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Advanced Pricing Arrangements and State Aid in the European Union: Evolution, Case Analysis and Recent Developments

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Abstract

This dissertation has the objective of providing a contribution on the ongoing debate surrounding recent controversial State Aid decisions by the European Commission. The focus is on Commission Decisions concerning advanced pricing arrangements on transfer pricing between Member States and multinational corporations. In the First Chapter, we provide an evolutionary analysis of the European Union's approach towards State Aid and harmful tax competition while explaining some important concepts relevant to the discussion. In this section, we showed the tangible change in approach of the Commission, reflecting an increasing embrace of OECD's BEPS project. The Second Chapter describes the investigations and decisions of *Apple*, *Amazon*, *Starbucks* and *Fiat Finance & Trade*. We analyzed the companies' structures in Europe, the reasoning and charges put forward by the Commission, and the appeals made by the companies and the Member States. The Third Chapter then provides a literature review of the reactions and debates that arose from the judgements of the Commission; in particular we focus on the issues regarding the use of the arm's length principle by the Commission and its ability to prove selective advantage as well as the critiques by the United States Government. Lastly, the Fourth Chapter deals with the most recent turning points of the discussion, these being the September 2019 Judgements by the General Court of the European Union on the *Starbucks* and *Fiat Finance & Trade* cases on one hand, and the recent election of Ursula von der Leyen as President of the European Commission on the other. We conclude by saying that while the critiques and issues raised by commentators and scholars were valid, the General Court has legitimized some key reasonings by the European Commission that had been contested, such as the use of the arm's length principle as a benchmark and tool to check the presence of state aid. At the same time, the Court still has to clarify certain aspects that remain unclear. Furthermore, considering the election of von der Leyen as President of the Commission and Margrethe Vestager's renewed term as Commissioner for Competition, we should expect to see more cases as the ones analyzed given their expressed commitment on fair taxation, in particular of large MNCs. Moreover, it is important to bear in mind that the Starbucks overrule has raised the bar as to the quality of investigation the Commission will have to provide.

Keywords: state aid, transfer pricing, advanced pricing arrangement, arm's length principle, harmful tax competition, BEPS, European Commission

Introduction

"All companies, big and small, should pay their fair share of tax"

Margrethe Vestager, European Commissioner for Competition (2019)

Historically, companies have always been closely linked to the countries in which they were founded. Today, this might still be the case for small undertakings or ones that want to exploit benefits linked to their home country, such as made-in effects. However, with the emergence of globalization, firms have become increasingly global, leading to the development of multinational corporations ("MNCs"), which were able to grow aided by technological advances allowing for easier mobility of capital and people (Ferreira, 2016). MNCs, by definition, do business or have subsidiaries in multiple countries. Therefore, these companies inevitably seek countries in which they can exploit favorable politics, economies, governments and laws. By doing so, MNCs compete on various grounds. One of the many ways in which they can compete is by exploiting the different national legislative corporate tax frameworks in the world to conveniently lower the amount of profit that is liable to taxation.

In turn, Governments can also compete on those grounds by offering low tax corporate rates in order to attract foreign investment. While this leads to lower profits in terms of revenues coming from corporate taxes, it can also result in other kinds of benefits, by creating more jobs and improving domestic competitiveness for example. In order to avoid for this competition to become harmful, the Organization for Economic Co-operation and Development (OECD) has published extensive guidelines for Governments.

Within the context of tax competition, advanced pricing arrangements ("APAs") are important measures that regulate the transfer prices between subsidiaries of the same group[1] when they enter into transactions with each other. APAs are *ad hoc* tax rulings and have the aim of preventing companies from shifting their profits from one country to another. They can do so by, for example,

[1] In this dissertation, we refer to companies belonging to the same group as "integrated companies" or "group companies". Companies which do not belong to any group, are referred to as "non-integrated companies" or "stand-alone" companies.

charging high prices on certain intra-group transactions that would otherwise be less expensive in the open market – i.e., in transactions between companies unrelated to each other. This is called the arm's length principle, that is, whenever two companies make a transaction, the price should always be as if the two were independent from each other – i.e., at an arm's length (Nicolaides, 2016).

Furthermore, the European Union provides a legislative framework in assessing corporate taxation and tax competition. In particular, it focuses on the concept of state aid under Article 107 TFEU. State aid can be broadly defined as *"(…) any aid granted by a Member State or through State resources (…) which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods"* (Consolidated version of the Treaty on the Functioning of the European Union, 2008).

In other words, state aid is present when certain conditions are in place, in particular: the company must benefit from an economic advantage granted by a Member State or through state resources; the measure is favoring certain undertakings, through advantages that are not available to all comparable businesses – i.e. the measure is selective; and competition among Member States is distorted (Thomson & Hardwick, 2017).

Historically, matters of corporate taxation in the European Union have always been a prerogative of Member States, who enjoyed a high degree of fiscal autonomy. Up until approximately the last five years, the EU focused its investigations on schemes, i.e. rules by Member States that applied to virtually any taxpayer. However, more recently, ever since the election of Margrethe Vestager in 2014 as Commissioner for Competition, the Commission started looking at cases of individual aid, in which Member States provide *ad hoc* rulings to specific taxpayers, adopting a stricter approach in its Decisions (Thomson & Hardwick, 2017).

The tax rulings being scrutinized and that fall within the scope of this dissertation are APAs between Member States and major MNCs. According to the Commission, these APAs allowed for companies to lower their profit base liable to taxation by approving unlawful transaction prices, thus resulting in state aid. The investigations culminated on August 30, 2016, when after a two-year investigation, the European Commission found that Apple was given illegal tax benefits worth more than €13 billion, between 2004 and 2014. These tax rulings have caused major uproar and controversy in the media and the academic world, given the entity of the MNCs involved and the changes in approach underwent by the Commission.

Several comments have been made regarding the Decisions analyzed in this dissertation. The main issues raised regard: the Commission's unique application and interpretation of the arm's length principle; the Commission's method in proving selectivity and advantage, in particular with the choice of the general national corporate tax regulative framework as reference system and considering integrated and stand-alone companies as legal and factually comparable; the Commission's novel interpretation and application of the OECD Guidelines on Transfer Pricing; the Commission's procedural choices, that led to the alleged breach of various Articles and principles of the EU. All these aspects have been criticized by the Member States and MNCs involved through appeals, as well as by academics and authors. We will analyze their reasonings behind their critiques and their predictions on the future of state aid in Europe.

Some important recent developments will likely have a great influence in the discussion. The first important updates are the September 2019 Judgements of the General Court of the European Union[2] on *Starbucks* (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019), which was overruled, and *Fiat Finance & Trade* (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019), which was confirmed. The Judgements provide some clarity on what the lawful standards should be for future investigations. Another crucial development is the recent election of Ursula von der Leyen as president of the Commission, who notably strongly committed to fight for fiscal equality among Member States and MNCs in the EU (Von der Leyen, 2019).

This dissertation is structured as follows: in the first Chapter we will give an overview of the legislative framework on tax competition and state aid, both at the international and European levels, providing some insights on OECD and EU legislation. Here, we will describe some important principles and elements that will be important to fully comprehend the discussion of the cases. Indeed, in Chapter Two, we will present four important cases on state aid that were investigated by the Commission: these are *Apple*, *Amazon*, *Starbucks* and *Fiat Finance & Trade*.

[2] The General Court of the European Union is a constituent court of the Court of Justice of the European Union. Among other duties, it has jurisdiction to hear and determine on actions brought by the Member States against the Commission (General Court, s.d.).

We will also report the appeals brought forward by both Member States and the companies involved.

Chapter Three will look at the most discussed and controversial aspects of the Commission Decisions, reporting the main critiques by authors and commentators, as well as the U.S. Treasury’s White Paper commenting on the Decisions. The fourth Chapter will discuss the most recent developments. First, we will look at the 2019 General Court’s Judgements: in light of the comments analyzed in the third Chapter, we will report on the main arguments of the Court, some confuting the Commission’s reasonings and some confirming them. Next, we will look at what Ursula von der Leyen’s future approach towards these issues might look like in the future. Finally, we will try to provide some comments on what we should expect for the future of state aid and fiscal laws in the European Union.

Purpose, Delimitation and Methodology

The aim of this dissertation is that of providing a contribution on the ongoing debate surrounding recent controversial State Aid decisions by the European Commission, specifically regarding advanced pricing arrangements between multinational corporations and Member States. We analyze the cases of *Apple*, *Amazon*, *Starbucks* and *Fiat, Finance & Trade*, which represent important case studies for the discussion. We then go on to discuss the main critiques and questions that these cases and other controversial Commission Decisions caused among academics and the public opinion. The principal topics tackled on are Commission's use and interpretation of the arm's length principle and the concept of selective advantage. Furthermore, we go on to report on the most recent developments, these being the September 2019 Judgements by the European General Court on *Starbucks* and *Fiat Finance & Trade* and the election of Ursula von der Leyen as President of the European Commission. Finally, in light of the whole discussion, this dissertation tries to give some considerations on what the future of state aid in the European Union might look like.

In order to present the discussion smoothly and for the sake of the reader's full understanding, we provide in the first Chapter a chronological review of past international and European legislation on matters of tax competition, state aid and transfer pricing. The focus is on harmful tax competition, the arm's length principle, advanced pricing arrangements, transfer pricing, and Article 107 TFEU, although these concepts are not explained too in depth, as these descriptions solely serve the aim of understanding the cases discussed in Chapter Two. These concepts are also the focus of our case analysis, as we concentrate on those aspects that caused controversy and discussion. An in-depth and strictly technical analysis of the Decisions and Judgements is out of the scope of this work.

In terms of the materials used to conduct the research, this dissertation uses several publications from the OECD to provide an overview of the international legislative framework on matters of corporate tax competition. For the EU-specific legislation, we analyzed the Treaties as well as Commission Notices and other kinds of official publications. Furthermore, for the case analysis, this dissertation uses the European Commission Decisions, official Appeals and Judgements from the General Court of the European Union. Given the novelty of the topics analyzed and the very recent developments in case law that at times can be unclear and limited, we often reference to academic papers, articles and contributions from various authors, in particular when discussing the reactions and predictions that followed the Decisions. Web resources were used as a contribution to the discussion regarding the September 2019 Judgements by the General Court.

1. **Chapter 1**: Evolution and Context of Legislation on Corporate Tax Avoidance

Since 2013, the European Commission has been applying the concept of state aid against member states enforcing tax rulings in favor of multinational corporations. Most notably, in 2016 it established that Ireland gave multinational technology company Apple up to €13 billion of illegal tax benefits for 2004-2014, to be repaid with interests (Press Release by the European Commission, 2016). Other cases involve negative decisions on major companies such as Fiat, Amazon and Starbucks, against the member states of Luxembourg and the Netherlands. According to a substantial number of commentators, the European Commission used unprecedented harshness in these rulings. Many believe that millions of dollars are at stake with these decisions and concerns were raised between governments, academics and MNCs on how the discrepancies between local tax rulings and the Commission's approach towards them will continue to impact subsidiaries in Europe (Bobby, 2017).

To have a clear understanding of the European Union's present approach towards fiscal aid and why cases such as the one in Ireland matter so much, it is important to look closely at the legislation available (both at the European and international level) and recent developments in the fight against state aid. This analysis will help us understand how we got to this point and how the international approach on tax issues has changed over time, causing quite some dissatisfaction among states and corporations. The aim of this Chapter is that of explaining the most important principles and topics addressed by the European Commission in its judgements on state aid, in order to fully understand the cases that are described in Chapter Two.

The first Chapter is divided in two parts. After a brief introduction on tax competition, the first section will discuss the evolution of international tax cooperation and competition through time. This evolution has as its main protagonist the OECD, the most important institution for international tax matters, which has been working ever since its foundation in 1961 on creating international guidelines on these topics (Morriss & Moberg, 2013). We will describe the concepts and principles provided by the OECD that have been tackled during the cases of state aid that we will analyze later in the paper. The most important topics addressed are the arm's length principle, transfer pricing, advanced pricing arrangements, harmful tax competition and base erosion and profit shifting. These are detailed following the chronological order of the OECD conventions and agreements that established them, in order to best envision the evolving nature of the debate on tax competition and tax avoidance.

In the second section of the Chapter, we will look at the legislation on corporate tax avoidance from the European Union's point of view. We will first describe the European legislation on state aid provided by Article 107 TFEU, followed by a description of the most recent policy documents provided by the Commission on the topic. Lastly, we will describe, as we did with the OECD, the evolution of the European Commission's approach towards state aid and tax competition.

1.1. Tax Competition

Among the many ways in which governments compete, we can identify tax competition as one example of regulatory economic competition. Broadly speaking, we can define this kind of competition as a way in which states attract corporations and firms to pursue business in their territory through convenient tax legislation. This kind of behavior, despite causing a decreased corporate tax revenue, can boost a country's tax base, create jobs and increase domestic competitiveness in the global market.

Just like any other kind, tax competition can have positive outcomes for the overall economy, providing gains in efficiency and improved allocation of public budget. Indeed, tax laws can differ in a number of ways, such as rates of taxation, tax deductions, and allocations of costs and revenues. These differences can create opportunities for individuals and firms, as well as issues arising from the possibility of arbitraging between states in seek of the less burdensome tax framework (Morriss & Moberg, 2013).

According to the OECD, during the 20th century, with the rise of globalization as a major social, political and economic force, tax havens became increasingly common and governments were induced to applying harmful tax regimes globally as a way to attract businesses. So-called harmful tax competition *"(...) can distort trade and investment patterns, erode national tax bases and shift part of the tax burden onto less mobile tax bases, such as labor and consumption, thus adversely affecting employment and undermining the fairness of tax structures."* (OECD, 1998). The next paragraph will focus on how the OECD approached this kind of competition, and on the events that led to it.

1.2. The Evolution of the Fight Against Harmful Tax Competition: the OECD Approach

The Organization for Economic Co-operation and Development (OECD) was born in 1961, as an evolution of the 1948 OEEC, a forum dealing with economic matters as well as double taxation issues (Morriss & Moberg, 2013). According to the 1960 Convention on the Organization for the Economic Co-operation and Development, its policies are designed with clear purposes:

"(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations." (OECD, 1960).

We will look at the history of the OECD through highlights from the work of authors Morriss and Moberg in their paper *Cartelizing Taxes: Understanding the OECD's Campaign Against "Harmful Tax Competition* (2013) which provides a clear historic evolution of the institution's approach and method in the international fight against unfair tax competition. By looking at the history of the OECD, we will focus in chronological order on those conventions and principles that serve the aim of this paper, these being the ones that the European Commission relied on when investigating the cases that we will analyze in the next Chapter. At the same time, by describing these concepts and principles in a chronological structure, we will be able to identify the different historic moments and events framing the OECD approaches through time, understanding how external factors can influence the institution's decisions.

1.2.1. The First Decades: The Beginnings of International Tax Cooperation

The 1963 *Draft Double Taxation Convention on Income and Capital*, revised in 1977, defined the OECD as the most important forum on international taxation issues and policy-making, and it remains such to this day (OECD, 1963; 1977). Through the 60s and 70s, the OECD grew, organized and structured itself to become an increasingly important body in the international arena. In the meantime, according to Morriss and Moberg, three factors determined the growing relevance of differences in tax regimes worldwide. First, after World War II, cross-border transactions became more common thanks to the European states recovering economies and technological advances which reduced the costs of pursuing economic activities. Second, floating exchange rates and less capital controls increased the advantages in doing business across states. Third, borrowing internationally for businesses was now easier and cheaper than borrowing in their own countries, thanks to the Eurocurrency market.

Given these new opportunities, entrepreneurs and business owners began to learn how to create more complex organizational structures in order to take advantage of lower regulatory costs and taxation. During this time, the OECD pursued its duties by providing technical expertise for inter-states treaties on how to tax cross-border activities. These were based on the 1977 *Model Double Taxation Convention on Income and Capital*, used as a framework for agreements. However, as the number of cross-national transactions and economic activities massively increased by the end of the 1970s, issues for tax authorities grew with the same intensity.

In this historic context, there are two important Conventions to take into consideration: The *Model Tax Convention on Income and on Capital* (1992) and the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995). These Conventions posed the bases for the OECD's most important guidelines for fiscal jurisdictions when it comes to international transaction agreements between enterprises. For the purpose of this dissertation, we will not analyze the whole content and articles of the conventions. Instead, we will discuss three important concepts addressed in them: the arm's length principle, transfer pricing and advanced pricing arrangements.

1.2.2. The Arm's Length Principle

The first important Convention that we will discuss in this section is the *Model Tax Convention on Income and on Capital*, first published in 1992 and later updated multiple times. The document provides a model for bilateral tax agreements between countries. For our analysis, we will look at Article 9, which basically provides guidelines for the application of the arm's length principle ("ALP"). Understanding the arm's length principle is important, as it was controversially used in most of the European Commission's decisions in the cases analyzed in Chapter Two. According to this principle, whenever two companies make a transaction, the price should always be as if the two were independent from each other – at an arm's length (Nicolaides, 2016).

In the context of international tax law, the arm's length principle establishes that transfer prices between multinational corporations should be set at market value. The principle serves as a tool against tax schemes by corporations, to avoid shifting profit from jurisdictions with high taxes to states with lower taxes. Accordingly, Article 9 provides that in the case of transactions between two enterprises related to each other in some way, such as in the case of subsidiaries, the state should tax the profits as if the two entities did not have any relation (OECD, 2017; Bobby, 2017).

1.2.3. Transfer Pricing

The second Convention we will look into now is the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, first published in 1995 as a revision of 1979's *Transfer Pricing and Multinational Enterprises*. We will use the most recent 2017 version in our analysis. In general, transfer pricing refers to whatever regulations and methods are used when giving a price to any kind of transaction between two related enterprises. As stated before, when transactions occur between subsidiaries of the same company, they should remain at arm's length, that is, the amount agreed should be the same as if the two enterprises were independent from each other.

The Guidelines provide a set of *"'traditional transaction methods' and 'transactional profit methods' that can be used to establish whether the conditions imposed in the commercial or financial relations between associated enterprises are consistent with the arm's length principle"* (OECD, 2017). The five methods are compatible to Article 9 of the *Model Tax Convention on Income and on Capital*.

Three of the methods are traditional and imply comparing prices paid by subsidiaries to those paid by independent undertakings and calculate deviations (OECD, 2017); they are the comparable uncontrolled price method (“CUP”), the resale price method (“RPM”) and the cost-plus method (“C+”) (Eden, 2009). Through the CUP method, the price charged in a transaction between two associated entities is compared to the price charged in a comparable transaction between two independent entities that occurred in similar circumstances; the RPM looks at undertaking that pursue comparable trade levels with similar distribution functions; lastly, the cost-plus method adds the gross markup that would have been charged by stand-alone companies with similar functions under similar circumstances as the company in consideration, and the standard price of the company in consideration (Eden, 2009).

The other two transactional profit methods are the transactional net margin method (“TNMM”) and the transactional profit split method (“PSM”) (Eden, 2009). Through the TNMM, comparable transactions are analyzed within the industry and the average profit margin earned by entities at an arm’s length is calculated; that average is then used to calculate the transfer price; the PSM requires that the profit of an intra-company transaction should be split between the two undertakings based on the contributions each made on the transaction, with the application of a ratio (Eden, 2009).

