an open economy, law ceases to be a mere external condition or frame for competition; it becomes a product of competition and subject to economic imperatives that interdependence between states entails. Although the units of competition are not individuals but national legal orders, evolutionists approach policy competition with the same normative ideas they apply to private competition. As Buchanan explains, the philosophy of competitive federalism 'is simply the extension of the principles of the market economy to the organization of the political structure.'[33] This means, most importantly, that policy competition should operate beyond pre-determined boundaries and independently of political intervention, such as harmonisation of tax or social policies. The normative theory of policy competition thus builds on the Hayekian philosophy of spontaneity: rather than by democratic design, legal orders should develop in spontaneous interaction and in the kind of open-ended evolution Hayek calls catallaxy.[34] In particular, later-generation members of the Freiburg school of economic thought have advocated spontaneous integration in the European context, arguing for European integration 'through competition'[35] or 'by framework activities'.[36] In the evolutionist ambition, from a means of governing the economy and correcting the workings of competition, law turns into an object governed by the market and embedded in the evolutive dynamics of competition. Governments, for their part, become 'quasi-commercial corporations'[37] and 'develop into business-like corporations competing with each other'.[38]

In triggering policy competition, the asymmetric federal structure acts as a constraint on state powers, such as the power to tax.[39] It sets 'an effective limit on all government',[40] and a federally dispersed government 'is thus in a very definite sense a limited government.'[41] The atomistic, heterarchical or polycentric social ontology that favours individuals as decision-makers in the market is transferred into the context of politics, where the federal dispersion of authority is portrayed as capable of limiting the range of power.[42] Competitive federalism hamstrings the democratic choice through two key structural changes. First, by increasing the dependence of politics on capital migration and embedding politics into market forces, it undermines the autonomy of the political. Second, it disembeds the market from politics. Hayekian-inspired philosophy is thus not apolitical. Despite the seemingly neutral language of spontaneity and open-endedness, evolutionists reserve an overtly political function for policy competition, viewing it as a check on a specific aspect of democratic authority, namely choices that interfere with the

[33]Buchanan (n 27) 260.

[34]Hayek (n 22) 1–136, 267–90. The spontaneous ordering of the social and economic sphere is among the cherished ideas of the liberal intellectual tradition, and it goes beyond Hayek's thought. For a representative instance, see M Polanyi, 'Manageability of Social Tasks' in M Polanyi, *The Logic of Liberty* (University of Chicago Press 1951) 154. For a historical overview, see N Barry, 'The Tradition of Spontaneous Order' 5 (1982) Literature of Liberty 7.

[35]ME Streit and W Mussler, 'Evolution of the Economic Constitution of the European Union' in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan 1998) 98–110.

[36]ME Streit and W Mussler, 'The Economic Constitution of the European Community: From 'Rome' to 'Maastricht' 1 (1995) European Law Journal 5.

[37]Hayek (n 22) 479.

[38]FA Hayek, 'Whither Democracy?' in FA Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge 1990 [1978]) 152, 162.

[39]FA Hayek, 'The Economic Conditions of Inter-State Federalism' 5 (1939) New Commonwealth Quarterly 131; Hayek (n 38); M Friedman, *Capitalism and Freedom* (University of Chicago Press 2002) 3.

[40]Hayek (n 26) 184.

[41]Hayek (n 26) 185.

[42]The idea that competition reduces power was among core neoliberal insights and was asserted in various contexts. Ordoliberal Franz Böhm, for instance, saw competition as 'the most remarkable and ingenious instrument for reducing power' among private market actors (F Böhm, 'Democracy and Economic Power' in *Cartel and Monopoly in Modern Law. Volume 1* (C.F. Müller 1961) 25, 42).

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economy. The evolutionist philosophy thus comes with a substantively defined normative perception of the social order. It promotes an order that favours a formally wide range of individual choice in the private sphere over collective decision-making in the political sphere. As an instrument of limiting political power, policy competition is trusted to halt the social democratic welfare state and macroeconomic planning – or, in evolutionist parlance, to tame the Leviathan. From the evolutionist perspective, democracy could be reined in by overt constitutional rules as well but, in their absence, policy competition functions as an alternative means of exerting discipline.[43] In this role, it is among the practices of disciplinary neoliberalism, referred to as 'new constitutionalism',[44] that seek to insulate the economy from democratic government. In the end, as policy competition among states asphyxiates democratic intervention in the economy, it reinforces the role of the price mechanism and market competition among individuals as means of organising the economy.

In evolutionist philosophy, law possesses a twofold character. On the one hand, market-making norms that enable policy competition belong to the transnational level. They become effectively constitutionalised, removed from the day-to-day authority of national legislatures and cushioned from political pressures. Therefore, due to its inevitable legal framing, the mechanism of spontaneous integration of legal orders is a product of legal design. On the other hand, market-correcting rules and the exercise of many essential public powers are preserved at the national level. In the ideal set-up, this is ensured by prohibiting their adoption above the national level through transnational norms. Due to the transnational constitutionalisation of market liberties, essential forms of public power and market-intervening policies become subject to policy competition. In a multi-level legal structure, market-correcting powers are constrained by exposing them to competition while transnational market-making norms are consolidated by protecting them from democratic government.[45]

The second post-war political philosophy of policy competition is the *interventionist philosophy*, which derives its premises roughly from social democratic ideas and more socially oriented forms of liberal thought. Social democrats share the liberal insight that market competition among individuals plays a pivotal role in organising the socio-economic reality. However, the economic outcomes of market processes must be kept within socially acceptable limits, and market competition may not be left to operate beyond corrective intervention. The social democratic state thus operates as a counterpart to – not as a replacement for – the market economy.[46] In an interventionist political economy, 'the economic system ceases to lay down the law to society and the primacy of society over that system is secured.'[47] In the social democratic view, the market gets embedded in social aspirations established through democratic practices,

[43]G Brennan and JM Buchanan, *The Power to Tax. Analytical Foundations of a Fiscal Constitution* (Cambridge University Press 1980) 168–86; S Sinn, 'The Taming of Leviathan: Competition Among Governments' 3 (1992) Constitutional Political Economy 177.

[44]S Gill, 'New Constitutionalism, Democratisation and Global Political Economy' 10 (1998) Global Change, Peace and Security 23. In this role, policy competition can be seen as relating to a broader post-war intellectual tradition aiming at limiting democracy through legal innovations (J-W Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe* (Yale University Press 2013)).

[45]As Werner Mussler writes, '[t]his somewhat paradoxical notion – systems competition requires some rules which must be exempt from systems competition – bases on the proposition from constitutional theory that politicians need to be prevented from changing certain rules which they would like to change because they feel constrained in their political freedom of action.' (W Mussler, 'Intra-EU Systems Competition' in KM Meessen et al (eds), *Economic Law as an Economic Good. Its Rule Function and Its Tool Function in the Competition of Systems* (Otto Schmidt/De Gruyter 2009) 337, 338.) See also J Whyte, 'The Invisible Hand of Friedrich Hayek: Submission and Spontaneous Order' 47 (2019) Political Theory 156, 172.

[46]A Przeworski, *Capitalism and Social Democracy* (Cambridge University Press 1987); I Cough, *The Political Economy of the Welfare State* (Macmillan 1983) 3; B Jessop, *The Future of the Capitalist State* (Polity 2002) 55–94; FW Scharpf, *Crisis and Choice in European Social Democracy* (Cornell University Press 1991) 22–5.

[47]K Polanyi, *The Great Transformation. The Political and Economic Origins of Our time* (Beacon 1957 [1944]) 251.

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and politics gains a certain primacy over the economy.[48] Democratic practices assume a penetrating role in ordering socio-economic relations between individuals and steering macroeconomic trends. The state turns into a device that translates democratic preferences into socio-economic effects, and 'organised power [is] deliberately used (through politics and administration) in an effort to modify the play of market forces.'[49] Rather than letting untrammelled competition govern the fate of individuals, the vital aspects of life are decommodified by insulating them from competition.[50] This happens through market-correcting measures, such as tax policies that deliberately reshape market-produced distribution. These policies aim at constituting individuals, living under various socio-economic interdependencies, as factually autonomous subjects in both private and political spheres. In correcting the outcomes of competition on the basis of purpose-oriented standards, the interventionist law of the democratic state differs markedly from market-enabling rules that avoid interference with economic processes.[51]

Like evolutionists, the proponents of the interventionist philosophy of policy competition argue that asymmetric or dual power allocation among different levels of a polity enables policy competition, as asserted especially in the context of international economic integration. The interventionists also agree that institutional interdependencies and policy competition prompt regulatory and fiscal externalities between states, which undermine governments' factual capabilities to intervene in the economy.[52] Thus, both argue similarly about the legal preconditions for policy competition and about the outcomes that competition is likely to produce. But the interventionists hold an opposite view on whether competition should be allowed to come about with all its ramifications. They wish to avoid asymmetric power allocation, prevent tax competition and protect market-embedding policies, for which reason they 'seek to have the private economy, in the form of trade and capital mobility, operate at the same level as that of tax and regulatory capabilities related to wealth distribution and the correction of market failures.'[53] The interventionist approach to policy competition, and to tax competition in particular, was given a theoretical formulation in the tradition of public finance, in which the state was allowed to play a significant role in ruling the economy. Richard and Peggy Musgrave, for instance, stressed the allocative, distributive and steering functions of the state.[54] The permissive view of the state was formative for public finance scholars' theory of fiscal federalism. They perceived the dispersed federal structure to yield sub-optimal policies and to hinder provision of public goods, which amounts to a mismatch between actual policy outcomes and democratic preferences.[55] For this not to happen, a federal structure should come with a roughly symmetric allocation of powers.

[48]S Berman, *The Primacy of Politics. Social Democracy and the Making of Europe's Twentieth Century* (Cambridge University Press 2006) 6, 177–99.

[49]A Briggs, 'The Welfare State in Historical Perspective' 2 (1961) European Journal of Sociology 221, 228.

[50]Cerny (n 3) 258–9.

[51]F Ewald, 'A Concept of Social Law' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (De Gruyter 1986) 40; D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in D Trubek and A Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (Cambridge University Press 2006) 19, 37–63.

[52]For instance, see M Zürn, 'The Challenge of Globalization and Individualization: A View from Europe' in H-H Holm and G Sørensen (eds), *Whose World Order? Uneven Globalization and the End of the Cold War* (Westview Press 1995) 137; S Strange, 'The Defective State' 124 (1995) Daedalus 55; J Habermas, 'The Postnational Constellation and the Future of Democracy' in J Habermas, *The Postnational Constellation. Political Essays*, translated by Max Pensky (Polity 2001) 58; FW Scharpf, 'Globalisierung als Beschränkung der Handlungsmöglichkeiten nationalstaatlicher Politik' MPIfG Discussion Paper 97/1; Scharpf (n 11) 84.

[53]A Harmes, *The Politics of Fiscal Federalism. Neoliberalism versus Social Democracy in Multilevel Governance* (McGill-Queen's University Press 2019) 57.

[54]RA Musgrave, *The Theory of Public Finance: a Study in Public Economy* (McGraw-Hill 1959) 6–27; RA Musgrave and PB Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill 1973) 7–13.

[55]WE Oates, *Fiscal Federalism* (Edward Elgar 1972); WE Oates, 'Fiscal Competition and the European Union: Contrasting Perspectives' 31 (2001) Regional Science and Urban Economics 133; RA Musgrave, 'Fiscal Federalism' in JM Buchanan and RA Musgrave, *Public Finance and Public Choice. Two Contrasting Visions of the State* (MIT Press 2000) 155.

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In a transnational polity, a symmetric and competition-inhibiting legal structure can be devised in two principal ways. The first option is that individual countries retain their market-correcting and other vital public powers, such as the power to tax, and are also permitted to intervene in cross-border economic mobility by means of national law. By controlling cross-border economic flows, governments can ensure their factual national capacity to rule domestic economies through the proper exercise of public power. Transnational law is thus open, in legal and factual terms, to different socio-economic models, whose adoption is a question of national political choice. The second option is that transnational law guarantees a high degree of cross-border economic openness and, concomitantly, implements market-embedding and fiscal measures whose national execution would, in the absence of transnational standards, likely end up being undermined by economic mobility. Within this symmetric framework, policy competition would be curbed through transnational intervention. Regarding tax competition, intervention may come in chiefly two forms. It could regulate how national governments exercise their power to tax, that is, it would give national tax systems a specific form through European tax norms. This is the most common way of thinking about constraining tax competition.[56] Beyond that, intervention may also establish transnational taxes whose revenues would flow into the purse of a transnational polity, which would distribute tax receipts to national governments or use them to produce transnational public goods.[57] In any case, centralised policymaking would de-commodify legal orders and narrow the scope of competition among governments. Hence, 'integration through intervention'[58] would be the proper mode of interaction between legal orders. Intervention helps states regain at the transnational level the factual policymaking autonomy they have lost at the national level – in a vaguely similar fashion that domestic market-correcting policies restore individuals' factual autonomy through collective political decisions. In insulating the exercise of public powers from market forces, transnational norms recreate the autonomy of the political and reinforce democratic government, rather than the anonymous dynamics of competition, as a means of ordering socio-economic reality.

The political philosophy of preventing policy competition by transnational intervention implies a substantively defined normative perception of the social order. While evolutionists advocate policy competition as a path towards limited government, interventionists look to transnational law as a means of ensuring appropriate scope for exercising public power. To address policy externalities, substantive political choices must be made. Without being exercised, transnational competences have no competition-constraining effect. Appraising which policy externalities to address and through what type of transnational norms requires political reasoning.[59] Relying on some imaginary democratic benchmark or seemingly neutral and optimal standard borrowed from economic reasoning would betray the interventionist premise that the socio-economic order is a product of political ordering. Affirmative construction of public powers at the transnational level is not an apolitical act but itself a form of political intervention, which formally reduces national room for manoeuvre. Neo-republican political theory correctly argues that transnational norms enable governments to discharge themselves from interdependencies

[56]This has been the main course of action discussed, for instance, in the EU (see AJ Menéndez, 'The Purse of Polity' in EO Eriksen (ed), *Making the European Polity. Reflexive Integration in the EU* (Routledge 2005) 187; P Genschel and M Jachtenfuchs, 'Conclusion: The European Integration of Core State Powers. Patterns and Causes' in P Genschel and M Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press 2013) 249).

[57]On these, see M Schratzenstaller, 'International Taxes – Why, What and How?' in Leaman and Waris (n 12) 283. See also WE Oates, 'An Essay on Fiscal Federalism' 37 (1999) Journal of Economic Literature 1120, 1124–30.

[58]The expression is used by Streit and Mussler (n 35); Streit and Mussler (n 36).

[59]A Somek, 'The Argument from Transnational Effects II: Establishing Transnational Democracy' 16 (2010) European Law Journal 375, 389–90; A Somek, 'What Is Political Union?' 14 (2013) German Law Journal 561, 574.

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and domination, and that by pooling sovereign powers they regain their role as political rather than competitive actors.[60] Still, in resorting to transnational law, interventionist philosophy cannot avoid the predicament of how to preserve national responsiveness to diverse political pressures while protecting domestic legal orders from competition. Hence, transnational law as a means of political re-empowerment comes with substantive legal constraints, and the more resistant to political renegotiation, the more unresponsive those constraints are.

