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TAXATION, TAX BENEFITS AND COMPETITION DISTORTION IN BRAZIL

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TASSAZIONE, BENEFICI FISCALI E DISTORSIONE DELLA CONCORRENZA IN BRASILE

ASTRATTO: Questa ricerca affronta il rapporto tra tassazione e concorrenza in Brasile. Poiché la tassazione influenza le decisioni di allocazione delle risorse da parte degli agenti economici, l'articolo si concentra su due tipi di agevolazioni fiscali: la zona di libero scambio di Manaus e il regime fiscale. Stabilito il modo in cui tali agevolazioni possono influenzare la concorrenza, vengono valutati i meccanismi presenti nel sistema giuridico brasiliano per prevenire o correggere le asimmetrie competitive causate dalla concessione di incentivi fiscali. Per illustrare meglio questo scenario, si procede ad un parallelo con l'articolo 107 del TFUE (Trattato sul funzionamento dell'Unione Europea). Considerando che l'ordinamento giuridico brasiliano non prevede un divieto simile, vengono prese in considerazione delle alternative, come l'articolo 146-A della Costituzione della Repubblica del Brasile, che prevede la possibilità di elaborare una legge che stabilisca criteri speciali per la tassazione con l'obiettivo di prevenire gli equilibri della concorrenza, e la possibilità di patrocinio della concorrenza esercitata dal Sistema Brasiliano di Difesa della Concorrenza.

PAROLE CHIAVE: Tassazione; concorrenza; benefici fiscali.

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ABSTRACT: This research addresses the relationship between taxation and competition in Brazil. As taxation influences decision on resource allocation by economic agents, the article will focus on two kinds of tax benefits: the Manaus Free Trade Zone and the fiscal. Established the way in which they can affect competition, the mechanisms present in the Brazilian legal system to prevent or correct competitive asymmetries caused by the granting of tax incentives will be evaluated. In order to better illustrate this scenario a parallel with Article 107 of the TFEU will be drawn. Considering that the Brazilian legal system does not have a similar prohibition, alternatives will be considered, such as Article 146-A of the Constitution of the Republic of Brazil, which provides for the possibility of editing a law establishing special criteria for taxation with the aim of preventing competition balances, and the possibility of competition advocacy exercised by the Brazilian Competition Defense System.

KEYWORDS: Taxation; competition; tax benefits.

TRIBUTAÇÃO, BENEFÍCIOS FISCAIS E DISTORÇÃO DA CONCORRÊNCIA NO BRASIL

RESUMO: Esta pesquisa aborda a relação entre tributação e concorrência no Brasil. Como a tributação influencia a decisão sobre a alocação de recursos por parte dos agentes econômicos, o artigo se concentrará em dois tipos de benefícios fiscais: o da Zona Franca de Manaus e o fiscal. Estabelecida a forma como eles podem afetar a concorrência, serão avaliados os mecanismos presentes no ordenamento jurídico brasileiro para evitar ou corrigir assimetrias competitivas causadas pela concessão de incentivos fiscais. Para melhor ilustrar esse cenário, será traçado um paralelo com o artigo 107 do TFEU. Considerando que o ordenamento jurídico brasileiro não possui vedação semelhante, serão consideradas alternativas, tais como o artigo 146-A da Constituição da República do Brasil, que prevê a possibilidade de edição de lei estabelecendo critérios especiais de tributação com o objetivo de prevenir equilíbrios concorrenciais, e a possibilidade de advocacia da concorrência exercida pelo Sistema Brasileiro de Defesa da Concorrência.

PALAVRAS-CHAVE: Tributação; concorrência; benefícios fiscais.

1. Introduction

Taxation has a significant effect on competition. The costs of a product or service are directly impacted, among other factors, by the tax burden in the business activity, or even by the amount of ancillary obligations that must be met by economic agents in order to comply with the provisions of a given legal system.[1] Thus, both the amount of taxes to be paid and the cost of compliance with the requirements of the Tax Authorities interfere in the decisions related to the allocation of resources and have competitive effects as they create regulatory environments in which a company has advantages or disadvantages when compared to other competitors.