In addition to the five methods, the Guidelines provide further guidance in dealing with transfer pricing. Within the chapter on administrative approaches we find a substantial section dedicated to advance pricing arrangements.

1.2.4. Advance Pricing Arrangements

Advance pricing arrangements (“APAs”)[3] are defined as follows in the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*:

“(…) an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. An APA is formally initiated by a taxpayer and requires negotiations

[3] We also refer to APAs in as “advanced pricing agreements” or “agreements”.

between the taxpayer, one or more associated enterprises, and one or more tax administrations." (OECD, 2017).

Basically, APAs determine an MNC's transfer pricings between its subsidiaries, with the aim of calculating its tax base beforehand, so that the MNC can be sure about how much in terms of taxes it will pay in a specific jurisdiction and make business plans and predictions accordingly (Bobby, 2017). APAs are another crucial element that was used by the European Commission to support its cases against Apple and many more. Some APAs are viewed as a tool to provide corporations favorable fiscal opportunities to attract them, causing unfair competitive advantages (Lovdahl Gormsen, 2016).

1.2.5. *Harmful Tax Competition: An Emerging Issue*

Continuing with Morriss and Moberg's historic analysis of the OECD, the authors assert that by the 1980s, tax havens were becoming a growing concern, while firms and individual taxpayers had developed complex financial exchanges to avoid paying taxes on revenues. At the same time, deregulated financial markets in Europe urged governments to attract businesses and firms through convenient tax regulations. Entrepreneurs now targeted countries with low taxation. The OECD published plenty reports on these issues, but a problem remained: it had always been a body that was cautious about infringing member states' national sovereignty. How could it discourage low-tax regimes without governments claiming a rightful jurisdiction in designing their own rates?

The idea was to delegitimize such states by setting new standards. Indeed, in 1998 the OECD agenda and debate on tax competition changed drastically with *Harmful Tax Competition: An Emerging Issue*. While prior to the report the OECD could be regarded as a body providing general instructions and recommendations to states for tax and financial-related issues, now it was sending a clear message that showed as its main prerogatives the fight against tax evasion, as well as preventing governments of pursuing unfair tax competition. This could only be reached by setting internationally accepted standards.

Moreover, the report was clear: *"countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so."* (OECD, 1998). As stated in the previous paragraph, the report claims that globalization, while bringing positive developments, was detrimental in creating *"an environment in which tax havens thrive and in which governments may be induced to adopt harmful preferential tax regimes to attract mobile activities."* (OECD, 1998). Therefore, the report's main objective is to fight this harmful competition by providing agreed-on and clear recommendations and guidelines, to encourage fairer tax regimes.

What made the report more innovative was the 5-year deadline given to countries to remove the so-called "harmful features" from tax regimes. In addition, a Forum was established, to involve non-member states in the conversation about harmful tax competition and to create a blacklist of tax havens, which would be sanctioned by OECD members (OECD, 1998). These coordinated actions made *Harmful Tax Competition: An Emerging Issue* a successful tool in the hands of the institution with short-term visible results.

Despite this success, Morriss and Moberg report that the 2001 election of George W. Bush in the United States led to a step back in the country's support to the OECD campaign to restrict harmful tax competition, and an overall weakening of the institution's efforts due to the influence the U.S. had in the global arena. However, the authors explain that this changed again after less than ten years with the election of Barack Obama and the global financial crisis: even though the crisis did not have much to do with fiscal issues, politicians swiftly used it to shift the attention to that matter, pointing out the need of having stricter fiscal laws, while Obama was in need of budget.

2010 marked another important landmark for OECD policymaking: *The Convention on Mutual Administrative Assistance in Tax Matters* was amended to add a protocol on full exchange of information on request in all tax matters. In the following years, the OECD continued its important work in tax issues worldwide, reaching another important landmark with the launch of 2013 *Action Plan on Base Erosion and Profit Shifting.*

1.2.6. The BEPS Action Plan

In parallel with the financial crisis, in those years we witnessed a quick spread of the digital economy worldwide, brought by technological and social developments. As businesses in the digital economy rely mainly on intangible assets and rely on "multi-sided business models", it is sometimes difficult to understand where value is created and under which jurisdiction they should be taxed (OECD, 2013). This new economic landscape revamped worries related to states applying harmful tax regimes and tax planning by multinational corporations, in particular when it comes to "base erosion and profit shifting". This term simply refers to the techniques adopted by corporations to move profits from high-tax jurisdictions to lower-tax ones, causing an erosion in the tax base of the jurisdictions where taxes are higher.

This led, as anticipated, to the *Action Plan on Base Erosion and Profit Shifting.* Among its many provisions, much of the focus was on providing insights about the concepts that we previously discussed (the arm's length principle, transfer pricing and APAs). The plan, that was developed with the support of the G20, structured in fifteen different actions, has three main goals:

"(1) New international standards must be designed to ensure the coherence of corporate income taxation at the international level (…). (2) A realignment of taxation and relevant substance is needed to restore the intended effects and benefits of international standards, which may not have kept pace with changing business models and technological developments (…) (3) The actions implemented to counter BEPS cannot succeed without further transparency, nor without certainty and predictability for business." (OECD, 2013)

This commitment by the OECD against BEPS, just like with *Harmful Tax Competition* before, was crucial in influencing the European Commission in applying its own agenda against unfair tax schemes, as we will see in the next paragraph.

1.3. Legislative context in the European Union

The analysis on the approach towards tax competition and, in particular, *harmful* tax competition undertook by the OECD and its member states through the years, shows us how fluctuating it has always been. Ever since the first talks on tax competition began, depending on the historic period, states were either committed against harmful tax competition – such as during the time in which *Harmful Tax Competition: An Emerging Issue* was published or in the more recent fight against BEPS – or it was simply not in countries' present interests – as during the Bush administration. These shifts in policy view can probably be explained by the ever-changing nature of the international economic landscape we live in: as economies and industries worldwide grow and change, external factors come to influence fiscal matters and the approach that states and institutions have towards them. Are these changes at the core of the European Commission's shift in approach towards tax competition and state aid?

This section of the Chapter will be focusing on the legislative framework of the European Union on matters of fiscal competition, specifically within the realm of state aid. Broadly speaking, under the European Union legislative framework, we can define state aid as an advantage of any form conferred on a selective basis to any undertaking by national authorities (Bobby, 2017). Under European Union laws, state aid is prohibited unless it is justified by reasons of social or economic development.

First, we will look at Article 107 TFEU, which sets the meaning of State Aid under EU law. Then, we will look at two more recent policy documents that further explain the Commission's approach to State Aid, with a focus on tax rulings and transfer pricing. Finally, we will look at the application of State Aid rules by the EU through the years, highlighting the influence of the OECD in setting standards and the main changes in approach.

1.3.1. State Aid: Article 107 TFEU

Article 107(1) of the TFEU defines state aid as follows:

"(…) any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." (2008)

Four elements must be in place for a measure to be considered state aid towards a specific undertaking (Lovdahl Gormsen, 2016; Thomson & Hardwick, 2017):

1) The undertaking must be benefiting from an economic advantage;

2) This advantage must be granted by a Member State or through state resources;

3) Presence of "selectivity", in the sense that the measure is favoring certain undertakings, or the provision of specific goods and services, and these advantages are not available to all comparable businesses;

4) There is distortion or potential distortion on trade between Member States.

Legislation on state aid, which is, of course, binding for all member states, are quite broad and can be applied pretty much to any case of favorable tax treatment by Member States (Thomson & Hardwick, 2017).

State aid can be justified only under a precise set of conditions, defined in the 2003 *Altmark* judgement by the European Court of Justice. Public service compensation is not viewed as state aid whenever the following cumulative conditions are in place:

"first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations." (Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, 2003)

1.3.2. Recent Updates and Clarifications on State Aid

Given the recent interest of the Commission towards state aid cases and the questions it raised from the public, two documents were published recently to give more insight on the meaning of Article 107 and the Commission's interpretation of it. These are the *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016) and the *DG Competition Working Paper on State Aid and Tax Rulings* (2016).

The Notice focuses on tax rulings granted by member states. According to Nicolaides (2016) these kinds of rulings are particularly important to intra-group trading companies. This is because they allow for an advanced agreement with governments on how taxes are calculated and how much subsidiaries have to pay, preventing disputes to occur. Such disputes might arise when subsidiaries, serving or buying from companies within the same group at very low prices or with high costs, show no taxable profit. As the author points out, the Commission recognizes the importance of tax rulings, yet it asserts in the Notice that selective advantage can still be present if the result of the tax ruling *"(...) does not reflect in a reliable manner what would result from a normal application of the ordinary tax system"* (European Commission, 2016).

The document goes on to say that tax rulings or APAs, should always be calculated through methodologies based on the arm's length principle and result in a market-based outcome. If *"the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome"* there is unacceptable selective advantage (European Commission, 1998)

Another important concept analyzed by the Notice is that of selective advantage. Selective advantage is crucial in the state aid cases that this dissertation analyzes. Whenever an *ad hoc* tax ruling is clearly benefiting one or more undertakings over others, selectivity can be easily identified. This can be more complicated in the case of broader measures that could be potentially applied to all undertakings belonging to a specific category. In these cases, a three-step process has to be applied in order to establish whether a tax measure represents selective advantage: (1) identify the reference system; (2) determine if the measure represents a derogation from the reference system (i.e. the measure is *prima facie* selective); (3) in case of a derogation, determine if it is justified (Nicolaides, 2016).

Even though the Notice does not provide much information on the methodology to apply when calculating APAs and tax rulings, the DG Working Paper gives member states some vague indication on how to do that. When suggesting how to select appropriate transfer pricing methods, the Commission suggests looking into the OECD's five guidelines (see paragraph 1.2.3 on transfer pricing) and select the most appropriate ones. In addition to this indication, the Commission comments on the recent decisions on matters of state aid, saying that they:

"(...) concerned national schemes that accept multinational corporations pricing their intra group transactions in a manner that does not reflect the conditions that apply between independent companies at arm's length. (...) some transfer pricing arrangements do not seem to reflect the arm's length principle when the outcome manifestly deviates from a reliable approximation of a market-based outcome." (European Commission, 2016)

1.4. A Change in Approach by the Commission

Historically, EU Member States have always enjoyed a high degree of fiscal autonomy. Direct taxation has always been deemed as a prerogative of sovereign states rather than something the Commission had a saying on. According to literature (Christians, 2015; Nicolaides, 2016; Thomson & Hardwick, 2017), in the late 1990s this view slightly shifted after the publication of the *Commission notice on the application of the State aid rules to measures relating to direct business taxation* (1998) and OECD's report on harmful tax practice on the same year. Several investigations were then initiated, culminating with negative decisions (Nicolaides, 2016).

Prior to approximately the last five years, the EU focused its investigations on schemes, i.e. rules by States that applied to any taxpayer. However, more recently, the Commission started looking at cases of individual aid, in which Member States provide *ad-hoc* rulings to specific taxpayers (Thomson & Hardwick, 2017). In 2013, the EU set up a Task Force on Tax Planning Practices dedicated to these investigations, in order to follow up on certain allegations in the media and in national Parliaments regarding favorable treatment of companies in some Member States (European Commission, 2019). That summer, the Task Force began looking into state rulings for subsidiaries of Apple, Fiat and Starbucks set up in Ireland, Luxemburg and the Netherlands respectively (Thomson & Hardwick, 2017). Later, it looked deeper into Luxemburg's state rules towards two more multinationals, Amazon and McDonald's (Thomson & Hardwick, 2017). These investigations started drawing major media attention towards the Commission's stricter treatment of state aid, particularly because of the big names involved.

As the first rulings started to unfold, 2016 saw the publication of the policy documents previously analyzed, giving guidance, together with Article 107 TFEU, on the investigations. As the Working Paper states: *"any fiscal measure a Member State adopts must comply with the EU state aid rules, which bind the Member States and enjoy primacy over their domestic legislation."* This statement and the overall tone of the Paper raised doubts and critiques on the extent to which the Commission has a saying on the Member State's tax decisions, and whether it could be justified on grounds of fiscal aid (Thomson & Hardwick, 2017). It is important to note that the Commission's new-found strictness towards state aid comes at a time in which more transparent tax affairs are becoming a primary focus and goal internationally. The most prominent example is the OECD Base Erosion and Profit Shifting (BEPS) Action Plan. Indeed, 2016 was the year in which decisions for some of the major cases cited above were revealed, which will be analyzed in the following Chapter.

2. **Chapter 2**: Case Studies: The *Apple*, *Amazon*, *Starbucks* and *Fiat Finance & Trade* Decisions

As anticipated, in this Chapter we will be analyzing the most significant cases in the European Union since the Commission's introduction of a novel interpretation of state aid *vis à vis* tax rulings. We will see how the concepts and regulations outlined in the first Chapter are put into practice through the Commission's judgements.

The cases concern the companies Apple, Amazon, Fiat Finance & Trade and Starbucks. These were selected because they can give us a clear perspective of the Commission's application of the State Aid rules *vis à vis* tax rulings since they all concern three different member states – Ireland, Luxembourg and The Netherlands – providing MNCs with *ad hoc* APAs found to be illegal. In addition, these cases were among the ones that caused the greatest reactions from the media and the public opinion in general, given the prominence of the companies involved and the significant monetary recoveries ordered by the EU. The reactions and opinions to these cases and to the Commission's approach in general will be discussed in the next Chapter.

In all four Decisions, the European Commission established that the APAs granted state aid through the application of the arm's length principle. This principle, as we explained in the first Chapter, was outlined by the OECD in Article 9(1) of its Model Tax Convention as a non-binding guideline to define whether there is selective advantage (OECD, 2017; Richard, 2018). The principle was applied with no consideration of whether the Member State in question was using it in its national tax legislation (Richard, 2018). This aspect was the strongest point in the Commission's judgements for all four cases. For now, it should be kept in mind, but in Chapter three it will be discussed more in depth.

First, we will investigate the *Apple* case. This case is more detailed than the others since it is the most complex and controversial. We will explain how the investigation started, the structure of Apple in Europe, the Commission's charges, the company's defense and the final decision. The *Amazon*, *Fiat Finance & Trade*, and *Starbucks* cases will follow, each with a focus on the companies' structures in Europe and the Commission's main arguments and reasonings. We also report on the appeals put forward by the companies and Member States, with a limited analysis given that the public versions show only a summary of the documents.

2.1. The *Apple* Case

The first case we will investigate is also the most notable and controversial one due to the massive payment that Apple was required to make and the MNC's notoriety. Apple Inc., a U.S.-registered company, allegedly took advantage of the differences of the tax regimes in Ireland and the US by setting up a subsidiary in the former country, with much lower corporate tax (Barrera & Bustamante, 2018). In addition to that, it negotiated its tax status with the Irish government and opened further subsidiaries, creating a web for a profit-allocation scheme (Yang, Meziani, & Shen, 2016). As we will see, while it could be argued that these business practices were aimed at tax avoidance, many say that the company did nothing illegal in exploiting loopholes within the jurisdictions, and that the Commission's €13 billion fine was exaggerated and unfair.

This section of the Chapter will be structured as follows: first, we will shortly introduce the *Apple* case by describing how the proceedings took place; this will be followed by an explanation of Apple's structure in Europe; then, we will explain the Commission's charges and the final decision; lastly, we will talk about Apple and Ireland's main defense arguments for each part of the Commission's accusations.

2.1.1. Apple's Tax Problem: How it all Began

On August 30, 2016, after a two-year investigation, the European Commission found that Apple was given illegal tax benefits worth more than €13 billion, between 2004 and 2014. According to European Commissioner for Competition Margrethe Vestager: *"(...) The Commission's investigation concluded that Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years. In fact, this selective treatment allowed Apple to pay an effective corporate tax rate of 1 per cent on its European profits in 2003 down to 0.005% in 2014."* (Press Release by the European Commission, 2016)

Apple's tax problems began back in 2013, in the United States, where a set of hearings were held by a bipartisan Senate subcommittee, where the company was questioned on whether it was shifting its profits to Ireland in order to avoid being taxed in the US (Christians, 2015). Apple CEO

Tim Cook strongly denied these allegations and was supported by most of the Senators. However, some of them did take notice of the very low tax percentage that Apple was paying abroad and wondered how smaller companies could compete with such a giant paying so little taxes on its profit (Christians, 2015).

These events did not go unnoticed in Europe, and it only took a few weeks for the Commission to issue a letter to the Irish government for an inquiry on matters of tax rulings (Christians, 2015). The Commission believed that Apple had been given selective advantage by the Irish government, breaching Article 107(1) TFEU. In June of the following year, Ms. Margrethe Vestager, on behalf of the EU Commission, opened an official investigation, together with two similar cases: Starbucks and Fiat, which we will discuss later in the chapter.

2.1.2. Apple's Structure in Europe

Apple's headquarters are located in Cupertino, California and control sales in North and South America (Barrera & Bustamante, 2018). In 1980, the company set up a subsidiary in Ireland, in the city of Cork, followed by a Controlled Foreign Corporation (CFC) in 1984, Apple Operations International (AOI) (Yang, Meziani, & Shen, 2016), fully owned by Apple Inc. Like most countries worldwide, Ireland has a territorial income tax policy, which means that any income from foreign countries is tax-exempt. The United States, on the other hand, requires national companies to pay taxes on their global income in the U.S. – what is called a worldwide income tax policy (Barrera & Bustamante, 2018). While not everyone agrees on the full legitimacy of Apple's tax structure, it is quite obvious that the company tried (and succeeded, at least until 2016) to take advantage of both these tax structures, as we will see in the following paragraphs.

The first major way in which the company managed to pay so little corporate tax in Ireland took form in 1991, when the Irish government and Apple made an agreement, through which the subsidiary was given a special tax status of "non-resident corporation", providing that its income generated in Ireland would be treated as foreign-sourced, and consequentially not taxed (Yang & Lauricella, 2017). This status was granted on the basis of Apple's claims that the products it sold required special R&D and technologies invented and developed in its home company rather than in Ireland, further claiming that its true source of income was indeed in the U.S. and not in Ireland (Yang & Lauricella, 2017; Yang, Meziani, & Shen, 2016; Barrera & Bustamante, 2018). The agreement was renewed in 2007 and they also regulated the profit allocation between Apple's subsidiaries in Ireland (Yang, Meziani, & Shen, 2016).

In fact, in order to maximize tax benefits, Apple Operations International set up several subsidiaries incorporated in Ireland (Richard, 2018; Press Release by the European Commission, 2016; Yang, Meziani, & Shen, 2016):

- Apple Operations Europe (AOE), with 400 employees and responsible for manufacturing certain Apple computers;
- Apple Retail Holding Europe, which owns retail stores in Europe;
- Apple Singapore and Apple Asia, situated in Singapore;
- Apple Distributions International (ADI), which originally purchased products from manufacturers and sold them to Apple Singapore. Later, in the case of European sales, ADI purchased to ASI and sold to retail stores;
- Apple Sales International (ASI), owned by AOE, was responsible for buying products from Apple manufacturers in China and other countries, and selling them (originally directly to customers, then through ADI) in Europe, Middle East, Asia, Africa and the Pacific, recording all sales in Ireland (Yang & Lauricella, 2017; Yang, Meziani, & Shen, 2016; Press Release by the European Commission, 2016; Barrera & Bustamante, 2018).

