ARE ALL TAX RULINGS STATE AID? EXAMINING THE EUROPEAN COMMISSION'S RECENT STATE AID DECISIONS

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I. INTRODUCTION 5
II. UNITED STATES SENATE HEARING AND *LUXLEAKS* SCANDAL TRIGGER EUROPEAN COMMISSION INVESTIGATIONS 8
   A. *The US Senate Holds Hearings in 2012 and 2013 Regarding the Tax Practices of US Multinationals* 8
   B. *The LuxLeaks Scandal Provides Evidence of Widespread Multinational Tax Avoidance* 10
   C. *The European Commission Begins its Enforcement Initiative* 11
   D. *Numerous Non-Governmental Organizations (NGOs) Publicly Support Tougher Taxation of Multinational Enterprises by Member States* 12
III. THE HETEROGENEITY OF EU TAX LAW 13
IV. OUTLINE OF STATE AID FRAMEWORK 14
   A. *State Aid under the Treaty on the Functioning of the European Union* 14
   B. *European Court of Justice Jurisprudence Regarding State Aid under Member State Tax Law* 15
      1. Advantage 16
      2. Selectivity is A Fundamental Component of a State Aid Finding 16
      3. Selectivity Analysis is A Three Step Test 17
      4. A Finding of Selectivity Requires Deviation from a Reference System and Advantage Compared to Similarly Situated Actors 18
      5. The Appropriate Reference System For Multinational Enterprises is Member State Tax Law 19

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6. The Appropriate Comparable Entities for Determining Selectivity are Similarly Situated Multinational Enterprises in the Member State 19
C. Prior European Commission State Aid Determinations Establish Similar Standards to ECJ Case Law 22
V. THE EUROPEAN COMMISSION HAS ISSUED SEVERAL RECENT ASSESSMENTS FINDING ILLEGAL GRANTS OF STATE AID WHICH HAVE BEEN CHALLENGED BY THE AFFECTED MEMBER STATE AND THE BENEFICIARY OF THE ALLEGED STATE AID 24
A. The European Commission's and the Arm's Length Principle in its Recent State Aid Decisions 25
B. The European Commission's Five Recent Decisions Regarding the Grant of State Aid through Tax Ruling Practices 28
1. The Commission's Starbucks Decision 28
2. The Commission's Fiat Decision 30
3. The Commission's Apple Decision 30
a. Background 31
b. The Commission's Legal Analysis in its Primary Rationale Suffers from the Same Issues Identified in the Fiat and Starbucks Decisions 33
c. The Commission's Second Rationale in the *Apple Decision* Contains Additional Flaws Not Addressed in the *Fiat* and *Starbucks Decisions* 34
4. The Commission Decision Regarding the Belgian Tax Ruling Practice 35
5. The Commission's Opening Decision Regarding Amazon 36
C. Each Commission Decision Has Been Subsequently Appealed by Both the Member State and the Alleged Recipient of State Aid 37
1. Netherlands and Starbucks v. Commission 37
2. Luxembourg and Fiat v. Commission 38
3. Ireland and Apple v. Commission 38
4. Belgium v. Commission 39
5. The Appellants Rely on Several Common Grounds for Appeal 39
VI. IN EVALUATING EACH OF THE COMMISSION DECISIONS, THE ECJ SHOULD USE A DISCRIMINATION TEST TO DETERMINE IF STATE AID WAS GRANTED; HOWEVER, EVEN IF THE ECJ ACCEPTS THE METHODOLOGY USED BY THE COMMISSION IN FINDING THAT STATE AID WAS GRANTED, ONLY PROSPECTIVE TAXES AND PENALTIES SHOULD BE IMPOSED UNDER THE THEORIES OF LEGITIMATE EXPECTATIONS AND LEGAL CERTAINTY 40

A. *The Appropriate Reference System is Member State National Tax Law as it Applies to Other, Similarly Situated, Multinational Enterprises for Determining Selectivity* 40
B. *The European Commission's Separately Developed Arm's Length Principle Cannot be Overlaid on Member State Tax Law to Form Part of the Reference System for Determining Advantage* 41
C. *Even if it Were Appropriate to Use the Arm's Length Principle to Evaluate Whether a Particular Tax Ruling Constituted a Grant of State Aid, the Commission Did Not Apply the Arm's Length Principle Appropriately* 42
D. *The Appropriate Test for Evaluating Whether a Member State has Illegally Granted State Aid to a Multinational Enterprise is Whether the Measure is Discriminatory Under Generally Applicable Member State Tax Law* 43
E. *Even if the ECJ Rules That the Commission Decisions Were Properly Issued, Under the Theories of Legal Certainty and Legitimate Expectations, the Assessments Should be Limited to the Period After the Decision was Issued* 48

VII. ADDITIONAL CONSIDERATIONS WEIGH IN FAVOR OF OVERTURNING THE COMMISSION DECISIONS FINDING STATE AID 50
A. *Economic Impact of Tax Uncertainty* 51
B. *Impact of EU Tax Assessments on other Jurisdictions* 52
C. *The Appropriate Commission Mechanism to Implement Multinational Enterprise Tax Reform in the EU is by Proposing Legislation to the European Parliament* 53

VIII. CONCLUSION 54

Abstract

The European Commission recently issued an € 13 Billion assessment against Ireland, alleging that Ireland provided illegal state aid to Apple by permitting Apple to engage in transfer pricing practices which understated Apple's Irish-sourced income. Although the case has garnered much attention, there is little understanding regarding the legal framework supporting this, and other recent Commission Decisions regarding state aid in the tax context. These European Commission decisions present a significant problem for both US and EU practitioners advising multinational clients as they would, if sustained, completely upend the previously-accepted interpretation of European Court of Justice state-aid case law and introduce substantial uncertainty into transfer pricing and multinational taxation within the EU by permitting the European Commission to invalidate any tax ruling, even if supported under Member State law.

This article analyzes the Commission's legal arguments put forth in recent Commission state aid Decisions and synthesizes several areas of European Court of Justice case law to argue that the Commission's recent Decisions are neither supported by the state aid framework under Article 107 of the Treaty on the Functioning of the European Union or European Court of Justice case law. By adopting the reasoning put forth in this article, the European Court of Justice can prevent significant harm to the global economy through the tax uncertainty that the European Commission's recent Decisions threaten to create.

I. INTRODUCTION

On August 30th, 2016, the European Commission (Commission) ordered Ireland to collect approximately € 13 Billion from Apple Group (through its subsidiaries Apple Sales International (ASI) and Apple Operations Europe International (AOE)—hereafter referred to collectively as "Apple").[1] The amount at issue makes this case one of the largest tax controversies on record, and has generated much press as a result.[2] However it is merely one of several Commission Decisions dealing with the taxation of multinational transfer pricing activities issued recently, seemingly in response to both a United States Senate investigation into the tax practices of US multinationals and the so-called "Luxembourg Leaks" or "LuxLeaks" documents released by the International Consortium of Investigative Journalists.[3] The Commission has recently initiated or finalized Decisions adverse to Fiat,[4] Starbucks,[5] Apple,[6] and Amazon[7] based on specific transfer pricing methodologies used by those firms, and endorsed by tax authorities in Luxembourg, the Netherlands, and Ireland, arguing that each received illegal state aid.[8] The Commission also found that the entire tax ruling practice in

1. Kyle Richard, *Apple and Ireland v. Commission What Will the Scope of the European Commission's Sate Aid Assessments be in the Tax Ruling Context*, TAXATION NEWS 2 (2017), http://www.wsba.org/~/media/Files/Legal%20Community/Sections/Taxation/Newsletters/2017_04%20Tax%20News.ashx (last visited November 14, 2017).

2. *See id.*

3. *See id.*

4. Commission Decision 2016/2326 of 21 October 2015 on State aid SA.38375 which Luxembourg granted to Fiat, 2016 O.J. (L 351) 1 [hereinafter Fiat or Fiat Decision]. Both Fiat and Luxembourg have appealed this Commission Decision to the European General Court. *See* Action brought on 30 December 2015 — Luxembourg v. Commission, 2016 O.J. (C 59) 48 (Luxembourg seeking to annul the Commission Decision); Action brought on 29 December 2015 — Fiat Chrysler Finance Europe v. Commission, 2016 O.J. (C 59) 49 (Fiat seeking to annul the Commission Decision).

5. Commission Decision 2017/502 of 21 October 2015 on State aid SA.38374 implemented by the Netherlands to Starbucks, 2017 O.J. (L 83) 38 [hereinafter Starbucks or Starbucks Decision]. Both Starbucks and the Netherlands have appealed this Commission Decision to the European General Court. *See* Action brought on 23 December 2015 — Netherlands v. Commission, 2016 O.J. (C 59) 50 (Netherlands seeking to annul the Commission Decision); Action brought on 5 September 2016 — Starbucks and Starbucks Manufacturing Emea v. Commission, 2016 O.J. (C 462) 25 (Starbucks seeking to annul the Commission Decision). A third appeal has been filed directly by Steven Verschuur, a Partner with Ernst and Young. *See* Action brought on 9 December 2016 — Verschuur v. Commission, 2017 O.J. (C 53) 42.

6. Commission Decision 2017/1283 of 30 August 2016 on State aid SA.38373 implemented by Ireland to Apple, 2017 O.J. (L 187) 1 [hereinafter Apple or Apple Decision]. Both Apple and Ireland have appealed this Commission Decision to the European General Court. *See* Action brought on 9 November 2016 — Ireland v. Commission, 2017 O.J. (C 38) 35 (Ireland seeking to annul the Commission Decision); Action brought on 19 December 2016 — Apple Sales International and Apple Operations Europe v. Commission, 2017 O.J. (C 53) 37 (Apple seeking to annul the Commission Decision).

7. State Aid — Luxembourg, 2015 O.J. (C 44) 2 [hereinafter Amazon, Amazon Decision, or Amazon Opening Decision] (The Commission has, thus far, only issued an opening decision in the *Amazon* case).

8. *See id.*

Belgium[9] constituted illegal state aid. At present, the Commission Decisions which have been finalized are each under appeal.[10]

This article will argue that the recent Commission Decisions are based on an improper application of EU law, and should therefore be overturned by the European Court of Justice. It will do so by outlining the framework against which the Decisions were issued, both in terms of the coverage of multinational tax practices and relevant ECJ case law, summarizing the Commission Decisions, evaluating the legal arguments presented by the Commission, and guiding the European Court of Justice's ruling on this issue. This article concludes by examining the potential impact the Commission Decisions could have on the global economy and outlining several policy reasons for overturning the Commission Decisions

Each of the Commission Decisions finds that an European Union (EU) Member State granted state aid in contravention of the Treaty on of the Functioning of the European Union (TFEU), Article 107(1).[11] The Commission Decisions address specific tax rulings or the tax ruling practice within Member States, finding that each of the rulings at issue provided an advantage to a specific taxpayer or class of taxpayers.[12] Although it is clear that the Commission can examine Member State tax ruling practices for the type of discrimination or "selectivity" that would constitute an illegal grant of state aid in contravention of the TFEU,[13] the recent Commission Decisions exceeded the scope of the Commission's authority by questioning generally applicable principles and provisions of Member State law without showing that the challenged measures were selective.

The Commission's Decisions have been harshly criticized by multinational firms and regulators, but appear to reflect prior criticism that non-governmental organizations (NGOs) had levied against both multinational enterprises and low-tax jurisdictions.[14] Given that each Commission Decision has been appealed to the European General Court

9. Commission Decision 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 implemented by Belgium, 2016 O.J. (L 260) 61 [hereinafter Belgium Decision]. Belgium has appealed this Commission Decision to the European General Court. *See* Action brought on 22 March 2016 — Belgium v. Commission, 2016 O.J. (C 191) 36. Thus far, the EGC has only denied an application by Belgium to suspend the application of the Commission Decision. *See* Case T-131/16, Belgium v. Commission, ECLI:EU:T:2016:427 (Jul. 18, 2016). Several recipients of the alleged aid have also filed appeals to the European General Court seeking to annul the Commission Decision. *See supra* text accompanying notes 4–7.

10. *See supra* text accompanying notes 4–7.

11. *See* Fiat Decision, *supra* note 4, at para. 346; Starbucks Decision, *supra* note 5, at para. 360; Apple Decision, *supra* note 6, at para. 321.

12. *See* Fiat Decision, *supra* note 4, at para. 346; Starbucks Decision, *supra* note 5, at para. 360; Apple Decision, *supra* note 6, at para. 321.

13. *See* Belgium Decision, *supra* note 9, at para. 118.

14. DeNovio, *State Aid: What It Is and How it May Affect Multinationals and Tax Departments*, TAX EXECUTIVE, April 6, 2016.

(EGC),[15] it appears likely that the scope of the Commission's power to examine Member State tax laws and tax ruling practices under the state aid principles will likely be decided by the European Court of Justice over the next several years.

Under ECJ case law, a finding of state aid requires a finding of selectivity and a finding of advantage.[16] However, in the rulings at issue, the Commission appears to have conflated the selectivity and advantage criterion into a single concept of selective advantage, minimizing the selectivity requirement, despite the fact that selectivity is both an important element of the state aid jurisprudence and has particular relevance in the case of transfer pricing agreements.[17]

Furthermore, in determining whether this new concept of selective advantage existed, the Commission applied its own, newly developed, "arm's length principle."[18] Where the prices set under the transfer pricing agreement did not meet the test under the Commission's arm's length principle, the Commission Decisions appear to indicate that such a failure would, by itself, support a finding of selective advantage.[19] This rationale would permit the Commission to, in effect, question any tax ruling or decision which did not comport with its view of the arm's length principle.

Thus, to support the Commission's Decisions in these state aid assessments, the Commission must be required to, at a minimum, reexamine whether both the selectivity and advantage criteria are met separately. Even if the Commission were able to show that both the selectivity and advantage criteria were met, it would remain unclear whether it could apply its own arm's length principle to support a finding of state aid without such an assessment contravening the theories of legitimate expectations and legal certainty.

Additionally, although others have theorized that the Commission's enforcement initiative could harm the global economy through erosion of tax certainty, this article seeks to provide a more complete and concrete analysis of the potential harm through the application of previous economic and accounting research on the impact of tax uncertainty. This analysis suggests that not only is the retroactive application of the Commission's proprietary arm's length principle not supported by ECJ case law, it is likely to exacerbate the very harms that the state aid rules were implemented to prevent, and which the

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15. *See supra* text accompanying notes 4–9.

16. *See, e.g.*, Joined Cases C-182/03 & C-217/03, Belgium and Forum 187 ABSL v. Comm'n, 2006 E.C.R. I-5613-15; Joined Cases C-78/08 to C-80/08, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. Paint Graphos Soc. coop. arl and Others, ECLI:EU:C:2011:550, paras. 48–49 [hereinafter Paint Graphos].

17. Fiat Decision, *supra* note 4 at para. 190.

18. *Id.* at para. 225.

19. *Id.* at para. 226–29.

