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Tax Competition among modern states

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Brief summary

The phenomenon of globalization has produced the transformation of market functioning rules and the consequent diminution of the States' role in governing the economy in favour of the thrusts coming from multinational financial and business entities.

As a consequence, the tax function, therefore, can no longer be identified with the centrality of the State, but must also be attributed to a plurality of supranational (such as that of the European Union) or local (such as that expressed by smaller territorial authorities) systems.

Moreover, alongside such relevant change, taxes become an instrument to encourage the allocation of foreign investment. In this context, a logic of competition between States had spread, measured on the basis of fiscal attractiveness, i.e. the ability to define an overall level of taxation that attracts foreign companies so as to determine the settlement of production initiatives in the State territory. The State which intends to participate in this competitive game is called upon to configure a tax system which is capable of convincing economic operators to establish in its territory the production factors needed to carry out business activities. In order to be attractive, this tax system must obviously have a lower effective impact on economic results than the average in other countries, and possibly tending towards zero (or at least a minimum tax burden). These policies can lead to a so called «harmful tax competition», distorting trade and investment patterns, eroding national tax bases and shifting part of the tax burdens abroad.

The well-founded risk that tax competition will take on the characteristics of a wild contest between States in order to continuously lower the tax

levy have led, in recent years, to a general rethink by international institutions (OECD, European Union) of an indiscriminate freedom to shape the tax system exclusively according to the single State's particular convenience.

The OECD expresses the idea of launching and consolidating effective instruments to combat «harmful tax practices» put in place by some States (in particular, by tax havens) in order to attract foreign investment. The legal instrument used at the international level therefore consists of «soft law», i.e. a series of documents that have no binding and compulsory value with respect to their addressees (OECD member states), but which result in recommendations and which draw their strength from the ethical capacity and moral persuasiveness to induce complying behaviour. In the meantime, the United States tax administration has thus consolidated its belief that the fight against international tax evasion could usefully be pursued through the use of stable forms of administrative cooperation between the authorities of the various countries based on achieving adequate transparency in the financial relations of foreign residents.

The first line of action against harmful tax competition can consequently be found in the definition of an international common legal model for regulating the activities of multinationals, represented by the «Base erosion and profit shifting – BEPS» project which defines a model for the taxation of international activities that allows the tax to be applied at the place where the activity is actually carried out, filling the gaps in national tax systems that allow forms of tax avoidance or evasion.

The second line of action can be found in the «Common Reporting Standard – CRS» adopted by OECD member states which requires financial and tax institutions (FIs) to report accounts held directly or indirectly by foreign tax residents to their local tax authority and requires tax authorities to exchange the account information. The goal of CRS is to limit the opportunities for taxpayers to circumvent reporting.

At present, the fight against harmful tax competition seems to be the basis to launch a new international tax order, characterised by a self-limitation of the States' fiscal sovereignty and a significant weight of international agreements (multilateral and/or bilateral), with the declared aim of containing imbalances in favour of multinationals and restoring balanced (and, if possible, declining) forms of taxation of domestic factors (and in particular labour).

Abstract

In recent years, a counter-trend phase has begun with respect to the process of tax competition between States, and the attention of international organizations (OECD, G20, G7, EU) has focused on the risks deriving from competition between the various state sovereignties. The emerging idea is that States must cooperate to achieve common development, economic and social objectives, even limiting, at least partially, their own tax sovereignty through the implementation of legal models formulated in international agreements in order to effectively pursue the erosion of the tax base. and internal taxation. The guidelines for intervention consist in the definition of taxation models for multinationals to be imposed with homogeneity on an international basis and in the pursuit of global transparency of the financial positions of taxpayers abroad. The fight against harmful tax competition therefore seems to constitute the basis for the launch of a new international tax order, characterized by a self-limitation of the fiscal sovereignties of the States and the relevance of international agreements (multilateral and/or bilateral).

Abstract

Negli ultimi anni si è avviata una fase di contro-tendenza rispetto al processo di concorrenza fiscale tra gli Stati, e si è focalizzata l'attenzione degli organismi internazionali (OCSE, G20, G7, UE) sui rischi derivanti dalla competizione tra le varie sovranità statali. Emerge l'idea che gli Stati debbono cooperare per raggiungere obiettivi comuni di sviluppo, economici e sociali, anche limitando, almeno parzialmente, la propria sovranità tributaria attraverso il recepimento di modelli giuridici formulati nelle intese internazionali pur di perseguire efficacemente l'erosione della base imponibile e della imposizione interna. Le direttrici di intervento consistono nella definizione di modelli di tassazione delle multinazionali da imporre con omogeneità su base internazionale e nel perseguimento della trasparenza globale delle posizioni finanziarie dei contribuenti all'estero. La lotta alla concorrenza fiscale dannosa sembra costituire pertanto la base per l'avvio di un nuovo ordine fiscale internazionale, connotato da una auto-limitazione delle sovranità fiscali degli Stati e dalla rilevanza degli accordi internazionali (multilaterali e/o bilaterali).

1. The crisis of tax function unity leads to the fragmentation of tax systems

The legal-institutional evolution of the 21st century has led to overcome the usual arrangement of tax relations and in particular to the idea of concurrence of the tax system with the national state.

Globalization has produced the transformation of market functioning rules and the consequent diminution of the States' role in governing the economy in favour of the thrusts coming from multinational financial and business entities. Under the action of vigorous corrosive forces, the superstructure of legal concepts that led to the idealisation of the state as a model of political unity of a community[1] was progressively demolished.

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[1] See L. Gallino, *Globalizzazione e diseguaglianze*, Rome - Bari, 2012. On this subject see N. Chomsky, *Sulla nostra pelle. Mercato globale o movimento globale*, Milan, 1999; S. Bauman, *Dentro la globalizzazione. Le conseguenze sulle persone*, Rome - Bari, 1999; U. Beck, *Che cos'è la globalizzazione. Rischi e prospettive della società planetaria*, Rome, 1999; M. Regini, *Modelli di capitalismo. Le risposte europee alla sfida della globalizzazione*, Rome - Bari, 2000; D. La Valle, *Economia di mercato senza società di mercato*, Bologna, 2004; A. Glyn, *Capitalismo scatenato. Globalizzazione, competitività e welfare*, Milan, 2007.

On the one hand, political pluralism due to the formation of centres of power alternative to and competing with the state power, able to operate in the fields of policy, industry, economy and professions, culture and religions, and on the other hand the attribution to supranational entities of decision-making powers with regard to the regulatory framework of an increasingly wide range of cases has led to a substantial attenuation of the main State's function as holder of the political decision monopoly[2].

Democratic pluralism and the plurality of normative sources thus impose «open» regulatory models, in which rigidly determined aprioristic schemes are abandoned in favour of a flexible design of coexistence of legal regulations, inspired by the logic of coexistence of the plurality of systems and capable of guaranteeing the spontaneity of social life and the variety of admissible solutions for political decisions.

The tax function, therefore, can no longer be identified with the centrality of the State, but must also be attributed to a plurality of supranational (such as that of the European Union) or local (such as that expressed by smaller territorial authorities) systems[3].

The erosion of the unitary principle of political organisation, represented by the State's predominant function, has thus undermined the unity of the same tax function, leading to the tax system fragmentation into a plurality of systems, each one responding to the plan of values expressed by the various legal systems[4]. In this way, the passage from a monolithic

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[2] On the crisis of the State following the advent of globalization and the downsizing of the traditional concept of sovereignty there is a widespread consensus both in constitutionalist doctrine and among political scholars. Without claiming to be exhaustive, the contributions of J. Habermas, *La costellazione postnazionale. Mercato globale, nazioni e democrazia*, Milan, 1999; M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transazionale*, Bologna, 2000; M.L. Salvatori, *L'occasione socialista nell'era della globalizzazione*, Rome - Bari, 2001; G. Tremonti, *La paura e la speranza*, Milan 2008; S. Acquaviva, *Le radici del futuro*, Rome, 2014.