All the subsidiaries were arranged in such way that consumers were purchasing any product from one of Apple's subsidiary, with the retail stores showing almost no profit. Since AOI was the parent company of all subsidiaries and it received dividends from them, profits were allocated there, and the corporate tax to be paid was the one arranged with the Irish government rather than that of any other country where all the retail stores were located (Yang, Meziani, & Shen, 2016; Yang & Lauricella, 2017).

Similarly, Apple managed to avoid paying taxes in the U.S. thanks to the arrangement of its subsidiaries; as stated before, according to the U.S. tax regulations, all U.S. companies are taxed on their international income. AOI is an Irish company, but it is owned by Apple Inc., a U.S.

company. This makes AOI a CFC[4], meaning a foreign corporation that is more than half-owned by U.S. shareholders. In the case of CFCs, income can be deferred from U.S. corporate taxes until dividends are paid back to the U.S. (Barrera & Bustamante, 2018). Unsurprisingly, AOI never paid dividends back to Apple Inc., and no tax was due to the IRS, which ended up losing an estimated $10 billion in tax revenue (Yang, Meziani, & Shen, 2016).

CFCs are also subject to so-called Subpart-F rules: whenever they are exempt from U.S. corporate tax because dividends were not paid, they must pay taxes on passive foreign income, or Subpart-F income – i.e. dividends, interests, royalties, fees, revenues transferred from one controlled company to the other (Yang & Lauricella, 2017). This rule was introduced to avoid that companies would take advantage of the exemption and move their income to tax havens (Barrera & Bustamante, 2018). Since Apple was moving sales revenues back to Ireland to avoid taxes in other companies, they had to come up with a strategy to prevent generating any Subpart-F income (Yang & Lauricella, 2017). This was accomplished by having all subsidiaries to be treated as entities other than a corporation, something legal in the U.S. under the "entity classification election" or "check-the-box election"[5]. This way, all companies were treated as if they were all part of their parent company, AOI. Therefore, for example, no tax was due to the U.S. if income was generated in a transaction such as ASI selling products to ADI, or ASI paying dividends to AOE, because they were all part of the same corporation – AOI.

2.1.3. The European Commission's Charges and Reasoning on *Apple*

The European Commission published its negative decision on August 30, 2016 (Decision on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland, 2016). As a premise, it stated that according to the European Union, tax rulings were not illegal. The aim of the European Union state aid control is to ensure that Member States give the same tax treatment to all companies, not to state that a certain tax regime is wrong or try substituting Member State's tax authorities. Overall, the Commission's decision against Apple can be summarized in three different elements: first, that Apple was given a preferential tax status; second, that the government provided illegal subsidies; third, that the company underwent unfair business (Yang, Meziani, &

[4] "Controlled Foreign Corporation".
[5] In the United States, a business entity can choose to be treated either as a company or an entity other than a corporation (Yang, Meziani, & Shen, 2016).

Shen, 2016; Yang & Lauricella, 2017). *Figure 1* summarizes the Commission's accusations regarding Apple's tax strategies.

As seen above, the Irish government and Apple made an agreement that allowed Apple's income to be treated as foreign-sourced, and therefore tax-free, gaining the status of a non-resident company. This, together with the APAs granted by the Irish government, as we will see below, allowed for Apple to pay much less than Ireland's 12.5 percent corporate tax (Yang & Lauricella, 2017). According to the Commission, the economic activities that provided profit for the company – that is, selling products – physically happened in Europe and Ireland. Therefore, Apple's justification that the profits were based on the development of technology, which takes place in the U.S., was not enough to justify being treated as a non-resident company by the Irish tax administration (Yang, Meziani, & Shen, 2016).

Given Apple's 2014 tax rate of 0.005 percent *vis à vis* the country's 12.5 percent regular rate, the Commission had suspicion that this incredible difference was proof of unfair illegal state aid (Bobby, 2017; Yang, Meziani, & Shen, 2016). The 1991 and 2007 agreements between Apple and the Irish government include APAs on the allocation of profit among Apple's subsidiaries in Ireland. (Yang & Lauricella, 2017). At least for the 2007 agreement, an arm's length principle pricing method was determined through the TNMM, with the net profit indicator being operating costs (Bobby, 2017; Wang, 2018). However, the Commission found no satisfactory rationale behind the choice of this indicator, and decided to test whether the agreements constituted state aid under Article 107(1) TFEU; they found that the measure was financed by Ireland given the loss in taxation funds derived from it, that it was distorting competition and intra-Union trade since Apple operates in most Member States, and that it constituted a selective advantage (Bobby, 2017). This was enough to be considered state aid.

Lastly, the Commission claims that Apple purposely shifted profits among its subsidiaries with the aim of avoiding paying taxes in other European Countries and taking advantage of its agreements with Ireland. This practice concealed the economic reality of the retail stores that sell Apple's products and are the true source of its profits, misrepresenting the true profit "at an arm's length transaction" (Yang, Meziani, & Shen, 2016). This kind of practice was found to be unfair by the

Commission since it distorted the real efficiency of Apple's economic activities (Yang & Lauricella, 2017).

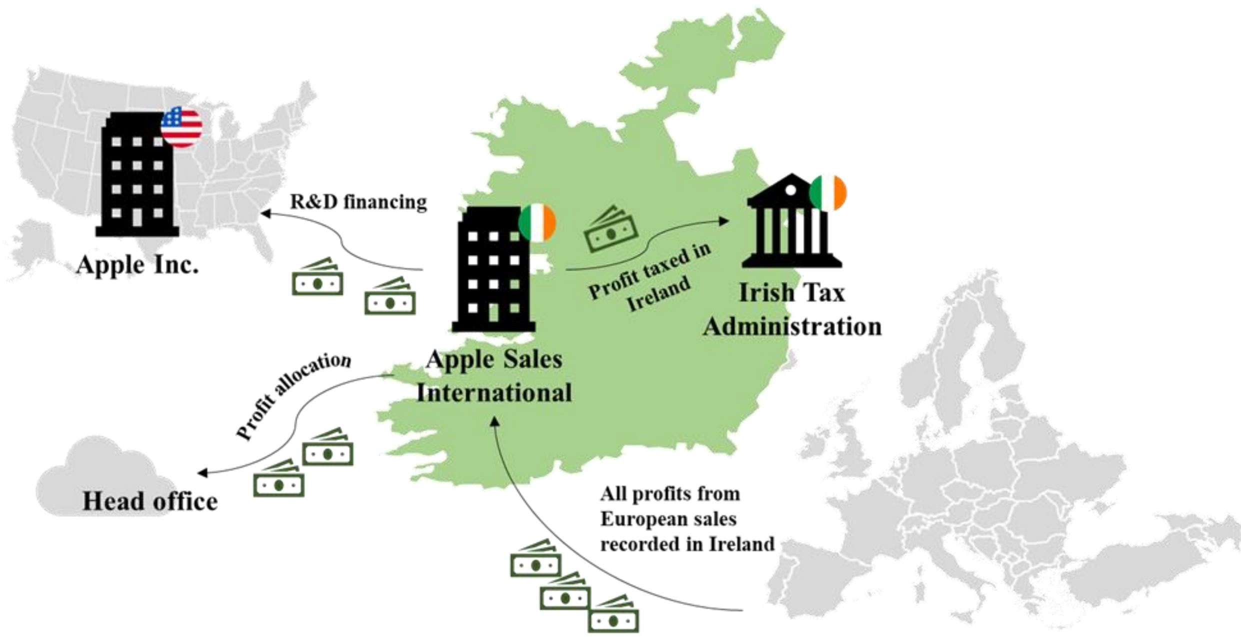

Figure 1 Apple's structure in Europe according to the European Commission. Adapted from the press release on the Apple decision, "State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion" (Press Release by the European Commission, 2016) *and "The European Commission's Application of the State Aid Rules to Tax: Where Are We Now?" by Thomson and Hardwick* (2017)*, p. 36.*

2.1.4. The Final *Apple* Decision

The final decision on the Apple case, which has already been anticipated, can be summarized through the following extract from the European Commission's Press release of August 30, 2016:

"This selective tax treatment of Apple in Ireland is illegal under EU state aid rules, because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules. The Commission can order recovery of illegal state aid for a ten-year period preceding the Commission's first request for information in 2013. Ireland must now recover the unpaid taxes in Ireland from Apple for the years 2003 to 2014 of up to €13 billion, plus interest." (Press Release by the European Commission, 2016)

2.1.5. Appeals on the *Apple* Decision

Plenty counter-arguments were put forward by Apple and Ireland following the accusations. Before discussing the appeals, we shall review the main comments provided by Apple before the Decision was published. First, in response to the claim of being given an unjustified preferential status as a non-resident company, Apple claimed that the Commission was basing its charge on the outdated idea of "physical presence" – i.e. profit is earned where physical sales are made (Yang, Meziani, & Shen, 2016). According to this idea, if sales are made in Ireland by an Irish company there is no reason for the profit to be considered foreign-sourced. However, Apple pointed out that in its area of business, major R&D and investments to develop a technology are what truly represents the company's source of income, while sales represent only a minimum part of the true profit. This idea is referred to as "economic nexus" – i.e. profit is made where product development occurs, not where the product is sold. In the case of Apple, that place would be the United States (Yang, Meziani, & Shen, 2016).

With respect to the APAs between Ireland and Apple, the defense claims that the company was offered the same treatment and opportunities as other companies in Ireland. The low tax rate was a result of the APAs together with Irish policies rather than state aid. Apple was simply following the state's regulations. The profit-allocation ratios were justified according to the Government, since most sales took place outside of Ireland. By claiming that Apple's corporate tax was too low, the Commission was presenting itself as a substitute of Ireland's tax administration, interfering with national sovereignty (Yang & Lauricella, 2017).

Responding to the charges of unfair business practice, Apple had to say that a company's management is responsible to decide tax planning strategies, and that it has the right to decide on the most beneficial one, within a country's legal boundaries. Although its profit-allocation structure was taking advantage of the tax policies, it did so while legally and efficiently reporting its performance in financial statements (Yang, Meziani, & Shen, 2016; Yang & Lauricella, 2017).

After the Decision, both Apple and the Netherlands submitted separate appeals in the years following the case (Richard, 2018).

2.1.5.1. Ireland's Appeal

The State had nine legal arguments (Case T-778/16, Ireland v Commission, 2016), that can be divided in three macro-categories as follows:

1) The Commission wrongly interpreted the Irish law and the situation of Apple in Ireland (pleas one and two):

    a) The two tax agreements were perfectly compliant with the Irish legislation – i.e. only the profits attributable to the subsidiary in Ireland were being taxed, in accordance with the territoriality principle – and the Commission made a false claim when stating that Ireland renounced revenue coming from Apple. Furthermore, the functions of ASI and AOE were misinterpreted as they functioned based on decisions made in the U.S. which, in turn, determined their revenue. The intellectual property of Apple was wrongly attributed to the two subsidiaries;

    b) The Commission made clear mistakes when assessing the presence of state aid: Ireland claims that no advantage was granted since the agreements were made in accordance with national law. It further asserts that the Commission did not respect the national corporate tax laws when it did not distinguish resident and non-resident companies in its assessment. Overall, this plea claims this behavior attempted at the Country's sovereignty.

2) The Commission wrongly applied the arm's length principle (pleas three to five):

    a) Even if Ireland adopted the principle in its legislation – which it does not – the State alleges that the Commission applied it to Apple inconsistently;

    b) The tax treatment of ASI and AOE was consistent with the arm's length principle;

    c) The Commission wrongly assumes that the arm's length principle is consistent with Irish national law.

3) The Commission breached important procedural requirements and European Union legislation (pleas six to nine):

a) The Commission breached its duty of good administration by failing at meeting certain procedural requirements;

b) The principles of legal certainty and legal expectations were breached: the Decision cites rules of EU law that are new in scope and effect. Furthermore, it refers to OECD work from 2010, when the tax rulings under scrutiny were from 1991 and 2007;

c) Thus, the Commission acted outside its legitimate competence breaching Articles 4[6] and 5[7] TEU and the principle of fiscal autonomy of Member States;

d) The Commission breached duties in providing a clear and univocal reasoning in the Decision by contradicting itself various times.

2.1.5.2. Apple's Appeal

ASI and AOE had fourteen legal arguments (Case T-892/16, Apple Sales International and Apple Operations Europe v Commission, 2016) that are quite similar to the ones proposed by Ireland but with broader grounds (Richard, 2018). They can be divided under six main points:

1) The Commission wrongly interpreted the Irish law (pleas one and six):

    a) ASI and AOE were non-resident Irish companies, thus only liable to corporate tax on "chargeable profits" earned by Irish branches;

    b) ASI and AOE did not receive favorable treatment by Ireland compared to other non-resident companies.

2) The Commission was wrong in assuming that Ireland was supposed to apply the arm's length principle to calculate Apple's tax base (plea two).

[6] Art. 4(2): *"The Union shall respect (…) essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State"* (Treaties of the European Union, 2007).

[7] Art. 5 describes the limits of the Union under the principles of conferral, subsidiarity and proportionality (Treaties of the European Union, 2007).

3) The Commission wrongly interpreted Apple's structure in Ireland and abroad (pleas three, four and five):

   a) The Commission failed in recognizing that the source of Apple's intellectual property was in the U.S.;

   b) The Commission failed to recognize that the Irish subsidiaries were not involved in the main activities that drove profits, such as the development and commercialization of intellectual property, which took place in the U.S.;

   c) The Commission makes a self-contradictory conclusion by not addressing Apple's comments on the source of its profits – i.e., that most profits were not made in Ireland, they were made in the U.S. where the intellectual property was being developed.

4) The Commission breached important procedural requirements (pleas seven, nine and twelve):

   a) The Decision was not well articulated in some lines of reasoning;

   b) The Commission wrongly compared certain opinions that were factually different;

   c) The Commission failed to pursue an impartial and thorough investigation.

5) The Commission wrongly rejects the application of the TNMM (plea 8).

6) The Commission breached important principles and Articles (please ten, eleven, thirteen and fourteen):

   a) The principle of legal certainty was breached by not explicating exactly how much is to be recovered;

   b) The requirement of retroactive recovery itself breached the principles of legal certainty and non-retroactivity;

c) The Commission breached Article 296 TFEU[8] and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union[9];

d) The Commission exceeded its competency under Article 107(1) TFEU.

2.2. The *Amazon* Case

The second major case we will analyze is the Amazon Case, whose investigations began in October 2014 and concluded four years later with a negative decision. According to the European Commission, an operating company of the U.S. Amazon group in Europe shifted unjustified significant profit through royalties to another entity only existing on paper.

The Commission conducted its investigations on Amazon's European subsidiaries operating between May 2006 and June 2014. After June 2014, the company changed its structure in Europe (Press Release by the European Commission, 2017). The focus of the investigation was on a tax ruling issued in 2003 and prolonged in 2011 by Luxembourg's tax authority concerning two companies of the Amazon Group, both incorporated in Luxembourg and owned and controlled by Amazon.com Inc. in the United States (Richard, 2018; Ferreira, 2016; Thomson & Hardwick, 2017). The whole structure as outlined in the Commission's decision can be seen in *Figure 2.*

The first company is Amazon EU – the Commission refers to it as the "operating company" – a subsidiary of more than 500 employees who selected and bought products from European manufacturers and retailers to be sold on Amazon's country websites. The company was also responsible of managing the sale and delivery of the products. All the profits from these sales were recorded in Luxembourg (Press Release by the European Commission, 2017).

The second company is Amazon Europe Holding Technologies, a holding company with no employees or physical presence. It holds special intellectual property rights in Europe through a cost-sharing agreement with the parent company, working as an intermediary between Amazon EU and Amazon in the United States. The holding company would grant the exclusive rights of

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[8] Art 296(2): *"Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."* (Consolidated version of the Treaty on the Functioning of the European Union, 2008)

[9] Art. 41(1), (2)(c) of the Charter of Fundamental Rights of the European Union *"(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. (2) This right includes: (...) the obligation of the administration to give reasons for its decisions."* (2000)

said intellectual property to Amazon EU, *vis à vis* royalty payments. In turn, the holding company would pay annual contributions to Amazon Inc. in order to finance the development of the intellectual property (Press Release by the European Commission, 2017; Thomson & Hardwick, 2017).

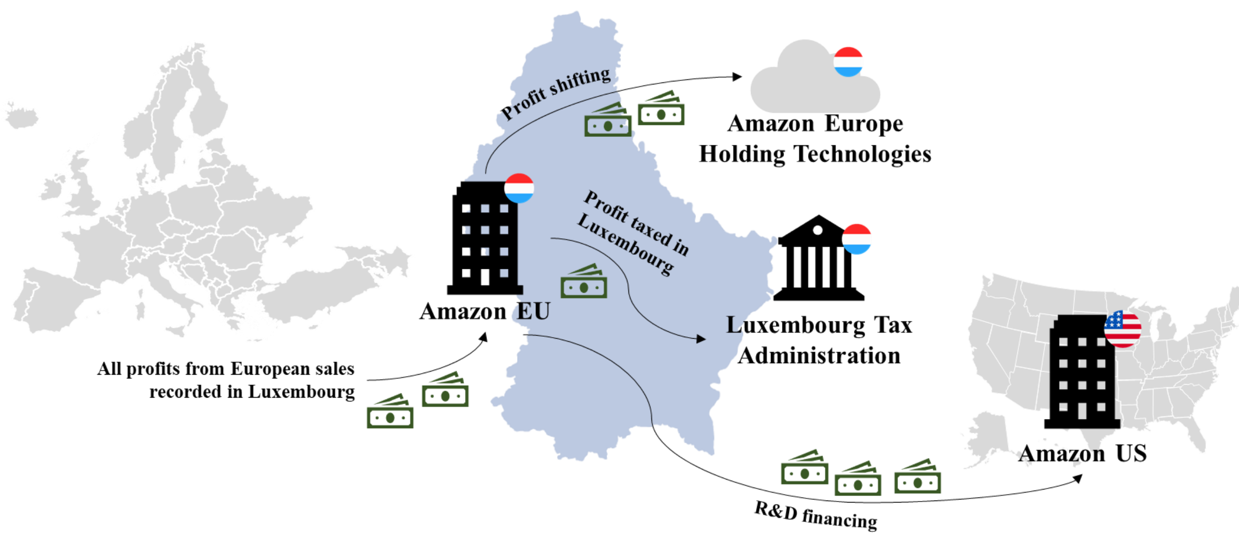

Figure 2 Amazon's structure in Europe according to the European Commission. Adapted from figures in the press release on the Amazon decision, "State aid: Commission finds Luxembourg gave illegal tax benefits to Amazon worth around €250 million" by the European Commission (2017) *and "The European Commission's Application of the State Aid Rules to Tax: Where Are We Now?" by Thomson and Hardwick* (2017)*, p. 40.*

2.2.1. The European Commission's Charges and Reasoning on *Amazon*

The Decision by the European Commission was published in October 2017 (Decision on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon, 2017). Given Amazon Europe Holding Technologies' status as "limited partnership" it was not subject to corporate taxation under Luxembourg's tax administration, while Amazon EU, which was the only Amazon operating company in Europe, was subject to regular taxation (Press Release by the European Commission, 2017). The 2003 tax ruling established two things: an APA to calculate the taxable base of Amazon EU, and the transfer pricing of the payments it had to make to the holding company in order to use the intellectual property.