Commission intended to remedy through this initiative. Therefore, the article suggests that while global tax reform may well be long overdue, the appropriate mechanism for achieving such tax reform is multilateral initiatives, harmonized national legislation, and tax treaty amendments to reduce the opportunities for tax avoidance by multinational enterprises, not European Commission enforcement actions without an appropriate legal basis.[20]

II. UNITED STATES SENATE HEARING AND *LUXLEAKS* SCANDAL TRIGGER EUROPEAN COMMISSION INVESTIGATIONS

Prior to the commencement of the challenged decisions, the US Senate and the International Consortium of Investigative Journalists opened separate investigations into the tax practices of multinational enterprises.[21] The Commission investigations were opened shortly after the US Senate hearings and LuxLeaks scandal, and the targets of these investigations are well-represented in the sample of rulings chosen by the Commission for state aid analysis, providing some evidence that the Commission's recent investigations were, to some extent, triggered and informed by these prior events.[22]

A. The US Senate Holds Hearings in 2012 and 2013 Regarding the Tax Practices of US Multinationals

On September 20, 2012, the Permanent Subcommittee on Investigations of the United States Senate's Committee on Homeland Security and Governmental Affairs committee held a hearing regarding "Offshore Profit Shifting and the U.S. Tax Code."[23] This hearing addressed practices by Microsoft and Hewlett Packard to reduce their U.S. tax liability through the use of foreign subsidiaries, offshore profit generation and transfer pricing agreements to minimize total United States sourced taxable income.[24] In introducing the topic, Subcommittee Chair, Senator Levin described a process by which US multinational companies had allegedly shifted profits to offshore locations in order to

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20. Tax avoidance is generally defined as the use of legal methods by a taxpayer in order to minimize tax liability. *See* I.R.M. §25.1.1.2.4 (January 23, 2014). Tax avoidance is contrasted with tax evasion, which involves the illegal underpayment (or non-payment) of taxes by a taxpayer. *Id.* Governments combat tax evasion through enforcement activities such as, in the United States, IRS audits. *Id.* Governments must combat tax avoidance through the passage or modification of legislation, which prohibits the activities, or arrangements giving rise to the tax avoidance. *Id.*

21. *See generally Offshore Profit Shifting and the U.S. Tax Code—Part I (Microsoft and Hewlett Packard) Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Security and Governmental Affairs of the United States Senate*, 112th Cong. 1 (2012).

22. *Id.* at 2, 4–5.

23. *Id.* at 1.

24. *Id.* at 2.

avoid, or reduce, US taxation.[25] With regard to transfer pricing, a multinational would first, according to Senator Levin, sell or license its assets (such as intellectual property) at an artificially low price to a subsidiary in a low tax jurisdiction in order to minimize the income recognized in the United States, and, to the extent that the US multinational parent needed to use any of the sold or licensed IP in the United States, would pay its subsidiary for such rights, significantly reducing the total US income in the process. [26] The hearing itself included statements by several law professors regarding the legality and structure of the tax planning structures implemented by Microsoft and HP, as well as testimony from executives responsible for the tax functions at Microsoft and HP.[27] The subcommittee does not appear to have suggested additional enforcement actions as a direct result of this hearing.

The subcommittee held a second hearing on May 21, 2013.[28] At this hearing, the subcommittee discussed similar issues, focusing on Apple.[29] Senator Levin's opening statement at this hearing indicated a more nuanced understanding of the issues inherent in base erosion and profit shifting, referring to transfer pricing, the arm's length principle, and the impact of the check-the-box regulations on corporate tax liability under Subpart F.[30] His opening statement also succinctly explained the Apple corporate structure later challenged by the European Commission.[31] In his statement, Senator Levin described Apple's Irish tax planning techniques as "the Holy Grail of tax avoidance, offshore corporations that it argues are not, for tax purposes, resident in any nation."[32] This is accomplished through differences in the definition of tax residence between US and Irish tax law—while US law provides for residence based on the place of incorporation, Irish law provides for tax residence based on where the company is managed and controlled; by organizing a corporation in Ireland, but arguing that it is managed and controlled in the United States, Apple created a series of entities with minimal taxable activities in either jurisdiction.[33] In order to minimize the income taxable in any jurisdiction, a US multinational, in this case, Apple, would execute a cost-sharing agreement with its subsidiary in

25. *Id.*
26. *Id.*
27. *See id.*
28. *See generally Offshore Profit Shifting and the U.S. Tax Code—Part II (Apple) Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the United States Senate*, 113th Cong. 1 (2013).
29. *See id.* at 2.
30. *Id.* at 1–3, 7.
31. *Id.* at 3–5.
32. *Id.* at 3.
33. *Id.*

Ireland under which the subsidiary pays Apple for the use of intellectual property rights in foreign jurisdictions and Apple retains the rights to sell and market Apple products in the Americas, with the subsidiary obtaining the rights to sell and market Apple products in the other jurisdictions.[34] The check-the-box regulations permit Apple to more effectively shift funds among members of its corporate group without subjecting such income to US taxation.[35] The European Commission opened its investigation into Apple's tax practices in the European Union less than a month later,[36] and more than a year prior to the Luxembourg Leaks

B. *The LuxLeaks Scandal Provides Evidence of Widespread Multinational Tax Avoidance*

The Luxembourg Leaks (referred to hereinafter as the LuxLeaks) made more than three hundred tax rulings granted by Luxembourg to multinational organizations.[37] The LuxLeaks were the result of an investigation conducted by the International Consortium of Investigative Journalists, global network of nearly 200 journalists who publish in-depth investigative stories.[38] The LuxLeaks revealed over 300 instances of multinational organizations setting up subsidiaries in Luxembourg which allowed those organizations to reduce the amount of income taxable in a high-tax jurisdiction by shifting that income to Luxembourg and other low tax jurisdictions and through the use of intercompany loans at interest rates which shift income to low tax jurisdictions, or, through differences in national tax laws, permit income to avoid taxation altogether.[39] Luxembourg's practice of The ICIJ has made searchable copies of the leaked tax rulings on its website.[40] Although the Apple investigation predates the LuxLeaks scandal, LuxLeaks appears to have prompted the Commission's broader enforcement initiative.

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34. *Id,*

35. *Id.*

36. *See* Apple Decision, *supra* note 6.

37. *See, e.g.*, Simon Bowers, *Luxembourg tax files: how tiny state rubber-stamped tax avoidance on an industrial scale*, THE GUARDIAN (Nov. 5, 2014), https://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale; Colm Keena, *Luxembourg leaks controversy a 'game changer'*, IRISH TIMES (Nov. 7, 2014), http://www.irishtimes.com/business/economy/luxembourg-leaks-controversy-a-game-changer-1.1992650.

38. About the ICIJ, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 13, 2012), https://www.icij.org/about.

39. *See* Bowers, *supra* note 37, at 3.

40. Matthew Caruana Galizia, *et. al., Explore the Documents: Luxembourg Leaks,* INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 9, 2014), https://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database.

C. The European Commission Begins its Enforcement Initiative

Shortly after the LuxLeaks scandal, the European Parliament and European Commission began investigations into the tax ruling practices and EU Member State tax laws that gave rise to the tax avoidance structures detailed in the LuxLeaks.[41] Three months after the LuxLeaks scandal, the European Parliament launched an investigation into the tax ruling practices.[42] Ultimately, the Parliamentary Commission published a report on its investigations, despite unwillingness to testify by multinational enterprises.[43] The report called for country-by-country reporting, a common consolidated corporate tax base (CCTB),[44] increased transparency by Member States, a broader role for the European Commission in reviewing tax ruling practices, and better protections for whistle-blowers.[45] At the same time, the European Commission proposed a measure for the exchange of tax rulings by Member States.[46] The Commission cited the LuxLeaks as motivation for its proposal for the sharing of tax rulings in the analysis which accompanied the proposed rules.[47] The exchange of tax rulings was unanimously approved by member states two days before the Parliamentary Commission published its report.[48]

Throughout 2016, the European Commission proposed additional measures to increase tax transparency, harmonize EU tax laws or provide for a common consolidated corporate tax base, and thereby minimize the ability of multinational organizations to utilize

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41. European Parliament Press Release, Parliament Sets Up a Special Committee on Tax Rulings (Feb. 12, 2015).

42. *Id.*

43. *Id.*

44. *See generally* Common Consolidated Corporate Tax Base (CCCTB), EUROPEAN COMMISSION, https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb. In the context of the European Union, a common consolidated corporate tax base refers to a proposal to establish a single, EU wide set of rules for multinational enterprises to calculate their total taxable income and total income tax liability in the EU. *Id.* The tax collected by the EU under this proposal would then be apportioned to the Member States in which the multinational enterprise earns income. *Id.* This proposal is favored by a number of groups seeking to reduce tax avoidance and strong proponents of the EU and the single market. *Id.* However, given the impact on Member State autonomy and tax policy decisions, the CCCTB has not received substantial support from EU Member States.

45. European Commission Press Release IP/16/3471, Fairer Corporate Taxes: Special Committee on Tax Rulings Votes Recommendations (October 27, 2015).

46. European Commission Press Release IP/15/4610, Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package (March 18, 2015).

47. Will Fitzgibbon, *Fundamental Change' in EU Tax Rules after LuxLeaks*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (March 18, 2015), https://www.icij.org/blog/2015/03/fundamental-change-eu-tax-rules-after-luxleaks.

48. European Commission Press Release IP/15/5780, Tax transparency: Commission Welcomes Agreement Reached by Member States on the Automatic Exchange of Information on Tax Rulings (October 6, 2015).

discrepancy in Member State tax laws to minimize their tax burdens.[49] At present, Member States have not agreed to implement a number of the proposals[50] and have only reached accord[51] on an agreement[52] to minimize the opportunities for multinational organizations to use tax planning techniques to minimize their EU tax burden, although the agreement included numerous exemptions and a long implementation timeline.[53] It has been widely criticized by the NGO sector as not sufficiently disincentivizing tax avoidance by multinationals.[54] Thus, although the European Council has taken steps to reduce the ability of multinational organizations to engage in tax avoidance throughout the European Union, it has not implemented the level of new anti-tax avoidance regulations desired by the NGO sector or proposed by the European Commission.[55]

D. Numerous Non-Governmental Organizations (NGOs) Publicly Support Tougher Taxation of Multinational Enterprises by Member States

In the years since the beginning of the European Commission investigations, numerous NGOs have published reports critical of the tax avoidance practices of multinational enterprises as well as the low-tax jurisdictions which allow those firms to pay a low effective rate of tax both before and after the Commission published its Decisions.[56] For example, Oxfam's Tax Battles[57] report ranked the Netherlands, Ireland, and Luxembourg among the world's worst tax havens.[58] The Netherlands ranked as the third, Ireland as the sixth, and Luxembourg

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49. *See, e.g.*, European Commission Press Release IP/16/1349, European Commission Proposes Public Tax Transparency Rules for Multinationals (April 12, 2016); European Commission Press Release IP/16/3471, Commission Proposes Major Corporate Tax Reform for the EU (October 25, 2016).

50. *See generally* Cecile Barbiere, *Brussels aims to Harmonise Corporate Tax by 2021*, EURACTIV (Oct. 26, 2016), http://www.euractiv.com/section/euro-finance/news/brussels-aims-to-harmonise-corporate-tax-by-2021/.

51. European Council Press Release, Corporate Tax Avoidance: Council Agrees its Stance on Anti-Avoidance Rules (June 21, 2016).

52. Proposal for a Council Directive Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, General Secretariat of the European Council, 10426/16 FISC 104 ECOFIN 628.

53. *See generally* Alexandra Eriksson, *EU struggles to close tax loopholes with new law*, EU OBSERVER (Jun. 22, 2016), https://euobserver.com/economic/133931.

54. *See, e.g.*, *EU finance ministers unwilling to address tax avoidance*, OXFAM INT'L (Jun. 21, 2016), https://www.oxfam.org/en/pressroom/reactions/eu-finance-ministers-unwilling-address-tax-avoidance.

55. *Id.*

56. *Tax Battles: The Dangerous Global Race to the Bottom on Corporate Tax*, OXFAM INT'L, https://www.oxfam.org/sites/www.oxfam.org/files/bp-race-to-bottom-corporate-tax-121216-en.pdf [hereinafter *Tax Battles*].

57. *Id.*

58. *Id.* at 4.

as the seventh worst tax haven in the world in the Tax Battles Report.[59] NGOs have also singled out firms that were the subject of the rulings in question, in particular Apple,[60] for criticism, including for the tax rulings at issue in the recent Commission Decisions.

Despite broad NGO pressure to reform international tax law to reduce the number and availability of opportunities for multinational enterprises to minimize their tax burden, the NGO sector has not provided substantive or implementable proposals.[61] NGOs with a focus on tax equity have generally praised the Commission's enforcement efforts as positive for increasing the level of taxation of multinational enterprises.[62] Although the Commission has received some praise from the NGO sector, such praise has been tempered by calls for more substantive tax reform directed at the Commission, the European Council, and the European Parliament.[63]

III. THE HETEROGENEITY OF EU TAX LAW

Although an in-depth discussion of the tax laws of each EU Member State is outside the scope of this article, the heterogeneity of EU Member State Tax laws is critical to understanding the fundamental dispute between Member States and the European Commission. This heterogeneity is a result of the EU's supranational, and arguably federalist, system and has given rise to many of the tax minimization techniques employed by US and EU based multinational organizations. As a result of this structure, the European Union does not have a single, cohesive tax system.[64] Member States are free to set national tax law and

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59. *Id.*

60. *See, e.g.*, *Highlights of Apple's Tax Dodging*, AMS. FOR TAX FAIRNESS, http://americansfortaxfairness.org/issues/corporate-taxes/highlights-of-apples-tax-dodging/ (accusing Apple of abusive tax practices; Richard Phillips *et al.*, *Offshore Shell Games 2016: The Use of Offshore Tax Havens by Fortune 500 Companies*, CITIZENS FOR TAX JUST. (Oct. 4, 2016), http://ctj.org/ctjreports/2016/10/offshore_shell_games_2016.php (highlighting practices by Fortune 500 Companies, including Apple, Starbucks, and Amazon, to reduce their effective tax burdens).

61. *Cf. Tax Battles*, *supra* note 56 (stating that relevant international organizations need to play a role in reducing the use of tax havens, maintaining tax bases, and increasing public transparency).

62. *See, e.g.*, *Apple Ruling Highlights How EU Governments Must Do More to Clean Up Murky Corporate Tax Practices*, OXFAM INT'L, http://ctj.org/ctjreports/2016/10/offshore_shell_games_2016.php; Sorcha N. Mhathúna, *Apple Tax Ruling Tip Of The Iceberg - EU Governments Must Do More,* OXFAM IR., https://www.oxfamireland.org/blog/apple-tax; John Christensen, *European Commission Determines State Sponsored Tax Avoidance Schemes Illegal,* TAX JUST. NETWORK (Oct. 21, 2015), http://www.taxjustice.net/2015/10/21/european-commission-determines-state-sponsored-tax-avoidance-schemes-illegal/.

63. *See, e.g.*, OXFAM INT'L, *supra* note 62; Mhathúna, *supra* note 62; Christensen, *supra* note 62.

64. Although the CCCTB would propose such a system. *See Proposal for a Council Directive on a Common Corporate Tax Base*, at 2-3, COM (2016) 685 final (Oct. 25, 2016).

policy, although numerous Articles of EU Treaties address tax issues, including the Articles addressing the free movement of capital, state aid and competition, and specific tax provisions (relating to indirect taxes).[65] While these treaties provide principles[66] for the development of Member State tax law and policy, no provisions directly address substantive requirements for national tax legislation. This *principle*, rather than *rule,* based approach permits Member States to enact state tax laws with substantial variance, resulting in significant heterogeneity among Member State tax laws.

However, this heterogeneity and principle based approach does not mean that EU law does not constrain the tax law and policy decisions by Member States. The European Parliament and Commission do utilize numerous types of "soft law"[67] to constrain the tax legislation and policy of Member States. This structure results in incentives for multinational enterprises to locate subsidiaries or branches in low-tax jurisdictions and develop structures to minimize their total tax burden.