[3] With regard to the coexistence of a plurality of tax systems and the evaporation of the monolithic concept of the legal system see A. Fantozzi, *Il diritto tributario*, Turin, 2003, pp. 756 ff.; P. Boria *L'anti-sovrano*, Turin, 2004, p. 46; F. Gallo, *Ancora in tema di autonomia tributaria delle Regioni e degli enti locali nel nuovo titolo V della Costituzione,* in *Rass. Trib*. 2005.

[4] For a general examination of the relationship between taxation and sovereignty, with particular reference to the evolution of the judicial systems of European States, see L. Antonini, *Dovere tributario, interesse fiscale e diritti costituzionali*, Milan, 1996; P. Boria, *L'interesse fiscale*, Turin, 2002; P. Boria, *L'anti-sovrano*, *op. cit*., 2004; G. Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, Padua, 2008; A. Perrone, *Tax competition e giustizia sociale nell'Unione Europea*, Padua, 2019; F. Pepe, *Dal diritto tributario alla diplomazia fiscale*, Padua, 2020.

state system, to which a single tax system corresponds, to a pluralist system characterized by the coexistence of several tax systems belonging to different forms of territorial community has occurred[5].

2. The crisis of an ethical understanding of the tax system

In less recent public law models, the coincidence of the tax system with the State means that the tax function is typically assigned to the pursuit of the general interests taken as a reference basis for the development of the state's community without other ideological elements being able to intervene in determining the conditions of use of the tax instrument.

The State, considered in its totality as the bearer of all the values and interests of the people, becomes the central pivot of civil society development, presenting itself as an entity in which the affiliates obtain «to enhance all ethical forces for the common good». The State's decision-making capacity thus finds its limits and the direction of progress in the ethical foundation of its own being, i.e. the identification with the community's will[6].

In this context, the duty to contribute to public expenses is considered as a typical manifestation of the citizen's general sense of awe with respect to the State-collectivity, based precisely on the ethical and legal relationship of belonging to the state's community. Thus paying taxes, released from the hated characteristic it had in the past and in the Middle Ages, is considered as a fundamental obligation of citizenship necessary for the community's survival.

Therefore, on the premise of the State's ethical foundation, the tax system is also affected by this ethical connotation, assuming a primary role in the constitutional order of a State. The tax presents itself as an unavoidable instrument to serve the State purposes and for pursuing the growth and protection objectives of the community of citizens[7].

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[5] For a general overview of the evolution of European tax systems, also in relation to European integration processes, see L. Bernardi, *Note sull'evoluzione recente e sulle prospettive future dei sistemi tributari,* in *Studi e note d'economia*, 2000, p. 25. See also N. Sartor, *I sistemi tributari dei paesi industrializzati: tendenze, problemi e prospettive,* in *Econ. Ital.* 1999.

[6] See P. Boria *Diritto Tributario*, Turin, 2019, p. 157.

[7] With reference to the issue of fiscal sovereignty, see F. Gallo, *Ancora in tema di uguaglianza tributaria*, in *Riv. Dir. Fin.,* 2013, I, pp. 321 ff.

The shift of fiscal sovereignty from the State to a plurality of territorial entities and lobbies and pressure centres has led to a profound transformation in the ethical concept of tax system, since with respect to the plurality of tax systems it is no longer possible to detect the presence of one or more material and political forces that are able to impose themselves overwhelmingly over regulatory choices.

In the liberal single-class State, the formation of the legislative decision was conceived in such a way as to reflect the substantially homogeneous values shared by the ruling class, leading to a fundamental gap between the civil society, in which the plot of values was elaborated from time to time, and the State, which limited itself to uncritically accepting the externally formulated axiological choices.

On the contrary, in a modern multiclass state, the coexistence of heterogeneous values, expression of a widening of participation in political life to various classes and interest groups, determines the need to combine decision-making bodies in a constant compromise between majorities and minorities, which is inspired and conducted according to the guidelines provided in the table of constitutional values[8].

The characteristic of the nineteenth-century formation of the rule of law, consisting of neutrality with respect to the values expressed by civil society, which led to the recognition of the validity of decision-making choices for the sole fact of the existence of a parliamentary majority, according to the well-known equation legitimacy/legality, is overturned in modern democratic and pluralist communities in which a «legality by values» is affirmed as a suitable parameter for the union of legislative activity.

The liberal state tax system, like other sectors of the legal system, was a legal instrument for achieving the objectives set by the ruling class and was therefore a means of serving the ideological convictions of civil society. As said, an ethical understanding of the tax system was required as an institutional factor of aid and support for the ideas and needs expressed by the society. In the age of globalization, on the other hand, we are witnessing a cancellation of this ethical understanding of the fiscal function: the crushing into a plurality of systems undermines the biunivocal correspondence

[8] On the institutional and political role of pressure groups and interest groups and the mechanisms of interference with decision-making processes, especially economic ones, see A.F. Bentley, *Il processo di governo. Uno studio delle pressioni sociali*, Milan, 1983; M. Olson, *La logica dell'azione collettiva*, Milan, 1983. On the same topic see also L. Ornaghi, *Gruppi di pressione*, in *Enc. Dir.*, Agg.to, Milan 1999, pp. 656 ff.

between the tax system and the underlying ideological and axiological plan, making it clear that the tax instrument can be adopted in a flexible manner for a plurality of collective purposes and aims.

The tax system thus becomes one of the institutional factors, although fundamental, for the implementation of the values expressed by each system, according to an instrumentality relationship that highlights the «neutrality» of the tax service with respect to the ideological beliefs of a civil society, rather valuing the correlation with the constitutional values of a community. We thus witness the «neutralization» of the ethical function of the tax system, in the context of a process of openness towards the numerous instances coming from an ontologically pluralist society.

Consistent with the transformation of the reference framework, the notion of tax system also receives an «open» structure, i.e. not supported by the pre-eminence of values coming from a social class and therefore by a particularistic and hegemonic vision of having to be, but rather determined by compromise solutions resulting from the political and social mediation of a plurality of demands emerging from civil society[9].

The shattering of the tax system into «tax systems» thus causes an ideological destructuring that allows for the possibilist and dynamic climate of a pluralist society, not sclerotic because of dominant ideas but oriented towards forms of harmonious coexistence of the values of civil coexistence.

3. The tax market

The spread of globalisation and market approximation processes have had a significant impact on the mechanisms for the definition of tax choices by States. And indeed, the tax burden becomes an important factor in the competition between companies, as it directly or indirectly affects the criteria of price formation, so as to determine the positioning with respect to the demand curve set by the market. Therefore, the choices concerning the structure of the tax system and the impact of the tax levy on economic activities are a decisive element in favouring the settlement of business ini-

[9] On the dynamics of the decision-making processes of pressure groups we can mention D. Riesman, *La folla solitaria*, Bologna, 1956, where the action of lobbies is presented as a set of irrelate and isolated pushes, sometimes hetero-directed at times, sometimes self-directed, often harnessed by crossed vetoes, however not referable to an organized and harmonic design, which configure an «amorphous structure of power».

tiatives and production plants in some States over others. In other words, it can be argued that the reduction of the tax levy is an element of attraction for foreign investments in the national context. It follows that, alongside the typical function of acquiring revenue for the livelihood and development of the national community, taxes become an instrument to encourage the allocation of foreign investment. In this context, a logic of competition between States is initiated, measured on the basis of fiscal attractiveness, i.e. the ability to define an overall level of taxation that attracts foreign companies so as to determine the settlement of production initiatives in the State territory. A real «tax market» is therefore established in which the offer of a reduced tax levy is the bargaining chip of the business establishment in the national territory[10].

