EQUALIZING OR ENCROACHING?

IRELAND'S PLACE IN THE EUROPEAN COMMISSION'S MOVE TOWARD TAX HARMONY

KATLYNN MICHALSKI[*]

ABSTRACT

This note examines how the European Commission's interpretation of "state aid" unjustifiably deprives Member States of their right to self-regulate national tax rules. Direct tax rulings are sovereign matters, and the Commission's decisions to unify tax practices in the European EU encroach on this sovereignty without considering the individual reasons for the practices. The Commission should not implement unity among the Member States without considering national differences in political and social structure, as well as individual differences among the relevant companies involved. These efforts are examined through the lens of the Commission's case against Apple, Inc.'s subsidiaries in Ireland involving underpayment of tax resulting from the tax ruling established between Apple and Ireland in 1991.[**]

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[*] Kate Michalski received her Juris Doctor from the University of Wisconsin Law School in May of 2018 and her Bachelor of Arts from the University of Wisconsin-Madison in May of 2015. She attributes her much of inspiration for this piece to her time spent in Dublin working in Dáil Éireann for Jimmy Deenihan. Her time with then-Minister Deenihan provided a fascinating look into Irish culture and heritage, and left a meaningful impact on Ms. Michalski's career; she will be forever grateful to him. She is also eternally grateful to Rob Misey for his advice and critiques on this piece, especially his insights about transfer pricing and industry colloquialisms. She would like to thank him further for his support and encouragement throughout Ms. Michalski's last semester of law school. Ms. Michalski would like to finally thank her friends and family for always backing her career goals and the wonderful staff of the Wisconsin International Law Journal for their hard work and dedication to legal academia.

[**] At the time of publication, both Ireland and Apple are considering options for appealing this decision. Ireland is still required to collect the amount required by the Commission's decision, however, and is considering plans to do so while sustaining its efforts in appeal. A final strategy for collection is expected from Ireland at the end of April, 2018. If Ireland does collect the amount, the Commission has considered withdrawing the complaint against Ireland and Apple. *See* Press Release, Roger Fingas, *EU says it may withdraw court case if Ireland recovers full $16B from Apple*, APPLE INSIDER (Feb. 27, 2018, 7:15 AM), http://appleinsider.com/articles/18/02/27/eu-says-it-may-withdraw-court-case-if-ireland-recovers-full-16b-from-apple.

INTRODUCTION

The European Commission ("the Commission") announced in August 2016 that Apple, Inc. ("Apple") had received advantageous and exclusive tax treatment from The Republic of Ireland ("Ireland") in order to attract the company's research and development ("R&D") subsidiaries to their jurisdiction.[1] The Commission concluded that Ireland's tax treatment of the technology giant amounted to illegal state aid under European EU law prohibiting selective treatment by Member States of foreign direct investment.[2]

The Commission defines "state aid" as the transfer of state resources that confers a selective economic advantage to one European Union ("EU") Member State ("Member State") to the detriment of intra-EU competition and trade.[3] There are four elements that must be satisfied in order to identify illegal treatment of multinational companies by Member States; the measure must: (1) confer an advantage upon the taxpayer in question; (2) at the cost of state resources, which; (3) affects competition and trade between Member States; and (4) is selective in that it favors certain undertakings or goods.[4] The Commission recently set out to unify taxation schemes among Member States by accusing nations of selective treatment towards multinational companies which unjustly deprives other Member States of the business.[5] These actions, according to the Commission, will identify discrepancies in EU-wide commerce.[6]

The EU operates to unify European countries both socially and economically. Free movement of people and goods amongst Member States, and a common currency, make it possible for the Member States to behave as one political entity through the European EU political bodies.[7] Despite this unity, there are areas to which Member States claim

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1 Commission Decision 2017/1283 of Aug. 30, 2016, On State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) Implemented by Ireland to Apple, 2016 O.J. (L 187/1) [hereinafter Apple Decision].

2 *Id.* paras. 145, 151.

3 Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1), Oct. 26, 2012, 2012 O.J. (C 326) 01 [hereinafter TFEU]; Jurjan Wouda Kuipers & Vanesa Hernandez Gerrero, Fiscal State Aid – The European Commission on a Mission, 34 INT'L TAX J. 33, 34 (2008).

4 Case C-156/98, Federal Republic of Germany v. Comm'n of the European Communities, 2000 E.C.R. I-6857; BEN J.M. TERRA & PETER J. WATTEL, EUROPEAN TAX LAW 77 (Kluwer Law International 5th ed. 2008).

5 Anjana Haines & Amelia Schwanke, *Multinationals and the EC Engulfed in State Aid Disputes*, INT'L TAX REV., Oct. 2016, at 27, 27.

6 European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016); Org. for Econ. Co-operation & Dev. [OECD], *Taxing Multinational Enterprises: Base Erosion and Profit Shifting (BEPS)*, BEPS Update No. 3 (Oct. 2015), https://www.oecd.org/ctp/policy-brief-beps-2015.pdf [hereinafter *Taxing Multinational Enterprises*]; Org. for Econ. Co-operation & Dev. [OECD], *Action Plan on Base Erosion and Profit Shifting*, at 15, (2013), http://dx.doi.org/10.1787/9789264202719-en [hereinafter BEPS Report].

7 *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Tax Policy in the European Union – Priorities for the Years*

sovereign rule over EU rule.[8] This includes national taxation and tax rulings regarding multinational companies that have subsidiaries in the Member States.[9] The recent decisions from the Commission threaten to deprive Member States of this essential sovereign right over their own tax schemes.

The crux of this issue in Europe lies in the Commission's slow deprivation of this sovereignty and the Member States' political and economic control over their own internal market. This internal market includes business and economic advantages brought to Member States by multinational companies establishing subsidiaries within the Member States' jurisdictions.[10] For Ireland in particular, its economy benefits from these multinational companies, like Apple's subsidiary in Galway and the technological opportunities that Apple brings.[11] Taxation is not a political bargaining chip, but is instead a result of Member States' careful calculation to balance their economies according to their unique needs.

The Treaty of the European Union provides that the European Council, rather than the Commission, has the power to impose provisions regarding the harmonization of Member State tax legislation where it is necessary to preserve the functioning of the internal market and prevent distortion of intra-Union competition.[12] The Commission's powers, on

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Ahead, paras. 2.2–2.3, COM (2001) 260 final (Oct. 10, 2001) [hereinafter *Tax Policy in the European Union*]; *see* European Commission Press Release IP/01/737, Taxation: Commission Outlines its Priorities (May 23, 2001). The Commission emphasized that the:

> [T]ax policy must contribute to achieving the goal established at the Lisbon European Council of March 2000 and confirmed at the Stockholm European Council in March of this year of making the Union the most competitive and dynamic knowledge-based economy in the world by 2010 . . . . At the same time, tax policy must be fully consistent with other EU policies such economic, employment, health and consumer protection, innovation, environmental and energy policies. But in particular tax systems must allow individuals and businesses to benefit fully from the Internal Market.

European Commission, *supra* note 7.

8 *Tax Policy in the European Union*, *supra* note 7, para. 2.4.

9 *Id.*

10 TRACY KAYE, EUROPEAN COMMUNITY TAX HARMONIZATION AND IMPLICATIONS FOR U.S. TAX POLICY 22 (1994).

11 Sheila Killian, *Crossed Lines: Two Cases of Tax Policy Incoherence*, 11 EJOURNAL TAX RES. 375, 378 (2013).

12 TFEU, *supra* note 3, art. 113. The European Council consists of heads of each of the Member States and sets the EU's political agenda, representing the highest level of political power within the EU. *European Council*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en (last visited Mar. 27, 2018). Conversely, the European Commission is the EU's "politically independent executive arm," proposing new EU legislation and implementing decisions from the European Parliament and the Council of the EU.

the other hand, allow it to merely propose provisions to prevent this distortion of competition and implementation of improper state aid.[13] The Commission can then ensure the adherence to these principles, and impose appropriate measures in the event of infringement.[14]

Legislation intentionally designed to advantage one Member State at the expense of another leads to the distortion of competition. In particular, as here, this applies when Member States distort conditions applied to similarly situated transactions in order to place one taxpayer at a competitive advantage over the other.[15] This is inapplicable, however, in the case of agreements that "contribute[s] to improving the production or distribution of goods or to promoting technical or economic progress" without impeding competition with respect to the products in question.[16] The important component in these considerations is that the measure must affect trade between Member States;[17] the purpose of these provisions is to harmonize the movement of people and goods between Member States to promote the free trade and amicable cohabitation between the nations.[18]

It is incompatible with the internal market to establish trade practices that unfairly advantage one Member State over another, but it is compatible with the internal market to establish legislation designed to facilitate the development of certain economic activities or areas provided that the legislation does not adversely affect trading conditions contrary to the common EU interest.[19] The Commission may therefore impose sanctions for infringement of provisions protecting the internal market, but there is a disconnect between the sanctions imposed and the actual harmonization of legislation from the European Council.[20] The

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European Commission, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited Mar. 27, 2018).

13 TFEU, *supra* note 3, art. 103(1).

14 *Id.* art. 105(1).

15 *Id.* art. 101(1)(d).

16 *Id.* art. 101(3)(b).

17 *Id.* art. 101(1).

18 TERRA & WATTEL, *supra* note 4, at 3.

19 TFEU, *supra* note 3, art. 107(1), (3)(c).

20 It is worth noting that the Council is comprised of *representatives* of each Member State working to advance their own nations' interests, whereas the Commission is comprised of politically neutral members advancing the interests of the Union as a whole. *European Commission*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited Mar. 27, 2018); *European Council*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en (last visited Mar. 27, 2018).

Commission is using its state aid powers as a means to exert control over Member State domestic taxation policies, over which it does not have control.[21]

The problem is not the gratuitous anticompetitive practices by the Member States, as the Commission claims.[22] The Commission is using the prongs in an attempt to unify a political arm over which they have no specifically assigned power under the Treaties of the European EU. The EU does not have the power to impose taxes, nor does it have the power to determine the rates at that Member States may impose taxes on their constituents.[23] It is to the detriment of Member State sovereignty that these actions operate. Careful analysis of each of the four prongs of "state aid" shows that Member States are not violating EU laws through illegal schemes.[24]

First, no state resources are transferred to the multinational companies from the Member States. The Commission argues in this decision that the forgone taxes constitute the conferral of state resources because they are the capital that Ireland waives,[25] but this interpretation could easily inspire debate among tax specialists as to whether taxes that Ireland never realizes may in fact be a conferral of benefits to the other party.

Second, selectivity provides that the ruling confers special treatment to one taxpayer differently than—and to the detriment of—other similarly situated taxpayers. These countries do not entice companies to their soil through promises of special treatment.[26] Multinational companies are treated equally to other multinational

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[21] *See generally* U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS (Aug. 24, 2016).

[22] *See, e.g.*, Apple Decision, *supra* note 1, para. 220; *see* Kuipers & Hernandez Guerrero, *supra* note 3, at 37.

[23] *Taxation*, EUROPEAN UNION, https://europa.eu/european-union/topics/taxation_en (last visited Mar. 27, 2018).

[24] The Commission uses the following prongs to find state aid: (1) the tax measure under consideration confers an advantage on recipients, (2) the advantage is granted by the state or through state resource, (3) the measure may affect competition and trade between Member States, and (4) the measure must be specific or selective. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384/03) paras. 9–12; *see also* Nicholas J. DeNovio et al., *State Aid: What It Is, and How It may Affect Multinationals and Tax Departments*, TAX EXECUTIVE INST., Mar./Apr. 2016, at 15, 18, http://taxexecutive.org/state-aid-what-it-is-and-how-it-may-affect-multinationals-and-tax-departments/.