The evolutionist and interventionist philosophies of policy competition are premised on contrasting normative perceptions of the socio-political order, and they differ in how they evaluate competition and democracy as means of governing socio-economic reality, which is so also as regards income taxes. These philosophies entail different legal frameworks for a transnational polity such as the EU. In the EU context, the Treaty Establishing the European Economic Community (Treaty of Rome), a key instrument in unleashing European integration in 1958, permitted many alternative patterns of integration to emerge.[61] This means, among other things, that the Treaty of Rome involved no legal commitment to foster policy competition, or to hold it back. It therefore allowed both symmetric and asymmetric legal orders to come about. Spontaneous income tax integration would be triggered by European law implementing deep market integration without harmonisation of Member States' income tax laws. Taking into consideration the centrality of market-making premises in the Treaty of Rome, a significant degree of economic mobility was a likely – albeit not predetermined and strictly programmed – outcome of integration. Yet the Treaty of Rome did not foreclose income tax harmonisation, which meant that market integration could be balanced by approximation of income taxes. The evolutionists' dream of a constitutionally prohibited construction of the power to tax was therefore not part of European law, although the Europeanisation of taxation has been overburdened by preserving the rule of unanimous decision-making. Furthermore, European taxes could be introduced as the Community's own resources. Openness towards tax integration meant that symmetry between market integration and income tax integration could be realised through European intervention. In historical perspective, the eventual outcomes of integration have depended on diverse political and economic factors, and they have reflected the broader trajectories of international political economy. The next Section will examine how contrasting ideas on the spontaneous integration of legal orders have been articulated in the European politics of income tax competition and how, if at all, they have translated into European law. Hence, from the perspective of income taxation, the actual historical formation of the European model of fiscal federalism will be analysed.

3. European integration and the evolving politics of income tax competition

A. Undeveloped conditions for tax competition under the political economy of embedded liberalism

The post-war epoch from 1945 until the 1970s is commonly characterised as a period of 'embedded'[62] or 'qualified'[63] liberalism. The political economy of the era involved a commitment to liberalising the international economic order. Yet, developing the cross-border market regime was conditioned on states retaining their national autonomy to carry out each country's preferred socio-economic model, which allowed, among other things, national market-correcting policies,

[60]See C Laborde and M Ronzoni, 'What Is a Free State? Republican Internationalism and Globalisation' 64 (2016) Political Studies 279; C Laborde, 'Republicanism and Global Justice' 9 (2010) European Journal of Political Theory 48; P Pettit, 'A Republican Law of Peoples' 9 (2010) European Journal of Political Theory 70.

[61]C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016); D Nicol, *The Constitutional Protection of Capitalism* (Hart 2010) 86.

[62]JG Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 36 (1982) International Organization 379.

[63]D McCann, *The Political Economy of the European Union* (Polity 2010) 22–6.

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management of investments and macroeconomic steering.[64] In terms of law, the emerging two-level political structure was devised to strike a balance between liberal and social democratic scripts of transnational law.[65] Rather than embracing a fully liberalised market regime or conferring ambitious market-embedding and other core public powers on international institutions, the emerging order implemented a moderate degree of economic openness, with countries being allowed to resort to capital controls so as not to jeopardise distributive interventions and macroeconomic priorities at home. The balance resembled the domestic settlement of democratic capitalism, under which market-based allocation of resources was supposed to co-exist with democratic choices over the proper distribution of resources.[66]

Regionally, embedded liberalism came to inform the functional division of labour between the European Economic Community (EEC) and its Member States. Here, the European pattern followed the more general trajectory of economic globalisation. Roughly speaking, the EEC was to foster aggregate economic growth through establishing the Common Market while Member States were to preserve their relevant autonomy in macroeconomic affairs and in executing distributive measures through social and tax policies, as required by their democratically asserted socio-economic models.[67] European law thus remained open to more market-driven and more socially oriented domestic systems.[68] Besides common agricultural policy and rudimentary forms of macroeconomic coordination, European law was primarily meant to reinforce participation by private economic actors in the Europeanised market system, which was looked on as resulting in improved collective standards of living in Member States. Integration was thus not contrary to but complementary to post-war state reconstruction.[69] In practice, however, carrying out the dual division of governing functions proved difficult. The idea of the European market lent itself to different economic readings. These demanded varying degrees of integration and implied alternative legal arrangements for the Community. Making the European market thus came with the potential of reducing national political discretion in monetary, economic, fiscal and social policy.[70] This became obvious in taxation, too. While tax policy had a place among core national prerogatives, market-making necessitated integrating parallel tax systems. Adaptation to market

[64]The post-war role of the state in the domestic economy varied among countries, with governments opting for different combinations of post-market redistribution, tax-financed social security, direct public spending, indirect management of private investments, wage policy, and control of aggregate demand through monetary and other macroeconomic policies (for these varieties, see G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990)). Under the permissive settlement of embedded liberalism, countries had a wide choice over how to put into practice domestic socio-economic premises, with the Keynesian-type of macroeconomic steering, for instance, being only one among many possible practices (see E Helleiner, 'The Life and Times of Embedded Liberalism: Legacies and Innovations since Bretton Woods' 26 (2019) Review of International Political Economy 1112, 1114–9).

[65]On the rival conceptions of the role of law beyond the state in the post-war years, see Slobodian (n 19); O Rosenboim, *The Emergence of Globalism. Visions of World Order in Britain and The United States, 1939–1950* (Princeton University Press 2017).

[66]W Streeck, 'The Crises of Democratic Capitalism' 71 (2011) New Left Review 5.

[67]B van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (Routledge 2002) 63–8; M Ferrera, *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection* (Oxford University Press 2005) 92–3; C Joerges, 'The Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process' in L Morlino and G Palombella (eds), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010) 163; F de Witte, 'The Architecture of a "Social Market Economy"' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 117, 117–24. For a very different reading, emphasising the telos of the EEC as a constraint on national popular sovereignty and political agency, see MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

[68]M Dani, 'Deconstitutionalising the Economic and Monetary Union' in *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow. ECB Legal Conference 2021* (European Central Bank 2022) 282, 286–94.

[69]AS Milward, *The European Rescue of the Nation-State* (Routledge 2000) 1–17 and especially 38.

[70]As Jacques Pelkmans writes, '[t]he dilemma is between having an incomplete CM [*ie* common market], safeguarding national macro-economic policy autonomy to some extent, and a fully fledged CM with big leaps forward in positive policy integration.' (J Pelkmans, 'Economic Theories of Integration Revisited' 18 (1980) Journal of Common Market Studies 333, 344–5.)

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concerns was not paramount only as regards indirect taxes. Additionally, income taxes – especially on capital and corporate income – were seen as capable of hindering the Common Market.

It might seem that integrating income tax systems through direct legal measures was excluded from the early integration agenda. The Treaty of Rome did not expressly address income taxes, and before the 1990s, no rules on them were issued by the Council.[71] There were also expectations that national laws might converge spontaneously as a result of abolishing the most severe trade obstacles, such as customs duties and quantitative restrictions. In this view, the likeness between national policies is not so much an inevitable ex-ante precondition for European trade as its possible ex-post consequence. With a moderate legal framework in place, the Common Market would prove partly self-executing in gradually furthering the conditions of its own functioning. That wage levels, social benefits, interest rates and also taxes might converge due to the 'interplay of economic forces' was envisaged in the Spaak Report, in which it was presented as one – but only one – feasible integration mechanism.[72] The idea was endorsed especially by those aiming to avoid any creation of interventionist powers beyond the state. In this vein, Alfred Müller-Armack held that the Common Market itself is capable of yielding the needed tax policy convergence, whatever its precise degree.[73] On the same note, Ludwig Erhard subscribed to the type of integration that could act as an 'anonymous force' pushing economically prudent governments, as he portrayed them, to adopt policies unilaterally but still in line with other countries' choices.[74] Yet, spontaneous ordering was not advocated as a form of destructive downward policy competition but rather as a way of achieving an institutional environment where the European market could yield full economic gains in the long run. Also, often when the Common Market, in turn, was expected to alter national living standards, these were anticipated to develop upwards, which was due to the mutual rewards expected from dynamic and non-zero-sum economic growth among the Six.[75]

In the 1960s, spontaneous ordering of tax systems came by no means to be favoured as the only or even primary integration mechanism. Legal ordering was advocated by the European Commission. In its 1962 action programme, the Commission gave an extensive reading to the Common Market, interpreting it as a market with 'conditions similar to those of an internal market.'[76] In the programme, while acknowledging the necessity to integrate indirect taxes, the Commission postponed the question of direct taxes and, for the time being, merely referred to their possible spontaneous approximation.[77] Later the same year, the Fiscal and Financial Committee, an expert group authorised by the Commission and chaired by Fritz Neumark, published its report on tax harmonisation. In conformity with its mandate, the committee reflected on integrating taxes for the purpose of 'establishing the Common Market bringing into

[71]The relatively late exception was Council Directive EEC 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L 336, 27 December 1977, though it only regulated cooperation among national tax administrations and did not align national tax systems in any substantive sense.

[72]Bericht der Delegationsleiter an die Aussenminister (Brüssel, 21 April 1956) 20, 29 and 48 ('Spaak Report'). Available at: <https://www.cvce.eu/en/obj/bericht_der_delegationsleiter_an_die_aussenminister_brussel_21_april_1956-de-4dd69921-433b-4bc0-acec-808f72fec9ae.html> accessed 21 October 2023.

[73]A Müller-Armack, 'Fragen der europäischen Integration' in A Müller-Armack (ed), *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur Sozialen Marktwirtschaft und zur Europäischen Integration* (Rombach 1966) 319–30, 324–5.

[74]L Erhard, 'Nach dem Scheitern der Europäischen Verteidigungsgemeinschaft' in L Erhard (ed), *Deutsche Wirtschaftspolitik. Der Weg der Sozialen Marktwirtschaft* (Econ-Knapp 1962) 245; L Erhard, 'Europäische Einigung durch funktionale Integration' in *idem*, 253, 257; L Erhard, 'Harmonie durch Harmonisierung?' in *idem*, 461; L Erhard, *Wohlstand für alle* (Econ 1960) 305–32.

[75]Spaak Report (n 72) 32; Milward (n 69) 104–96. For a very articulated position, see *Social Aspects of European Economic Co-operation. Report by a Group of Experts* (International Labour Office 1956) 84–91 ('Ohlin Report').

[76]Commission of the European Communities, Memorandum of the Commission on the action programme of the Community for the second stage. COM(62) 300, 24th of October 1962, 20.

[77]Commission of the European Communities (n 76) 26.

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being and guaranteeing conditions analogous to those of an internal market'.[78] This permissive interpretation of the Common Market gave rise to a comprehensive plan for approximating taxes by means of law, and the committee proposed ambitious measures with a view to harmonising the core properties of income tax systems.[79] Some years later, many of the committee's ideas were adopted by the Commission, who drafted an extensive programme[80] for harmonising income taxes and proposed two (initially stalled) corporate tax directives.[81] Even the Commission's 1975 (failed) proposal[82] for aligning Member States' corporate tax rates largely followed the Neumark committee's proposals. In this process, the idea of income tax integration by means of law was formative for the Commission's work, and it also found support in expert opinion. Rather than competitive forces producing convergence among taxes, law-made similarity among tax systems would precede and usher in 'the free play of the forces of competition' between market actors.[83]

Income tax integration by means of law was promoted for the purpose of creating an economically rational order of the Common Market, and the Europeanisation of taxation was chiefly a function of market integration. European law was essentially invoked to bring about territorial neutrality among income tax systems.[84] This entailed, first of all, abolishing the type of tax obstacles that specifically afflict cross-border activities. Secondly, territorial neutrality required harmonising tax systems, which meant bringing national tax structures and rates closer to each other, even if applied to domestic activities only. Ever since the Spaak Report, tax harmonisation had been associated with the conditions of private competition among commodity producers, on the one hand, and capital movements, on the other.[85] Regarding the former, income tax differentials were seen to distort the relatively equal conditions of private competition and cross-border commodity flows, as they would make production costs differ among producers located in different countries. Regarding the latter, tax system disparities were perceived as artificial incentives capable of influencing market participants' locational decisions and of prompting '"abnormal" capital movements, ie movements springing from other than the traditional economic and financial considerations.'[86] Taxes were also not to function as deterrents that 'artificially divert or impede the necessary mobility' of factors of production.[87] By functioning as false incentives (*ie* triggering unwanted capital movements) and deterrents (*ie* inhibiting economically warranted investments), taxes would lead to 'a misallocation of capital'[88] and undermine the aggregate economic gains rationalising the integration process. Income taxes were thus construed as costs on production, and harmonising them by means of European law was to ensure they do not make for disproportionate competitive advantages among producers and

[78]'Report of the Fiscal and Financial Committee' in Reports on Tax Harmonisation. The Report of The Fiscal and Financial Committee and The Reports of The Sub-Groups A, B and C (International Bureau of Fiscal Documentation 1963) 94–156, 98.

[79]Report of the Fiscal and Financial Committee (n 78) 118–45. Fritz Neumark himself had already stressed the significance of income tax approximation in the European context in 1953 (see F Neumark, 'Die budgetären und steuerlichen Aspekte der wirtschaftlichen Integration' in F Neumark, *Wirtschafts- und Finanzprobleme des Interventionsstaates* (J. C. B. Mohr 1961) 291, 312–4).

[80]Commission of the European Communities, Programme for the harmonization of direct taxes. Commission Memorandum to the Council, of 26 June 1967. Supplement to Bulletin N. 8-1967 of the European Economic Community.

[81]Vorschlag einer Richtlinie des Rates über das gemeinsame Steuersystem für Fusionen, Spaltungen und die Einbringung von Unternehmensteilen, die Gesellschaften verschiedener Mitgliedstaaten betreffen, Abl. C 39, 22. März 1969, 1–6; Vorschlag einer Richtlinie des Rates über das gemeinsame Steuersystem für Mutter- und Töchtergesellschaften verschiedener Mitgliedstaaten, Abl. C 39, 22 März 1969, 7–9. These proposals were eventually adopted in 1990.

[82]Proposal for a Council Directive concerning harmonization of systems of company taxation and of withholding taxes on dividends, OJ C 253, 5 November 1975, 2–8.

[83]Commission of the European Communities (n 80) 9.

[84]F Neumark, *Grundsätze gerechter und ökonomisch rationaler Steuerpolitik* (J. C. B. Mohr 1970) 279–82; W Hallstein, *Die Europäische Gemeinschaft* (Econ 1973) 163–7.

[85]Spaak Report (n 72) 3, 29–32, 46–8.

[86]Commission of the European Communities (n 80) 9. See also Commission of the European Communities (n 76) 26.

[87]H von der Groeben, Harmonizing taxes – a step to European integration (European Community 1968) 6.

[88]Report of the Fiscal and Financial Committee (n 78) 134.

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obstruct the functioning of the cross-border market mechanism. In this role, harmonisation was to protect the genuinely economic sphere from arbitrage and guarantee that arbitrary legal factors do not pervert the process of price formation.

Harmonising taxes by means of law and for the sake of fostering competition among private actors was cast in a positive light in particular by Hans von der Groeben, acting as a European Commissioner from 1958 until 1970. As a second-generation ordoliberal, von der Groeben was much more sanguine about European integration than original ordoliberals.[89] Many ordoliberals were wary of the integration process because, as a form of regional co-operation, it lacked a truly global reach. They also feared that the emerging European Communities would assume the powers of political intervention and thus replicate national practices of economic planning.[90] Still, ordoliberal doubters of European integration, such as Wilhelm Röpke, held that the co-existence of national tax systems, oscillating in line with volatile political preferences, produces arbitrary cost factors capable of distorting international competition among private actors. Concern was especially pronounced under developed post-war tax systems, harnessed for various political purposes of economic steering, industrial policy and social protection.[91] This was also precisely von der Groeben's concern. But where many ordoliberals refrained from considering European law as a feasible way out of this predicament, von der Groeben adopted the core ordoliberal premise of law as a means of ensuring the existence of private competition and entrusted European law with the task of 'normalising' the institutional conditions of competition across the Common Market.[92] Tax harmonisation by means of law was to be operationalised exactly to achieve this goal. In von der Groeben's view, tax harmonisation was not to give rise to European powers of redistribution or dirigiste planning but merely to establish a rational and law-made framework for the European system of market economy and private competition.[93]

In spite of the push for income tax integration, national room for political manoeuvre in using taxes for social, budgetary, economic and fiscal policy purposes was not to be compromised, as frequently articulated in harmonisation initiatives.[94] Rather than full unification, harmonisation entailed that Member States preserve the characteristic features of their tax systems, stemming from national fiscal traditions, and continue to harness taxes for the political goals of their domestic democratic choice.[95] Upon proposing harmonisation of corporate taxes in 1975, the Commission still acknowledged taxation as an important domestic 'instrument for achieving economic and social objectives, whether they affect structures or current economic trends. Until these objectives can be defined and achieved at Community level, the authorities will have to

[89]Slobodian (n 19) 183–4.

