Brooklyn Journal of International Law

Volume 43 | Issue 1 Article 32

12-12-2017

Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings

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TAX IN THE WORLD OF ANTITRUST ENFORCEMENT: EUROPEAN COMMISSION'S STATE AID INVESTIGATIONS INTO EU MEMBER STATES' TAX RULINGS

> "In this world nothing can be said to be certain, except death and taxes."[1]

INTRODUCTION

On August 30, 2016, the European Commission (the "Commission") ordered Apple Inc. ("Apple") to pay up to €13 billion in retroactive taxes, as it ruled that the company had received illegal State aid in the form of tax breaks from the government of Ireland.[2] This decision has prompted a heated debate around the world about the validity of the Commission's determination, as well as its authority to interfere with the individual Member States' fiscal matters and to assess back taxes[3] ten years into the past.[4]

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1. Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789); Neelie Kroes, *Why EU State Aid is Not the Right Tool to Fight Tax Avoidance*, GUARDIAN (Sept. 1, 2016), https://www.theguardian.com/technology/2016/sep/01/eu-state-aid-tax-avoidance-apple.

2. Foo Yun Chee & Padraic Halpin, *EU Hits Apple with $14.5 Billion Irish Tax Demand*, REUTERS (Aug. 30, 2016), http://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKCN114211.

3. Back taxes are taxes that were not paid when due. Back Taxes, BUS. DICTIONARY, http://www.businessdictionary.com/definition/back-taxes.html (last visited Jan. 17, 2017). The Commission alleges that Apple did not pay its fair share of tax in Ireland as a result of the company's agreements with the Irish government. Renae Merle, *Apple Owes $14.5 Billion in Back Taxes, European Authorities Say*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/business/economy/apple-owes-145-billion-in-back-taxes-european-authorities/2016/08/30/e7f6ed80-6ea2-11e6-9705-23e51a2f424d_story.html?utm_term=.144b49539890. Therefore, the Commission has assessed back taxes from the company. *Id.*

4. *See* Chee & Halpin, *supra* note 2; Padraic Halpin & Conor Humphries, *Ireland to Join Apple in Fight Against EU Tax Ruling*, REUTERS (Sept. 2, 2016), http://www.reuters.com/article/us-eu-apple-taxavoidance-ireland-idUSKCN1180WR; Romain Dillet, *Apple Ordered to Pay up to $14.5 Billion for Illegal Tax Benefits in Ireland*, TECH CRUNCH (Aug. 30, 2016), https://techcrunch.com/2016/08/30/apple-ordered-to-pay-up-to-145-billion-for-illegal-tax-benefits-in-ireland/; Gavin Ekins, *Understanding the European*

The EU Member States have a sovereign right to determine their own fiscal policies and tax regulations.[5] The EU State aid law,[6] however, prohibits them from providing aid, including tax benefits, to companies in a way that distorts competition.[7] In its investigation against Ireland, the Commission found that the tax rulings the country granted to Apple in 1991 and 2007 allowed the company to attribute profits earned by two Irish-incorporated subsidiaries, Apple Sales International and Apple Operations Europe, to a virtual "head office,"[8] which existed only on paper, had "no physical location or staff," and "was not based in any country."[9] Such attributed profits remained untaxed, significantly lowering Apple's effective tax rate.[10] As a result, Apple paid substantially less tax than other businesses at a corporate tax rate of no more than 1 percent, while the standard corporate tax rate in Ireland was 12.5 percent.[11] The Commission said that Ireland granted such tax deal exclusively to Apple, while similar benefits were not available to other companies.[12]

Notably, Ireland has joined Apple in opposing the Commission's decision[13] and is strongly "determined not to accept the tax windfall."[14] On November 9, 2016, the country initiated an appeal of the decision in the General Court of the European Union.[15] Ireland's leadership is concerned that the Commission's

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Commission's Recent Tax Rulings, TAX FOUND. (Sept. 13, 2016), http://taxfoundation.org/blog/understanding-european-commission-s-recent-tax-rulings.

5. Kroes, *supra* note 1.

6. *See infra* Part I for a more in-depth discussion of EU State aid law.

7. Nicholas J. DeNovio et al., *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments*, TAX EXEC. (Apr. 6, 2016), http://taxexecutive.org/state-aid-what-it-is-and-how-it-may-affect-multinationals-and-tax-departments/.

8. Eric Maurice, *EU's €13bn Tax Decision Angers Ireland, US, and Apple*, EU OBSERVER (Aug. 30, 2016), https://euobserver.com/economic/134816.

9. James Titcomb et al., *Apple Tax: Downing Street Says Tech Giant 'Welcome' to Come to UK After EU Orders Ireland to Claw Back £11bn*, TELEGRAPH (Aug. 30, 2016), http://www.telegraph.co.uk/technology/2016/08/30/apple-ordered-to-pay-11bn-after-european-union-tax-investigation/.

10. Dillet, *supra* note 4.

11. *Apple Should Repay Ireland 13bn Euros, European Commission Rules*, BBC (Aug. 30, 2016), http://www.bbc.com/news/business-37220799.

12. Titcomb et al., *supra* note 9.

13. Maurice, *supra* note 8.

14. Halpin & Humphries, *supra* note 4.

15. Mark Scott, *Dublin Appeals $14.3 Billion Tax Charge Against Apple*, N.Y. TIMES (Nov. 9, 2016), at B6.

determination will damage the country's reputation as a business-friendly, low-tax haven among large multinational corporations.[16] For example, Irish Finance Minister at the time, Michael Noonan,[17] issued a strong statement criticizing the decision and accusing the Commission of halting international progress in the area of tax avoidance and tax evasion reforms and introducing uncertainty for companies doing business in Europe.[18] Minister Noonan has also expressed concerns about the future of foreign direct investment in the European Union if the Commission can overturn valid arrangements between the investor and the Member State "a generation later" and find that the investor owes back taxes.[19]

Apple has been equally outraged by the decision, blaming the Commission for striking "a devastating blow to the sovereignty of EU member states over their own tax matters, and to the principle of certainty of law in Europe."[20] On December 19, 2016, Apple followed Ireland's example and filed an appeal of the Commission's decision at the EU's General Court.[21] The company's CEO, Tim Cook, noted that Apple found itself in an odd situation of being compelled to pay additional back taxes to a government

16. Dan Bobkoff, *What Just Happened to Apple, Explained*, BUS. INSIDER (Aug. 30, 2016), http://www.businessinsider.com/what-just-happened-to-apple-explained-2016-8. Ireland has an "extremely pro-business environment" and "has attracted investments by some of the world's biggest companies" due to "low tax burden, investor protection and personal freedom." Kurt Badenhausen, *Ireland Heads Forbes' List of the Best Countries for Business*, FORBES (Dec. 4, 2013), http://www.forbes.com/sites/kurtbadenhausen/2013/12/04/ireland-heads-forbes-list-of-the-best-countries-for-business/#73823fb61e6a. Between 2008 and 2012, "U.S. firms invested $129.5 billion in Ireland." *Id.* Google, LinkedIn, Twitter, and Facebook currently have their European headquarters in Dublin. *Id.*

17. In May 2017, Finance Minister Noonan stepped down from his leadership position after six years in power. Vincent Boland, *Irish Finance Minister Michael Noonan to Step Down*, FIN. TIMES (May 18, 2017), https://www.ft.com/content/edcdc279-49bb-3721-bc68-1efa238fc003?mhq5j=e5.

18. Maurice, *supra* note 8.

19. Halpin & Humphries, *supra* note 4.

20. Maurice, *supra* note 8.

21. Julia Fioretti, *Apple Appeals Against EU Tax Ruling, Brussels Says No Cause for Low Tax Bill*, REUTERS (Dec. 19, 2016), http://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKBN148007.

that said the company did not owe them more than it had already paid.[22] The U.S. Department of the Treasury has also issued a statement criticizing the decision as "unfair" and "contrary to well-established legal principles."[23] It warned the Commission of turning into a "supranational tax authority" interfering into fiscal matters of individual Member States.[24]

The Commission's State aid decision against Ireland and Apple serves as an example of a greater problem existing within the European Community. EU Member States are competing with each other for foreign direct investment by lowering their tax rates.[25] It has been argued that a decrease in tax revenues leads to a decline in the "quality of public services" and deterioration of the Member States' "welfare system."[26] The Commission, therefore, is trying to contain the harmful consequences of tax competition and improve fiscal transparency via its State aid investigations.[27] If the decision against Ireland and Apple is enforced, however, it will result in EU Member States losing authority over their sovereign tax matters, which have been historically in the province of individual governments.[28] EU courts, faced with the pending State aid appeals, have to review an important issue—whether to give room to more antitrust enforcement at the expense of Member States potentially losing their tax independence.[29]

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22. Amar Toor, *Read Apple's Letter to Europe on Irish Tax Decision*, VERGE (Aug. 30, 2016), http://www.theverge.com/2016/8/30/12707932/apple-tim-cook-ireland-tax-european-commission.

23. *Europe's 'Unfair' Apple Tax Ruling Sparks US Anger*, BBC (Aug. 30, 2016), http://www.bbc.com/news/business-37226101.

24. *Id.*

25. Igor Nikolic, *EU State Aid and National Taxation: Moving Towards Harmonization*, U.C. LONDON, Aug. 1, 2012, at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158729.