The non-existence of mechanisms of heteronomic regulation of globalization processes and the well-founded risk that fiscal competition takes on the characteristics of a wild contest between States in order to continuously lower the tax levy have induced a general rethink regarding the existence of an indiscriminate freedom to shape the tax system exclusively according to reasons of the single State's particular convenience.

Particularly in Europe, the importance of a greater coordination of the tax policies of European Union countries has been clarified in order to avoid, above all, that regulations could be issued whose main effect would consist in the erosion of the tax base of other States. On the other hand, the resulting tax bleedings have increased the awareness that tax competition between States not only distorts EU integration, but above all penalizes the identification of a balance in taxation, generating situations of «State fiscal crisis». It is therefore possible to identify an incentive to tax system transformation as a consequence produced by the changes generated by other tax systems due to tax competition processes, according to a logic of international normative osmosis. But it is also true that this mercantile research of the tax level calibrated for the attraction or even the mere maintenance of the entrepreneurial substratum within the state territory, finds a brake and a limit in the identification of European tax standards.

Increasingly, it can be argued that the tax system is the result of the concurrent action of a plurality of sources, located at state, sub-state and international (and in particular community) level, which sometimes pro-

[10] See P. Boria, *Diritto tributario, op. cit.*, p. 158.

duce divergent and opposing impulses, whose balance represents the arrival point, contingent and changing, of the regulatory process.

4. The international order of tax competition as a qualifying element of modern taxation

Tax competition between States is a decidedly recent form of competition between the different national sovereignties, inspired by the objective of attracting capital and businesses to the territory of the State through the use (even nonchalant) of the tax lever.

The State which intends to participate in this 'competitive game' is called upon to configure a tax system which is capable of convincing economic operators - and typically multinationals - to establish in its territory the production factors needed to carry out business activities. In order to be attractive, this tax system must obviously have a lower effective impact on economic results than the average in other countries, and possibly tending towards zero (or at least a minimum tax burden)[11].

The economic convenience calculation formulated by the State competing at tax level is based on the assumption that the establishment of companies and capital is able to compensate for the lack of tax revenue through an increase in other factors determining social welfare (direct employment of employees, indirect employment of companies and self-employed workers linked to multinationals, consumption development, increase of available capital, etc.). Therefore, renouncing to tax collection does not constitute a significant damage for the community, but if anything it represents the necessary stimulus factor to activate the development of the national economy[12].

In this context, a logic of competition between States is initiated, measured in terms of fiscal attractiveness, i.e. the ability to define an overall level of taxation that is attractive to foreign companies so as to determine the establishment of production initiatives in the State territory[13]. As men-

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[11] On the subject see H. Ault, *Concorrenza fiscale: corsa verso l'alto o verso il basso*?, Naples, 2008.

[12] On this subject, see S. Cipollina, *I redditi «nomadi» delle società multinazionali nell'economia globalizzata,* in *Riv. Dir. Fin.* 2014, I, pp. 38 ff; L. Carpentieri, *La crisi del binomio diritto-territorio e la tassazione delle imprese multinazionali,* in *Riv. Dir. Trib.* 2018, I, pp. 351 ff.

[13] On this subject see P. Boria, *La concorrenza fiscale tra Stati: verso un nuovo ordine della fiscalità internazionale*, in AA.VV., *La concorrenza fiscale tra Stati*, Padua, 2018, pp. 5 ff.

tioned above, a real «tax market» is thus established in which the offer of a reduced tax levy constitutes the bargaining chip of the business establishment in the national territory.

The non-existence of heterogeneous mechanisms to regulate globalization processes and the well-founded risk that tax competition will take on the characteristics of a wild contest between States in order to continuously lower the tax levy have led, in recent years, to a general rethink by international institutions (OECD, European Union) of an indiscriminate freedom to shape the tax system exclusively according to the single State's particular convenience.

Thus, the conviction of the importance of a greater coordination of countries' tax policies in order to avoid that rules could be issued whose main effect would be other States' tax base erosion[14] has been clarified. On the other hand, the tax bleeding resulting from recent forms of international tax competition has increased the awareness that tax competition between States penalizes taxation balance, generating situations of «State fiscal crisis». The mercantile research of the tax level to attract the entrepreneurial substratum within the state territory thus begins to find a brake and a limit in the identification of international tax standards.

5. Tax competition between States

Fiscal competition between States is a relatively recent phenomenon, which developed in the second half of the 20th century and then consolidated definitively in the 21st century so as to constitute the qualifying trait of relations between different tax sovereignties.

Tax competition between States, as reconstructed by the international literature[15], expresses a structure of international relations characterized by

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[14] On tax competition in international tax law see R. Seer, *Le fonti del diritto comunitario ed il loro effetto sul diritto tributario*, in AA.VV., *Per una costituzione fiscale europea*, Padua, 2008, pp. 38 ff.; AA.VV., *Manuale di diritto tributario internazionale,* Milan 2012; L. Salvini, *I regimi fiscali e la concorrenza tra imprese,* in *Giur. Comm.,* 2016, pp. 130 ff.; R. Cordeiro Guerra, *Istituzioni di diritto tributario internazionale,* Milan, 2016.

[15] There is a widespread and broad international economic doctrine on the role and scope of «tax competition». Without claiming to be exhaustive, please refer to C.M. Tiebout, *A pure theory of local expenditures,* in *Journal of political economy* 1956, pp. 416 ff.; W. Oates, *Fiscal federalism*, New York, 1972; G. Brennan - J. Buchanan, *The power to tax: analytical foundations of a fiscal constitution*, Cambridge 1980; S. Bucovetsky - J. Wilson, *Tax competition with two*

the use of the tax lever as a function of attractiveness of capital and activities of multinational companies (or, in any case, of companies with an international vocation)[16].

And indeed, from a competitive standpoint, the State decides to adopt a tax policy inspired by a reduction in the tax burden on capital and multinational companies compared to the level normally applied by most of the countries in the world (i.e. the States that express «mature» market economies and that can therefore be considered as a benchmark of international taxation), so as to attract economic operators who decide to move from other (more burdensome) tax sovereignties to the State that chooses tax relief.

Tax relieves (i.e. a lower level of taxation than the international benchmark) are in fact an important factor in the strategic decisions of multinational companies on where to establish their activities and their material organisation. Clearly, the awareness of a lower tax burden can contribute decisively to this choice, since it allows the company to maximize the profit (profit after tax) generated by its activity[17].

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tax instruments, in *Regional science and urban economics* 1991, pp. 333 ff.; R.A. Musgrave, *Devolution, grant and fiscal competition, Journal of economic perspectives*, 1997, pp. 65 ff.; J. Wilson, *Theories of tax competition*, in *National Tax Journal,* 1999, pp. 269 ff.; J.D. Wilson - D.E. Wildasin, *Tax competition: bane or boon?,* London, 2001; Avi -Yohah, *Globalization, tax competition and the crisis of the Welfare state,* in *Harvard law review* 2000, pp. 1573 ff.; Id. *Globalization and tax competition: implication for developing countries*, Ann Arbor (USA), 2001; W. Schon, *Tax competition in Europe*, Amsterdam, 2003; C. Mc Lure, *Tax competition in a digital world*, in *Bullettin for international fiscal documentation*, 2003, pp. 146 ff.; M. Littlewood, *Tax competition: harmful to whom?,* in *Michigan Journal International law*, 2004, pp. 412 ff.; J. Malherbe *Double taxation and national fiscal interests*, in *Riv. Dir. Trib*. 2015, V, pp. 23 ff.

[16] See F. Gallo, *Mercati finanziari e fiscalità*, in *Rass. Trib*. 2013, pp. 45 ff.