[90]R Sally, *Classical Liberalism and International Economic Order. Studies in Theory and Intellectual History* (Routledge 1998) 131–49.

[91]W Röpke, 'Economic Order and International Law' in Academie de Droit International, *Recueil des Cours, 1954* (A. W. Sijthoff 1955) 207, 235. See also W Röpke, 'Europa als Wirtschaftliche Aufgabe' in A Hunold (ed), *Europa – Besinnung und Hoffnung* (Eugen Rentsch 1957) 159. Röpke was occasionally also hopeful that free trade would level institutional conditions among countries (W Röpke, *International Order and Economic Integration* (D. Reidel Publishing 1959) 264–5).

[92]Von der Groeben (n 87); H von der Groeben, 'Die nächsten zehn Jahre' in H von der Groeben, *Europa. Plan und Wirklichkeit* (Nomos 1967) 151, 155–60. See also H von der Groeben, 'Harmonisierung der Umsatzsteuern im Gemeinsamen Markt' in *idem* 171.

[93]Von der Groeben, Die nächsten zehn Jahre (n 92) 162; H von der Groeben, 'Wettbewerb und Programmierung als Instrumente der Wirtschaftspolitik im Gemeinsamen Markt' in A Plitzko (ed), *Planung ohne Planwirtschaft. Frankfurter Gespräch der List Gesellschaft 7–9 June 1963* (Kyklos 1964) 191; H von der Groeben, 'The Role of European Integration in the West German Economic Order' 135 (1979) Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics 493.

[94]Report of the Fiscal and Financial Committee (n 78) 98–108; Commission of the European Communities (n 76) 7; Commission of the European Communities, Action Programme for Taxation. Communication from the Commission to the Council. COM (75) 391 final, 23 July 1975, 1–2.

[95]Menéndez (n 13) 80–4; AJ Martín Jiménez, *Towards Corporate Tax Harmonization in the European Community: an Institutional and Procedural Analysis* (Kluwer 1999) 107–8.

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ensure that harmonization in no way hampers the use of taxation as an instrument of national policy.'[96] The roughly shared aspiration was to reconcile control over domestic socio-economic orders with the rational organisation of the Common Market. Yet, as regards income taxes, agreement on the balance between these two aspects proved unattainable and political bargaining yielded no results before the 1990s.[97] In the post-war European state, income taxes had transformed into such an essential means of shaping social and economic circumstances that political discretion in exercising the power to tax was not to be risked.

The eventual lack of income tax integration resulted in a number of cross-border trade obstacles being removed but income tax policy being kept at national discretion. Did this outcome, then, come down to what Fritz W. Scharpf has influentially characterised as the asymmetric structure of the European polity, a structure conducive to tax competition?[98] And was it perhaps a straightforward product of actors and ideas favouring tax competition? Some observers have indeed seen the EEC as 'the closest realization of the neoliberal ideal of a federalized tax regime', which neoliberal intellectuals 'must have been happy with'.[99] Regarding early integration, this interpretation seems to be ahistorical. As already mentioned, non-harmonisation was associated with the need to preserve national capacities to actually use the power to tax for democratically warranted purposes. Therefore, non-harmonisation was anything but validated by reference to triggering disciplinary forces of policy competition. For many, the reverse side of non-harmonisation was not a loss but rather preservation of policy autonomy. Interpreting the non-centralised system of income taxation as a sign of endorsement for tax competition would amount to an anachronistic reading. This is so for three key reasons.

The first reason is that in the 1960s capital was not unequivocally considered as transnationally mobile, either legally or factually, as it has been since the 1980s. In Article 67 of the Treaty of Rome, liberalisation of capital movements pointed primarily to allowing payments necessary for other market freedoms to materialise. In spite of this humble formulation, more extensive liberalisation certainly had its proponents and two directives were issued to liberalise many key and also tax-relevant capital movements, although in a qualified fashion.[100] Beyond these, however, liberalisation of the European capital market was paralysed until the late 1970s.[101] As a result, preconditions for mobile finance remained relatively scarce and free movement of capital featured as an 'aspirational goal'.[102] Even when income tax harmonisation was invoked to prevent unwished-for capital movements, as analysed above, capital movements were often regarded as a conceivable outcome of future integration and the hypothetical completion of capital market union.[103] Because footloose capital, capable of reacting rapidly to national tax system differences,

[96]Commission of the European Communities 1975 (n 94) 1–2.

[97]See (n 71).

[98]Scharpf (n 11).

[99]P Triantafillou, 'Neoliberal Taxation Regimes and the Articulation of Sovereign State Power' 14 (2021) Journal of Political Power 409, 417–8. The lack of interventionist powers more broadly has provoked interpretations of the EEC as a legal framework essentially supportive of policy competition (see, for instance, W Mussler, 'Systemwettbewerb als Integrationsstrategie der Europäischen Union' in ME Streit and M Wohlgemuth (eds), *Systemwettbewerb als Herausforderung an Politik und Theorie* (Nomos 1999) 71, 79–89).

[100]EEC Council's First Directive for the implementation of Art 67 of the Treaty, OJ English special edition, volume 1959–1962, 49–59; Second Council Directive 63/21/EEC of 18 December 1962 adding to and amending the First Council Directive for the implementation of Art 67 of the Treaty, OJ English special edition, volume 1963–1964, 5–17. On their relevance for capital mobility and taxation, see also P Genschel, *Steuerwettbewerb und Steuerharmonisierung in der Europäischen Union* (Campus 2002) 134–5.

[101]P Teixeira, *The Legal History of the European Banking Union* (Hart 2020) 10–35.

[102]AJ Menéndez, 'The Existential Crisis of the European Union' 14 (2013) German Law Journal 453, 474. See also CJ Bickerton, *European Integration. From Nation-States to Member States* (Oxford University Press 2012) 122.

[103]Report of the Fiscal and Financial Committee (n 78) 155; The Development of a European Capital Market. Report of a Group of Experts Appointed by the EEC Commission (European Economic Community 1966); PB Musgrave, 'Harmonization of Direct Business Taxes: A Case Study' in CS Shoup (ed), *Fiscal Harmonization in Common Markets, Volume II* (Columbia

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was not widely experienced as a critical phenomenon, it was not perceived as catalysing destructive policy competition. In the absence of full capital mobility, harmonisation was not a vital task.[104] Hence, even if mobility of capital should not be underestimated, its effect on national policy autonomy was considered more modest than in later decades. Limited capital mobility was also not only a cause that reduced fear of tax competition. Rather, it partly resulted from the precise need to create a legal framework able to inhibit policy competition, and – as one of the core elements of embedded liberalism – limited capital mobility was devised to protect national policy autonomy.[105]

The second reason seen to lessen the pressures of tax competition was weak macroeconomic integration. To be sure, in the Commission's 1962 action programme, ambitious plans emerged for European macroeconomic coordination.[106] Later, the expert group chaired by Pierre Werner envisaged a thorough Europeanisation of monetary policy, which would deprive Member States of their ability to manage the external value of money (exchange rate) within the Common Market.[107] In spite of the push towards common monetary policy, advocated chiefly as a way to complete the European market, macroeconomic integration remained at a rudimentary level.[108] As a result, Member States continued to have at their disposal monetary policy instruments by which to manage the balance of payments or, in language having become more common later, competitiveness. Even in the Bretton Woods monetary system of fixed exchange rates, currency devaluation remained an instrument of adjusting the competitive position of a national economy. Because of the possibility of devaluation, taxation and fiscal policy were not the only significant means of tuning domestic producers' international competitiveness. Since taxation was not overburdened as a factor of competitiveness, tax systems could better resist possible competitive pressures. Admittedly, managing the exchange rate was not an ideal measure to restore competitiveness; if the problem was a particular industrial sector with specific competitive disadvantages, devaluation was an imprecise cure.[109]

The third reason why tax competition did not come out as a critical concern was lack of a developed ideational framework, that is, conceptual lenses through which policymakers perceive and interpret the political and economic reality. To be sure, the idea of tax competition was not unfamiliar around the time of early integration. Many of its basic properties and also its uneasy relationship with democracy had already been recognised in scholarly work.[110] Further, from the mid-1950s onwards, early formalised models of tax competition, mainly for national federal

University Press 1967) 207; von der Groeben (n 87) 7–8. Tax integration was thus a correlate of market integration and of capital mobility in the Common Market. See also Report to the Council and the Commission on the realization by stages of economic and monetary union in the Community (Council – Commission of the European Communities 1970) 9–14 ('Werner Report').

[104]This view was present in the Ohlin Report (n 75) 84–110, especially in the context of social policy harmonisation, although the report's assumption of the immobility of capital was equally strongly challenged by one of its drafters, Maurice Byé (in *idem* 119–39). The Report depicts how estimations of the degree of capital mobility were not unanimous in the post-war period, and it shows that the differences in opinion were not only political but also scholarly and analytical.

[105]E Helleiner, *States and the Reemergence of Global Finance. From Bretton Woods to the 1990s* (Cornell University Press 1996) 25–50.

[106]This happened especially under the influence of Commissioner Robert Marjolin (K Seidel, 'Robert Marjolin: Securing the Common Market through Economic and Monetary Union' in K Dyson and I Maes (eds), *Architects of the Euro: Intellectuals in the Making of the European Monetary Union* (Oxford University Press 2016) 51; H Canihac, 'Programming the Common Market: The Making and Failure of a "Dirigiste" Europe, 1957–1967' 30 (2021) Contemporary European History 383, 387–392).

[107]Werner Report (n 103).

[108]K Tuori and K Tuori, *The Eurozone Crisis. A Constitutional Analysis* (Cambridge University Press 2014) 13–60; Kaupa (n 61) 73–83.

[109]Fiscal and Financial Committee (n 78) 116.

[110]M Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie. 1. Halbband* (J.C.B. Mohr 1976 [1922]) 209–11; J Schumpeter, 'Finanzausgleich (I)' in J Schumpeter (ed), *Aufsätze zur Wirtschaftspolitik* (J.C.B. Mohr 1985 [1926/1927]) 84, 89; Hayek 1939 (n 39).

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polities, were gradually produced in economics.[111] Yet it was only in the 1980s that literature on the preconditions and consequences of international tax competition burgeoned and became more analytical.[112] In particular, scholars began to examine tax competition as capable of creating serious downward convergence among national tax systems[113] and of distorting proper distribution of the tax burden between migrant and immobile taxpayers.[114] These issues were also analysed rigorously in the context of European integration.[115] States were also increasingly portrayed as actors aiming to attract foreign capital and not merely protecting their existing domestic industries. The idea of a tax competition framework rapidly translated into policymakers' ideational frame through which to review the outcomes of non-centralised and, alternatively, harmonised taxation. But, before the 1980s, the conceptual framework for perceiving governments as rival actors introducing competitive tax incentives in order to become a lucrative territory for migrant capital was not fully developed and thus did not permeate early political discourse on tax integration. In part, this related to real-world circumstances: due to restrained capital mobility under embedded liberalism, the political economic reality did not feed into a powerful imagery of tax competition. Ideas matter, but their policy-shaping power depends on their historical elaborateness and the support they command from various knowledge producers.

To recapitulate, in early integration, non-harmonisation of Member States' income tax systems is not to be taken as displaying endorsement of tax competition that could pre-empt national democratic choices. Relatively modest capital mobility, an array of domestic macroeconomic policy options and lack of a fully developed idea of states as devoted competitive agents meant that tax competition was not a critical concern in discourses on income tax integration. When present, worries related merely to the distorting effects of tax concessions on the conditions of competition among private actors, but not on social, macroeconomic or fiscal deterioration.[116] Given the firm mandate of politics for ordering social and economic conditions under post-war democratic capitalism, more articulate anxieties about tax competition should have ensued, had the dynamics of competition been experienced as undermining national autonomy to organise the domestic economy. In fact, the viability of national welfare regimes was essential in validating the pursuit of international economic openness, which was *prima facie* seen as a precarious enterprise, especially due to the spectre of the inter-war economic collapse.[117] Achievability of national variants of a mixed economy was a condition of legitimate integration, but rather than by harmonising income taxes, this achievability was confirmed through confined and trade-oriented market integration. The roughly symmetric structure of European law was thus brought about by combining moderate economic integration with national income tax autonomy. Even if one correctly assumes a dormant tension between European market-making and national tax autonomy, it was only towards the 1990s that this unease came to be seen as developing into a fully-fledged clash. The Hayekian neoliberal federation capable of exhausting interventionist political energies and domesticating other core public powers was still waiting to be invented.

[111]The classic starting point was C Tiebout, 'A Pure Theory of Local Expenditures' 64 (1956) Journal of Political Economy 416. See also Oates 1972 (n 55). On further literature relevant for the idea of tax competition, see A Harmes (n 53) 30–86.

[112]P Genschel and P Schwarz, 'Tax competition: A Literature Review' 9 (2011) Socio-Economic Review 339; H Lierse, 'A Race to the Bottom? The Politics of Tax Competition' in L Hakelberg and L Seelkopf (eds), *Handbook on the Politics of Taxation* (Edward Elgar 2021) 166; DM Andrews, 'Capital Mobility and State Autonomy: Toward a Structural Theory of International Relations' 38 (1994) International Studies Quarterly 193.

[113]DR Lee and RB McKenzie, 'The International Political Economy of Declining Tax Rates' 42 (1989) National Tax Journal 79.

[114]PB Musgrave and RA Musgrave, 'Fiscal Coordination and Competition in International Setting' in McLure, Sinn, Musgrave and others (eds), *Influence of Tax Differentials on International Competitiveness* (Kluwer 1990) 61.

[115]H-W Sinn, 'Tax Harmonization and Tax Competition in Europe' 34 (1990) European Economic Review 489.

[116]Von der Groeben (n 87) 4.

[117]In the global context, see JA Frieden, *Global Capitalism. Its Fall and Rise in the Twentieth Century* (W. V. Norton 2006) 278–300. In the European context, see L Tsoukalis, *The New European Economy Revisited* (Oxford University Press 1997) 9–32.

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B. The ascent of tax competition under the neoliberal reconfiguration of political economy

By the early 1990s, policy competition and institutional competitiveness had solidified themselves as commanding policy ideas and established a largely new frame of political reason.[118] They had come to shape not only domestic law-making but also discourses on transnational governing arrangements, such as the Europeanisation of income tax law. For their ascent, a number of institutional and ideational transformations were crucial. Several of these transpired as (often delayed and protracted) responses to the 1970s economic downturn that preluded the end of post-war economic expansion. As they were pivotal for global political economic reorientation, they were critical for the EU.

The first change was the continuous deepening of the global market regime and in particular the legal and factual mobility of capital, corporations and intra-firm activities.[119] The 1980s 'relaunch' of European integration and the new Single Market conception were regional forms of this development.[120] Second, under non-harmonisation of income tax systems, the gradual enlargement of the Community widened tax policy gaps between Member States and reinforced their significance as potential incentives for territorially migrant capital.[121] Also, with more countries on board, it became more difficult to reduce these differences. This was unquestionably so due to the unanimity rule. Even though the Single European Act (SEA) largely abandoned the procedurally demanding constraint of unanimous decision-making in the Council, taxes remained within the scope of the unanimity rule,[122] as some countries feared that easy Europeanisation would moderate future tax competition and bar domestic choices in terms of lowering fiscal burdens.[123] Furthermore, as many market-making norms could be adopted by a qualified majority but tax norms required unanimity, furthering economic mobility was disproportionately easier than adopting tax rules capable of balancing market integration.[124] The outcome of this asymmetry became evident immediately under the SEA. As capital movements were liberalised in 1988, their liberalisation was to be counterbalanced with a minimum tax on interest accruing from

[118]KO Pedersen, 'Institutional Competitiveness: How Nations Came to Compete' in G Morgan et al (eds), *The Oxford Handbook of Comparative Institutional Analysis* (Oxford University Press 2010) 625.