These payments turned out to be surprisingly high: the Commission found that Amazon EU would pay roughly 90 percent of the company's operating profits to Amazon Europe Holding Technologies; this was 1.5 times higher than what the holding company was required to pay to Amazon.com Inc for the intellectual property (Press Release by the European Commission, 2017). According to the Commission, this scheme reduced the operating company's taxable profits by a quarter, while the rest remained untaxed, as it was in the hands of the holding company, not subject to any form of taxation thanks to its limited partnership status.

The payments that Amazon EU made to the holding company were found to be unjustifiably high (Cachia, 2017): indeed, Amazon EU was the sole operating company, truly managing all operations and investing on marketing to add value to the brand, while the holding company was just an "empty shell" (Press Release by the European Commission, 2017) used to concentrate most profit through transactions that did not reflect the economic reality of the business and were not at an arm's length. To put it into Margarethe Vestager's words:

"Luxembourg gave illegal tax benefits to Amazon. As a result, almost three quarters of Amazon's profits were not taxed. In other words, Amazon was allowed to pay four times less tax than other local companies subject to the same national tax rules. This is illegal under EU State aid rules. Member States cannot give selective tax benefits to multinational groups that are not available to others." (Press Release by the European Commission, 2017)

Based on this reasoning, the Commission ordered Amazon to pay back due taxes estimated to be around €250 million, plus interest.

2.2.2. Appeals on the *Amazon* Decision

Both Amazon and Luxembourg appealed the Commission's decision. Amazon's appeal has nine legal arguments (Case T-318/18, Amazon EU and Amazon.com v Commission, 2018) while Luxembourg's has five (Case T-816/17, Luxembourg v Commission, 2017). The appeals have strong similarities with the structure of the ones on the *Apple* Decision. The main difference is that Amazon does not have an issue with the Commission's application of the arm's length principle, but it claims that the Commission was wrong in saying that the APA under scrutiny does not conform to it. Since the appeals are similar to each other we will look at their main arguments jointly. We shall divide them into three main categories:

1) Failure to prove an advantage:

   a) The royalty fees under scrutiny were at an arm's length, so no advantage was in place;

   b) The claim that there was an advantage is based on a wrongful interpretation of the subsidiaries' roles and functions;

   c) The claim was based on wrong factual assumptions and applications of law that caused a wrongful invalidation of the TNMM.

2) Failure to prove selectivity:

   a) The Commission wrongly assumed that the 2003 tax ruling was an *ad hoc* individual measure;

   b) The Commission failed in defining a relevant frame of reference.

3) Breach of articles and principles:

   a) By failing to consider all evidence the Commission breaches Article 41 of the Charter of Fundamental Rights of the EU and the principle of sound administration;

   b) Failure on the duty to state reasons because the advantage claim is premised on a royalty that violates the arm's length principle;

   c) Breach of the principle of legal certainty because the analysis is based on a wrong reference system – i.e. the general national corporate tax framework;

   d) Breach of legal certainty, retroactivity, and non-discrimination by applying 2017 OECD Guidelines that are posterior to the 2003 tax ruling;

e) Wrongful application of Articles 16 and 17 of Regulation 2015/1589[10];

f) Infringement of the right of defense since the Commission unjustly rejected Amazon's defense documentation;

g) The Commission imposed its opinion on how APAs should be done with the aim of creating fiscal harmonization on transfer pricing.

2.3. The *Starbucks* Case

The next investigation by the EU to be discussed is the Starbucks case in the Netherlands, which began in June 2014 and was concluded in October 2015, in a joint final decision with the Fiat Finance & Trade case. The case once again challenges an APA between the company and the Netherlands, which allegedly provided a selective advantage allowing for the Dutch subsidiary to shift its profits through intra-group transactions consequentially lowering its tax burden (Richard, 2018). The Decision was appealed by both the Netherlands and Starbucks. The case was overruled on September 24, 2019 by a decision of the General Court.

The subsidiary scrutinized by the Commission is Manufacturing EMEA BV (referred by the Commission as "Starbucks Manufacturing" or "SMBV"). The company has the role of roasting coffee and producing related products such as packaging, cups, tea, packaged pastries, to be sold to the various Starbucks coffeeshops around Europe. The Commission called into question a 2008 tax ruling by the Dutch government, which allegedly lowered the company's tax burden by allowing two intra-group transactions that the Commission found to be illegal (they are pictured in *Figure 3*) (Cachia, 2017). The APA used a methodology to determine profit allocation to Starbucks MBV that is outlined in a report by Starbuck's tax advisor. The remuneration is based on the function performed by the subsidiary of roasting and manufacturing. The report uses the

[10] This Regulation regards the application of Article 108 TFEU. According to Article 16 and 17 of Regulation 2015/1589, if no Decision was taken by the Commission "(16) *Fines and periodic penalty payments are not applicable to Member States, since they are under a duty to cooperate sincerely with the Commission in accordance with Article 4(3) TEU, and to provide the Commission with all information required to allow it to carry out its duties under this Regulation.* (17) *(…) after a period of 18 months from the opening of the procedure, (…) the Member State concerned has the opportunity to request a decision, which the Commission should take within 2 months".* (Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, 2015)

TNMM method to establish the taxable profit, with operating expenses being the profit level indicator.

The first intra-group transaction being challenged by the Commission was between Starbucks Manufacturing and Starbucks Coffee Trading Company SARL (also referred to as "SCTC"), a subsidiary of the Group located in Switzerland that sold coffee beans at inflated prices; the second one was with Alki, a UK Starbucks sister company that received very high royalties in exchange for intellectual property on coffee roasting know-how (Press Release by the European Commission, 2015).

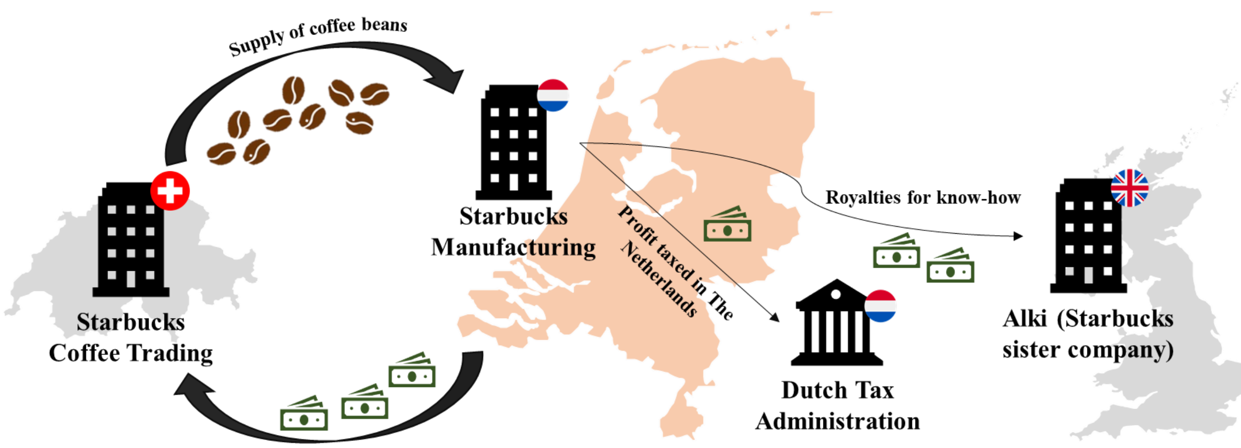

Figure 3 Starbucks' structure in Europe according to the European Commission. Adapted from figures in the press release on the Starbucks decision, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules" by the European Commission (2015) *and "The European Commission's Application of the State Aid Rules to Tax: Where Are We Now?" by Thomson and Hardwick* (2017)*, p. 38.*

The payments towards the Swiss subsidiary were found to be unduly high, even triplicating since 2011. Given the high costs required to buy coffee beans, the company did not even generate enough profit from the coffee-roasting activities to pay the royalties to Alki in exchange of the specific coffee-roasting know-how. Therefore, the Commission believed that the subsidiary was paying the royalties with profit from its other activities and sales, illegally shifting it to Alki, which was not even taxed in the UK, nor in the Netherlands. In addition to that, the Commission found that the royalties were not reflecting the market: no other Starbucks subsidiary or comparable company was paying that much in exchange for intellectual rights of that kind, making the transactions not at an arm's length (Press Release by the European Commission, 2015). The APA between the Netherlands and Starbucks was found to grant a selective advantage to the company, and therefore constituted illegal state aid. The Commission's final Decision concluded that approximately €20 to €30 million in unpaid taxes had to be paid back to the Dutch administration.

2.3.1. The European Commission's Charges and Reasoning on *Starbucks*

In Section 9 of the Decision (Decision on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, 2015), the Commission found that State Aid had been granted to Starbucks. we will analyze the Decision thoroughly since we will also be discussing the overrule by the General Court in the next Chapter. As an opening argument, the Commission recalls the four conditions set out in Article 107(1) TFEU, explaining how each condition was satisfied in determining that the Netherlands granted State Aid to Starbucks:

1) *"(...) there must, first, be an intervention by the State or through State resources"*: To satisfy this requirement, the Commission claims the APA being challenged was concluded between the Dutch tax administration and Starbucks MBV and was therefore imputable to the Member State. In addition, it argues that the APA was set out in a way that lowered the company's tax liability, causing losses in the State's resources.

2) *"(...) second, the intervention must be liable to affect trade between Member States (...) fourth, it must distort or threaten to distort competition*": The Commission argues that Starbucks MBV is part of a global group operating in all Member States of the European Union; any aid granted to such company can affect trade between Member States. In addition, it argues that any measure that could potentially relieve it from tax burdens it would otherwise have been required to pay to the Member State, can improve a company's competitive position by aiding it financially, therefore hindering competition. The contested measure did so by allowing SMBV's tax burden to be lowered, improving its financial situation and, in turn, competitive position. The Commission believes that this fulfils the second and fourth requirements.

3) *"(...) third, it must confer a selective advantage on an undertaking":* The Commission proves the presence of selectivity through the three-step test:

a) *Selection of a reference system*: The Commission established that the reference system in the case was the whole Dutch corporate tax system. Specifically, it did not make a distinction between integrated companies and stand-alone companies – i.e. companies that are part of a group and single entities – because it found that they were in a comparable factual and legal position (Richard, 2018).

b) *Demonstrating a derogation from the reference system*: According to the commission, the demonstration of a derogation from the reference system coincides with the identification of the advantage. Therefore, if *"(…) a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system (…)"*, the reduction will be enough to prove both the advantage granted by the measure and the derogation from the reference system.

c) *Establishing whether the derogation is justified by the nature or the general scheme of the reference system*: The Commission argues that the APA granted to SMBV is an individual aid measure. Referencing to case law, the Commission goes on to assert that identifying the economic advantage is enough to presume that selectivity is at place.

   The Commission collapses the concepts of selectivity and advantage into the single principle of selective advantage (Richard, 2018).

The Commission goes on to state that in order to verify if a selective advantage was in place within the scope of Article 107(1), it had to verify if the methodology used to determine the taxable profits of SMBV in the APA followed the arm's length principle. In assessing this, the Commission found that it was not relevant to take into consideration whether the Netherlands were applying the principle in their corporate tax legislative framework. The APA was criticized on several methodological points.

First, in applying the TNMM method, the Commission believes that the transfer pricing report by the Starbucks tax advisor failed in identifying and analyzing controlled and uncontrolled transactions – i.e. transactions between two associated companies and transactions between companies independent from each other. This was problematic for the Commission since it is an important aspect to consider in verifying if the arm's length principle is being respected when transactions between related companies occur. Particularly, the report did not demonstrate if the transaction for which the APA had been requested, that is, the one between SMBV and Alki, was at an arm's length.

When analyzing this transaction, the royalty payments between SMBV and Alki were found not to be at an arm's length when analyzed through a comparable uncontrolled pricing method of transfer pricing (CUP). The royalty payments were compared to other similar agreements in the market and ones between Starbucks and independent parties. The result of this analysis showed that the value of the royalties should have been zero, since SMBV did not directly derive any benefit from the intellectual property it was buying from Alki. Therefore, all the money paid to Alki should have been recorded as profit and taxed in the Netherlands. Thus, the TNMM was not useful in determining compliance with the arm's length principle. Since this method was accepted by the Netherlands and it caused a lowering of the company's tax liability, the APA was found to confer selective advantage.

Similarly, in analyzing the prices paid by SMBV to Starbucks Coffee Trading SARL for coffee beans between 2011 and 2014, the Commission found that the report failed in addressing it to establish if it was at an arm's length. Therefore, the State's approval of the method used in the APA was found to constitute a selective advantage.

The Commission goes on to say that even with the assumption that the TNMM was an appropriate method for determining SMBV's profits, it claims that it was wrongly applied by the tax advisor. First, the Commission argued that the report wrongly categorized SMBV as "tested party"[11]. It did so by challenging the assumption that it was the least complex party given the various functions it performed and that Alki performed limited activities. Thus, the determination of the taxable income is flawed.

Second, the Commission believes that SMBV was wrongly classified as a low-risk toll manufacturer, that is, a subsidiary whose main role was that of roasting coffee. Given this classification, the report then selected as the profit level indicator the operating costs of the

[11] In the TNMM, the net margin of the transaction can be determined by comparing the net margin obtained by the "tested party" in comparable transactions with independent parties. The tested party is the least complex and lower-risk enterprise between the two that are making the transaction (Eden, 2009).

company. The Commission believes that using sales instead would have been more correct given the great amount of reselling and distribution activities conducted by SMBV. This would have led to a higher taxable profit. Instead, the Netherlands accepted an APA that conferred a reduced tax liability.

Lastly, the Commission criticized two adjustments made by the tax advisor that did not allow for a marked-based approximation to be reached

2.3.2. Appeals on the *Starbucks* Decision

The Netherlands had five pleas against the Commission's Decision (Case T-760/15, Netherlands v Commission, 2015):

1) The Commission was wrong in finding that the APA was selective:

    a) The criterion of selectivity was not analyzed separately to the one of advantage nor in a satisfactory way;

    b) The reference system was not adequate, as it should have been the general corporate legal framework applied to the national legislation on transfer pricing[12]. When applied to this narrower reference system, the APA results lawful;

2) The arm's length principle is not present in the EU law and it should not have been applied by the Commission to prove advantage under Article 107(1) TFEU;

3) The use of the TNMM to settle the pricing in the APA did not confer an advantage. The Commission does not demonstrate that the payments have no business value;

4) The Commission wrongly states that the TNMM was not applied rightfully, thus it does not demonstrate if a better application of the TNMM could lead to a higher taxable profit or the absence of advantage;

[12] The "Wet inkomstenbelasting" (Income Tax Act) of 2001, and the Decree IFZ2001/295M "Transfer pricing method, application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" by the Netherlands State Secretary for Finance, of March 30, 2001. (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019).

5) Breach of the duty to exercise due care, since the Commission did not assess all information that is relevant to the case and uses information that was not available to the Government or anonymous.

Starbucks submitted three pleas to the General Court that differ slightly from the ones submitted by The Netherlands (Case T-636/16, Starbucks and Starbucks Manufacturing Emea v Commission, 2016). They both criticize the reference system applied by the Commission.

1) The Commission violated Article 107(1) TFEU by making mistakes of law and assessment in the selection and application of the reference system in determining whether the APA granted selective advantage;

2) The Commission failed in establishing whether the APA conferred an advantage:

    a) It committed factual mistakes and wrong assessments;

    b) The examination was not diligent and impartial;

    c) It failed in providing adequate reasons.

3) The Commission violated Article 16 of Regulation (EU) 2015/1589.

2.4. *Fiat Finance & Trade*

The last case we will analyze is the one regarding Fiat Finance & Trade (FFT), whose investigations were launched in June 2014 and were concluded on October 21 2015, with a joint Decision concerning FFT and Starbucks (Richard, 2018). The Decision was confirmed by the General Court in September 2019 (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019).

Fiat Finance & Trade, based and taxed in Luxembourg, acts as a bank for other companies of the group, providing loans and undergoing other kinds of large intra-group transactions (see *Figure 4*). The focus of the investigations was on a tax ruling from 2012, which allowed for the use of the transactional net margin method (TNMM) to calculate FFT's tax base, with return on equity as the profit level indicator. As we saw in the first chapter when we discussed transfer pricing, this method involves the use of a reference system (OECD, 2017). While the Commission did not challenge the use of this method, it found that the way in which it was applied constituted unfair advantage (Cachia, 2017). The Commission found that the capital base established to calculate the taxable profit was set at a value that was too low by the tax administration, on the basis of unjustifiable assumptions (Press Release by the European Commission, 2015).

In addition, the remuneration established was found to be too low as well. The Commission questioned the comparable companies list used – they were 66 companies, some of which conducted different financial activities from FFT, with two even being central banks. The Commission also questioned the decision of considering FFT as a "low risk" company (Cachia, 2017).

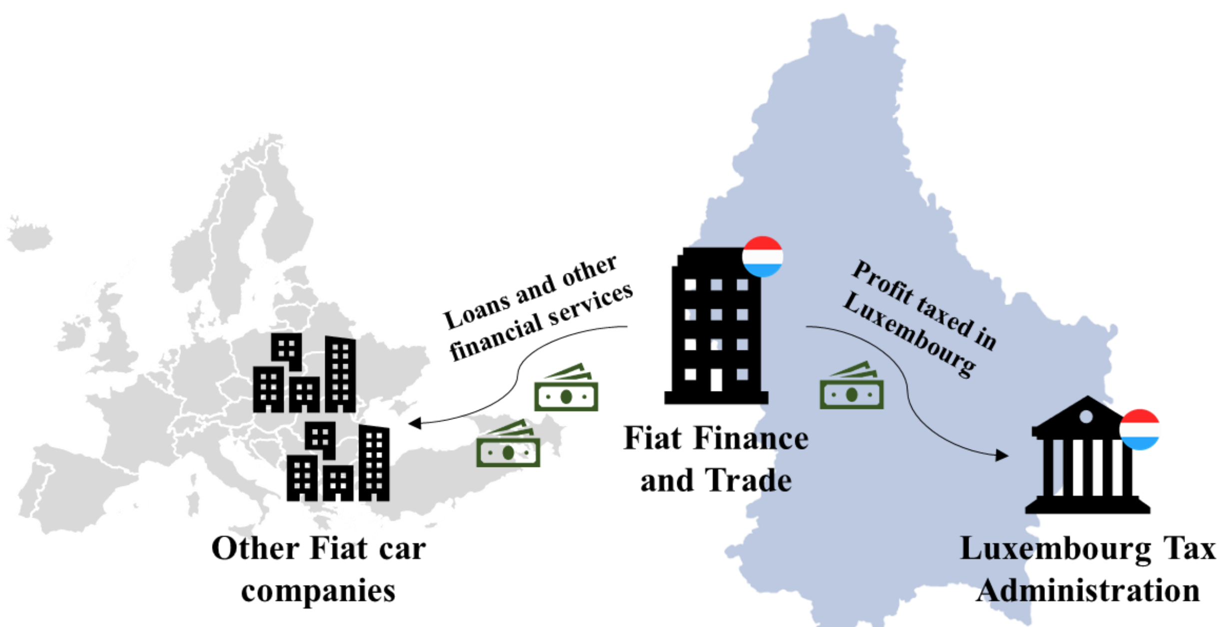

Figure 4 Fiat's structure in Luxembourg and Europe according to the European Commission. Adapted from figures in the press release on the Fiat Finance and Trade decision, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules" by the European Commission (2015) *and "The European Commission's Application of the State Aid Rules to Tax: Where Are We Now?" by Thomson and Hardwick* (2017)*, p. 39.*

Given the results of the investigation, the Commission estimated that FFT had only paid one twentieth of what it would have paid in Luxembourg under normal market conditions. This meant FFT must pay €20 to €30 million euros back to the government.