[25] Apple Decision, *supra* note 1, para. 221.

[26] *See generally* RONAN LYONS, ECONOMIST INTELLIGENCE UNIT, INVESTING IN IRELAND: A SURVEY OF FOREIGN DIRECT INVESTORS (Aviva Freudmann & Jason Sumner eds., 2012).

companies of the same structure and caliber in each individual Member State.[27] Multinational companies should not be treated in the same as local companies, just as subsidiaries of the same company should not be treated the same as cooperative independent companies. The Commission especially fails to consider the differences in structure of these companies in their decisions, particularly where they differ even within the same Member State.[28]

Third, there must be no economic advantage unjustifiably conferred on these companies over domestic companies or other multinational entities. The European Commission will consider this prong met where the measure results in different treatment towards factually and legally similar recipients.[29] Taxation of companies depends on how their corporate structure operates *across* national boundaries and *within* corporate ones.[30] The Commission improperly conflates the latter two prongs—selectivity and advantage—in these state aid decisions and in doing so deprives the Member States of the most common defense to these accusations: the fact that the rulings are *not* applied differently to similarly situated taxpayers and therefore do not constitute state aid.[31]

Finally, these schemes do not deprive the EU of competition and equal treatment among Member States. No two Member States are alike, either in their economic structure or social landscape. Despite the unity that Europe now boasts, it remains a conglomeration of centuries-old nations which seek to cater to their national needs above all else.[32] The Commission will not achieve economic unity through "even" treatment among the Member States.[33] Instead, the Commission will more effectively achieve unity through careful consideration of the economic and social differences of the countries and the use of these differences as the basis for any equalizing treatment. In particular, Ireland's peripheral

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[27] *Id. See generally* MATHESON, IRELAND AND LUXEMBOURG – A COMPARISON (Matheson ed. 2016).

[28] *See* LYONS, *supra* note 26; *see also* Apple Decision, *supra* note 1.

[29] DeNovio et al., *supra* note 24, at 25 n.36.

[30] *See generally* Agreement Between the Government of the United States of America and the Government of Ireland to Improve International Tax Compliance and to Implement FATCA, U.S-Ir., Dec. 21, 2012, T.I.A.S. No. 14-402.

[31] U.S. DEP'T OF THE TREASURY, *supra* note 21, at 6 (highlighting existing Union case law in which accused Member States dispute the accusations against them by negating the applicability of the selectivity prong, showing that rulings are conferred to similarly situated taxpayers without special treatment).

[32] TERRA & WATTEL, *supra* note 4, at 77.

[33] *See generally* Kuipers & Hernandez Guerrero, *supra* note 3.

location and small economy should not be likened to economies as large and globally influential as Germany and France.[34] Fair competition comes from an even playing field, not an assumption of similarity.

This analysis will focus primarily on two of the many facets of this last prong of the Commission's definition of state aid. First, Ireland's unique political and physical attributes will show that nations cannot be compared to one another without considering the wide variety of relevant factors in tax rulings. Second, corporate individuality across three different cases, including Apple in Ireland, will show that similar treatment for different companies does not lead to economic equality but instead leads to disparate treatment towards individual entities. This final prong—the deprivation of equal economic treatment among the EU—encompasses the entire concept of "equality" in a multifaceted entity that boasts advantageous diversity that the Commission is not considering in these decisions. In addition to examining Ireland's tax ruling with Apple, Luxembourg's taxation with Fiat and the Netherlands' ruling with Starbucks will highlight the inaccurately similar treatment by the Commission towards very different companies.

Economic unity is not easy to achieve in a diverse entity such as the EU. The EU is relatively young as a political entity, and unity among old and diverse nations must hinge more on interconnected national sovereignty than EU-wide artificial political unity. The economic structure of the EU invites foreign investment, often to the advantage of Member States whose individual economies benefit from foreign influence. This note will analyze the ways that internal taxation should be the ultimate deciding factor for affected Member States that the scheme will affect.

I. BACKGROUND

A. THE SYSTEM OF TAXATION IN EUROPE AND IRELAND, AND APPLE'S POSITION IN THE CROSSFIRE

Political arms of the EU pass guidelines to form a more cohesive and co-dependent Europe, acting almost as a "United States of Europe" in overseeing various facets of the economy, the political landscape, and

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[34] Killian, *supra* note 11, at 377.

the European society as a whole.[35] While these guidelines have traditionally not extended to taxation, recent decisions and investigations by the European Commission have been aimed at creating a more transparent tax system to eradicate overly competitive taxation policies that siphon business from other Member States.[36] The Organization for Economic Coordination and Development ("OECD") released a report on Base Erosion and Profit Shifting ("BEPS Report")[37] to express concern over deteriorating competition in international business and establish a neutral system for taxation agreements among countries doing business with one another.[38]

The decision in August 2016 from the European Commission regarding Ireland's taxation policies on various subsidies of Apple, Inc. was one such decision, claiming that the country provided selective tax benefits to the multinational corporation.[39] Ireland has appealed the decision, maintaining that Apple was never discriminately taxed, and the Commission's decision is an attempt to deprive Member States of their sovereign right to tax as they see fit.[40] This decision could have wider-reaching effects beyond Ireland, possibly deterring foreign direct investment in the rest of Europe over other countries such as Singapore and China.[41] Taxation in the EU is a sovereign power each Member State possesses in order to protect domestic economic growth and promote fair competition among the countries, but the Commission's decision could deprive the nations of this responsibility, possibly to the Member States' detriment.[42]

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[35] Consolidated Version of the Treaty on European Union Preamble, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

[36] *See generally* Kuipers & Hernandez Guerrero, *supra* note 3.

[37] *See generally Taxing Multinational Enterprises*, *supra* note 6.

[38] *Id.* at 8.

[39] European Commission, *supra* note 6.

[40] *See also* Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35. *See generally* 920 Dáil Deb. (Sept. 7, 2016) col. 6 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/ (comments of Michael Noonan, Minister of Finance).

[41] 920 Dáil Deb. (Sept. 7, 2016) col. 6 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/ (comments of Micheál Martin).

[42] Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35 (arguing that the Commission lacked the competence to take on the decision and breached Articles 4 and 5 of the Treaty of the European Union, which preserve the fiscal sovereignty of Member States).

B. INTRODUCTION TO EU STRUCTURE AND INVOLVEMENT IN TAX

With the aim of creating a more unified body, the European Coal and Steel Community was established with the Treaty of Paris in 1951, and this body became a tenuous precursor to the official EU that stands today.[43] The EU was established following the two World Wars that ravaged the economic and social landscape of the continent; the underlying premise for the creation of the European Community[44] was to accomplish a lasting peace between European nations and prevent a devastating recurrence.[45] The current EU consists of representatives from twenty-eight countries both on and around the European continent, and acts as a unifying political body to create more economic and social harmony.[46] Unity itself was the original objective of the Treaty of Paris, in both commerce and society, to ensure economic expansion and stability for the entire continent.[47] Ireland joined the EU in 1973.[48]

The 1990s saw a period of economic growth, and the Single Market of the EU was established to protect the "four freedoms" in Europe's trade market: the movement of goods, services, people, and money.[49] The Single Market was established to regulate the free and fair trade between countries unified in the EU.[50] Part of this free and fair trade is the competition between countries for commerce.[51] The policy in the Treaty regarding competition in Europe currently works to prevent

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[43] *Summaries of EU Legislation: Treaty Establishing the European Coal and Steel Community, ECSC Treaty*, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0022 (last updated Oct. 15, 2010) (original members of the ECSC are: France, Belgium, Luxembourg, Germany, The Netherlands, Italy).

[44] This term changed with the Treaty on the European Union, which replaced "Community" with "Union" in establishing the larger and more comprehensive system of unified government. Treaty on European Union art. A, Feb. 7, 1992, 1757 U.N.T.S. 3; *see also* Case SA.38375 (2014/C ex 2014/NN) Commission Decision of 21.10.2015, n.1 at 2 [hereinafter Luxembourg Decision].

[45] *The History of the European Union*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history_en (last updated (Mar. 19, 2018).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See also* Conor Quigley Q.C., *The European Commission's Programme for State Aid Modernization*, 20 MASSTRICHT J. EUR. & COMP. L. 35, 38 (2013). *See generally* RALPH H. FOLSOM ET AL., INTERNATIONAL TRADE AND ECONOMIC RELATIONS IN A NUTSHELL 297–354, 300–01 (6th ed. 2016).

[51] *Communication from the Commission to the Council*, *supra* note 7, at 3.2.1.

market distortions caused by uneven policies among the different Member States.[52]

Direct taxation was never intended to be a specifically enumerated aspect of this regulation,[53] but the Treaty of Rome in 1957 established an indirectly controlling policy that tax systems must not result in unduly competitive means of siphoning fair economic activity from other Member States.[54] Direct taxation is the responsibility of individual nations, except where tax schemes encroach on Community-wide economic activity.[55] Article 87 of the Treaty of the European Union[56] prohibits these unfair tax schemes that significantly deviate from the norm enough that the policy constitutes illegal "state aid" from the nation.[57] "State aid" refers to the advantage afforded by the Member State in question through the tax scheme that the government sets up with a multinational corporation.[58] As discussed previously, in order to constitute state aid, the tax ruling must confer an undue advantage to the multinational company through selective means by a national public authority.[59]

This undue advantage conferred upon selected companies is the standard under which the Commission is acting against Ireland and other Member States.[60] This kind of action constitutes indirect tax rulings from

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52 TERRA & WATTEL, *supra* note 4, at 10; *see also* Treaty Instituting the European Coal and Steel Community, art. 86, Apr. 18, 1951, 1957 U.N.T.S. 221 [hereinafter Treaty of Paris].

53 TERRA & WATTEL, *supra* note 4, at 29–30 (differentiating between direct taxation, which is the prerogative of Member States, except where it is considered illegal state aid, and indirect taxation, which the European Commission implements through policy); *see also* European Parliament Resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union (2015/2010(INL)) 2017 O.J. (C 399) 77 (emphasizing that "according to the Union treaties the power to legislate on corporate taxation is currently vested in the Member States").

54 *Summary of the Treaty Establishing the European Economic Community*, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0023 (last updated Mar. 14, 2017).

55 TERRA & WATTEL, *supra* note 4, at 29; *see also* Treaty of Paris, *supra* note 52, art. 86.

56 The prohibition on state aid in the TFEU reads as follows:

> Save as otherwise provided in this Treaty, 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, insofar as it affects trade between Member States, be incompatible with the common market.

TFEU, *supra* note 3, art. 107.

57 TERRA & WATTEL, *supra* note 4, at 21; *see also* Treaty of Paris, *supra* note 52, art. 86.

58 TERRA & WATTEL, *supra* note 4, at 21.

59 *Id.* at 21, 77; *see also supra* Introduction, at 3–9.