[17] On the subject in Italian doctrine see R. Lupi, *Concorrenza tra ordinamenti, comunità europee e prelievo tributario,* in *Rass. Trib*. 2004, pp. 989 ff; P. Valente - F. Roccatagliata - G. Rolle, *Concorrenza fiscale internazionale,* Milan, 2002; V. Ceriani, *Competitività dei sistemi fiscali,* in *Enc. Giur. Treccani*, Rome 2009, XXI; G. Melis - A. Persiani, *Trattato di Lisbona e sistemi fiscali*, in *Dir. Prat. Trib.* 2013, pp. 268 ff.; F. Amatucci, *L'adeguamento dell'ordinamento tributario nazionale alle linee guida dell'Ocse e dell'UE* in *materia di lotta alla pianificazione fiscale aggressiva,* in *Riv. Trim. Dir. Trib.* 2015, pp. 3 ff.; S. Biasco, *I danni della concorrenza fiscale in Europa*, in *Rass. Trib.* 2015, pp. 119 ff.; F. Gallo, *L'Europa sociale e l'Europa fiscale dopo il Trattato di Lisbona,* in *Dir. Trib.* 2016, pp. 1789 ff.; L. Salvini, *op. cit.*, pp. 130 ff.; P. Pistone, *La pianificazione fiscale aggressiva e le categorie concettuali del diritto tributario globale*, in *Riv. Trim. Dir. Trib.* 2016, pp. 395 ff; P. Boria, *Diritto tributario europeo*, Milan, 2017, pp. 267 ff.

Therefore, by following the natural impulse of profit maximization - which is the DNA of business activities - the State can attract enterprises by removing income taxes (or other economic items) related to their activities[18].

Clearly, attracting companies triggers forms of competition among States about the establishment of business activities in the international space[19].

The economic calculation underlying tax competition clearly consists of an assessment of convenience regarding the indirect return and the positive externalities produced by the establishment of multinational companies in the State; the State, in fact, considers that the socio-economic income from such establishment (ascribable to employment increase, the demand for supplies of services and/or goods from domestic operators, the deposit of cash in domestic banks, etc.) causes an increase in collective welfare higher than that which could come from the use of the ordinary level of taxation[20]. In essence, the State opts for market instruments - and therefore for the benefits produced by the activities of multinational companies in the territory - with preference over recourse to taxation. Therefore, a trade-off is created between taxes and the market, with a political decision directed towards the market to the detriment of taxation.

6. Harmful tax competition

The phenomenon of tax competition between States has long been the subject of advanced economic studies[21], in which the differential use of tax policy as a productive system growth lever has been analysed.

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[18] See G. Marino, *La concorrenza fiscale: lealtà, slealtà o semplice realtà?*, in AA.VV. *La concorrenza fiscale tra Stati*, Padua 2018, pp. 67 ff.

[19] On the «competition game» between companies on international markets due to the level of national taxation see G. Pitruzzella, *La concorrenza fiscale nel processo di integrazione europea*, in AA.VV. *La concorrenza fiscale tra Stati*, Padua, 2018, pp. 31 ff.

[20] Among the theorists of the legitimacy of tax competition between States, however, with subject-matters that essentially refer to liberalist reasons (and not to an enhancement of national sovereignty and constitutional sovereignty), see S. Cnossen, *Qual è il grado di armonizzazione nella comunità europea*, in AA. VV. *Esperienze straniere e prospettive per l'ordinamento tributario italiano*, Padua, 1989, pp. 105 ff.

[21] See G. Brennan - J. Buchanan, *The power to tax: analytical foundations of a fiscal constitution*, Cambridge, 1980; S. Bucovetsky - J. Wilson, *Tax competition with two tax instruments,* in *Regional science and urban economics,* 1991, pp. 333 ff.; R.A. Musgrave, *Devolution, grant and fiscal competition, Journal of economic perspectives*, 1997, pp. 65 ff.; J. Wilson, *Theories of tax competition*, in *National Tax Journal,* 1999, pp. 269 ff.; J. Wilson - D. Wildasin, *Tax*

In this perspective, although it is typically traced back to the economies of developing countries (so-called asymmetric tax competition), tax competition between States has not been considered in economic doctrine as an automatic market distortion, but rather as a possible instrument of economic policy to favour the increase of certain production factors of the national system. The choice of tax relief may in fact be useful to promote the development of certain business initiatives or investments through foreign capital that would otherwise be inhibited to participate in that State[22].

Only recently, starting from the late 20th century, the notion of «harmful tax competition» between States has been clarified, indicating a use of the tax lever in a distorting dimension with respect to normal market logic[23].

In particular, the «harmfulness» of tax competition is due to a selective and not generalized tax exemption, i.e. aimed only at certain types of economic activities (often with regard to the financial sector, precisely in order to favour the establishment (even if only formal) of some multinational companies and not to promote a growth of the internal production system[24].

Facilitated taxation was thus aimed at favouring minimum allocations of multinational companies, often only through registered offices with light structures, in order to benefit from advantageous tax treatment of certain income flows (e.g. interest, dividends, royalties).

Tax relief is thus not functional to an industrial positioning likely to produce the positive externalities resulting from the establishment of business activities, but only to attract foreign capital because of tax advantages[25].

Fiscal competition is therefore not linked to a plan for the internal productive system development - and therefore of employment, with the fundamental beneficial effects on work and social dignity - but is instead referred to an increase in internal financial wealth which is reflected on some social classes (usually higher classes, such as bankers) and not also on the entire population[26].

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competition: bane or boon?, London, 2001; Avi -Yohah, *op. cit.*, pp. 1573 ff.; J. Malherbe, *op. cit.,*. 2015, V, pp. 23 ff.

[22] See L. Salvini, *op. cit.*, pp. 30 ff.

[23] See S. Biasco, *op. cit.*, pp. 119 ff.

[24] On the subject see P. Boria, *Diritto tributario europeo*, *op. cit*., pp. 270 ff.

[25] See on the subject A. Uricchio, *Dematerializzazione della ricchezza, globalizzazione e nuovi indici di misurazione della ricchezza: le sfide dell'imposizione nell'inizio del nuovo millennio*, in AA.VV. *Dal diritto finanziario al diritto tributario, Studi in onore di Andrea Amatucci*, Naples, 2011, pp. 111 ff.

[26] On this subject, see F. Gallo, *Le ragioni del Fisco. Etica e giustizia nella tassazione,* Bologna

Tax competition is therefore qualified as «harmful» because it is linked to an ideologically reprehensible political calculation, since it is not linked to a generalized economic benefit and referable to the nation as a whole, but rather to a limited number of beneficiaries (and in particular to multinationals and the main international economic operators).

7. Market as the uttermost reference of international tax competition

The prime point of reference of the legal framework that is being composed through international tax competition is the «market», or rather, the conviction that market protection - understood as the metaphorical place where commercial transactions and entrepreneurial initiatives are carried out - is the primary objective of the coexistence process of the various international sovereignties[27].

This ideological background seems to be conducive to a general climate, more and more widespread in modern democracies, which seems to propose again political and institutional models strongly biased towards liberalist constructions, in which the decisions on the redistributive structure of income are entrusted to the natural composition of the «market», almost as if to record the functioning crisis of the opposite welfare state model[28].

The market thus presents itself as a sort of regulating mechanism of social and economic balances, capable of acting as a parameter for judging the efficiency of allocative solutions, based solely on the individual capabilities of economic operators and not also by virtue of pre-determined upstream assessments made by the State.

Therefore, the tax phenomenon is also regulated accordingly: it is a question of reducing the weight of fiscal measures, although necessary for the achievement of essential public expenditure resources, in order to avoid that taxes may result in impediments altering the market ability to function. In this perspective, there is a clear understanding of the transposition

2007, p. 149; *Id. L'Europa sociale e l'Europa fiscale dopo il Trattato di Lisbona,* in *Dir. Prat. Trib.* 2016, 1789 ff.; A. Perrone, *op. cit.*, pp. 8 ff.