2.4.1. The European Commission's Charges and Reasoning on *Fiat Finance & Trade*

The Commission's assessment of the measure granted by Luxembourg authorities to FFT is described in Section 7 of the Decision (Decision on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, 2015). Like previous decisions, it begins by recalling state aid conditions under Article 107(1) and how they were all satisfied: first, the tax ruling could be attributed to Luxembourg and gave rise to losses in Government revenue since it reduced FFT'S tax liability. Second, FFT was a group operating in the Union, thus any aid could affect trade within Member States. Third, since the ruling conferred a lowering of the tax liability compared to what the company would have paid had it been paying according to the regular corporate taxes, it conferred a selective advantage. Four, the ruling improved FFT's financial position resulting in a distortion of competition.

Again, the three-step selectivity analysis test was used in determining whether the tax ruling was selective. The reference system was deemed to be the general Luxembourg corporate tax system applying to domestic companies and foreign companies and their branches residing in the country, with no distinction between integrated and stand-alone companies. The Commission had rejected Luxembourg and FFT's arguments that the reference system should have been limited to entities subject to transfer pricing regulations.

Again, like the Starbucks Decision, in order to verify whether the measure derogated from the reference system, the Commission found that proving an advantage was enough to also assume that there was a derogation. Thus, if the tax ruling results in an unjustified reduction of the tax liability for the company which would have otherwise paid more in normal circumstances under the reference system, that unjustified reduction constituted both an advantage and a derogation.

The Commission goes on to say that to determine whether the derogation was justified, it had to prove if the methodology accepted by Luxembourg in determining FFT's taxable profits in the APA led to an appropriate determination of a market-based outcome – i.e., it complied with the arm's length principle. Otherwise, a selective advantage would be in place. The Commission goes on to state several points that put in discussion the validity of the APA:

1) The Commission criticized plenty methodological choices within the APA that led to a reduction of FFT'S corporate tax liability. Among those, it criticized the way in which the TNMM was applied;

2) It rejected FFT's argument according to which an increase in tax liability in Luxembourg would have led to a reduction in other Member States, proving that there was no advantage at place;

3) Even applying a more limited reference system, such as the one proposed by FFT and Luxembourg – i.e. undertakings subject to transfer pricing rules[13], thus, integrated companies – the investigation resulted in finding selective advantage;

4) The Commission believed that none of the parties had provided a satisfactory justification for the selective treatment of FFT resulting from the APA, nor had the Commission itself found any. It also refused the list of comparable provided by FFT.

Therefore, the tax ruling constituted a selective advantage, as it resulted in a lowering of FFT's tax liability within the Luxembourg corporate tax system, as well as under the Luxembourg corporate tax system only applicable to integrated companies. Furthermore, the tax ruling constituted state aid under Article 107(1) TFEU. In Section 10 of the Decision, the Commission required Luxembourg to collect the unlawful aid from FFT, and that it was not required to state the exact amount to be recovered.

2.4.2. Appeals on the *Fiat Finance & Trade* Decision

Fiat Chrysler Finance Europe submitted an appeal in December 2019 in which it described four pleas of law (Case T-759/15, Fiat Chrysler Finance Europe v Commission, 2015). The claims are the following:

1) The Commission breached Article 107(1) TFEU because it misapplied the concept of selective advantage and failed to prove a distortion of competition.

[13] Article 164(3) of the Luxembourg Income Tax Code "loi du 4 décembre 1967 concernant l'impôt sur le revenue" (Law of 4 December 1967 on income tax), and Circular L.I.R. No 164/2 of 28 January 2011, issued by the director of Luxembourg taxes (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019).

2) The Commission breached Article 296(2) TFEU and the duty to state reasons by:

    a) Failing to explain the source of the arm's length principle within EU law;

    b) Failing to explain the meaning of the principle;

    c) Failing to describe thoroughly the direct effect of the APA on competition.

3) The Commission breached the principle of legal certainty by applying the arm's length principle because it caused plenty confusion and uncertainty when it comes to determining if an APA complies with state aid rules.

4) The Commission breached the principle of legitimate expectations by stepping away from previously-defined parameters to assess parameters – i.e., the OECD Guidelines.

As in the previous cases we saw, the Member State in question provided appeals as well (Case T-755/15, Luxembourg v Commission, 2015). It presented three legal arguments that are similar to the ones presented by Fiat:

1) The Commission failed to prove selectivity, breaching Article 107(1);

2) The Commission failed to prove advantage and restriction of competition, breaching its obligation to state the reasons;

3) The Commission breached Article 14(1) of Council Regulation (EC) No. 659/1999[14] by requiring the recovery of aid disregarding the principles of legal certainty and right of defense.

2.5. An Evolving Notion of State Aid

The cases reviewed in this Chapter give us an overview of the European Commission's recent approach to State Aid, showing the stricter scrutiny being applied against Member States' APAs ever since Margarethe Vestager's nomination as European Commissioner for Competition in 2014.

[14] Regulation 659/1999 lays down detailed rules for the application of Article 88 (formerly Article 93) of the EC Treaty. Art. 14(1) *"Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (...). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law."* (1999). This regulation from 1999 was later replaced by Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (2015).

This new-found approach of the Commission has gained quite some attention and criticism: many do not agree with the use of the arm's length principle as a good indicator of State Aid; others, are arguing that the Commission has breached the national sovereignty of tax administrations, and could potentially jeopardize the economic development and opportunities that MNCs bring to the European economy.

We even witnessed reactions and comments even coming from foreign institutions and politicians. In the U.S., the Treasury issued a White Paper – discussed in Chapter three – and president Donald Trump said Margarethe Vestager *"(...) hates the United States perhaps worse than any person I've ever met... She's suing all our companies"* (Rettman, 2019), calling her "Europe's tax lady" (Amaro, 2019).

In particular, the Member States and MNCs involved have appealed the Decisions with arguments that are very similar to each other. Thus, we saw strong disagreement with the Commission on the following common points: (1) the Commission's unique application and interpretation of the arm's length principle; (2) the Commission's method in proving selectivity and advantage, in particular (3) the choice of the general national corporate tax regulative framework as reference system; (4) The Commission's novel interpretation and application of the OECD Guidelines on Transfer Pricing, in particular (5) The Commission's issues with the TNMM as a method for establishing transfer prices; (6) The Commission's procedural choices, that led to the alleged breach of various Articles and principles of the EU. The next chapter will try to look at these various reactions, reporting on some of the comments put forward by authors and academics on the topic. We will also discuss the reaction of the U.S. and the recent Judgements by the European General Court on *Starbucks* and *Fiat Finance & Trade*. Based on these recent developments we will try to look at what the future might look like for state aid in the EU.

3. **Chapter 3**: Reactions and Critiques on the Decisions

As stated at the beginning of this dissertation, the recent European Commission Decisions on state aid came with plenty of controversy and criticism by scholars, member states, commentators and even institutions. Furthermore, the recent overrule of the *Starbucks* decision and the confirmation of the *Fiat Finance &Trade* decision by the General Court in September 2019, has created quite some confusion on what the future of state aid, APAs and tax competition in Europe might be. This Chapter will describe the main reactions and arguments against the European Commission's Decisions on the cases outlined in Chapter two. These were selected through an analysis of the literature available on the subject matter and date prior to the most recent General Court of the European Commission Judgements on the cases, as they represent the doubts and issues that arose following the Commission's Decisions. In the following Chapter, we will then report on the most important aspects of the GCEU Judgements in order to see if the problems put forward by the appeals and the literature were addressed.

The first section will investigate the main arguments against the Decisions put forward by the Member States and the MNCs who appealed the Decisions, which we already mentioned in Chapter Two. These views are also shared by most of the academic literature available on the topic. The first important critique we will discuss is on the use of the arm's length principle as a benchmark for determining the legality of the APAs; the second one recalls the doubts regarding the Commission's approach in proving selective advantage, in particular, in the issue of the selection of the reference system.

Following these general arguments, we will look into the reaction of the United States; even though the White Paper published by the U.S. Treasury addresses similar points to the ones thoroughly discussed by the literature and the appeals, it was quite controversial as it completely opposed the Commission's decisions on state aid against U.S. companies. Next, we will report some of the possible implications for MNCs in the European Union theorized by academics and commentators. An analysis of the GCEU Judgements on Starbucks and FFT will follow in Chapter Four, tackling the most important arguments and points put forward by the Court, which could set a precedent in case law for future state aid and APA cases in the EU.

3.1. Main Arguments Against the Commission's Decisions

After the European Commission issued each judgement, all MNCs and Member States appealed the decisions, as we saw in Chapter Two. All the appeals have some common ground and are based on three main arguments (Richard, 2018): (1) the European Commission' application of the arm's length principle was unsatisfactory and unjustified in proving state aid; (2) it was unable to prove the presence of selectivity and advantage by (3) failing in selecting the correct reference system to determine whether the APAs constituted state aid. These arguments are also the most common among scholars who dispute the Commission's recent approach to state aid.

This section is structured as follows: first, we will discuss the use of the arm's length principle; second, we will look into the Commission's method in proving selective advantage, focusing on the Commission's dual choice of a reference system – i.e., stand-alone *vis à vis* integrated companies and the general national corporate tax system *vis à vis* specific transfer pricing agreements.

3.1.1. The Use of the Arm's Length Principle

As stated many times before, the Commission used the arm's length principle as a strong benchmark to determine state aid in all cases analyzed and justified its use in both the Notice on the Notion of Aid and Working Paper (Phedon, 2016; European Commission, 2016; European Commission, 2016). This approach raised many questions among the parties involved in the decisions and scholars; was the rigid use of the arm's length principle a breach of the Commission's authority? Is this approach completely new, or does it have strong judicial validity supported by case law in the EU? Is the Commission's interpretation of the principle in line with the OECD Model Tax Convention in which it was first outlined? This section will try to analyze these questions and what are the conclusions in the available literature.

As we reported in the first Chapter, the arm's length principle was first set out by the OECD, in order to determine the correct transfer pricing between related companies. According to the principle, subsidiaries of a larger MNC should be taxed on the basis that they engage in transactions with each other that are at an arm's length (Cachia, 2017). The Commission decided to use the principle as the main tool to measure economic advantage in any transfer pricing decision, regardless of whether the Member State in question had integrated the principle in its national tax laws (Lovdahl Gormsen, 2016; Thomson & Hardwick, 2017). Indeed, laws on transfer pricing are not harmonized in the EU. Therefore, some Member States could have adopted the guidelines of the OECD in their national tax framework of regulations, while others might not (Lovdahl Gormsen, 2016). Given the lack of harmonization on transfer pricing laws at EU level, it is normal to assume that there are divergences in this application among Member States, in particular when it comes to the arm's length principle.

The Commission apparently overlooked the fact that some Member States did not include the arm's length principle in their regulatory frameworks. The *Apple* case is a good example of that: Ireland's tax authorities did not use the arm's length principle when establishing the profit allocation among Apple's subsidiaries, as the principle was not a present as a binding element in the country's national law; nevertheless, it was applied by the Commission in the Decision (Thomson & Hardwick, 2017). This kind of behavior was interpreted by many as the Commission trying to act as a supra-national tax authority (U.S. Department of the Treasury, 2016; Lee, 2017), extending itself beyond the scope of its authority. Critics argue that the Commission is imposing its own judgement over Member States' informed and experienced right in law-making, reducing the State Aid inquiries to a simple matter of whether the Commission believes that the arm's length principle was satisfied or not (Lee, 2017).

Importantly, the OECD guidelines are not binding under international law (Lovdahl Gormsen, 2016). Member States are not required to integrate the arm's length principle in their national regulatory frameworks, as it is not even a part of EU law. The Commission stressed in the Notice and in the Working Paper that if a Member State follows the OECD Guidelines in setting transfer pricing agreements, then they would unlikely result in state aid (European Commission, 2016; European Commission, 2016; Thomson & Hardwick, 2017). They also point out that MNCs can use other methods that are not set out by the OECD, as long as they comply with the arm's length principle (Thomson & Hardwick, 2017). However, as we saw in Chapter two, the Commission challenged the TNMM, in preference of the uncontrolled pricing method. This kind of approach is rather questionable: first, the Commission imposes a set of non-binding guidelines on Member States, then, when applying them, it gives its own interpretation, favoring some over others, without any precedent case law history to support this behavior.

With the lack of harmonization at EU level on tax rulings and no precedent case law, the Commission gives a unique interpretation of the arm's length principle that differs in what the OECD has established as valid. It stated in its opening decisions that the arm's length principle is an 'internationally agreed standard' (Lovdahl Gormsen, 2016), but then contradicts itself by applying it with its own interpretation, creating an apparent new standard that no one had agreed with previously.

The Commission's approach created some practical issues for Member States (Thomson & Hardwick, 2017). First, the Commission in applying its own unclear version of the arm's length principle; second, it does so despite the set of widely-accepted Guidelines, which were established *vis à vis* international consensus and thanks to the deep experience of the OECD in matters of tax competition; third, the Commission never stated officially Member States of which Guidelines it favors and which ones it discourages; four, it is not possible for Member States to comply with both interpretations of the arm's length principle.

3.1.2. Proving Selective Advantage

In order to continue the analysis, we shall quickly look back at the concept of selective advantage, which we already discussed in Chapter one. As outlined in Article 107(1) TFEU, a crucial consideration in determining whether a tax ruling constitutes state aid, is whether the measure provides an advantage to the company (Richard, 2018). To put it simply, an advantage is present provided that after the tax ruling a company pays less than what it would have paid with the tax ruling (Gunn & Luts, 2015). An advantage granted through a tax ruling that is available to virtually any company does not necessarily constitute state aid. Tax rulings become problematic if selectivity is also present – i.e., when the advantage is only available to a certain group of companies that belong to a similar factual and legal position (Gunn & Luts, 2015).

To determine the presence of selectivity, a three-step test was defined by the European Court of Justice (Richard, 2018): first, the Commission has to select an appropriate reference system, then prove that the company was favored by the tax ruling, and finally whether the derogation could be justified by the inherent structure of the State's tax system. How did the Commission apply the three-step test in the recent state aid cases? The next section will analyze the argument according to which the Commission failed to assess the most adequate reference system in order to determine whether a selective advantage was in place. The mistakes that the Commission made were (1) treating independent companies and integrated companies the same way, and (2) using as reference system the national ordinary general tax system rather than a regulatory system on tax rulings.

3.1.2.1. Selecting the Right Reference System – Stand-Alone Companies as Factually and Legally Comparable to Integrated Companies

The first step to decide whether a tax ruling constitutes an advantage in state aid cases is to determine what tax system must be used as reference in the analysis (Galendi Junior, 2018). In the past, the European Court of Justice has usually indicated the law of taxation in general as the appropriate reference system (Richard, 2018). In the recent cases, especially the ones analyzed in Chapter Two, the Commission decided that the reference system is the ordinary tax system. This caused much discussion, as the companies and Member States involved in the cases believe that the right reference system should be the narrower system of tax rulings (Phedon, 2016)

Indeed, as we reported in the previous Chapter, in order to comply with the first requirement of the selectivity test, the Commission applies a two-step approach: first, it states that it chooses to select as reference system the national ordinary corporate tax legislative framework; then, the Commission considers stand-alone and integrated companies – i.e. companies belonging to the same group – as legally and factually comparable, within the context of national corporate tax regulation.

Given this initial reasoning, the Commission further underlines that independent companies enter into transactions with each other with prices at an arm's length and are taxed on that basis. This is true and should not be disputed. Thus, it goes on to say that since group companies and independent companies are viewed as belonging to the same reference system, it would be a deviation from the ordinary corporate legislative system to allow group companies to derogate from transfer prices not at an arm's length (Thomson & Hardwick, 2017). Therefore, since it was defined that group companies shall treated the same way as independent companies by the Commission, group companies are also subject to the arm's length principle.

But why does the Commission apply the reference system to both related and independent companies? According to the Working Paper (2016) by the DG competition which we mentioned in the first Chapter, prices that are charged between related companies have to be similar or close to those charged between independent companies. Therefore, it would seem logical to say that to check if a tax ruling on transfer pricing resulted in selective advantage, one should compare the effects of this ruling to the effects of normal tax rules on other companies; the issue is that transfer pricing rules only apply to group companies (Phedon, 2016).

Thus, the reasoning applied by the Commission appears to be flawed. Furthermore, Verhagen (2017) claims that the Commission made a conscious choice when using this approach, since applying the largest possible reference basis for the analysis can enhance the chances of proving that a tax ruling derogates from it. Furthermore, the author reports that this reasoning allows for relying on the arm's length principle under Article 107(1) TFEU, instead of analyzing national provisions on transfer pricing, as also stated in the second paragraph of this section.

But can the Commission say that independent and related companies are legally and factually comparable? Related companies and independent companies are different economic entities. The reasons why subsidiaries of the same group enter into transactions with each other are substantially different from the ones of independent companies pursuing transactions in the open market. Phedon (2016) reports on some of the main differences: transactions between related companies are subject to lower risk, higher transparency and more control over quality; having business with subsidiaries that are low-risk can affect prices, which might be higher when two independent are engaging in the same activities. In addition to that, the OECD recognizes in its Transfer Pricing Guidelines (2017) that the use of the arm's length principle when assessing transaction prices between related companies can be hindered because these companies often engage in transactions that are not motivated by tax avoidance, but yet by economic circumstances different from the ones of independent companies.

Given these considerations, Phedon (2016) explains why the application of the ordinary national corporate tax regulatory framework as reference system does not necessarily result in selective treatment by a Member State. In the context of the ordinary tax system, related companies can manipulate transfer prices, so tax rulings should be added complement the ordinary tax regulatory framework, creating a reference system that combines these two elements in the analysis on state aid. Consequentially, a tax measure is selective only if it deviates from this system and gives an advantage to only one or a few of the companies subject to the system. However, since tax measures only relate to group companies, in this theoretical reference system there would only be group companies. This goes against the Commission's reasoning outlined above, according to which group and independent companies are both a benchmark. Basically, group and independent companies are treated the same despite belonging to different reference systems in theory

Verhagen, (2017) presents plenty arguments to further refute the claim that independent and group companies are legally and factually comparable. First, while it is true that both integrated and stand-alone companies are equally taxed under the national corporate tax legislative framework for their financial exchanges in the market, the profits of independent companies, unlike those of integrated ones, cannot be influenced by shareholder relationship. Thus, they have to be legally separated, to make sure that the taxable profit of group companies approximates that of single entities that deal in the open market.