[119]For capital, see Helleiner (n 105) 81–194; R Abdelal, *Capital Rules. The Construction of Global Finance* (Harvard University Press 2007). For the territorial dispersion of firms, see MA Desai, 'The Decentering of the Global Firm' 32 (2009) World Economy 1271. Importantly, the capacity of investors and firms to migrate across borders should not be equated with their actual responsiveness to legal differences, which must be assessed empirically and cannot be gauged *in abstracto* (see, for instance, NM Jensen, *Nation-States and the Multinational Corporation: A Political Economy of Foreign Direct Investment* (Princeton University Press 2006)). Yet, for ideas to become influential among policymakers, actors' opportunities and governments' expectations often suffice (see C Hay and B Rosamond, 'Globalization, European Integration and the Discursive Construction of Economic Imperatives' 9 (2002) Journal of European Public Policy 147).

[120]Commission of the European Communities, Completing the Internal Market. White Paper from the Commission to the European Council. COM(85) 310 final, of 14 June 1985. The free movement of capital was furthered by the Council Directive (EEC) 88/361 of 24 June 1988 for the implementation of Art 67 of the Treaty, OJ L 178, of 8 July 1988, 5–18. Capital mobility was also enhanced by redrafting the Treaty provisions on free movement of capital by the Treaty of Maastricht.

[121]T Padoa-Schioppa et al, *Efficiency, Stability and Equity. A Strategy for the Evolution of the Economic System of the European Community* (Oxford University Press 1987); FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' 40 (2002) Journal of Common Market Studies 645; P Genschel, A Kemmerling and E Seils, 'Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market' 49 (2011) Journal of Common Market Studies 585; M Höpner and A Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' 66 (2012) International Organization 429.

[122]In addition to a provision (now Art 115 in the Treaty on the Functioning of the European Union (TFEU)) according to which income tax harmonisation is predicated on unanimity, there remained a provision (now Art 116 TFEU) allowing harmonisation by qualified majority. The latter has never been operationalised as a legal basis for any secondary legal act, not even beyond taxation.

[123]B Eichengreen, *The European Economy since 1945. Coordinated Capitalism and Beyond* (Princeton University Press 2007) 344. For further discussion on preserving the unanimity clause in taxation, see F Wasserfallen, 'Political and Economic Integration in the EU: The Case of Failed Tax Harmonization' 52 (2014) Journal of Common Market Studies 420.

[124]On this imbalance between decision-making rules, see Menéndez (n 102) 482–3.

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mobile financial assets (such as deposits, loans and securities), but the Commission's draft for such a tax[125] was rejected. Third, beyond the political mode of decision-making, the European Court of Justice (the Court, the ECJ) expanded the interpretation of the four economic freedoms, which had a liberalising effect on overall economic mobility. This aggravated European institutional asymmetries, since the Court's liberalising reading of the economic freedoms was difficult to balance by political decisions, and especially so when the latter required unanimity.[126] Fourth, as definite steps to Economic and Monetary Union (EMU) were fixed in the Treaty of Maastricht, Member States were destined to lose essential monetary policy powers, especially the capacity to manage the exchange rate.[127] This reduced the ways in which countries could influence their international competitive performance and, eventually, underlined taxation as a means by which governments could still engineer their competitiveness, which itself was now perceived as a core factor heralding the economic fate of a nation. In addition, the euro as a common currency could boost the internationalisation of finance and the mobility of competed-for capital. The asymmetric structure of the EMU meant that monetary policy was centralised, whereas fiscal policy, especially income taxation, continued to be organised in the form of competitive federalism.[128]

Besides developments in European institutional arrangements, two political economic changes that unfolded across countries should be highlighted. The first of these was the enhanced importance of foreign capital. International finance and inward foreign direct investment were portrayed extremely positively and cast as vital sources of national economic prosperity, for which reason they turned into salient targets for policy competition.[129] Rather than merely ensuring domestic firms' market shares at home and export competitiveness, governments tailored their laws to serve as incentives for inward investments. Simultaneously with cross-border financial flows becoming a key resource for private economy (and indirectly for generating tax receipts and employment), they grew pivotal for governments in a more direct manner. Especially from the 1980s until the early 1990s, rates of sovereign indebtedness soared as public spending was increasingly financed through public debt. In order to qualify as credible borrowers, countries set out to attune their policies to assumed creditor preferences.[130] Increased capital mobility thus came with a widespread yearning for foreign finance. Second, the protracted economic crises of the 1970s had discredited social democratic and Keynesian priorities and empowered neoliberal

[125]Commission of the European Communities, Tax Measures to Be Adopted by the Community in Connection with the Liberalization of Capital Movements. Communication from the Commission to the Council. COM(89) 60 final, of 8th February 1989.

[126]FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' 8 (2010) Socio-Economic Review 211. For a more constitutional view, see D Grimm, 'Europe's Legitimacy Problem and the Courts' in Chalmers et al (n 13) 241.

[127]P Anderson, *The New Old World* (Verso 2009) 26; A Chadwick, 'Rethinking the EU's "Monetary Constitution": Legal Theories of Money, the Euro, and Transnational Law' 1 (2022) European Law Open 468, 479–80. The constraints arising under the EMU were foreshadowed by those having arisen under the European Monetary System (EMS), agreed in 1978 (Menéndez (n 2) 142–8).

[128]H Lokdam, 'Beyond Neoliberal Federalism? The Ideological Shade of the Eurozone's Constitutional Order after the Eurozone Crisis' in J Komarek (ed), *European Constitutional Imaginaries* (Oxford University Press 2023) 296, 299–308.

[129]L Linsi, 'The Discourse of Competitiveness and the Dis-Embedding of the National Economy' 27 (2020) Review of International Political Economy 855; A Reurink and J Garcia-Bernardo, 'Competing for Capitals: The Great Fragmentation of the Firm and Varieties of FDI Attraction Profiles in the European Union' 28 (2021) Review of International Political Economy 1274. See also S Picciotto, 'The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks' in W Bratton, J McCahery, S Picciotto, and C Scott (eds), *International Regulatory Competition and Coordination. Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press 1996) 89.

[130]W Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism*, translated by Patrick Camiller (Verso 2014) 34–6 and 72–96; Menéndez (n 2) 147.

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economic wisdom.[131] Neoliberals interpreted the 1970s crises to have resulted from overgenerous welfare state provision and political intervention in the economy, and they saw that the crises merely corroborated the unsustainability of the post-war market-embedding regime.[132] This interpretation became powerful among policymakers. Governments across countries began to adopt more neoliberal recipes of supply-side economics, which advised not to manage aggregate demand but to incentivise capital circulation and economic initiative by retrenching taxes and other public interventions. The post-war tax systems suffered a legitimacy loss and could not but be reformed.[133] Restructuring tax and other policies could thus be advocated on the grounds of economic efficiency and irrespective of competitive pressures. Yet the neoliberal mentality had an effect on competitiveness, too. Under the diffusion of neoliberal ideas, governments were ready to craft policies more competitive through downward adjustments. A distrust of market-embedding systems meant that competitive rules were easier to enforce, as alternative policy options were losing currency.

Simultaneously with political economic changes, the idea of policy competition emerged powerfully among knowledge producers. International bodies, such as World Economic Forum (formerly known as the European Management Forum) and World Competitiveness Center, introduced competitiveness scoreboards, with individual countries setting up their own competitiveness councils.[134] These bodies produced indicators by means of which policymakers audited governing systems and set out to improve competitive performance in the eyes of migrant capital and regime-shoppers. This involved a novel rationality or episteme through which the law was (re)viewed, perhaps most correctly called a calculus of competitiveness. Laws were increasingly subject to economistic evaluation, which had its origins particularly in the law and economics movement and in various management theories.[135] In addition, in formal-mathematical economics, use of policy competition as an analytical framework burgeoned. Furthermore, a growing body of political scientists and legal scholars perceived the global market as a regime where states act as rival agents under economic exigencies and spontaneous market dynamics. The global economy, introduced to prompt competition among private actors, was seen as turning into a catalyst for competition among governments. The notion of the 'competition state' was only a terminological peak in this widespread pattern of thought.[136] Since the European market was also felt as attaining primacy over national policy autonomy and undermining Member States' effective political control over their socio-economic systems, European embedded liberalism was experienced as becoming replaced with 'subversive liberalism'.[137] Under subversive

[131]DJ Forsyth and T Notermans, 'Macroeconomic Policy Regimes and Financial Regulation in Europe, 1931–1994' in DJ Forsyth and T Notermans (eds), *Regime Changes: Macroeconomic Policy and Financial Regulation in Europe from the 1930s to the 1990s* (Berghahn 1997) 17.

[132]See C Offe, 'Some Contradictions of the Modern Welfare State' in C Offe, *Contradictions of the Welfare State* (Hutchinson 1984) 147, 149–54; A Schäfer, 'Liberalization, Inequality and Democracy's Discontent' in A Schäfer and W Streeck (eds), *Politics in the Age of Austerity* (Polity 2013) 169; F Block, 'The Fiscal Crisis of the Capitalist State' 7 (1981) Annual Review of Sociology 1, 15–7.

[133]M Buggeln, M Daunton and A Nützenadel, 'The Political Economy of Public Finance since the 1970s: Questioning the Leviathan' in M Buggeln, M Daunton and A Nützenadel (eds), *The Political Economy of Public Finance: Taxation, State Spending and Debt since the 1970s* (Cambridge University Press 2017) 1; Leaman (n 12) 80; M Stewart, *Tax and Government in the 21st Century* (Cambridge University Press 2022) 39–43.

[134]N-L Sum, 'The Production of Hegemonic Policy Discourses: "Competitiveness" as a Knowledge Brand and Its (Re-) Contextualisations' 3 (2009) Critical Policy Studies 184; Pedersen (n 118) 635–40; Fougner (n 3); D Plehwe, 'The Development of Neoliberal Measures of Competitiveness' in D Russ and J Stafford (eds), *Competition in World Politics. Knowledge, Strategies and Institutions* (Transcript 2021) 155.

[135]Davies (n 4) 73–150; A Supiot (n 4) 78–163; Fougner (n 3).

[136]PG Cerny, *The Changing Architecture of Politics. Structure, Agency and the Future of the State* (Sage 1990).

[137]M Rhodes, '"Subversive Liberalism": Market Integration, Globalization and the European Welfare State' 2 (1995) Journal of European Public Policy 384. The notion of 'subversive liberalism' aims at capturing the specific dynamics between national and European law. It refers to the subversion of national socio-economic systems under the influence of transnational law and markets. From a domestic point of view, subversion results in a neoliberal restructuration of national socio-economic systems.

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liberalism, Member States were losing their factual capacities to govern while those same powers were not being reconstituted through European law. This resulted in a regulatory void and the evaporation of political authority.[138] Importantly, policy competition extended far beyond innovation, technology and education policy. Since taxes were easily construed as burdens on economic activity and therefore as undermining countries' cost-competitiveness, scaling down tax levels and the redistributive functions of tax systems seemed like a sacrosanct path to greater competitive performance. Once non-competitive fiscal alternatives had been pre-empted, genuine democratic choice at home had become hollow.[139] Under the hegemony of the competitiveness imperative, the co-existence of national policy autonomy and the reconfigured European market was widely interpreted as running into a fatal clash.

Ascending ideas and practices of competitiveness created a context in which the question of European law as a framework for tax competition could not but come into play. Those relying on social democratic political premises insisted that erosion of political capacities be corrected through European rules, capable of mitigating the democratic and social damage caused by the competitive order. Rather than reversing the trend of internationalising the economy, those with a social democratic inclination welcomed enhanced economic mobility across borders.[140] But at the same time they began to look on European and more global institutions as feasible forms of enabling effective exercise of core public powers and governing market externalities, in symmetry with the newly created economic openness.[141] For them, it seemed that 'welfare-state functions can be maintained at their previous level only if they are transferred from the nation-state to larger political entities'.[142] Hence, the interventionist political philosophy of policy competition was endorsed. In contrast, those relying on neoliberal political premises celebrated the fact that Europe was facing its 'once-in-history constitutional opportunity' of creating a federal union with a fully liberal economic constitution that would unleash spontaneous market forces, avert all market-embedding leanings and, through the workings of policy competition, rein in national policy choices.[143] For them, European law was a means by which to expedite neoliberal choices at home. Their alternative was the evolutionist political philosophy of policy competition. Hence, Europe stood at the crossroads of interventionist and evolutionist modes of integration. In the context of policy competition, Gerard Radnitzky, hailing from the Hayekian neoliberal faction, envisaged that '[m]ore than by anything else the form of life prevalent in the post-1992 Europe will be determined by the placement of the frontier between evolutionary competition and constructivistic *dirigisme*.'[144] It was at this ideational crossroads that European responses to tax competition were expected to emerge.

European tax competition policy began to take shape in the early 1990s. The European Commission forecast that completing the European market would multiply capital flows triggered by tax system differences and that it would fuel tax competition. This could have adverse budgetary and distributive consequences in Member States.[145] Yet these concerns remained clearly overshadowed by market-making considerations, amplified by the need to execute the new Single

[138]FW Scharpf, 'Community and Autonomy: Multilevel Policy-making in the European Union' 1 (1994) Journal of European Public Policy 219.

[139]P Genschel and P Schwarz, 'Tax Competition and Fiscal Democracy' in Schäfer and Streeck (n 132) 59.

[140]R Abdelal and S Meunier, 'Managed Globalization: Doctrine, Practice and Promise' 17 (2010) Journal of European Public Policy 350.

[141]Harmes (n 53) 87–166.

[142]J Habermas, 'Learning from Catastrophe? A Look Back at the Short Twentieth Century' in Habermas (n 52) 38, 52.

[143]JM Buchanan, 'Europe's Constitutional Opportunity' in JM Buchanan et al (eds), *Europe's Constitutional Future* (Institute of Economic Affairs (IEA) 1990) 1.

[144]G Radnitzky, 'Towards a Europe of Free Societies: Evolutionary Competition or Constructivistic Design' 42 (1991) *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 139, 150. For other views coming from the Mont Pelerin Society around the time of 'relaunching' European integration, see R Ventresca, 'Neoliberal Thinkers and European Integration in the 1980s and the Early 1990s' 31 (2022) Contemporary European History 31.

[145]Commission of the European Communities, Communication to Parliament and the Council: Guidelines on Company Taxation. SEC (90)601 final, 20 April 1990, 11.

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Market programme. The Commission came to regard income tax integration chiefly as an instrument for creating the European market, but not for preventing the deleterious effects of market integration or consolidating national capacity to tax. Furthermore, carrying out the Single Market was different from establishing the Common Market in the initial phase of integration. This was evident as regards the modes of integration. The Commission largely withdrew from its earlier attempts to neutralise institutional differences by means of legal harmonisation. The approach was in accordance with the broader premises of minimal harmonisation endorsed in the Single Market programme.[146] As a result, European tax law-making was confined to abolishing only the most distortive obstacles to cross-border market activities.[147] In this vein, the Council adopted its first income tax directives,[148] one postponing taxation of cross-border corporate restructuring[149] and another removing taxes on intra-firm cross-border profit distribution.[150] Hence, in implementing the Single Market, European law was harnessed to enhance intra-Community economic mobility, and legal harmonisation as a means of neutralising the conditions of private competition or of reining in tax competition was largely off the table.