26. *Id.*

27. *Id.*

28. Terry Hayes, *Apple's €13 Billion Irish Back-tax Bill Reverberates*, THOMPSON REUTERS BLOG (Sept. 3, 2016), https://blogs.thomsonreuters.com/answerson/apples-13-billion-irish-back-tax-bill-reverberates/.

29. Philip Lowe, *Competition Policy in the European Union*, AM. ANTITRUST INST. (July 1, 2002), http://www.iatp.org/files/Competition_Policy_in_the_European_Union.htm. On October 4, 2017, while Ireland's and Apple's appeals are still pending in the European courts, the Commission referred Ireland to the European Court of Justice for failure to timely recover back taxes from Apple. Dara Doyle, *EU Sues Ireland over Apple Billions as Tax Tensions Flare*

This Note will argue that the Commission's decisions in the Apple case and other recent State aid cases[30] concerning tax rulings of the Member States are not the most effective mechanism for improving fiscal transparency. These decisions encroach on the sovereignty of the Member States' tax systems and erode taxpayers' confidence in the tax laws.[31] Instead of making efforts to integrate and reconcile EU tax regulations for the future, the Commission attempts "to apply rules after the fact," which "amounts to harmonization through the back door, and is dangerous for Europe."[32] The EU tax reform has to be carried out via legislative process by adopting tax laws to apply prospectively, not by creatively utilizing State aid rules so that they can bypass national legislation.[33]

Part I of this Note will provide background information on State aid, the Commission, and its legislative authority to conduct State aid investigations, as well as discuss the application of State aid rules to tax laws and, in particular, the tax rulings. Part II will examine three recent decisions by the Commission which preceded the Apple case, where the Commission found that Luxembourg, the Netherlands, and Belgium, similar to Ireland, had granted illegal State aid. Part III will then focus on the problems that arise as a result of the Commission's State aid decisions, which include introducing uncertainty into the international tax systems via retroactive tax assessments, creating inconsistencies with the international tax norms and transfer pricing standards, and hindering foreign direct investment into

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Up, BLOOMBERG (Oct. 4, 2017), https://www.bloomberg.com/news/articles/2017-10-04/eu-sues-ireland-over-apple-billions-as-tax-tensions-flare-up; Philip Blenkinsop, *EU Takes Ireland to Court for not Claiming Apple Tax Windfall*, REUTERS (Oct. 4, 2017), https://www.bloomberg.com/news/articles/2017-10-04/eu-sues-ireland-over-apple-billions-as-tax-tensions-flare-up. The Commission stated that the deadline to collect was January 3, 2017, and, until the funds are recovered, Apple continues to enjoy its illegal advantage. Blenkinsop, *supra*. Ireland's finance ministry called the Commission's action "regrettable," but vowed to collect the amount due and keep the funds in an escrow account pending the outcome of the appeals. *Id.*

30. *See infra* Part II for a discussion of other relevant State aid investigations.

31. Liza Lovdahl Gormsen, *By Singling Out Apple over Taxes, Brussels Is Abusing Its Own Tax Rules*, TELEGRAPH (Aug. 28, 2016), http://www.telegraph.co.uk/business/2016/08/28/brussels-mustnt-achieve-tax-reform-by-using-state-aid-rules-crea/.

32. *Id.*

33. *Id.*

the European Union. Finally, Part IV will conclude that State aid investigations are not the best mechanism for targeting tax avoidance and tax evasion. This Part will suggest that in the long run, the most appropriate solution is a series of comprehensive tax reforms aimed at increasing transparency and harmonizing tax systems across the Member States to ensure proper functioning of tax laws across the region via their prospective, as opposed to retroactive, application. In the short term, however, the outlined problems can be dealt with by recognizing the internationally accepted transfer pricing guidelines[34] as the primary authority for all transfer pricing determinations within the European Union.[35] Additionally, there should be a special agency created at the Commission charged with advance review of transfer pricing rulings for potential State aid violations before their issuance by the Member States.[36]

I. THE COMMISSION AND STATE AID

The concept of State aid is unique to EU law.[37] It prohibits Member States from using state resources to provide assistance to selected companies, thereby giving them an unfair advantage over other market players and hurting competition within the European Union.[38] State aid regime is "a central pillar" of the EU Single Market and supports the free flow of goods and services within the union without undue interference from the Member States.[39] This Part will discuss the Commission's legis-

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34. *See infra* Part III.B. for more information on the internationally accepted transfer pricing guidelines.

35. Stuart Gibson, *Brokering the Brawl When EU Commission Tax Rulings Become State Aid*, FORBES (Sept. 29, 2016), http://www.forbes.com/sites/taxanalysts/2016/09/29/brokering-the-brawl-when-eu-commission-tax-rulings-become-state-aid/#75a539fc16b9.

36. *Id.*

37. Jan Blockx & Falk Schoning, *EU: State Aid*, GCR (July 20, 2016), http://globalcompetitionreview.com/chapter/1067821/eu-state-aid; Claus-Dieter Ehlermann, *State Aid Control in the European Union: Success or Failure?*, 18 FORDHAM INT'L LAW J. 1212, 1213 (1994).

38. UK DEP'T FOR BUS. INNOVATION & SKILLS, STATE AID: THE BASICS GUIDE 3 (July 2015), https://www.gov.uk/government/...data/.../BIS-15-417-state-aid-the-basics-guide.pdf.

39. Brian Hartnett et al., *Five Minutes On…EU State Aid Law*, SQUIRE PATTON BOGGS (Sept. 2, 2016), http://www.tradepractitioner.com/2016/09/five-minutes-on-european-state-aid-law/.

lative authority to enforce State aid rules, the State aid investigation process, and how the Commission can use State aid to inquire into the Member States' fiscal matters.

A. Legislative Authority of the Commission to Conduct State Aid Investigations

Articles 107 through 109 of the Treaty on the Functioning of the European Union (TFEU) govern the legality of State aid provided by EU Member States.[40] Article 107(1) of the TFEU 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."[41] The TFEU, however, also recognizes that in certain situations, government involvement is necessary to support a well-performing economy. As such, it justifies State aid initiatives for policy reasons if they support "general economic development."[42]

While the original purpose of State aid legislation was to prevent Member States from subsidizing their "national champions" and limiting competition from companies located in other Member States, the concept has now evolved to include an increased number of various state incentives.[43] These days, "aid" is "defined very broadly"[44] and, besides subsidies, can include "tax measures, financial guarantees or preferential commercial

40. *The EU State Aid Regime: An Overview*, WILLIAM FRY (Jan. 28, 2014), http://www.williamfry.com/newsandinsights/news-article/2014/01/28/the_eu_state_aid_regime_an_overview; Nikolic, *supra* note 25, at 6. Article 107 defines State aid and discusses when it can be compatible or incompatible with the internal market. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Article 108 outlines the Commission's responsibilities in conducting State aid investigations. *Id.* art. 108. Article 109 mentions when European Council can take action in regards to State aid. *Id.* art. 109.

41. TFEU art. 107(1).

42. *State Aid Control*, EUR. COMMISSION, http://ec.europa.eu/competition/state_aid/overview/index_en.html (last visited Oct. 3, 2017).

43. Bertold Bar-Bouyssiere, *Luxleaks—Challenging the Challenges to Tax Rulings in the EU*, DLA PIPER (Mar. 27, 2015), https://www.dlapiper.com/en/us/insights/publications/2015/03/global-news-mar-2015/luxleaks-challenging-the-challenges/.

44. Nikolic, *supra* note 25, at 6.

terms provided by a government."[45] This list, however, is not exhaustive.[46]

The Commission is the government body responsible for overseeing that any State aid provided by the Member State is in compliance with EU rules.[47] Its original authority comes from Article 93 of the Treaty Establishing the European Community (EEC Treaty, commonly called the Treaty of Rome and subsequently amended by TFEU),[48] which entrusts State aid control "to the Commission and to the Commission alone."[49] There is one exception found in Article 93(2) of the EEC Treaty (or Article 108(2) of TFEU as amended), which allows the European Council, upon request from a Member State, to find State aid to be compatible with the internal market if justified by "exceptional circumstances."[50] This exception, however, "has been very rarely used."[51] The Commission thus remains the only true enforcer of State aid rules in the European Union.[52]

B. State Aid Investigation Process

The Commission is vested with broad powers to both investigate and recover unlawful State aid.[53] When the Commission

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45. Blockx & Schoning, *supra* note 37.

46. Nikolic, *supra* note 25, at 7. For example, the government can also provide State aid through a "capital injection" into the company, reduction in the company's required social security contributions, or purchase of goods and services from the company. Giorgio Motte & Niels Baeten, *EU State Aid Enforcement: What Multinationals Need to Know*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Sept. 19, 2017), https://www.skadden.com/insights/publications/2017/09/insights-quarterly-september/eu_state_aid_enforcement.

47. *State Aid Control*, *supra* note 42.

48. Treaty Establishing the European Community art. 93, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. *See also* TFEU arts. 107–09. Articles 107 to 109 of TFEU originated from Articles 92 to 94 of EEC Treaty. *Key Changes in Terminology Following Lisbon,* SLAUGHTER & MAY (Nov. 2009), https://www.slaughterandmay.com/media/870575/key_changes_in_terminology_following_lisbon.pdf.