[27] On this subject see J. Stiglitz, *La globalizzazione ed i suoi oppositori*, Turin 2002, pp. 183 ff.; R.G. Rajan - L. Zingales, *Save capitalism from capitalists*, Turin 2004, pp. 28 ff.

[28] On this topic see P. Boria, *L'Antisovrano*, Turin, 2004, pp. 119 ff.

of economic theories that envisage «neutral» taxation models for the configuration of public finance systems in supranational unions.

On the other hand, also the formulation and development of the notion of «harmful tax competition» as an emerging value of the international order is conceptually aligned with the idea of «market taxation», reconnecting to the same liberalist axiological system. This notion denotes the openness towards the «market» as a reference point for tax choices, clearly showing the surrender of national fiscal sovereignty to the logic of full competition of companies and economic operators.

It should be noted, however, that the assumption of «market» as a reference value of the international tax system clearly collides with the choices made in single States' constitutions, where taxation is generally recognized as an important driving force with respect to the processes of social transformation[29]. In fact, implementing an efficient and balanced tax system plays a crucial role in the development programmes of the social order in line with the fundamental rule of substantial equality formally incorporated in various constitutional charters and in any case accepted in each democratic country's material constitution[30]. Involving all the associates in tax payments, eliminating pockets of impunity or privilege, as well as attenuating the specific weight of the categories favoured by reasons of timocratic prevalence, more than any other social mechanism, allows for a distribution of resources between unequal individuals, directed to a reduction of economic differences and an elevation of the weaker social classes. The regulation of taxation - *rectius*, the fiscal interest of the State's community - is closely linked to the protection of values far from market neutrality, to be identified, on the contrary, in the promotion of social integration through the constitution of adequate «life chances» that allow individuals to effectively implement the process of social freedom[31]. Fiscal interest in national constitutions therefore appears as a principle of liberation from deprivation, by virtue of which an impulse is issued to correct imbalances in the natural resources distribution so as to favour the social transformation process.

According to a recurrent trait in modern democratic systems, social order and the balance of interests are achieved through the normative imple-

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[29] On the subject see A. Perrone, *op. cit.,* pp. 132 ff.

[30] For a broad analysis in this sense P. Boria, *L'interesse fiscale*, Turin, 2002.

[31] On the subject see G. Melis, *Evasione ed elusione fiscale internazionale e finanziamento dei diritti sociali: recenti trends e prospettive*, in *Rass. Trib*. 2014, pp. 1283 ff.; A. Perrone, *op. cit*., pp. 12 ff.

mentation of the relations between political power and economic power. The economy globalization and the development of multinational productive realities, no longer referable to a circumscribed spatial domain and even less limited to the national territory, have put in crisis the national logic of regulation of economic phenomena.

In fact, the international market does not coincide with the territory of one or more States, it is not marked or divided by material frontiers and does not even show the territory physicality; the space of globalized economy (more correctly, the plurality of international economic spaces) is marked by the network of exchanges and the extension of negotiation relations, often virtual and telematic, and therefore it is de-materialized (or rather de-territorialized)[32]. Abandoning the reference to the territory indicates, in turn, the expiration of national political power, inadequate with respect to the regulation of phenomena which develop beyond the spatial area of competence, in an axiological dimension which escapes, often completely, the capacity of national sovereignty regulation[33].

The split between political and economic space is thus recorded in international relations through the abandonment of national sovereignty and marked by the establishment of an order of freedom that recognizes the self-regulating capacity of the globalized market. In this perspective it has been argued that international law is a-political, that is, detached from the fabric of social values that characterize democratic constitutions and direct political action, having to be traced rather to the spontaneity of the interests present on the market, as a sort of natural and neutral rule of production and exchange[34].

The crisis of the traditional concept of the absolute State sovereignty thus leads to a shift of control of economic resources from the political class to the forces that direct the unified market. There is thus a sort of logical inversion with respect to the traditional relationship between State and market: States begin to become functional to markets, conforming to the decisions and links emerging from the confrontation between economic interests and moving away from social reasons of sovereignty[35].

Therefore, there is a clear reversal of the relationship between economic power and political power: the plan of choices and decisions made by States

[32] See A. Uricchio, *op. cit.,* pp. 111 ff.
[33] See L. Carpentieri *op. cit.*, p. 351.
[34] See J. Stiglitz, *op. cit.,* p. 220.
[35] On this subject see A. Perrone, *op. cit.*, pp. 86 ff.

is often subordinate and controlled by international finance and supranational economy. In this way, the control of social change tends to evade the political-institutional government of the States to naturally flow back into power centres which determine, more or less unconsciously, the economic relations which alternatively are composed and dissolve in the market.

The nation-state, in this context, is increasingly becoming a market regulatory centre, with the power to mediate economic relations and negotiate resources between social partners and multinational productive forces. In essence, an «administrative» State function emerges in place of the social function which has denoted the path of development of pluralist democracies and which has been largely absorbed in democratic constitutions.

It may be clear what serious danger is looming with the consolidation of such a weakening of national sovereignty: to bring decisions of general interest back to the natural composition of supply and demand, to rely on the capacity of self-regulation of the market is to restore the power to define the structure of conflicting interests to the international economic community, in which - as it is well known - there is no stable hierarchy of powers and there is a total lack of institutional organization; rather, the economic forces of large multinational companies, trade unions and professional organizations, centres of transversal power and unions of interests, even temporary and temporary ones, appear to be dominant[36].

The market, in its most «wild» and aggressive guise, in which the «strong» also ruthlessly impose themselves on the «weak», favouring their expulsion from the productive circuit or, however, confining them to narrow areas, is the real centre of the decisions that are taken in the globalized society. The marginalization of political power and the re-dimensioning of national sovereignty imply the emergence of an indeterminate and indefinable class of individuals entitled, often, also by chance, to the new sovereign power, that is, called to formulate the choices of allocation of resources and flows of wealth.

The danger caused by such a mercantile order consists, therefore, in abandoning the social function and the consequent idea of establishing a market order and economic activities responding to the balance of the community's various interests, according to a plan of progressive transformation of society favoured and promoted by the constellation of values taken in the constitutional charters, determining, on the contrary, a struc-

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[36] See R.G. Rajan - L. Zingales, *op. cit.*, pp. 347 ff.

ture of economic uncontrollably market-generated relations and correlated to the ungovernable and random composition of negotiating interests, in which, in any case, the trend is seen in the progressive strengthening of the «strong» and the «rich» to the detriment of the «weak» and the «poor»[37].

Market democracy, which practically replaces constitution democracy, is unfair and socially disharmonious, calling for effective participation in the competitive game - and therefore the allocative decision – of only a few individuals and excluding the great mass of affiliates[38].

Competitive taxation produces, therefore, the abandonment of any social and redistributive connotation of tax levy, which is thus brought back to a mere financial instrument of public debt coverage; it is valid to permanently promote the primacy of the market with respect to any conforming and regulating function of public power; it establishes the axiological priority of interests spontaneously flowing back from the competitive game with regards to the community general interests; it determines the decay of the fabric of values set by democratic constitutions in comparison with the need for self-regulation of economic forces.

8. The emergence of an opposing trend towards tax competition between States in international perception: the position of the OECD and soft law as an instrument of international tax policy

The phenomenon of unfair (or «harmful») tax competition has only recently been the subject of a number of studies by global economic institutions (and in particular the OECD)[39].

In January 1997, following requests made at the G7 meeting in Lyon in June 1996, the OECD Fiscal Affairs Committee launched the project

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[37] On this subject, see the acute analysis by F. Gallo, *Diseguaglianze, giustizia distributiva e progressività,* in *Rass. Trib.* 2012, pp. 287 ff; *Id.*, *Giustizia sociale e giustizia fiscale nella prospettiva dell'unificazione europea,* in *Rass. Trib.*, 2014.