60 *See also* Commission Decision No. 2017/1283, 2017 O.J. (L 187) 1 [hereinafter Ireland Decision]. *See generally* Apple Decision, *supra* note 1.

the Commission, and it impacts Member States in the form of "negative integration."[61] This does not constitute *tax* law as much as it constitutes *EU* law because these Commission decisions impact general rules of principle, such as market equality and nondiscrimination.[62]

An entire chapter of the Treaty of the European Union covers tax provisions among and within Member States.[63] Provisions in these articles concern the transfer of goods and services across Member State lines and preventing measures designed to confer an unfair advantage to internal products over exported products.[64] Other than these provisions, the European Commission does not interfere in the national management of tax in Member States. As such, national policies designed and implemented by individual Member States are the primary source of general tax law in Europe,[65] closely followed by European Court rules of market and principle and the OECD Model Taxation Convention. The OECD Model Taxation Convention is a model form of existing positive integration of international tax law that the European Court references but does not necessarily require of its Member States.[66] The Commission cited this directive in their investigations, but never defined the model laws or their scope within the investigation.[67]

The Commission will only interfere with a Member State's taxation policies under Article 258 of the Treaty when the Commission finds them to be discriminatory or an impediment to intra-Community trade.[68] Policies that are at least uniform and equal in their effect—and therefore do not constitute a restriction on the movement of capital—are outside of the scope of Article 65 of the Treaty on the Functioning of the European Union and therefore cannot be influenced by the

61 TERRA & WATTEL, *supra* note 4, at 29–30. *See generally* Treaty of Paris, *supra* note 52, art. 86.

62 TERRA & WATTEL, *supra* note 4, at 29–30. *See generally* Treaty of Paris, *supra* note 52, art. 86.

63 TFEU, *supra* note 3, art. 110–13.

64 *See id.*

65 *Id.*

66 *See* Case C-336/96, R. Gilly v Directeur des services fiscal ux du Bas-Rhin, 1998 E.C.R. I-2793, I-2835 (the Court held that in allocating fiscal jurisdiction, Member States may base their agreements on the Model Convention from the OECD).

67 Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 36 (Ireland arguing that the rules would not have been known when the ruling was established, and that the laws are still novel and unknown in scope in terms of their impact within the European Union).

68 *See* Terra & WATTEL, *supra* note 4, at 63; *see also* TFEU, *supra* note 3, art. 258 (enumerating the policy by which the Commission finds that a Member State is not complying with the terms of the Treaty and may issue an opinion on the matter and give the State the opportunity to refute it).

Commission.[69] Policies that do not satisfy this requirement, however, have still been subject to investigation by the Commission.[70]

C. THE EUROPEAN COMMISSION'S "ACTION PLAN FOR FAIR AND EFFICIENT CORPORATE TAXATION IN THE EU" AND PREVIOUS DECISIONS

In 2000, the Commission announced a large-scale investigation into national business taxation schemes in order to curb unfair tax competition among the Member States in the wake of the Code of Conduct for Business Taxation.[71] This Code of Conduct was not legally binding, but instead was a proverbial gentlemen's agreement intended to define and reduce harmful tax measures.[72] It seems, however, that this was in fact the precursor to formal investigations. These investigations focused on eleven national tax measures of eight Member States under Article 88(2).[73]

The investigations were aimed generally at establishing the EU as a tax competitor with the rest of the world, especially with the United States and Asian countries whose economies are less burdened by intergovernmental ruling bodies like the EU.[74] The Commission identified three policy aims for national tax system reform: (1) to be more transparent and simple with tax schemes, (2) to contribute to an effective functioning of the internal market, and (3) to shift to Community-wide lower rates and broader tax bases.[75] Eventually, the Commission aimed to closely monitor tax schemes in "Mother-

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69 TERRA & WATTEL, *supra* note 4, at 68 (speaking to the fact that disparities in economic treatment between two member states "are obstacles to intra-Community economic activity" and therefore fall under the ambit of Article 258 of the Treaty); *see also* TFEU, *supra* note 3, art. 63, 65.

70 *See, e.g.*, 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).

71 TERRA & WATTEL, *supra* note 4, at 21; *see also* Treaty of Paris, *supra* note 52, art. 86.

72 *See* William Bratton & Joseph McCahery, *Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation*, 38 COMMON MKT. L. REV. 677, 685 (2001); *see also* Econ. and Fin. Affairs Council [ECOFIN], *Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council of 1 December 1997*, at 3, 1998 O.J. C 2 (Jan. 6, 1998).

73 TERRA & WATTEL, *supra* note 4, at 161; *see also* TFEU, *supra* note 3, art. 96.

74 TERRA & WATTEL, *supra* note 4, at 164; *see also* TFEU, *supra* note 3, art. 96.

75 *Tax Policy in the European Union: Priorities for the Years Ahead*, para. 2.3, COM (2001) 260 final (Oct. 10, 2001).

Communications" to ensure uniform adherence to these policy aims.[76] These three aims conflict with Member States' power to individually legislate on corporate taxation often impedes the EU's goal to unify economic policies.[77]

The Commission therefore desired, in this measure and those related to its recent state aid efforts, to create greater transparency and accountability in Member State taxation schemes.[78] This, according to the Commission, would create "progress in the fight against tax evasion, tax avoidance and aggressive tax planning" in a harmonized system that identifies and holds accountable each Member State in their tax decisions.[79] The most prominent of these measures, at this time, concerns state aid and its detrimental effect on competition between Member State economies.

While the Commission's definition of state aid[80] requires critical analysis of the relevant facts, the Primarolo Group,[81] a group of EU Finance Ministers who established the Code of Conduct, identified three specific tax schemes that should be labelled as *per se* harmful for these purposes: (1) those with headquarter functions whose attributable profits are determined in a manner deviating from OECD transfer pricing guidelines; (2) finance branches where attributable profits between the branch and main office are not at arm's length (established independently from the head office, such as the nation in which the branch is incorporated) but instead are established by the head office itself; and (3) holding companies that grant exempted dividends even though their profits were subject to substantially lower taxation schemes than the holding company itself.[82]

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76 TERRA & WATTEL, *supra* note 4, at 165.

77 European Parliament, *supra* note 53, para. AR(iv).

78 *Id.* para. AS(i) (discussing the endeavor to seek a full and mandatory Common Consolidated Corporate Tax Base for foreign multinational companies which establish bases in Member State jurisdictions).

79 *Id.* para. AR(vi).

80 *See* Apple Decision, *supra* note 1, para. 220; *see also* Commission Notice on the application of the State aid rules to measures relating to direct business taxation, art. B, 1998 O.J. (C 384) 3.

81 The original purpose of the Primarolo group was to create a voluntary agreement among Member States to eradicate harmful tax practices. However, the group came under fire for relying on threats and rewards to reach their goals. Lorraine Mallinder, *Primarolo Group under Fire*, POLITICO (Feb. 14, 2007), http://www.politico.eu/article/primarologroupunderfire/.

82 TERRA & WATTEL, *supra* note 4, at 200, (citing H. Nijkamp, *Uitfasering van "sckaddyke" belastingmaatregelen start in 2002,* translation: Phasing-out "harmful' tax measures starts in 2002).

The Primarolo Group, a United Kingdom-based cooperative, was established to elaborate on the criteria against unsavory tax practices, and identify Member States whose practices fell short of these criteria.[83] The group identified these specific schemes based on the criteria from the Commission and other investigations into harmful tax practices.[84] Despite the fact that the group encountered heavy opposition to their findings and purpose, these *per se* schemes seem to have influenced the Commission in their investigations into apparently harmful tax measures.[85] These aims and restrictions led to a push from the Commission to more heavily investigate and regulate questionable tax practices from Member States.

In its early communications regarding tax policy strategies, the Commission reiterated its stance against "across the board harmonization" of Member State tax policies, and focused on the removal of cross-border obstacles for citizens in the EU.[86] It also encouraged the use of tax incentives to attract R&D business to Europe, citing the desire to achieve 3% of GDP originating in R&D as an incentive in these measures.[87] The Commission wanted to achieve general uniformity between Member States in order to encourage movement by both individuals and businesses, both within and outside of the EU, as previously discussed herein.[88]

Moreover, the general aim of these decisions and communications was also to ensure that these measures toward harmonization resulted in a strengthened "knowledge economy" within the EU, establishing not only a competitive business market, but an innovative one as well.[89] The Commission announced in 2005 its plan to attract more business R&D through the Lisbon Strategy.[90] Among the various strategies to attract R&D was the Commission's plan to effect a "level playing field" in Europe's different national tax systems, thereby

[83] Mallinder, *supra* note 81; *see also* TERRA & WATTEL, *supra* note 4, at 199.

[84] TERRA & WATTEL, *supra* note 4, at 199–200.

[85] *Id.* at 200.

[86] *See generally* Tax policy in the European Union – Priorities for the years ahead, Factsheet, COM (2001) 260 final (May 23, 2001).

[87] Communications from the Commission to the Council, the European Parliament, and the European Economic and Social Committee, Towards a More Effective Use of Tax Incentives in Favor of R&D, COM (2006) 728 final (Nov. 22, 2006).

[88] *See supra* Section I.B. (regarding the relationship of the European Union and Taxation).

[89] Towards a More Effective Use of Tax Incentives in Favor of R&D, *supra* note 87, at 9.

[90] Implementation of the Community Lisbon Programme, Communication from the Commission to the Council and the European Parliament, at 12–13, COM (2005) 532 final (Oct. 25, 2005).

removing additional costs in investing in European commerce.[91] The Commission reiterated its intention in this strategy to work towards the Common Consolidated Corporate Tax Base (CCCTB) to eliminate problems associated with cross-border activities and restructuring by establishing a consolidated tax base to which each Member State could contribute its share.[92]

The Commission announced its plan for investigating questionable national taxation in 2015, when they set a series of initiatives to handle tax avoidance and strengthen the Single Market for foreign and domestic businesses.[93] The investigation was intended to include a strategy to re-launch the CCCTB, ensure effective taxation through enforcing uniform policies and closing loopholes, and increase transparency of Member States' tax structures.[94]

The first wave of investigation concerned Starbucks in the Netherlands and Fiat in Luxembourg.[95] The Commission determined that the tax rulings of both countries, examined simultaneously, constituted an illegal artificial reduction in the companies' tax burden.[96] According to the Commission, the prices for the goods and services that these companies offered did not adequately correspond with the relevant market conditions and were not economically justified by trends in the countries.[97]

The Commission claimed that Luxembourg's tax ruling for Fiat endorsed an unnecessarily complicated methodology for determining taxable profits.[98] Fiat therefore only paid taxes on a small portion of its accounting capital because Luxembourg allowed them a lower capital base than what should have been reasonable according to average market rates.[99] Belgium, on the other hand, shifted Starbucks' tax base by allowing them to pay an inflated price for Swiss-imported green coffee beans. This in turn lowered the royalty the company owed the Swiss

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91 *Id.* at 4.

92 *Id.* at 5.

93 European Commission Press Release IP/15/5188, Commission presents Action Plan for Fair and Efficient Corporate Taxation in the EU (June 17, 2015).

94 *Id.*

95 Luxembourg Decision, *supra* note 44; Commission Decision of 21.10.2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks [hereinafter Netherlands Decision].