Forsaking legal harmonisation did not entail total disregard for equal institutional conditions of private competition. They were still pursued, but the means were now different from legal equalisation. In this context, the Commission cast tax competition as a potential mechanism for eradicating institutional differences; the interplay of market forces and competition among states was envisaged as leading to spontaneous alignment of tax systems.[151] In contrast to earlier efforts at harmonising taxes by means of law and political agreement, harmonisation was entrusted to take place in an open-ended process of policy competition. Tax competition was thus seen as capable of realising the essential goals of integration. In this process, the function of law was different from what it was in the earlier 'integration through tax harmonisation'[152] approach. The role of law was now to foster cross-border economic mobility, which enabled policy competition as a mechanism of spontaneous integration. Viewing tax competition as an integration mechanism was in line with the Commission's 'realistic' and 'pragmatic' approach to tax integration, cherishing subsidiarity and Member States' formal fiscal autonomy as fully as possible.[153] As stated by Christiane Scrivener, the Commissioner responsible for taxes, '[w]hat we need is a minimum approximation consistent with the abolition of fiscal frontiers by January 1, 1993. After that date, market forces will play their role in the single market.'[154] In harmonisation, European law occupied a secondary role in comparison to the power of market forces. Rather than political intervention, spontaneous evolution occurred as the proper framework for producing equal conditions for competition among market actors.[155] The self-restrained approach to legal harmonisation became evident in the Commission's response to the report drafted by the committee of tax experts, chaired by Onno Ruding. The committee shared the Commission's idea

[146]Commission of the European Communities (n 120) 6. In so-called regulatory issues, the approach was strongly related to the mutual recognition doctrine, which, however, was not easily transferable to taxation. Yet, the so-called Stockholm Group of tax scholars proposed a European corporate tax solution that would operate along the lines of mutual recognition (see S-O Lodin and M Gammie, 'The Taxation of the European Company' 39 (1999) European Taxation 286).

[147]Commission of the European Communities, Report of the Commission on the Impact of Community Legislation on Business with Special Regard to SMEs. COM(90) 200 final, of 15 May 1990, 6.

[148]Both Directives were originally proposed as long ago as 1969 (see n 81).

[149]Council Directive (EEC) 90/434 of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, of 20 August 1990, 1–5.

[150]Council Directive (EEC) 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 225, of 20 August 1990, 6–9.

[151]Commission of the European Communities (n 145) 11–2.

[152]Menéndez (n 13) 80–4.

[153]Commission of the European Communities (n 145) 2 and 10.

[154]G Field, 'Europe's First Lady of Tax' 1 (1989) International Tax Review 6, 6.

[155]On these paradigms, see especially Streit and Mussler (n 35); Streit and Mussler (n 36).

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of policy competition as a positive means of fostering fiscal convergence and the functioning of the European market. Beyond that, it acknowledged drawbacks resulting from tax competition and proposed far-reaching harmonisation of corporate tax rates and bases.[156] Yet the Commission and national representatives maintained that harmonising fiscal conditions would surpass the acceptable boundaries of the new harmonisation approach, for which reason the Commission was unwilling to follow the committee's recommendations.[157] Rather, through spontaneous dynamics of tax competition, harmonisation could purport to proceed in an apolitical fashion, as the shape of national tax systems could be portrayed as unfolding independently from intrusive European political decisions. More than its possibly subversive effects, the concern was that tax competition, as an adjunct of market integration, might not generate enough convergence for the needs of completing the Single Market.

In the mid-1990s, tax competition was turning into a more complex issue and ceased to be a mere constructive instrument of spontaneous market integration. It emerged as a source of dysfunctionalities for national fiscal systems and domestic public policies. Besides fostering the Single Market and enhancing the effectiveness of domestic employment policies, curbing tax competition became one of the three key ideas rationalising the Europeanisation of taxation.[158] In this respect, the view of Jacques Santer's Commission[159] (in office 1995–1999), in which Mario Monti took a shepherd's role in taxation issues, merits being quoted at some length:

> Fair competition is a key component of the Single Market, but unfair competition in the tax area is a cause of concern because of its potential negative effects, particularly on tax revenues of Member States, on the efficient allocation of economic resources within the EU, and on competitiveness and employment. (p. 2) . . . These developments suggest that individual Member States' freedom to structure their own taxation systems has diminished, and that they have in part reacted to the threat of fiscal degradation by shifting the tax burden [to less mobile tax bases]. (p. 4) . . . The apparent defence of national fiscal sovereignty has gradually brought a real loss of fiscal sovereignty by each Member State in favour of the markets, through tax erosion, especially on the more mobile tax bases. In order to counteract this phenomenon each Member State has to some extent been driven to overcharge labour. This has unwanted adverse effects on employment and on income distribution. (p. 10)

Beyond the traditional Community concern for inefficient and abnormal circulation of resources across countries, the Commission cast tax competition as a constraint on national political autonomy. Competition was capable of undermining governments' capacities to collect revenues and of leading to 'fiscal degradation'[160]; distorting fair patterns of distribution; and, by pushing Member States to shift the tax burden from mobile tax bases to labour, hindering domestic attempts to raise the rate of employment. The rising tax burden on labour figured as the most critical concern. More than for distributive reasons, regulation of tax competition was urged to ensure labour market efficiency and 'employment-intensive' growth. The need to boost

[156]Report of the Committee of Independent Experts on Company Taxation. Commission of the European Communities 1992, 202–18.

[157]Commission of the European Communities, Communication to the Council and Parliament subsequent to the conclusions of the Ruding Committee indicating guidelines on company taxation linked to the further development of the internal market. SEC(92) 1118 final, of 26 June 1992.

[158]This triad of objectives was articulated perhaps for the first time in the Economic and Social Committee, Opinion on direct and indirect taxation, OJ C 82 of 19 March 1996, 49–63, 49–50, which discussed tax competition intensively, although in a limited perspective.

[159]Commission of the European Communities, Taxation in the European Union. Discussion paper for the Informal Meeting of ECOFIN Ministers. Commission of the European Communities. SEC (96) 487 final, 20 March 1996.

[160]Without budget cuts, the expected erosion of tax revenues also made it harder for Member States to comply with the Maastricht criteria for 'sound public finances', which was a condition for accessing the EMU.

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employment framed Community policies on virtually all fronts,[161] and also in the context of taxation it was declared that '[f]ighting unemployment is the biggest challenge facing the Community today.'[162] It was repeatedly argued that counteracting tax competition would help reduce non-wage labour costs and that these tax cuts would, through their dynamic effects, facilitate employment. Here, the key predicament was that tax competition generated an economically adverse allocation of the burden between mobile tax bases and labour. Tax competition was thus claimed to be structurally tilted towards specific socio-economic effects.

Due to its disruptive effects, tax competition could not be left to structure public policies without European political interference. With some hindsight, the Commission held that a 'deliberate and limited pooling of fiscal sovereignty by individual Member States to their collective decision-making would have avoided an unconscious surrender of sovereignty by each of them to market forces, in a field that should remain the prerogative of public policy.'[163] Tax competition featured not only as a disciplinary force *vis-à-vis* public authority but something that itself had to be regulated.[164] In order to prevent excessive erosion of the power to tax, the evolutionist paradigm of integration was to be complemented with interventionist properties. In a sense, European integration was becoming a reflexive process: should carrying out the Community's primary goals prompt secondary consequences, they were to be corrected through European law.[165] The promise of transnational law was now partly seen in its capacity to restore, at the European level, the political autonomy that Member States had lost in the absence of European intervention.

As political reflections on a regulatory response to tax competition unfolded, the Commission kept on repeating the unwished-for consequences of competition for domestic public policies. Yet it[166] painted tax competition in more complimentary terms than it did when it initiated the process:

> Tax competition in itself is generally to be welcomed, as a means of benefiting citizens and of imposing downward pressure on government spending. However, unrestrained competition for mobile factors can both bias tax systems against employment and make an orderly and structured reduction in the overall tax burden more difficult. . . . Market integration, without any accompanying tax co-ordination, is putting increasing constraints on Member States' freedom to choose the appropriate tax structure, including by broadening the tax base and lowering the rates.

While in the early 1990s the beneficial effects of tax competition were associated with spontaneous fiscal convergence rationalising the functioning of the Single Market, they were now linked to domestic public policies – in a sense that goes beyond European market-making reasoning. Also, unlike roughly a year before, these effects were also characterised favourably. Tax competition was envisaged as creating downward pressure on taxation and public spending. Therefore, as an

[161]For instance, see White Paper on Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century (European Commission 1994); Commission of the European Communities, Action for Employment in Europe. A Confidence Pact. CSE (96) 1 final, of 5 June 1996; Dublin European Council 13 and 14 December 1996, Presidency Conclusions.

[162]See also, Commission of the European Communities, Taxation in the European Union. Report on the Development of Tax Systems. COM(96) 546 final, of 22 October 1996, 5.

[163]Commission of the European Communities (n 159) 11.

[164]This reflected a more globally developing consciousness that open financial markets required balancing legal measures (see Organization for Economic Co-operation and Development, *Harmful Tax Competition. An Emerging Global Issue* (OECD 1998)).

[165]P Genschel and T Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation' in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 154.

[166]Commission of the European Communities, Towards tax co-ordination in the European Union. A package to tackle harmful tax competition. Communication from the Commission to the Council. COM (97) 495 final, 1 October 1997, 2.

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instrument of fiscal discipline, it could support the Commission's sharpening effort to push Member States onto the track of 'a durable reduction in the overall tax burden',[167] also regarded as conducive to competitiveness. The view was in line with neoliberal ideas gaining political relevance in the 1990s and stressing the function of policy competition as a wished-for disciplinary mechanism on the exercise of political powers.[168] But the new perception also aligned with a further idea about the capacity of policy competition to benefit individuals by optimising national governing systems and making them more efficient. This idea developed especially powerfully from the late 1980s onwards among German economists and later-generation ordoliberals, who borrowed Hayek's view of competition among individuals as a 'discovery procedure' and applied it to competition among legal systems.[169] They assigned an epistemic function to policy competition and depicted it essentially as a means of knowledge generation and policy learning.[170] Faced with fiscal necessities, governments are forced to make policy innovations and resort to alternative governing arrangements. Rather than moderation of competition through legal harmonisation, the constitutional type of order with economic mobility and non-centralised tax policy is promoted. For validating the legal framework of spontaneous integration, the idea that competition produces forced policy innovation was crucial, as spontaneous integration could be conveyed as something other than a force with mere subversive and constraining effects.

The perceived benefits notwithstanding, one of the detrimental effects of tax competition was that it hampered the structural rationalisation of tax systems. Rationalisation is what is referred to as 'broadening the tax base and lowering the rates.'[171] This normative model of taxation involves broad tax bases – the inclusive scope of the power to tax – with low tax rates – the relatively restrained intensity of the power to tax. The model has its recent ideational and policy-relevant origin in post-1970s economic theory, and it was enforced through neoliberal tax reforms abounding since the mid-1980s.[172] It was a reaction to the post-war interventionist tax systems, which steered the economy and investments through tax policies. In the politics of taxation, the model urged 'a shift from market-regulating to market-conforming policy rules',[173] equated to tax neutrality. A neutral tax system abstains from interfering with market-based allocation of capital and, so goes the assumption, results in effective allocation of investments – both within and across borders. Since tax competition is prone to distort the distribution of tax burdens among mobile and immobile taxpayers, it violates tax system neutrality. Therefore, work against tax competition was not so much concerned with safeguarding Member States' revenue-raising capacities as ensuring that countries are able to introduce system structures that align with normative ideas

[167]European Commission, Communication from the Commission to the Council, the Parliament and the Economic and Social Committee. COM (2001) 260 final, 7.

[168]See text between n 17 and 45. These ideas were advocated particularly by German scholars coming from the Kiel Institute for the World Economy and from the tradition of Freiburg ordoliberalism. Especially on the Kiel Institute and its influential director Herbert Giersch, see D Plehwe and Q Slobodian, 'Landscapes of Unrest: Herbert Giersch and the Origins of Neoliberal Economic Geography' 16 (2019) Modern Intellectual History 185.

[169]FA Hayek, *Der Wettbewerb als Entdeckungsverfahren* (Institut für Weltwirtschaft an der Universität Kiel 1968); available in English as FA Hayek, 'Competition as a Discovery Procedure' 5 (2002) The Quarterly Journal of Austrian Economics 9. On the influence of Hayek's idea on later-generation ordoliberals, see C Joerges, 'The Overburdening of Law by Ordoliberalism and the Integration Project' in J Hien and C Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart 2018) 179, 189–90. On the gradually increasing relevance of policy competition within the ordoliberal tradition, see F Bruno, 'Ordoliberal ideas on Europe: Two Paradigms of European Economic Integration' 49 (2023) History of European Ideas 737.

[170]This line of research flourished especially among German scholars. For a very concise exposition, see V Vanberg and W Kerber, 'Institutional Competition among Jurisdictions' 5 (1994) Constitutional Political Economy 193.

[171]Commission of the European Communities (n 166) 2.

[172]S Steinmo, 'The Evolution of Policy Ideas: Tax Policy in the 20th Century' 5 (2003) British Journal of Politics and International Relations 206; J Campbell, *Institutional Change and Globalization* (Princeton University Press 2004) 149–64; J Christensen, *The Power of Economists within the State* (Stanford University Press 2017) 6–40; Jaakkola, Ylönen and Saari (n 9) 17–8; Buggeln, Daunton and Nützenadel (n 133).

[173]D Swank, 'Funding the Welfare State: Globalization and the Taxation of Business in Advanced Market Economies' 46 (1998) Political Studies 671.

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characterising neoliberal tax reforms and conform to rational organisation of the market economy.[174]

Spontaneous integration was claimed to come with both benefits and pitfalls, and the European political response to tax competition was to strike a balance between them. For the chosen regulatory approach, neutrality of taxation became the formative principle. The idea of neutrality framed the core separation between 'harmful' and 'fair' tax competition, which gradually obtained its distinct conceptual edifice in the course of drafting European policy.[175] The former equates to targeted tax competition employing atypical tax base structures and favouring particular economic activities, whereas the latter refers to general tax competition resorting to low but equal tax rates or generally applicable tax base exemptions for similar economic actors.[176] Hence, it was harmful competition that violated neutral tax treatment. Yet neutrality of taxation is a formal criterion requiring equal treatment and leaving the material characteristics of that treatment unaddressed.[177] Due to the narrow understanding of what qualified as harmful tax competition, substantive legal standards for taxation remained absent. Beyond factually discriminatory taxes, it was in Member States' discretion as to how to harness their tax systems for policy competition. In fact, in 2001, the Commission asserted that any rational system of European corporate taxation ought to tackle harmful modes of tax competition while, at the same time, 'must not hinder the possibility of general tax competition'.[178] In this view, tax base rules necessitated some degree of coordination but spontaneous integration of tax rates, including their downward trend, was generally advocated. Tax rate-based competition was thus becoming a confirmed normative doctrine in European multi-level governance of taxation.

The extent to which neutrality and the harmful mode of tax competition dominated the European approach becomes evident in the actual regulatory response. This took place chiefly on two institutional fronts. The first was the Code of Conduct for Business Taxation, which was a political commitment to relinquish tax structures or special tax rates that result in abnormally low taxation when compared to the ordinary tax burden in the country in question.[179] The second was application of the European state aid rules to tax systems. Like the Code of Conduct, the state aid rules were also put into practice so as to address atypical tax structures and special tax rates that were, as required by constitutional state aid criteria, selective and diverged from ordinary tax structures in the country in question.[180] Both regulatory responses thus addressed structural anomalies within a given national system. Rather than governing dysfunctionalities arising from gaps between separate tax systems, responses were concerned with system-internal consistency.

[174]For similar conclusions in the OECD context, see M Webb, 'Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition' 11 (2004) Review of International Political Economy 787; R Palan, R Murphy, and C Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010) 213.

[175]Commission of the European Communities (n 157) 7; Economic and Social Committee (n 158) 57; Commission of the European Communities (n 162) 2; European Parliament, Tax Competition in the European Union (Working Paper by Directorate-General for Research 1998) 18–23. For a parallel development in the OECD, see G7 Lyon Summit, Economic Communiqué: Making a Success of Globalization for the Benefit of All (1996); Organization for Economic Co-operation and Development (n 164).