[38] See A. Perrone, *op. cit.*, pp. 93 ff.

[39] There is a series of main documents and reports drawn up by the OECD on the subject of harmful tax competition: *Harmful tax competition: an emerging global issue*, OECD report, Paris 1998; *Progress in aggressive tax planning through improved transparency and disclosure*, OECD report, Paris 2011.

to combat harmful tax competition and set up a special session on tax competition.

In 1998 the OECD published a first report on harmful tax competition in which, in addition to identifying the phenomenon on an international basis (as it relates to the location of «geographically mobile activities, such as financial and other service activities, including the provision of intangibles»), it tries to identify possible actions to be taken at national level, with particular regard to relations with the so-called «tax havens» (i.e. countries with privileged taxation). The report identifies some «harmful tax practices», as they aim to erode the tax base of the tax sovereignty of nation-states (other than tax havens), which are likely to create distortions to business and investment models so as to alter the normal market order. In this context, a number of key elements of harmful tax competition are identified: i) the reduction (sometimes even cancellation) of taxation; ii) the delimitation of tax benefits to foreign investors; iii) the lack of financial transparency; iv) the lack of exchange of information with the financial administrations of foreign countries. Attention is focused in particular on the behaviour of multinationals, since they are considered to be the most dangerous for tax purposes and may influence the tax policies of some States.

In this document, the notion of «harmful tax competition» is clearly formulated, which is due to the use of «harmful tax practices» aimed solely at attracting foreign investment through the use of forms of tax relief and not responding to any need to increase the production capacity of the local system. The damage produced by such «harmful tax practices» clearly consists in the reduction of the tax flows of nation-States as a result of harmful tax competition.

In 2000, the OECD published a second report on the same subject, aimed at identifying the privileged tax regimes envisaged by some countries (in particular, 47 potentially harmful tax regimes were identified) and at providing a catalogue of recommendations to States to eliminate (or at least reduce) tax evasion and avoidance arising from financial and commercial relations with entities located in those countries. In this connection, a list of States with a privileged tax regime (the so-called «Black list») is identified, which constitutes a parameter of evaluation to be assumed in national regulations to fight against tax competition practices.

In this document, the OECD promotes a collaborative approach between various countries, suggesting the use of forms of administrative col-

laboration between the various States that can promote transparency in the tax behaviour of multinationals and economic operators in general. The need for coordinated multilateral participation (and not also individual unilateral or bilateral actions) to tackle and combat harmful tax competition is therefore advocated.

In subsequent reports (issued in 2001, 2004 and 2006), the OECD continues to maintain a high level of attention to harmful tax competition, introducing elements to stimulate international cooperation, mainly through the exchange of information and the fight against banking secrecy and the lack of transparency of tax practices in tax havens. It is clear that «he fight against harmful tax practices» cannot be left to arbitrary tax policy choices made by individual States, but must be coordinated by joint action at international level[40].

Finally, in February 2011, a report was published expressing the need to launch an international governance of taxation that would discourage «aggressive tax planning» of multinationals; in particular, the report highlights the need to define a common model of corporate taxation that favours a tax treatment of transnational economic activities inspired by shared and widespread rules, so as to avoid that some tax jurisdictions may be artificially attractive with respect to the establishment of capital and business activities (this document can be considered as the logical basis of the BEPS report, which will be discussed later).

This series of documents published by the OECD clearly expresses the idea of launching and consolidating effective instruments to combat «harmful tax practices» put in place by some States (in particular, by tax havens) in order to attract foreign investment. The legal instrument used at the international level therefore consists of «soft law», i.e. a series of documents that have no binding and compulsory value with respect to their addressees (OECD member states), but which result in recommendations, suggestions, guidelines, and which draw their strength from the ethical capacity and moral persuasiveness to induce complying behaviour (and therefore «moral suasion»). These are therefore acts that fulfil a function of stimulation and direction of the regulatory policy of the States, destined to favour the elaboration of homogeneous legal models to be taken in the national systems.

[40] For some considerations on the subject see A. Easson, *Harmful tax competition: an evaluation of the OECD initiative,* in *Tax notes international*, 2004, pp. 1037 ff.

9. The US experience as the original foundation of the fight against harmful tax competition between States

The fight against harmful tax competition was initiated on an international basis thanks to the activity carried out by the United States to protect itself from tax evasion resulting from transactions carried out abroad by its residents[41].

It should be noted, first of all, that a significant debate has been developing in the American scientific literature on the effects of globalisation and international tax competition[42]; alongside a recognition of the validity of competition (including tax competition) as an instrument of market efficiency, the effect of tax resources bleeding from the most advanced tax jurisdictions (and among them in particular from the USA) as a result of the aggressive policy of emerging countries and tax havens has been identified.

Thus, during the first decade of the 21st century, the U.S. financial administration has begun to undertake thorough investigations at some of the major foreign financial institutions to obtain detailed information about the tax behaviour of its taxpayers with regard to the payment of taxes in the United States. In the course of these investigations, a constant recourse to elusive tax practices, often encouraged and supported by the banks themselves, emerged, which had led to a substantial erosion of the US tax base.

The U.S. tax administration has thus challenged tax violations against its taxpayers, as well as against foreign financial institutions for correctness related to their support in tax evasion. Significant agreements have thus been concluded with these institutions aimed both at recovering taxes and penalties and, above all, at the emergence of evasive conduct.

The main international events carried out by the United States tax authorities to fight against tax evasion are as follows:

i. UBS: In 2008, the FBI began an investigation into the Swiss bank for a suspected tax evasion case involving several billion dollars; on 18 February 2009, UBS agreed to pay a fine of USD 780 million;
ii. Credit Suisse: pleaded guilty to conspiracy to help some U.S. tax-

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[41] See P. Boria, *La concorrenza fiscale tra Stati: verso un nuovo ordine della fiscalità internazionale*, *op. cit.*, pp. 14 ff.

[42] See, without being exhaustive, J.D. Wilson, *Theories of tax competition*, in *National Tax Journal*, 1999, pp. 269 ff.; D.M. Ring, *Democracy, sovereignty and tax competition: the role of tax sovereignty in shaping tax cooperation*, in *Florida Tax review*, 2009, pp. 555 ff.; M. Littlewood, *op. cit.*, pp. 412 ff.

payers evade federal taxes and accepted a fine of about $1.8 billion for the Department of Justice and about $715 million for the New York Department of Financial Services;

iii. Wegelin: The IRS was allowed to request information from UBS AG on the US clients of Wegelin & Co.; the Swiss bank pleaded guilty to defrauding the IRS; following the complaint the bank ceased operations;

iv. Bank Leumi: Transacted $400 million in sanctions for helping 1,500 U.S. taxpayers evade the U.S. Treasury.

In relation to this experience, the US tax administration has thus consolidated its belief that the fight against international tax evasion could usefully be pursued through the use of stable forms of administrative cooperation between the authorities of the various countries based on achieving adequate transparency in the financial relations of foreign residents.

The diplomatic and economic strength expressed by the USA in international relations is to allow the American experience of the fight against tax evasion and avoidance to be transferred externally as a benchmark, being transposed by international agreements as a legal basis for containing and regulating tax competition between States.

The legal model developed in the US FATCA legislation for combating harmful tax competition is thus taken up, almost sequentially, in the OECD framework, representing the regulatory basis adopted as a global standard in the various international agreements.

Clearly, the legal model for combating harmful tax competition originally formulated on the basis of American experience has been exported as a worldwide format.

10. Strength as an essential instrument of the adoption of pact instruments in the new order of international taxation

The case presented above shows some connotations that seem to provide the cue for a general reflection on the formation of international tax law pacts[43].

[43] In general on the evolution of international tax law see the authoritative, and debated, reconstruction of Avi Yonah, *International tax law*, Cambridge, 2007.

