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**How do Unilateral APAs overcome the issues of
legitimate expectations, tax transparency and state
aid in the European Union?**

by

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Abstract

Advance pricing arrangement (“APA”) becomes a common tool to attract foreign investors to carry out their business in the Member States’ territory. The advantage of APA which providing legitimate expectations to the taxpayers is one of the reasons of why the companies file an APA request to the tax authorities.

However, APAs are not free from issues or problems arose, especially in relation to the disruption of the harmony in the internal market within the European Union (“EU”). The unilateral APA will become a problem when it is implemented in the unlawful way and receives preferential tax treatment that may lead to the state aid infringement in the meaning of EU rules.

Yet, this matter could be solved by increasing the tax transparency which unilateral APAs are lack of. Thus, in order to answer the critical needs for tax transparency, the European Commission published the tax transparency package on 18 March 2015 as a proposal to introduce a quarter basis of automatically exchanging information in terms of Member State’s cross-border tax rulings and advance pricing arrangements.

Preface

This research thesis aims to answer the concerns that arise with regard to the APAs framework. I am happy and thankful that the Republic of Indonesia granted me the possibility to participate in one of the most valued programmes globally concerning international tax law.

In particular, I would like to thank my beloved family and friends in supporting me throughout this quest; with my special thanks go to Caroline Silalahi and Merijn de Beer, for their advice and encouragement during my graduate studies.

Abbreviation list

Aiki LP	Alki Limited Partnership
Amazon EU Sarl	Amazon EU Société à responsabilité limitée
APA	Advance Pricing Arrangement
BEPS	Base Erosion and Profit Shifting
Closed CV	Closed Dutch limited partnership
CSA	Cost-sharing arrangement
EC	European Commission
ECJ	European Court of Justice
EMEA	Europe, Middle East and Africa
EU	European Union
FFT	Fiat Finance and Trade Ltd
IP	Intellectual property
Lux SCS	Amazon Europe Technologies Holding SCS
MAP APA	Advance Pricing Arrangement under the Mutual Agreement Procedure
OECD Model Tax Convention	OECD Model Tax Convention on Income and Capital
SIGI	Société de Gestion Industrielle SA
SIAT	Société d'investissement pour l'agriculture tropicale SA
Starbucks BV	Starbucks Coffee EMEA B.V.
Starbucks Manufacturing	Starbucks Manufacturing EMEA B.V.
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

Tax transparency has become one of the major solutions to tackle harmful tax competition. In order to answer to the increasing need for tax transparency, the European Commission (“EC”) published the tax transparency package on 18 March 2015, as a proposal to introduce a quarter basis of automatically exchanging information between Member States. This was done in coherence with their cross-border tax rulings and advance pricing arrangements (“APA”).¹

When looking at the APAs, there have been numerous state aid proceedings that attracted the attention of the EC which responded by starting an in-depth investigation concerning the individual tax rulings issued by some Member States’ tax authorities – covering some unilateral APAs. Examples are the three transfer pricing arrangements that were conducted between the Irish tax authorities and Apple, the Dutch tax authorities and Starbucks and the Luxembourgish tax authorities and Fiat on 11 June 2014.² These investigations were followed by the proceedings subjected to Amazon in Luxembourg on 7 October 2014. The non-transparent individual tax rulings published by several Member States to certain taxpayers may involve European Union (“EU”) state aid rules since the counterpart tax jurisdictions would experience the disadvantage by reason of the particular taxpayers could possibly undervalue their taxable profit in the local tax jurisdiction.³

Following the statements of the Vice-President Valdis Dombrovskis who is responsible for the Euro and Social Dialogue, *“Everyone has to pay their fair share of tax. This applies to multinationals as to everyone else. With today’s proposal on the automatic exchange of information, tax authorities would be able to better identify loopholes or duplication of tax between Member States. In the coming months, we will put forward concrete actions to tackle such loopholes or overlaps. We are committed to following up on our promises with real, credible and fair action”*⁴, the EC amended the Directive on Administration Cooperation⁵ and resulted in adoption of the regulation by the Council in December 2014 to ‘ensure that the EU has a

¹ European Commission Press Release, *Combating corporate tax avoidance: Commission presents Tax Transparency Package*, http://europa.eu/rapid/press-release_IP-15-4610_en.htm as accessed on 3 May 2015.

² http://www.stateaidlaw.eu/46_193_news_2716.php as accessed on 14 May 2015.

³ European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg*, http://europa.eu/rapid/press-release_IP-14-1105_en.htm as accessed on 14 May 2015.

⁴ *Ibid.*

⁵ Council Directive 2014/107/EU amending Directive 2011/16/EU.

solid legislative framework for the automatic exchange of information and spells the definitive end of bank secrecy for tax purposes across the EU’⁶. This amendment is considered as a significant achievement in increasing the tax transparency within the EU.

These concrete steps by the EC are in line with the Action Plan 13 of Organization for the Economic Cooperation and Development’s (“OECD”) Base Erosion and Profit Shifting (“BEPS”) project, which was delivered on September 2014. Action Plan 13 which was named “Guidance on Transfer Pricing Documentation and Country-by-Country Reporting” provides a standardized structure for transfer pricing documentation and a guidance for three documents that should be produced by the taxpayers. Those documents comprise of a master file, a local file and a country-by-country report.⁷ These actions are essential to tackle the BEPS issue by ‘providing tax administrations with adequate information to conduct transfer pricing risk assessments and examinations’ as a part of the structural increase of tax transparency.

APA itself, which is initiated by the request from taxpayers, has three different types i.e. unilateral, bilateral and multilateral APAs. Dissimilar to bilateral and multilateral APAs, unilateral APAs cannot eliminate either the juridical or economic double or non-taxation since not all relevant countries participate to produce the unilateral APAs.⁸ This results in the issue that Unilateral APAs may create significant problems to both tax administrations and taxpayers since the other tax jurisdictions may have a different judgement with regard to the transfer pricing methods or range of acceptable pricing that was concluded in the APA.⁹

The matter of unilateral APAs is not only with respect to the tax transparency, as explained in the abovementioned. One of the objectives to obtain APAs is increasing the legitimate expectations between taxpayers and tax administrations. Yet, due to the exclusion of other tax authorities from which the transactions are covered by the APA, the legitimate expectations that should be provided by the unilateral APAs will have no influence since the counterpart party is not bound by such an APA. Thus, the taxpayers will lose their advantage of the legitimate expectations even though they have obtained the unilateral APAs.

⁶ European Commission, *Communication from the commission to the European Parliament and the Council on tax transparency to fight evasion and avoidance*, p. 3.

⁷ OECD (2014), *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, <http://dx.doi.org/10.1787/9789264219236-en>, p. 9.

⁸ OECD (July 2010), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD Guidelines”)*, OECD Publishing, para. 4.145.

⁹ See para. 4.147 and 4.148 of the OECD Guidelines.