[176]Commission of the European Communities, A package to tackle harmful tax competition in the European Union. COM (97) 564 final, 5 November 1997; Organization for Economic Co-operation and Development (n 164).

[177]J Jaakkola and R Knuutinen, 'The International Order of Corporate Taxation: From Market-Building to Sustainable Fiscal Settlement?' in B Sjåfjell and CM Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2020) 114, 120–3. See also S Ganghof, *The Politics of Income Taxation. A Comparative Analysis* (ECPR 2006) 33–4.

[178]European Commission, Towards an Internal Market without tax obstacles. COM (2001) 582 final, 23 October 2001, 5.

[179]Resolution of the Council and the Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a code of conduct for business taxation, OJ C 2, of 6 November 1998, 2–6.

[180]W Schön, 'Taxation and State Aid Law in the European Union' 36 (1999) Common Market Law Review 911. In 2001, the Commission initiated 15 state aid investigations, which were immediate offspring of work against tax competition.

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For this reason, it has been suggested that the rules adopted did not abolish tax competition. Instead, because of the narrow interpretation of what counted as harmful, they merely reshaped national competitive practices and advised Member States to harness general and non-discriminatory corporate tax rates in pursuing competitive advantage.[181] For countries having already adopted a lowering of the general corporate tax rate as their strategy, the European normative choice merely confirmed the acceptability of their existing course of action.[182] Regulation of tax competition did not thus fully address the imbalance between corporate and labour taxation, which was initially seen as one of the predicaments raised by tax competition. In fact, given that general tax rate cuts, as well as generally applicable tax base exemptions not discriminating between taxpayers, lower the burden across the whole corporate sector, shifting competition to general rates and structures might aggravate the imbalance between corporate and labour taxation. By avoiding substantive legal standards and interference with tax rates, tax coordination was able to purport to proceed as a predominantly apolitical path of integration.

The confined understanding of what makes tax competition harmful crucially limited European regulation of spontaneous fiscal integration. In fact, the premise of non-discriminatory treatment between corporate market actors, which regulation boiled down to, demonstrates how intimately the European response was – in terms of its eventual legal settlement – designed to urge a neutral cross-border market regime; rather than safeguarding Member States' fiscal capacity, it ensured equal treatment of market actors. The response aligns accurately with the Commission's credo that 'a properly functioning Single Market remains overriding priority for Community action in the field of taxation'.[183] It has indeed been suggested that the political narrative of tax competition was devised as a mere persuasive means of pushing forward long-stalled income tax integration whose core rationale remained none other than the traditional aspiration of integrating taxes for the sake of creating a European market.[184] Furthermore, simultaneously with the hegemonic national imperative that an individual country must secure its competitiveness *vis-à-vis* other countries, a powerful regional imperative emerged that Europe, as a distinct economic space, must ensure its competitive performance *vis-à-vis* other regions.[185] To some extent, this set the boundaries for what was deemed possible in regulating tax competition. It was repeatedly asserted that minimum tax rates across the EU might trigger the outflow of capital to third countries. Hence, curing the malady stemming from countries' obsession with competitiveness was partly thwarted by the same obsession that gave birth to the very malaise, albeit it was now Europe's collective competitiveness that appeared imperative.

The Commission stated in 1990 that, in the absence of political income tax integration but with a commitment to complete the Single Market, the ECJ ought to ensure that economic mobility is not frustrated by income taxes and that it should do so by interpreting the

[181]A Kemmerling and E Seils, 'The Regulation of Redistribution: Managing Conflict in Corporate Tax Competition' 32 (2009) West European Politics 756, 769–70. For this 'squeeze balloon effect', see R Palan and A Nesvetailova, 'Sophisticated Financial Engineering and Tax Arbitrage. An Assessment of the European Fiscal Regime for Corporate Tax Mitigation' in B Unger, L Rossel and J Ferwerda (eds), *Combating Fiscal Fraud and Empowering Regulators. Bringing Tax Money Back into the COFFERS* (Oxford University Press 2021) 35, 36.

[182]This was precisely the mindset in Finland, for instance. See Ministry of Finance, *Towards Competitive Taxation. Report of the Working Group for Developing Income Taxation* (Ministry of Finance 2002; available only in Finnish).

[183]Commission of the European Communities (n 166) 4.

[184]C Radaelli, 'Harmful Tax Competition in the EU: Policy Narratives and Advocacy Coalitions' 37 (1999) Journal of Common Market Studies 661. Importantly, work against tax competition was part of a more extensive policy package that also aimed to foster cross-border economic mobility through tax integration. It included a directive that limited taxation of intra-firm cross-border interests and royalties, which was a market-making directive pure and simple, capable of severely catalysing competition on tax rates (Council Directive (EC) 2003/49 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, of 26 June 2003, 49–54).

[185]B Rosamond, 'Imagining the European Economy: "Competitiveness" and the Social Construction of "Europe" as an Economic Space' 7 (2002) New Political Economy 157, especially at 165–72.

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economic freedoms.[186] The Court had begun to do precisely that in the 1980s,[187] and during the 1990s, the number of rulings only soared. By applying the economic freedoms, the Court enforces the market-making aspect of EU law and provides for tax competition. To what extent it does so depends on how broadly it interprets the economic freedoms and the justifications available for countries to defend their existing laws.[188] Importantly, the Court came to adopt an extensive reading of the freedoms, as it also let arrangements with hardly any economic substance fall within their scope. The economic freedoms thus came to protect practices used to yield advantage from legal differences. In company law, this happened famously in the *Centros* case.[189] In the income tax context, the Court ruled that operations with only nominal economic substance are also covered by the economic freedoms and only 'wholly artificial arrangements' are considered as tax avoidance.[190] The Court thus rendered the economic freedoms instrumental in forum shopping and made room for artificial measures that can be operationalised for reaping benefits from tax system differences. Given that corporate profits can be shifted across borders by means that have almost no economic substance but yet major tax effects, they react quickly to competitive incentives introduced by governments. At the same time, the Court did not counteract tax competition in any meaningful way. This, of course, was not surprising, as the Court was systemically unsuited to doing so, which is so for two core reasons. First, the Court was programmed to implement economic liberties but not to oblige states to tax; at best, it allowed states to maintain the fiscal measures they had already adopted at their own initiative.[191] Had the Court been enforcing secondary legislation obliging Member States to use their power to tax, things would have been different. But this type of income tax legislation remained lacking and the Court focused on implementing economic liberties. Second, the Court operated in the mode of negative integration; it ruled whether domestic and cross-border situations were treated equally but did not prescribe any materially determined standard that governments were to follow in amending their tax laws. Hence, the Court remained far from an organ for legal harmonisation. Even though the Court can obviously recalibrate its lines of interpretation, it cannot revoke its structural reins and basic operative logic.[192]

To recapitulate, unlike in the earlier phase of integration, in the 1990s the idea of tax competition became formative for the discourse on income tax integration. Tax competition was considered as affecting both the Single Market and Member States' domestic policies. Through its harmonising effect, spontaneous integration was expected to align the institutional conditions of competition among private actors. Through its disciplinary effect, it was further hoped to exert downward pressure on the tax burden. In spite of its possible wished-for effects, harmful tax competition was nonetheless claimed to distort private competition among enterprises, and it was this concern that eventually fashioned the European legal response. Elements of interventionist integration were endorsed, but since they addressed only country-internal tax system inconsistencies, their harmonising effect remained modest. Rather than asserting positively determined substantive standards on tax treatment, European rules focused on preventing discriminatory treatment of market actors and sporadically prohibiting specific national

[186]Commission of the European Communities (n 145) 9.

[187]Case C-270/83 *Commission v France* ECLI:EU:C:1986:37.

[188]AJ Menéndez, 'The Unencumbered European Taxpayer as the Product of the Transformation of Personal Taxes by the Judicial Empowerment of "Market Forces"' in R Letelier and AJ Menéndez (eds), *The Sinews of European Peace. Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union* (Oslo 2009) 157.

[189]Case C-212/97 *Centros* ECLI:EU:C:1999:126.

[190]Case C-264/96 *ICI* ECLI:EU:C:1998:370; case C-324/00 *Lankhorst-Hohorst* ECLI:EU:C:2002:749; case C-446/03 *Marks & Spencer* ECLI:EU:C:2005:763; case C-196/04 *Cadbury Schweppes* ECLI:EU:C:2006:544.

[191]MJ Graetz and AC Warren Jr, 'Income Tax Discrimination and the Political and Economic Integration of Europe' 115 (2006) Yale Law Journal 1186, 1223.

[192]For these structural and systemic reasons, I consider that ECJ case law provides only insufficient access to observing and understanding the development of ideas on tax competition at the European level.

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arrangements, thereby leaving the proper material treatment open.[193] They thus largely retained national legislatures' formal legal autonomy in taxation. To be sure, examined against its own eventual premises, work against tax competition was not a complete failure.[194] However, since the idea of tax competition was construed on the basis of liberal market-making premises, the European regulatory response did not result in the kind of market-correcting norms that the social democratic advocates of European integration had been waiting to emerge and that could have mitigated what was experienced as the eroding balance between capital and labour in taxation. If Commissioner Scrivener's statement that after 1992 'market forces will play their role'[195] had been a normative preference in 1989, it could be restated as a relatively valid empirical account ten years later. The degree of income tax harmonisation did not match enhanced economic mobility, and their asymmetry began to resemble the order of competitive fiscal federalism, familiar from neoliberal reveries. At the crossroads of evolutionist and interventionist philosophies of policy competition, the latter road was not taken in any profound sense.

C. Post-neoliberal globalisation and the European rescue of national public finances?

The first decade of the 21st century witnessed lethargy in the political integration of income taxes. While governments carried on with devising their tax – and especially corporate tax – systems with an internalised commitment to competitiveness, new ways of governing tax competition did not come into view at the European level. The EU politics of tax competition had found its course in the late 1990s, with championing non-discriminatory competition on general tax rates and structures remaining at its core. Even upon proposing a harmonised corporate tax base and a mechanism for allocating taxable profits among countries in 2011, the Commission insisted that '[f]air competition on tax rates is to be encouraged'.[196] If tax system differences seriously hindered anything, it was the market-rational functioning of the European Market. Indeed, from 2001 onwards, reflections on income tax integration took place almost exclusively in the context of implementing the Internal Market.[197] Furthermore, the Internal Market itself was to execute the Lisbon agenda that aspired to turn the EU into 'the most competitive and dynamic knowledge-based economy in the world',[198] which also set a framework for income tax policy.[199] Beyond competitiveness, the Commission chiefly advised Member States to render tax systems more efficient and rational with the customary recipe of broadening tax bases and lowering tax rates, which aligned with the inherited wisdom of tax system neutrality.[200] During this period, disregarding systemic problems inherent in the co-existence of tax systems amounted to 'an extraordinary conspiracy of silence among the European policy-making community'.[201] At the

[193]There was also Council Directive (EC) 2003/48 of 3 June 2003 on taxation of savings income in the form of interest payments, OJ L 157 26 June 2003, 38–48, which was accepted as part of the tax competition package. It did not harmonise tax systems but only required interest-paying financial institutions to deliver information to the recipient's home country about to whom the interest was paid.

[194]Genschel and Rixen (n 165). For a long-term view, see M Nouwen and PJ Wattel, 'Tax Competition and the Code of Conduct for Business Taxation' PJ Wattel et al (eds), *Terra/Wattel. European Tax Law. Volume 1: General Topics and Direct Taxation* (Kluwer 2018) 927.

[195]Field (n 154).

[196]European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB). COM (2011) 121 final, 16 March 2011, 4. In this context, see also European Commission (n 178).

[197]European Commission (n 167).

[198]Lisbon European Council 23 and 24 March 2000, Presidency Conclusions.

[199]Commission of the European Communities, Implementation of the Community Lisbon Programme. Communication from the Commission to the Council and the European Parliament: The Contribution of Taxation and Customs Policies to the Lisbon Strategy. COM (2005) 532 final, 25 of October 2005.

[200]M Hallerberg, Explaining European Patterns of Taxation: From the Introduction of the Euro to the Euro-Crisis (Inter-American Development Bank, Technical Notes No. IDB-TN-400, 2012) 3–4.

[201]Leaman (n 12) 93.

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same time, a certain tension was building up in European tax policy. On the one hand, taxation was supportive of cutting budget deficits and sovereign debt, which was exactly what countries were expected to do in order to comply with the EMU rules on sound public finances. On the other hand, and with a fair dose of economistic confidence, lowering taxes was experienced as having dynamic effects that would contribute to economic growth, investments and employment, with the reignited dynamics of the private economy consolidating public finances, too. In the 2010s, this tension became crystal clear.

As the 2010s were setting in, even hesitant scholars began to believe that, in the field of international tax, a shift from market-oriented and neoliberal globalisation 'to what we can only describe at this point, the beginning of the process, as a post-neoliberal globalization'[202] might be in the making. The post-financial crisis era seemed to validate the prediction, leading political scientists to declare that the 2010s 'changed the scene of global tax governance in dramatic ways',[203] 'provoked a period of rapid, radical and unpredictable co-operation'[204] and resulted in 'a sea change in EU policy'.[205] The celebrated change did not emanate from nothing. The 2007 economic crisis that erupted as a financial or subprime credit crisis gradually developed into a Eurozone sovereign debt crisis, which called for political responses capable of fortifying national public finances, wherein enhancing the revenue-raising capacity of taxation could feature as a key measure. Moreover, letting national income tax systems develop on their own devices and under competitive pressures seemed contradictory as the crisis sparked off cries for European fiscal capacity and for EU taxes financing the EU's own activities and public goods produced at the European level.[206] Furthermore, the simultaneity of trenchant austerity policies and several leaks disclosing how corporations and capital owners avoid taxes spurred political frustration in the public, which politicised the usually inconspicuous matters of international tax.[207] Relatedly, non-governmental organisations gained a footing in the tax discourse,[208] which balanced the policy-shaping power of experts who had traditionally exerted a major influence on international tax rules.[209] This politicisation also took place among norm-makers, who began to forge ahead with new international rules. While this was the case in the EU,[210] the initiative often came from the group of G20 countries and the OECD. Due to this widely shared commitment among countries, the new rules could be adopted globally and therefore without critical loss of regional competitiveness. As to the feasibility of the reform, even the business sector was not entirely against multilateral tax norms. Because some type of tax reform was clearly gaining momentum, the corporate sector bemoaned the likelihood that unilateral measures would yield disparate and more stringent rules than coordinated efforts were likely to produce.[211] But has the claimed

[202]Palan, Murphy and Chavagneux (n 174) 238.

[203]I Römgens and A Roland, 'The Politics of Taxation in the European Union' in L Hakelberg and L Seelkopf (eds), *Handbook on the Politics of Taxation* (Edward Elgar 2021) 276, 280.

[204]M Hearson and T Rixen, 'The Politics and History of Global Tax Governance' in Hakelberg and Seelkopf (n 203) 244, 245.

[205]L Seabrooke and D Wigan, 'Powering Ideas Through Expertise: Professionals in Global Tax Battles' 23 (2016) Journal of European Public Policy 357, 362.

[206]See text between n 261 and 269.

[207]RC Christensen and M Hearson, 'The New Politics of Global Tax Governance: Taking Stock a Decade After the Financial Crisis' 26 (2019) Review of International Political Economy 1068; D Lesage, M Vermeiren and S Dierckx, 'New Constitutionalism, International Taxation and Crisis' in S Gill and AC Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014) 197.

[208]Seabrooke and Wigan (n 205).

[209]S Picciotto, 'Technocracy in the era of Twitter: Between intergovernmentalism and Supranational Technocratic Politics in Global Tax Governance' 16 (2020) Regulation and Governance 634.

[210]Snell and Jaakkola (n 14); A Roland and I Römgens, 'Policy Change in Times of Politicisation: The Case of Corporate Taxation in the European Union' 60 (2022) Journal of Common Market Studies 355.

[211]C Quentin, 'Gently Down the Stream: BEPS, Value Theory and the Allocation of Profitability along Global Value Chains' 13 (2021) World Tax Journal 163, 203.