49. Ehlermann, *supra* note 37, at 1216.

50. *Id.*; EEC Treaty art. 93(2) (as in effect 1958) (now TFEU art. 108(2)); TFEU art. 108(2).

51. Ehlermann, *supra* note 37, at 1216. European Council decisions are rare because they are intended for exceptional situations. EUR. COMM., STATE AID MANUAL OF PROCEDURES (2013), http://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf. Additionally, the Council has a hard time "reaching unanimity." *Id.*

52. Ehlermann, *supra* note 37, at 1216.

53. *State Aid Control*, *supra* note 42.

has a serious reason to suspect that the Member State's actions are incompatible with the EU State aid rules, or where it cannot obtain the required information from the Member State, it is obligated to open a formal investigation under Article 108(2) of TFEU.[54] In order to find incompatible State aid, the Commission needs to determine that "a national measure: (1) is financed by the State or through State resources, (2) provides an advantage for an undertaking, (3) is selective, and (4) affects trade between Member States and distorts competition."[55]

The first requirement, financed by the State, is met if the benefit is provided either by the State directly "or through a private or public body designated and established by the State."[56] The key question is whether the State provided its resources and conferred a benefit that can be traced back and attributed to the State.[57] The second and third criteria, advantage and selectivity, respectively, are the most important ones.[58] "Advantage" means that company received a benefit from a Member State, which gave the company an unfair lead in the market.[59] "Selectivity" means that this benefit was available only to a specific business or businesses.[60] It is usually relatively easy to show that a company received a benefit from a Member State, but, in most State aid investigations, the issue turns on whether such benefit was "selective."[61] Generally, "a measure is selective if it produces an advantage exclusively for certain undertakings or certain sectors of activity."[62] It can be difficult to establish the difference between general and selective measures, however, as there are "many diverging interpretations from the Commission, the

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54. *State Aid Procedures*, EUR. COMMISSION, http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html (last visited Oct. 18, 2017).

55. U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS 5–6 (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf [hereinafter STATE AID WHITE PAPER]; DeNovio, *supra* note 7.

56. Nikolic, supra note 25, at 7.

57. *Id.*

58. Ekins, *supra* note 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. Nikolic, *supra* note 25, at 7.

Court and the academic literature."[63] The fourth requirement, affecting trade and distorting competition between Member States, is easy to demonstrate after establishing that the advantage and selectivity criteria are met.[64] Improvement in the company's "competitive position is assessed simply by reference to the advantage" it received from the State.[65]

Once the Commission determines that the State measure met the criteria for State aid and did not support any policy objectives, it is found to be incompatible with the internal market.[66] At that point, the Commission issues a final decision to the EU Member State and orders it to recover the illegal aid.[67] The purpose of recovery is to eliminate the unfair advantage provided to the recipient.[68] If the Member State fails to timely proceed with the recovery of illegal State aid, the Commission can refer the case directly to the European Court of Justice.[69] In turn, Member States, as well as the impacted State aid beneficiaries, can appeal the Commission's decisions at the EU General Court.[70] The judgments of the EU General Court can then "be appealed to the European Court of Justice for review of legal issues only."[71]

C. State Aid and Tax

In the 1960s and 70s, when State aid law was still in the early stages of development, the Commission preferred not to interfere with the Member States' national fiscal policies under the

63. Nikolic, *supra* note 25, at 11. For example, in the Apple case, the Commission alleges that "Apple's Irish subsidiary received an advantage [from the Irish government] that was not open to other Irish companies." Hartnett et al., *supra* note 39. At the same time, Apple argues that the tax structure it utilized in Ireland was available to all companies and "was not unique to Apple," so there was no selective advantage, as any company could apply for a similar tax ruling. Vanessa Houlder et al., *Apple's EU Tax Dispute Explained*, FIN. TIMES (Aug. 30, 2016), https://www.ft.com/content/3e0172a0-6e1b-11e6-9ac1-1055824ca907.

64. Nikolic, *supra* note 25, at 7.

65. *Id.*

66. Policy objectives may include "aid with a social character" and "aid for the promotion of culture and heritage." Blockx & Schoning, *supra* note 37. If State aid is found to be "incompatible with the single market," it is deemed illegal. *Id.*

67. DeNovio, *supra* note 7.

68. Blockx & Schoning, *supra* note 37.

69. *Id.*

70. DeNovio, *supra* note 7.

71. *Id.*

umbrella of State aid, since it believed that "direct taxation remain[ed] a sovereign area" under individual governments' control.[72] Since the end of the twentieth century, as a result of a more aggressive tax competition between Member States, the Commission has started to increasingly focus on the correlation between the tax regimes and State aid.[73] In 1998, it started conducting State aid investigations "into national business taxation" and has been pursuing this course of action ever since.[74]

State aid rules apply to tax law based on the premise that a reduction in tax liability may represent an illegal benefit provided by a Member State to a company operating within the State.[75] In other words, the State's refusal to take on more tax revenue by providing a tax break to a particular company equates to use "of State resources in the form of fiscal expenditure."[76] The Commission's State aid inquiry into the Member State's tax measure, similar to other State aid investigations, also focuses on the criteria of advantage and selectivity.[77] The latter still remains "the most disputed and undetermined issue," as the EU General Court has so far been interpreting selectivity of tax measures very broadly.[78]

One area of tax law the Commission is becoming increasingly concerned about deals with national tax rulings.[79] Tax rulings[80]

72. Nikolic, *supra* note 25, at 7.

73. Blockx & Schoning, *supra* note 37. Member States are competing by lowering their corporate tax rates in order to attract more foreign direct investment. Reint Gropp & Kristina Kostial, *FDI and Corporate Tax Revenue: Tax Harmonization or Competition?*, IMF FINANCE & DEV'T, vol 38, June 2001, http://www.imf.org/external/pubs/ft/fandd/2001/06/gropp.htm. This has spurred a lot of debates on whether the EU tax rates have to be harmonized, or tax competition between Member States should be permitted. *Id.*

74. Nikolic, *supra* note 25, at 9.

75. DeNovio, *supra* note 7.

76. *Id.*

77. *Id.*

78. Nikolic, *supra* note 25, at 9. The EU General Court has previously ruled that even if the tax measure "is not aimed at one or more specific recipients," or "there are indefinite number of beneficiaries who are initially identified," this does not mean it is not selective. *Id.* at 14. The Court further stated that "measures covering whole sector of economy" can also be selective. *Id.*

79. Blockx & Schoning, *supra* note 37.

80. Tax rulings are "essentially letters of comfort" issued by the State's taxing authorities "to provide clarity on tax questions to a business." Arthur Beesley & Alex Barker, *Apple Tax Deal: How It Worked and What the EU Ruling Means*, FIN. TIMES (Aug. 30, 2016), https://www.ft.com/content/cc58c190-6ec3-

have been used historically "to provide certainty with regard to the tax implications of investments and transactions in advance of" companies proceeding with them.[81] The Commission has now taken a position that "any tax ruling that does more than simply interpreting the general tax system" can potentially qualify as State aid.[82] It has recently started conducting investigations into the transfer pricing rulings issued by tax authorities in a number of Member States.[83] The Commission is convinced that some Member States have allowed companies to allocate profits to the untaxed subsidiaries by abusing the transfer pricing rules.[84] As a result, to date, it has issued negative rulings in five cases, including the Apple case.[85]

II. RECENT COMMISSION'S STATE AID INVESTIGATIONS INTO THE RULINGS OF THE MEMBER STATES

In February 2014, the Commission started its inquiries into the tax ruling practices of the following six Member States: Luxembourg, Ireland, the Netherlands, the United Kingdom, Cyprus, and Malta.[86] In the course of that year, the Commission launched formal investigations against Ireland (for incompatible State aid provided to Apple), Luxembourg (for unlawful tax benefits presented to Fiat and Amazon), and the Netherlands (for illegal tax breaks given to Starbucks).[87] In December 2014, the

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11e6-a0c9-1365ce54b926. These rulings "explain how local tax rules will be applied in individual cases, and companies rely" on them to make investment decisions. Kroes, *supra* note 1.

81. Lodewijk Berger et al., *EU Rules Starbucks, Fiat Received Tax Advantages from The Netherlands and Luxembourg Constituting Illegal State Aid, Must Pay Back Taxes*, JONES DAY (Oct. 2015), http://www.jonesday.com/eu-rules-starbucks-fiat-received-tax-advantages-from-member-states-constituting-illegal-state-aid-must-pay-back-taxes-10-21-2015/.

82. Bar-Bouyssiere, *supra* note 43.

83. Blockx & Schoning, *supra* note 37.

84. *Apple Appeal Against EU Tax Bill Would Enter Uncharted Territory*, FORTUNE (Sept. 2, 2016), http://fortune.com/2016/09/02/apple-appeal-eu-tax-bill/.

85. Three decisions (Starbucks, Fiat, and Belgian excess profits system) preceded the Apple case, while the Amazon decision was issued post Apple one. *Tax Rulings*, EUR. COMMISSION, http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html (last visited Oct. 17, 2017).