As we have seen, in the process of developing a solution of international tax law with respect to the critical issues generated by tax competition between States, some fundamental steps can be identified:

a) a country with absolute and primary authority on the international scene - i.e. the United States of America - identifies the terms of the problem: tax competition between unregulated states can take forms and contents that can alter the ordinary course of business activities on international markets, generating a diversion of tax flows to the detriment of consolidated and «friendly» tax jurisdictions («race to the bottom»);
b) In the context of the legal thinking formed in the same country, possible regulatory solutions are also defined to limit and/or combat «harmful» tax competition between States[44];
c) Before these legal solutions were accepted by other countries, the United States of America adopted restrictive measures against companies which enjoy, often casually, the tax benefits of 'harmful' tax competition between States; these measures are very strict and have even affected the personal freedom of the legal representatives of these companies;
d) the strength of the US, supported also by international prestige and the ability to influence the commercial traffic of multinationals in markets conditioned by the decisional weight of the United States itself, has substantially directed the debate on the pact regulation of the economic and legal phenomenon (i.e. fiscal competition between States);
e) Consequently, the legal model developed by the «American doctrine» has been taken up in the two guidelines against «harmful» tax competition between States: BEPS as the standard for multinational corporate taxation and the «Common Reporting Standard» originally defined in FATCA clearly represent regulatory solutions accepted in international tax law on the basis of the US legal elaboration[45].

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[44] On the subject see A. Christians, *Taxation in a time of crisis: policy leadership from the OECD to the G20*, in *New York Journal of law* 2010, pp. 377 ff.

[45] Indeed, the issue is a complex one; the US authorities - even though they are aware that they have embarked on the pact path underlying the BEPS - have complained that they have not been decisive in transposing all their demands and that they have been under pressure from other States (and in particular from the European Union). On this legal path see Avi Yonah, *A tale of two cities: Washington, Brussels and BEPS*, in *Tax notes* 2016, pp. 569 ff. See also P. Pistone, *I limiti esterni alla sovranità tributaria statale nell'era del diritto globale*, in AA.VV. *Per*

The international pact law is clearly conditioned by the legal position and, above all, by the strength and authority expressed by the United States with regard to the legal problem.

There is a widespread belief that, without the decisive action taken by the US authorities, the international negotiations on the two regulatory solutions mentioned above (BEPS and «Common Reporting Standards») would not have been finalised.

It can be stated, in this perspective, that the recent guidelines of international tax law are to be considered as derived from the exercise of force in the pact context[46]; the State endowed with the capacity of influence on international markets and able to deeply affect the material and economic life of many multinational companies, through clear and unequivocal positions, determines the normative solution which is transposed by other States (which, in this way, put themselves in a logical and legally subordinate position with respect to the US pre-dominant role)[47].

According to one of the main teachings of international law, the pact rules that compose international treaties are not so much the result of a negotiation between equal subjects, but are the result of decisions supported by the strength and authority of one (or, sometimes, more) of the pre-dominant States ([48]). The rules of international law - and among them, also the fiscal rules aimed at contrasting the fiscal competition between States - are not so much an expression of democratic freedom (*rectius*, of the freedoms of the market), but rather of the primacy of a State's fiscal sovereignty, more authoritative and «stronger» than the others[49].

This is a logical step that leads to reconsider, in a decidedly realistic (and not philosophical) perspective, the formation of the rules of international tax law, far from general considerations of international tax justice [50].

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un nuovo ordinamento tributario, Padua 2019, note 54.

[46] See A. Christians, *Sovereignty, taxation and social contract*, in *Minnesota Journal of International Law*, 2009, pp. 99 ff.

[47] For some general considerations on this subject, see C. Sacchetto, *La trasformazione della sovranità tributaria: i rapporti tra ordinamenti e le fonti del diritto tributario*, in AA.VV., *Principi di diritto tributario europeo e internazionale*, Turin 2011, pp. 3 ff.; P. Pistone, *I limiti esterni alla sovranità tributaria statale nell'era del diritto globale*, *op. cit*., pp. 655 ff.

[48] On the subject see I. Grinberg, *The new international tax diplomacy*, in *Georgetown Law Journal*, 2016, pp. 1137 ff.

[49] On the democratic deficit, in particular, of the BEPS legal case, see P. Pistone, *op. cit.*, p. 685.

[50] The subject of «tax justice» (or «tax fairness») is recently studied in tax literature as a possible guide to international tax law: see AA.VV., *Philosophical explorations of Justice and taxation*: *nations and global issues*, Berlin 2015; AA.VV., *Global tax fairness*, Oxford, 2016.

11. The first guideline to combat harmful tax competition between States: definition of a tax standard for multinationals

The first line of action against harmful tax competition can be found in the definition of an international common legal model for regulating the activities of multinationals[51].

Following on from the ideas provided in the various OECD reports (and in particular those contained in the document of February 2011), the report «Base erosion and profit shifting - BEPS», which formalizes the results of a joint project launched by the OECD and the G20, was published in July 2013 at the G20 in Moscow[52].

The objective of this document is to define a model for the taxation of international activities that allows the tax to be applied at the place where the activity is actually carried out, filling the gaps in national tax systems that allow forms of tax avoidance or evasion[53].

In particular, the BEPS sets out recommendations addressed to national tax authorities to adapt their systems on the basis of minimum standards for a number of tax matters concerning the treatment of international activities[54]. The action plan necessary for the pursuit of a comprehensive strategy against the erosion of the tax base of States is divided into 15 actions which can be grouped along certain conceptual lines[55]:

i). To regulate the digital economy from a fiscal standpoint;

ii). to give consistency to national tax systems with regard to transnational activities (e.g. on the limitation of harmful practices, regulation of CFCs and intra-group financial transactions, etc.);

iii). to pursue the realignment of taxation to the substantial location of production activities (through rules on treaty abuse, permanent establishment, transfer pricing, etc.);

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[51] On this subject, see F. Gallo, *La concorrenza fiscale tra Stati*, *op. cit*., pp. 55 ff.

[52] See the OECD document *Addressing base erosion and profit shifting*, Paris, 2013.

[53] There is extensive literature on the anti-avoidance objective of the BEPS framework and the objectives of containing tax bleeding from tax jurisdictions. Without claiming to be exhaustive see S. Dorigo - P. Mastellone, *L'evoluzione della nozione di residenza fiscale delle persone giuridiche nell'ambito del progetto BEPS,* in *Riv. Dir. Trib.* 2015, V, pp. 35 ff.; P. Piantavigna, *Tax abuse and aggressive tax planning in the BEPS was: how EU law and OECD are establishing aa unifying conceptual framework in international tax law,* in *World tax Journal*, 2017.

[54] See G. Marino, *La concorrenza fiscale: lealtà, slealtà o semplice realtà?*, *op. cit*., pp. 76 ff.

[55] In general on the regulation of BEPS and the various measures see P. Tarigo, *Diritto tributario internazionale*, Turin, 2018, pp. 259 ff.

iv). to increase the transparency of international activities (disclosure initiatives) and facilitate the exchange of information;
v). to allow the adaptation of bilateral treaties through the transposition of a multilateral convention.

The recommendations contained in the BEPS have been implemented by the main States by transposing them into their own internal legislation[56]; the European Union has also adapted to this direction of development of international taxation by transposing the recommendations made in the BEPS into its own regulatory models[57]. In this way, a reference framework of transnational activities has been formed, inspired by a common and therefore basically homogeneous model.

12. The second guideline to combat harmful tax competition between States: the elimination of banking secrecy and tax transparency through the «common reporting standard»

The second guideline against harmful tax competition can be seen in the definition of appropriate rules to ensure the transparency of financial relations of an international nature (i.e. entered into by residents of a State with financial institutions resident in other States) and the automatic exchange of information between tax administrations.