The reduction of the tax burden can be carried out by illicit devices attributed to individuals. Tax evasion and abusive tax planning are examples of acts that can result in unfair competitive advantages to an economic agent. Such acts, characterized as violations against the economic order, are normally pursued by Taxes Monitoring Entities. But should Brazilian Competition Defense System (SBDC) play a role on this matter in accordance with Federal Law No. 12.529 of 2011? This law regulates art. 173, s 4 of the Constitution of the Republic, according to which the law will suppress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase in profits.

However, it is also possible that the asymmetries of competitive conditions are provoked by the State, by exercising its power to institute taxes and, consequently, to grant tax benefits. This is the focus of this research.

According to the Brazilian legal system, it is possible to Governments (Federal or State/Regionals) to grant tax benefits to stimulate sustainable economic development, to foster the growth of industrial activity in certain regions of the Country or to protect values recognized as essential by the Federal Constitution. However, in some situations, these benefits are only granted to certain companies, and not to all those

1 According to art. 113 of the Brazilian Tax Code (CTN), the tax liability may be principal or ancillary. The main obligation consists in the tax payment, while the ancillary obligation consists in the information provided by the taxpayer in the interest of the collection or supervision of taxes, such as issuing invoices and keeping accountability books within certain standards. Failure to comply with ancillary obligations puts the taxpayer at risk of multiple penalties, such as paying fines. It is therefore understood that the quantity and degree of complexity of ancillary obligations to be met by a person is part of the so-called "compliance cost" and has the potential to interfere in competitive aspects when they are not evenly requested from all those who are dedicated to a particular business branch and who are under the same conditions.

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who dedicate themselves to the same branch of activity, leading to unequal competition conditions in the market.

In addition, tax benefits are generally granted only by looking at their effects from a financial law perspective. This means, limited to the analysis of the impact of the revenue waiver on the public accounts, without having a preliminary analysis of its impact on the 3 competitive environment.

On top of that, Brazil is a federation of continental geographical dimensions and its different regions present numerous social and economic inequalities. Some federative entities grant tax benefits to attract certain activities/companies to their territories, but without respecting the applicable constitutional provisions, giving rise to a so called "fiscal war". A "fiscal war" is the term used to explain when a federal entity (States or Municipalities) reduces the tax burden to dispute, among other federal entities, activities developed by the private initiative. The "fiscal war", apart from affecting the federative pact, also causes relevant distortions on competition, as detailed in this paper.

In this context, the research proposed to investigate the relations between taxation and competition in the Brazilian scenario, identifying in which ways the tax benefits granted by the Government can create or induce conditions for sustainable economic development or when they can generate market distortions. Furthermore, investigates whether the Brazilian legal system has adequate instruments to prevent and punish violations of the economic order caused by tax incentives.

To meet its objectives, the research was based on the hypothetical deduction method. To this end, a literature review on the subject was conducted, along with the analysis of the applicable legislation, the identification of existing bill of laws, the study of the Brazilian competition authority's jurisprudence and of other documents from organs that are part of the SBDC.

As a result, the research identified that there is an intimate connection between taxation and competition. Thus, when granting tax, the Government must consider the consequences to market, avoiding the creation of asymmetries between economic agents that can lead to a distortion in competition. In Brazil there is a lack of safe criteria to establish preventive acts against competitive distortions caused by taxation. The lack of regulation of art. 146-A of the Constitution and the fact that the Brazilian Competition Law does not apply against public entities when they harm competition by grating tax incentives leads to this situation. The Brazilian competition authority's (CADE), could fill this gap, but its role, as well as the Secretary of Advocacy

for Competition and Competitiveness's role (SEAE) role, are limited to the advocacy of competition, not being enough to punish or restore market competition whose stability has been shaken by the granting of tax benefits.