IV. OUTLINE OF STATE AID FRAMEWORK

The recent Commission assessments are based on the prohibition against grants of "State Aid" by EU Member States.[68] The state aid framework is derived from the Treaty on the Functioning of the European Union (TFEU) Article 107(1) and has been the subject of many cases before the European Court of Justice, including several dealing with state aid granted through Member State tax laws or tax ruling practices.[69] This section will discuss the basis for state aid assessments issued by the European Commission, and introduce relevant ECJ case law in the state aid context.

A. *State Aid under the Treaty on the Functioning of the European*

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65. *See* European Parliamentary Research Serv., *Tax Policy in the EU; Issues and Challenges*, at 4–5 (Feb. 2015), http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS_IDA(2015)549001_EN.pdf.

66. *See* John Avery Jones, Tax Law: Rules or Principles? Address at IFS Annual Lecture 1996 (June 17, 1996), *in* 17 Fiscal Stud. 63, 74, 78, 79 (1996) (drawing a distinction between tax legislation which sets substantive rules vs. tax legislation which merely sets forth principles of tax law and suggesting a move toward principle-based tax legislation, such as that enacted by the European Parliament for the UK).

67. Hans Gribnau, *Improving the Legitimacy of Soft Law in EU Tax Law*, 35 INTERTAX 30, 33 (2007)(defining "soft law" as consisting of instruments which have no legally binding force, but which nonetheless result in indirect legal effects).

68. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1), June 7, 2016, 2016 O.J. (C 202) 91 [hereinafter TFEU].

69. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM)*, at para. 23, COM (2012) 209 final (May 8, 2012) [hereinafter *Commission*].

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The prohibition on state aid derives from TFEU Article 107(1), which states that "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."[70] This Article provides that Member States may not, through Member State legislation or other use of Member State resources, provide a benefit to persons or industries which is not broadly available under generally applicable Member State law.[71] In the words of the European Commission, the state aid rules are intended to "ensure that . . . [the] internal market is not distorted by . . . favouring some actors to the detriment of others."[72] This anti-discrimination requirement forms the basis for the Commission's recent enforcement actions against multinational enterprises, as will be discussed later.

B. European Court of Justice Jurisprudence Regarding State Aid under Member State Tax Law

State aid may be found for any Member State measure which provides an advantage to a specific actor to the detriment of others, and tax rulings have long been considered within the ambit of this analysis.[73] ECJ case law provides for a four-prong approach to determining whether State Aid exists.[74] The alleged aid must be 1) financed by the State or through the use of state resources, 2) the alleged aid must provide an advantage to an undertaking, 3) it must be selective, and 4) it must affect trade between Member States and thereby distort competition.[75] Although all four elements must be proven to support a finding of state aid, in tax ruling cases, the alleged aid will always be provided by the State or through the use of state resources and in the case of the types of transfer pricing issues covered by the rulings recently challenged by the Commission, the rulings will affect trade between Member States in a way that could distort competition.[76]

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70. TFEU, *supra* note 68 at art. 107(1).

71. *See id.*

72. *Commission*, *supra* note 69, at para. 2.

73. *See* Case 30/59, De Gezamenlijke Steenkolenmijnen in Limburg v High Auth. of the European Coal & Steel Cmty., 1961 E.C.R. 1, 12, 14.

74. Joined Cases C-393/04 & C-41/05, Air Liquide Indus. Belg. SA v. Ville de Seraing, 2006 ECJ EUR-Lex Lexis 2045, para. 27–28, (June 15, 2006).

75. *Id.* at para. 28.

76. European Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 1, 37.

Because selectivity and advantage are present in some tax ruling cases, but may be lacking in others, this article focuses on those two factors.

1. Advantage

The first consideration in determining whether State Aid exists is whether the measure at issue provides an advantage to an undertaking.[77] The ECJ has not put forth a single concrete test for a finding of advantage in all scenarios. However, in *Forum 187,* the ECJ suggested that in some circumstances, the arm's length purpose may be an appropriate test for determining whether advantage exists.[78] Thus, the arm's length principle may be an appropriate measure for determining whether a measure constitutes a grant of state aid. The concept of advantage has been the subject of substantially less guidance by the ECJ than the concept of selectivity, likely because selectivity analysis requires several additional analytical steps with a degree of discretion.[79]

2. Selectivity is A Fundamental Component of a State Aid Finding

Selectivity is a separate element from advantage, and therefore must be proved separately to support a finding of state aid.[80] ECJ jurisprudence in the recent, *MOL Magyar* case clearly establishes the necessity to prove these two elements separately.[81] In *MOL Magyar,* the ECJ stated:

> the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings[82]

Although the ECJ went on to say that "[t]he identification of the economic advantage is, in principle, sufficient to support the presumption that it is . . . selective."[83] However, while advantage may

77. Joined Cases C-393/04 & C-41/05, Air Liquide Industries Belgium SA v. Ville de Seraing a.o., 2006 E.C.R. I-5307.

78. Joined Cases C-182/03 and C-217/03, Belgium & Forum 187 ASBL v. Comm'n of the European Cmtys., 2003 E.C.R. I-6890, para. 119.

79. Werner Haslehner, *The US Treasury White Paper on Transfer Pricing and State Aid*, KLUWER INTERNATIONAL TAX BLOG (Aug. 31, 2016), http://kluwertaxblog.com/2016/08/31/the-us-treasury-white-paper-on-transfer-pricing-and-state-aid/.

80. *Id.*

81. Case C-15/14 P, Comm'n v. MOL Magyar Olaj-és Gázipari Nyrt., 2015 E.C.R. 1, para. 47.

82. *Id.*

83. *Id.* at para 51.

give rise to a rebuttable presumption of selectivity, it is generally accepted that a finding of advantage does not obviate the requirement to separately determine whether the measure is also selective.[84] Additionally, scholars[85] and the ECJ Advocate General[86] have suggested that a presumption of selectivity is particularly inappropriate when analyzing income tax measures.

Similarly, in *Belgium and Forum 187 ABSL*,[87] the ECJ stated, under the heading "selectivity" that:

> According to settled case-law, [a state aid analysis] requires that it be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation. If so, the measure concerned fulfils the condition of selectivity which is a defining characteristic of the concept of State aid as set out by that provision[88]

Again, this provision clearly indicates that a separate finding of selectivity is critical to finding that a particular measure constitutes illegal state aid.

Therefore, selectivity is critical to determining whether a tax ruling constitutes state aid under ECJ case law. Furthermore, fundamentally, the requirement that a measure be selective is both compatible with and furthers the purpose of the prohibition on State Aid—where a measure confers an advantage on a particular actor, but that advantage is broadly available to all like individuals or enterprises, it simply represents a tax policy decision made by a Member State government to provide tax incentives for certain classes of individuals, entities, or industries.

3. Selectivity Analysis is A Three Step Test

The ECJ defines a three-step test for determining whether a particular measure is selective.[89] The three steps of this analysis are (1) the identification of an appropriate reference system, (2) as compared

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84. *See* Liz Lovdahl Gormsen, *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, 7 J. OF EUR. COMPETITION L. & PRAC. 369, 375 (2016) (noting that because economic advantage and selectivity are two separate conditions they require separate analyses).

85. *Id.* at 374–75.

86. Case C-66/14, Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz, 2015 E.C.R. 1, para. 114–15.

87. *See* Joined Cases C-182/03 and C-217/03, Belgium & Forum 187 ASBL v. Comm'n of the Euro. Cmtys., 2003 E.C.R. I-6890, para. 119 (appearing to rely on this case for the proposition that the Commission is not required to prove selectivity and advantage separately, and may instead simply prove a concept known as selective advantage).

88. *Id.*

89. *See* SPIRAMUS, INTRODUCTION TO EUROPEAN TAX LAW: DIRECT TAXATION para. 356, at 110 (Staringer C. Schuch et al. eds., 3rd ed. 2013).

to that reference system, whether the measure favors certain enterprises compared to similarly situated entities,[90] and (3) whether an otherwise selective measure can be justified based on the underlying logic of the tax system.[91] Thus, in order to find selectivity, the Commission must identify an appropriate reference system, show that a particular enterprise is favored by the measure at issue, and finally show that the measure, even if it is selective under the first two prongs of the test, is not otherwise internally consistent with the Member State's tax regime such that it may be said to be justified by the overall structure of that system.[92]

4. A Finding of Selectivity Requires Deviation from a Reference System and Advantage Compared to Similarly Situated Actors

In order for a measure to be considered "selective", it must provide a benefit to one undertaking which, "in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question" provides an advantage to the undertaking receiving the benefit in comparison to the other, similarly situated undertakings.[93] In order to determine whether a measure is selective, the first step is to determine the reference framework, the "common or 'normal' regime", under which the undertaking would have been treated without the presence of the disputed measure.[94]

Once the reference system is established, a measure is evaluated to determine whether it "derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation"[95] although such a derogation "justified by the nature or general scheme of the system of which it is part" is not considered a selective measure.[96] Thus, in order to establish selectivity, the measure must not only deviate from the established

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90. *See* Case T-308/00, Salzgitter AG v. European Commission, 2013 E.C.R. II-01933 ("State aid, within the meaning of European Union law, thus presupposes that, [1] *within the context of a particular legal system*, a State measure is such as to [2] *favour certain undertakings or the production of certain goods in comparison with others which are in a legal and factual situation that is comparable* in the light of the objective pursued by the scheme in question")(emphasis added).

91. Case C-173/73, Italy v. Comm'n, 1974 E.C.R. 710, 719.

92. Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Uinion, 2016 O.J. (C 262) 1,29.

93. Case C-88:03, Portugal v. Comm'n, 2006 E.C.R. I-7145, I-7166.

94. Paint Graphos, *supra* note 16, at para 49.

95. Paint Graphos, *supra* note 16, at para. 49 (citing Case C-88/03, Portugal v. Comm'n, 2006 E.C.R. I-7145, I-7115).

96. Case C-143/99, Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten, 2001 E.C.R. I-8384, at I-8396.

reference system but must also discriminate between similarly situated undertakings.

5. The Appropriate Reference System For Multinational Enterprises is Member State Tax Law

In identifying a reference system, the ECJ has typically considered the reference system to be the general law of taxation.[97] More recently, the ECJ specifically found that the appropriate reference system was the "ordinary or 'normal' tax system applicable in the Member State concerned"[98] which applies to a set of similarly situated actors. As will be discussed in more depth below, with regard to selecting the appropriate set of comparable entities, the reference system for evaluating a tax ruling provided to a multinational enterprises must, therefore, be the tax laws which apply to multinational enterprises in the Member State.[99] This rule is appropriate without regard to whether a Member State's tax law provides specific or different rules for the taxation of multinational enterprises, or subjects them to taxation in precisely the same manner as standalone domestic entities.[100]

Furthermore, nowhere does ECJ case law hold or suggest that the tax laws of other Member States or non-binding "soft law", which has not been given the force and effect of law in the particular Member State should be considered the reference system. This is particularly true in the case of direct taxation measures.[101] Thus, the appropriate reference system for determining whether the tax ruling practices at issue in the recent Commission assessments constitute state aid is the generally applicable Member State tax law in the Member State in which a particular ruling was granted.

6. The Appropriate Comparable Entities for Determining Selectivity are Similarly Situated Multinational

97. *See* Case C-88/03, Portugal v. Comm'n, 2006 E.C.R. I-7145, I-7167.

98. Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, para. 67.

99. Elly Van De Velde, *'Tax Rulings' in the Eu Member* States, DIRECTORATE GENERAL FOR INTERNAL POLICIES, EUR. PARL. DOC. (IP/A/ECON/2015-08) 33 (2015). Note, that in evaluating the broader regime applicable to multinational enterprises or a Member State's tax ruling practice, it may be appropriate to determine whether the entire *scheme* fits within the broader reference system of national tax law, or even national financial laws more generally. However, in evaluating whether Member State tax law or a particular tax ruling by a Member State tax authority provides illegal state aid to an entity, the appropriate reference system are the Member State tax laws which apply to like entities. STUART ADAM ET AL., IFS Green Budget 179 (2007).

100. STUART ADAM ET AL., IFS Green Budget 179 (2007).

101. Case T-308/00, Salzgitter AG and Germany v. Comm'n, 2004 E.C.R. II-01933.

Enterprises in the Member State

In a recent case prior to the recent Commission enforcement activity against multinational enterprises and Member State tax ruling practices, the ECJ ruled that the appropriate reference system against which to compare the treatment of a multinational enterprise is the treatment of other similarly situated multinational enterprises in the Member State.[102] The lack of prior ECJ case law in this area may be attributed to the recent change in practice by the Commission to argue that multinational enterprises should be compared to standalone enterprises located in the Member State (as described below).[103] Because the Commission did not previously assert that such entities were in a comparable factual and legal situation, the ECJ has had few opportunities to rule on this issue. Thus, in order to sustain an assessment for a grant of state aid, the Commission must show that the multinational enterprise that was the alleged recipient of impermissible aid received an advantage that was selective compared to that available to similarly situated multinational enterprises in the Member State.[104]

Although the ECJ recently found that a tax measure which provided a tax advantage to Spanish resident companies with certain 5% or greater investments in foreign organizations in *Commission v. World Duty Free Group SA*,[105] may have been selective and referred the case back to the EGC, the ECJ emphasized the comparability of the "factual and legal situation" faced by all *resident* companies.[106] The ECJ does not compare the resident companies with comparably sized non-resident companies, or non-resident companies within the same industry.[107] Thus, this decision, although it finds that there may be selectivity based on the investment decisions made by resident companies is consistent with a selectivity analysis which compares the recipient of an alleged measure of state aid to other undertakings with the same residence status.[108]

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102. STUART ADAM ET AL., IFS Green Budget 179 (2007).

103. Commission Decision 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 implemented by Belgium, 2016 O.J. (L 260) 79.

104. *Id.*

105. *See* Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, paras. 41, 89-90. This ECJ decision overturned an EGC decision (*Autogrill Espana, SA v. Commission*, Case T-219/10, ECLI:EU:T:2014:939) which had initially overturned a Commission Decision finding that the tax preference at issue was a grant of state aid because the tax preference was available to all taxpayers without a substantial financial commitment (Case T-219/10, Autogrill España, SA v. Comm'n, ECLI:EU:T:2014:939,paras. 55-57).

106. Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, para. 79.

107. *See generally id.*

108. *Id.* at para. 60.

Even the *Gibraltar* case, which the Commission cites in several of its Decisions, does not stand for the proposition that multinational enterprises should be compared to domestic standalone companies when determining whether selectivity exists.[109] Although the ECJ ultimately found that Gibraltar's entity taxation, which consisted of a payroll tax and a tax on occupying business property,[110] favored offshore companies to the detriment of domestic companies, it does not stand for the proposition that the appropriate comparison for multinational enterprises are standalone entities resident in the Member State whose tax system is at issue.[111] The ECJ clearly bases its selectivity analysis on the fact that the tax regime at issue applies to *all* enterprises,[112] unlike a tax regime which solely addresses transfer pricing, and can therefore only be applied to integrated enterprises with more than one entity making transfers or sales amongst themselves; that the domestic entities are not distinguishable from foreign entities, because both are taxed on the same nominal basis, which acts to discriminate against domestic entities because the measure of taxation (number of employees and space occupied) will, by its operation, exempt non-resident entities from taxation.[113] In fact, the ECJ explicitly recognizes that the reason why comparison of domestic entities to foreign entities is because both are taxed on the same basis.[114] This is unlike the situation in which a multinational entity is taxed (in part) on the basis of its transfer pricing arrangements—multinational entities are uniquely capable of entering into transfer pricing agreements, and

109. Joined Cases C-106/09 P & C-107/09, Comm'n and Kingdom of Spain v. Gov't of Gib. and U.K. of Gr. Brit. and N. Ir., 2011 E.C.R. I-11157, I-11158.