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transformation of the international tax regime come with a meaningful change in the European politics of tax competition and in the core ideas animating it? The answer is mixed and depends on where the change is expected to occur.

The first place to look for change is the EMU context. The Eurozone crisis was addressed through various new (but also old) forms of European economic governance, such as the Macroeconomic Imbalance Procedure and the European Semester, which essentially related to the EMU edifice and were harnessed to engender financial and fiscal stability. Member States' budgets and economic policies, including tax, were increasingly reviewed against (everchanging) European standards of stability and perceived macroeconomic prudentiality. In this form of economic governance, tax systems were chiefly expected to foster investment, growth, employment, social mobility, tax compliance and overall competitiveness.[212] The vague prescription for governments was to lower taxes on labour and shift the burden onto other immobile bases, such as consumption and property ownership.[213] Tax reforms were to 'trigger private investment' and to turn the domestic 'socio-economic structure into a *more competitive* one', which was regarded as particularly imperative for states with a high sovereign debt load and subject to debt-cutting programmes.[214] These loose maxims were familiar from the two preceding decades; tax systems had to become competitive and conducive to employment, economic initiative and efficient circulation of private capital. In the tradition of economistic reasoning, the suggested reforms were portrayed as translating into dynamic effects that increase the volume of economic activity and, in turn, consolidate public finances. Hence, the new mode of economic governance chiefly reinvigorated existing economic wisdom by giving it a more formal and institutionalised status. Yet, countries receiving financial assistance from the European Financial Stabilisation Mechanism, the European Financial Stability Facility or the European Stability Mechanism, were also subject to measures involving obligations to rely more extensively on taxation (for instance, by increasing the progressivity of income taxation).[215] Then again, Ireland's low corporate tax rate, being one of the notorious hallmarks of tax competition in Europe, was not addressed in the country's fiscal consolidation programme,[216] as 'the retention of the 12.5 per cent corporation tax rate was a red line for the Irish authorities.'[217] For governing tax competition, the new mode of economic governance indeed remained rather futile. For Member States whose public finances and macroeconomic trends roughly abided by European threshold values, the new economic governance did not become imperative, for which reason it had a varied impact in different countries. For its different imprint across countries – also between Eurozone countries and those outside the euro – the new mode of economic governance had limited capacity to steer and in particular to harmonise national tax systems.[218] Overall, outright interference with tax systems remained relatively modest. But by effectively ruling out many policy options, the new mode of economic governance pushed countries, both discursively and formally, to maintain their competitiveness, as this was one of the economically orthodox policy courses that countries had at their disposal, and taxes continued to play a pivotal role in fostering competitiveness.

[212]These were vaguely articulated in annually drafted growth surveys and, in some cases, translated into more detailed country-specific recommendations, both being part of the European Semester procedure. The standards were also spelled out in Tax Policies in the European Union surveys, which the Commission began to publish in 2016.

[213]De Witte (n 67) 130.

[214]Menéndez (n 13) 112 (italics in the original). See also Menéndez (n 2) 148–52 on how the new mode of economic governance has increasingly deprived countries of alternatives to 'increasing the competitiveness of the external sector of the economy'.

[215]This was obvious in the case of Greece (see Memorandum of Understanding between the European Commission, Acting on behalf of the European Stability Mechanism, and the Hellenic Republic and the Bank of Greece (2015)).

[216]European Commission, *The Economic Adjustment Programme for Ireland*. Occasional Papers 76 (European Union 2011).

[217]European Commission, *Ex post Evaluation of the Economic Adjustment Programme*. Ireland, 2010–2013. European Economy Institutional Paper 004 July 2015 (European Union 2015) 64.

[218]Van Cleynenbreugel (n 14).

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In analysing the broad trajectories of the EU's post-financial crisis political economy, scholars have (rightly) stressed the legal instruments used in governing macroeconomic stability in the EMU framework. Yet, regarding European tax policy, this emphasis presents a myopic picture, since ideas on tax competition have been critically re-articulated outside EMU procedures, although this took place rather slowly when compared to reactions within the EMU framework. Especially since 2015, this has happened by the straightforward method of drafting directives, and a flood of directive proposals has been emanating from the Commission.[219] If the new modes of macroeconomic governance have focused on making national tax systems competitive and compliant with perceived dynamic laws of private economy, directive proposals have involved measures supportive of Member States asserting their power to tax in positive terms, that is, by imposing taxes. Rather than only assuming dynamic-behavioural effects resulting from scaling down taxation, drafting directives has underlined the legal design of tax systems. Still, even beyond the EMU context, the change in the politics of tax competition has been somewhat camouflaged by how the new agenda has been staged. Pursuing tax reform has chiefly been framed as a response to taxpayers' aggressive tax planning, tax avoidance and tax evasion practices. The cause for reform has thus been construed as the problem of states struggling to exercise the power to tax, with taxpayers doing their best to circumvent that power. On the surface level, the focus has shifted from externalities between governments to perverted interaction between the state and private economic actors, which has made tax competition seem like a mere secondary issue. Yet I would venture to suggest that policy ideas on tax competition have anything but escaped significant re-articulation. This is partly so because taxpayers' tax avoidance practices rely on virtual or imaginary capital flows, and these capital movements are something over which governments have increasingly learned to compete. Moreover, as post-financial crisis tax policy ideas developed, they ceased to deal with mere virtual capital flows. In so doing, they partly abandoned the premise that tax competition is harmful only when relating to artificial or virtual capital flows.

The second place, then, to look for change in the European politics of tax competition is the traditional law-making context of drafting directives. European post-financial crisis tax policy has been rather manifold, but regarding tax competition it can be meaningfully divided into three approaches. First, rules have been introduced to reduce tax authorities' epistemic deficits. They have been part of the process that Commissioner Pierre Moscovici proclaimed as the European tax 'transparency revolution'.[220] For instance, financial institutions must report asset holdings to tax administrations more openly,[221] corporate actors must present their tax-related figures to tax collectors on a country-by-country basis,[222] and tax officials must inform foreign treasuries about secretly issued domestic advance tax rulings.[223] Rules on transparency and administrative sharing of information do not create new obligations to impose and pay taxes. By establishing an administrative right to know and see clearly, they merely empower states to factually enforce existing tax obligations, instituted and due by a national statute already in force. Since transparency rules are not creative of the power to tax, they have been regarded as a liberal and lax form of governing tax competition.[224] Moreover, as knowledge-enabling norms avoid setting substantive standards on how to tax, they do not harmonise national tax systems. Yet, at the same

[219]In addition to drafting directives, the Commission made more resolute use of the state aid rules, much as it did as a result of the 1990s work against tax competition. For an overview, see S Douma, 'State Aid and Direct Taxation' in Wattel et al (n 194) 883; Snell and Jaakkola (n 14) 782–3; van Cleynenbreugel (n 14) 241–3.

[220]Speech by Commissioner Pierre Moscovici at the Tax Congress of the Berlin Tax Forum 2016, of 20 June 2016.

[221]Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359, of 16 December 2014, 1–29.

[222]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, of 3 June 2016, 8–21.

[223]Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, of 18 December 2015, 1–10.

[224]Webb (n 174).

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time, they are not totally insignificant in regulating tax competition. Many countries' competitive policies of low or non-taxation are predicated on taxpayers' auxiliary chance not to report taxable income to their home-country exchequers. While reducing tax secrecy directly addresses tax avoidance or tax evasion, it indirectly mitigates adoption of predatory tax schemes. In fact, scholars have suggested that the recent OECD transparency rules, implemented in the EU as well, have genuinely helped governments tap financial flows, which has reversed the downward trend in tax rates on capital income across borders.[225] In the Commission's revised view, then, tax competition should be not only 'fair' but also more pronouncedly 'transparent'.[226] Even though countries remain broadly allowed to compete on taxes, pressures to do so should not derive from taxpayers' chances to conceal their true affairs. Once again, disapproving tax competition remained qualified, and for some time curing the epistemic deficit through transparency rules was to determine 'everything that we [the Commission] wish to accomplish on the tax policy front over the next few years.'[227]

The second approach to regulating tax competition has aimed at introducing substantive tax rules and is therefore more significant than transparency-oriented norms. The approach has been captured in the somewhat phraseological imperative of corporate profits being 'taxed where economic activities take place and value is created',[228] stressing a real and meaningful territorial connection between taxation and the economy. Recent developments in economic reality have distorted this connection and enabled corporations to sever the link between the territory of income formation and that of taxation.[229] Taxpayers have become able to shift profits to countries offering low taxation but having no actual role in income generation. This has corrupted the idea of economic allegiance between the taxpayer and the state, which obtained an influential formulation by a group of economists in 1923[230] and has been formative for the international order of corporate taxation. In the OECD's view, 'low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it'.[231] The key criterion for harmful tax behaviour is artificiality, which refers to capital movements without actual economic substance. These capital movements lack business logic and seek to reap benefits solely from disparities between legal orders. They are routinely organised in the form of intra-firm payments and often carried out with fictitious (non-market) prices.[232] The burgeoning of artificial capital movements has cut off the territory of economic value creation from the territory of tax obligations. While in the early phase of integration it was held possible that abnormal capital flows might result from the free movement of capital, they were now seen as having reached their full actuality.

The use of artificial capital movements lurks at the core of taxpayers' tax planning and avoidance practices. They are also something over which governments increasingly compete, which has not escaped the eye of international organisations. The International Monetary Fund

[225]L Hakelberg and T Rixen, 'Is Neoliberalism Still Spreading? The Impact of International Cooperation on Capital Taxation' 28 (2021) Review of International Political Economy 1142.

[226]European Commission, *Tax Policies in the European Union. 2018 Survey* (European Union 2018) 38.

[227]Speech by Commissioner Pierre Moscovici at the AGEFI Conference in Geneva 12 November 2015.

[228]Organization for Economic Co-operation and Development, Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2015) 4. See already G20 Leaders' Declaration. Saint Petersburg Summit 5–6 September 2013. See also 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 June 2015, 6.

[229]ED Kleinbard, 'Stateless Income' 11 (2011) Florida Tax Review 700; W Vlcek, *Offshore Finance and Global Governance. Disciplining the Tax Nomad* (Palgrave Macmillan 2017); R Palan, H Petersen and R Phillips, 'Arbitrage Spaces in the Offshore World: Layering, "Fuses" and Partitioning of the Legal Structure of Modern Firms' 55 (2022) EPA: Economy and Space 1041.

[230]League of Nations, Report on Double Taxation Submitted to the Financial Committee, document E.F.S.73 F.19 5 April 1923. The concept of economic allegiance borrowed from G Schanz, 'Zur Frage der Steuerpflicht' 9 (1892) *Finanzarchiv* 1.

[231]Organization for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013) 10.

[232]Jaakkola, Ylönen, and Saari (n 9).

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(IMF) acknowledged that 'tax competition is driven at least as much by profit-shifting concerns, including in relation to "[tax] havens", as by the desire to attract real investments.'[233] Governments tailor tax policies to incentivise inward – and to disincentivise outward – artificial capital flows. These types of policy choices are characteristic of contemporary tax competition, conceptualised as 'virtual tax competition'.[234] This insight has critically shaped the post-financial crisis regulation of tax competition. It has also been formative in terms of the Commission's approach, which has stressed the complementary nature of tax avoidance and tax competition. In drafting anti-tax competition policies, the Commission has noted that 'the nature and form of tax competition have changed substantially over the past two decades'[235] and that governments 'compete for highly mobile tax bases, notably accounting profits as well as income related to intangible assets[.] At the same time, multinational companies use these structures as well as unintended mismatches between countries [sic] tax systems to decrease their overall tax payments.'[236] In fact, '[i]ntense competition for mobile tax bases has created new opportunities for aggressive tax planning'.[237] It appeared that rival governments both inspire and rely on corporations' quasi-economic behaviour, and the harmfulness of tax competition became attributed to competition over artificial capital flows. The legal geography of corporate taxation had indeed developed into something like a virtual reality. In spite of the original grand aspiration of the European project to create a market order with a genuinely economic logic, the market-making law of the EU has essentially enabled the emergence of artificial capital movements and the virtual aspects of contemporary capitalism.

The second approach to tax competition chiefly addresses the mismatch between the territory of economic value creation and that of taxation, aiming at '[r]e-establishing the link between taxation and where economic activity takes place'.[238] In short, re-pairing the economy and taxation should happen by fixing which corporate activities a Member State ought to tax. The substantive rules would specify the economic activities that should be taken into account in calculating a national tax base. European law would thus involve a positive construction of the tax base. For instance, the Anti-tax-avoidance Directive[239] enhanced resistance by tax systems to non-economic capital flows by obliging states to disregard some of these flows in calculating tax bases, resulting in non-recognition of artificial arrangements (such as in the cases of excessive intra-firm interest payments and economically passive intermediate entities). The directive was essentially organised upon the idea of refusing to acknowledge mere virtual arrangements.[240] The Commission also proposed[241] a (later abandoned[242]) full harmonisation of the corporate tax base,

[233]International Monetary Fund, *Spillovers in International Corporate Taxation*. IMF Policy Paper (IMF 2014) 21.

[234]For virtual tax competition, see Jaakkola, Ylönen and Saari (n 9); T Rixen, 'From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance' 18 (2011) Review of International Political Economy 197; P Dietsch, 'Whose Tax Base? The Ethics of Global Tax Governance' in P Dietsch and T Rixen (eds), *Global Tax Governance. What Is Wrong with It and How to Fix It* (ECPR 2016) 231.

[235]European Commission, Communication from the Commission to the European Parliament and the Council on Tax Good Governance in the EU and beyond, COM (2020) 313 final, 15 July 2020, 3.

[236]European Commission, Commission Staff Working Document Corporate Income Taxation in the European Union, SWD (2015) 121 final, 17 June 2015, 6.

[237]European Commission (n 228) 2.

[238]European Commission (n 228) 6.

[239]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 913, of 19 July 2016, 1–14.

[240]The same logic permeated the European Commission's proposal relating to so-called shell entities (Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. COM/2021/565 final, 22 December 2021).

[241]European Commission, Proposal for a Council Directive on a Common Corporate Tax Base. COM (2016) 685 final, 25 October 2016.

[242]European Commission, Communication from the Commission to the European Parliament and the Council. Business Taxation for the 21st Century. COM(2021) 251 final, of 18 May 2021, 11–2.

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as uniformity would mitigate capital flows that exploit disparities between national rules on which items to tax. Still, even with a common European tax base in existence, states could continue to compete through differences in statutory tax rates. Indeed, resorting to statutory rates is what the Commission had for long encouraged Member States to do and what had also been allowed by the European politics of tax competition. Partly because of tax rate competition, there was a need for rules on allocating taxable profits between countries, that is, determining which Member State is entitled to tax profits. Rules of distribution were proposed (without success) both for business activities in general[243] and for the digitalised economy in particular.[244] The allocation rules employed criteria such as the number of employees and customers and the volume of sales, as these were considered genuinely economic and value-creating factors in a relevant material sense. Yet, even if a share of the tax base was allocated to a Member State, it remained allowed to decide its tax rate or indeed whether to apply any corporate tax at all. Rather than regulating tax rates, the significance of rates in competition was to be reduced indirectly by adopting proper criteria for territorial economic allegiance. The rules were intended to articulate the criteria for evaluating where firms generate value and conduct their business. In such a role, they would re-create the territorial congruence between tax law and economic reality, which by now was establishing itself as a key imperative for the politics of tax competition and rearticulating the limits of acceptable competition.