In this context, a body has been set up within the OECD - the «Global forum on transparency and exchange of information for tax purposes» - which, starting in 2010, has launched a series of initiatives for the verification and implementation of tax transparency at international level.

Following the model established in the United States legislation (so-called FATCA) and transposed in bilateral agreements reached by the United States with some countries (called «Inter-governmental agreements» - IGA) for the transparency of financial accounts concerning taxpayers with transnational activities, it was decided to identify an information standard

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[56] See F. Amatucci, *L'adeguamento dell'ordinamento tributario nazionale alle linee guida dell'Ocse e dell'UE in materia di lotta alla pianificazione fiscale aggressiva,* in *Riv. Trim. Dir. Trib.* 2015, pp. 3 ff.; L. Salvini, *op. cit.*, pp. 130 ff.; P. Pistone, *La pianificazione fiscale aggressiva e le categorie concettuali del diritto tributario globale, op. cit*., pp. 395 ff.

[57] On the relationships between BEPS and EU laws see F. Vanistendael, *Is tax avoidance the same thing under the OECD base erosion and profit shifting action plan, national tax law and EU law*, in *Bullettin for international taxation,* 2016.

that could overcome the opacity of foreign financial relations and allow a basic knowledge of the assets held in financial institutions of other countries compared to the one of fiscal residence[58].

On 13 February 2014, the Global Forum published the «Standard for automatic exchange of financial account information in tax matters», which established automatic exchange of information as the fundamental tool to ensure full recovery of tax transparency with regard to cross-border activities.

Then (12 July 2015) the Multilateral Convention on Mutual Administrative Assistance in Tax Matters was approved (originally signed by 53 countries and then extended to many others, exceeding 90 States), which incorporated the results defined by the Global Forum. Moreover, it is foreseen that the various States stipulate bilateral administrative agreements according to a common model developed at international level (called «Model Competent Authority Agreement» - CAA Model, also defined as TIEA) aimed at regulating the ways and forms of automatic exchange of information between the competent administrative authorities.

On the basis of these international agreements, a common format - i.e. a single standard on an international basis - valid for all OECD member states (called «Common Reporting Standard» - CRS) has been transposed to regulate information flows automatically exchanged by tax administrations[59].

In particular, it is planned that, as from the year 2017:

i. each financial institution is required to collect the personal data of the beneficial owner of the financial assets existing at the same institution - beneficial owner who is resident abroad for tax purposes - by verifying such data through the examination of appropriate documentation (e.g. passport);
ii. the financial institution is obliged to communicate to the tax authority of its country the personal data and data on financial assets of beneficial owners resident abroad at the end of each calendar year;

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[58] See G. Marino, *Lo scambio di informazioni finanziarie nel prisma geopolitico dell'OCSE e dell'UE: ambizioni globali e ipocrisie nazionali,* in *Riv. Guardia Fin.*, 2016, pp. 943 ff.

[59] On the regulation of automatic exchange of information in the international framework see E. Traversa - F. Cannas, *Lo scambio di informazioni tributarie: gli updates dell'art. 26 del modello OCSE ed i progressi in direzione dello scambio automatico come standard internazionale*, in *Riv. Trim. Dir. Trib.*, 2016, pp. 115 ff.

iii. Finally, the tax authority of the country concerned by the notice of financial institutions provides the tax authorities of the various States concerned (where the tax residences of beneficial owners are located) with an 'information package' including data on beneficial owners, current accounts (or other financial positions) and year-end deposits.

The «information package» received automatically by the tax administration of each State can be easily used to compare the data emerging from the tax returns of its taxpayers in order to verify tax conduct and compliance with national tax laws.

13. Tax competition between States in the current globalisation phase

In the last few years, a counter-trend has started to take place with respect to the process of tax competition between States that has been going on for a long time, not only focusing the attention of international bodies (OECD, G20, G7, EU) on the risks deriving from the competition between the various state sovereignties, but also identifying international legal models to deal with harmful tax practices.

The guidelines for action indicated above - i.e. the definition of models for the taxation of multinationals to be imposed with homogeneity on an international basis and the pursuit of transparency in the financial positions of taxpayers abroad - make it possible to identify an evolutionary path that moves towards an international tax system inspired by an effective fight against tax evasion and avoidance[60]. It seems to come out, in particular, the idea that States must cooperate in order to achieve common development, economic and social objectives, also limiting, at least partially, their own fiscal sovereignty through the transposition of legal models formulated in international agreements in order to effectively pursue the erosion of the tax base and internal taxation[61].

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[60] See P. Boria, *La concorrenza fiscale tra Stati: verso un nuovo ordine della fiscalità internazionale*, *op. cit.*, p. 25.

[61] For perspectives on the evolution of international tax cooperation see H. Rosenbloom – N. Noked - S. Helal, *Il turbolento mondo del Fisco: proposte per un Forum di cooperazione fiscale internazionale*, in *Riv. Trim. Dir. Trib.* 2014, pp. 183 ff.

Above all, there is a widespread belief in the governments of the main countries that harmful tax competition can not only distort the market in favour of multinationals (with systemic effects on the domestic productive fabric as a result of the loss of competitiveness of small and medium-sized enterprises), but above all it can lead to a negative tax circuit to the detriment of national taxpayers[62].

It is worth mentioning that harmful tax competition is identified as one of the main causes of the shift of the tax levy to the labour factor by States. In fact, the provision of privileged tax regimes is able to attract out of the State territory the productive factors endowed with greater mobility (such as capital and enterprise), but not also labour, which is a factor strongly rooted in the original territory and scarcely mobile. It follows, therefore, that the mobility of capital and enterprise activates a vicious circle: in order to counteract the shift towards privileged tax regimes, States reduce the tax burden on capital and enterprise and, conversely, are forced to increase the tax levy on the labour factor in order to keep tax revenues unchanged. From this point of view, the fight against harmful tax competition is considered to be functional not only to the pursuit of free competition on the international market, but also functional to social recovery, as it is aimed at rebalancing the level of taxation on labour and thus, ultimately, to promote employment growth.

The fight against harmful tax competition thus seems to be the basis to launch a new international tax order, characterised by a self-limitation of the States' fiscal sovereignty and a significant weight of international agreements (multilateral and/or bilateral), with the declared aim of containing imbalances in favour of multinationals and restoring balanced (and, if possible, declining) forms of taxation of domestic factors (and in particular labour)[63].

Naturally, many initiatives still need to be taken in order to effectively combat harmful tax competition between States and the imbalances in international taxation (such as the definition of a common international tax base for corporation tax, the so-called CCCTB; the limitation of deviations in corporate and personal tax rates; the taxation of digital activities on the territory of States where commercial transactions substantially take

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[62] Clearly in this sense see A. Perrone, *op. cit.*, pp. 358 ff.

[63] On the subject of international «double non-taxation» see L.A. Scapa - A. Henie, *Avoidance of double non taxation*, in *Intertax* 2005, pp. 266 ff.; M. Greggi, *Coordinamento fiscale e doppie deduzioni internazionali,* in *Riv. Dir. Trib. Int.*, 2013, pp. 73 ff.

place)[64]. The initiatives already taken thus represent the first steps, certainly not exhaustive, of the path of international taxation, which are in any case worth indicating the road, presumably indispensable, of tax policy choices of the coming years. Active participation in the process of combating international tax competition should thus be considered as a widespread and generalized political commitment that individual States cannot set aside, not even for cyclical economic policy options, as it is functional to a non-negotiable plan for balancing international relations and economic and social relations.

[64] Evolutionary perspectives and food for thought on international taxation, in particular with regard to the digital economy see AA.VV., *La digital economy nel sistema tributario italiano ed europeo*, Roma, 2015; A. Uricchio - W. Spinapolice, *La corsa ad ostacoli della web taxation,* in *Rass. Trib.* 2018, pp. 451 ff.

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