110. *Id.* at I-11121.

111. This tax regime, by its nature, favors companies that do not occupy property in Gibraltar and which do not have employees in Gibraltar. In that case, the entity would be entirely exempt from both taxes, even if it earned substantial income from business activities conducted in Gibraltar. *See id.*

112. *Id.* at I-111211. ("It should be noted in that respect that, contrary to what the General Court held with regard to recitals 143, 144 and 150 of the contested decision, it is apparent from those recitals that the Commission examined the existence of selective advantages for offshore companies in the light of the tax regime at issue, which formally applies to all undertakings. It is thus apparent that the contested decision identifies that regime as a reference framework in relation to which offshore companies are, in fact, favoured.").

113. *Id.* at I-11212. ("In view of the features of that regime, outlined in the preceding paragraph, it is apparent that the regime at issue, by combining those bases, even though they are founded on criteria that are in themselves of a general nature, in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar.").

114. *Id.* at I-11213. ("Thus, the fact that offshore companies, which constitute a group of companies with regard to the bases of assessment adopted in the proposed tax reform, avoid taxation precisely on account of the specific features characteristic of that group gives reason to conclude that those companies enjoy selective advantages.").

cannot be said to be in a comparable legal and factual situation to a standalone entity within a single Member State.

Therefore, under current European Court of Justice case law, whether a measure is selective with regard to a multinational enterprise appears to be determined based on whether it favors a particular multinational to the disadvantage of other, similarly situated multinational firms.[115] This rule, derived from ECJ jurisprudence, also comports with the state aid framework, as multinational or non-resident firms cannot truly be said to be in the same factual and legal situation as non-multinational or resident companies.[116] Thus, in order to determine whether the tax rulings challenged by the Commission should be considered state aid, the ECJ must determine whether those tax rulings provided an advantage to the recipients of those rulings which was not available under generally applicable member state tax law to similarly situated multinational enterprises in those Member States.[117]

C. Prior European Commission State Aid Determinations Establish Similar Standards to ECJ Case Law

Although prior European Commission state aid determinations are not precedential, they do help illustrate Commission practice and how the Commission has previously interpreted the requirements that must be met for a measure to be considered "state aid". As noted above, the Commission has previously considered selectivity and advantage to be separate prongs of the state aid analysis, and has recognized that both selectivity and advantage must be separately proven as recently as 2016.[118] The Commission defined advantage as "any economic benefit which an undertaking could not have obtained under normal market conditions."[119] The advantage must be granted "in a selective way to certain undertakings or categories of undertakings or to certain economic sectors."[120]

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115. Commission Notices on the Notion of State aid as Referred to in Article 107(1) of the Treaty on the functioning of the European Union, 2016 O.J. (C 262) 1, 37.

116. The simplest illustration of this principle is transfer pricing: an entity resident in a single EU Member State would not engage in transfer pricing to determine the income sourced to that Member State, because transfer pricing in that context requires that there be more than one controlled or related enterprises which exchange goods or services at an agreed-upon transfer price. Comparing the transfer pricing practices and methodologies employed by a non-resident multinational entity to a resident company would be impossible, because the resident company would not have the same type of transfer pricing activity.

117. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 4.

118. Notices from the European Institutions, Bodies, Offices, and Agencies, 2016 O.J. (C 262) 1, 3.

119. *Id.* at 15.

120. *Id.* at 27

Similarly, in a Commission decision regarding the *Dutch Groepsrentebox*[121] tax preference, the European Commission found that the *Dutch Groepsrentebox* tax measure, under which intra-group loans among related companies were subject to lower taxation was not selective because:

> stand-alone companies that are not credit or financial institutions are in principle not engaged in the regular business of granting loans to independent parties, they are not discriminated against with regard to loan transactions, as compared with related companies granting loans to affiliated companies.[122]

At its core, the rationale in the *Groepsrentebox* decision is similar to that which would be applied to transfer pricing activities engaged in by multinational enterprises: when measuring selectivity of a given measure, if a group of enterprises possesses a unique ability to engage in a particular activity, selectivity is measured with regard to members of that group, not all firms in the market, without regard to their ability to engage in that activity.

Finally, the Commission found in a 2010 decision (the *Hungarian Inter-Group Interest* decision) that the appropriate comparison to determine whether a measure which solely affects multinational enterprises is selective is the universe of similarly situated multinational enterprises, rather than companies which only have presence in a particular Member State.[123] In particular, the Commission found (under a similar rationale to that used in the *Groepsrentebox* decision) that intercompany loans are not comparable to loans between unrelated entities, because "[w]ith respect to debt financing activities, related companies are not in a comparable legal and factual situation with unrelated companies."[124] Much like the *Groepsrentebox* decision, the *Hungarian Inter-Group Interest* decision supports the notion that with regard to transfer pricing, related companies cannot be said to be in a comparable legal and factual system to unrelated companies.[125]

Thus, prior to the recent Commission assessments regarding state aid in the context of Member State tax ruling practices, the requirement to separately prove advantage and selectivity of that advantage appears to have been a non-controversial and generally accepted pre-requisite

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121. Commission Decision of 8 July 2009 On The Groepsrentebox Scheme Which The Netherlands Is Planning To Implement (C 4/07 (ex N 465/06)), 2009 O.J. (L 288) 26 [hereinafter Groepsrentebox Decision](Groepsrentebox translates to "group interest box" in English. It refers to a particular type of inter-company loan permitted under Dutch law with tax-advantaged consequences).

122. *Id.* at 36.

123. Commission Decision of 28 October 2009 on State Aid C10/07 Implemented By Hungary For Tax Deductions For Intra-Group Interest, 2010 O.J. (L 42) 3, 8.

124. *Id.* at 15.

125. *Id.*

to a finding of state aid.[126] In particular, the Commission appears to have recognized that related companies forming a part of a multinational group are not in a comparable legal and factual situation to unrelated companies.[127] In addition to the support for this approach in prior Commission decisions, it also comports with generally accepted principles of corporate law and practice—related companies are both treated differently under numerous non-tax legal provisions, and relationships between related multinational entities will necessarily involve higher levels of certainty, trust, transparency, collaboration, and interest alignment than relationships between unrelated entities due to the shared management structure and activities.[128] Any of these considerations could justify rational differences in tax law treatment of transactions between multinational enterprises and standalone Member State entities.

V. THE EUROPEAN COMMISSION HAS ISSUED SEVERAL RECENT ASSESSMENTS FINDING ILLEGAL GRANTS OF STATE AID WHICH HAVE BEEN CHALLENGED BY THE AFFECTED MEMBER STATE AND THE BENEFICIARY OF THE ALLEGED STATE AID

As noted above, following US Senate investigations into US multinational tax practices and the LuxLeaks scandal exposing tax rulings granted by the government of Luxembourg to multinational enterprises which allegedly provided unfairly reduced tax rates to those organizations, the European Commission opened a number of investigations into the tax practices of multinational enterprises.[129] These investigations have resulted in several assessments by the Commission against multinationals, and appear to be based on a new theory of state aid developed by the Commission.[130] Each assessment has been subsequently appealed by the Member State at whom the assessment was directed, as well as the multinational enterprise which allegedly received illegal state aid.[131]

This section will briefly outline each decision and the Commission's apparent new theory on state aid, before discussing the appeals of each assessment by Member States and multinational

126. *Id.* at 14.

127. *Id.* at 15.

128. *See* Org. for Econ. Co-Operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* 5, 11–12 & 21–22 (June 2000).

129. European Commission Press Release IP/16/2923, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion (Aug. 30, 2016).

130. Commission Regulation 651/2104, 2014 O.J. (L 187) 1,2 (EU).

131. Christian Grobecker, *The Commission's Notice on State Aid and the Tax Ruling Cases: Clarification or Justification?*, KLEWER COMPETITION LAW BLOG (July 15, 2016), http://kluwercompetitionlawblog.com/2016/07/15/the-commissions-notice-on-state-aid-and-the-tax-ruling-cases-clarification-or-justification/.

enterprises. This section, and the remainder of this article, will focus on these Decisions and an analysis of the common legal issues and themes contained therein, with additional attention devoted to the Apple Decision and subsequent appeal for several reasons—in part because the assessment was by far the largest assessment issued by the Commission, and in part because it provides the case which provides the clearest test case to evaluate the Commission's new arm's length principle based test for selective advantage.[132]

A. The European Commission's and the Arm's Length Principle in its Recent State Aid Decisions

Prior to discussing each of the recent state aid decisions and assessments by the Commission, it is critical to understand the arm's length principle, the Commission's apparent implementation and use of that principle in the decisions at issue, how it differs from the OECD framework on which the arm's length principle is based, and why the arm's length principle may not be an appropriate measure for determining advantage in the context of at least some of the rulings recently challenged by the Commission.

In general, the arm's length principle in the context of tax law and transfer pricing can be summarized as the principle that a transfer pricing agreement executed between two related entities should result in approximately the same tax consequences to related parties as would have been achieved had those parties dealt at arm's length.[133] While the Commission starts from this framework, based on the generally accepted formulation of the arm's length principle contained in Article 9(1) of the OECD Model Tax Convention it both departs from OECD guidance and introduces an entirely new factor to the arm's length principle analysis.

The Commission relies heavily on the arm's length principle derived from Article 9(1) of the OECD Model Tax Convention,[134] which is referenced in the OECD Transfer Pricing Guidelines[135] as the appropriate standard for determining whether a transaction is conducted at arm's length. However, while those guidelines refer to the arm's length principle contained in the Model Tax Convention as an appropriate method of evaluating a transfer pricing agreement, the

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132. Ivana Kottosova, *EU hits Apple with $14.6 Billion tax bill*, CNN MONEY (August 30, 2016), http://money.cnn.com/2016/08/30/technology/apple-tax-eu-us-ireland/index.html.

133. Christian Bauer & Dominika Langenmayr, *Sorting into Outsourcing: Are Profits Taxed at a Gorilla's Arm's Length?*, 90 J. INT'L ECON. 326–27 (2013).

134. Articles of the Model Convention With Respect to Taxes On Income and On Capital, Jan. 28, 2003, OECD Tax Convention, 11, 12.

135. Org. for Econ. Co-Operation and Dev. [*OECD*], *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 31* (July 2010).

guidelines appear to anticipate that the arm's length principle will be used flexibly—to "estimate[e]" or "approximat[e]" the transfer pricing outcome, without providing for a precise or formulaic result.[136] The Commission, however, applies the arm's length principle rigidly,[137] ostensibly on the basis that the ECJ, in *Belgium and Forum 187 ABSL* endorsed analysis of transfer pricing agreements by reference to the arm's length principle in determining whether advantage existed.[138] Arguably, in *Belgium and Forum 187 ABSL,* the ECJ suggested that in some circumstances, the arm's length purpose may be an appropriate test for determining whether advantage exists.[139]

There are two flaws with the Commission's application of the arm's length principle. First, the Commission's argument that the ECJ clearly endorsed use of the arm's length principle in determining whether a transfer pricing agreement constituted an advantage which could give rise to a finding of state aid is flawed. In *Belgium and Forum 187 ABSL,* the ECJ did not clearly endorse the use of the arm's length principle to determine whether state aid had been granted—rather, the ECJ stated that the transfer pricing agreement should *resemble* the prices that would be charged in conditions of free competition.[140] *Belgium and Forum 187 ABSL* also contained a minimum size requirement for coordination centers that were part of a multinational group to qualify for the tax preference,[141] which introduced an element of discrimination not present in any of the instant cases. Nowhere does the ECJ explicitly endorse the use of the arm's length principle, nor does the ECJ state or imply that its holding is generalizable to all situations. Secondarily, the arm's length principle as expressed in the OECD Model Tax Convention and referenced in the OECD Transfer Pricing Guidelines are not binding law unless incorporated into the national law of the Member States at issue.[142] These guidance documents are intended to guide national

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136. *Id.* at 35–6.

137. *See, e.g*, Fiat Decision, *supra* note 4, at paras. 216–231. (arguing that the Commission finds that the appropriate reference system is Luxembourg corporate tax law, the Commission uses the arm's length principle to determine that the ruling at issue provides a selective advantage to Fiat by failing to provide for a transfer pricing methodology which approximated the results which would have occurred if similar transactions had been made by two unrelated entities. This analysis is similar to that conducted in the Commission Decisions regarding state aid granted to Starbucks and Apple. In each, the Commission refers to Member State law regarding corporate taxation as the reference system, but overlays its arm's length principle analysis in finding that despite apparent compliance with the provisions of generally applicable Member State law, the rulings at issue constituted a grant of state aid because they did not fit within the framework of the Commission's arm's length principle analysis.)

138. *See id.* at para. 223 (quoting Belgium and Forum 187 ASBL v. Comm'n).

139. Belgium and Forum 187 ABSL v Commission, 2006 E.C.R. I-5609–10.

140. *Id.*

141. *Id.* at I-5587.

142. Liza Lovdahl Gormsen, *Has the Commission Taken Too Big a Bite of the Apple?*, 1 EUROPEAN PAPERS, no. 3, 2016, at 1137, 1140.

legislative bodies (including those of Member States) in adopting national tax measures, but have no force and effect within a Member State if not adopted into a Member State's national law, and have no force and effect between Member States if not adopted into a Member State's double-taxation treaties.[143] Some Member States have not adopted the arm's length principle into national law, and others, such as Ireland, had not adopted that principle at the time of the tax rulings at issue.[144] Finally, there is no indication in Article 107(1) TFEU that a finding of state aid may be based upon failure of a fiscal measure to any legal principle, other than the prohibition on discrimination, when such principle is not a part of Member State law.[145]

Finally, as others have noted,[146] the Commission introduces the concept of a "prudent independent operator"[147] for the purpose of comparing the transfer pricing arrangement to determine whether the transfer pricing agreement approximates a transaction entered into at arm's length. This approach is not contained anywhere in OECD guidance and although it appears intended to facilitate a more mechanical approach to analyzing whether a transaction approximates one entered into at arm's length, it instead introduces additional ambiguity in the Commission's arm's length principle approach by departing from the established approach under the OECD Model Tax Convention and introducing another area in which the Commission's discretion[148] (rather than principles of Member State law and the TFEU) may ultimately determine whether the Commission finds that state aid was granted. Furthermore, the prudent independent operator test rests on a fundamentally flawed assumption—that it is possible to identify a

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143. *Id.* at 1138–40.

144. *Ireland*, PRICEWATERHOUSECOOPERS, www.pwc.com/gx/en/international-transfer-pricing/assets/ireland.pdf (last visited Sept. 30, 2017).

145. TFEU, *supra* note 68, at art. 107(1).

146. *See* Liza Lovdahl Gormsen, *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, 7 J. EUR. COMPETITION L. & PRAC., no. 6, 2016, at 369, 371.

147. *See, e.g.*, Council Common Position (EC), State Aid — Luxembourg State aid SA.38375 of 17 Oct. 2014, 2014 O.J. (C 369) 1, 21 ("Thus, where an APA concerns transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted.").

148. See Murray Clayson, The Recognition of the Effect of Passive Association on Controlled Transactions for Transfer Pricing Purposes 87 n. 242 (Jan. 29, 2016) (unpublished Ph.D thesis, University of London) (on file with Houston Business and Tax Law Journal).In the case of the "prudent independent operator" test, the Commission has given itself the de facto power to set the reference framework by which *advantage*, will be judged, by developing a standard which requires reference to a hypothetical "prudent independent operator" to determine whether a transfer pricing agreement approximates an arm's length transaction. If the Commission Decisions on the alleged aid granted to Starbucks, Fiat, and Apple are any indication, the Commission appears likely to find a grant of state aid in any case in which the transfer pricing agreement provides for a tax calculation methodology, which even if compliant with Member State tax law, contradicts the Commission's policy positions at the time of the Commission Decision. *Id.*

single comparable actor against which to measure a questioned transfer pricing agreement, rather than evaluating the transfer pricing agreement with reference to a range of potential outcomes, in accordance with OECD transfer pricing guidance.