2. Taxation and competition policy

There is an intimate relationship between taxation and competition, because both the tax burden itself and the ancillary obligations to be met by economic agents affect the allocation of resources decisions, production costs and profit margins (Brazuma, 2009, p. 22-23). With this, both illegal acts committed by individuals (such as tax evasion) and acts practiced by Governments (such as the granting of tax benefits) have the capability to generate asymmetries in market conditions.

Economic liberalism relates taxation with the idea of neutrality, according to which the tax burden should not be a decisive fact in the allocation of resources, mitigating the intervention of the State in the economy.

Silveira (2009, p. 117-118) explains that the sense of fiscal neutrality lies in the idea that taxation should be used mainly to public funding and not as a mechanism of economic intervention. Taxation should be as neutral as possible. It should not be a fundamental element of the economic agent's decision in their investment choices. Thus, taxation cannot be an element of distortion of the economic system or an obstacle to development. The regulatory function of taxes should be residual, motivated and, if possible, temporary. Taxes cannot be understood as a fundamental element of economic direction, but only as a means of exceptional, limited, and justified regulation.

3. Tax benefits

The Brazilian Federal Constitution on several occasions authorizes the use of taxation to encourage certain conducts. In this context, the benefits or tax incentives arise, which are characterized by the reduction or exemption of the payment of the tax due. They may take the form of remission, allowance, presumed credit, change of rate, modification of the calculation basis or any other form that implies a decrease or extinction of the amount due as a tax. They are usually capable of promoting differentiated treatment for a specific group or person in order to achieve a constitutionally legitimate goal.

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Criticism of tax benefits arises because, on some occasions, they are directed to specific people, and not to all those who engage in an economic activity, generating competitive distortions.

Abreu (2008, p. 96-97) highlights the unfairness of the granting of tax benefits to certain companies to establish themselves in a certain territory of the country. By doing that, Governments deny the extent of the benefit to those who have been based for some time in the same region, exploiting the same branch of activity. It is logical that, with lower costs for the production and circulation of their merchandise, companies who benefit from the granting of taxes will be in better condition to produce and market their products than the other ones. According to Abreu the situation becomes even more incoherent when one looks at the fact that the newly arrived company did not have the desire to invest in that region until the proposal to grant tax incentives and, therefore, benefits greatly. The companies that settled there before decided to invest in the place regardless of any benefit and from now on see the government finance part of the operating costs of a competing company, leaving them significantly impaired. Interventions like these are manifestly unconstitutional for violation of free enterprise and free competition because they harm the private economic agent who, devoid of the same benefits, has more operational costs for the production and circulation of its products than the company benefited, and may be forced to close its doors in that locality. Before promoting a reduction in regional inequality or increase employment, such action generates economic instability in that region and drives away new companies.

Tax neutrality, understood in absolute terms, is practically impossible to achieve in the Brazilian Tax System, because of the recognition of the possibility of creating taxes in order to reduce certain behaviors (Schoueri, p. 2007, p. 254; Brazuma, 2009, p. 142; Silveira, 2009, p. 24-25).

The following are some examples of tax incentives granted in Brazil and their consequences for competition.

3.1 The Manaus Free Trade Zone (ZFM)

The Manaus Free Trade Zone (ZFM) is a regional development strategy that covers the states of Acre, Amazonas, Rondônia, Roraima and two cities of Amapá (Macapá and Santana), providing for this a series of tax incentives. Created by Law No. 3.173/1957, it was later amended by Decree-Law No. 288/1967, which in art. 1 defined it as an area

of free trade in import and export and special tax incentives, established with the purpose of creating within the Amazon an industrial, commercial, and agricultural center with economic conditions that allow its development, in view of local factors and the great distance to which the consumer centers of its products are found.

This enactment predicted that the ZFM would be installed in a continuous area with a surface area of ten thousand square kilometers, on the left bank of the Negro and Solimoes rivers, and that it would include the city of Manaus and its surroundings. Decree-Law No. 356/1968 extended some tax benefits provided for the ZFM to other locations in the Western Amazon, which includes the States of Amazonas and Acre, and the former Territories of Rondônia and Roraima. Finally, through Law No. 8.397/91, Macapá and Santana (in the State of Amapá) joined the ZFM, through the creation of the Free Trade Area of these two cities.