The author goes on to cite case law, stating that in the past the Commission has claimed that *"with regard to financing activities with debt, stand-alone companies are not in a factually and legally comparable situation with companies that form part of a group of companies."* (Verhagen, 2017). Furthermore, the author wonders if this statement can be valid for inter-company transactions in general. In this view, stand-alone companies and integrated companies are not factually and legally comparable, given that stand-alone companies cannot engage in these kinds of transactions.

Lastly it should be noted that the OECD conducted extensive work to provide several guidelines to deal with the specific issues that arise from establishing the transfer pricing of transactions between related companies. These have been approved and implemented globally and were in part discussed in the First Chapter. Thus, it seems odd and quite contradictory for the Commission to view these two economic entities as factually and legally comparable (Verhagen, 2017).

3.1.2.2. Selecting the Right Reference System – The General National Tax Framework Rather than Provisions on Transfer Pricing

As stated previously, following the observation that stand-alone companies and group companies are factually and legally comparable, the Commission applies as reference system the ordinary national corporate tax legislative framework as reference system. Verhagen (2017) shows that the Commission rejects the idea of applying a narrower reference system – e.g. specific transfer pricing rules – asserting that this kind of approach and the presence of special rules only applying to related companies would lead to selectivity. However, the author refutes this view by restating the impossibility of considering these two kinds of economic entities as factually and legally comparable (Verhagen, 2017).

The author goes on to cite relevant case law by the European Court of Justice, according to which the determination of selectivity requires an extensive examination of the scope of the tax rulings being examined, that is, the administrative and legal framework in which they were applied (Verhagen, 2017). By limiting the analysis to the compliance of the arm's length principle under Article 107(1) TFEU, the Commission ignores much of the regulations that are applied in the specific Member State (Verhagen, 2017). This reasoning results in an erroneous reference system. Thus, the OECD Guidelines on Transfer Pricing are subject to different interpretation since they are indeed "guidelines" rather than binding regulations. Therefore, it is safe to assume that Member States applied them with varying degree. The Commission should have taken this into consideration and, in considering the reference system, it should have observed the way in which the OECD Guidelines were applied.

In conclusion, according to Giraud and Petit (2017), it would have been more logical for the Commission to use as reference system the corporate tax that applies only to group companies. This approach makes more sense since, as stated above, group and independent companies are factually different. The argument could then have been that within this system, some companies had benefitted from sweetheart deals not available to others. However, with this reasoning the Commission would have been forced to prove that the beneficiary of the tax ruling had been given a selective advantage compared to other group companies in the same situation. The authors conclude that this kind of argument would have ben harder for the Commission to prove, which then opted for a more theoretical and abstract approach.

3.2.The United States Treasury Department's White Paper

On August 24, 2016, the U.S. Treasury Department issued the White Paper *"The European Commission's Recent State Aid Investigations on Transfer Pricing Rulings"* in which it disagreed and challenged the Decisions, specifically referring to the ones against U.S. companies (Yang & Lauricella, 2017). The Paper focused on three main issues:

- *"The Commission's Approach Is New and Departs from Prior EU Case Law and Commission Decisions (...)"* (U.S. Department of the Treasury, 2016). According to the Treasury's analysis, the recent Decisions by the Commission deviate from previous case law. It argues that the approach to establish the presence of state aid it does not follow the classic standards – i.e. the aid must be financed by state funds, it provides and advantage, it is selective, and it distorts competition (Consolidated version of the Treaty on the Functioning of the European Union, 2008). In the past, these have been applied comparing MNCs that benefited from an individual tax measure with others that did not, scrutinizing tax rulings that were granted to a group of companies that had certain specific criteria. Contrarily, now the Commission is deeming the individual transfer pricing rulings "selective" even if they could be applied virtually to any other company. This new approach collapsed the concepts of "advantage" and "selectivity", as previous case law showed that an advantage ranted to a single MNC was not necessarily selective. Unlike the past, the two concepts are not analyzed separately.

- *"The Commission Should Not Seek Retroactive Recoveries Under Its New Approach (...)"* (U.S. Department of the Treasury, 2016). The White Paper reports one of the regulations on state aid: *"(...) the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law."* (Lovdahl Gormsen, 2019). Given this regulation, recovery is only allowed if it does not go against any EU principle. According to the White Paper, requiring companies to make retroactive payments goes against the "principle of legal certainty". This principle exists to avoid that any European Union public authority acts in an arbitrary manner by requiring that Rules of Law should have clear, foreseeable and precise effects and consequences (Lovdahl Gormsen, 2019). By not providing clear information to the

MNCs involved in the state aid cases on the extent of the obligations imposed to them, the Treasury argues that the Principle was not respected since the parties involved were not fully aware of what their rights and obligations were.

Apple and Ireland have also claimed that the principle of legal certainty had been breached by the Commission in two ways: by opening an investigation into a 22-years old ruling and by applying an external framework that was not a part of national framework at the time – i.e. the arm's length principle and OECD guidelines (Thomson & Hardwick, 2017).

- *"The Commission's New Approach Is Inconsistent with International Norms and Undermines the International Tax System (…)"* (U.S. Department of the Treasury, 2016). The OECD provides internationally-agreed regulations on transfer pricing and tax competition manners. As we saw in the first Chapter, it has been doing so since the sixties. In the European Union, Member States apply these rules in a varying way. The Treasury argues that in recent decisions the Commission seems to be imposing a regulatory framework for the EU based on a use of the arm's length principle that was never agreed in the international arena and that was not foregone by the OECD. By doing so, the Commission is not only imposing itself in national sovereignty, but it is undermining long-agreed international consensus, creating uncertainty and confusion for Member States and MNCs.

3.3. Expectations for Multinational Corporations and Member States

Establishing a subsidiary in a foreign country can be a difficult and long process even for large companies. Managers and leaders must take into consideration many aspects when deciding the business structure of subsidiaries, one of those being the compliance with national laws and regulations. Any company incorporating in a Member State of the European Union must also consider the additional scrutiny and restrictions that he EU imposes in its treaties. According to Lee (2017) the Commission's retroactive recoveries imposed an additional barrier to entry for MNCs in the EU, something that can undermine businesses, Member States and even the EU economy. In this state of uncertainty, there are a few roads that MNCs and Member States might take as a reaction to the Commission's behavior.

Member States might not be able to undergo special agreements with MNCs anymore, with fear of creating advantage that could be prosecuted by the Commission. Complying to OECD principles might not be enough anymore. Virtually, any existing or future ruling deviating from domestic tax regulations could be challenged by the Commission. Thomson and Hardwick (2017) suggest that existing rulings should be reviewed by Member States and MNCs, keeping under control specific details, such as the duration of the rulings and the supporting evidence: rulings should have strong supporting analyses and evidence conducted by the national tax administration providing it. In addition, rulings that are longer that five years are more likely to be challenged, as well as ones granted rapidly.

When it comes to transfer pricing, the Commission developed a unique view, as we saw in section 3.1.1. Through its decisions, it became clear that it prefers the comparable uncontrolled price method (CUP) rather than the TNMM (Thomson & Hardwick, 2017), even though both methods are approved by the OECD. This should be considered for future transfer pricing rulings, as deviating from the arm's length principle could potentially lead to a state aid investigation.

Despite these considerations, some have commented that it is unlikely that companies already incorporated in the EU will relocate outside of it. Reincorporating outside of the EU would require for an MNC to dissolute all subsidiaries in the Member State and reincorporate in the state of arrival, arising large transnational costs as well as conflicts of law principles (Lee, 2017).

4. **Chapter 4**: The 2019 Judgements by the General Court and Ursula von der Leyen's Commission: Possible Implications and What to Expect Next

In the Second Chapter, we analyzed the appeals by Member States and companies; in the Third, we saw the various comments and critiques of the public opinion, academics and the United States. We will now turn on the most recent developments on the cases that we investigated, these being the September 2019 Judgements by the European General Court and the election of Ursula von der Leyen as President of the European Commission.

The first section of the Chapter will be structured as follows: we will first look at the *Starbucks* Judgement (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019) which overruled the Decision by the Commission, and then the *Fiat Finance & Trade* (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019), which was instead confirmed. We will try to understand which aspects of the appeals submitted by Member States and MNCs were accepted and which were rejected.

Given this analysis, in the second and final section of the Chapter, we will rationalize the Judgements tackling the main points discussed by the Court. Then, we will try to draw some conclusions on what the future for state aid might look like, considering the recent election of Ursula von der Leyen as incoming President of the European Commission and the confirmation of Margrethe Vestager as Commissioner for Competition.

4.1. The General Court's Overturn of the *Starbucks* Decision

After a summary of the *Starbucks* case and of the Commission's Decision its and reasoning, the Judgement of the General Court undergoes a joint report of the appeals by Starbucks and The Netherlands jointly (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019). Even though we already described them in section 2.3.2 of the Second Chapter, we will shortly repeat them here, adopting the same structure used by the Court:

1) The Commission did not prove selectivity and erred in choosing the reference system;

2) The Commission did not prove the presence of advantage, specifically infringing Article 107 TFEU by applying the arm's length principle to establish whether there was an advantage, infringing the Netherlands' fiscal autonomy;

3) The Commission made a mistake when claiming that the choice of the TNMM to establish transfer pricing constituted a tax advantage;

4) The Commission made a mistake when claiming that the way in which the TNMM was applied was erroneous and granted an advantage;

5) The Commission breached the principle of due diligence.

Next, the Court goes on to clarify that the two appeals call into question the Commission's assessment that the APA conferred a selective advantage to Starbucks Manufacturing. Thus, the Court goes on to say that it does not dispute the Commission's approach of analyzing the presence of selectivity and advantage jointly, as this is not incorrect since both aspects were investigated. Given this clarification, the Court affirms that in its Judgement it first considers whether the Commission could conclude that there was an advantage, and then whether the advantage could be said to be selective, for the sake of giving an ordered analysis. Then, the Court analyzes in more detail the arguments proposed by the Commission and that were challenged by the appeals: (1) the use of the arm's length principle; (2) whether an advantage was proved, and, in particular (3) the Commission's choice of the reference system.

4.1.1. The Legitimacy of Using Arm's Length Principle

The first point discussed was on the use of the arm's length principle in the field of state aid and whether this is in compliance with the Member States' fiscal autonomy. On this point, the Court judges in favor of the Commission. As a starting point, the Court cites case law to state that in the absence of EU regulation, it is the Member States' prerogative to assess and determine the different factors of production and economic activity among which corporate tax burden can be spread. However, any tax measure affecting these matters can be subject to state aid examination. While the Commission does not have the authority of determining a standard for taxation of integrated companies ignoring national legislation of Member States, Article 107(1) TFEU allows it *"to verify whether the price level of intra-group transactions, accepted by the national authorities for* *determining the tax base of an integrated undertaking, corresponds to a price level of a transaction which has been negotiated in market conditions"* (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019). Thus, the Commission is not exceeding its competences when validating whether the outcome of a tax ruling leads to a market-based outcome.

Furthermore, the Court confirms that the Commission deemed the arm's length principle as a general principle of equal treatment in taxation falling within the scope of Article 107(1) TFEU. However, the Court believes that this definition should not be interpreted in a way that gives Article 107(1) TFEU a scope that is too broad. Thus, the Court clarifies that the Commission views the principle as a tool checking "*that intra-group transactions are remunerated as though they had been negotiated between independent companies*" (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019). Thus, the Court rejects the pleas of The Netherlands and Starbucks according to which the Commission made a mistake in using the arm's length principle to determine the presence of State Aid.

4.1.2. Existence of a Tax Advantage

The next topic discussed by the Court regards the proof of existence of a tax advantage in favor of Starbucks MBV. The first issue regards the use of the TNMM, and the alleged failure of the report submitted by the tax advisor of Starbucks to examine the intra-group transaction for which the APA was requested – i.e. the royalty paid by SMBV to Alki. Regarding the latter, the Court makes several comments that favor the appeals: (1) the fact that the Commission found methodological mistakes in the APA does not suffice to demonstrate that there is an advantage conferred by it; (2) the fact that the royalty was not identified as the transaction for which the transfer price had been determined, and thus, no analysis was made to check its conformity with the arm's length principle, does not suffice to state that there was a non-conformity with the principle; given the previous statements, (3) the tax advisor did not disregard the transaction since it is actually taken into account when SMBV's remuneration is proposed. Therefore, the Court states that the Commission erred when it found that an advantage was conferred when the royalty was non analyzed separately in the report.

Next, on the use of the TNMM to establish remuneration for SMBV, the Commission claims that the CUP method was the most appropriate one. The Court claims that the Commission was unable to prove that the use of the TNMM instead led to a lowering of SMBV's tax burden, thus conferred an economic advantage. Following this observation, the Court believes that the Commission could not impose the CUP method stating that it should have been prioritized. Therefore, in favor of Starbucks and the Netherlands, it found that the choice of using the TNMM was not defining to confer an advantage to SMBV.

The second issue discussed within the determination of whether there was a tax advantage in favor of SMBV regards the Commission's claims that the royalties paid to Alki should have been zero. Here, the Court undergoes in-depth analysis of the company's situation and comes to a series of conclusions that uphold the appeals: (1) it agrees with the Starbucks claim that the Commission could not base most of its reasoning on information that for the most part was not available to Starbucks and The Netherlands at the time of the APA (April 2018); (2) the Commission was wrong in finding that SMBV did not exploit on the market the intellectual property it paid Alki for; (3) the Commission was unable to prove that SMBV was generating losses that caused the payments to be unsustainable and unjustified; (4) the Commission was unable to demonstrate that by applying the CUP method to compare previous contracts between Starbucks and unrelated parties to the one with Alki, would have led to a conclusion of zero royalty to be paid; (4) the Court rejects the Commission's argument that the royalty should have been less than the one in the APA.

The third issue regards the amount ought to be paid for coffee beans by SMBV to SCTC, which the Commission claims was not at an arm's length. On this, the Court agrees with Starbucks in the claim that the price of the coffee beans was out of the scope of the APA being analyzed. Following this conclusion and the three reasonings we just described, the Court finds that the Commission was unable to demonstrate that SMBV had been conferred an advantage within the meaning of Article 107(1) TFEU based on its first three lines of reasoning.

The Court goes on to describe three more lines of reasoning which all fall under the "subsidiary reasoning" according to which the Commission claimed the existence of a tax advantage. The first issue regards the Commission's claim that SMBV was the most complex entity in the APA and thus, could not be identified as the tested party when applying the TNMM. With respect to this, the Court agrees with Starbucks when claiming that the Commission was unable to prove how this choice led to a reduction of SMBV's taxable profit, thus breaching the duty to state the reasons.

The second issue discussed regards the definition of the functions of SMBV and, as a consequence of those, of the determination of its profits based on operating costs. The Court claims that the Commission was unable to prove that the choice of operating costs was incorrect, as it found the Commission's alternative – i.e., total sales, based on the claim that SMBV's main role was that of a reseller – to be inappropriate because it was based on income deriving from resell activities rather than profits, thus: "*a high proportion of income does not necessarily translate into a high proportion of profits, such that that finding alone is not sufficient to prove that SMBV's main function is the resale of non-coffee products*" (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019). Consequentially, the court was unable to demonstrate that SMBV's functions and the choice of profit level indicator indicated in the APA conferred an advantage.

The third issue regards the Commission's claim that certain adjustments had granted an advantage. Without going into too much technical detail, the Court found that the Commission to prove advantage with its investigations on the various adjustments present in the APA. Thus, by disproving the six lines of reasoning we just reported, the Court claims that the Commission could not demonstrate that the APA had conferred an advantage towards SMBV.

4.1.3. The Reference System Applied by the Commission

In the last topic analyzed by the Court, the issue regarding the reference system is tackled. In particular, the claims by The Netherlands and Starbucks that a narrower reference system should have been applied for the whole investigation – i.e., the transfer pricing decree under Dutch national corporate tax legislation. The Commission, in turn, had stated in its Decision that the APA conferred a selective advantage even after an analysis *vis à vis* this more restrictive reference system.

The Court does not give a specific legal answer to the issues regarding the choice of the reference system, but it gives a factual opinion on the Commission's findings. The Court clarifies that the conclusion according to which the APA still resulted in a selective advantage when compared to a narrower reference system was based on the Commission's assumptions from the first part of its analysis, which we discussed in the previous paragraphs. Given that the Commission had not been able to demonstrate that the APA conferred an advantage to SMBV for the reasons already discussed by the Court, when applying the same reasonings to the more restrictive reference system, it came to the same conclusions, although the Court believes that it was still unable to prove the advantage of the APA. Importantly, the Court says that it does not find it necessary "*to take a position on the exact nature and scope of the reasoning in respect of the Commission's limited reference system.*" (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019).

4.2. The General Court's Confirmation of the *Fiat Finance & Trade* Decision

We will now go on to discuss the Fiat Finance & Trade confirmation by the European General Court (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019). The Starbucks and FFT Judgements are very similar in their structure. Moreover, while the results are drastically different, there are some similarities in the Court's reasonings, thus showing consistency in the Judgements. Like the *Starbucks* Judgement, the Court starts off with a summary of the investigations and of the main points of the Commission's Decision – which we described in section 2.4 of the Second Chapter. It then goes on to report the pleas of the appeals of Luxembourg and Fiat – which we will not repeat as they are already summarized in section 2.4.2. Then, the Court divides the pleas into five categories: (1) pleas regarding the accusation of harmonization in disguise and power abuse; (2) pleas claiming that the Commission did not prove an advantage; (3) pleas on the absence of the selectivity element in the tax ruling; (4) pleas against the Commission's claims that the ruling restricted competition; (5) pleas claiming unfairness in the aid recovery. We shall discuss them one by one below.

4.2.1. Harmonization in Disguise and Power Abuse

In the first series of pleas, Luxembourg and the Netherlands claim that the Commission exceeded its powers infringing Articles 4 and 5 TEU by trying to harmonize tax legislation. In line with what stated in the Starbucks Judgement, the Court claims that while it is a prerogative of Member States to legislate on matters that determine how *"to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors"* (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019), given the absence of EU legislations of direct taxation, the Commission does have the power of checking the compliance of tax rulings with Article 107(1) TFEU. Thus, even though some areas of the law are not harmonized at EU level, they can still be included in the monitoring of state aid. The Commission's analysis of the tax ruling at issue falls within the scope of its powers. Thus, it did not engage in any form of harmonization.

4.2.2. Absence of an Advantage

In the second series of pleas, the appeals state that the Commission infringed Article 296 TFEU and breached the principles of legal certainty and protection of legitimate expectations by stating that the tax ruling conferred an advantage based on the idea that it did not comply with the arm's length principle. On this topic, the Commission applies two lines of reasoning.