Thus, while the Commission focuses on applying the arm's length principle to determine whether an advantage has been granted in each of the five Commission Decisions discussed below, it is at best unclear whether the arm's length principle ought to apply if not adopted by the Member State that allegedly granted aid, and it is more likely that such principle is unenforceable unless explicitly adopted by the Member State. This follows from the arm's length principle's status as OECD *guidance*, used for drafting double taxation treaties and interpreting Member State transfer pricing laws and regulations *if* such laws and regulations adopt the arm's length principle.[149] Additionally, even if the arm's length principle were an appropriate framework to analyze transfer pricing and related rulings, the Commission's addition of an additional criteria (the prudent independent operator) to the generally accepted arm's length principle analysis calls into question whether the Commission's analysis could be sustained by the ECJ without re-examination under the traditional arm's length principle framework.

B. The European Commission's Five Recent Decisions Regarding the Grant of State Aid through Tax Ruling Practices

In five recent rulings, the European Commission has alleged that state aid was granted through the provision of various advance pricing agreements (APAs) issued by EU Member States.[150] The theory on which the Commission relies in finding that, in the four cases in which final Commission Decisions have been issued, state aid was granted through the APA(s) at issue, is based on an application of the arm's length principle contained in non-binding OECD guidance, as interpreted by the Commission overlaid on Member State tax law, without regard to whether the Member State has implemented the arm's length principle in its national tax legislation.[151]

1. The Commission's Starbucks Decision

On October 21, 2015, the European Commission published the first two decisions in its recent state aid enforcement effort—one against

149. Org. for Econ. Co-Operation and Dev. [*OECD*], *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 34* (July 2010).

150. *The European Commission's Application of the State Aid Rules to Tax – Where Are We Now?* https://www.sullcrom.com/siteFiles/Publications/SC_Publication_State_Aid_and_Tax_January_17_2017.pdf (Last visited September 26, 2017).

151. *Id.*

Starbucks for alleged state aid granted to it by the Netherlands[152] and one against Fiat[153] for alleged state aid granted to it by Luxembourg. The Starbucks decision was based on an APA[154] in which the profit of SMBV, a subsidiary of Starbucks was determined by reference to an agreed upon markup on costs[155] and royalty payment calculation methodology.[156]

In finding state aid, the Commission, as it does throughout each of the decisions discussed herein, collapses the concepts of "selectivity" and "advantage" into a single concept, "selective advantage."[157] The Commission considered the reference system to be the broad Dutch corporate tax system, rather than the provisions of Dutch law which deal with similar multinational enterprises[158]—despite recognizing explicit differences in the way that the Dutch corporate tax system treats resident vs. non-resident companies[159] and integrated (multinational) vs. standalone domestic companies.[160] The Commission reconciles this stance by stating that the:

> difference in determining the taxable profits of non-integrated companies, i.e. those not belonging to a corporate group and thus "standalone", and integrated companies, i.e. those belonging to a corporate group, has no bearing on the objective of the Dutch corporate income tax system which aims to tax profits of all companies subject to tax in the Netherlands[161]

and argues that the seeming contradiction of the Commission's *Groepsrentebox* Decision can be explained by the lack of precedential value of Commission decisions and the Commission's belief that despite the integrated nature of Starbucks and SMBV, SMBV could, theoretically

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152. Starbucks Decision, *supra* note 5.

153. Fiat Decision, *supra* note 4.

154. Starbucks Decision, supra note 5 at para. 41. In the words of the Commission, " An APA is an agreement between a tax administration and a taxpayer on the application of tax law regarding (future) transactions, i.e. it determines the amount of profit that the taxpayer generates from its activities that are taken into account in that tax jurisdiction. An APA determines, in advance of intra-group transactions, an appropriate set of criteria (e.g. method, comparables, and appropriate adjustments thereto, critical assumptions as to future events) for the determination of an arm's length pricing for those transactions over a fixed period of time. An APA is formally initiated by a taxpayer." *Id.*

155. Including "all personnel costs engaged in both manufacturing and supply chain activities, the cost of production equipment (i.e. depreciation) and plant overheads. It does not include the costs of the Starbucks cups, paper napkins, etc., the costs of green coffee beans (cost of raw materials), the logistics and distribution cost for services provided by third parties, the remuneration for activities provided by third parties under so-called "consignment manufacturing contracts" and the royalty payments to Alki LP." *Id.* at para. 43.

156. *Id.* at paras. 43–44.

157. *Id.* at para. 229.

158. *Compare id.* at para. 232 *with id.* at para. 251.

159. *Id.* at para. 232.

160. *Id.* at para 235.

161. *Id.* at para. 236.

offer similar services to the market, unlike the entities at issue in the *Groepsrentebox* Decision.[162] Once it identified the reference system as the general Dutch corporate tax system, the Commission analyzed the APA for selective advantage by collapsing the required findings of selectivity and advantage[163] and found that, under the Commission's conception of the arm's length principle, the ruling in question granted state aid to Starbucks by providing a selective advantage to Starbucks, by and through SMBV.[164] This analysis (whereby the Commission summarily identifies the general national tax system as the reference system, collapses the concepts of selectivity and advantage, and then finds that state aid is granted through a selective advantage to a particular multinational enterprise) is repeated, in one form or another, throughout the Commission Decisions discussed herein which deal with APAs granted to a specific multinational enterprise.

2. The Commission's Fiat Decision

In *Fiat,* much like in *Starbucks*, the Commission found state aid on the basis of an APA granted by a Member State (in this case, Luxembourg) to a member of a multinational group (in this case, Fiat Finance and Trade Ltd, or "FFT") on the basis that the transfer pricing agreement approved by the Member State in the APA at issue did not comply with the arm's length principle as applied by the Commission.[165] As in *Starbucks*, the Commission found that the appropriate reference system was the general corporate taxation law of the Member State at issue (rather than Member State corporate taxation law as applied to multinational enterprises),[166] collapsed the concepts of selectivity and advantage into a single selective advantage analysis[167] and found that a selective advantage was granted on the basis that the transfer pricing calculation did not meet the Commission's arm's length principle test.[168]

3. The Commission's Apple Decision

The *Apple Decision* has garnered the most press, likely in part due to the size of the assessment issued by the Commission, but also due to the response the *Apple Decision* received from Apple, Ireland, and even

162. *Id.* at paras. 238–44.

163. *See, e.g., id.* at para. 253. ("In relation to that second step of the selectivity analysis, whether a tax measure constitutes a derogation from the reference system will generally coincide with the identification of the advantage granted to the beneficiary under that measure.").

164. *Id.* at paras. 415–16.

165. Fiat Decision, *supra* note 4 at para. 301.

166. *Id.* at para 209.

167. *See id.* at para. 186.

168. *Id.* at para. 276.

the US Treasury department.[169] Despite the attention received, the Commission's reasoning in the *Apple Decision* rests on similar grounds as the *Starbucks* and *Fiat* decisions.[170] However, despite these similarities, there are also a number of differences arising from the Commission's secondary rationale and challenges thereto.

a. Background

In 1991 and 2007, the Irish tax and customs administration agency ("Irish Revenue") issued tax rulings to ASI and AOE regarding the appropriate allocation of profit to their Irish branches.[171] Under these rulings, ASI and AOE determine the profit generated by their respective Irish branches through transfer pricing agreements based on two separate versions of modified branch operating costs,[172] modified branch operating expenses,[173] or branch operating costs plus an intellectual property return based on branch turnover.[174] Although little additional detail beyond the percentages and multipliers for each element of the profit calculation methodology is given in the Commission Decision is given, there is some variability in the transfer pricing methodologies endorsed by Irish Revenue, even with regard to the same entities.

One feature of Apple's corporate structure which may have motivated the Commission's assessment, and which is likely to be at issue in the ensuing litigation is the lack of true tax residence by ASI and AOE, resulting in a very low total corporate tax burden borne by both entities.[175] However, this status is a function of generally applicable Irish and US tax law—as the Commission recognizes, while companies incorporated in Ireland are generally subject to Irish taxation on worldwide income, companies which are ultimately controlled by persons resident in a country with which Ireland has executed certain tax treaties, were taxable only on their Irish-sourced profits.[176] Thus, without regard to the ultimate effective tax rate paid in Ireland by ASI and AOE, their treatment as non-resident companies, taxable only on their Irish-sourced income is in accord with generally accepted principles of Irish corporate tax law.

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169. *See* Ivan Kottasova, *EU hits Apple with $14.6 Billion tax bill*, CNN MONEY (Aug. 30, 2016), http://money.cnn.com/2016/08/30/technology/apple-tax-eu-us-ireland/index.html.

170. Emmanuel Llinares & Guillaume Madelpuech, *Apple and the CCCTB: Can the European Commission Have Both?*, 85 TAX NOTES INT'L 557–58 (2017).

171. Apple Decision, *supra* note 6 at para. 39.

172. *Id.* at paras. 59–60 (summarizing the 1991 and 2007 APAs provided to ASI).

173. *Id.* at para. 61. (summarizing the 1991 APA provided to AOE).

174. *Id.* at para. 62. (summarizing the 2007 APA provided to AOE).

175. *Id.* at para. 276.

176. *Id.* at paras. 48–49.

The Commission presented two rationales for its finding of selective advantage and resulting assessment, both of which rest upon a claim that Ireland improperly failed to apply the arm's length principle to the profit allocation methodologies proposed by Apple which Irish Revenue endorsed in ruling.[177] The first rationale was that the method for profit allocation to ASI's and AOE's Irish branches, based primarily on branch operating costs or expenses, reduced their tax burden compared to non-integrated companies, providing them with a selective advantage over other companies.[178] The second was that the profit allocation methodologies endorsed by Irish Revenue in those rulings granted a selective advantage to Apple even as compared to other similarly situated Irish non-resident companies operating through a branch because the rulings at issue do not comply with the arm's length principle.[179]

The Commission's first rationale is based on a theory that treatment of intellectual property under Irish tax law prior to 2010 (when Ireland adopted the arm's length principle in its national law)[180] provided a selective advantage to Apple because, as an integrated company, ASI and AOE were able to benefit from Apple intellectual property licenses without the value of such intellectual property being sourced to Ireland,[181] and in the alternative, even if Apple intellectual property licenses were allocated outside of Ireland, that the tax rulings in question undervalued the functions performed by the Irish branches of ASI and AOE.[182] Thus, in the *Apple Decision*, the Commission challenges not only the underlying legal framework present in Ireland at the time of the challenged APAs and Irish Revenue's ability to provide the rulings at issue, but also the substantive methodology used by Apple and approved by Irish Revenue in arriving at the transfer pricing arrangements approved in the APAs.[183]

The Commission's second rationale—that Apple was granted a selective advantage under Irish tax law based on the rulings provided to its subsidiaries by Irish Revenue as compared to other multinational enterprises—contains additional inconsistencies.[184] The Commission cites a number of Irish tax rulings, and paraphrases eleven of those rulings within its decision.[185] In analyzing those rulings, the Commission states that based on the rulings analyzed "the Commission was unable

177. *See id.* at para. 408.
178. *Id.* at para. 361.
179. *Id.* at para. 403.
180. *Id.* at para. 78.
181. *Id.* at para. 264.
182. *Id.* at para. 325.
183. *See id.*
184. *See id.* at para. 383.
185. *Id.* at paras. 385–95.

to identify any consistent set of rules that generally apply [to allocate taxable profits to Irish branches of non-resident companies]"[186] and "the choice of methods [for allocating taxable profits to Irish branches of non-resident companies] is not systematic even where the activities being described are similar."[187] The Commission summarily concludes that because:

> [N]o consistent criteria are applied to determine the allocation of profits to Irish branches of non-resident companies . . . the contested tax rulings were issued on the basis of Irish Revenue's discretion in the absence of objective criteria related to the tax system and that, therefore, those rulings should be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty[188]

The Commission argues that this result follows because Ireland has argued that the arm's length principle does not apply under the provisions of Irish tax law applicable to similarly situated multinational enterprises, and that therefore, in the absence of alternative, objective criteria, the rulings at issue give rise to a presumption of state aid,[189] although Commission cites no authority for this proposition. Thus, the Commission's subsidiary argument is, in essence, that if the Commission is not permitted to use the arm's length principle to evaluate a Member State tax law for an illegal grant of state aid, the Commission may shift the burden to the Member State to prove that *objective* criteria for issuing APAs exist.

b. The Commission's Legal Analysis in its Primary Rationale Suffers from the Same Issues Identified in the Fiat and Starbucks Decisions

As in both *Starbucks* and *Fiat*, the Commission found that the appropriate reference system was the general corporate taxation law (rather than Irish corporate taxation law as applied to non-resident companies),[190] although, as discussed below, the Commission did also argue that state aid had been granted even if the appropriate reference system were Irish corporate taxation law applicable specifically to non-resident companies such as ASI and AOE.[191] Additionally, the Commission once again collapsed the concepts of selectivity and advantage into a single selective advantage analysis[192] and found that a

186. *Id.* at para. 383.
187. *Id.* at para. 397.
188. *Id.* at para. 403.
189. *Id.* at para. 381.
190. *Id.* at paras. 245, 361.
191. *Id.* at para. 261.
192. *See id.* at para. 258.

selective advantage was granted on the basis that the transfer pricing calculation did not meet the Commission's arm's length principle test, resulting in an impermissible grant of state aid.[193]

c. The Commission's Second Rationale in the *Apple Decision* Contains Additional Flaws Not Addressed in the *Fiat* and *Starbucks Decisions*

The Commission's second rationale does not appear to support a finding of state aid to Apple without additional evidence; rather, it illustrates the difficult, unique and nuanced tax issues that revenue authorities must consider when issuing tax rulings and the impossibility of comparing or applying tax rulings to even slightly different sets of facts and circumstances. In particular, in the case of transfer pricing agreements, the OECD provides mere *guidance*, rather than strict methodological requirements, and provides for five[194] different calculation methodologies depending the specific facts and circumstances present, and there does not appear to be any ECJ case law which supports the proposition that tax measures must always be based on a mechanical, objective set of criteria. By requiring a set of objective criteria, the Commission would essentially ensure that *any* transfer pricing APA would be an illegal grant of state aid. Despite the information provided in the *Apple Decision* regarding the tax rulings evaluated by the Commission, it is unclear whether the differences in profit allocation methodologies may have been based on legitimate differences both among the firms to which rulings were granted, and between any one or more of those firms and ASI and AOE. This result departs substantially from the state aid framework, which seeks to prevent discriminatory provisions from favoring one enterprise or industry to the detriment of other enterprises or industries—not to require that tax laws provide rigid standards for evaluating every transaction.[195]

In sum, the Commission's proposed requirement for objective criteria does not appear to be supported by ECJ case law or prior Commission Decisions, and would create an impossible hurdle for tax authorities in many areas of tax law in which discretion is both necessary and desirable. Although a lack of objective criteria may be one *factor* in determining whether to initiate an investigation, given the potential of abuse in areas lacking a means of objective measurement, there is no support for the proposition that a lack of objective criteria

193. *Id.* at para. 361.

194. Org. for Econ. Co-Operation and Dev. [*OECD], OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 59* (July 2010)(explaining the five methods, which are the comparable uncontrolled price method; the cost plus method; the resale minus method; the transactional net margin method; and the transactional profit split method.