96 European Commission, s*upra* note 70.

97 *Id.*

98 *Id.*

99 *Id.*

company, Alki, for "coffee-roasting know-how."[100] This royalty to Alki, a tea partner in the Starbucks brand, did not adequately reflect the market value of the beans or the products.[101] A large part of the taxable profits were unduly shifted to Alki's business, which was not liable to pay any corporate tax in their home state.[102]

Smaller countries and countries on the periphery of the EU must generally employ outlier tax schemes because their small market size and disadvantageous geographic location is unattractive to multinational businesses.[103] Ireland, in particular, depends heavily on foreign direct investment from multinational companies to sustain their economy and maintain their position at the near-forefront of technological development in Europe.[104]

D. IRELAND'S TAX STRUCTURE AND THE DECISION FROM THE COMMISSION

As one of the smaller European countries (about the size of Maine) and the most peripheral, Ireland's national economy is vastly different than that of other Member States. Ireland depends on foreign direct investment for much of its tradeable assets.[105] The Irish Government therefore maintains specifically-designed business guidelines to attract multinational companies to the country.[106] These corporate tax incentives for inward investment have been the foundation of the Irish economy for more than sixty years, and each successive Government has maintained this policy in order to establish themselves as one of the preeminent European locations for multinational business.[107]

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] TERRA & WATTEL, *supra* note 4, at 160.

[104] 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Ir.), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016090700006?opendocument#D00100 (Michael Noonan).

[105] Killian, *supra* note 11, at 377.

[106] *Id.;* 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Ir.), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016090700010?opendocument (Enda Kenny).

[107] Killian, *supra* note 11, at 378; *see also* John Ryan et al., *Business Operations in the Republic of Ireland*, 7170 T.M. (BNA) (2018).

Ireland bases its legal system largely on Great Britain's—primarily concerning common law—and in fact bases some current common law on British decisions preceding Ireland's independence from the United Kingdom in 1922.[108] Ireland's tax system is one such inheritance, even to the extent that a substantial percentage of United Kingdom (UK) tax law is pertinent to the operation of Irish tax law.[109]

It has become increasingly difficult for multinational companies to find low-tax countries to establish a home office; Ireland's low-tax structure has attracted several well-known technology companies, including Google, Facebook, and Apple.[110] Ireland also offers a comprehensive R&D tax credit system, with a substantial intellectual property protection component, to encourage these companies to invest in development in Ireland as well.[111] This tax system is designed specifically to attract foreign nationals, both companies and individuals, to their rocky soil.[112]

This R&D credit was particularly attractive to Apple, which established data facilities in Galway and Cork because of the attractive taxation policies.[113] The facility began initially with sixty employees, and employed nearly six thousand by the time the Commission issued its

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[108] *History of the law*, Court Service: Ireland, http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/EA59D61A0CD9C5A680257FC3005B5422?opendocument (last updated Nov. 7, 2014).

[109] AIDAN WALSH & CHRIS SANGER, IR. DEP'T OF FIN., THE HISTORICAL DEVELOPMENT AND INTERNATIONAL CONTEXT OF THE IRISH CORPORATE TAX SYSTEM 3 (2015), http://www.budget.gov.ie/Budgets/2015/Documents/EY_Historical_Dev_International_Context_Irish_%20Corporation_Tax.pdf.

[110] *Top 1000: Our Guide to Irish Business*, IRISH TIMES, http://www.top1000.ie/ (last visited Apr. 26, 2018).

[111] Henk Vording, *A Level Playing Field for Business Taxation in Europe: Why Country Size Matters*, 39 EURO. TAX 410 (1999).

[112] Ryan et al., *supra* note 107; *see also* 962 Dáil Deb. (Nov. 30, 2017) col. 5 (Irl.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/ (Deputy Paschal Donohoe). Deputy Donohue indicated that:

> [T]he level of investment from the US into Ireland cannot be attributed just to corporate tax policy – that is not a fair reflection of the many other reasons that companies choose to locate in Ireland. Factors such as availability of physical and technological infrastructure, availability of skilled staff, access to the EU market as well as culture and quality of life are also significant and important considerations.

962 Dáil Deb. (Nov. 30, 2017) col. 5 (Irl.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/.

[113] 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Michael McGrath) http://oireachtasdebates.oireachtas.ie/debates%20authoring/daallsnippets.nsf/(datemembersdail)?openview&count=-1; *see also id.* (Dara Calleary).

opinion.[114] For the company, and their employees, it was the tax certainty and transparency from the Irish government that made the facility's foreign operations advantageous.[115] Despite this facility, the primary source of research and development for Apple—in terms of taxation—remained with its United States branches.[116]

Ireland's tax system also includes specific measures designed to attract multinational businesses within certain sectors. An important element includes incentives for technological development to attract technology companies, which still makes up a large portion of the Irish economy today.[117] The business taxation rate is also 12.5%, which involves classifying income into two streams: trading income at 12.5% and non-trading income at 25%.[118] Because this rate is open to all resident business sectors and boasts a flexible working system, businesses that would not have normally chosen to expand to Ireland have done so.[119] Even during the recession in Ireland, American companies were attracted to the low tax rate and opportunities for tax breaks.[120] Tax residence is determined by two tests: the place of incorporation test, established by the Finance Act of 1999; and the central management and control test, established by Irish case law.[121] Both the incentives for technological advancement and research protection, as well as a low corporate tax structure, have been the cornerstone of Ireland's competitive taxation scheme that has attracted influential business to the nation.

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[114] *Id.* (Dara Calleary).

[115] *See id.*

[116] *Id.; see also id.* (Michael McGrath).

[117] Vivian Nathan, *Reasons to Do Business in Ireland – Research and Development (R&D) Tax Credits*, ROBERTS NATHAN (Oct. 1, 2015), http://www.robertsnathan.com/reasons-to-do-business-in-ireland-research-and-development-rd-tax-credits/.

[118] Ryan et al., *supra* note 107.

[119] *Id.* These companies include: Intel, Boston Scientific, Dell, Pfizer, Google, Hewlett Packard, Facebook, and Johnson & Johnson, among others. In particular, technology companies found advantages in the numerous tax breaks for development and talented workforce. Henry McDonald, *700 US companies now located in Ireland as direct investment soars*, THE GUARDIAN (Mar. 5, 2015), https://www.theguardian.com/world/2015/mar/05/ireland-attracts-soaring-level-of-us-investment.

[120] McDonald, *supra* note 119.

[121] Ryan et al., *supra* note 107.

E. COMMISSION V IRELAND: STATE AID AND ANTICOMPETITIVE TAX SCHEMES

The 2016 decision from the European Commission regarding Apple's business in Ireland concerns a tax ruling that the Commission claims provided illegal selective tax benefits to Apple between 1991 and 2014.[122] The Commission's investigation into Ireland's tax structure began in 2014.[123] The investigation included all of the European resident Apple subsidiaries, which all happen to also be resident in Ireland, including: Apple Operations Europe, Apple Distribution International, Apple Sales International, and Apple Retail Europe Holding.[124] The Commission determined that the profits from Apple's international sales in all of Europe—which are technically attributable to the corporate branches in Ireland—were in fact attributed to a "head office" that was not located in any country, nor was it the base for any corporate activity aside from the occasional board meeting.[125] According to the Commission, this profit-shifting resulted in an effective corporate tax rate of 1% imposed on Apple in 2003 and 0.005% in 2014.[126]

Ireland has appealed this decision, claiming that Apple has paid the full amount of taxes required by its tax ruling and the decision will be damaging for Ireland's reputation as a competitive location for multinational businesses.[127] Ireland claims that the Commission misunderstood the tax law in Ireland, and improperly appropriated revenues to Ireland that should have been attributed to the United States branches, as the original ruling established.[128] In fact, Ireland's tax measures for Apple involve income from these Irish branches that is actually attributable to the United States branches that develop the technology in question.[129]

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[122] European Commission, *supra* note 6.

[123] European Commission, Letter dated Nov. 06, 2014 from the Vice President addressed to the Minister for Foreign Affairs, E.U. Doc. SA.38373 (2014/C)(ex 2014/NN)(ex 2014/CP) (Nov. 06, 2014).

[124] *Id.*

[125] European Commission, *supra* note 6.

[126] *Id.*

[127] 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Ir.) (Micheal Noonan), http://oireachtasdebates.oireachtas.ie/debates%20authoring/daallsnippets.nsf/(datemembersdail)?openview&count=-1.

[128] Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35.

[129] *Id.* at 35.

Under the Irish law in question, the difference between these sources lies in the source of the income: Irish incorporated or Irish resident.[130] Ireland was therefore taxing only the income arising from the branch located in Ireland's jurisdiction, and excluded income attributable elsewhere.[131] In particular, Ireland's appeal draws on the Commission's lack of knowledge about the tax measures and the fact that the measures had been in place for more than twenty years without issue.[132]

Apple has also appealed the decision, claiming that the Commission used improper tests to determine state aid, and that the company is liable only for revenues directly attributable to their Irish branches, of which the European sales of the iPhone were not applicable.[133]

Former Taoiseach Enda Kenny[134] supported the decision, saying that Ireland has "some advantages when compared to other economies" with their corporate tax structure that would make other countries envious, but maintains that the law was applied fully and appropriately in terms of Apple's taxation scheme.[135] Apple's headquarters located in Galway have supplied nearly six thousand jobs for Irish citizens and is a valued member of the Irish business community in providing unique technological work.[136] The "cutting-edge" Apple operations in Cork include technological advancement and industry, and these advancements help establish Ireland as a technological asset to

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[130] *Id.; see also* John Gulliver, *Apple State Aid Decision: What is the Precedent, if Any?*, INT'L TAX REVIEW (Sept. 5, 2016), http://www.internationaltaxreview.com/Article/3583185/Apple-state-aid-decision-What-is-the-precedent-if-any.html.

[131] Gulliver, *supra* note 130.

[132] Ireland v Comm'n, 2017 O.J. (C 38) at 35-36.

[133] Case T-892/16, Apple Sales Int'l and Apple Operations Europe v Comm'n, 2016 E.C.R. 53/37, 37–38 (arguing that the Commission should not have applied arm's-length testing to the measures, or attributed all European iPhone sales to the Irish branches because their business model attributed development of the phones and their direct sales to the branches in the United States).

[134] "Taoiseach" in the Dáil is the political equivalent of a Prime Minister. At the time of this decision from the Commission and subsequent initial debates, Enda Kenny held this position. In 2017, Leo Varadkar was elected to the position. Constitution of Ireland 1937 art. 13; Henry McDonald, *Leo Varadkar, gay son of Indian immigrant, to be next Irish PM*, THE GUARDIAN (June 2, 2017), https://www.theguardian.com/world/2017/jun/02/leo-varadkar-becomes-irelands-prime-minister-elect.

[135] *See* 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Ir.) (Enda Kenny), http://oireachtasdebates.oireachtas.ie/debates%20authoring/daallsnippets.nsf/(datemembersdail)?openview&count=-1.

[136] *Id.*

businesses seeking the workforce and economic attributes that only Ireland can offer.[137]

The Government within Dáil Eireann, Ireland's legislative branch of government that has a similar structure and status to Congress in the United States, also claims that the Commission's decision is an attempt to encroach on Ireland's sovereign right to regulate their own taxes.[138] This decision would not only significantly impact Ireland's status with multinational companies, but the Irish Government[139] was also concerned that the decision would even deter companies from moving to other European bases because of the uncertainty in tax structures resulting from the Commission's decision.[140]

The other side of the issue is, of course, that €13.5 billion is enough capital to significantly help Ireland's economy; certain political representatives, known as Teachtaí Dála (singular: Teachta Dála) or TDs, believe there may be merit to the Commission's accusations.[141] TDs in other political parties claim that moving Apple's profits away from Ireland to a proverbial "Bermuda Triangle" constitutes illegal and damaging state aid, and the fact that the Commission is the body to display that issue globally is more destructive to the Irish reputation than the decision itself.[142] The monetary considerations are an issue in the Dáil because areas of Irish economy, health, and education could be substantially improved with the extra boost in capital; for a country this small, €13.5 billion could make a substantial difference.[143] The Labour Party, on the other hand, suggests a more gradual change in the tax structure in order to both adhere to the decision and maintain the same advantages Ireland boasts for foreign direct investment, but to do so without influence from the Commission.[144]

This decision by the Commission will likely impact both the national economy of Ireland, and the intra-EU economy at large, most

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[137] *Id.* (Dara Calleary).