According to the principal line of reasoning, the ruling derogated from the reference system – i.e. the general Luxembourg corporate income tax system. On this line of reasoning the appeals claim a series of errors. According to some of the pleas, the Commission erred in using the arm's length principle in the monitoring of state aid. In response to these claims, the Court applies the same reasoning as in the Starbucks case. Without repeating ourselves, it should be enough to say that the Court rejects this argument as the use of the arm's length principle by the Commission was legitimate. According to a second series of pleas, Luxembourg refutes the claim that there were mistakes in the methodology for calculating FFT's remuneration. Without going too in-depth in analyzing the technical errors alleged by Luxembourg, the Court establishes that the methodology for determining the remuneration of FFT did not indeed lead to an arm's length outcome.

The subsidiary line of reasoning alleges that the tax ruling derogates from the more limited reference system formed by group companies under the national transfer pricing rules. Here, the Commission applied the same reasoning and conclusions as in the principal line. Thus, the Court agrees with the Commission on the bases previously discussed.

On the absence of advantage, Luxemburg and FFT claim that the Commission was unable to demonstrate the presence of advantage at group level (Fiat/Chrysler Group), infringing the obligation to state the reasons. Indeed, the Commission claims in its Decision that the selective advantage being granted to FFT within the meaning of Article 107(1), was beneficial for the Group as a whole, since FFT was one of the economic units composing the Group and was granted a lowered tax liability. Moreover, the Court does not find this reasoning unacceptable, agreeing that if the ruling was directly benefiting FFT, it could indirectly also benefit the Group as a whole.

Therefore, this claim in the appeals was refused by the Court. In light of this conclusion and the analysis conducted by the Court, the second series of pleas was rejected.

4.2.3. Non-Selectivity of the Advantage

In the third series of pleas, the appellants find that the Commission wrongly considered the ruling to be selective. In particular, the reference system was not the most appropriate one. Thus, they claim that the tax regime would not derogate from a system of integrated companies. The Court reiterates the importance of using the three-step selectivity test:

"*The Commission carried out that examination using as a reference framework, principally, the general Luxembourg corporate income tax system and, on a subsidiary basis, Article 164 of the Tax Code and the Circular. (...) the Commission correctly found that the tax ruling at issue derogated from the rules constituting each of those reference frameworks.*" (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019).

Accordingly, the Court claims that the Commission did not err in its three-step selectivity analysis. Furthermore, the third series of pleas is also disputed.

4.2.4. Restriction of Competition

In the fourth series of pleas Luxembourg claims that the Commission was unable to prove any restriction of competition. The Court claims that for state aid to be demonstrated, the Commission is required to show that there is a possibility for the aid to affect trade and thus competition. Moreover, it is not required to show that there is a tangible effect in the trade between the Member States that causes a distortion of competition. Thus, the Commission rightfully claims that the reduction of FFT's tax liability resulting from the APA, represented a financial improvement for the Group as a whole. The Court believes that this condition is enough to create a situation in which competition and trade could be distorted in the open market. In light of this, the Court believes that the fourth series of pleas should be disputed.

4.2.5. Recovery of Aid

According to the fifth and last series of pleas, the recovery of the aid as required by the Decision is against the principles of legal certainty and rights to defense. According to the principle of legal certainty, rules must be clear and precise. The Court states that without any doubt, under Article 107(1) TFEU, any tax measure that fulfils the requirements, should be deemed unlawful and be subject to a recovery of the specific monetary amount. Then, it claims, in line with what stated by the Commission, that there was no reason to believe that the Commission would not be applying the Article in its investigation. Thus, there is no reason to believe that the parties involved could claim a breach of the legal certainty principle.

Furthermore, Luxembourg claims that its right of defense is being breached since the Commission ordered a recovery of an amount it could not quantify. In these cases, the State claims that no recovery should be ordered. The Commission claims that according to case-law, it is enough to provide the Member State with enough information to estimate an amount. The Court agrees with this view, as it believes the Commission provided reliable and appropriate information to determine the calculation. Given these considerations and the previous ones, all pleas were refuted, and the Decision confirmed.

4.3. Understanding the General Court's Judgements

The Judgements in the *Starbucks* and *FFT* cases provided the first time, some clarification to the doubts and questions sparked by the transfer pricing cases alleging state aid in the EU (Skadden, Arps, Slate, Meagher & Flom LLP, 2019), ever since the first cases in 2014. As Margrethe Vestager said in an official statement following the Court's publication of the results, the Judgements *"(…) give important guidance on the application of EU State aid rules in the area of taxation.* (2019)*"*. Indeed, The Judgements mark a crucial step in the discussion and will surely serve as a basis for future cases. Importantly, they could be used as a predictive tool to make some assumptions on the ongoing appeals of *Apple* and *Amazon*, even though some doubts remain.

The first key point in both Judgements regards the Commission's right of using its powers as a check of state aid compliance. As we saw in the Second and Third Chapters, a strong critique towards the Commission regarded its alleged abuse of power, given the lack of harmonization of fiscal laws at EU-level. As Vestager underlines in her statement, *"(…) the judgments confirm that, while Member States have exclusive competence in determining their laws concerning direct taxation, they must do so in respect of EU law, including State aid rules."* (2019). Indeed, in FFT the Court refuted the claim that the Commission was undergoing a harmonization in disguise that went beyond the scope of its powers. Accordingly, in the case that a tax ruling is proved to lead to an outcome of selectivity and thus confers a state aid, the Court finds it legitimate to order a Member State the recovery of retroactive aid.

The same reasoning on the Commission's power to check the compliance of tax rulings with state aid regulations holds true in Starbucks. This was the sole aspect where the Court ruled in favor of the Commission, specifying that "*Article 107(1) TFEU allows the Commission to verify whether the price level of intra-group transactions, accepted by the national authorities for determining the tax base of an integrated undertaking, corresponds to a price level of a transaction which has been negotiated in market conditions.*" (Judgement of the General Court in Cases T-760/15 and T-636/16, 2019).

This also gives us an important answer on another key aspect of the judgement: *"(...) the General Court has also confirmed the Commission's approach to assess whether a measure is selective and if transactions between group companies give rise to an advantage under EU State aid rules based on the so-called 'arm's length principle'"* (Press Release by the European Commission, 2019). All the appeals we reported in Chapter Two, as well as most of the critics of the Decisions, pointed their fingers at the use of the arm's length principle as a tool and benchmark to decide if individual tax measures resulted in state aid. In the Starbucks Judgement, the Court ruled in favor of the Commission in its use of the ALP, even though it then failed in showing the inconsistency between the tax ruling granted to SMBV and the arm's length principle.

While the Court admits that the arm's length principle is not part of EU hard law, it concludes in both judgements that the Commission was perfectly entitled to use it as both The Netherlands and Luxembourg had integrated it in their national legislations – regardless of them claiming otherwise. Here, the Court seems to be less over-reaching than the Commission, which claimed that the ALP originated from EU law and could thus be applied regardless of a Member State's use of it in its national corporate tax laws (Decision on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, 2015; Decision on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, 2015).

Given this legitimization of the arm's length principle, the Court acknowledges the different interpretations and methodologies through which it can be applied, as recognized in the OECD

Guidelines (2017). Thus, the Guidelines are soft law that can be integrated by Member States with different interpretations (Van Der Made, 2019). Given its "approximate nature" (Judgment of the General Court in Cases T-755/15 and T-759/15, 2019), analyzing transfer prices using the arm's length principle can raise some legal issues as it is not a clear-cut and straightforward process. As the OECD recognized in the Guidelines, it is not an "exact science" (2017) and Member States should be recognized with a margin of error.

Thus, the Guidelines (2017) provide extensive methods for the determination of transfer pricing. These are all recognized as valid. Indeed, the Court found that the mere choice of a methodology by a Member State over another that is preferred by the Commission, is not enough to claim that the tax measure being investigated confers an advantage (Skadden, Arps, Slate, Meagher & Flom LLP, 2019; Monsenego, 2019). This was exemplified in *Starbucks*, where the Court found that by simply accepting the use of the TNMM in determining Starbuck's taxable base, The Netherlands could not be creating a situation of selective advantage. The Commission must respect its "burden of proof", that is, it must provide tangible reasons for the presence of an advantage that go beyond a mere methodological choice. While it failed in doing so in *Starbucks*, it was possible in *FFT*.

Considering that the Court has accepted the use of the OECD Guidelines in these judgements, it has importantly recognized that only information that was available at the time of the tax measure to the parties involved should be used in determining the presence of a selective advantage (Monsenego, 2019). This was particularly true in *Starbucks*, where later versions of the OECD Guidelines were used by the Commission.

The next important element concerns the idea of stand-alone and integrated companies being "legally and factually comparable". On this topic, despite the Court not giving much insight on its reasoning, it seems to agree with the Commission (Monsenego, 2019). The same applies with the topic of the reference system; in *Starbucks*, the Court believes that the Commission wrongly assumed that even when a narrower reference system was used, a selective advantage could be proved. The Court did not give a specific legal opinion on the topic of reference systems *per se*, instead, it criticized the Commission's use of the same wrong assumptions when considering the narrower reference system.

While some points were cleared out, it is not easy to determine the implications of the Judgements for other appeal cases. The Court seems to have strategically avoided taking a precise position on legal elements. Thus, it based its Judgements on specific facts rather than providing clear guidance on the approach the Commission should have on cases of state aid. Hopefully, if the Court of Justice will confirm the Judgements, it will provide more clearance on topics such as the reference system (Monsenego, 2019), even though this might take several years (Skadden, Arps, Slate, Meagher & Flom LLP, 2019).

4.4. What to Expect Next: The von der Leyen Commission

In September 2019, Margrethe Vestager was offered a second term as European Commissioner for Competition under the new von der Leyen Commission (Amaro, 2019). Despite how rare and honorable this may be, her reputation and legacy are still being discussed given the recent overturn of the *Starbucks* case and the continuous opposition showed by MNCs and Member States (The Economist, 2019). However, the critical reviews on the Commission's work provided by the recent Judgements of the GCEU, will not necessarily entail in a step backwards by the Commission in its commitment towards the elimination of state aid. In her Political Guidelines for the next Commission, President-elect Ursula von der Leyen reports "fair taxation" to be one of the main objectives of her political agenda (2019). In line with what has been said and done by the DG Competition under Vestager thus far, she claims that the current corporate tax legislations worldwide are not in line with the peculiarities of the contemporary digital economy; therefore, reforms are needed both at the EU and international level (Von der Leyen, 2019).

However, tax harmonization has been thwarted by Member States in past proposals (Van Der Made, 2019), and with the rise of Euro-skeptical political parties this far-reaching objective might be further hindered. This does not seem to discourage von der Leyen who "(…) *will put forward proposals to improve the business taxation environment in the single market. A common consolidated corporate tax base would provide businesses with a single rulebook to compute their corporate tax base in the European Union."* (2019).

Considering the profitable business models that digital MNCs have, which were able to benefit from the advantages that are peculiar to the digital economy, von der Leyen ensures that *"taxation of big tech companies is a priority"* (2019). This approach is in line with the international need and pursuit of more transparent tax regimes and requirement of compliance for all MNCs. The statements made by von der Leyen in her agenda bear close similarities with the BEPS project that we discussed in Chapter One and is in line with the goals of the OECD at the international level. It is important, in order to reach the goal of fair taxation, that the Commission is able of harmonizing fiscal laws, so that all Member States comply equally with the OECD internationally-accepted standards.

Given these objectives by the new president-elect and the recent Judgements by the General Court of the European Union that legitimize the Commission's check of compliance with Article 107(1) TFEU and use of the arm's length principle, we shall expect a continued enforcement by the Commission in matters of state aid. There is no reason why Margrethe Vestager should slow down in pursuing cases as the ones we analyzed. However, the Judgements also made it clear that the Commission must be particularly thorough when proving the existence of an advantage granted to a tax ruling beneficiary (Skadden, Arps, Slate, Meagher & Flom LLP, 2019). Therefore, we should also expect more precise investigations on the individual tax rulings. Thus, it is not clear how the Judgements of Apple and Amazon will turn out to be. The Judgements could still be challenged by the Court of Justice of the European Union. Moreover, they are not conclusive for the other cases that are still waiting for a Judgement by the EGC (Bodoni, 2019).

Conclusion

"I will ensure that taxation of big tech companies is a priority"

Ursula von der Leyen, President-elect of the European Commission (2019)

As we saw in the first Chapter, the fight against unfair tax competition has been a prerogative of institutions worldwide ever since the eighties. With the *Model Tax Convention on Income and on Capital*, first published of 1992 and the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, first published in 1995 as a revision of a 1979 version, we were first introduced to concepts such as transfer pricing and advanced pricing arrangements. These important publications served as guidelines for States to comply with internationally-agreed standards on how corporate taxes ought to be created and applied to multinational corporations. In particular, we discussed an important tool provided by the OECD to check that prices between companies belonging to the same group were set at market value, the arm's length principle. The most recent effort by the OECD on fair taxation is the BEPS project, which tries to tackle the issue of tax competition in light of the changes brought by the digital economy.

Furthermore, in the fight against unfair tax treatment, the European Union has provided its own contribution, in particular within the realm of state aid. Broadly speaking, under the European Union legislative framework, we can define state aid as an advantage of any form conferred on a selective basis to any undertaking by national authorities (Bobby, 2017). In addition to the hard law provided by the TFEU, the Commission recently published two important documents on the topic: the *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016) and the *DG Competition Working Paper on State Aid and Tax Rulings* (2016). These have the aim of addressing widespread criticism that arose following certain Decisions by the Commission on the matter of State Aid. These Decisions required Member States to collect from several high-profile MNCs a large amount of taxes that had not been paid in the previous years due to tax rulings and APAs that resulted in alleged state aid.

In fact, as many commentators have said, the Commission had recently changed its approach towards fiscal matters. Historically, EU Member States had always enjoyed a high degree of fiscal autonomy, as direct taxation has always been deemed as a prerogative of sovereign states rather than something the European Union had a saying on. Then, following the election of Margrethe Vestager as Commissioner for Competition, and in response to certain allegations in the media and in national Parliaments regarding favorable treatment of companies in some Member States (European Commission, 2019), the Commission began looking into suspicious state rulings for the subsidiaries of Apple, Fiat and Starbucks set up in Ireland, Luxemburg and the Netherlands respectively (Thomson & Hardwick, 2017). Later, it looked deeper into Luxemburg's state rules towards two more multinationals, Amazon and McDonald's (Thomson & Hardwick, 2017). These investigations started drawing major media attention towards the Commission's stricter treatment of state aid, particularly because of the big names involved.

These cases culminated with negative decisions. In particular, the Second Chapter of this dissertation analyses the cases of *Apple*, *Amazon*, *Starbucks* and *Fiat Finance & Trade*. In the cases, the Commission adopted new reasonings and often referenced to the OECD guidelines, at times using a unique interpretation. These cases have several aspects in common: (1) they all call into question APAs on transactions between the subsidiaries set up in their respective countries and other subsidiaries or headquarters; (2) the Commission applies the same reasonings, in particular (a) it uses the arm's length principle and (b) it applies the same kind of reference system to prove selective advantage; (3) it calls for a retroactive recovery of aid. Unsurprisingly, all cases have been appealed by both the Member States and companies involved.

All the appeals have some common ground and are based on three main arguments (Richard, 2018): (1) the European Commission' application of the arm's length principle was unsatisfactory and unjustified in proving state aid; (2) it was unable to prove the presence of selectivity and advantage by (3) failing in selecting the correct reference system to determine whether the APAs constituted state aid. These arguments were analyzed in Chapter Three, which also reports on the comments that various authors and academics have made regarding these issues.

Lastly, Chapter Four investigates the most recent updates on the cases we selected. First, it discusses the Starbucks overrule and Fiat Finance & Trade confirmation by the General Court of the European Union. Both Judgements provided some clarity on the many issues tackled, even though some uncertainty remained. The Court confirmed the Commission's right to undergo investigations on tax rulings within the scope of Article 107(1) TFEU. Thus, it accepts the requirement of aid recovery in case that state aid is proven. It also accepted the much-discussed use of the arm's length principle to check whether state aid is in place. Furthermore, the Court claimed that in order to prove that there is a selective advantage the Commission is required to bring a deep investigative analysis on the single ruling (e.g. it is not enough to say that methodological mistakes led to an outcome that made the measure selective, as the Commission claimed in *Starbucks*). The Court also accepted the use of the OECD guidelines and soft law, even though all legislation the Commission refers to had to be available at the time of the adoption of the tax measure.

It is not easy to determine the implications of these Judgements for other appeal cases. The Court seems to have strategically avoided taking a precise position on certain legal elements. Thus, it based its Judgements on specific facts rather than providing clear guidance on the approach the Commission should have on cases of state aid. For instance, the Court did not give a specific legal opinion on the topic of reference systems *per se*, instead, it criticized the Commission's use of the same wrong assumptions when considering the narrower reference system in *Starbucks*.

The second important development tackled in Chapter Four, is the recent election of Ursula von der Leyen as President of the Commission. In her Political Guidelines for the next Commission, she claims that "fair taxation" is one of the main objectives of her political agenda (2019). In line with what has been done by the DG Competition under Vestager thus far, she claims that the current corporate tax legislations worldwide are not in line with the peculiarities of the contemporary digital economy; therefore, reforms are needed both at the EU and international level. von der Leyen commits to reaching a wider harmonization of fiscal laws in the EU, specifically focusing on the taxation of big tech corporations, in line with the requirements outlined in the BEPS project.

Thus, given these important developments, this dissertation concludes by saying that we should expect a continued enforcement by the Commission in matters of state aid, specifically through the harmonization of legislation and new investigations on individual tax rulings between Member

States and MNCs. However, considering that the Judgements also made it clear that the Commission must be particularly thorough when proving the existence of an advantage granted to a tax ruling beneficiary (Skadden, Arps, Slate, Meagher & Flom LLP, 2019), we should also expect more precise investigations.

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Summary

The focus of this dissertation is on recent controversial Commission Decisions concerning advanced pricing arrangements (APAs) between certain Member States and multinational corporations (MNCs) in the European Union. The main reason for the widespread debates that the Decisions caused is the European Union’s sudden change of approach towards cases of state aid, specifically regarding advanced pricing arrangements. To understand this change, we should start by looking at the history of tax competition, what it means and how it changed through the years, both at the EU and international levels.

Historically, companies have always been closely linked to the countries in which they were founded. Today, this might still be the case for small undertakings or ones that want to exploit benefits linked to their home country, such as made-in effects. However, with the emergence of globalization, firms have become increasingly global, leading to the development of multinational corporations, which were able to grow aided by technological advances allowing for easier mobility of capital and people (Ferreira, 2016). MNCs, by definition, do business or have subsidiaries in multiple countries. Therefore, these companies inevitably seek countries in which they can exploit favorable political economies, governments and laws. By doing so, MNCs compete on various grounds.

One of the many ways in which companies can compete is by exploiting the different national legislative corporate tax frameworks in the world to conveniently lower the amount of profit that is liable to taxation. In turn, Governments can also compete on those grounds by offering low tax corporate rates in order to attract foreign investment. While this leads to lower profits in terms of revenues coming from corporate taxes, it can also result in other kinds of benefits, by creating more jobs and improving domestic competitiveness for example. In order to avoid for this competition to become harmful, the Organization for Economic Co-operation and Development (OECD) has published extensive guidelines for Governments.