195. *See Commission*, *supra* note 69, at para. 2.

can, itself, support a finding of state aid without proof of both selectivity and advantage to a particular enterprise.

4. The Commission Decision Regarding the Belgian Tax Ruling Practice

Although the *Belgium Decision* by the Commission deals with the entire tax ruling practice of a Member State, rather than a particular tax ruling or series of tax rulings issues to a multinational enterprise, it contains several interesting elements which are worth considering in the context of the Commission's recent enforcement activities and advantage and selectivity analysis. On January 11, 2016, the Commission issued a decision finding that the "excess profit tax ruling system" in Belgium constituted an illegal grant of state aid because the scheme "gives rise to a reduction of charges that should normally be borne in the course of their annual business operations."[196]

The "excess profit tax ruling system" permits

> Belgian resident companies that are part of a multinational group and Belgian permanent establishments of foreign resident companies that a part of a multinational group (hereinafter: "Belgian group entities") to reduce their tax base in Belgium by deducting from their actually recorded profit so-called "excess profit"…[calculated by] estimating the hypothetical average profit that a standalone company carrying out comparable activities could be expected to make in comparable circumstances and subtracting that amount from the profit actually recorded by the Belgian group entity in question.[197]

To benefit from this exemption, the entity must receive an advance tax ruling from the Belgian tax authority.[198]

The Commission cited to various provisions of Belgian tax law addressing corporate taxation and the advance tax ruling practice,[199] the OECD Model Tax Convention and Transfer Pricing Guidelines, including the arm's length principle set fort therein before criticizing the use of the TNMM methodology.[200] The Commission then discusses the functioning of the "excess profit tax ruling system", and the entities which received such rulings.[201] The Commission did not separately analyze selectivity and advantage, instead once again combining the two concepts into a single concept of selective advantage,[202] and finding

196. Belgium Decision, *supra* note 9, at para. 188.
197. *Id.* at para. 13.
198. *Id.* at para. 13.
199. *Id.* at paras. 22–46.
200. *Id.* at paras. 58.
201. *Id.* at paras. 59–68.
202. *Id.* at paras. 118–182.

selective advantage because the excess profit tax ruling system "grants Belgian group entities benefitting from the contested scheme a selective advantage for the purposes of Article 107(1) of the Treaty by exempting a part of their profit actually recorded from Belgian corporate income tax"[203], despite the fact that the ruling practice merely reduced multinational firms' taxable base to that of a comparable standalone firm, and despite comparing the "excess profit tax ruling system" to the Belgian corporate tax system,[204] because it was "not . . . available to all corporate entities . . . in a similar legal and factual situation,"[205] which the Commission construed to mean all similarly sized companies in Belgium without distinguishing between standalone and multinational or integrated entities.[206] As with the other cases, the Commission also based its decision on the system's alleged failure to adhere to the Commission's new arm's length principle, despite the fact that this principle has at no point been codified in Belgian law.[207]

Thus, in the *Belgium Decision*, the Commission based its decision that the entire *scheme* granted state aid to multinational firms on the basis that multinational firms should be compared to both multinational and standalone firms, that despite a lack of Belgian implementation of the Commission's arm's length principle and the Commission's recognition that the appropriate reference system was Belgian tax law, this principle constituted a part of the reference system, and that the ruling practice provided a selective advantage to such multinational enterprises in comparison to standalone firms. This analysis by the Commission mirrors the analyses which dealt with individual tax rulings, and although it deals with a somewhat different issue, it provides an interesting insight into the breadth of rulings that the Commission is currently challenging.

5. The Commission's Opening Decision Regarding Amazon

Although no final Commission Decision has been issued, the European Commission has indicated that it believes, at least initially, that Luxembourg granted illicit state aid to Amazon through an APA.[208] As in *Fiat*, *Starbucks*, and *Apple*, the Commission asserts that the arm's length principle ought to apply to the challenged APA, without citing any authority for this proposition.[209] The Commission also once again collapses the separate selectivity and advantage analyses into a single

203. *Id.* at para. 133.
204. *Id.* at para. 129.
205. *Id.* at para. 136.
206. *Id.*
207. *Id.* at para. 154-58.
208. Amazon Decision, *supra* note 7, at para. 86.
209. *Id.* at para 11.

selective advantage analysis,[210] and although the Commission does not explicitly state its position on the appropriate reference system, its introduction of the "prudent independent operator" to evaluate whether the transfer pricing methodology approved by the Luxembourg Revenue Authority in the challenged APA was compatible with the arm's length principle[211] indicates that the Commission will, once again, attempt to read the arm's length principle into Member State tax law. Because no final Commission Decision has been issued in this case, it is not analyzed further herein. However, given the language of the Opening Decision, it appears likely that the ultimate *Amazon Decision* will follow a similar framework to that laid out in the *Fiat*, *Starbucks*, and *Apple Decisions*.

C. Each Commission Decision Has Been Subsequently Appealed by Both the Member State and the Alleged Recipient of State Aid

Each of the Commission Decisions discussed above has been appealed by the affected parties to the EGC.[212] Given the substantial amounts at stake in each case, it is likely that each will be separately appealed to the ECJ, regardless of the ruling in the EGC, and although the grounds for appeal in each case appear similar, based on the public versions of the appeals, each is analyzed separately. However, given the summary nature of the public version of the appeal documents, the analysis of the parties' legal arguments is limited.

1. Netherlands and Starbucks v. Commission

Starbucks and the Netherlands have each appealed the Commission Decision to the EGC.[213] The Netherlands asserts five pleas of law in its appeal—that the Commission failed to establish selectivity; that the Commission failed to prove advantage through application of the Commission's arm's length principle, as no such principle exists in the state aid framework; that the Commission erred factually in finding advantage as a result of the use and application of the TNMM as the transfer pricing methodology; and that the Commission breached the duty to exercise due care by using anonymous information and failing to disclose certain information to the parties.[214] Starbucks relies on

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210. *See id.* at paras. 47, 52-53.

211. *Id.* at para 53.

212. *See supra* text accompanying notes 4-6, 9.

213. *See* Action brought on 23 December 2015 — Netherlands v. Commission, 2016 O.J. (C 59) 50 (Netherlands seeking to annul the Commission Decision); Action brought on 5 September 2016 — Starbucks and Starbucks Manufacturing Emea v. Commission, 2016 O.J. (C 462) 25 (Starbucks seeking to annul the Commission Decision).

214. Action brought on 23 December 2015 — Netherlands v. Commission, 2016 O.J. (C 59) 51.

three pleas of law—that the Commission selected the incorrect reference framework; that the Commission incorrectly found that the APA at issue granted an advantage to Starbucks; and that the Commission calculated the measure of alleged aid incorrectly.[215]

2. Luxembourg and Fiat v. Commission

Both Luxembourg and Fiat have appealed the *Fiat Decision*, again on similar grounds.[216] Luxembourg's appeal is based on three pleas of law—that the challenged measure was not selective; that the Commission failed to prove advantage; and that the recovery suggested by the Commission would violate the principle of legal certainty.[217] Fiat's appeal is based on four pleas of law: that the concept of selective advantage is a misapplication of the state aid framework under Article 107(1) TFEU; that the application of the arm's length principle is inappropriate in state aid determinations; that the Commission Decision, and the Commission's use of its newly formulated arm's length principle violate the principle of legal certainty; and that the Commission Decision violates the principle of legitimate expectations. [218]

3. Ireland and Apple v. Commission

As noted above, both Apple and Ireland have lodged separate appeals.[219] In its Application, Ireland outlines nine pleas of law,[220] which fall into four categories—that the Commission improperly interpreted Irish law and the facts of the case in finding that Apple was given state aid through a reduced tax burden; that the Commission improperly applied the arm's length principle to Apple; that the decision, even if otherwise correct, contravenes the principle of legal certainty and legitimate expectations under European Union law; and that the

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215. Action brought on 5 September 2016 — Starbucks and Starbucks Manufacturing Emea v. Commission, 2016 O.J. (C 462) 25.

216. *See* Action brought on 30 December 2015 — Luxembourg v. Commission, 2016 O.J. (C 59) 48 (Luxembourg seeking to annul the Commission Decision); Action brought on 29 December 2015 — Fiat Chrysler Finance Europe v. Commission, 2016 O.J. (C 59) 49 (Fiat seeking to annul the Commission Decision).

217. Action brought on 30 December 2015 — Luxembourg v. Commission, 2016 O.J. (C 59) 48-49.

218. Action brought on 29 December 2015 — Fiat Chrysler Finance Europe v. Commission, 2016 O.J. (C 59) 50.

219. *See* Action brought on 9 November 2016 — Ireland v. Commission, 2017 O.J. (C 38) 35 (Ireland seeking to annul the Commission Decision); Action brought on 19 December 2016 — Apple Sales International and Apple Operations Europe v. Commission, 2017 O.J. (C 53) 37 (Apple seeking to annul the Commission Decision).

220. *See* Action brought on 9 November 2016 — Ireland v. Commission, 2017 O.J. (C 38) 35-36.

Commission breached various procedural requirements inherent in the Commission's decision-making process.[221]

Apple's appeal asserts fourteen pleas of law,[222] which rest on relatively similar, although broader grounds—that the Commission misinterpreted Irish law; that the arm's length principle is not an appropriate test for determining whether state aid exists under Article 107(1) TFEU; that the Commission misunderstood Apple's activities inside and outside of Ireland; that the Commission failed to prove selectivity by treating ASI and AOE as resident companies, contrary to their non-resident status under Irish law; that the Commission erred in its examination and application of Apple's chosen transfer pricing methodology; that the Commission wrongly compared the APAs provided to ASI and AOE to other rulings provided by Irish Revenue due to differing factual circumstances; that the recovery suggested by the Commission would violate the principles of legal certainty and legitimate expectations; and that the Commission made various procedural and factual errors.[223]

4. Belgium v. Commission

Belgium's appeal to the European General Court rests on five pleas of law—that the Commission violated certain provisions of the TEU in redefining the tax jurisdiction of a Member State; that the Commission mischaracterized the alleged state aid measure as an aid scheme that does not require any further implementing measures; that the Commission failed to find either selectivity or advantage; that the Commission erred in finding the multinational groups to which the alleged recipients of aid belong as the beneficiaries of the aid; and that the Commission violated the principle of legality in finding that aid was granted to such multinational groups.[224] Although the EGC has issued a dismissal of Belgium's application for interim measures,[225] that decision appears to have merely prevented Belgium from securing temporary relief from the assessment issued by the Commission until after the case is resolved.[226]

5. The Appellants Rely on Several Common Grounds for

221. *Id.*

222. Action brought on 19 December 2016 — Apple Sales International and Apple Operations Europe v. Commission, 2017 O.J. (C 53) 37-39.

223. *Id.*

224. *See* Action brought on 22 March 2016 — Belgium v. Commission, 2016 O.J. (C 191) 36.

225. Order of the President of the General Court 19 July 2016 — Belgium v Commission, 2016 O.J. (C326) 28.

226. *Id.*

Appeal

The appellants in each case rely, to varying extents on three main arguments—that the Commission erred in introducing its arm's length principle into the state aid framework, that the Commission failed to prove selectivity and/or advantage, and that the Commission erred in selecting the appropriate reference system for determining whether the APA at issue constituted an illegal grant of state aid. As will be discussed below, the ECJ should carefully consider each of these pleas of laws both in the context of the specific case as well as in the context of the state aid framework more generally in ruling on these cases. In each case, there is, at a minimum ambiguity with regard to whether the Commission appropriately applied the state aid framework in each Commission Decision.

VI. In Evaluating Each of the Commission Decisions, the ECJ Should Use a Discrimination Test to Determine if State Aid Was Granted; However, Even if the ECJ Accepts the Methodology Used by the Commission in Finding that State Aid Was Granted, Only Prospective Taxes and Penalties Should be Imposed under the Theories of Legitimate Expectations and Legal Certainty

The ECJ should require the Commission to prove that the challenged measures were discriminatory, in derogation of the general tax law applicable in the Member State which implemented the challenged measure in order to support a finding that the challenged measure constituted an illegal grant of state aid. This standard follows from the principle that the appropriate reference system for a finding of state aid is generally applicable Member State law, that the arm's length principle, as developed by the Commission, cannot be overlaid onto a Member State's tax law scheme unless explicitly adopted by the Member State as a part of its national tax laws, and that the appropriate test in the context of a tax measure which allegedly functions as a grant of state aid is whether the challenged measure discriminates with regard to similarly situated entities.[227]

A. The Appropriate Reference System is Member State National Tax Law as it Applies to Other, Similarly Situated, Multinational Enterprises for Determining Selectivity

In the context of tax rulings, the appropriate reference system is generally applicable national tax legislation as it applies to similarly

227. *See* Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, para. 67.

situated multinational enterprises.[228] This follows from several ECJ rulings in the state aid context, and represents the appropriate inquiry under Article 107(1) TFEU.[229] ECJ case law clearly establishes that the appropriate reference system for determining whether a particular tax measure constitutes an illegal grant of state aid is the generally applicable Member State tax regime which applies to similarly situated taxpayers.[230] On the other hand, the ECJ appears to have addressed the appropriate universe of similarly situated taxpayers in a Member State based on an implicit facts and circumstances test.[231] Because multinational enterprises are uniquely positioned to engage in cross-border transfer pricing activities, the appropriate comparison for an APA granted to a multinational enterprise regarding its transfer pricing methodology is to similarly situated multinational enterprises with similar subsidiaries, branches, or affiliates in the Member State which issued the APA.[232] On the other hand, where a challenged measure consists of an entire tax ruling *practice* or a provision of Member State law which, in itself, allegedly discriminates against a set of entities based on their status, the appropriate group of comparable entities, may by necessity, need to be more broadly construed.

B. The European Commission's Separately Developed Arm's Length Principle Cannot be Overlaid on Member State Tax Law to Form Part of the Reference System for Determining Advantage

As discussed above, despite the Commission's reference to the arm's length principle in its recent decisions, ECJ case law does not support the proposition that the arm's length principle can be used to evaluate tax rulings otherwise compliant with Member State tax laws, which do not discriminate in favor of a particular class of entities such that the Member State tax scheme itself may be said to grant state aid.[233] In the case of Member State tax laws which *can* be said to be discriminatory, the arm's length principle may be one framework by which to analyze whether the scheme itself is, *in fact* discriminatory, by

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228. *Id.*

229. TFEU, *supra* note 68, at art. 107(1).

230. Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, para. 67.

231. *See generally* Groepsrentebox Decision, *supra* note 121, at para 58, 103.

232. *See, e.g.,* Groepsrentebox Decision, *supra* note 121, at para 123 (recognizing that treasury companies are not comparable to standalone financing companies). This reversal of course is particularly egregious in the case of *Fiat*, as the services provided by FFT are the type of internal lending and treasury services which, like those at issue in the *Groepsrentebox Decision* are particularly ill-suited for comparison to standalone entities. Fiat Decision, *supra* note 4, at para. 94.

233. As the Commission has alleged in the *Belgium Decision*, and which it succeeded in proving in Joined Cases C-182/03 & C-217/03, Belgium and Forum 187 ABSL v. Comm'n, 2006 E.C.R. I-5613-15.

determining whether the Member State tax laws function to provide state aid to an entire *class* of individuals or entities.