[138] *Id.* (Michael McGrath); Constitution of Ireland 1937 art. 16.

[139] The "Government" in Ireland refers to the members of the Taoiseach's Cabinet. At the time of this decision, all members were part of one of Ireland's prominent political parties, Fine Gael.

[140] *See* 920 Dáil Deb. (Sep. 7, 2016) col. 1 (Ir.) (Michael Martin), http://oireachtasdebates.oireachtas.ie/debates%20authoring/daallsnippets.nsf/(datemembersdail)?openview&count=-1.

[141] *Id.* (Gerry Adams) (speaking to the Dáil about big issues facing Ireland's economy, including insufficient hospital beds, education insufficiencies, and housing crises, among others).

[142] *Id.* (Pease Doherty).

[143] *Id.*

[144] *Id.* (Brendan Howlin).

notably because of the high price that the Commission has put on Ireland's infraction. While the Commission has issued similar decisions in the past, the price tags on these decisions were closer to €30 million, whereas the decision in this case will require the transfer of €13 billion.[145] A sum such as this is still likely to stir up substantial debate, but Ireland's best strategy is still to appeal the decision and maintain its reputation as an advocate for businesses that will bring jobs and opportunity to the country.

F. THIS HAS BEEN DONE BEFORE: LUXEMBOURG AND THE NETHERLANDS AS PREVIOUS TARGETS

Tax havens have become the subject of investigations in Member States' taxation schemes with multinational companies. In particular, Luxembourg and the Netherlands have become the targets of such investigations, among others.[146] There has been no consistent definition of "tax havens," but the term has been used throughout investigations and subsequent writings to describe the Commission's recent actions against these Member States and others.[147] Both governmental and non-governmental organizations claim that the issue with tax havens lies in one country depriving another of a reasonable opportunity to host the branch of international companies, which is why the European Commission has started their investigations against tax inconsistencies among Member States.[148] The European Council began the measures by stating that the purpose of the action would be "to review [Member States'] tax systems with the aim of making them more effective and efficient, removing unjustified exemptions, broadening the tax base, shifting taxes away from labour, improving the efficiency of tax collection and tackling tax evasion."[149] These measures have targeted

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145 Joe Stanley-Smith, *Starbucks and Fiat hit with EUR 30m state aid bill*, INT'L TAX REVIEW (Oct. 29, 2015).

146 *See also* Luxembourg Decision, *supra* note 44. *See generally* Netherlands Decision, *supra* note 95.

147 Gary Tobin & Keith Walsh, *Policy Paper: What Makes a Country a Tax Haven? An Assessment of International Standards Shows Why Ireland is not a Tax Haven*, 44 ECON. & SOC. REV. 401, 402 (2013).

148 *Id.* at 401–02.

149 Press Release, 3167th Council Meeting of Economic and Financial Affairs (May 15, 2012), http://europa.eu/rapid/press-release_PRES-12-198_en.htm?locale=en; *see also* European Council, Council Conclusions No. 7652/1/08 of 20 May 2008, 3–4, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207652%202008%20REV%201

mainly multinational companies with headquarters in Europe, but does not necessarily favor companies based in one nation or another.[150]

The Commission encourages, but does not require, countries to adopt the rules established by the Organization for Economic Co-operation and Development (OECD) in their transfer pricing reports. These rules are mere model laws, but the Commission has used them more extensively in its investigations.[151] The "arm's length" principle establishes that tax administrations should accept transfer pricing policies that govern intra-group companies on an equal scale as independent companies negotiating under comparable circumstances.[152] The arm's length principle focuses on several factors to compare both controlled and uncontrolled parties, including the functions performed and risks assumed by the related party, as well as contractual terms between the parties and the economic conditions that characterize the market.[153]

Arm's length can be found through several different methods, including, but not limited to: the comparable uncontrolled price ("CUP") method, the comparable uncontrolled transaction ("CUT") method, the profit split methods and the transactional net margin method ("TNMM").[154] CUP examines transfer pricing as the price charged for the transfer of property or services in a single controlled action, whereas TNMM examines the arm's length profit for one entire activity.[155] CUP is therefore more of a direct analysis than TNMM because it specifically examines the price of the activity at hand, which is why the Commission is more favorable to its results "in cases where comparable transactions can be observed on the market."[156] The results that accompany a CUP

[150] 3167th Council meeting, *supra* note 149.

[151] Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35 (claiming that the Commission's definition of arm's length and the OECD policies are still largely unknown to Member States and so should not be used as a measuring stick for ideal tax practices).

[152] *Taxing Multinational Enterprises*, *supra* note 6; Luxembourg Decision, *supra* note 44, para. 85.

[153] *See* ROBERT J. MISEY, JR. & MICHAEL S. SCHADEWALD, PRACTICAL GUIDE TO U.S. TAXATION OF INTERNATIONAL TRANSACTIONS 484–93 (10th ed. 2015).

[154] Luxembourg Decision, *supra* note 44, paras. 88, 90; *see also* MISEY & SCHADEWALD, *supra* note 153, at 484–93 (comparing all common transfer pricing methods comparing the transfer of tangible goods, including: CUP, resale price method, cost plus method, comparable profits method and profit split methods; additionally this discusses the transfer of intangible property, such as CUT, as well as the performance of services method).

[155] MISEY & SCHADEWALD, *supra* note 153, at 483–84, 490.

[156] *See generally* Luxembourg Decision, *supra* note 44.

analysis are generally more transparent than TNMM, and this creates more uniformity in the system.[157]

CUP's counterpart in the transfer of intangible property is CUT, the comparable uncontrolled transaction method.[158] The arm's length charge for the transfer of intangibles between *related* parties should, under this method, be commensurate with the amount charged for the transfer of comparable intangibles between *unrelated* parties.[159] This method is more appropriate than CUP when transferring the rights or know-how between company branches, but follows the same framework as if the company was transferring tangible property such as inventory or materials.

Like CUP, the profit split methods analyze the transfer of tangible property between related parties.[160] The two variations of this method analyze the company's allocation of combined operating profit between the two related parties against the same action between unrelated parties.[161] The comparable profit split method allocates the operating profit between the two parties based only on their respective activities for the business, whereas the residual profit split first determines the profit return for the parties' respective activities and allocates the residual profit based on the value of intangible property each party contributed to the relationship.[162]

1. *Fiat, S.p.A. in Luxembourg*

In Luxembourg, Fiat S.p.A. became the subject of one investigation in 2009 when the Commission announced that the tax measures Luxembourg granted to the automobile conglomerate used an illegal profit allocation that resulted in a hidden profit distribution.[163] The Commission found that Luxembourg was allowing Fiat to claim an advantageous corporate structure between its intra-group entities.[164]

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[157] Elizabeth Hughes & Wendy Nicholls, *The Different Methods of TP: Pros and Cons*, TAX JOURNAL (Sept. 10, 2010), https://www.taxjournal.com/articles/different-methods-tp-pros-and-cons.

[158] MISEY & SCHADEWALD, *supra* note 153, at 493.

[159] Luxembourg Decision, *supra* note 44, para. 85.

[160] MISEY & SCHADEWALD, *supra* note 153, at 490.

[161] *Id.*

[162] *Id.*

[163] Luxembourg Decision¸ *supra* note 44, para. 75.

[164] *Id.* para. 110.

Luxembourg tax advisors used TNMM to find the taxable profit for the Italian-based company.[165] They determined that only the profits attributed to financial services were applicable because the headquarters in Luxembourg were entirely business-related.[166]

The Commission initiated the investigation against Luxembourg because it doubted that this tax ruling complied with the arm's length principle as it stood in Article 107(1) of the Treaty.[167] According to the Commission, the taxable base was too low to have accounted for the profits they believed were attributable to this branch.[168] Luxembourg protested the uniform EU-wide application of laws that bear more importance to individual Member States. Luxembourg emphasized that the Commission admitted that "the interpretation and application of the arm's length principle varies from one tax administration to another" and applying uniform tax codes to the different Member States was unreasonable.[169] The Commission should have allowed Fiat the freedom to structure itself as the company saw fit and Luxembourg the tax authority to find the best fitting tax scheme for both the company and the country.

2. Starbucks in the Netherlands

The Netherlands faced a similar issue when the Commission targeted its Starbucks branch for the country's advance pricing agreement ("APA") between Starbucks Manufacturing BV ("SMBV") and Alki LP ("Alki") for the exchange of coffee beans and "roasting know-how" with the coffee giant.[170] The Dutch tax administration approved an APA that did not conform to the Commission's standards for commercial transactions between different entities of the same corporate group.[171] The Netherlands' administrators followed their own application of the OECD Guidelines under Section 3.8 of their Income

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165 *Id.* para. 132.
166 *Id.* para. 54.
167 *Id.* para. 129.
168 *Id.* para. 134.
169 *Id.* para. 150.
170 Vidya Kauri, *Starbucks' Transfer Pricing Behind EU's $34M Tax Ruling*, LAW360 (June 28, 2016), https://www.law360.com/articles/811753/starbucks-transfer-pricing-behind-eu-s-34m-tax-ruling.
171 *Id.*; *see* Netherlands Decision, *supra* note 95, paras. 40–45 (claiming that the remuneration utilized by Dutch authorities improperly calculated taxable percentages of the company's profits).

Tax Act, and allowed Starbucks' tax advisor to determine the remuneration rate and establish the markup of all relevant profits attributable to the Dutch branch.[172] In this case, somewhat unlike its Luxembourg counterpart, the company was targeted for its structure of independent branches of the same corporate conglomeration. Alki LP is an independent green coffee bean roaster in the United Kingdom that sold beans and "roasting know-how" exclusively to Starbucks.[173]

The Commission initiated this action against the coffee conglomerate because the remuneration may not have complied with true arm's length requirements according to Article 107(1) of the Treaty.[174] Specifically, the Commission doubted that the Dutch tax administration could have accepted SMBV's tax advisor's recommendations of the corporate structure and corresponding profit allocation because it claimed that the method of taxation chosen by authorities was inappropriate for determining transfer pricing.[175] In its decision, the Commission applied each of the four elements of state aid to Starbucks' situation.[176] They claimed that SMBV's APA lowered SMBV's tax liability under illegal tax rules, resulting in an unfair reduction in revenue to the Netherlands in the form of lost taxes.[177]

They further claimed that because SMBV operates in all member states in the form of Starbucks franchises, the loss in tax costs affected intra-EU trade and constituted selective advantage to SMBV.[178] In doing so, the Commission claimed that this action distorted competition between Member States.[179] The Commission found that royalties should not have been due for the "roasting know-how" to Starbucks, and there

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172 Netherlands Decision, *supra* note 95, para. 237.

173 William Byrnes, *Application of TNMM to Starbucks Roasting Operation: Seeking Comparables Through Understanding the Market*, KLUWER INT'L TAX BLOG (July 13, 2016) http://kluwertaxblog.com/2016/07/13/application-tnmm-starbucks-roasting-operation-seeking-comparables-understanding-market/.