When addressing the needs to increase the legitimate expectations level through APAs, the legal certainty principle is a fundamental principle in the EU law ‘which requires the law to be clear, easily accessible, comprehensible, prospective rather than retrospective and relatively stable.’¹⁰ However, APA is not considered as a law but an agreement or contract, since APA is executed based on the factual information provided by the taxpayers to the competent authorities. Thus, APA is not an interpretation of the law where the legal certainty principle applies. Yet, APA itself has the legal consequences when it is executed not in accordance with the EU law. This means that obtaining APA may breach EU law, which in this case is the EU state aid rules.

1.2 Aim

With a view of the background presented, the purpose of this thesis is to examine whether the unilateral APAs include a risk of infringing the EU law. The unilateral APAs that are granted inappropriately with its aim to increase the level of legitimate expectations for the taxpayers may lead to the breach of EU state aid rules. Also, the non-transparent unilateral APAs to the other tax jurisdictions may result to the harmful tax competition between Member States since the other counterpart parties do not aware with the APAs’ presence.

This thesis will as well provide the solutions to overcome the issues mentioned above for unilateral APAs.

1.3 Method and material

The methodologies used for this thesis are to take the on going issues that the EC investigated in the state aid reviews and fetch support in the several European Court of Justice (“ECJ”) cases law. In order to have a better understanding with regard to APAs, the OECD Model Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“OECD Guidelines”) have been used extensively in this study.

1.4 Delimitation

From a geographical perspective, the APA issues will be limited to the member states that enforce unilateral APAs within the EU. The issues analysed will be only limited to the state aid proceedings and several relevant ECJ case law. The understanding of APAs is based on the OECD Model Tax Convention and OECD Guidelines in accordance to the transfer pricing issues.

¹⁰ Dennis Weber and Thidaporn Sirithaporn, *Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law*, p. 235.

1.5 Outline

This research is structured in different sections. A description of the problem area will be given in the introduction chapter, pointing out the feasibility of the study. Furthermore, the purpose and delimitations will describe the scope and motivation for the study.

Chapter two will introduce and define the legal phenomenon known as APAs, followed by an extensive description of state aid proceedings in chapter three. Chapter four discusses the ECJ case law and its relation to the APAs and tax law regimes. The following chapter explains the legality issues in relation to the APA. Chapter six explains about the today's tax transparency package which it will help to increase the level of legitimate expectations for the taxpayers while obtaining the unilateral APAs.

Concluding remarks will be made in chapter seven, wherein the findings of the study are presented.

2. An introduction to APA

2.1 Understanding the APA

The OECD Guidelines describes APA as:

*“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”.*¹¹

The controlled transactions in the description above indicate that the transactions occur between two or more entities which have a special relationship with one another. APA could also be interpreted as

*“A procedural arrangement between a taxpayer or taxpayers and a tax administration intended to resolve potential transfer pricing disputes in advance”.*¹²

There are three different types of APAs, which are defined as unilateral, bilateral or multilateral APAs. An extensive description is given in the next paragraph:

The arrangements that are conducted solely between a taxpayer and a tax administration under the domestic law and jurisdiction ‘without the involvement of other interested tax administrations’ refer to unilateral APAs.¹³ Unilateral APAs have some advantages such as (1) providing certainty to the taxpayer for the ‘specified period of time’, (2) more simplified procedures to acquire the APA compare to bilateral and multilateral APAs, (3) and it decreases the time and cost in case of tax audit to the bare minimum level.¹⁴ However, the unilateral APAs do not prevent the double taxation by the reason of the other tax jurisdiction is not directly involved and might disagree with the APA’s conclusion.¹⁵ This situation could emerge when the taxpayer over-allocates income ‘in order to avoid lengthy and expensive transfer pricing enquiries or excessive penalties’ in which the APA is concluded. It could therefore shift its administrative burden to the other tax jurisdiction.¹⁶ This means that the legitimate expectations that were designed to be the advantage for the taxpayer in the

¹¹ See para. 4.123 of the OECD Guidelines.

¹² See para. 3 of the annex to Chapter 4 of the OECD Guidelines.

¹³ See para. 4.129 and para. 5 of the annex to Chapter 4 of the OECD Guidelines.

¹⁴ See para. 4.142 of the OECD Guidelines and Ina Kerschner and Marion Stiahtny, *The Experience with Advance Pricing Agreements*, Intertax Vol. 41 Issue 11, Kluwer Law International BV p. 588.

¹⁵ See para. 4.147 of the OECD Guidelines.

¹⁶ *Ibid.*

country in which APA is concluded, will lead to much less valuable when the APA is proved as inconsistent to the arm's-length principle. As the OECD states, the unilateral APAs may create significant problems to both tax administrations and taxpayers since the other tax jurisdiction may have a different judgement with regard to the transfer pricing methods or range of permissible pricing that was concluded in the APA.¹⁷

Bilateral APA is a 'single mutual agreement between the competent authorities of two tax administrations under the relevant party'. Multilateral APA is the occurrence of more than one bilateral mutual agreement which consists of tax authorities from more than two countries.¹⁸ Both bilateral and multilateral APAs are invoked to advance pricing arrangements under the mutual agreement procedure ("MAP APAs"), which is considered to be within the scope of article 25 of the OECD Model Tax Convention on Income and on Capital ("OECD Model Tax Convention") i.e. the mutual agreement procedure. In paragraph 3 of the article, it states that:

*"The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may consult together for the elimination of double taxation in cases not provided for in the Convention."*¹⁹

One of the main objectives of APAs is to reduce the risk of double taxation, hence seeing the above-mentioned paragraph, it is considered that 'APAs are authorised by paragraph 3 of article 25 because the specific transfer pricing cases subject to an APA are not otherwise provided in the Convention'.²⁰ It is in accordance with the facts that bilateral or multilateral APAs provide greater level of legitimate expectations for both taxpayers and tax administrations than Unilateral APAs. However the costs combined with time-consuming procedures to obtain such APAs are generally much more higher and longer than Unilateral APAs.²¹

¹⁷ See para. 4.147 and 4.148 of the OECD Guidelines.

¹⁸ See para. 5 of the annex to Chapter 4 of the OECD Guidelines.

¹⁹ See para. 3 of the art. 25 of the OECD Model Tax Convention.

²⁰ See para. 4.139 of the OECD Guidelines.

²¹ See para. 4.145 and 4.158 of the OECD Guidelines.

3. State aid rule and APAs proceedings in the EU

3.1 State aid rule in the EU law

The commissioner for Taxation, Algirdas Šemeta, stated in the press release on 11 June 2014 that:

“Fair tax competition is essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level-playing field between our businesses. Our social and economic model relies on it, so we must do all we can do to defend it.”²²

The general rule of State Aid is incompatible with the internal market. However there are some justifications and measures which can be applied to permit the State Aid and allow it to be compatible to the internal market, such as stated in the Article 107 (2) and (3) TFEU, de minimis aid and the General Block Exemption Regulation.

In order for a measure to be qualified as State Aid, all conditions stemming from Article 107 (1) TFEU must be fulfilled:

- a. Aid granted by a Member State or through State resources;
- b. Selective economic advantage;
- c. Distortion of competition; and
- d. Affectation of trade between Member States.