Additionally, where Member State tax law contains ambiguity, it is within the discretion of the revenue authority to determine how to interpret that ambiguity in compliance with the general Member State tax law scheme.[234] It is generally accepted that transfer pricing rules are one area in which substantial ambiguity is likely to exist, given the complexity of applying those rules, and it is thus clearly within the discretion of the Member State tax authority to interpret them.[235] Where Member State tax law does not incorporate the arm's length principle, while the Member State revenue authority is likely *empowered* to consider the arm's length principle in determining whether a particular APA is appropriate, such a revenue authority is not required to do so.[236]

Thus, the Commission erred in applying the arm's length principle in determining that the Member State tax rulings at issue constituted an advantage to the multinational enterprises at issue. Although the Commission may be able to show that the Member States provided state aid on another theory—if, for example, the rulings granted to the multinational enterprises at issue conferred an advantage not available under generally applicable Member State law as it applies to similarly situated multinational enterprises, a finding that a particular ruling did not comply with the arm's length principle does not support such a finding of state aid.

C. *Even if it Were Appropriate to Use the Arm's Length Principle to Evaluate Whether a Particular Tax Ruling Constituted a Grant of State Aid, the Commission Did Not Apply the Arm's Length Principle Appropriately*

As discussed above, the Commission appears to have modified the generally accepted OECD arm's length standard to include an additional factor—whether the transaction, when compared to a hypothetical transaction entered into by a "prudent independent operator" produces the same tax results.[237] This Commission interpretation of the arm's length principle errs by attempting to produce an entirely mechanical and objective arm's length test.

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234. *See, e.g.*, Thomas Jaeger, *Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law*, 8 J. EUR. COMPETITION L. AND PRACTICE 2, 9.

235. *Id.* (arguing that even if the framework for determining whether a tax ruling constituted an illegal grant of state aid, the tax authority ought to have discretion to apply the appropriate methodology applicable to the particular case, and that the application of such methodology should then be tested against a discrimination standard).

236. *Id.*

237. *See supra* text accompanying note 147.

First, the Commission appears to misapprehend the arm's length test as a mechanical test which is able to produce a single result against which a transaction can be compared to determine whether a particular transaction confers an advantage on a particular entity by way of a simple "yes/no" answer. Clearly, this is not how the arm's length test developed by the OECD, on which the Commission relies, was intended to be used.[238] The OECDtest is open-ended, and is intended to be used to produce a range of results against which a transaction may be compared to determine whether a reasonable result is reached.[239] In this way, the arm's length test, as conceived by the OECD recognizes the numerous variances in the market that may result in different transfer pricing methodologies and results, as well as the inherent ambiguity in determining whether a particular methodology and result are "reasonable." The Commission attempts to mold this "reasonableness" test into an objective one by introducing the concept of a single "prudent independent operator," the hypothetical actions of which the entity engaging in transfer pricing's methodology is evaluated.[240] This creates a situation in which the method for judging an activity is altered from comparison to a wide range of potentially acceptable results to a determination regarding whether the transaction results in less favorable tax results than one entered into by a hypothetical firm. In addition to completely changing the relevant framework against which transfer pricing agreements would be judged, this would also have the consequence of giving the Commission the power to determine whether any APA addressing a transfer pricing agreement was an illegal grant of state aid, by empowering the Commission to develop the "prudent independent operator" against which the transfer pricing agreement on which the ruling is based would be judged.

D. The Appropriate Test for Evaluating Whether a Member State has Illegally Granted State Aid to a Multinational Enterprise is Whether the Measure is Discriminatory Under Generally Applicable Member State Tax Law

The appropriate test for the ECJ to determine whether a Member State granted illegal state aid is to, once the reference system has been established, determine whether the Member State discriminated in favor of a particular enterprise or industry by providing a benefit that would not have been available to other similarly situated enterprises in the Member State. Such a discrimination test is supported by ECJ state

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238. Org. for Econ. Co-Operation and Dev. [OECD], *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 133* (July 2010).

239. *Id.* at 124.

240. *See supra* text accompanying notes 147–48.

aid case law,[241] reflects ECJ jurisprudence in other areas of Member State tax law, and is supported by the text of the TFEU addressing state aid as well as the policy considerations underlying state aid determinations.[242]

As discussed above, although the ECJ has not traditionally used the term "discrimination" to describe its state aid analysis, its state aid cases reveal a discrimination-based approach to determining whether state aid exists.[243] By requiring the Commission to separately prove advantage and selectivity in comparison to a reference system, as discussed above, the ECJ has always imposed a de facto discrimination test—in order for a measure to be considered a grant of state aid, it must discriminate in favor of a particular enterprise or group of enterprises to the detriment of other enterprises.[244] Despite the Commission's suggestion that the appropriate test be whether a particular measure meets the arm's length test in a vacuum, or in comparison to a hypothetical prudent independent operator, nothing in ECJ case law supports the proposition that a measure can be said to grant state aid without being discriminatory. Even in *Belgium and Forum 187*, which the Commission somewhat erroneously cites in favor of its argument that an arm's length test can be overlaid on Member State tax law to directly measure whether state aid is granted, the ECJ employed a discrimination test in finding that Belgium had granted state aid to certain "coordination centers" by providing tax exemptions to those coordination centers which were not generally available to the market.[245]

In addition to being supported by ECJ case law in the state aid context, a discrimination test also comports within the broader anti-discrimination framework employed by the ECJ in the context of

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241. Case C-88/03, Portugal v. Comm'n, 2006 E.C.R. I-7145, para. 54(citing Case C-143/99, Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten, 2001 E.C.R. I-8384, para. 41).

242. TFEU, *supra* note 68, at art. 107(1).

243. *See supra* text accompanying notes 77–92.

244. *See supra* text accompanying notes 93–96; *see* Case C-15/14 P, Comm'n v. MOL Magyar Olaj- és Gázipari Nyrt., 2015 E.C.R. 1, para. 47.

245. Joined Cases C-182/03 and C-217/03 R, Belgium & Forum 187 ASBL v. Comm'n of the European Cmtys., 2003 E.C.R. I-6890, paras. 21–26. Furthermore, *Belgium and Forum 187* is particularly inapplicable in the context of evaluating whether a transfer pricing agreement or APA issued by a Member State approving such a transfer pricing agreement constitutes a grant of state aid, as *Belgium and Forum 187* also dealt with a situation in which certain tax *exemptions* were provided to multinational enterprises. *Id.* at paras. 48-49. In the context of tax exemptions, comparison to the arm's length principle or use of the universe of all firms in the Member State at issue may be more appropriate, as an exemption, by its nature, provides a benefit to a class of individuals or entities that is not generally available to the market. By contrast, a transfer pricing agreement is merely a *method* of calculating the taxable base on which a given entity will be subject to corporate income tax—that the method cannot be based solely on open market pricing and is therefore different than the method for determining the taxable base for a standalone entity is merely a necessary feature of a transfer pricing regime, not evidence of discrimination.

analyzing Member State tax law generally. Member state tax law is analyzed using the same principles of anti-discrimination applicable to all aspects of Member State national law.[246] This follows from the generally accepted principle that the rights and protections provided under the treaties forming the basis of the EU, including the state aid provisions of the TFEU are based on "a common, underlying principle of non-discrimination".[247] As in the context of transfer pricing agreements (as discussed above), the ECJ employs a comparability test to identify discrimination,[248] and generally treats residents of a particular Member State as non-comparable to the residents of a separate Member State.[249] The ECJ appears to have moved towards this approach in *Commission v. World Duty Free Group SA*,[250] in which it evaluated an alleged grant of state aid by comparing companies resident in Spain which benefited from the challenged measure to other, similarly situated resident companies—rather than the broader category of all companies conducting business in Spain. This generalized approach to analyzing tax law for discrimination to determine whether it violates one of the fundamental freedoms provided in the treaties underlying the formation and governance of the EU therefore applies to the specific analysis in which a Member State tax law or ruling is alleged to violate the prohibition on state aid contained in Article 107(1) of the TFEU.

In further support of the theory that the ECJ ought to continue using a non-discrimination test in the context of state aid cases, the ECJ's jurisprudence in the area of tax benefits for charitable contributions shows a clear move towards a non-discrimination test for determining whether tax benefits are permissible.[251] In both *Walter Stauffer*[252] and *Persche*[253], the ECJ determined that German law discriminated between charities resident in Germany and non-resident charities in contravention of the principle of free movement of capital provided in Article 56(1) of the Treaty of the European Community.[254] However,

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246. *See, e.g.*, Case 82/71, Italy v. Società Agricola Industria Latte (SAIL), 1972 E.C.R. 120, 135. (holding that "[t]he effectiveness of Community law cannot vary according to the various branches of national law which it may affect").

247. *See, e.g.* NIELS BAMMENS, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL AND EUROPEAN TAX LAW 524 (24th vol. 2012) (citing R. Lyal, *Non-discrimination at the Crossroads of International Taxation*, 93a *CAHIERS DE DROIT FISCAL INTERNATIONAL* 64 (2008) (Belg.).

248. *See, e.g.*, *id.* at 526.

249. *See, e.g.*, Case C-270/83, Comm'n v. French Republic, 1986 E.C.R. 285, paras. 16–17; Case C-330/91, Queen v. Inland Revenue Comm'rs, *ex parte*: Commerzbank AG, 1993 E.C.R. I-4038, paras. 14–16.

250. *See* Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, para. 79.

251. *See infra* text accompanying notes 252–54.

252. Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8234, para. 62.

253. Case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, 2009 E.C.R. I-390, paras. 37–39.

254. *Id.* at para. 23.

despite finding that Member State laws which discriminated against foreign charities violated the principle of free movement of capital,[255] the ECJ in *Persche* permitted Member States to require that a charitable entity pursue purposes recognized as charitable by the tax laws of the Member State granting the tax benefit[256] and to require donors to prove that the foreign charity satisfied the so-called *Persche* test prior to receiving a tax benefit.[257] While scholars have suggested that the *Persche* test contains some ambiguity regarding the level of proof required to substantiate a taxpayer's claim that a foreign charity qualifies under the laws of the Member State of which the taxpayer is a resident,[258] the requirements of the test and anti-discrimination basis are not subject to substantial dispute.

Although at first glance these cases would seem to support the proposition that the ECJ should compare resident companies to non-resident companies, or to all companies present in the Member State, *Persche* and *Walter Stauffer* are distinguishable on two grounds which make clear why the ECJ compared resident charities to non-resident charities. The first is that both cases addressed *facially* discriminatory provisions of Member State law, which disfavored foreign charities to the benefit of resident charities.[259] The second, related, ground is that both cases were in the context of a different principle of EU law—the prohibition against the free movement of capital.[260] The reasoning in both cases clarifies that by discriminating against non-resident charities, the Member State infringed on this restriction by discouraging charitable donations to charitable organizations resident in another Member State, in clear contravention of the principles underlying the prohibition on the restriction of the free movement of capital.[261] There is no such restriction alleged in the context of the challenged APAs; transfer pricing APAs are not instruments which would tend to infringe on that principle as, by their nature, such APAs *encourage* the free movement of capital by facilitating cross-border investment through

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255. *Id.* at paras. 38, 39.

256. *Id.* at para. 47. For example, the German Fiscal Code Sections 51-54, which address the deductibility of charitable donations, require that a non-resident charity either meet the requirements of the public benefit test under German law within Germany, or if otherwise qualifying public benefit objectives are pursued outside of Germany, that the charity either provide benefits solely to German residents or that its activities contribute to Germany's international reputation. BUNDESGESETZBLATT [BGBI] [FISCAL CODE], §§ 51–54, *translation at* https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html (Ger.).

257. *Persche*, E.C.R. I-390, para. 54 (citing Case C-422/01, Försäkringsaktiebolaget Skandia v. Riksskatteverket, 2003 E.C.R. I-6830, para. 43).

258. Khrista Johnson, *The Charitable Deduction Games: Are the Laws in Your Favor?*, 5 COLUM. J. TAX L. 69, 88–89 (2013).

259. *See, e.g.:* Theodore Georgopoulos, *Can Tax Authorities Scrutinise the Ideas of Foreign Charities? The ECJ's Persche Judgment and Lessons from US Tax Law*, 16 EUR. L.J. 458, 459 (2010).

260. *Id.*

261. *Id.*

increased tax certainty. Furthermore, even if the ECJ's *Persche* decision stood for the proposition that Member States were generally prohibited from discriminating on the basis of residency in all contexts, the *Persche* test permits non-discriminatory differences in the tax law which apply to foreign and domestic entities—under that test, donors are required to conduct a much more extensive analysis and provide substantially more evidence to support a donation to a foreign charity than would be required to substantiate a donation to a domestic charity.[262]

Thus, in analyzing a Member State's transfer pricing framework or specific APAs granted to a multinational enterprise, the ECJ should adopt a non-discrimination test which evaluates whether the transfer pricing framework or APA at issue favors a specific multinational enterprise or group of multinational enterprises to the detriment of other multinational enterprises. This framework comports with the ECJ's jurisprudence in the analogous situation in which a taxpayer of one EU Member State seeks a tax benefit for a charitable contribution made to a charity resident in another Member State. By evaluating transfer pricing agreements and APAs to determine whether the transfer pricing methodology used is available to all similarly situated multinational enterprises, the ECJ would ensure that all similarly situated taxpayers are treated in the same manner—without regard to their residence or other impermissible bases for discrimination.

Such a discrimination test also comports with both the language of Article 107(1) of the TFEU and the policy objectives inherent in the state aid framework. By adopting a discrimination test for evaluating whether a Member State has illegally granted state aid to a taxpayer, the ECJ would ensure that state aid findings are limited to the situation in which a taxpayer receives a benefit not available to other, similarly situated taxpayers. Although Article 107(1) of the TFEU does not explicitly use the term "discrimination," it is clear that the prohibition on state aid, is, at its heart, a discrimination test—no aid may be granted which favors certain undertakings or industries except under specified circumstances.[263] Thus, in order to find that state aid exists, the appropriate analysis is whether the challenged measure impermissibly discriminates amongst similarly situated undertakings. A discrimination test would also afford appropriate weight to Member State sovereignty and tax law, by ensuring that a finding of state aid be a bona fide derogation from the general system of taxation in the Member State at issue (either, in the case of an entire ruling practice, where the Member State treats two subsets of similarly situated taxpayers differently, to the advantage of one subset, or in the case of a single ruling, where the ruling at issue provides the taxpayer with a

262. *See Persche*, E.C.R. I-390 paras. 47, 55.
263. TFEU, *supra* note 68, at art. 107(1).

reduced tax burden not available to similarly situated taxpayers). A discrimination test would therefor appropriately balance Member States' rights with the Commission's legitimate interest in ensuring that Member States do not engage in tax practices that provide impermissible aid to taxpayers or industries.

Thus, in evaluating whether any of the measures challenged by the Commission constituted an illegal grant of state aid, the ECJ must evaluate whether any of the measures resulted in discrimination among similarly situated taxpayers under Member State tax law. The Commission did not explicitly examine whether any of the measures at issue here discriminated among similarly situated taxpayers, opting instead to evaluate whether each met the Commission's new formulation of the arm's length principle. As the ECJ's decisions in *Commission v. World Duty Free Group SA* shows, in selecting the appropriate base for measuring discrimination, the ECJ has previously recognized that in the context of state aid and corporate taxation, the appropriate base for comparison is the universe of companies with similar residence status.[264] In many respects, resident and non-resident enterprises share more similarities than do multinational and standalone enterprises. As a result, each Commission decision should be overturned in its present state unless the Commission can show that the measures at issue discriminated between the recipients of the challenged APAs and other, similarly situated, multinational enterprises.