The third approach to tax competition gained currency at the turn of the 2020s. Because the rules for extensive tax base harmonisation and allocation of taxable profits between countries had not found political endorsement, new alternatives were sought. The concerns behind this approach were relatively similar to those that framed the second approach. The diagnosis was that not only tax base structures, but also statutory tax rates, were extensively used in competition over tax revenues. As revenue needs were building up due to the Covid-19 pandemic, Germany and France proposed that European recovery measures should ensure 'effective minimum taxation' of corporations.[245] While not proposing a minimum corporate tax as part of the Next Generation EU recovery package, in 2021 the Commission did propose[246] a 15 per cent minimum effective tax rate on corporate profits of large companies. This was once again in line with an initiative and pre-drafted rules emanating from the OECD,[247] the idea being 'to put a floor on excessive tax competition between jurisdictions.'[248] The proposal was initially opposed by Poland and Hungary, as a result of which some countries announced their intentions to implement the tax unilaterally.[249] Yet, with some amendments, the Council endorsed the proposal in 2022.[250] The directive marks a departure from any recent tax competition policy and especially from the Commission's previous blueprints, which have constantly underlined that 'harmonisation of corporate tax rates is not part of th[e] agenda.'[251] The regulation of tax competition now came to involve affirmative and quantified construction of public authority, that is, the minimum level of

[243]European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB). COM (2016) 683 final, 25 October 2016.

[244]European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence. COM (2018) 147 final, 21 March 2018.

[245]European Union – French–German initiative for the European recovery from the coronavirus crisis (Paris 18 May 20) <https://www.diplomatie.gouv.fr/en/coming-to-france/coming-to-france-your-covid-19-questions-answered/coronavirus-statements/article/european-union-french-german-initiative-for-the-european-recovery-from-the> accessed 21 October 2023.

[246]European Commission, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union. COM (2021) 823 final, 22 December 2021.

[247]Organization for Economic Co-operation and Development, Tax Challenges Arising from the Digitalisation of the Economy. Global Anti-Base Erosion Model Rules (Pillar Two). Inclusive Framework on BEPS (OECD 2021).

[248]European Commission (n 246) 1.

[249]'Five EU States Vow to Introduce Minimum Corporate Tax' (*Financial Times* 9 September 2022).

[250]Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328, of 22 December 2022, 1–58.

[251]European Commission (n 228).

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exercising the power to tax. While the second approach imposed substantively defined and positive standards on tax base architecture, it did not require Member States to exercise the power to tax; the decision on actually making use of that prerogative remained at the national political discretion. This is what the third approach aims to change.

While the minimum corporate tax rate initiative has been prepared in the discursive framework of ensuring taxation where value is created, it follows a significantly different logic. This becomes evident, for instance, in how the directive's main rule, the income inclusion rule, operates. In the case of multinational enterprises, the rule requires that minimum taxation be executed at the level of a group's parent company and collected by the parent's home country. This happens by adding to the parent's taxable income a foreign subsidiary's profits initially taxed by the latter's home country but with a rate falling below the 15 per cent minimum. Inclusion takes place irrespective of whether the income to be included has been generated abroad as a result of genuine economic activities, although this effect is moderated by the so-called 'substance-based income exclusion', which reduces the amount of taxable income with reference to real-economic factors.[252] The minimum tax rate rule cannot therefore be fully inferred from the normative assumption that taxation must take place where value is created, as the country responsible for taxation may be a country without any actual or material connection to the subsidiary's value creation. Indeed, the minimum rate approach is 'more concerned with *whether* companies pay tax than *where* they pay it.'[253] In such a role, the said rule is meaningful in governing tax competition, as the power to tax is exercised at the minimum intensity irrespective of how corporate taxpayers have been geographically organised. Hence, the politics of tax competition looks beyond the premise of taxing where value is created, and the qualifying criterion of artificiality, previously essential for reinterpreting what accounts for harmful tax competition, becomes partly transcended. This, of course, comes with the rather radical consequence that corporate taxation is made more or less extraterritorial.[254] Since profits may be taxed without any actual connection to the government taxing them, the exercise of public authority is not preconditioned on any connecting factor having traditionally justified exercise of the power to tax in international (tax) law. This suggests that the politics of tax competition is being driven to a point where even some foundational premises of public law and the exercise of public authority are becoming reformed.

The second and third approaches to income tax competition involve ideas and legal components that differ essentially from the 1990s regulation of tax competition. Rather than merely prohibiting discriminatory tax system properties by way of negative prohibitions, both approaches put forward substantive standards on how to tax. They also differ from traditional market-making rules that enhance cross-border economic mobility through prohibiting imposition of taxes. Rather than constraining the use of public authority, they ensure that the power is indeed exercised. The new ideas point to legal arrangements going beyond the liberal and negative constitutional logic of reining in public authority or safeguarding equality of treatment, and they balance power-constraining properties with power-constituting arrangements. This involves the centralised construction of the capacity to tax income. It also points to transnational legal orders as the means of protecting national public finances and core public powers from the erosion prompted by competitive fiscal federalism. The post-financial crisis period has thus come with novel elements of and ideas for governing tax competition, whose regulation is now clearly less qualified than it was in the 1990s. In terms of contrasting post-war political philosophies, the recent development entails at least a partial rebalancing between the evolutionist and

[252]Council Directive (n 250) Art 28. For a critical perspective, see R Avi-Yonah and YR (Christine) Kim, 'Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax' 43 (2022) Michigan Journal of International Law 505.

[253]R Mason, 'The Transformation of International Tax' 114 (2020) American Journal of International Law 353, 387 (italics in the original).

[254]For instance, see F Debelva and L De Broe, 'Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and the European Union Law Perspective' 50 (2022) Intertax 898.

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interventionist philosophies of tax competition. Indeed, there has been an increasing push to find acceptable boundaries to the spontaneous integration of income tax systems. Scholars working on the political economy of taxation may fall prey to a melancholic narrative of no counteractions ever taking place in the field of international tax, which is indeed a historically well-warranted assumption, but this narrative should not blind scholars from seeing changes.[255]

In spite of a number of transparency rules and adoption of two other directives, the Anti-tax Avoidance Directive[256] and the Minimum Corporate Tax Directive,[257] a gap looms between ideational change and legal outcomes. While policy ideas on tax competition have become different, EU law has been relatively resistant to reform; ideational change has not fully translated into legal change. This can be observed, on the one hand, in a number of directive proposals finding no endorsement by the Council. On the other hand, the adopted directives have been outstandingly qualified in their scope of application. In the post-financial crisis era, turning tax policy ideas into law has remained hampered by the rule of unanimous decision-making. Income tax integration is a notorious policy area in which promoting 'the common good is constrained by the extremely high consensus requirements of EU legislation.'[258] Given the recent ideational change, the mismatch between ideas and law is perhaps more pronounced than before. Under embedded liberalism, the unanimity rule could ensure that integration would not run against salient national preferences, no more by sacrificing the viability of national tax systems on the altar of market integration than by introducing tax obligations alien to national political choice. As integration consolidated economic mobility as a condition for policy competition, the democracy-enabling rule began to turn into a constraint on democracy. In the contemporary EU, the unanimity requirement plays a key role; while European law is seen as allowing income tax integration for several purposes, the unanimity rule makes adoption of competition-constraining norms extremely hard. The unanimity rule thus comes with the neoliberal effect of paralysing the political.[259] Under the consensus requirement, those who advocate embedding tax competition into a more elaborated regulatory framework may find themselves 'waiting for Polanyi' in what time and again proves to be a more 'Hayekian setting'.[260]

In the course of integration, the conceivable ways of governing tax competition have typically been identified with European legal norms regulating how Member States exercise their power to tax.[261] This has matched the EU's predominant character as a community in which law has been 'the central instrument . . . for realising integration.'[262] Rather than assuming core administrative powers or taxing and spending capacities, the EU has predominantly been a 'legislation-centred' polity.[263] The regulatory mode of operation has also characterised the tax measures recounted in this subsection. Yet, in response to the Eurozone crisis, the demand for European fiscal capacity was repeatedly raised,[264] and it

[255]This point has been made in an important way by Christensen and Hearson (see n 207).

[256]See (n 239).

[257]See (n 250).

[258]FW Scharpf, 'Legitimacy in the Multi-level European Polity' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2012) 89, 94. See also FW Scharpf, 'De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe' 23 (2017) European Law Journal 315.

[259]Wilkinson (n 67) 205–6.

[260]To recite Martin Höpner and Armin Schäfer (see n 121).

[261]See (n 56). In a more global context but with relevance to the EU, see T Rixen and B Unger, 'Taxation: A Regulatory Multilevel Governance Perspective' 16 (2022) Regulation and Governance 621.

[262]D Chalmers, M Jachtenfuchs and C Joerges, 'The Retransformation of Europe' in Chalmers, Jachtenfuchs and Joerges (n 13) 1, 9.

[263]N Walker, 'Freedom, Security and Justice' in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (European University Institute 2003) 159, 166–8.

[264]President of the European Council, 'Towards a Genuine Economic and Monetary Union' Interim Report (Brussels 12 October 2012).

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quickly turned into a debate on the EU's own taxes.[265] In the context of Covid-19, the demand for European taxes was invigorated and the Commission pledged to consider EU taxes that would function as the EU's own resources.[266] While these are chiefly advocated for functional reasons of enabling the EU to act, this Article has submitted above[267] that the interventionist philosophy of tax competition sees the EU's own capacity to raise taxes as one additional way of curbing tax competition. As scholars have suggested,[268] imposing EU taxes on mobile tax bases benefiting most from the European market would balance the fiscal and distributive losses caused by tax competition. The financial transaction tax, a European share of corporate tax and levies on digital business activity, all having featured in more recent debates, could come close to this. For the time being, the EU's own income taxes are lacking, with the exception of the EU being allowed to tax its officials' salaries. Furthermore, if mooted EU taxes are to play a significant corrective function in governing tax competition in the future, they should be significant enough. At the same time, Member States must retain their national tax revenues, which means that European taxes alone can hardly enervate tax competition. Rather than the EU's own taxing capacity, regulating how Member States themselves collect taxes will therefore probably be the chief means by which to address tax competition. Lastly, if revenues from European taxes are spent on European public goods or distributed to Member States under terms of conditionality, such as commitment to structural reforms and competitiveness, European taxes could turn out as counterproductive to the very idea of ensuring sufficient democratic discretion in income tax policy. In any case, introducing European taxes as the EU's own resources must happen by unanimity.[269] Hence, adopting them will prove perhaps no easier than regulating how Member States levy their national taxes.

4. Conclusion: towards politicisation of governing tax competition in Europe?

The evolutionist and interventionist philosophies of income tax competition rely on substantively and normatively loaded perceptions of the socio-political order, borrowing either from more liberal or more social democratic premises. This is especially so when they advocate an asymmetric and competition-enabling legal framework or, alternatively, the Europeanisation of taxation. The two philosophies entail different roles for democratic government and market-modelled ways of organising the socio-economic reality. Just as neither philosophy is apolitical, any decision on whether and how to regulate tax competition under deep market integration is not apolitical either. A choice of allowing tax competition and market forces to spontaneously structure national tax systems cannot pretend to be blind to its liberal inclinations. Likewise, a European choice of obliging countries to impose taxes cannot purport to be a neutral act of resolving a technical distraction by relying on some simplified standard of mobile taxpayers' 'fair share' or some golden wisdom derived from statistical-economistic reasoning. Choosing the

[265]F Fabbrini, 'Taxing and Spending in the Euro Zone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' 39 (2014) European Law Review 155.

[266]European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 'The Next Generation of Own Resources for the EU Budget' COM (2021) 566 final.

[267]See text between n 55 and 59.

[268]In a pre-financial crisis context, see AJ Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax (with Some Comparative Observations)' 10 (2004) Columbia Journal of European Law 297, 324–5. In the post-financial crisis context, see M Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) 11 RSCAS Policy Paper, 13–4; M Kumm, 'Democratic Challenges Arising from the Eurocrisis: What Kind of a Constitutional Crisis Is Europe in and What Should Be Done about It?' in *Challenges of Multi-Tier Governance in the European Union: Effectiveness, Efficiency and Legitimacy* (European Parliament 2013) 124; TP Woźniakowski and M Poiares Maduro, 'Why Fiscal Justice Should be Reinstalled Through European Taxes that the Citizens Will Support' (2020) 7 Policy Analysis, European University Institute.

[269]Art 311 TFEU.

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means by which to organise the socio-economic reality and fixing taxpayers' obligations therein stand at the core of politics. Hence, the European choice between politics governed by the market and the market governed by politics should result from a genuine political contestation. The question is to what extent the EU legal framework is able to provide for the political contestation over this choice and for proper deliberation on contrasting socio-political systems.[270]

For European political contestation, the unanimity rule in tax matters appears counterproductive. This is so for two chief reasons. First, in the special legislative procedure with the unanimity rule in place, the European Parliament remains on the sidelines with only a consultative role. Decisions are negotiated among national governments although the causes for regulating tax competition do not stem from interests that are characteristically national.[271] The distributive conflict implied by tax competition goes beyond a revenue conflict between states and extends to a distributive conflict between socio-economic groups, such as labour and capital owners. Since relevant interests relate to broader socio-economic conflicts, the European Parliament may better represent different socio-economic groups between which conflicts should be resolved. Perhaps the interest divisions in the international community conform not to national interests but rather to socio-economic group interests.[272] Second, the requirement of unanimity makes it hard to reach a consensus above the lowest common denominator, which is only aggravated by a correct anticipation that unanimity must be achieved anew, should a need emerge to change tax norms.[273] Under the unanimity requirement, European tax rules would effectively act as constitutional norms; they would be constitutional in the sense of boundary conditions that take specific political options away from the scope of normal political discretion.[274] They would remain resistant to the will of any majority. By incorporating the unanimity rule in taxation, the EU institutional framework privileges non-action and asymmetries between decision-making rules.

In order to overcome the policy-blocking unanimity rule, the Commission has recently looked – albeit rather cautiously – into alternative Treaty provisions not requiring unanimity.[275] It has pointed to the (so far un-operationalised) Article 116 TFEU. This provision allows removal of distortions of private competition by means of ordinary legislative procedure, that is, by qualified majority voting in the Council and with the European Parliament as co-legislator.[276] Relying on this provision for the purposes of income tax integration would indeed resolve the most severe deficiencies that afflict decision-making by unanimity and keep on blocking interventions in tax competition. Yet it would come with a radical reconfiguration of fiscal democracy. Under qualified majority voting, the national democratic process and each government's national accountability would cease to be an absolute precondition for Europeanisation of tax law, which of course would also hold true if exercise of the power to tax were to be constrained and scaled down for market-making purposes. Some type of European political collectivity would replace the national constituency as an agent of fiscal democracy. However, perhaps economic interdependencies between national polities, partly deriving from creation of the European market regime, would be properly matched with further Europeanisation of the political community, which in turn would

[270]For a critical evaluation of EU law with respect to accommodating socio-political conflicts, see M Dani, 'Rehabilitating Social Conflicts in European Public Law' 18 (2012) European Law Journal 621.

[271]J Jaakkola, 'Enhancing Political Representation Through the European Economic Constitution? Regressive Politics of Democratic Inclusion' 15 (2019) European Constitutional Law Review 194.

[272]For early European federalist visions, this remained a real issue to be considered (see EB Haas, 'The United States of Europe' 63 (1948) Political Science Quarterly 528, 542).

[273]FW Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' 66 (1988) Public Administration 239.

[274]D Grimm, 'Verfassung' in D Grimm (ed), *Die Zukunft der Verfassung* (Suhrkamp 1991) 11, 16.

[275]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, of 15 January 2019; European Commission, Communication from the European Commission to the European Parliament and the Council. An action plan for fair and simple taxation supporting the recovery strategy. COM (2020) 312 final, of 15 July 2020.

[276]See also Thomas Piketty and 14 Others, 'Our Manifesto for Europe' (*The Guardian* 2 May 2014).

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bring fiscal and economic geographies closer to each other. What seems likely is that if the EU legal framework cannot accommodate European regulation of tax competition in a way that is politically and democratically warranted, it will be a pale replacement even for national legislatures that have, under competitive and necessitarian economic reasoning, significantly lost their capacities to govern their socio-economic systems through income taxation. To be sure, the vibrant culture of politics comes with practices and preconditions that cannot be reduced to law. But the law still has its role to play in framing and accommodating politics.

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