The selectivity advantage factor is assumed to be the main measurement to determine ‘whether there is a specific target group that benefits from the measure whilst other economic agents do not’.²³ Thus, the selectivity test, which consists of three steps, is performed to differentiate between ‘general economic measures and selective measures’, as follows:

- a. ‘The ‘common’ or ‘normal’ tax system of Member States should be recognized;
- b. Determine whether the tax measure at issue grants an advantageous deviation from the ‘normal’ tax system; and

²² European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)*, http://europa.eu/rapid/press-release_IP-14-663_en.htm as accessed on 17 March 2015.

²³ M. Lang, P. Pistone, J. Schuch and C. Staringer, *Introduction to European Tax Law on Direct Taxation*, 3rd edition, Linde, p. 109.

- c. Examine whether the exception to the system or differentiation within the system may be justified by the nature or general scheme of the tax system.’²⁴

3.2 APAs proceedings in the EU

The following proceedings are the state aid reviews which drew the attention of the EC and thus opened the in-depth investigation to examine whether those Member States comply with the EU rules on state aid. These proceedings have to deal with the tax rulings on transfer pricing arrangements between the competent authorities and taxpayer(s) that involve state aid within the meaning of EU rules.

- **Amazon (SA.38944)**

Amazon filed an APA request to the Luxembourgish tax authorities on 23 October 2003 with regard to the royalty pricing arrangement between Amazon Europe Technologies Holding SCS (“Lux SCS”) and Amazon EU Société à responsabilité limitée (“Amazon EU Sarl”). The tax authorities approved the request on 6 November 2003, which was only 11 working days from the date that Amazon submitted the letter and remained valid for the next 10 years. The EU Commission investigated if the transfer pricing arrangements on corporate taxation of Amazon in Luxembourg were complying with the EU rules on state aid.²⁵

Amazon.com Inc entered into a cost-sharing arrangement (“CSA”) with its Luxembourg affiliate, Lux SCS, where it was entitled to exploit the intangibles in Europe.²⁶ Because of the buy-in license and cost-sharing agreement, Lux SCS could consequently license the Amazon group’s intellectual property (“IP”) rights to Amazon EU Sarl, a Luxembourg commercial company which functions as the head office of Amazon in Europe, to run the European websites.²⁷ Amazon EU Sarl itself holds all the shares in the EU Marketing subsidiaries outside Luxembourg, either direct or indirect.²⁸

In the APA request letter dated 23 October 2003, Amazon presented the economic analysis of functions and risks that would be borne by

²⁴ M. Lang, *op.cit.*, p. 110.

²⁵ European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg*, http://europa.eu/rapid/press-release_IP-14-1105_en.htm as accessed on 23 February 2015.

²⁶ Lowell D. Yoder, *Recent Transfer Pricing Cases*, International Tax Journal (September–October 2014), CCH Wolters Kluwer, p. 3.

²⁷ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 18 and 19.

²⁸ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 31.

Amazon EU Sarl and the determination of the royalty calculation based on the analysis.²⁹ However, the Luxembourgish tax authorities did not submit the copy of the analysis to the EC. As stated in the letter, the determination of royalty rate and payment from Amazon EU Sarl to Lux SCS was as follows:

“1) Compute and allocate to Amazon EU Sarl the “Amazon EU Sarl Return”, which is equal to the lesser of (a) [4-6] % of Amazon EU Sarl’s total EU Operating Expenses for the year and (b) total EU Operating Profit attributable to the European Web Sites for such year;

(2) The Licence Fee shall be equal to EU Operating Profit minus the Amazon EU Sarl Return, provided that the License Fee shall not be less than zero.

(3) The Royalty Rate for the year shall be equal to the License Fee divided by total EU Revenue for the year.

(4) Notwithstanding the foregoing, the amount of the Amazon EU Sarl Return for any year shall not be less than 0.45% of EU Revenue, nor greater than 0.55% of EU Revenue.

(5) (a) In the event that the Amazon EU Sarl Return determined under step (1) would be less than 0.45% of EU Revenues, the Amazon EU Sarl Return shall be adjusted to equal the lesser of (i) 0.45% of Revenue or EU Operating Profit or (ii) EU Operating Profit (b) In the event that the Amazon EU Sarl Return determined under step (1) would be greater than 0.55% of EU Revenues, the Amazon EU Sarl Return shall be adjusted to equal the lesser of (i) 0.55% of EU Revenues or (ii) EU Operating Profit.”³⁰

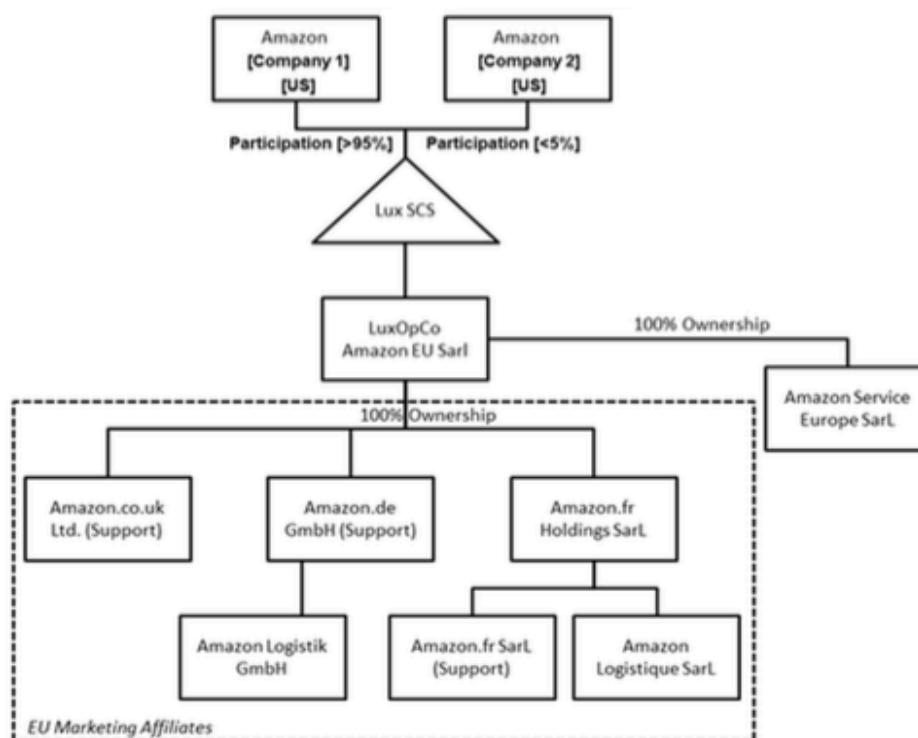
As Lux SCS was established as a Luxembourg limited liability partnership, it is considered to be a transparent entity for the tax purposes in Luxembourg.³¹ The following figure is the structure of the Amazon group companies.³²

²⁹ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 35.

³⁰ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 37.

³¹ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 39.

³² *Ibid.*, p. 10.