Initially scheduled to last until 1997, the ZFM was extended for another ten years through Decree No. 92.560/1986. The Federal Constitution of 1988, which maintained the ZFM, recognized it as an area of free trade, export, import, and tax incentives, and extended it for 25 years (art. 40 of the Transitional Provisions Act). Constitutional Amendment No. 83/2014 prolonged its term to 2073.

Despite its legal and constitutional provision, the tax benefits granted to companies located in the Manaus Free Trade Zone can be a factor of competitive advantage, generating distortion in the market according to Gonçalves (2007, p. 37-62) and Ribeiro and Freire Júnior (2011).

It is also proper to mention the Brazilian competition authority's (CADE) analysis on Consultation No. 087000.002380/2006-35, which will be detailed ahead in this paper.

3.2 Fiscal war

The fiscal war in Brazil, especially among states, is another phenomenon that raises concerns in competitive terms. In order to discuss it, a brief introduction to the Brazilian Tax System is necessary.

Brazil is a federation made up of the Union, 26 States, 5.570 Municipalities and a Federal District, each of these entities having attribution to create its own taxes. These attributions are outlined in the Federal Constitution, who provides that it is the Union's responsibility to create eight taxes, the States and the Federal District three

taxes and the Municipalities three other taxes. Each of these political entities will also be responsible for the institution of fees due to the exercise of police power or the use of public services, as well as for the contributions imposed for improvements in property value derived from public constructions. The Union may also institute compulsory loans in certain circumstances, as well as social contributions, economic intervention contributions and contributions related to professional or economic categories. Finally, the Union, States, Municipalities and Federal District must establish each one the contributions for the cost of its employees' social security system.

Fiscal war can take place between two or among several States or Municipalities. The most well-known problems in the competitive field occur in the fiscal war among States.

States grant a wide range of benefits to encourage companies to settle in their territory, thus generating new jobs and promoting the development of that region. Szajnbok (2017, p. 170) states that such a practice ends up causing a dispute among States, to the extent that each State, in the afore-call of attracting more enterprises, ends up offering a wide range of incentives, especially tax benefits.

States have the power to institute a tax on the circulation of goods and services (ICMS), which focuses on transactions related to the movement of goods and on the provision of interstate and intermunicipal transport and communication services, even if operations and services begin abroad. This tax is usually at the heart of discussions involving tax war.

The Constitution of the Republic determines that it is up to the complementary law to regulate the way in which exemptions, incentives and tax benefits related to this tax will be granted and revoked, which should undergo the deliberation of the States and the Federal District (art. 155, s 2º, XII, g). The need to enter into an agreement for the granting of tax incentives had already been in the Constitutional Amendment No. 1 of 1969, which issued the new text of the Federal Constitution of 1967. This provision was introduced into the legal system precisely to prevent or minimize the effects of the fiscal war.

Complementary Law No. 24/75 regulated this imposition and created the National Council for Business Policy (CONFAZ), a collegiate committee composed of representatives of all States and the Federal District, presided over by the Minister of Economy, and under which agreements that deal with the granting or repeal of tax incentives or benefits involving ICMS are concluded.

With the creation of CONFAZ, the granting of tax benefits must necessarily be deliberated by this collegiate, and States cannot unilaterally grant benefits of this kind.

In order to circumvent this restriction, many States use subterfuge to attract companies to settle in their territory, granting tax benefits indirectly without prior authorization from CONFAZ. According to Bassoli and Pereira (2008, p. 62-63), to attract better investments and to concentrate as much wealth as possible within their borders, States have sometimes devised a true 'public tax planning' built not to obtain, but to favor the economy of the taxes they charge themselves and thus reduce the tax burden or foster isolated operations.

Complementary Law No. 24/75 provides consequences for States that issue unilateral measures containing tax benefits without prior authorization of CONFAZ, but the constitutionality of this provision is questioned (Silveira, 2009, p. 177).