86. DeNovio, *supra* note 7.

87. STATE AID WHITE PAPER, *supra* note 55, at 2–3.

Commission began looking into the tax rulings of all other Member States, and subsequently initiated an investigation against Belgium challenging the State's excess profit tax ruling system.[88] The Fiat, Amazon, Starbucks, Apple, and Belgian excess profits system investigations have all been finalized, resulting in the Commission finding the State aid and ordering the respective governments to recover unpaid taxes for up to ten years into the past.[89]

This Part will discuss the Commission's decisions against the Netherlands, Luxembourg, and Belgium, which preceded the Apple decision. Specifically, this Part will provide useful background on the Commission's newly adopted approach of reviewing the Member States' tax rulings under the umbrella of State aid.

A. Starbucks Investigation and Decision

The Commission initiated its Starbucks investigation in June 2014.[90] At issue was a tax ruling that the Dutch government had granted to Starbucks' Dutch affiliates approving the company's transfer pricing methodology.[91] The Commission found that the

88. DeNovio, *supra* note 7.

89. Francois-Charles Laprevote et al., *Three Years of EU State Aid Review of Tax Rulings: Taking Stock,* CLEARY GOTTLIEB 2 (July 29, 2016), https://www.clearygottlieb.com/~/media/cgsh/files/alert-memos/three-years-of-eu-state-aid-review-of-tax-rulings-taking-stock.pdf (at the time of publication of this alert memorandum, only the Fiat, Starbucks, and Belgian "excess profits" ruling system investigations had been finalized); *Tax Rulings*, *supra* note 85.

90. Oliver R. Hoor & Keith O'Donnell, *State Aid Investigations in the EU: How the EU Commision Risks the International Consensus on BEPS*, BLOOMBERG BNA (Jan. 12, 2017), https://www.bna.com/state-aid-investigations-n73014449722/.

91. *EU Commission Final Decisions in Starbucks and Fiat State Aid Cases*, PWC (Oct. 21, 2015), https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-eu-commission-final-decisions-in-state-aid-cases.pdf; Bob van der Made, *EU: European Commission Issues Final Decisions in Starbucks and Fiat State Aid Cases*, INT'L TAX REVIEW (Dec. 15, 2015), http://www.internationaltaxreview.com/Article/3514742/EU-European-Commission-issues-final-decisions-in-Starbucks-and-Fiat-state-aid-cases.html. Tax rulings on transfer pricing, called "advance pricing arrangements," are meant to provide legal certainty regarding "the tax treatment of transfers of goods and services between companies which are members of the same corporate group—or in some cases between establishments of a single company in different countries." Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 FORDHAM INT'L L.J. 1017, 1020 (2015).

royalties paid by Starbucks Netherlands to its U.K. sister company for coffee roasting know-how could not be justified, as the royalties did not reflect market value.[92] Additionally, the Commission determined that the price that Starbucks Netherlands paid to its Swiss subsidiary for the coffee beans was inflated and unlawfully reduced taxable profits resulting from the coffee roasting activities.[93] Therefore, the Commission concluded that Starbucks owed between €20 million and €30 million in back taxes to the Dutch taxing authorities.[94]

The Dutch government has strongly disagreed with the Commission's decision and its transfer pricing analysis, saying that it was not in line with the Dutch national legislation and the Organization for Economic Cooperation and Development (OECD) guidelines.[95] The Netherlands has appealed the decision, hoping to eliminate "the illegal uncertainty both for companies and for the government."[96]

B. Fiat Investigation and Decision

In its investigation of Fiat, also initiated in June 2014,[97] the Commission challenged the transfer pricing methodology utilized by Fiat's Luxembourg financing company when it provided intra-group loans to its operating affiliates in the United States, Canada, and Italy.[98] The Commission found that these loans were not carried out at fair market value and resulted in a lower tax bill due to the Luxembourg taxing authorities.[99]

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92. *EU Commission Final Decisions in Starbucks and Fiat State Aid Cases*, *supra* note 91; Simon Bowers, *Starbucks and Fiat Sweetheart Tax Deals with EU Nations Ruled Unlawful*, GUARDIAN (Oct. 21, 2015), https://www.theguardian.com/business/2015/oct/21/starbucks-and-fiat-tax-deals-with-eu-nations-ruled-unlawful.

93. *EU Commission Final Decisions in Starbucks and Fiat State Aid Cases*, *supra* note 91; Bowers, *supra* note 92.

94. Bowers, *supra* note 92.

95. Archie Van Riemsdijk, *Netherlands to Appeal EU Decision that Starbucks Tax Deal Is Illegal State Aid*, WALL ST. J. (Nov. 30, 1015, 11:34 AM), http://www.wsj.com/articles/netherlands-to-appeal-eu-decision-that-starbucks-tax-deal-is-illegal-state-aid-1448653827.

96. *Id.*

97. Hoor & O'Donnell, *supra* note 90.

98. European Commission Press Release IP/15/5880, Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands Are Illegal Under EU State Aid Rules (Oct. 21, 2015), http://europa.eu/rapid/press-release_IP-15-5880_en.htm; Bowers, *supra* note 92.

99. Bowers, *supra* note 92.

The Commission's investigation revealed that the 2012 tax ruling issued by Luxembourg to Fiat allowed the company to employ a "highly complex" methodology to arrive at its taxable profits.[100] In particular, as a result of "economically unjustifiable assumptions and down-ward adjustments," the financing company has significantly understated its capital base and subsequently applied a below-market remuneration to this "much lower capital for tax purposes."[101] Margrethe Vestager, European Competition Commissioner, stated that such methodology could not be "justified by economic reality."[102] She further noted that if Fiat properly valued its capital and applied market interest rates to its intra-group loans, the company's taxable profits would be twenty times higher.[103]

Similar to the Starbucks case, the Commission estimated that Fiat had to repay between €20 million and €30 million to the Luxembourg taxing authorities.[104] The Luxembourg government appealed the decision and stated that the Commission had utilized "unprecedented criteria in establishing the alleged State aid" and "has not established in any way that Fiat received selective advantages within the meaning of article 107 TFEU."[105]

100. Julie Levy-Abegnoli, *Tax Rulings: EU Commission Deals €30m Blows to Fiat and Starbucks*, PARLIAMENT MAG. (Oct. 21, 2015), https://www.theparliamentmagazine.eu/articles/news/tax-rulings-eu-commission-deals-%E2%82%AC30m-blows-fiat-and-starbucks.

101. European Commission Press Release IP/15/5880, *supra* note 98.

102. Levy-Abegnoli, *supra* note 100.

103. *Id.*; European Commission Press Release IP/15/5880, *supra* note 98.

104. Van der Made, *supra* note 91.

105. *Luxembourg to Appeal Fiat State Aid Decision*, PWC TAX BLOG (Dec. 16, 2015), http://pwc.blogs.com/tax/2015/12/luxembourg-to-appeal-fiat-state-aid-decision.html. Besides the Fiat investigation, on October 4, 2017, the Commission finalized its investigation against Luxembourg for the alleged State aid granted to Amazon. Jennifer Rankin, *Amazon Ordered to Repay €250m by EU over 'Illegal Tax Advantages'*, GUARDIAN (Oct. 4, 2017), https://www.theguardian.com/technology/2017/oct/04/amazon-eu-tax-irish-government-apple. Amazon established an operating company for its retail business and a holding company, organized as a limited partnership, for its intellectual property (IP) in Luxembourg. *EU Commission Decides that Luxembourg Gave Illegal State Aid to Amazon of €250m*, ICAEU (Oct. 4, 2017), https://ion.icaew.com/taxfaculty/b/weblog/posts/eu-commission-decides-that-luxembourg-gave-illegal-state-aid-to-amazon-of-250m. The holding company, not subject to Luxembourg tax, granted an exclusive license in its IP to the operating company in return for royalty payments. *Id.* The Commission's investigation established that royalties paid by Amazon's operating company to the IP holding company in Luxembourg were excessive and "did not reflect economic reality." *Id.* As a

C. Investigation and Decision against Belgium

The Commission's investigation against Belgium dealt with an excess profit scheme introduced in 2005,[106] which allowed certain multinational corporations to deduct a so-called "excess profit" from their actual profits made in Belgium[107] and, therefore, substantially reduce their tax base.[108] The excess profit was determined using a transfer pricing methodology by calculating a "hypothetical average profit" of a "standalone company" engaged in comparable activities and subtracting it from the actual profit recorded by the multinational corporation in Belgium.[109]

The Commission ordered Belgium to recover approximately €700 million from thirty-five multinational companies as a result of finding State aid.[110] Belgium argues that the excess profit tax regime was necessary in order to prevent double taxation of

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result of overstating its royalty payments, Amazon's operating company was able to reduce its profits to one-fourth of what they actually were. *Id.* The Commission ordered Luxembourg to recover €250 million in unpaid taxes, and both Amazon and Luxembourg are considering an appeal. Rankin, *supra*; Silvia Amaro, *Luxembourg Could Appeal against the EU's $294 Million Amazon Tax Bill, Says Finance Minister*, CNBC (Oct. 10 2017), https://www.cnbc.com/2017/10/10/luxembourg-could-appeal-against-the-eu-294-million-amazon-tax-bill-says-finance-minister.html. In addition to final decisions in the Fiat and Amazon cases, the Commission's investigations against Luxembourg for the alleged tax deals with McDonald's and GDF Suez (now Engie) are still ongoing. *Tax Rulings*, *supra* note 85.