Source: State aid SA.38944

In other words, all the royalty payments received from the licensing agreement and interest received from intra-group loans by Lux SCS would not be taxed in Luxembourg in principle, as it would be taxed in the country of residence of the partners in Lux SCS to whom the profits were allocated on a yearly basis.³³

The problem became more complicated when Amazon requested confirmation from the Luxembourgish tax authorities that no partners of Lux SCS or Lux SCS itself have any tangible presence in Luxembourg, such as employees or offices.³⁴ While Lux SCS was not deemed to be operating through a permanent establishment in Luxembourg, the non-resident partners of the Lux SCS or Lux SCS itself was not taxed in Luxembourg.³⁵

In connection to the explanation above, ‘the Commission has concerns that the ruling could underestimate the taxable profits of Amazon EU Sarl, and thereby grant an economic advantage to Amazon by allowing the group to pay less tax than other companies whose profits are allocated in line with market terms.’³⁶ The EC argued that Luxembourg did not submit a transfer pricing report prepared by Amazon as a supporting document to request the APA nor the

³³ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 39.

³⁴ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 40.

³⁵ *Ibid.*

³⁶ Press release Luxembourg, *op.cit.*

economic analysis with regard to the functions and risks that Amazon EU Sarl was expected to perform. Moreover, as described in the definition of royalty rate above, the EC pointed out that the royalty payment is a residual profit which means that ‘the royalty will be expressed as a percentage of revenues’ instead of being calculated based on the revenues.³⁷ That is to say the royalty payment is just a predictable number and does not give consideration to the actual functions and risks carried out by the company.

- **Starbucks (SA.38374)**

The EC investigated APA concluded by the Netherlands with Starbucks Manufacturing EMEA BV (“Starbucks Manufacturing”) where the Dutch tax authorities agreed to the set-up of the Starbucks Dutch companies’ legal structure and the arm’s-length remuneration amounts to 9-12 % mark-up on the relevant cost base (which is the value added cost).³⁸

Alki Limited Partnership (“Alki LP”), a UK Limited partnership, owns Starbucks BV and gives license of the intellectual property rights to Starbucks Coffee EMEA BV (“Starbucks BV”), the head office for Europe, Middle East and Africa (“EMEA”) segment.³⁹ Starbucks BV also has a direct subsidiary, a Dutch company, called Starbucks Manufacturing.⁴⁰ Both of these Dutch companies pay royalties to Alki LP in relation to the intangible rights.⁴¹ The figure below shows the structure of Starbucks group companies.⁴²

³⁷ State aid SA.38944 (2014/C) Luxembourg, *op.cit.*, para. 67.

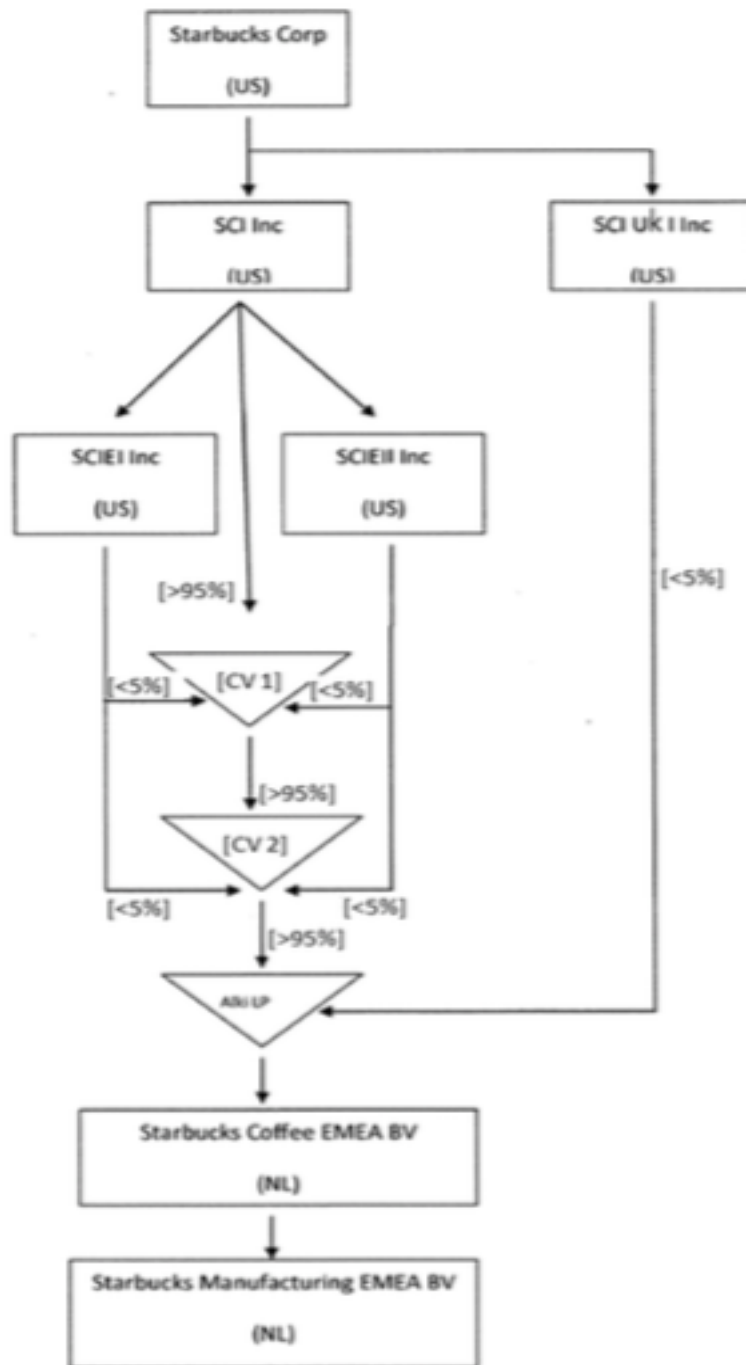
³⁸ SA.38374 (2014/C) Starbucks, *op.cit.*, para. 17, 30 and 31.

³⁹ European Commission, State aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Netherlands alleged aid to Starbucks, para. 22.

⁴⁰ *Ibid.*

⁴¹ SA.38374 (2014/C) Starbucks, *op.cit.*, para. 22 and 23.

⁴² SA.38374 (2014/C) Starbucks, *op.cit.*, p. 9.