The fiscal war among States surely can stifle competition. For example, the inequality of opportunities among companies that were already located in the territory of the State that is granting the tax incentive and those companies that have been attracted precisely because of this benefit (Abreu, 2008, p. 96-97), as well as the inequality among companies of the same economic sector, but that are established in different States.

4. Brazilian legal system's mechanisms to restore competition distortion

4.1 Comparison between the Brazilian legal system and art. 107 TFEU

Having demonstrated the consequences for competition arising from tax benefits, the next step will be to analyze the mechanisms present in the Brazilian legal system to restore the fairness of the market in competitive terms.

In order to better illustrate this scenario, a brief comparison with art. 107 of the Treaty on the Functioning of the European Union (TFEU) will be drawn.[2] It forbids State-aid that distorts or threatens to distort competition by disposing that

2 EUROPEAN UNION. *Consolidated version of the Treaty on the Functioning of The European Union*. Available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF . Access on: Jan. 2022.

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> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.[3]

According to Gunn and Luts (2015, p. 119-120),

> the State aid prohibition also applies to the Member States's tax measures. In fiscal State aid cases, the existence of a 'selective advantage' is key. The formal mechanism through which a selective advantage is conferred, is not decisive. Furthermore, it is generally accepted that a selective advantage can result both from unsound legislation (i.e., tax measures adopted by the State's Legislature) and unsound administration (i.e., the application of tax provisions by the State Executive).

Art. 107 TFEU served as the basis for some cases brought to trial by the European Commission (EC) involving tax benefits and competition, such as: (a) Ireland and Apple, (b) Fiat Chrysler and Luxembourg and (c) Ikea and the Netherlands.

In the first case, the EC decided that two tax rulings issued by the Irish Revenue in 1991 and in 2007 have unlawfully granted State aid to two Apple Group companies: Apple Sales International and Apple Operations Europe; these are incorporated in Ireland but considered a non-tax resident in this country. These rulings enabled them to determine their tax liability in Ireland on a yearly basis, thus resulting in a lower tax burden for those companies. According to the Commission's decision[4], these rulings

> confer a selective advantage on those companies that is imputable to Ireland and financed through State resources, which distorts or threatens to distort competition, and which is liable to affect trade between Member States. The contested tax rulings therefore constitute State aid within the meaning of Article 107(1) of the Treaty.

3 Article 107 contains three exceptions (2.a, b, c) and three possible exceptions (3.a, b, c, d, d) to that prohibition.

4 EUROPEAN UNION. EUROPEAN COMISSION. *Decision of 20.08.2016 on state aid SA. 38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*. Available at: 253200_1851004_674_2.pdf (europa.eu). Access on: Jan. 2022.

Hence, the EC determined that Ireland should recover the granted aid. The General Court[5] annulled this decision under the argument that the Commission "did not succeed in showing to the requisite legal standard that there was a selective advantage for the purposes of Article 107(1) TFEU". The Commissioner appealed before the Court of Justice of the European Union (CJEU), pending court decision.

In the second case,

> the Luxembourg tax authorities issued a tax ruling in favour of Fiat Chrysler Finance Europe (FFT), an undertaking in the Fiat group that provided treasury and financing services to the group companies established in Europe. The tax ruling at issue endorsed a method for determining FFT's remuneration for these services, which enabled FFT to determine its taxable profit on a yearly basis for corporate income tax in the Grand Duchy of Luxembourg.[6]

The EC decided in 2015 that this ruling granted State aid to Fiat Chrysler under art. 107 TFEU, which was incompatible with the internal market and determined Luxembourg should recover the unlawful aid. In 2019 the General Court upheld the Commission's decision, in contrast to what happened in the Apple case. Fiat Chrysler and Ireland, as a third party, appealed the General Court's judgement; the case is still ongoing. Ireland appealed because seeing it relevant to the Apple case soon to be decided by the CJEU.