174 Netherlands Decision, *supra* note 95, para. 261 (defining arm's length as transfer prices between intra-group companies which are "remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length").

175 *Id.* para. 232 (claiming that the APA employed by Dutch authorities granted a tax exemption which placed Starbucks in a more favorable position than other similarly-situated companies because "companies established in the Netherlands are resident taxpayers" and so are subject to the same system as other resident companies).

176 *Id.* para. 224.

177 *Id.* para. 226.

178 *Id.* para, 227.

179 *Id.*

was no market justification for price markups for the green coffee beans that Alki supplied.[180]

The Commission admitted that its analysis of Starbucks' scheme required comparable examination of legally and factually similar companies. The Netherlands granted non-resident companies a scheme that taxed only business accountable to the Dutch branch of the company, and all related corporate actions.[181] The Netherlands claimed that the reference system for transfer pricing in their country should be found in their Decree, which establishes the taxation system for multinational companies with headquarters in their jurisdiction.[182] The Commission, however, had established in prior cases that taxable profits should be set at a flat rate which represents the total amount of operating costs and expenses in the branches headquartered in the Member State.[183] In other words, transfer prices not also present in other similarly situated independent branches would be impermissible.[184] The purpose of this measure is to ensure that transactions between group-companies are treated the same in Member States' structures as are transactions between independent branches of the same company.[185]

3. *Comparisons Between the Discussed Cases*

The primary issue in these three cases boils down to finding attributable profits between subsidiaries of the United States' branches of each corporation. This depends on the functions performed, debts assumed and intangibles employed by the branch. At the core of this issue is, in Ireland's case, whether the profits that Apple claims are

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180 Kauri, *supra* note 170.

181 Netherlands Decision, *supra* note 95, para. 233. Article 3 CIT 1969 and Chapter III of the CIT 1969 (according to which, non-resident companies are taxed on: (1) business income derived from a Netherlands permanent establishment or permanent representative, (2) income and capital gains derived from immovable property located in the Netherlands, (3) income and capital gains from rights related to the exploration for or exploitation of natural resources situated in the Netherlands or the Netherlands part of the continental shelf, (4) all remuneration derived from a directorship of a resident entity, and (5) income from rights to the profits of an enterprise (bonds and shares excluded) the management of which is situated in the Netherlands).

182 *Id.* paras. 180–83.

183 Joined Cases C-182/03 & C-217/03, Kingdom of Belgium v Comm'n of the European Cmtys & Forum 187 ASBL v Comm'n of the European Cmtys, 2006 E.C.R. I-5584.

184 Netherlands Decision, *supra* note 95, para. 261 ("[T]ransactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length.").

185 *Id.*

attributable to their American headquarters are in fact attributable to the work done in technology in the subsidiaries in Galway and Cork. Whether the nation who hosts the headquarters can benefit from the profits of said subsidiaries depends on the corporate makeup of each of these questions, but it is more nuanced than simple allocation. Oftentimes, the taxation scheme offered by different member states determines the ultimate location of these headquarters, and subsequent benefits that they bring. This is the issue presented in this note and discussed below.

II. COMMISSION V IRELAND: APPLE'S BIG BREAK

The European Commission denounced Ireland's tax system as illegal because it constitutes state aid in the form of specific preferential treatment to Apple.[186] Both Apple and Ireland have denied the claims, saying that the ruling between the two parties was agreed upon in the interests of both, and tax regulations were applied uniformly across the market.[187] This tax determination, which would ultimately benefit the citizens of Ireland both in the tax gained from Apple and in the business that the tech giant brings to the country, should be left to the sovereign control of the Irish government.[188] It is instead the subject of a Commission decision set on superficially establishing equality amongst Member States. Fianna Fail and Fine Gael, the largest political representative parties in Ireland, support the Government's decision to appeal the Commission's decision, claiming that Ireland never gave anyone a sweetheart deal, but in fact is serving as the Commission's guinea pig for taxation reformation in Europe.[189]

As Ireland's economy stands, it will be more beneficial for the country to appeal the decision from the European Commission because the Commission is indeed encroaching on Ireland's sovereign right to

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[186] Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35. Commissioner Margrethe Vestager claimed that "Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years," and improperly allocated sales profits to a head office which "did not correspond to economic reality." European Commission, *supra* note 6.

[187] Case T-892/16, Apple Sales Int'l and Apple Operations Europe v Comm'n, 2016 E.C.R. (2017/C 053/46); *see also* Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 36.

[188] 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.) (Michael Noonan), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debate. . .il2016090700006?opendocument#D00100.%20Ireland%20v%20Commission.

[189] *Id.* (Michael McGrath).

determine their own tax policies.[190] This presents an issue with the balance of national government versus the EU, and calls into question the integrity of national tax decisions that could impact the European economy as a whole. Since the most important consideration in international tax is transparency and predictability of the system, the European Commission's action against previously agreed-upon rulings between countries and companies casts doubt on all previously stable treaties and calls into question the stability of international business.

A. IRELAND'S ECONOMY CANNOT SUSTAIN ITSELF WITHOUT FOREIGN DIRECT INVESTMENT

Ireland is a small country on the periphery of the EU, and does not have the same advantages as other Member States. The result of the continuing Irish Diaspora[191] has enticed workers and businesses to move away from Ireland and towards opportunities in larger and more prominent markets. Ireland's tax needs do not equally reflect the tax needs of other European countries because of their location and their unique market.[192]

Ireland's unique position in the European market justifies certain measures that the country takes to attract Foreign Direct Investment.[193] Ireland's market differs significantly from other European countries, and this should require their tax structure to differ to an equal extent.[194] Their competitively low tax rate at 12.5% makes up for their peripheral location, while their market transparency makes up for their small market size.[195] Maintaining foreign business depends on predictability and accountability in the market, and Irish policies have proven that the

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[190] *See supra* Section I.A.

[191] Ciara Kenny, *The Global Irish: Where do they live?*, IRISH TIMES (Feb. 4, 2015), http://www.irishtimes.com/life-and-style/generation-emigration/the-global-irish-where-do-they-live-1.2089347 (showing that an estimated 771,572 Irish-born immigrants lived in 72 different countries in the world in 2013). The Diaspora has drawn Irish citizens away from Irish soil, and in doing so has deprived the country of valuable economic labor. Measures have been taken in the Dáil to encourage these emigrants to return to Ireland, both economically and physically, in order to bring their success and expertise back to their homeland. These measures have gone so far to include emigrants in political elections and community events.

[192] *See* 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/; Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35.

[193] Killian, *supra* note 11, at 377.

[194] *See generally id.*

[195] *Id.* at 377–78.

country is committed to not only keeping corporate tax low but maintaining transparency with both potential and long-time partners.[196]

Ireland does not exhibit the same characteristics as a tax haven as defined by the OECD in 1998.[197] These characteristics vary widely in identifying tax havens, and fail to identify a straightforward definition of "tax haven."[198] While Ireland's corporate tax regime for foreign direct investment is lower than all of the other countries in the European EU, their tax base is related to their national size and economy. Ireland's tax regime is purposefully designed to reduce complexity in treaties, which has attracted more foreign direct investment to their country than others in the EU.

Ireland does treat businesses equally based on unifying factors that the European Commission has failed to consider. All foreign direct investment incurs the same corporate tax rate based on profits attributable to Ireland, while all domestic companies receive the same treatment.[199] This decision is therefore not specific or selective, as the European Commission claims. The rates between Ireland and other member states may differ, but this is an issue that is part of Ireland's sovereign control.[200] Companies with the same corporate structure and identity are given the same rate among themselves, but different compositions of companies justify different treatment based on need and motivation for taxation by the government.

In this situation, Ireland has taxed Apple with the same structure as all other foreign companies on their soil,[201] so the structure of domestic companies and companies from other European countries should not be

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[196] *See generally* Gary Tobin & Keith Walsh, *What Makes a Country a Tax Haven? An Assessment of International Standards Shows Why Ireland is Not a Tax Haven*, 44 ECON. & SOC. REV. 401, 402 (2013).

[197] *See id.* (identifying four key factors of tax havens as: "(1) no or only nominal taxes; (2) lack of transparency; (3) unwillingness to exchange information with the tax administrations of OECD member countries; and (4) absence of a requirement that activity be substantial").

[198] Tobin, *supra* note 196, at 403; *see also* Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35.

[199] Suzanne Kelly, *Why Ireland is really only entitled to its seller's margin on Apple sales: The effect of the European Commission's decision is to tax the seller on the entire sales income and ignore any income due to the owner*, SUNDAY INDEP. (Sept. 18, 2016), https://www.independent.ie/business/irish/why-ireland-is-really-only-entitled-to-its-sellers-margin-on-apple-sales-35057395.html (showing that profits attributable to different branches of the same company are part of a different area of taxation law which identifies taxation as attributable only to the income of the home operation, rather than the branch itself).

[200] Case T-778/16, Ireland v Comm'n, 2017 O.J. (C 38) 35, 35–36 (arguing that the Commission incorrectly identified selectivity and advantage in tax measures that properly followed Irish tax law, which was also universally applicable to other similarly-situated companies).

[201] *See id.* at 35.

considered as a standard for Apple's tax scheme. Corporate tax is applied to these various kinds of companies according to different factors that the government considers in their treaties with them.

Attracting foreign direct investment with low tax rates and simple treaty processes is one of the ways in which Ireland has improved its independent economy. With few exportable goods and little influence in the international market, Ireland has established itself as the base for European development for companies looking to establish a market in the EU. Members of Dáil Eíreann generally agree that maintaining Ireland's position regarding foreign direct investment is crucial to maintaining their economy.[202] Foreign investment depends on predictability and stability in tax agreements between countries and companies. Ireland has offered this.

B. THE COMMISSION'S DECISION CONSTITUTES AN ENCROACHMENT ON SOVEREIGNTY

Taxation is at the heart of a country's sovereign control. The three decisions from the European Commission discussed in this note constitute a serious encroachment on member state sovereignty because they impose retroactive burdens both on the State and the companies involved. The Commission does not have the authority to deprive a country of its right to establish final taxation principles with the citizens and the companies therein.[203] Only the Member State itself can establish taxation policies that best fit its own economic climate. For this reason, the Commission cannot possibly establish a reliable uniform taxation principle for the entire EU that will adequately adhere to their specific requirements as Member States. A uniform tax principle can only hope to satisfy one or a few countries' concerns; in this manner, a decision of this nature is not in the interest of the European community at large.

Member states do not have identical political or geographical landscapes; their proximity to one another make their close relations possible, despite their varying cultures and ideologies. Ireland, as the

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[202] *See* 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.) (Paschal Donohoe), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupdail)/20160907~NN?opendocument#NN00300.

[203] *See* TFEU, *supra* note 3, art. 4, 5 (establishing together a balance between the powers of Member States to regulate matters which concern internal issues, and the powers of the Commission to ensure that these internal policies do not encroach on the internal policies of another Member State).

most peripheral member state, stands in stark contrast to countries such as Germany and France, whose central locations and larger economies alone establish an easy location for foreign direct investment. By allowing taxation to remain a Member State issue, the European Commission avoids the task of creating an ideal uniform taxation code that would appease all of the various member states in the EU.