Source: State aid SA.38374

According to Dutch tax law, Alki LP is similar to a closed Dutch limited partnership (closed CV), hence it is not liable to corporate income tax.⁴³ In other words, the royalty payments made to Alki LP are considered as direct payment to Starbucks US from a Dutch tax

⁴³ SA.38374 (2014/C) Starbucks, *op.cit.*, para. 28.

perspective.⁴⁴ Also, since Alki LP is a UK limited partnership, the company does not have an obligation to file accounts in UK.⁴⁵

The problem arose when Starbucks Manufacturing paid the excess profit beyond the 9-12% mark-up to Alki LP as a tax deductible royalty for ‘manufacturing process patent’ in order to meet the pricing agreed in the APA – where the taxable profit should only be on position of 9-12% of Starbucks Manufacturing’s operating expenses.⁴⁶ This means that the royalty payment made to Alki LP did not reflect the value of the IP at all. Because the APA was used to calculate the corporate income tax basis of Starbucks Manufacturing and the royalty payment also took place on the basis of the APA issued by the Dutch tax authorities, the decrease of the taxable basis through the royalty expense can be concluded as ‘the APA gives rise to a loss of State resources’.⁴⁷

- **Fiat (SA.38375)**

The Fiat investigation may be the tensest APA proceeding between the competent authorities and the EC. Fiat Finance and Trade Ltd (“FFT”) requested a transfer pricing arrangement by submitting a letter and transfer pricing report as supporting document to Luxembourgish tax authorities on 14 March 2012. Tax authorities accepted this request on 3 September 2012 by issuing a decision letter which was binding for the next five years i.e. from tax year 2012 to tax year 2016. However, to obtain all the information needed in order to examine whether Luxembourgish tax authorities comply with the state aid rules, the EC had to issue an information injunction decision which the Luxembourg authorities appealed later on.

FFT is a treasury and finance company based in Luxembourg which is owned by Fiat S.p.A (approximately 40%), the head of Fiat Group based in Italy; and Fiat Finance S.p.A. (approximately 60%), a wholly-owned subsidiary of Fiat S.p.A. Within the Group, Fiat centralises its financial and treasury functions, including all funding, corporate finance, bank relationship, cash pooling, cash balances management, etc. by the treasury companies.⁴⁸ ‘FFT itself provides treasury services and financing to Fiat Group companies based mainly in Europe excluding Italy and also manages several cash pool

⁴⁴ SA.38374 (2014/C) Starbucks, *op.cit.*, para. 28.

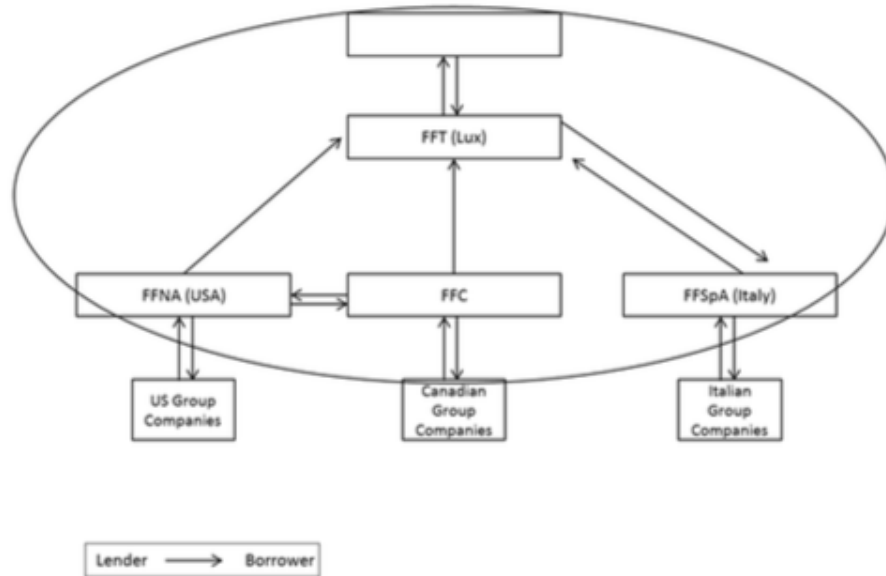
⁴⁵ *Ibid.*

⁴⁶ SA.38374 (2014/C) Starbucks, *op.cit.*, para. 58.

⁴⁷ SA.38374 (2014/C) Starbucks, *op.cit.*, para 70 and 71.

⁴⁸ European Commission, State aid SA.38375 (2014/NN) (ex 2014/CP) – Luxembourg alleged aid to FFT, para. 23.

structures for the group companies'.⁴⁹ The following figure shows the structure of FFT intra-sector transactions.⁵⁰



Source: State aid SA.38375

As seen from the picture above, FFT's cross-border intra-group transactions occur between treasury companies and between the group companies. The intercompany transactions are intercompany loans and intercompany guarantees on the bonds issued.⁵¹

In the APA agreed by the Luxembourg authorities, the remuneration was determined as follows,

“The transfer pricing study determines an appropriate remuneration on the capital at risk and the capital aimed at remunerating the functions performed by the company of EUR 2.542 million on which a range of +/- 10% is envisaged”⁵²

where the standard tax rate applied is 28.80% and this remuneration is considered arm's length and will not have any adjustment within the five-years period.

For the purpose of APA, the remuneration for the functions and risks performed by FFT is calculated on the basis of the Capital Asset Pricing Model, which is used to determine the arm's-length margin of a net profit indicator i.e. equity. As explained above, the tax base is

⁴⁹ State aid SA.38375 FFT, para. 21.

⁵⁰ State aid SA.38375 FFT, para. 23.

⁵¹ State aid SA.38375 FFT, para. 26.

⁵² State aid SA.38375 FFT, para. 37.

fixed at EUR 2.542 million (+/- 10%) which could be translated to a fixed range for taxable basis of 2.288 to 2.796 million.⁵³ This means that the tax base is virtually fixed – unless FFT could maintain the stable business in the duration of tax ruling which unfortunately there is no information about the guarantee or how FFT would achieve the stable condition.⁵⁴

3.3 Analysis of the APAs proceedings

As explained in the previous section, one of the main objectives of obtaining APAs is to increase the level of legitimate expectations between taxpayers and tax administrations. From the above-mentioned proceedings, it is clear that the taxpayers expect to ensure their legitimate expectations with respect to the tax liability in each Member States.

Article 9 of the OECD Model Tax Convention sets the international standard of the arm's-length principle, where the commercial or financial relations between two associated enterprises should not differ from those which would be made between independent enterprises. However, the APAs concluded by the competent authorities and taxpayers in the proceedings enclosed show that the arm's-length principle is infringed and being investigated by the EC.

It is obvious that the taxpayers and parties who are involved and gain the advantage from the APAs would never complaint or raise any objections to the court or the EC. However, since it is an unilateral APA, the secrecy remains in the domestic law and the counterpart tax jurisdictions will have difficulties to find out without the exchange of information. Same condition goes to the EC. Thus, the unilateral APAs become a new strategy for particular taxpayers in certain Member States to avoid tax and harm the tax competition which infringes the state aid rules within the EU and the arm's-length principle with regard to the transfer pricing issues. At the time when the unilateral APAs are not transparent to other relevant tax jurisdictions, the APAs have lost the legitimate expectations and will become unaccountable.

As a matter of fact, when the Member States grant the APA request to the domestic taxpayers based on purely discretionary exercise of authorization as described in the above three state aid proceedings, they are considered as providing the selective advantage to a specific companies which constitute illegal state aid within the EU.

⁵³ State aid SA.38375 FFT, para. 64.