The third case refers to an investigation procedure started by the EC in 2017 regarding an alleged State aid granted by the Netherlands to Inter IKEA Systems B.V, a legal entity of the Inter IKEA Group established in the Netherlands. The investigation concerned two transfer pricing agreements (the "2006 APA" and the "2011 APA") and subsequent annual tax assessments.[7] In 2020 the EC decided to extend the formal investigation starting from tax year 2006, as it was not covered by the opening decision of 2017. The Commission's provisional conclusion

5 EUROPEAN UNION. GENERAL COURT. *Judgment of the General Court of 15 July 2020 – Ireland and The Commission (T-778/16 e T-892/16)*. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1439099. Access on: Jan. 2022.

6 EUROPEAN UNION. GENERAL COURT. *Press release – The General Court confirms the Commission's decision on the aid measure granted by Luxembourg to Fiat Chrysler Finance Europe*. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-09/cp190118en.pdf . Access on: Feb. 2022.

7 EUROPEAN UNION. EUROPEAN COMISSION. *Letter 18.12.2017 – State aid SA.46470 (2017/NN) – Netherlands Possible State aid in favour of Inter IKEA*. Available at: https://ec.europa.eu/competition/state_aid/cases1/202046/272426_1973466_310_2.pdf . Acess on: Jan. 2022.

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> is that the Advanced Pricing Agreement concluded between the Dutch tax administration and Inter IKEA Systems B.V. on 9 March 2006, the Advanced Pricing Agreement concluded between the Dutch tax administration and Inter IKEA Systems B.V. on 19 December 2011, and Systems' annual corporate income tax assessments for the tax years 2006 and following constitute State aid within the meaning of Article 107(1) of the Treaty granted by the Netherlands to Inter IKEA Systems B.V. and to the Inter IKEA group as a whole. The Commission provisionally concludes that that State aid is not compatible with the internal market[8].

It is an ongoing case for which no final decision has yet been taken.

The Brazilian legal system, especially the Brazilian Competition Law, has no similar prohibition to that provided in art. 107 TFEU. Instead, the Constitution of the Republic of Brazil prescripts, in art. 146-A, the possibility of the edition of a law establishing special criteria for taxation to prevent distortion of competition, as will be discussed below.

4.2 Art. 146-A of the Constitution of the Republic of Brazil

Art. 146-A was introduced into the Constitution of the Republic of Brazil through Constitutional Amendment No. 42 of December 19, 2013, which amended the National Tax System in several aspects. This article prescribes that complementary law may establish special taxation criteria, with the aim of preventing distortions in competition, without prejudice to the Union's competence, by law, to establish rules of equal objective.

The first aspect to be highlighted is the requirement of "complementary law" for its regulation. According to the Brazilian Constitution, the "complementary law" has a higher approval quorum (requirement of absolute majority)[9] when compared to the so called "ordinary law" (requirement of simple majority)[10]. It is expressly stated by the Constitution that when the subject is sensitive to the collective interest and demands a greater rigor for its approval the matter can only be disciplined by "complementary law".

In this context, the importance of the matter brought by art. 146-A of the Brazilian Constitution requires an absolute majority of the National Congress for its

8 EUROPEAN UNION. EUROPEAN COMISSION. *Letter – 30.04.2020 – State aid SA.46470 (2017/C) – Netherlands possible state aid in favour of Inter IKEA – Extension of the formal investigation*. Available at: https://ec.europa.eu/competition/state_aid/cases1/202027/272426_2169565_285_2.pdf . Access on: Jan. 2022.

9 Article 69 of the Brazilian Constitution.

10 Article 47 of the Brazilian Constitution.

approval. Its relevance is due to the direct connection to the balance of power in the federation (avoiding fiscal wars) and to the structure of the economic order (avoiding competitive distortions).

Art.146-A of the Constitution is a rule that grants the Union the power/duty to regulate that precept. This provision has not yet been regulated, but it already has the effect of permitting the declaration of unconstitutionality of any acts of public authorities that are contrary to its purpose. That is, although a "complementary law" has not been issued to regulate this command, tax rules that create competitive distortions are incompatible with the constitutional order.