Ireland agreed with the tax ruling between itself and Apple in 1991, and adjusted in the following years to adhere to the changing economic climate. This agreement, which concerns only the two parties involved and which pertains to the specific composition of each, was approved by the parties and withstood over a decade of practical use. The fact that a third party has come forward to claim invalidity is incompatible with the EU's intention for EU-wide harmony. Considering the fact that the tax in question would benefit only the people in Ireland, and would burden only Apple, the Commission has neither information helpful to, nor an interest in the outcome of, internal taxation.

If a sovereign decision can stand practical muster for over a decade and appease both parties involved, it is logical that it should stand. Alternatively, if the issue that the Commission claims inundates this treaty really does exist to the extent that it affects the EU, then the Commission's decision should stand. However, the latter is not true. The tax principle in issue concerns possible profits attributable to Apple's Irish branch. While other European countries may have a claim to some of the profits from products sold in their countries, this is not the issue at hand. Profits from the products sold constitute a different tax than the tax in Ireland for profits attributable to the R&D work in a specific branch of the company. This tax, and this tax alone, is of concern, and the Commission is conflating the issue with other tax concerns.

C. THE RETROACTIVE NATURE OF THE COMMISSION'S DECISION CREATES CONCERN

Retroactively issuing punishment for previously agreed-upon tax rulings throws into doubt all tax treaties between European countries and foreign investors. Attracting foreign investment depends on transparency and predictability, both of which Ireland's rulings provide for its investors. If the Commission's decisions stand, all tax agreements with US companies will be in jeopardy, and companies will question their own agreements. According to members of the Dáil, companies already have other options in Singapore and other countries for foreign investment that would satisfy the same purpose as investing in Europe.[204] The draw for investing in Europe is the diverse market and predictability of rates unique to each country.

If companies cannot adequately predict what their foreign tax rates will be, or what they may become in the event of market change, any incentive to invest is effectively eliminated. It is not possible for a country to attract foreign investors with the caveat that their agreement may be rendered illegal by a higher governing body with only a small semblance of power to do so. The Commission disregards the fact that their decision will have this wider-reaching effect on countries' individual economies than it will on the general European economy. However, the Commission cannot ignore the fact that the effect of national taxation schemes will benefit or burden only the country who made the scheme in the first place. Companies invest in countries that they believe have fair and economical tax rates, predictable structures, and a reliable workforce; they do not invest in Europe as a concept.

The European Commission does not have a national economy to maintain or a citizenry to appease; its decisions affect only the imposition of a policy which these countries may have to handle. The Commission may claim that it understands the European economy as a whole and the issues that it faces. However, it neglects to consider the unique climates of each of these apparently harmful economies and the problems that each corresponding government addresses as they consider the system. Instead of retroactively creating a uniform economy to which each country must devote itself, the Commission's efforts would be better spent elsewhere.

III. COMMISSION V EUROPE: NOWHERE TO HIDE

One of the predominant features of the Commission's analyses in affected cases concerns the consistency with which tax rulings are employed by and among Member States. Most determinative in these rulings is whether the treatment exhibited by the Member States is consistent for factually and legally similar companies. In cases from both Luxembourg and the Netherlands, this determination came from two differently-situated companies. One, in Fiat, an intra-corporate branch;[205]

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[204] *See generally* 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/.

[205] Luxembourg Decision, *supra* note 95, paras. 34–36.

the other, in Starbucks, an independent partner, albeit an exclusive one, of the corporation.[206] Legally and factually-speaking, these two companies are different, and should be treated differently by their host countries. However, the Commission seeks to standardize the taxation system between Member States in order to reduce competition in the EU and ensure that countries grant no undue state aid to international companies.

Taxation is specifically a matter reserved for Member State legislators. However, the means by which some Member States have implemented their own internal tax policies have affected the economy of the EU as a whole.[207] The LuxLeaks[208] scandal in 2014 highlighted the need for Member States to increase transparency and coordinate tax policies, especially those that have the power to affect the corporate policies of other Member States.[209] The announcement and subsequent investigation into the issue brought attention to the fact that base erosion and profit shifting were common and detrimental practices among Member States.[210] As the first of many investigations into tax avoidance schemes, European bodies of law have continued to move towards transparency and coordination between Member States in enacting taxation policies for both multinational and European companies. The basis for these decisions from the Commission lies in the EU's desire to create a more harmonized market in which multinational companies are not given advantageous tax treatment to the detriment of EU-based companies. Creating transparency and uniformity among Member States

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[206] *See* Netherlands Decision, *supra* note 95, paras. 10, 106.

[207] Resolution on tax rulings and other measures similar in nature and effect, PARL. EUR. DOC. P8_TA(2015)0408, para. 20 (highlighting studies that show the revenue loses to the Union as a whole due to tax avoidance schemes from Member State corporate taxation policies could amount to around €50–70 billion, or as high as €160–190 billion if special tax arrangements are taken into account); *see also* European Parliament, *supra* note 53, para. AS (showing that "the power to legislate on corporate taxation is vested in the Member States, yet the vast majority of problems linked to aggressive tax planning are of a multinational nature").

[208] *See generally* Jim Brunsden, *LuxLeaks: Luxembourg's Response to an International Tax Scandal*, FIN. TIMES (June 22, 2017), https://www.ft.com/content/de228b90-3632-11e7-99bd-13beb0903fa3 (Referring to the Luxembourg Leaks scandal in which journalists revealed the secret deals between Luxembourg and 340 multinational companies, which allowed these companies to significantly reduce their global tax bills. Tax advisors across the Union were implementing similar strategies to reduce the tax liability of multinational companies, and the Commission realized this inequality between multinational companies and local companies created the need for increased transparency in tax schemes.).

[209] *See also* European Parliament, *supra* note 53, para. AK.

[210] Brunsden, *supra* note 208.

would diminish unfair competition while also enhancing EU-based companies' competitiveness in their own market.[211]

While direct corporate taxation is the responsibility of Member State legislatures, convergence among Member State taxation systems is, according to the Commission, necessary to expand the European economy as a whole.[212] Multinational companies within this structure play a key role in benefitting significant segments of the European economy, including investments and job growth.[213] However, significant issues arise when this system of national taxation is exploited by multinational companies pitting Member States against one another in competition for foreign direct investment, which tends to result in tax systems that favor malleable profit allocation and asset expenditures.[214] These issues are exacerbated in IP-intensive industries, which are the key to economic growth and employment in many countries.[215]

Determining attributable income and taxation to each country becomes complicated when considering the actual source of income generated, especially concerning intellectual property by each branch, as is evident in these three cases herein discussed. The OECD determined that source taxing should be based on where value is generated.[216] The substantial activity component to this requirement works to prevent purely tax-centered operations within multinational companies that do not substantially contribute to the economic operations.[217] This recognizes the number of Member States that develop intentional regimes to attract companies' most intangible assets in intellectual

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[211] European Parliament, *supra* note 53, para. AO (discussing the effect of the LuxLeaks scandal on successive decisions from the Commission in terms of their desired effect to equalize taxation treatment between multinational companies as well as Member States themselves).

[212] European Parliament, *supra* note 207, paras. F, N, O.

[213] *Id.* para. AB.

[214] Resolution on tax rulings, *supra* note 207, para. 29.

[215] *See generally* BEPS Report, *supra* note 6. Intellectual property in business is growing exponentially as a viable source of relief for struggling economies, particularly where the industry expands to create jobs and growth in other interdependent sectors. Patent protection is one of several related features which are common in digital foreign direct investment that are significant in driving a successful economy. *See generally* ALLEN N. DIXON, INTELLECTUAL PROPERTY: POWERHOUSE FOR INNOVATION AND ECONOMIC GROWTH (2011), http://www.eurosfaire.prd.fr/7pc/doc/1297093490_ip_powerhouse_innovation_economic_growth_2011.pdf.

[216] European Parliament, *supra* note 53, para. AS(iii).

[217] *See* BEPS Report, *supra* note 6, at 18.

property contributes to tax credits that falsely reflect economic activity within their jurisdictions.[218]

The Forum on Harmful Tax Practices considered different approaches to taxation of intellectual property in recognizing the substantial activity requirement, including the transfer pricing approach, as employed in these three cases.[219] This approach allows the company to attribute income generated by the intellectual property operations within specific jurisdictions, if the taxpayer could identify crucial functions actually carried out in that jurisdiction.[220] This is satisfied when the legal owner of the assets in the jurisdiction in question uses the assets, both to the promise of benefit and the risk of detriment to the taxpayer, in the furtherance of profit-seeking activities in the company.[221] It primarily concerns the commercial transactions between companies within the same corporate group, or individual companies with several subsidiary operations.[222]

Prominence in the field of research and development has been the EU's goal in recent years, the approach being to promote favorable tax treatment for R&D while acknowledging Member State control over national tax policies.[223] This is apparent especially in Member States' efforts to make structural alterations to their own economies in order to accommodate the growing industry.[224] Still, the aspirations for more expansive technological growth in the EU stems from EU-wide objectives, similar to those contained in Article 163(1) of the Treaty that includes "strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at the international level."[225]

The issue, especially in these cases, arises—according to the Commission—when these transactions are not carried out at arm's length

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[218] Resolution on tax rulings, *supra* note 207, para. 25.

[219] Org. for Econ. Co-operation and Dev. [OECD], *BEPS Action 5 on Harmful Tax Practices: Transparency Framework: Peer Review Documents*, at 18, (Feb. 2017), https://www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf.

[220] *Id.*

[221] *Id.*

[222] Ireland Decision, *supra* note 60, para. 80.

[223] *Towards a more effective use of tax incentives in favour of R&D,* at 3, COM (2006) 728 final (Nov. 11, 2006) (the Commission announcing in 2005 their commitment to becoming more attractive to R&D businesses in COM (2005) 532 final).

[224] *Id.*

[225] *Id.* at 6.

and instead constitute manipulation of profits to limit those attributable to higher taxation jurisdictions.[226] Transfer pricing is affected by the lack of comparable transactions between other companies, in addition to benchmarks identifying arm's-length operations.[227] The measures at issue therefore result in discrepancies between the source of value created and the actual taxation of that value.[228]

Overcomplicated tax rulings from Member States that diverge from neighboring Member States create significant advantage for multinational companies that use the inherent loopholes to achieve the lowest tax liability possible.[229] The issue arises in the divergence between harmful tax practices and profit shifting, and Member States' desire for foreign direct investment in their own jurisdictions.[230] The Commission seeks to promote R&D investment, but overstates the overriding interest of the EU at large to achieve these investments through justifiable restrictions on individual Member State freedoms.[231] It promotes the common aim of the EU to participate in the increasing globalization of the knowledge economy and the trends toward advantageous R&D investments.[232]

An overwhelming complication in all of this convergence of taxation policies lies in the fact that Europe is generally not a naturally unified entity. Centuries-old nations existing independently far before unity was achieved in the middle of the twentieth century do not lend themselves easily to abrupt compromise. The power of overriding European EU legislative and regulatory bodies forgets their counterparts at the national level in striving for integration to the point of acceptability among Member States.[233] The Treaties then forced this shift towards unification, resulting somewhat in pushback from Member States in implementing EU strategies and decisions, as well as questions

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[226] Ireland Decision, *supra* note 60, para. 83; Luxembourg Decision, *supra* note 44, para. 85; Netherlands Decision, *supra* note 95, para. 63.

[227] Resolution on tax rulings, *supra* note 207, para. 28.

[228] European Parliament, *supra* note 53, para. C.

[229] *Id.* para. 5.

[230] *Id.* para. 4.