⁵⁴ *Ibid.*

4. ECJ Case Law

4.1.1 ECJ case law in relation to APAs

- SIAT⁵⁵

Société d'investissement pour l'agriculture tropicale SA ("SIAT") is a Belgian resident company which established a joint subsidiary with a Nigerian group for the production of palm oil.⁵⁶ Under on the agreement the between parties, SIAT has to supply services and sell equipment to the joint subsidiary where, as the commission for introducing the business, SIAT has to pay a Luxembourg company named Megatrade International (the company heading of Nigerian Group) a give back part of the profit.⁵⁷ SIAT recorded the payment of commission as business expenses, which was denied by the Belgian tax authority. SIAT challenged the decision and the court referred the case to the ECJ for a preliminary ruling, questioning the compatibility of the Belgian tax rules with the article 56 of the Treaty on the Functioning of the European Union ("TFEU") i.e. freedom to provide services.⁵⁸

Under the Belgian tax rules, there is a general rule for the domestic transactions where the taxpayer has to provide proof of the authenticity and amount of the expenditure incurred; and the expenditure is necessary for acquiring the taxable income.⁵⁹ While under the special rule, there is a presumption from the beginning that the expenses are not deductible 'unless the Belgian taxpayer provides proof that such payments relate to a genuine and proper transaction'.⁶⁰ This special rule applies when a tax regime is appreciably more advantageous than the applicable regime in Belgium.

Three possible justifications were argued to the court, stating that it is need in order to combat tax avoidance and evasion, balance the allocation of taxing powers and ensure the effectiveness of fiscal supervision. However, the Court stated that the rule does not meet the requirement of the principle of legal certainty where the 'rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings', considering that the Belgian tax

⁵⁵ C-318/10, *SIAT*, 5 July 2012.

⁵⁶ C-318/10, *SIAT*, para. 8.

⁵⁷ C-318/10, *SIAT*, para. 9.

⁵⁸ C-318/10, *SIAT*, para. 14.

⁵⁹ C-318/10, *SIAT*, para. 21.

⁶⁰ C-318/10, *SIAT*, para. 17.

authority does not require to provide *prima facie* evidence of tax evasion or avoidance.⁶¹ Thus, the rule cannot be considered to be proportionate.

- **P Oy**⁶²

P Oy, a company incorporated in Finland, requested to deduct the losses incurred between the tax years 1998 and 2004 to the Finnish tax authorities on 3 September 2008.⁶³ P Oy changed the ownership shares in August 2004. However, the competent tax authorities rejected the request considering there were no special reasons to justify the grant of authorisation.

The Finnish law allows the application for a loss carry forward up to 10 years, unless more than 50% of the company's shares are changed.⁶⁴ Nevertheless, when it is necessary to change the ownership for the purpose of company's activities named 'special reasons', the tax authorities may grant the company to deduct the losses.⁶⁵

After the rejection, P Oy appealed to the Supreme Administrative Court which referred the case for a preliminary ruling to the ECJ considering whether the Finnish law constitutes state aid, particularly for the criterion of selectivity requirement.⁶⁶

Since the law was established before Finland joined the EU on 1995, the court decided that it was classified as an existing aid.⁶⁷ The court also stated that in order to identify the selectivity condition, it was necessary to examine the reference system, named the 'normal' system, tax regime in relation to the exception provided by the Finnish tax authorities.⁶⁸

- **Oy AA**⁶⁹

Oy AA is a Finnish resident company which is owned indirectly 100% by AA Ltd, the parent company established in the United Kingdom. The indirect subsidiary wants to give a group contribution of its profits to AA Ltd, due to its loss in 2003 and it is expected to continue the losses in 2004 and 2005. Thus, Oy AA applies for a preliminary decision from the Finnish Central Tax Board 'as to whether the

⁶¹ C-318/10, *SIAT*, para. 55 and 58.

⁶² C-6/12, *P Oy*, 18 July 2013.

⁶³ C-6/12, *P Oy*, para. 10.

⁶⁴ C-6/12, *P Oy*, para. 4-6.

⁶⁵ C-6/12, *P Oy*, para. 7 and 8.

⁶⁶ C-6/12, *P Oy*, para. 11

⁶⁷ C-6/12, *P Oy*, para. 43.

⁶⁸ C-6/12, *P Oy*, para. 32.

⁶⁹ C-231/05, *Oy AA*, 18 July 2007.

transfer envisaged constituted an intra-group financial transfer under Finnish law and could therefore be regarded as a tax-deductible expense'.⁷⁰

The Finnish law itself provides the possibility to gain the tax advantage by having a deduction of an intra-group financial transfer if the parent company holds at least 90% of the capital or shares of the subsidiary. The contribution is tax deductible for the distributor and taxable for the recipient. In the case of Oy AA, all requirements for a group contribution are met, except for the fact that the recipient of the contribution is not resident in Finland. As a consequence, Oy AA could not deduct the contribution. Oy AA objects the decision made by the Finnish tax authorities and goes to the court by arguing that nationality clause conflicted with the free movement of capital and freedom of establishment.

The Member States involved argue for the justification of the restriction on freedom of establishment which the ECJ accepted i.e. the need to safeguard the balanced allocation of the power to tax between Member States, the risk of the losses might be used twice and the prevention of tax avoidance.⁷¹

As a conclusion of the court, the ECJ stated that 'the lack of a cross-border dimension to the Finnish rules was a proportionate and necessary response to the twin problems of not being able to tax the profits of group companies arising on its territory and preventing tax avoidance through the artificial of profits to other member states to achieve a tax saving'.⁷²

The Oy AA case shows that the protection of balance in the allocation of taxing rights between Member States is important to tackle tax avoidance involving wholly artificial arrangements.

- **SGI**⁷³

Société de Gestion Industrielle SA ("SGI") is a holding company incorporated under Belgian law which granting an interest-free loan to Recydem SA, a company incorporated under French law.⁷⁴ SGI holds 65% shares of Recydam SA. While a Luxembourg company,

⁷⁰ European Commission Legal Service, *Summaries of important judgments C-231/05 Oy AA, judgement of 18 July 2007.*

⁷¹ C-231/05, *Oy AA*, para. 53-58.

⁷² Tom O'Shea, *News Analysis: Finland's Intragroup Financial Transfer Rules Compatible with EU Law*, Tax Notes International Vol 47 No. 7, p.4.

⁷³ C-311/08, *Société de Gestion Industrielle SA (SGI) v. Belgian State*, 21 January 2010.

⁷⁴ C-311/08, *SGI*, para. 9.

Cobelpin SA, owns 34% shareholding in SGI and also a director and managing director of SGI.

The Belgian authorities challenged the interest-free loan transaction from SGI to Recydem SA and added a notional interest of 5% of the amount granted back to SGI's profits, as ruled under the domestic law provision.⁷⁵ Under the Belgian rules, the amount of exceptional or gratuitous advantages granted to the non-resident related party will be included in the tax base of the Belgian company and taxed accordingly.⁷⁶ In the national court, the matter came considering the national provision might be incompatible with the freedom of establishment and/or the free movement of capital in the EU.