106. Natalia Drozdiak & Matthias Verbergt, *EU Tax Ruling May Prompt Businesses Move Out of Belgium*, WALL ST. J. (Feb. 28, 2016, 8:34 AM), http://www.wsj.com/articles/eu-tax-ruling-may-prompt-business-move-out-of-belgium-1456666493.

107. Edoardo Traversa & Pierre Sabbadini, *Belgium's Excess Profit Tax Ruling System: Why the Commission Thinks It's Illegal State Aid*, MNE TAX (May 6, 2016), http://mnetax.com/belgiums-excess-profit-tax-ruling-system-commission-thinks-illegal-state-aid-14993.

108. Drozdiak & Verbergt, *supra* note 106.

109. Traversa & Sabbadini, *supra* note 107.

110. *Belgium's "Excess Profit" Tax Scheme Qualified As Illegal State Aid*, STIBBE (Feb. 2, 2016), https://www.stibbe.com/en/news/2016/february/belgiums-excess-profit-tax-scheme-qualified-as-illegal-state-aid; Hoor & O'Donnell, *supra* note 90.

multinational companies' income[111] and has appealed the Commission's determination.[112]

While all four cases decided by the Commission remain on appeal with the European courts, the boundaries of the EU State aid law, as applied to the tax ruling practices of the Member States, "remain unsettled."[113] EU Courts are now faced with an important task of shaping the tax and antitrust policies in this area by deciding whether to give an unlimited power to the Commission to conduct investigations into the individual States' tax practices, or leave fiscal policy decisions in the province of national governments.[114]

III. Problems with the Commission's State Aid Decisions in the Context of Tax Rulings

The Commission's ruling against Apple has provoked substantial criticism of the recent State aid investigations that utilized the State aid clause of the TFEU "to strike down tax agreements and force collection of back taxes with interest."[115] The U.S. Treasury stated that "retroactive tax assessments by the Commission [were] unfair, contrary to well-established legal principles, and call[ed] into question the tax rules of individual member states."[116] This Part will discuss the normative legal problems with the Commission's State aid decisions as pertaining to the Member States' tax rulings. In particular, it will focus on the problems of retroactive tax assessment, departure from the widely recognized international tax norms, and hindering of the foreign direct investment into the European Union.

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111. *Only in Belgium? – The EU Commission Declares Belgian Excess Profits Tax Rulings for Multinationals to Be Illegal*, Cromwell Moring (Jan. 19, 2016), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Only-in-Belgium-The-EU-Commission-Declares-Belgian-Excess-Profits-Tax-Rulings-for-Multinationals-to-be-Illegal.

112. Traversa & Sabbadini, *supra* note 107.

113. Laprevote et al., *supra* note 89, at 1.

114. *See* Houlder et al., *supra* note 63.

115. The affected companies, the U.S. Treasury, and Ministries of Finance of the affected Member States have all criticized the Commission's decisions, saying that the tax rulings in question did not constitute State aid, and that the Commission was discriminating against American companies. Ekins, *supra* note 4.

116. *Europe's 'Unfair' Apple Tax Ruling Sparks US Anger*, supra note 23.

A. Violation of the Principle of Legal Certainty and Retroactive Tax Application

The Commission's recent State aid investigations into tax rulings of Member States have created uncertainty about the corporate tax arrangements between multinational companies and EU countries, as the Commission can now order recovery of retroactively assessed unpaid taxes, deemed to be illegal State aid, as far as ten years into the past.[117] Such situation can happen even when both the company and the Member State are confident that the tax ruling is valid, that they are not violating any tax rules, and have no reason to believe otherwise.[118] By imposing its State aid decisions in the Apple and other similar cases, the Commission has violated a fundamental principle of the EU law—the principle of legal certainty.[119] Additionally, it has introduced confusion into the international tax system[120] and undermined the G20's[121] efforts to promote tax certainty.[122]

The European courts recognize the principle of legal certainty as one of the most important fundamental principles of EU law.[123] It "encompasses both notions of legitimate expectations and of non-retroactivity (or non-retrospectivity) of the law,"[124] and enables the parties involved "to know precisely the extent of the obligations which are imposed on them."[125] Market players

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117. Kroes, *supra* note 1.

118. *Id.*

119. STATE AID WHITE PAPER, *supra* note 55, at 14; Joseph Atangan Tangea et al., *The Principle of Legal Certainty as a Principle of Economic Efficiency*, EUR. J. OF LEGAL STUDIES 1 (U. of Westminster Sch. of Law Res. Paper No. 13-13, July 8, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332016.

120. Kroes, *supra* note 1.

121. G20 (the Group of Twenty) "is an international forum that brings together the world's 20 leading industrialised and emerging economies. The group accounts for 85 per cent of world GDP and two-thirds of its population." Jamil Mustafa, *What Is the G20 and How Does It Work?*, TELEGRAPH (July 3, 2017), http://www.telegraph.co.uk/business/0/what-is-the-g20-and-how-does-it-work/. The United States, the United Kingdom, Germany, China, and Russia are all members of the G20. *Id.*

122. STATE AID WHITE PAPER, *supra* note 55, at 1.

123. Tangea et al., *supra* note 119, at 3.

124. *Id.*

125. Hysni Ahmetaj, *Legal Certainty and Legitimate Expectation in the EU Law*, I INDISCIPLINARY J. OF RES. & DEV. 20, 21 (2014), http://www.uamd.edu.al/new/wp-content/uploads/2015/07/5.-Hysni-Ahmetaj.pdf.

must be capable of articulating their exact rights and responsibilities, and then act in accordance to them.[126] Therefore, according to the principle of legal certainty, whenever the law provides a benefit to the individual, such benefit can only be withdrawn prospectively, even if the law is determined to be illegal.[127]

The companies that are now under the Commission's investigation have relied on the Member States' tax rulings for a long time, in some situations for over ten years, and the Commission has not taken any enforcement action against them, or indicated in any way that they were doing something wrong.[128] Moreover, before the Commission started its investigations in 2014, none of the companies had acknowledged the risk of State aid investigations in their audited financial statements.[129] In fact, "neither internal review nor third-party review and audit of the affected firms by tax and audit professionals" signaled in any way that their tax position could possibly trigger State aid inquiry.[130] Therefore, since the Commission's new approach to State aid investigations could not be anticipated or predicted by the companies in question,[131] its unfavorable determinations and "retroactive enforcement of a newly adopted approach"[132] were in violation of the EU's fundamental principle of legal certainty.

Besides violating the principle of legal certainty that is highly regarded by the EU courts, the Commission has disturbed the international tax system by applying tax laws retroactively.[133] Companies have a right to understand their tax obligations up front and plan for them accordingly.[134] Retroactive tax application is inherently unfair—if taxpayers follow all the current tax rules, they should not be punished as a result.[135] Corporations hire various legal and accounting professionals to ensure that

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126. *Id.*; STATE AID WHITE PAPER, *supra* note 55, at 14.
127. Tangea et al., *supra* note 119, at 5.
128. STATE AID WHITE PAPER, *supra* note 55, at 15.
129. *Id.*
130. *Id.*
131. *Id.* at 14.
132. *Id.*
133. Kroes, *supra* note 1.
134. *Id.*
135. David Brunori, *Retroactive Tax Laws Are Just Wrong*, FORBES (Aug. 21, 2015), http://www.forbes.com/sites/taxanalysts/2015/08/21/retroactive-tax-laws-are-just-wrong/#6414bfe7347d.

they are compliant with the tax rules in the relevant jurisdictions.[136] If the laws can change retroactively, however, there is no incentive for the companies to put so much effort into trying to diligently follow those rules.[137]

In all four of the Commission's State aid cases in question, companies under investigation have received tax rulings from the EU Member States' taxing authorities.[138] These companies structured their operations and planned their expenses in reliance on these rulings, which they deemed to be valid pieces of legislation.[139] It is, therefore, unfair for the Commission to assess back taxes on these companies after the fact.[140] Such decision can only lead to uncertainty and confusion for the international corporations doing business in the European Union, as they would no longer be able to rely on the tax rulings issued by the taxing authorities of the countries they operate in.[141]

Such an unfortunate result would also be inconsistent "with broader efforts taken by the international community to improve tax certainty,"[142] which is one of the priorities on G20's agenda.[143] In the action plan that G20 has developed during its most recent meeting in Hangzhou, China, it was noted: "We . . . stress the benefits of tax certainty to support cross-border trade and investment."[144] In the plan, G20 members have also asked the OECD and the International Monetary Fund "to produce reports on tax policies to promote innovation-driven and inclusive growth, and to promote tax certainty."[145] The Commission's actions resulting in retroactive tax recoveries, in contrast to the

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136. *Id.*

137. *Id.*

138. *See* STATE AID WHITE PAPER, *supra* note 55, at 2-3.

139. *See id.* at 14.

140. Natalia Drozdiak & Sam Schnechner, *Apple Ordered by EU to Repay $14.5 Billion in Irish Tax Breaks*, WALL STREET J. (Aug. 30, 2016), http://www.wsj.com/articles/apple-received-14-5-billion-in-illegal-tax-benefits-from-ireland-1472551598.

141. STATE AID WHITE PAPER, *supra* note 55, at 17.

142. *Id.* at 16.