[231] *Towards a more effective use of tax incentives in favour of R&D, supra* note 223, at 6.

[232] *Id.*

[233] Michael Burgess, *Introduction: Federalism and Building the European Union*, 26 OXFORD JOURNALS 1, 4 (1996) (citing "Interview with Spinelli" and reminding readers that "the European Commission's political center remained weak and impotent, lacking the capacity to go much beyond what already existed and unable to adapt to new forces and problems encountered at the European level," in their efforts to achieve unification at its early stages).

surrounding preemptive legislative issues that naturally arise between EU legislators and their Member State counterparts.[234]

A. THE IMPACT OF THE DECISIONS ON INDEPENDENT MEMBER STATE DEALINGS WITH MULTINATIONAL COMPANIES.

These tax investigations and decisions from the European Commission create uncertainty for Member States, both for the countries in their tax rulings, and the companies in their dealings with Member States. Selectivity in taxation is a central issue in these cases because the Commission claims that the treatment these companies receive from Member States differs from other similarly situated companies. In terms of the prongs for "state aid," advantage is meant to be distinct from selectivity, but these concepts are often examined in tandem in these decisions.[235] Luxembourg argues in these decisions that the Member States create their own tax rulings to adhere to Member State–specific criteria, and to provide legal certainty for the taxpayer which is establishing their headquarters in their jurisdiction.[236] The Netherlands similarly supports the sovereignty of Member States, even while following the OECD Guidelines.[237] Selectivity, as one of the prongs of state aid, therefore depends on the Member State and the company in particular.

Collapsing these requirements is significant in the Commission's examination of these tax rulings because advantage is easier to discern when the arm's length adherence is more indicative of state aid than selectivity. Whereas prior decisions examined advantage in terms of selectivity, and therefore looked mainly at whether the Member State

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[234] *See generally id.*

[235] U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS 8–9 (2016) (recalling that the selectivity prong was often, in previous cases, the determinative hurdle for the Commission to clear in order to find state aid; the collapse of these prongs "reduces a State aid inquiry to whether the Commission believes that a transfer pricing ruling satisfies its view of the arm's length principle" and in doing so deprives Member States of a crucial defense).

[236] Press Release, Ministere des Finances, Luxembourg to appeal the Commission's Fiat decision (Apr. 12, 2015), http://www.mf.public.lu/actualites/2015/12/fiat_041215/index.html.

[237] Letter from Eric Wiebes, State Sec'y of Fin., Minister of Fin., to the President of the Second Chamber of the Dutch Parliament (Nov. 27, 2015), www.government.nl/binaries/government/documents/parliamentary-documents//2015/11/30/cabinet-response-to-the-european-commission-decision-on-starbucks-manufacturing-bv/cabinet-response-to-the-european-commission-decision-on-starbucks-manufacturing-bv.pdf.

was singling out an entity based on unique legal and factual elements, these decisions, as well as recent decisions, rely mainly on the multinational nature of the entity alone.[238]

This is somewhat skewed because Member States will give different treatment and terms to multinational companies on this basis alone, but this does not itself constitute state aid. Luxembourg, the Netherlands and Ireland have satisfied the arm's length principle in terms of the multinational nature of their respective decisions. This does not depend on a comparison to domestic companies in terms of similarity. Certain distinguishing factors of companies should not be the sole basis for the selective treatment, but there are aspects of companies—especially multinational ones—which will inherently differ from others for strategically advantageous reasons.

Arm's length will naturally follow from these determinations, but it will not always reveal what taxation methods the Member State has applied. Ireland, Luxembourg, and the Netherlands each claim that their tax rulings adhere to the arm's length principle because their tax rulings concern only the taxable profits associated with the branch located in that Member State.[239] Specifically in Ireland, former Deputy Michael Noonan said that the tax treatment given to Apple concerns only profits attributable to the work done in Ireland, regardless of the work done in the United States.[240] The problem in these cases is not that the Member States incorrectly applied the arm's length principle in their rulings, but that the Commission's determination of the corporate structure does not reflect what the Member States have already determined.

B. DETERMINATIONS AS A POWER OVERREACH BY THE EUROPEAN COMMISSION

This is another example of the shifting political imbalance between the Commission and Member States. If tax rulings should be transparent and predictable, a tax administrator's ruling on the structure

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238 *See id.; see also* Liza Lovdahl Gormsen, *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, 7 J. EUR. COMPETITION L. & PRAC. 369 (2016), http://www.biicl.org/documents/1286_state_aid_law_and_transfer_pricing.pdf?showdocument=1.

239 Ireland Decision, *supra* note 60, para. 33; Luxembourg Decision, *supra* note 44, para. 257; Netherlands Decision, *supra* note 95, para. 42.

240 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/.

of each multinational company should not be subject to subsequent unilateral review by a relatively uninterested and uninformed third party. The European Commission does not have a direct role in taxes or tax rates, but rather oversees cooperation between national tax rules and ensures compliance with certain EU policies.[241] Included in these policies is the monitoring of business activity in one country that may have an unfair advantage over another business in another country.[242]

This advantage pertains to activity that actually distorts or threatens to distort commercial competition between Member States.[243] A determination that so drastically changes the economic environment in the EU requires unanimous agreement by all Member States.[244] This advantage must also not be generally available to all businesses in a similar legal or factual situation in order to be found to be illegal state aid.[245] As the three cases in this analysis have shown, the countries' treatment given to multinational businesses was applied equally to all multinational businesses in the same factual and legal situation.[246] These tax rulings were based on individual determinations by the companies' tax administrators about the structure and profit attribution to each individual branch, and were therefore based on valid business differences.

The tax decisions were different according to each Member State in question. Ireland's tax and financial structure did not reflect the Netherlands', nor did it reflect Luxembourg's. The European Commission's decisions differed between these nations because the issues in each case varied according to the industry in question and each nation's policies. Despite the increased effort to coordinate taxation policies in the EU,[247] direct taxation is still within the sole purview of

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[241] *Taxation*, EUROPEAN UNION, https://europa.eu/european-union/topics/taxation_en (last updated Mar. 27, 2017); *see also* TFEU, *supra* note 3, art. 65(1)(a); *supra* Section II.B.

[242] *Taxation*, EUROPEAN UNION (last updated Mar. 27, 2017), https://europa.eu/european-union/topics/taxation_en. *See generally* U.S. Department of the Treasury, *supra* note 235.

[243] DEP'T FOR BUS. INNOVATION & SKILLS, STATE AID: A BEGINNER'S GUIDE 1–2 (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229789/bis-10-951-state-aid-beginners-guide.pdf.

[244] *See* Tobin & Walsh, *supra* note 147, at 409–12 (noting that the unanimity requirement stems from the original desire of the European Union to collectively deal with continent-wide disputes).

[245] TERRA & WATTEL, *supra* note 4, at 77.

[246] Case T-778/16, Ireland v Comm'n, 2016 E.C.R. 38/35; Case T-892/16, Apple Sales Int'l and Apple Operations Europe v Commission, 2016 E.C.R. 53/37.

[247] Literature promulgating the rhetoric that unification of tax policies throughout Europe are the key to increasing Europe's competitive economic advantages, both internally and within the

Member States when it comes to spending them, so the policies are generally designed to reflect this.[248] Instead of commingling sovereignty to create a stronger unified Europe, decisions such as this have diminished Member State control.[249] If taxation is ultimately the decision of each Member State, intervention from the Commission is overreach.

Retroactivity is still an issue in this matter. Companies must be confident in their dealings with Europe in order to facilitate global expansion and growth of the economy. The Commission is also hard-pressed to find a legal rationalization—beyond state aid—to justify intervening in Member States' taxation affairs. While the Commission may refuse state aid at the outset, and stop it immediately when they identify it,[250] they cannot retroactively determine the impact of state aid on the economy.

Each Member State and company involved in these cases determined that they would appeal the decision on the grounds that the Commission cannot overstep its bounds in handing down a decree to control taxation, an area in which Member States are entitled to exercise sovereign control.[251] Competition is a natural occurrence between countries, but it does not reach the level of detriment to another.[252] Fair competition is within nations' rights. Especially in Ireland's case, its tax determinations depend on both its needs and the structure of the corporation, and this should be solely within its purview. The Commission is overstepping their legal bounds, and is going beyond the intent of the Treaty.

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worldwide market, has driven the conversation about state aid measures from the Commission. The Commission claims that while complete harmonization is not necessary, "a high degree of harmonisation is essential in the indirect tax field" to expand Europe's world commercial presence. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Tax Policy in the European Union – priorities for the years ahead*, COM (2001) 260 final (Oct. 10, 2001).

[248] *See* Case T-778/16, Ireland v Comm'n, 2016 E.C.R. 38/35 (arguing that the Commission breached Articles 4 and 5 of the Treaty of the European Union in violating the fiscal autonomy of Member States); Case T-892/16, Apple Sales Int'l and Apple Operations Europe v Commission, 2016 E.C.R. 53/37.

[249] *See* Mary Kaldor, *The Return of Politics*, THE EUROPEAN (Feb. 7, 2013), http://www.theeuropean-magazine.com/mary-kaldor—2/6347-the-role-of-the-nation-state.

[250] 3167th Council meeting, *supra* note 149.

[251] *See* Case T-778/16, Ireland v Comm'n, 2016 E.C.R. 38/35; Case T-892/16, Apple Sales Int'l and Apple Operations Europe v Comm'n, 2016 E.C.R. 53/37; Case T-756/15, Fiat Chrysler Fin. Europe v Comm'n, 2015 E.C.R. 59/43; Case T-636/16, Starbucks and Starbucks Mfg. Emea v Comm'n, 2016 E.C.R. 462/25; Case T-760/15, Netherlands v Comm'n, 2015 E.C.R. 59/50.

[252] 920 Dáil Deb. (Sept. 7, 2016) col. 1 (Ir.), https://beta.oireachtas.ie/en/debates/debate/dail/2016-09-07/.

IV. CONCLUSION

Intra-Union trade is dependent to an extent on foreign direct investment, and this comes from a transparent and unique taxation scheme, to be accorded to each company by the individual Member States involved. The European Commission is overstepping its political boundaries by exerting this control over tax rulings in national governments. Ireland, as one such example, devised a scheme with Apple, Inc. to tax them at a rate that would represent the allocated capital related to their business in Ireland. Instead, the Commission claims that their scheme unjustifiably taxed the technology conglomerate at a purposefully lower rate than similar companies in their country. Comparable cases in Luxembourg and the Netherlands show that this is not an isolated ruling from the Commission, but they are mistakenly associating the state aid issue with individual national tax rulings. Tax is still in the full sovereignty of Member States, and these rulings improperly encroach on this power.

These decisions, and future decisions from the Commission going forward, may have a substantial and detrimental effect on investment in Europe. Already, the international economic community has expressed concern at the Commission's overreach and whether the decisions will eventually lead to an overhaul of taxation schemes throughout Europe. Companies are now unsure in their decades-old agreements with European countries because the Commission shows no signs of ceasing these actions. Taxation, which ultimately benefits and burdens the affected country that established it in the first place, should be the sole and sovereign decision from the Member State in question. Regardless of valid justifications for EU intervention, taxation remains the sole concern of national governments, not multinational entities. These decisions threaten to eliminate that concept, and force taxation to emerge as an EU-wide endeavor. As Ireland and Apple each prepare to appeal their decision, this issue continues to develop in Europe, with potentially problematic consequences.