Two justifications were scrutinized to accept the restrictions of the freedom i.e. the need to safeguard the balanced allocation of taxing rights between the Member States and the need to prevent tax avoidance.⁷⁷

In conclusion, The ECJ stated that the Belgian tax rules at issue were proportionate and, 'subject to verification of the proportionality issue by the referring court in Belgium, such rules were justified and proportionate'.⁷⁸

4.1.2 Analysis and comparison

SIAT is one of the transfer pricing cases where it paid a commission fee as business expenses to the parent company of its joint subsidiary in Luxembourg. In that case, the presumption that each and every time the taxpayer pays to foreign affiliate is considered as tax avoidance may always be incompatible with the freedom of providing services. This could happen because the tax authorities suspect the creation of artificial arrangements which do not reflect economic activity. However, obtaining the APA could solve this matter as taken place in SIAT case, as long as it is transparent. In short, the APA will bring the actual transactions and information of economic activity to the tax authorities.

As mentioned in the Introduction, in the name of the principle of legal certainty, the law has to be stated clearly and publicly. Yet, the problem in P Oy case lies under the uncertain circumstances of 'special reasons' to grant the loss carry forward application. This matter will lead to a higher risk that

⁷⁵ C-311/08, *SGI*, para. 12.

⁷⁶ C-311/08, *SGI*, para. 3 and 15.

⁷⁷ C-311/08, *SGI*, para. 60, 65 and 69.

⁷⁸ C-311/08, *SGI*, para. 75 and Tom O'Shea, *Case Notes on the Direct Tax Jurisprudence of the Court of Justice of the European Union*, p.7.

such law favours certain undertakings and may constitute an unlawful state aid.

While for Oy AA and SGI cases, they have different circumstances but similar patterns. Either Finnish tax authorities or Belgian authorities argued that the restriction of law is needed to tackle the tax avoidance and harmful tax competition. This restrictive legislation, which is made by proportionate justifications, also creates a clear, transparent and definite rule for the taxpayers to follow and be bound by the law. Despite the restrictive tax provision will not likely attract Multinational Enterprises (MNEs) to their territory, yet the Member States could possibly maintain the balance in the allocation of taxing rights and protect against the tax avoidance between entities resident in one Member State and the related parties established in other Member States.

While compared to the APAs cases explained in the previous section, the Member States provide an attractive tax provision by granting the APAs requests. However, when the unilateral APAs are granted in inappropriate manner and tend to be secrecy from outside but local jurisdictions only, the APA itself would never pass the test of proportionality in the case law of the court and will lose the legitimate expectations advantage as one of its main objectives. Thus, in order to increase the legitimate expectations level of APAs, the EC has come with a package of transparency, which will be described in the next section.

4.2.1 ECJ case law in relation to tax low regimes

ECJ, Joined Cases C-182/03 and C-217/03 *Belgium v. Commission (Belgian Coordination Centres)* was about a ‘coordination centre’ which was created by group of multinational companies aimed to provide services in the financial field for those companies; where in 1982, the Belgian authority offered a special scheme particularly in the tax sector that was beneficial for such centres.⁷⁹ Some benefits provided were the exemption for property tax, the exemption from capital duty and the exemption from withholding tax.

The Commission began the investigation procedure in December 1985, followed by the amendments from the Belgian Government in August 1986 which closed the procedure since the amendments provided the compatibility with Article 107 of the TFEU.⁸⁰ Subsequently, there were

⁷⁹ Opinion of Advocate General Léger delivered on 9 February 2006 – Joined Cases C-182/03 and C-217/03.

⁸⁰ 2003/755/EC: Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (Text with EEA relevance.) (notified under document number C(2003) 564) – official Journal L 282, 30/10/2003 P. 0025-0045.

several communications had been done between the Belgian Authorities and the Commission which finally triggered the Commission to ask the interested parties to make their comments on the measure known in 2002.

European Commission, 2006/940/EC, Commission Decision of 19 July 2006 on aid scheme C3/2006 implemented by Luxembourg for 1929 holding companies and billionaire holding companies concerned a scheme in Luxembourg which exempt the billionaire holding companies from taxes under the 1929 Law. The Organic Law of 31 July 1929 introduced a tax vehicle which allowed the operating companies in a multinational group to distribute the profits while avoid the tax of profits that belongs to the beneficiary holding companies and distributed it to the shareholders. Under the 1929 Law, those holding companies were not subject to corporate income tax (*impôt sur le revenu des collectivités*), municipal business tax (*impôt commercial communal*) and net worth tax (*taxes ur la valeur nette*). However, they were liable to the taxes on capital, such as the real estate tax (*impôt foncier*) and the annual subscription tax (*taxe d'abonnement*). Dividends, interest, royalties and capital gains were also exempted from the 1929 holding companies.⁸¹

After several examinations, the Commission decided that the scheme constituted aid which was incompatible with the common market in July 2005.

The next case was the Grand Chamber Case between the European Commission and Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland in joined cases C-106/09 P and C-107/09 P. The Commission decided to start a formal investigation regarding Gibraltar's two corporate tax measures i.e. 'exempt companies' (OJ 2002 C 26, p.13) and 'qualifying companies' (OJ 2002 c 26, p.9) to fulfill the requirement of the 'exempt companies'.

The criteria formed the assessment which was adopted by the tax system that allows some companies to be recognized in order to gain selective advantages. In other words, it was characterized as 'the recipient undertakings', which was a privileged category constituted as favoring 'certain' undertakings within the meaning of the Article 107 (1) TFEU. As the matter of fact, the offshore companies, which were group of companies based on the assessment adopted in the proposed tax reform, avoided the taxation due to their specific characteristic of the group benefited from the selectivity advantages.

⁸¹ 2006/940/EC: Commission Decision of 19 July 2006 on aid Scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies – notified under document number C (2006) 2956).

4.2.2 Analysis

Article 107 (1) of TFEU provides that ‘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 common market’.

The Commission held the investigations on coordination centres in Belgium on the ground that those centres were benefiting specific advantages. This happened due to the cost-plus method was only applied to these coordination centres and the treatment went beyond the exemptions to all firms that were entitled based on the general tax system; which lead to the distortion of the competition and adversely affect the fair trade within the meaning of article 107 (1) of the TFEU. The coordination scheme was also incompatible with the common market since the aid was measured and the exceptions provided in Article 107 (2) and (3) of TFEU did not apply.

The Commission groundwork on the investigations in Luxembourg were also based on the Article 107 (2) and (3) of TFEU which put some measures that the scheme on Luxembourg constituted an infringement of a fair trade between Member States. The competition between Member States would be affected by the advantages given to the 1929 holding companies since they were treated more favorably than independent service providers and financial intermediaries, such as traditional banks and consultancy firms.

The Commission was aware that some degree of tax competition within the European Union may ‘inevitable’ and may contribute to the lower tax pressure. Member States are free to choose the tax systems that are considered as the most appropriate and under their preferences.⁸² However, the European Union had the urgency to ensure that the competition in the common market applied the code designed to encourage foreign undertakings or capital (not only to protect domestic). This meant that the discrimination was unfavorable to the residents of the Member States in order to combat the harmful tax competition.