According to Brazuma (2009, p. 131), art. 146-A of the Constitution refers to a constitutional authorization for the legislator to intervene in the economic order by induction, with the aim of preventing competitive distortions, which must be done by 'establishing special taxation criteria'. In other words, it is an authorization for the legislator to use inductive tax rules, with the aim of preventing such distortions.

Silveira (2009, p. 79) points out that the special taxation criteria of art. 146-A may, for example, establish certain parameters for the granting of tax incentives or the use of procedures such as tax substitution, legal presumptions, and ancillary obligations.

Based on the recognition that ancillary tax obligations may also be directly related to competitive asymmetries, Schoueri (2007, p. 268) suggests that art. 146-A can open space for the creation of these kind of tax obligations, which, by hindering tax evasion, ensure free competition. He emphasizes, however, that they must have an equitable repercussion among competitors, even if they constitute, for some, a greater burden resulting from its greatest competitive ability.

It should also be noted that there are two bills on the subject in the Federal Senate. Bill No. 161/2013, authored by Senator Delcídio do Amaral, had its procedure closed on 21.12.2018, without approval, due to the termination of the legislature (art. 332 of the Internal Rules of the Federal Senate). Bill No. 284/2017, initiative of Senator Ana Amélia, had a favorable legal opinion by the Committee on Transparency, Governance, Oversight, Control and Consumer Protection of the Federal Senate, in the form of a replacement amendment presented[11], but had its procedure closed on 21.12.2022 for the same reason as Bill No. 161/2013.

Anyway, art. 146-A of the Brazilian Constitution has not yet been regulated.

11 BRASIL. SENADO FEDERAL. *Opinion (Federal Renate) No. 5, 2021*. Available at: Projeto de Lei do Senado n° 284, de 2017 (Complementar) - Matérias Bicamerais - Congresso Nacional. Access on: Jan. 2022.

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4.3 Performance of the Brazilian Competition Defense System

In addition to the possible legal regulation of art. 146-A, the role of CADE would be an alternative to restore the competition in market in the event of distortions caused by tax benefits. However, is there a legal permission for CADE to interfere in situations like these?

CADE, a member of the SBDC, whose role is regulated by Law No. 12.529/2011, is a federal authority with jurisdiction throughout Brazilian territory. It is responsible for controlling anticompetitive conducts, promoting the prevention, and combating infractions against the economic order. CADE is composed of three bodies: the Administrative Tribunal of Economic Defense (TADE), the General Superintendence (SG) and the Department of Economic Studies (DEE). The role of each body is described in arts. 9, 13 and 17 of Law No. 12.529/2011.

Art. 36 of Law No. 12.529/2011 describes acts that constitute a violation of the economic order. Among them is the provision that, regardless of guilt, acts manifested in any form that have as object or may limit, distort or in any way harm free competition or free enterprise is an infraction of the economic order.[12]

At first sight this provision resembles art.107 TFEU. However, this similarity is only apparent. While art. 107 is addressed to the Member States of the European Union (EU), prohibiting them from performing acts that may distort or threaten to distort competition, art. 36 of Law No. 12.529/2011 is aimed at punishing acts committed by those who engage in business.

Bagnoli (2020, p. 403-404) highlights that in addition to preventing violations of the economic order, Law nº 12.529/2011 also acts, therefore, in the repression of these practices, being applied to individuals or legal entities governed by public or private law, as well as to any associations of entities or persons, constituted in fact or in law, even if temporarily, with or without legal personality, even if they exercise activity under a legal monopoly regime. Therefore, art. 31 of Law No. 12.529/2011 does not make distinctions, applying to everyone. Thus, infractions against the economic order are acts practiced by economic agents, contrary to free competition relations and capable of altering the balance in a given market.

12 Article 36, I, of Law No. 12.529/2011.

So, art. 31 of Law No. 12.529/2011 prescribes that this statute applies to individuals or legal entities under public or private law. Nevertheless, it will only apply to institutions under public law when they engage in business activity, which is not the case when Government grants tax benefits. Considering that, CADE cannot act against public entities when they harm competition by grating tax incentives. The most CADE can do in this situation is make a recommendation.