The 1963 *Draft Double Taxation Convention on Income and Capital*, revised in 1977, defined the OECD as the most important forum on international taxation issues and policy-making, and it remains such to this day (OECD, 1963; 1977). Through the 60s and 70s, the OECD grew, organized and structured itself to become an increasingly important body in the international arena.

In the meantime, according to Morriss and Moberg (2013), three factors determined the growing relevance of differences in tax regimes worldwide. First, after World War II, cross-border transactions became more common thanks to the European states recovering economies and technological advances which reduced the costs of pursuing economic activities. Second, floating exchange rates and less capital controls increased the advantages in doing business across states. Third, borrowing internationally for businesses was now easier and cheaper than borrowing in their own countries, thanks to the Eurocurrency market.

Indeed, according to the OECD, during the 20th century, with the rise of globalization as a major social, political and economic force, tax havens became increasingly common and governments were induced to applying harmful tax regimes globally as a way to attract businesses. So-called harmful tax competition *"(...) can distort trade and investment patterns, erode national tax bases and shift part of the tax burden onto less mobile tax bases, such as labor and consumption, thus adversely affecting employment and undermining the fairness of tax structures."* (OECD, 1998).

Given the new opportunities brought by the emergence of globalization, entrepreneurs and business owners began to learn how to create more complex organizational structures in order to take advantage of lower regulatory costs and taxation. During this time, the OECD pursued its duties by providing technical expertise for inter-states treaties on how to tax cross-border activities. These were based on the 1977 *Model Double Taxation Convention on Income and Capital,* used as a framework for agreements. However, as the number of cross-national transactions and economic activities massively increased by the end of the 1970s, issues for tax authorities grew with the same intensity.

In this historic context, there are two important Conventions to take into consideration: The *Model Tax Convention on Income and on Capital* (1992) and the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995). These Conventions posed the bases for the OECD's most important guidelines for fiscal jurisdictions when it comes to international transaction agreements between enterprises. There some important concepts and principles described in the Conventions that should be analyzed for our discussion: the first one is the arm's length principle. According to this principle, whenever two companies make a transaction, the price should always be as if the two were independent from each other – at an arm's length

(Nicolaides, 2016). In the context of international tax law, the arm's length principle establishes that transfer prices between multinational corporations should be set at market value. The principle serves as a tool against tax schemes by corporations, to avoid shifting profit from jurisdictions with high taxes to states with lower taxes.

The second important concept described in the convention is that of transfer pricing, which refers to whatever regulations and methods are used when giving a price to any kind of transaction between two related enterprises. As stated before, when transactions occur between subsidiaries of the same company, they should remain at arm's length, that is, the amount agreed should be the same as if the two enterprises were independent from each other. The Guidelines provide a set of *"'traditional transaction methods' and 'transactional profit methods' that can be used to establish whether the conditions imposed in the commercial or financial relations between associated enterprises are consistent with the arm's length principle"* (OECD, 2017). Furthermore, advance pricing arrangements are defined by the OECD as arrangements between a taxpayer and a tax administration that establish certain criteria for the determination of the transfer pricing of transactions between subsidiaries of the same group over a fixed period of time (OECD, 2017).

By the 1980s, tax havens were becoming a growing concern, while firms and individual taxpayers had developed complex financial exchanges to avoid paying taxes on their profits (Morriss & Moberg, 2013). At the same time, deregulated financial markets in Europe urged governments to attract businesses and firms through convenient tax regulations. Entrepreneurs now targeted countries with low taxation. The OECD published plenty reports on these issues, but a problem remained: it had always been a body that was cautious about infringing member states' national sovereignty. How could it discourage low-tax regimes without governments claiming a rightful jurisdiction in designing their own rates?

The idea was to delegitimize such states by setting new standards. Indeed, in 1998 the OECD agenda and debate on tax competition changed drastically with *Harmful Tax Competition: An Emerging Issue*. While prior to the report the OECD could be regarded as a body providing general instructions and recommendations to states for tax and financial-related issues, now it was sending a clear message that showed as its main prerogatives the fight against tax evasion, as well as preventing governments of pursuing unfair tax competition. This could only be reached by setting internationally accepted standards. What made the report more innovative was the 5-year deadline given to countries to remove the so-called "harmful features" from tax regimes. In addition, a Forum was established, to involve non-member states in the conversation about harmful tax competition and to create a blacklist of tax havens, which would be sanctioned by OECD members (OECD, 1998). These coordinated actions made *Harmful Tax Competition: An Emerging Issue* a successful tool in the hands of the institution with short-term visible results.

The next landmark for the OECD was the 2013 *Action Plan on Base Erosion and Profit Shifting* (BEPS). In parallel with the financial crisis, we witnessed a quick spread of the digital economy worldwide, brought by technological and social developments. As businesses in the digital economy rely mainly on intangible assets and rely on "multi-sided business models", it is sometimes difficult to understand where value is created and under which jurisdiction they should be taxed (OECD, 2013). This new economic landscape revamped worries related to states applying harmful tax regimes and tax planning by multinational corporations, in particular when it comes to "base erosion and profit shifting". This term simply refers to the techniques adopted by corporations to move profits from high-tax jurisdictions to lower-tax ones, causing an erosion in the tax base of the jurisdictions where taxes are higher. Among its many provisions, much of the focus of BEPS was on providing insights about the concepts that we previously discussed (the arm's length principle, transfer pricing and APAs).

It is in within the context of BEPS that we shall introduce the European Union's approach towards matters of tax competition. From a legislative point of view, the TFEU focus on the concept of state aid under Article 107. We can define state aid as an advantage of any form conferred on a selective basis to any undertaking by national authorities (Bobby, 2017). Under European Union laws, state aid is prohibited unless it is justified by reasons of social or economic development. Four elements must be in place for a measure to be considered state aid towards a specific undertaking (Lovdahl Gormsen, 2016; Thomson & Hardwick, 2017): (1) The undertaking must be benefiting from an economic advantage; (2) This advantage must be granted by a Member State or through state resources; (3) "selectivity" must be in place, in the sense that the measure is favoring certain undertakings, or the provision of specific goods and services, and these advantages are not available to all comparable businesses; (4) There is distortion or potential distortion on trade between Member States.

Besides Article 107 TFEU, given the recent interest of the Commission towards state aid cases and the questions it raised from the public, two documents were published recently to give more insight on the meaning of Article 107 and the Commission's interpretation of it. These are the *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016) and the *DG Competition Working Paper on State Aid and Tax Rulings* (2016). The Notice focuses on tax rulings or APAs granted by member states. The Commission recognizes the importance of those for MNCs, yet it states in the Notice that selective advantage can still be present if the result of the tax ruling *"(...) does not reflect in a reliable manner what would result from a normal application of the ordinary tax system tax rulings or APAs, should always be calculated through methodologies based on the arm's length principle and result in a market-based outcome"* (2016).

A three-step process has to be applied in order to establish whether a tax measure represents selective advantage: (1) identify the reference system; (2) determine if the measure represents a derogation from the reference system (i.e. the measure is prima facie selective); (3) in case of a derogation, determine if it is justified. Moreover, even though the Notice does not provide much information on the methodology to be applied when calculating APAs and tax rulings, the DG Working Paper gives member states some vague indication on how to do that. When suggesting how to select appropriate transfer pricing methods, the Commission suggests looking into the OECD's Guidelines.

The publication of these documents by the Commission reflects a recent change in approach. Prior to approximately the last five years, the EU focused its investigations on schemes, i.e. rules by States that applied to any taxpayer. However, more recently, the Commission started looking at cases of individual aid, in which Member States provide *ad-hoc* rulings to specific taxpayers (Thomson & Hardwick, 2017). In 2013, the EU set up a Task Force on Tax Planning Practices dedicated to these investigations, in order to follow up on certain allegations in the media and in national Parliaments regarding favorable treatment of companies in some Member States (European Commission, 2019). That summer, the Task Force began looking into state rulings for subsidiaries of Apple, Fiat and Starbucks set up in Ireland, Luxemburg and the Netherlands respectively (Thomson & Hardwick, 2017). Later, it looked deeper into Luxemburg's state rules towards two more multinationals, Amazon and McDonald's (Thomson & Hardwick, 2017). These investigations started drawing major media attention towards the Commission's stricter treatment of state aid, particularly because of the big names involved.

We shall now look at some of these famous cases. The most prominent one is probably the *Apple* case. On August 30, 2016, after a two-year investigation, the European Commission found that Apple was given illegal tax benefits worth more than €13 billion, between 2004 and 2014 thanks to a selective treatment that allowed Apple to pay an effective corporate tax rate of 1 percent on its European profits in 2003 down to 0.005 percent in 2014 (Press Release by the European Commission, 2016). Apple Sales International (ASI) and Apple Operations Europe (AOE) were two Irish incorporated companies that belonging to the Apple group scrutinized by the Commission. According to the investigations, the two companies pay royalties to Apple Inc. in the U.S. to finance R&D in exchange for special intellectual property rights. Furthermore, the tax bases for ASI and AOE were determined by a 1991 APA, which was confirmed in 2007 (Press Release by the European Commission, 2016).

According to the Commission, the economic activities that provided profit for the company – that is, selling products – physically happened in Europe and Ireland. Therefore, Apple's justification that the profits were based on the development of technology, which takes place in the U.S., was not enough to justify being treated as a non-resident company by the Irish tax administration (Yang, Meziani, & Shen, 2016). Furthermore, the Commission claims that Apple purposely shifted profits among its subsidiaries with the aim of avoiding paying taxes in other European Countries and taking advantage of its agreements with Ireland. This practice concealed the economic reality of the retail stores that sell Apple's products and are the true source of its profits, misrepresenting the true profit "at an arm's length transaction" (Yang, Meziani, & Shen, 2016). This kind of practice was found to be unfair by the Commission since it distorted the real efficiency of Apple's economic activities (Yang & Lauricella, 2017).

The second case analyzed is the *Amazon* Decision. The focus of the investigation was on a tax ruling issued in 2003 and prolonged in 2011 concerning two companies of the Amazon Group in Luxembourg, owned and controlled by Amazon.com Inc. in the U.S. (Richard, 2018; Ferreira, 2016; Thomson & Hardwick, 2017). The first company is Amazon EU ("operating company" for the Commission), a subsidiary with 500+ employees which selected and bought products in Europe to be sold on Amazon's country websites also managing the sale and delivery of the products. All the profits from these sales were recorded in Luxembourg (Press Release by the European Commission, 2017). The second company is Amazon Europe Holding Technologies, a holding company with no employees or physical presence, holding intellectual property ("IP") rights in Europe through a cost-sharing agreement with the parent company. The holding company would grant the rights of said IP to Amazon EU, *vis à vis* royalty payments. In turn, it would pay annual contributions to Amazon Inc. financing the development of the intellectual property (Press Release by the European Commission, 2017; Thomson & Hardwick, 2017). Amazon Europe Holding was a "limited partnership", thus not subject to corporate taxation under Luxembourg's tax administration, while Amazon EU, was subject to regular taxation (Press Release by the European Commission, 2017).

The 2003 tax ruling established two things: an APA to calculate the taxable base of Amazon EU, and the transfer pricing of the payments it had to make to the holding company in order to use the intellectual property. The Commission found that Amazon EU would pay roughly 90 percent of the company's operating profits to Amazon Europe Holding Technologies; this was 1.5 times higher than what the holding company was required to pay to Amazon.com Inc for the intellectual property (Press Release by the European Commission, 2017). According to the Commission, this scheme reduced Amazon EU's taxable profits by a quarter, while the rest remained untaxed, as it was in the hands of the company not subject to any form of taxation. The payments that Amazon EU made to the holding company were found to be unjustifiably high (Cachia, 2017): according to the Commission, the holding company was just an "empty shell" (Press Release by the European Commission, 2017) used to concentrate most profit through transactions that did not reflect the economic reality of the business and were not at an arm's length. The Commission ordered Amazon to pay back due taxes estimated to be around €250 million, plus interest.

The third case is *Starbucks* in the Netherlands, concluded in October 2015. The case challenges an APA between the company and the Government. The subsidiary scrutinized by the Commission is Manufacturing EMEA BV ("SMBV"). The company has the role of roasting coffee and producing related products such as packaging, cups, tea, packaged pastries, to be sold to the various Starbucks coffeeshops around Europe. The Commission called into question a 2008 tax ruling by the Dutch government, which allegedly lowered the company's tax burden by allowing two intra-group transactions that the Commission found to be illegal (Cachia, 2017). The APA used a methodology to determine profit allocation to SMBV based on the function performed by the subsidiary of roasting and manufacturing. The first intra-group transaction being challenged by the Commission was between SMBV and Starbucks Coffee Trading Company SARL ("SCTC"), a subsidiary of the Group located in Switzerland that sold coffee beans at inflated prices; the second one was with Alki, a UK Starbucks sister company that received very high royalties in exchange for IP on coffee roasting know-how (Press Release by the European Commission, 2015).

The payments towards the Swiss subsidiary were found to be unduly high, even triplicating since 2011. According to the Commission, SMBV could not even generate enough profit from the coffee-roasting activities to pay the royalties to Alki in exchange of the IP. Therefore, the Commission believed that the subsidiary was paying the royalties with profit from its other activities and sales, illegally shifting it to Alki, which was not even taxed in the UK. Furthermore, the Commission found that the royalties were not reflecting the market: no other Starbucks subsidiary or comparable was paying that much in exchange for similar IP rights, making the transactions not at an arm's length (Press Release by the European Commission, 2015). The APA between the Netherlands and Starbucks was found to grant a selective advantage to the company, and therefore constituted illegal state aid. The Commission's final Decision concluded that approximately €20 to €30 million in unpaid taxes had to be paid back to the Dutch administration.

The last case is *Fiat, Finance & Trade*, concluded in October 2015 as well. The company, based and taxed in Luxembourg, acts as a bank for other companies of the group, providing loans and undergoing other kinds of large intra-group transactions. The focus of the investigations was on a tax ruling from 2012, which allowed for the use of the transactional net margin method (TNMM) to calculate FFT's tax base, with return on equity as the profit level indicator. The Commission found that the way in which the method was being applied constituted unfair advantage (Cachia, 2017). The Commission found that the capital base established to calculate the taxable profit was set at a value that was too low by the tax administration, on the basis of unjustifiable assumptions (Press Release by the European Commission, 2015). In addition, the remuneration established was found to be too low as well. The Commission questioned the comparable companies list used – they were 66 companies, some of which conducted different financial activities from FFT, with two even being central banks. The Commission also questioned the decision of considering FFT as a “low risk” company (Cachia, 2017). Given the results of the investigation, the Commission estimated that FFT had only paid one twentieth of what it would have paid in Luxembourg under normal market conditions. This meant FFT must pay €20 to €30 million euros back to the government.

Unsurprisingly, all companies and Member States involved appealed the Decisions of the Commission. All the appeals have some common ground and are based on virtually the same arguments, which are also supported by many scholars and commentators. The first one calls into question the European Commission’ application of the arm’s length principle. Given the lack of harmonization on transfer pricing laws, it is normal to assume that there are divergences on the application of these laws among Member States, in particular when it comes to the arm’s length principle. Critics say that the Commission overlooked the fact that some Member States did not include the arm’s length principle in their regulatory frameworks (Lovdahl Gormsen, 2016; Thomson & Hardwick, 2017). Using this principle for the Decisions, was interpreted by many as the Commission trying to act as a supra-national tax authority, imposing its own judgement over its Member States (Lee, 2017). Importantly, the OECD guidelines are not binding under international law, thus Member States are not required to integrate the arm’s length principle in their national regulatory frameworks, as it is not even a part of EU law.

Furthermore, the Commission stressed in the Notice and in the Working Paper that if a Member State follows the OECD Guidelines in setting transfer pricing agreements, then they would unlikely result in state aid. Thus, MNCs can use other methods that are not set out by the OECD, as long as they comply with the arm’s length principle (Thomson & Hardwick, 2017). However, in the Decisions, the Commission strongly challenged the TNMM, in preference of the uncontrolled pricing method. Strangely, first, the Commission imposes a set of non-binding guidelines on Member States, then, when applying them, it gives its own interpretation, favoring some over others, without any precedent case law history to support this behavior.

Another issue with the Commission’s Decisions regards its apparent inability of proving selective advantage. First, it treated independent companies and integrated companies the same way, as factually and legally comparable. Then, it used as reference system the national ordinary general tax system rather than a narrower regulatory system on tax rulings (Verhagen, 2017). Moreover, the U.S. also heavily criticized the Commission's judgements by using the same arguments and stating that it should not seek retroactive recovery of aid (U.S. Department of the Treasury, 2016).

Given the strong controversy following the Decisions of the Commission, recently, there have been important updates on the issue of tax competition and state aid in the EU. The first key developments are the *Starbucks* overrule and *Fiat Finance & Trade* confirmation by the General Court of the European Union on September 24, 2019. Both Judgements provided some clarity on the many issues brought to the table by commentators and authors, even though some uncertainty remained. The Court confirmed the Commission's right to undergo investigations on tax rulings within the scope of Article 107(1) TFEU and to require a retroactive recovery of the aid. Thus, it accepts the requirement of aid recovery in case that state aid is proven. It also accepted the much-discussed use of the arm's length principle to check whether state aid is in place. Furthermore, the Court claimed that in order to prove that there is a selective advantage the Commission is required to bring a deep investigative analysis on the single ruling (e.g. it is not enough to say that methodological mistakes led to an outcome that made the measure selective, as the Commission claimed in *Starbucks*). The Court also accepted the use of the OECD guidelines and soft law, even though all legislation the Commission refers to had to be available at the time of the adoption of the tax measure.

It is not easy to determine the implications of these Judgements for other appeal cases. The Court seems to have strategically avoided taking a precise position on certain legal elements. Thus, it based its Judgements on case-related facts rather than providing clear guidance on the approach the Commission should have on cases of state aid. For instance, the Court did not give a specific legal opinion on the topic of reference systems *per se*, instead, it criticized the Commission's use of the same wrong assumptions when considering the narrower reference system in *Starbucks*.

The second important development is the recent election of Ursula Von der Leyen as President of the Commission. In her Political Guidelines for the next Commission, she claims that "fair taxation" is one of the main objectives of her political agenda (2019). In line with what has been done by the DG Competition under Vestager thus far, she claims that the current corporate tax legislations worldwide are not in line with the peculiarities of the contemporary digital economy; therefore, reforms are needed both at the EU and international level. Von der Leyen commits to reaching a wider harmonization of fiscal laws in the EU, specifically focusing on the taxation of big tech corporations, in line with the requirements outlined in the BEPS project.

Thus, given these important developments, this dissertation concludes by saying that we should expect a continued enforcement by the Commission in matters of state aid, specifically through harmonization efforts by the Commission and new investigations on individual tax rulings between Member States and MNCs. However, considering that the Judgements also made it clear that the Commission must be particularly thorough when proving the existence of an advantage granted to a tax ruling beneficiary (Skadden, Arps, Slate, Meagher & Flom LLP, 2019), we should also expect more precise investigations