143. *Promoting Tax Certainty on the Agenda of the Next G20 Presidency*, MNE TAX (June 12, 2016), http://mnetax.com/promoting-tax-certainty-agenda-next-g20-presidency-15624.

144. G20, HANGZHOU ACTION PLAN 11 (2016), http://www.gpfi.org/sites/default/files/documents/Hangzhou%20Action%20Plan%202016.pdf.

145. *Id.*

G20's plan, create a high level of uncertainty for the international actors.[146] Moreover, they set an unwanted precedent for other tax authorities around the world "to seek large and punitive retroactive recoveries."[147] Such outcome would be disastrous for the international corporations.

In order for a company to function successfully in today's global business environment, it must be able to predict and plan for its expenses, in particular the tax outlays, which often become a substantial income statement item. Tax rulings used to be an effective way for companies to obtain confidence regarding their tax matters in relevant jurisdictions.[148] The Commission's State aid investigations into the Member States' fiscal policy decisions, however, undermine this certainty and introduce unnecessary confusion into the companies' operations.[149] This hinders the ability of the international corporations to plan for their economic activities and investments, and has an overall negative impact on international business.

B. Departure from Widely Recognized Transfer Pricing Practices and International Tax Norms

Most of the Commission's recent tax ruling investigations, including the Apple investigation, dealt with rulings on transfer pricing.[150] Transfer pricing is a method by which related companies under shared ownership assign value to their internal transactions and allocate profits between jurisdictions.[151] Unlike sales between unrelated parties, where there is little or no room for price negotiation, the price of the transactions between companies under common control "can be manipulated in order to allow the group as a whole to lessen its tax burden, by shifting revenue to low-tax countries, and over-stating costs in high-tax

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146. STATE AID WHITE PAPER, *supra* note 55, at 17.

147. *Id.*

148. Massimiliano Trovato, *Tax Rulings and State Aid: A Treacherous Mix*, EPICENTER, at 3 (Apr. 30, 2015), http://www.epicenternetwork.eu/publications/tax-rulings-and-state-aid-a-treacherous-mix/.

149. STATE AID WHITE PAPER, *supra* note 55, at 17.

150. Laprevote et al., *supra* note 89, at 2.

151. Lyal, *supra* note 91, at 1020; Elizabeth A. Jone, *State Aid in the EU Through Tax Rulings and Transfer Pricing*, SETON HALL L. SCHOOL STUDENT SCHOLARSHIP 7–8 (2016), http://scholarship.shu.edu/student_scholarship/911/.

countries."[152] In order to prevent such manipulation, the tax authorities around the world require related companies to apply a so-called "arm's length principle" to their internal transactions.[153] It requires that companies under common ownership charge each other such prices that would be assessed by "similarly situated but independent companies"[154] "under market conditions."[155]

The OECD, which is comprised of more than one hundred countries, including the United States and most EU Member States,[156] is an organization that sets international standards on transfer pricing.[157] Its Transfer Pricing Guidelines ("TP Guidelines" or "OECD TP Guidelines") focus on applying the arm's length principle to the related party transactions.[158] There are five transfer pricing methods in the TP Guidelines that are considered widely acceptable and recognized by the international community—comparable uncontrolled price (CUP), resale price, cost plus, transactional net margin method (TNMM), and transactional profit split.[159]

Though the TP guidelines are not binding, they have been developed as a result of long negotiations and are considered the best way of determining an arm's length price or profit level.[160] They have been successful "for decades in maintaining a consensus regarding minimizing double taxation and resolving disputes."[161] The national tax authorities use these guidelines as their reference point when establishing the arm's length principles, with many EU Member States explicitly referring to them

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152. Lyal, *supra* note 91, at 1020.
153. Jone, *supra* note 151, at 2.
154. *Id.*
155. Lyal, *supra* note 91, at 1020.
156. STATE AID WHITE PAPER, *supra* note 55, at 18.
157. Jone, *supra* note 151, at 8.
158. *Id.*
159. CUP method compares the price between related parties with the price observed between unrelated parties in the market. Lyal, *supra* note 91, at 1021–22. Resale price and cost plus methods compare gross margins in related and unrelated party sales. *Id.* TNMM "takes an appropriate base such as costs, turnover or fixed investment and applies a profit ratio reflecting that observed in comparable uncontrolled transactions." *Id.* Transactional profit split "takes the combined profits of two related undertakings and divides them according to the resources used by the parties and their respective functions." *Id.*
160. *Id.* at 1022.
161. STATE AID WHITE PAPER, *supra* note 55, at 18.

in their tax legislation.[162] Before the most recent State aid investigations into the tax rulings of the Member States that started in 2014, the Commission had also used the TP Guidelines as a basis for its analysis in State aid cases.[163]

In its recent Apple investigation, as well as other aforementioned State aid investigations that commenced post February 2014, however, the Commission has completely changed its approach and introduced a separate "EU-only" arm's length principle that differed from the global TP Guidelines.[164] While Ireland's tax ruling granted to Apple allowed the company to apply the transaction net margin method to its related party transactions,[165] which is one of the methods found in the TP Guidelines, the Commission argued that this method did not provide an arm's length result.[166] Instead, the Commission used an arm's length principle that did not correspond to any of the OECD transfer pricing methods, or "to any transfer pricing principle enshrined in Irish law."[167] The principle the Commission now applies in evaluating the transfer pricing rulings for State aid purposes is "an application of Article 107(1)" of TFEU, "which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation."[168] The only guidance that the Commission has given for applying this principle is that the taxable profit of related companies has to be calculated using methodology that provides "a reliable approximation of a market-based outcome."[169]

The Commission has clarified that its newly defined EU arm's length principle drives the State aid determinations in the tax rulings' investigations regardless of "whether a Member State has incorporated this principle into its national legal system and in what form."[170] In effect, this allows the Commission to ignore national law when making a determination whether a transfer

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162. Lyal, *supra* note 91, at 1022.
163. *Id.*
164. STATE AID WHITE PAPER, *supra* note 55, at 17.
165. Lyal, *supra* note 91, at 1023.
166. Bernard E. Amory et al., *EC Rules That Apple Received Illegal State Aid Under Irish Tax Rulings*, JONES DAY (Aug. 31, 2016), http://www.lexology.com/library/detail.aspx?g=9b43c895-4af9-4d14-b6c3-7b8d44d512e4.
167. *Id.*
168. Laprevote et al., *supra* note 89, at 4.
169. *Id.*
170. *Id.*

pricing tax ruling has violated the arm's length principle.[171] As a result, the Commission can find that a tax ruling that is in line with the Member State's tax law but deviates "from the EU arm's length principle is unlawful State aid."[172] This way the Commission now becomes a judge of when the transfer price is arm's length.[173]

Such an arrangement is problematic because the Commission is a "non-tax agency" and has little tax expertise;[174] therefore, it should not have authority to establish the transfer pricing rules and to determine whether the tax ruling is consistent with them. Moreover, the Commission has never clearly defined its arm's length principle, except referencing "the market," and has left the Member States in the dark as to how it is planning to apply this principle in practice.[175] These actions create uncertainty for those multinational companies, which have obtained rulings from the Member States that they believed were compliant with the internationally accepted OECD standards.[176]

The Commission's recent State aid investigations show that an international corporation may obtain a straightforward transfer pricing ruling that is in line with the TP Guidelines from a Member State, but still not be protected by it if the Commission decides to apply its own arm's length principle.[177] This raises multiple problems, especially when dealing with a related company outside the European Union, which uses the OECD method.[178] The TP guidelines were developed to avoid double taxation or double non-taxation by applying internationally uniform standards to related company transactions.[179] If one related party in the European Union, however, is required to use the Commission's newly defined arm's length principle, while the other one outside the European Union uses the OECD methodology, this

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171. *Id.*

172. *Id.*

173. STATE AID WHITE PAPER, *supra* note 55, at 19.

174. *Id.* at 20.

175. *Id.*

176. Alex M. Parker, *Practitioners: EU Apple Case Will Cause Chaos, Hurt BEPS*, BLOOMBERG BNA (Sept. 1, 2016), http://www.bna.com/practitioners-eu-apple-n73014447109/.

177. *Id.*

178. *See* John Neighbour, *Transfer Pricing: Keeping It at Arm's Length*, OECD OBSERVER (July 3, 2008), http://oecdobserver.org/news/archivestory.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html.

179. *Id.*

can potentially result in an outcome that the TP guidelines are specifically meant to prevent (i.e. double taxation or double non-taxation).[180]

Finally, the Commission's State aid investigations into the Member States' tax rulings threaten to undermine the progress made under the Base Erosion and Profit Shifting (BEPS) project,[181] which seeks to identify and eliminate gaps in tax rules across the world that allow companies shift profits to low or no-tax jurisdictions.[182] The countries taking part in the BEPS project have spent years negotiating and compromising the OECD guidelines in order to establish a clear arm's length framework, especially in relation to intellectual property.[183] The Commission's decision to apply its own arm's length standard, and not to use the OECD framework, undermines OECD efforts and raises doubts about the Member States' declared commitment to the TP Guidelines.[184] Additionally, it "also calls into question the Commission's endorsement . . . of the BEPS project and its outputs."[185]

Countries around the globe have put significant efforts into developing the OECD TP guidelines to ensure that the tax rules can be applied uniformly in the international business setting. [186] The Commission's actions in relation to its State aid investigations not only undermine all the efforts in harmonizing the tax rules, but also introduce more uncertainty into the international tax system by creating "a separate competing standard" to the TP Guidelines.[187] This will only result in less clear tax rules, more complex cross-border transactions, and increased confusion among the international actors.