Among the functions of CADE and the Secretary of Advocacy for Competition and Competitiveness (SEAE), which together compose the SBDC, is competition advocacy. In general, it is up to SEAE, among other duties, to present studies and give opinions on normative acts and draft laws related to competition.[13] CADE, on the other hand, is responsible for answering queries and editing guides and market guidelines.[14]

Silveira (2009, p. 109) points out that CADE seems to be in a privileged position for certain competition advocacy tasks, especially those related to the interface with the private sector. This occurs, above all, because of its function of answering queries, which allows companies to question CADE about the legality of a particular behavior.

It was precisely through a consultation[15] that CADE expressed its opinion on the fiscal war and its correlation with competition. In 1999 the National Thought of Business Bases (PNBE) made an enquiry to CADE (Consultation no. 0038/99) about the harmfulness of the fiscal war to competition, carried out mainly among States, and concerning tax and financial-tax mechanisms related to ICMS.

To begin with, and without carrying out into the merit of the consultation, CADE pointed out that the granting of tax incentives, as well as like any other aspect of the national tax system, influences the formation of market prices, and therefore is umbilically linked to the defense of competition. So, CADE concluded that is up to him to determine if the fiscal war can limit competition. However, it cannot express opinions on any specific case or impose any penalties.

On the merits, an after analysing empirical studies, CADE stressed that the practice of fiscal war has a gigantic effect on the profitability of the benefited companies,

13 Article 19 of Law No. 12.529/2011.
14 Article 9º, § 4º e § 5º and Article 13, XVIII-XV of Law No. 12.529/2011.
15 BRASIL. MINISTÉRIO DA JUSTIÇA. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. *Reply to consultation No 0038/99*. Available at: http://institutosarlo.com.br/pdfs-novos/6.%20Parecer%20CADE%20Consulta%20Guerra%20Fiscal%20e%20Concorr%C3%AAncia.pdf. Access on: Jan. 2022.

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providing them with significantly unequal and advantageous conditions of operation compared to other companies competing on the same markets.

The losses are of various orders. First, there is the general effect, reducing the degree of efficiency of the whole economy. Concerning the company that receives the tax incentive, it has ensured such superior profitability in comparison to its competitors that it can perfectly afford stagnation, failing to seek greater efficiency and innovation. It can, too, reduce its price to a point that others don't will be able to keep up. The companies that weren't granted the benefit are at a brutal disadvantage regardless of its merits, leading to lack of investments, expansion, and new market entries. Therefore, CADE concluded that the fiscal war has a highly harmful consequence on competition and on social welfare.

However, because CADE's power is limited to issuing recommendations, the only determination set from the enquiry was to send a copy of the report (decision) to the Special Commission on Tax Reform of the House of Representatives, to the Supreme Court (STF) and to CONFAZ, stressing that CADE remains available to assist these institutions or any others with creating and maintaining an efficient and competitive healthy tax system.

5. Conclusions

The preliminary research concluded that there is an intimate connection between taxation and competition. Thus, when granting tax benefits or even when establishing ancillary tax obligations, the Government must consider the consequences to market, avoiding the creation of asymmetries between economic agents that can lead to a distortion in competition.

In Brazil the lack of regulation of art. 146-A of the Constitution creates a gap in the system. This leads to a lack of safe criteria to establish preventive acts against competitive distortions caused by taxation.

Different than the EU where the art. 107 TFEU has the scope to prohibit Member States from performing acts that may distort or threaten to distort competition, the Brazilian Competition Law does not apply against public entities when they harm competition by grating tax incentives.

CADE and SEAE attributions include presenting studies, issuing opinions on normative acts and draft laws, and editing guides and market guidelines related to

competition. Nonetheless, these functions are limited to the advocacy of competition, and they are not enough punishing or even enough to restore market competition whose stability has been shaken by the granting of tax benefits.

In the development of public policy concerning taxation (especially when considering the inductive functions of the tax), the aspects related to competition should be considered besides the consequences of tax waivers on public accounts.

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