E. Even if the ECJ Rules That the Commission Decisions Were Properly Issued, Under the Theories of Legal Certainty and Legitimate Expectations, the Assessments Should be Limited to the Period After the Decision was Issued

In the state aid context, the theories of legitimate expectations and legal certainty are closely related concepts which constrain the Commission's ability to issue Decisions which impose retroactive assessments on Member States and alleged recipients of aid where such assessments were not foreseeable at the time when the alleged grants of aid were made. In this case, because the APAs which, according to the Commission, constituted grants of aid were issued under generally applicable Member State tax law at the time, the Commission Decisions finding that those rulings constituted a grant of state aid violates the theories of legitimate expectations and legal certainty to the extent Member State tax law does not, itself, contain an illegal grant of state aid. Thus, retroactive assessment against Member States and the recipients

264. *See* Joined Cases C-20/15 & C-21/15-P, Comm'n v. World Duty Free Group and Others, 2016 ECLI:EU:C:2016:981, paras. 75-76.

of such APAs would result in consequences based on rules of law which were not in force at the time such APAs were issued and which were not foreseeable at the time which the APAs were issued, the recent Commission Decisions should be considered the Commission's change in administrative policy, and if the ECJ upholds the Commission Decisions, it must, at a minimum limit Commission assessments to prospective prohibition on reliance upon the challenged APAs, or similar measures.

Under the theory of legitimate expectations, where an actor subjects itself to a legal system, that actor develops a set of expectations upon which such participation is based, which, if violated, may give rise to a claim that the actor's "legitimate expectations" were breached by the party,[265] which through a regulatory or enforcement change, harms the actor in a manner that was not foreseeable by that actor at the time that the actor subjected itself to the legal system at issue.[266] The theory of legitimate expectations is "undeniably part" of ECJ jurisprudence,[267] and scholars have argued that the doctrine of legitimate expectations is fundamentally concerned with whether change is *foreseeable*, and whether a given change is a "quantitative change", which is generally considered foreseeable or a "qualitative change" (a change to the underlying system), which are typically not foreseeable if such changes are "changes of view by the authorities".[268]

Similarly, the principle of legal certainty requires that those subject to the law must be able to conform their behavior to the law.[269] This requires that the law be clear, knowable, and precise. The ECJ has previously held that Commission violates the principle of legal certainty by imposing obligations on Member States which were not foreseeable.[270] Foreseeability requires, among other things, that enforcement actions be taken only after the administrative action giving rise to the basis of enforcement is taken and sufficient time is given to those who may be subject to enforcement to modify their behaviors or activities to conform to the administrative action.[271]

265. Such as the European Commission or a Member State

266. *See, e.g.*, Case C-120/86, Mulder v. Minister van Landbouw en Visserij, 1988 E.R.C. 2344, paras. 26–27.

267. *E.g.*, Eleanor Sharpston, *European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom*, 11 NW. J. INT'L L. & BUS. 87, 89 (1990) (quoting Advocate General Lenz in Joined Cases 63 and 147/84, Finsider v. Comm'n 1985 E. Comm. Ct. J. Rep. 2858, 2865).

268. *Id.* at 101.

269. *See* Case C-610/10, Comm'n v. Spain, 2012 ECLI:EU:C:2012:781, para. 49.

270. *See, e.g.*, Case C-325/91, France v. Comm'n, 1993 E.R.C. I-3303, paras. 24, 26, 30; Case 325/85, Ireland v. Comm'n, 1987 E.R.C. 5083, para. 18.

271. Taha Ayhan, *The Principle of Legal Certainty in EU Case Law*, 4 TODAIE'S REV. PUB. ADMIN. 160, 162 (2010).

Thus, in the context of the challenged APAs, the recipients may be able to succeed on a legal certainty or legitimate expectations ground to the extent that they can prove that they entered into the challenged APAs with the Member State revenue authorities with the expectation that such APAs were enforceable and would not be challenged by the Commission based on pre-existing Commission decisions and ECJ case law, and that the Commission subsequently changed its approach in a manner which harmed the recipients of the challenged APAs. Both theories appear to have merit in this case, as even if the Commission's new arm's length principle is endorsed by the ECJ as an appropriate measure for determining whether a Member State has granted state aid to the recipient of an APA, this new approach appears to be both substantially different than the approaches taken in prior Commission decisions, and a departure from existing ECJ case law. Nor does there appear to be any way that a multinational enterprise or Member State which entered into an APA over 25 years ago (such as Apple, which entered into the first set of challenged APA with Irish Revenue in 1991) could have foreseen that the Commission would so substantially change its approach to the state aid framework and attempt to overturn an apparently valid and non-controversial APA.

Thus, because the Commission decisions could not have been reasonably foreseen by the recipients of the challenged APAs, even if those Decisions are upheld, they should only be enforced prospectively under the theories of legitimate expectations and legal certainty. Although there appear to be other significant flaws with the Commission's reasoning in the challenged decisions, in the event those Decisions are upheld by the ECJ, prospective enforcement would appropriately balance the Commission's legitimate interest in enforcing the prohibition on state aid with the Member States' sovereignty in matters of tax law, and the legitimate expectations of the multinational enterprises which received the challenged APAs.

VII. ADDITIONAL CONSIDERATIONS WEIGH IN FAVOR OF OVERTURNING THE COMMISSION DECISIONS FINDING STATE AID

In addition to ECJ case law which supports overturning the Commission decisions issued against Ireland, the Netherlands, Luxembourg, and Belgium, there are other, non-precedential factors weighing in favor of such a result. The primary reason is that the Commission decisions are not in the best interest of the EU as a whole. The decisions, if upheld, are likely to harm both the European Union economy, as well as the economy of countries which engage in cross-border investment with EU Member States. Secondarily, as has been shown, the Commission decisions clearly intend to alter substantive Member State tax law as it applies to multinational enterprises, and

while Commission decisions are not the appropriate mechanism for doing so, the Commission has an appropriate mechanism for making substantive policy changes to Member State law.

A. Economic Impact of Tax Uncertainty

The Commission's recent decisions, by departing from established ECJ case law and prior Commission decisional practice, introduces increased tax uncertainty into Member State and EU tax law, which is likely to both harm the EU economy and reduce Member State tax receipts. Tax uncertainty is the risk that results from the unpredictability regarding future tax rates, tax policies, or a tax authority will treat an uncertain tax position. Although it is beyond the scope of this article to fully examine the scholarship regarding the economic impact of tax uncertainty, it is clear that tax uncertainty results in decreased investment activity[272] and increases the cost of both debt and equity.[273] Furthermore, increased tax uncertainty actually results in an increasing *loss* in tax revenue.[274] The Commission's decisions create tax uncertainty in two ways—first, by departing from existing ECJ case law regarding the appropriate methodology for determining whether state aid exists, the Commission reduces taxpayers' ability to rely on apparently valid APAs,[275] increasing the level of tax uncertainty. Second, by reviewing APAs issued by a Member State based on standards which were not a valid part of Member State tax law at the time the APA was issued, the Commission creates uncertainty regarding the future validity of APAs issued by Member States—if future changes in Commission state aid enforcement practices change, such APA would not only cease to have prospective effect, it could also result in an unexpected tax burden dating to the time the APA was issued. These increases in tax uncertainty are likely to reduce the level of cross-border investment in EU Member States, increase the cost of capital for firms which do invest in the EU, and reduce the tax revenue in Member States.

272. *See, e.g.*, Kevin A. Hassett & Gilbert E. Metcalf, *Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?*, 109 ECON. J. 372, 388 (1999).

273. M. Max Croce *et al.*, *Fiscal Policies and Asset Prices*, 25 REV. FIN. STUD. 2635, 2665 (2012).

274. *See, e.g.*, Hassett, *supra* note 272, at 389; Rainer Niemann & Caren Sureth-Sloane, *Does Capital Tax Uncertainty Delay Irreversible Risky Investment?*, 209 QUANTITATIVE RES. TAX'N – DISCUSSION PAPERS, 1, 28 (2016); Jonathan Skinner, *The Welfare Cost of Uncertain Tax Policy*, 37 J. PUB. ECON., 129, 144 (1988).

275. The express purpose of which is to reduce tax uncertainty. Org. for Econ. Co-Operation and Dev. [OECD], *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 173* (July 2010).

B. *Impact of EU Tax Assessments on other Jurisdictions*

In addition to the broad impact that the recent Commission decisions may have on the economy of the EU and each of its Member states from increased tax uncertainty, these decisions will also both directly and indirectly impact the global economies and the economy of countries in which multinational firms are resident. Although it would be impossible to quantify the impact on each country's economy, the United States government has, in particular, made numerous statements regarding the potential impact on the United States economy.[276]

The United States Treasury department published a whitepaper responding to the *Apple Decision*, which harshly criticized the Commission's approach and ruling.[277] That white paper essentially asserts that the Commission decisions will cause three primary harms, each of which will impact multinational enterprises as well as the United States' economy.[278]

First, the Treasury white paper alleges that the Commission decisions will "undermine the United States' efforts in developing transfer pricing norms and implementing the OECD/G20 BEPS project"and "call into question the ability of Member States to honor their bilateral tax treaties with the United States."[279] Second, Treasury argues that "repayments ordered by the Commission [may] be considered foreign income taxes that are creditable against U.S. taxes owed by the companies in the United States."[280] Third, Treasury claims that both the current Commission decisions, as well as the potential for additional Commission decisions may result in a "chilling effect on U.S.-EU cross-border investment" and reduce multinational enterprises' "ability to assess risks and plan for the future, and sets an unwelcome precedent for tax authorities around the world to take similar retroactive actions that could affect U.S. and EU companies alike."[281]

Although the Treasury white paper comes from the perspective of a regulator, it makes several points which are relevant to identifying the

276. *See, e.g.*, Letter from U.S. Senate Committee on Finance to Jacob J. Lew, U.S. Secretary of the Treasury (Jan. 15, 2016), https://www.finance.senate.gov/imo/media/doc/Finance%20Committee%20Members%20Push%20for%20Fairness%20in%20EU%20State%20Aid%20Investigations.pdf ("[T]he United States has a stake in these cases and has serious concerns about their fairness and potential impact on the U.S. fisc.").

277. U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULES, 25 (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf.

278. *Id.* at 3–4.

279. *Id.*

280. *Id.* at 4.

281. *Id.*

potential harm that may come from upholding the Commission decisions at issue here. In essence, the Treasury white paper essentially argues that the Commission decisions will create four major harms if not overturned—first, they may result in greater tax uncertainty by reducing clarity regarding the implementation of the OECD BEPS program, and increasing the likelihood that an apparently valid and enforceable tax ruling will be later overturned by the Commission on a basis that could not have been foreseen at the time the ruling was issued; second the Commission decisions may strain relationships between Member States and other countries by calling into question Member States' ability to honor current tax treaty obligations; third, they may reduce the quantity of cross-border investment in Member States, thereby harming the EU economy, and fourth, the Commission decisions regarding US multinationals will result in no additional tax burden for the multinational enterprises at issue, because any taxes assessed by the Commission will result in a dollar-for-dollar credit against US taxes, merely shifting the benefit of that multinational's corporate tax payments to the EU, rather than the US. Each of these potential issues raises serious policy concerns with regard to the Commission's decisions, beyond the substantive legal issues, addressed earlier, that indicate that the decisions themselves may have been based on a misapplication of the state aid rules in the EU.

Although the impact on the global economy, particularly on economies of countries which are not EU Member States, is not a factor formally directly considered by the ECJ in its jurisprudence, the ECJ is and the Treaty on the EU provides for an EU which "shall work for the sustainable development of Europe"[282] and shall, in relation to non-Member States "uphold and promote [the] values and interests [of the EU]."[283] Commission assessments which disincentivize multinational enterprises from participating in the EU market, or which incentivize non-Member States to enact protectionist policies in order to prevent its residents or tax receipts do not comport with those principles.

C. The Appropriate Commission Mechanism to Implement Multinational Enterprise Tax Reform in the EU is by Proposing Legislation to the European Parliament

The European Commission has, under Article 17(2) on the Treaty on European Union, the exclusive power to propose initiatives

282. Consolidated Version of the Treaty on European Union, art. 3(3), Oct. 26, 2012, 2012 O.J. (C 326) 13.

283. *Id.* at art. 3(5).

(legislation) to the European Parliament.[284] Although the Parliament is empowered to exercise the legislative functions of the EU, and may modify and determine whether and how to take action on the proposal by the Commission.[285] Thus, if the ECJ overturns the Commission's Assessments in these cases, the Commission has a remedy to combat any tax avoidance activities that it identifies—that is, while state aid assessments are not the appropriate means for reforming EU Member State tax law, the Commission is empowered to promote its tax reform agenda through another means. While such tax reform may not ultimately be enacted, or may not be enacted in precisely the way that the Commission advocates, that is simply a feature of the EU system—not a grounds for enforcement activity without a solid legal basis.

VIII. CONCLUSION

Although a full resolution may take years, the ECJ's ultimate ruling regarding whether a Member State's ruling practice constitutes state aid, as well as the Commission's ability to retroactively question a Member State's tax ruling practice will have enormous ramifications not only for Member State tax ruling practices, but also in determining the ultimate scope of the Commission's power to modify generally applicable Member State law. Ultimately, the Commission's power to question Member State tax ruling practices is limited to determining whether a ruling or set of rulings provide impermissible state aid. In order to find impermissible state aid, the Commission must prove both that a tax ruling provides an advantage to an undertaking, and that the tax ruling itself is selective.[286] Although this power is broad, and permits the Commission wide discretion in challenging tax rulings, it does not grant the Commission the power to retroactively modify generally applicable Member State tax laws.

As this article has argued, the ECJ therefore must find that the Commission exceeded its authority in finding that the tax rulings granted by Ireland, Luxembourg, and the Netherlands to Apple, Fiat, Amazon, and Starbucks constituted state aid. Any Commission state aid assessment as a result of a Member State tax measure must be based on Member State tax laws as applied to similarly situated entities in the Member State, rather than the Commission's arm's length principle (or even the arm's length principle laid out in OECD Guidelines). In formulating assessments, the Commission should refer to Member State tax law, rather than individual rulings, as each individual ruling is based

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284. *Id.* at art. 17(2)("Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.").

285. *Id.* at art. 14.

286. *See* TFEU, *supra* note 68, at arts. 107(1), 108(1).

on individual facts and circumstances which may not be clear from the text of the rulings.

Furthermore, even if the ECJ were to find that the Commission had the authority to issue the assessments at issue, these assessments cannot result in a recovery of state aid under the theories of legal certainty and legitimate expectations because the Commission's assessments are based on a novel interpretation of Article 107(1) TFEU that could not have been reasonably anticipated at the time at which the rulings were granted. In addition, these rulings represented a legitimate, non-discriminatory interpretation of generally applicable Member State tax law, as it existed at the time that the rulings were granted, rather than a selective measure.

In ruling on the Commission assessments at issue, the ECJ should be mindful of the economic impact that tax uncertainty can have. Were the Commission to be given the power to retroactively question Member State tax rulings which comport with generally applicable Member State tax law, and could not have been reasonably anticipated to be considered selective measures at the time they were granted, it would introduce a great deal of tax uncertainty with regard to the potential tax liability faced by taxpayers in the EU, and would partially or completely obviate the purpose of obtaining a tax ruling or advance pricing arrangement. As this article has shown, the introduction of such tax uncertainty would result in substantial economic impact on the EU, in direct opposition to the Commission's objective in investigating abusive tax practices to improve the EU economy through increased competition and fairness.

Finally, the ECJ should consider the fact that the appropriate method for the Commission to more closely align Member State tax law and policy with the arm's length principle (either as formulated by the Commission or as provided in the OECD guidelines) is through multilateral, principle-based legislation, rather than ad hoc assessments. The Commission is empowered to propose such legislation to the European Parliament, so it is clear that the Commission has other, legitimate options to harmonize Member State tax laws.