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180. *See* STATE AID WHITE PAPER, *supra* note 55, at 17.

181. *Id.*

182. OECD, Base Erosion and Profit Shifting, http://www.oecd.org/ctp/beps/.

183. Intellectual property is the most complex area of transfer pricing, and a lot of transfer pricing disputes relate to this area in particular. STATE AID WHITE PAPER, *supra* note 55, at 24.

184. *Id.*

185. *Id.* at 25.

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

187. *Id.*

C. Hindering Foreign Direct Investment

If the EU courts uphold the Commission's decision against Apple, this will have a devastating impact on the foreign direct investment (FDI) into Ireland, as well as the European Union as a whole.[188] Historically, Ireland has been an investment hub for foreign companies, in particular U.S. multinational corporations, due to its "investor-friendly environment."[189] The country attracts foreign investors by offering a low corporate tax rate, as well as access to the European single market via its EU membership.[190] Ireland's economy significantly depends on the country's favorable tax regime,[191] which helps entice business activity and create new employment opportunities by lowering the investing companies' economic burden and promoting innovation.[192] Many technology firms, including Google and Facebook, mention that a key attraction for them in Ireland is that the country allows adopting such tax structures that result in a tax rate much lower than the standard corporate 12.5 percent rate.[193]

Currently, around 700 U.S. companies have operations in Ireland and employ "an estimated 130,000 people."[194] In the past twenty years, the foreign direct investment by U.S. companies

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188. Karolina Borońska-Hryniewiecka & Szymon Zaręba, *The Implications of the European Commission's Decision in the Apple Tax Case*, POL. INST. OF INT'L AFF. BULL. (2016), https://www.pism.pl/files/?id_plik=22317.

189. Brian Beary, *Commission's Apple Decision and Brexit Create New Quandaries for Ireland*, EUR. INST., http://www.europeaninstitute.org/index.php/205-european-affairs/2183-commission-s-apple-decision-and-brexit-create-new-quandaries-for-ireland (last visited Nov. 11, 2016).

190. Gary Clyde Hufbauer & Zhiyao Lu, *Apple's Tax Dispute With Europe and the Need for Reform*, PIIE (Oct. 2016), https://itif.org/publications/2016/09/07/why-europes-apple-decision-misguided-and-what-it-means-ireland-tech.

191. George Hay, *Europe's Bite at Apple Could Leave Bad Aftertaste*, REUTERS (Aug. 30, 2016), http://blogs.reuters.com/breakingviews/2016/08/30/europes-bite-at-apple-could-leave-bad-aftertaste/.

192. Joe Kennedy, *Why Europe's Apple Decision Is Misguided and What It Means for Ireland, Tech Companies, and the Future of Global Tax Reform*, ITIF (Sept. 7, 2016), https://itif.org/publications/2016/09/07/why-europes-apple-decision-misguided-and-what-it-means-ireland-tech.

193. Chee & Halpin, *supra* note 2.

194. *Apple's Ireland Tax Case: What Impact for Foreign ICT Investment*?, ITU BLOG (Aug. 30, 2016), https://itu4u.wordpress.com/2016/08/30/apples-ireland-tax-case-what-impact-for-foreign-ict-investment/.

into Ireland amounted to $277 billion USD.[195] According to 2015 statistics, the country is the second largest recipient of U.S. FDI in Europe after Netherlands.[196] As for Apple, it alone "supports an estimated 18,000 jobs across the country, including more than 5,000 direct Apple employees."[197] Additionally, just before the Commission ruled against the company, Apple had announced its plan to construct a huge data center in Athenry, requiring an investment of €850 million, which would generate even more jobs and cash inflows into the country.[198]

If Apple and other technology giants operating in Ireland would no longer be able to utilize the country's beneficial tax regime, it is clear that they would be looking for investment opportunities elsewhere.[199] The Commission's ruling against Apple is acting as a warning "for other tech giants including Twitter, Facebook, Google, and Airbnb who also house their European Headquarters in or near Dublin."[200] If these firms were to leave Ireland and export their capital and jobs to a more attractive destination, it would have a disastrous impact on the country's economy.

The Commission's decision in the Apple case is particularly worrisome in light of Brexit.[201] Ireland and the United Kingdom

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195. *Id.*

196. In the first nine months of 2015, 20 percent of U.S. FDI in Europe went to Ireland, while 31 percent went to Netherlands. The United Kingdom received 18 percent. Beary, *supra* note 189.

197. *Apple's Ireland Tax Case: What Impact for Foreign ICT Investment*?, *supra* note 194.

198. *Id.*

199. Turkish Deputy Prime Minister Mehmet Simsek has already offered Apple to shift operations from Ireland to Turkey, which is not a member of the European Union, and said he would be "happy to provide more generous tax incentives." Max Bearak, *How the E.U.'s Ruling on Apple Explains Why Brexit Happened*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/30/how-the-e-u-s-ruling-on-apple-explains-why-brexit-happened/.

200. *Apple's Ireland Tax Case: What Impact for Foreign ICT Investment*?, *supra* note 194.

201. Hay, *supra* note 191; Beary, *supra* note 189. Brexit is a nickname for British exit from the European Union. Alice Foster, *What Is Brexit and What Is Going to Happen Now that Britain Has Voted to Leave the EU?*, EXPRESS (Sept. 22, 2017), http://www.express.co.uk/news/politics/645667/Brexit-EU-European-Union-Referendum-David-Cameron-Economic-Impact-UK-EU-exit-leave. On June 23, 2016, U.K. citizens voted in a historic referendum for the United Kingdom to leave the European Union. *Id.* Once the process is triggered, Britain may be leaving by March 2019. *Id.*

were competing for foreign direct investment when Britain was a member of the European Union, with Ireland having a clear advantage over its neighbor due to its lower tax rates.[202] Post Brexit referendum, the British Chancellor, George Osbourne, has outlined plans to dramatically cut the U.K. corporate tax rates to make them lower than 15 percent in order "to galvanise the economy" and prove that the country is still "open for business."[203] Once out of the European Union, Britain will no longer be subject to the EU State aid rules, and will try to beat the Irish preferential tax regime and attract foreign investors by "competing as an offshore low-tax state."[204] The Ireland's Economic and Social Research Institute's studies have showed that "a 1 percentage point cut in the UK corporate tax rate could reduce the probability of non-EU states sending foreign direct investment into Ireland by 4 percent."[205] If the EU courts proceed with enforcing the Commission's decision against Apple, this will create a huge degree of uncertainty for companies operating in Ireland. [206] As a result, Britain will succeed in luring FDI from Ireland into the United Kingdom, further undermining the Irish economy.

The negative effects of the Commission's decision against Apple—as well as other decisions against large multinational corporations like Starbucks and Fiat—if upheld by the European courts, would be felt far beyond Ireland, or Netherlands and

202. In the first nine months of 2015, 20 percent of U.S. FDI in Europe went to Ireland, while 18 percent went to the United Kingdom. Beary, *supra* note 189.

203. This will be a 50 percent reduction from the U.K. corporate rate of 30 percent back in 2008. Gavin McLoughlin et al., *Brexit: Threat to Irish 12.5pc Corporation Tax as UK Bids to Slash Rate*, IRISH INDEPENDENT (July 4, 2016), http://www.independent.ie/business/brexit-threat-to-irish-125pc-corporation-tax-as-uk-bids-to-slash-rate-34854333.html. In 2016, the corporate tax rate in the United Kingdom was 20 percent. UK CORPORATION TAX RATES AND RELIEFS, https://www.gov.uk/corporation-tax-rates/rates (last visited Nov. 12, 2016).

204. Andrew Cave, *Apple and Brexit: an Unintended Consequence of the European Commission's Tax Ruling?*, FORBES (Aug. 31, 2016), http://www.forbes.com/sites/andrewcave/2016/08/31/apple-and-brexit-an-unintended-consequence-of-the-european-commissions-tax-ruling/#5283162f4aab.

205. Hay, *supra* note 191.

206. *Id.*

Luxembourg respectively.[207] The increased uncertainty around the EU Member States' tax regimes would result in overall curtailing of foreign direct investment into Europe, making the Commission's decisions "a grievous self-inflicted wound for the European Union and its citizens."[208]

The Commission's ruling is already sending a clear message to other innovative companies looking to invest in Europe: the European Union considers American companies "too powerful" and "under-taxed."[209] Therefore, EU Member States should not compete with each other for investment by offering more favorable tax regimes.[210] The Commission seems to imply that the EU countries should not be able to attract economic benefits by providing excessively advantageous tax arrangements.

Moreover, the Commission's decision eliminates any trust in the tax agreements made by the companies with the Member States' fiscal authorities—no investor can now feel assured that its low corporate tax rate can be maintained, even if the Member State has issued a tax ruling to support it.[211] Ireland's former Finance Minister Noonan has rightfully inquired: "How could any foreign direct investor come into Europe if they thought the valid arrangements they made under law could be overturned a generation later and they be liable to pay back money?"[212] If the Commission's decisions are upheld, the result will be "a reduction in inward foreign direct investment" into the European Union and "a reduction in the continent's ability to compete for the markets of the future."[213] In the end, the EU countries and their citizens will be the ones suffering from the direct consequences of these decisions.[214]

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207. Rob Davies, *Apple Tax Ruling Must Be Overturned, Says US Business Group*, GUARDIAN (Sept. 16, 2016), https://www.theguardian.com/business/2016/sep/16/apple-tax-ruling-must-be-overturned-says-us-business-group.
208. *Id.*
209. Kennedy, *supra* note 192.
210. *Id.*
211. Halpin & Humphries, *supra* note 4.
212. *Id.*
213. Kennedy, *supra* note 192.
214. Davies, *supra* note 207.

IV. SUGGESTED APPROACH

The Commission's investigations of the Member States' tax rulings are a troubling development.[215] The Commission is fighting tax avoidance under the umbrella of State aid,[216] thus interfering in the national fiscal systems at a more profound level than ever envisioned.[217] The Commission's actions are undermining the very purpose of the tax rulings—to provide "legal and regulatory certainty."[218] No business will want to negotiate with EU taxing authorities if there is a substantial risk that the Commission will later overturn any deal that is agreed to.[219] This Note acknowledges the fact that tax harmonization in the European Union is the best ultimate solution for fighting tax evasion problems, but that it will take a lot of time and concerted effort to implement in practice and will likely meet significant resistance from the Member States.[220] If State aid continues to be used as one of the mechanisms for fighting tax avoidance and tax evasion in the European Union, the Commission should work to clarify the EU transfer pricing guidelines to match those of the OECD and create a special body responsible for reviewing any pending tax rulings for potential State aid violations.[221]

A. Long-term Solution: Harmonization of EU Tax Laws

The best and most effective way to fight tax avoidance and tax evasion in the European Union is via harmonization of tax rules across Member States, as opposed to State aid application.[222] If direct taxation laws were harmonized across all EU countries, Member States would no longer be able to compete with each other for FDI by lowering their effective corporate tax rates and

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215. Trovato, *supra* note 148, at 6.
216. *Id.* at 7.
217. *See* Jone, *supra* note 151, at 2–3.
218. Trovato, *supra* note 148, at 6.
219. *Id.* at 6–7.
220. Nikolic, supra note 25, at 3–4.
221. Gibson, *supra* note 35.
222. Nikolic, supra note 25, at 3. "Tax harmonization consists in coordinating the taxation systems of the European countries to avoid non-concerted and competing changes in national fiscal policies, which could have an adverse effect on the internal market." Mihaela Göndör, *What About Direct Tax Harmonization in the EU?*, WORLD TAX (June 27, 2016), https://www.world.tax/articles/what-about-direct-tax-harmonization-in-the-eu.php. Total harmonization would include harmonization of tax rules and tax bases, as well as tax rates. *Id.*

offering special tax breaks to companies.[223] Instead, they would have to compete based on their offerings of human capital, business climate, technological advances, and other non-tax incentives.[224] This would help eliminate unfair tax competition and prevent companies from structuring their operations in a way aimed to avoid taxes.[225]

Even though tax harmonization would be an effective way to fight tax avoidance and tax evasion in the European Union, it is not a realistic solution that can work in the near future.[226] The Member States are keen on protecting their fiscal independence[227] because tax policy is one of the limited number of tools that governments can utilize to influence the economy and economic development, and is a major factor for increasing FDI.[228] Additionally, tax harmonization would negatively impact the less developed countries within the European Union, which cannot afford lower tax rates and are highly dependent on tax revenue inflows.[229] Until those countries achieve comparable level of economic development with the more successful EU Member States, they would be reluctant to accept such tax reform.[230] Therefore, tax harmonization, even though an effective solution for tax evasion, is not an immediately achievable goal for the European Union.[231]

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223. *See generally* Göndör, *supra* note 222.

224. *See generally id.*

225. Patricia Lampreave, *Fiscal Competitiveness versus Harmful Tax Competition in the European Union*, 65 BULL. FOR INT'L TAX'N 4.1 (2011), http://www.law.hku.hk/aiifl/wp-content/uploads/2012/05/Paper-Fiscal-Competitiveness-versus-Harmful-Tax-Competition-in-the-European-Union.pdf.

226. Göndör, *supra* note 222; Nikolic, supra note 25, at 4.

227. Nikolic, supra note 25, at 3–4.

228. Göndör, *supra* note 222.

229. Simeon Djankov, *Tax Policy and State Aid in the EU*, WORLD ECON. FORUM (Sept. 13, 2016), https://www.weforum.org/agenda/2016/09/tax-policy-and-state-aid-in-the-eu.

230. *Id.*

231. Stuart Gibson, *The Dissonance of European Tax Harmonization*, FORBES (Jan. 27, 2016), http://www.forbes.com/sites/taxanalysts/2016/01/27/the-dissonance-of-european-tax-harmonization/#2eb221ca4f87; Göndör, *supra* note 222.

B. Short-term Solution: Using OECD TP Guidelines and Establishing a Special Office at the Commission to Review Tax Rulings for State Aid Violations

Since tax harmonization is an option that cannot be implemented in the near future, at present time, the Commission should deal with problems arising from State aid investigations into the Member States' tax rulings by establishing OECD TP Guidelines as the primary authority for all transfer pricing determinations within the European Union.[232] Instead of applying its own arm's length principle, the Commission needs to incorporate international standards for allocating income into the EU law.[233] TP Guidelines "form the basis for mutual agreement by competent authorities" in different countries, and using them consistently across the European Union would help avoid double taxation or double non-taxation problems, as both countries involved would need to apply the same arm's length principle as defined by TP Guidelines.[234]

In addition to recognizing OECD TP Guidelines as the basis of all transfer pricing rulings within the European Union, there should be a special office established at the Commission, where Member States would be able to obtain prompt advance determinations on whether a proposed tax ruling can potentially violate State aid law.[235] Under this proposal, the State issuing a tax ruling to a company would be able to perform a safety check on it—providing the ruling to the special agency designated by the Commission, which would review the ruling within a pre-determined time period, likely between sixty to ninety days, and conclude if there is any potential State aid violation. If there is no probable violation, the State can proceed with issuing the ruling to the company. Also, upon such determination, the Commission can no longer question or inquire into this tax ruling in the future for any State aid violation, unless some undiscovered circumstances come to the Commission's attention. If a potential State aid violation is discovered, the State is recommended not to issue a tax ruling, or be ready to deal with the consequences of State aid investigation. Under this approach, State aid inves-

232. Gibson, *supra* note 35.
233. *See* STATE AID WHITE PAPER, *supra* note 55, at 18.
234. *See id.*
235. Gibson, *supra* note 35.

tigations into the tax rulings would only happen if a State knowingly decided to forgo an option to receive an advance determination from the Commission.

By clarifying the transfer pricing rules, recognizing OECD TP Guidelines as the only authority for all transfer pricing determinations, and creating an agency within the Commission responsible for advance review of the tax rulings for any potential State aid violations, the Commission would be able to significantly improve its State aid investigation processes, in particular as they apply to tax matters.[236] The suggested approach will not interfere with the individual Member States' fiscal sovereignty, but will create an effective mechanism for dealing with problems outlined in this Note. It will eliminate uncertainty by allowing Member States to get an advance opinion on any tax ruling before its issuance to the recipient and by introducing OECD TP Guidelines as mandatory EU law for all Member States. It will also eliminate inconsistency with the international tax norms, as all EU Member States would be obligated to use TP Guidelines for their transfer pricing rulings. Finally, the suggested approach would reduce the number of State aid investigations and, therefore, would prevent a significant reduction in FDI into the impacted Member States as long as they comply with the new requirement of getting an advance determination by the Commission.

CONCLUSION

For the past four years, the European Commission has been conducting investigations into the Member States' tax rulings under the umbrella of State aid.[237] The Commission's recent decisions against Luxembourg, Belgium, the Netherlands, and Ireland, finding that the relevant Member States' transfer pricing rulings constituted illegal State aid, have been subject to harsh criticism.[238] The Commission's application of State aid rules to tax rulings creates uncertainty via retroactive tax assessments, violates international tax norms, and threatens to obstruct foreign direct investment into the European Union.[239] Even though

236. *Id.*

237. *See* STATE AID WHITE PAPER, *supra* note 55.

238. *See* Chee & Halpin, *supra* note 2; Halpin & Humphries, *supra* note 4; Dillet, *supra* note 4; Ekins, *supra* note 4; Hoor & O'Donnell, *supra* note 90.

239. *See supra* Part III for a discussion of problems related to the Commission's State aid investigations into the Member States' tax rulings.

harmonization of tax laws is the best mechanism to deal with these problems, it is not a realistic approach in the short term.[240] It is therefore recommended that the Commission, in the interim, accepts OECD TP Guidelines as the only valid framework for transfer pricing determinations in the European Union and creates an agency responsible for advance review of tax rulings for potential State aid violations.[241] In practice, the abovementioned approach would provide more certainty for companies doing business in the European Union and ensure that large multinational corporations continue to invest in the region.

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240. Göndör, *supra* note 222; Nikolic, supra note 25, at 4.

241. Gibson, *supra* note 35.

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