Additionally, the State Aid regime was designed to protect the competition between undertakings from distortion or intra-community trade that were generated by the Member States through the grant of measures favoring certain undertakings or goods at the expense of others. It was intended to protect the internal market against the segmentation through the state aid while, at the same time, provided certainty that there was no unjustified

⁸² Opinion of Advocate General Jääskinen in Joined cases C-106/09 P and C-107/09 P, para. 125.

discrimination against the foreign nationals or non-residents as the form of protectionism favoring only domestic undertakings or capital.⁸³

⁸³ Opinion of Advocate General Jääskine, *op.cit.*, para. 133.

5 APA and the principle of legality

5.1 The legality issues

The principle of legality ‘protects the citizen against the arbitrary use of power, or, more precisely, it demands a legal basis (which itself must be of a certain standard) to legitimize State action’.⁸⁴ APA’s nature itself is a contract between the tax authority and the taxpayer. Thus, it means that under the principle of legality, there should not be a creation of private law and APA should exist for everyone.⁸⁵

In practice, such as in the three abovementioned examples of the APA proceedings, the advantages of APAs are described by carrying out the negotiation with the tax authorities, granting tax benefits which may not be authorized by the law, doing it secretly and no transparency. These acts may increase a higher risk of creating the private law, which means particular taxpayers that enter into an APA will be privileged under a special law.⁸⁶ Yet, all of these activities may infringe the principle of legality.⁸⁷

This creation of ‘special legislation’⁸⁸ to certain taxpayers will lead to the question whether the selectivity tax measurement is caught under the article 107 (1) TFEU. The EC argued that APA constitutes state aid in the current pending proceedings by stating the APA that appeared to result in a decrease of expenses or underestimate the taxable profit of what should normally be borne in the independent transactions between third parties, may constitute state aid when the tax ruling is established by providing the selectivity advantage to certain companies.⁸⁹ However, as explained in the abovementioned, the nature of APA is a cooperative mechanism between the parties to determine the method of transactions and, under the principle of legality, the APA should be accessible to everyone.⁹⁰ This means that the argument of infringing the selective tax measurement under the article 107 (1) TFEU is questionable as the APA is just one of the alternatives to assess a tax basis in the tax system. Yet, even though the APA should be accessible to everyone and chances should be equal to all taxpayers, as a matter of fact,

⁸⁴ Leonard F.M. Besselink, Frans Pennings, Sacha Prechal, *Eclipse of the Legality Principle in the European Union*, Kluwer 2010.

⁸⁵ M.T. Leão, *Advance Pricing Agreements and the Principles of Legality and Equality: The Problems Surrounding Contracts in Tax Law*, International Transfer Pricing Journal, July/August 2014, p. 261.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 262.

⁸⁸ *Ibid.*

⁸⁹ State aid SA.38375 FFT, para. 89.

⁹⁰ M.T. Leão, *op.cit.*, p. 259.

OECD has also acknowledged that APA may be limited to large taxpayers only due to the high administration cost in the process to obtain the APA.⁹¹ Hence, in order to prevent the selectivity advantage within the APA, OECD recommends the tax authorities to establish more efficient APA access for small and medium enterprises.⁹²

⁹¹ See para. 4.163. of the OECD Guidelines.

⁹² *Ibid.*

6 Tax transparency package

6.1 Understanding today's tax transparency package

The EC presented the proposal of tax transparency package on 18 March 2015 with respect to protect against tax avoidance and harmful tax competition in the EU. The main agenda in this package is an introduction to a quarter basis of automatically exchanging information between Member States to protect their tax bases and prevent the companies which try to avoid paying their fair share of taxes.⁹³

The key component of the tax transparency package is to increase the cooperation level between Member States since tax transparency is considered as one of the most important ways to tackle the tax avoidance, especially in the cross-border transactions. However, Member States have difficulties to obtain the information about other Member States' tax rulings due to the confidentiality and secrecy reasons in each Member States.⁹⁴ Therefore, this non-transparent situation is frequently being used by particular companies to gain the advantage of artificially reducing their tax payment.⁹⁵ The lack of awareness of cross-border tax rulings outside Member State's jurisdiction 'may impact their own tax bases'.⁹⁶

The APAs proceedings outlined in section 3 are good examples on how the individual tax rulings could shift the tax liability from one to another Member States. The straight tax rulings are considered appropriate for attracting the foreign business or investors, yet the preferential treatment in tax rulings to particular entities will harm the tax competition and encourage the companies to avoid paying their fair share of taxes.⁹⁷

Thus, the automatic exchange of information will facilitate those matters where every Member States will aware on any cross-border tax rulings within the EU due to Member States would have no option to refuse or reduce the information based on the reasons of 'commercial secrecy or public policy'.⁹⁸

The lists below are the standard information to be provided by every Member States in their quarterly reports on tax rulings:

"a. Name of taxpayer and group (where this applies);

⁹³ EC Press release, *Combating tax avoidance, op.cit.*, as accessed on 17 May 2015.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ European Commission – Fact Sheet, *Combating corporate tax avoidance: Commission presents Tax Transparency*, http://europa.eu/rapid/press-release_MEMO-15-4609_en.htm, as accessed on 17 May 2015.

⁹⁸ *Ibid.*

- b. A description of the issues addressed in the tax ruling;*
- c. A description of the criteria used to determine an APA;*
- d. Identification of the Member State(s) most likely to be affected;*
- e. Identification of any other taxpayer likely to be affected (apart from natural persons)”⁹⁹*

As for the transparency package, the EC decided to repeal the Savings Taxation Directive, which was adopted in March 2014, in order to make the package becomes more efficient.¹⁰⁰ The Savings Taxation Directive limited the scope to only automatically exchange the information in relation to savings-related income.¹⁰¹ Meanwhile, in December 2014, the EC proposed an amendment of the Administrative Cooperation Directive (Council Directive 2014/107/EU amending Directive 2011/16/EU) which would ensure that ‘Member States automatically exchange the full spectrum of financial information from 2017’.¹⁰²

⁹⁹ European Commission – Fact Sheet, *Combating corporate tax avoidance, op.cit.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

7 Final Remarks

APAs are one of many instruments to attract foreign investors to carry out their business in the Member States' territory. The objectives of APAs such as 'increasing the level of certainty for the taxpayers involved and a reduction in economic or juridical double taxation for the MNE group'¹⁰³ become the reasons of why the taxpayers will to file an APA request to the tax administrations, despite the length and the high costs that may occur in the process of obtaining APA.

Yet, APAs are not free from issues or problems arose, especially in relation to the disruption of the harmony in the internal market within the EU. That problem, in this case is the unilateral APAs, is implemented in the unlawful way and receives preferential tax treatment that may lead to the state aid infringement in the meaning of EU rules. The main reason is the Member State' tax authorities concludes the unilateral APAs without any binding to the counterpart tax jurisdictions and thus, on the ground of commercial secrecy, the tax ruling taken place remains secret inside the local tax jurisdiction. Certainly, without the transparency and/or the simplicity in exchanging the information between Member States, one Member State which concludes unilateral APA could shift the tax liability and lead to serious revenue losses to other Member States.¹⁰⁴

All of the abovementioned matters cause the unilateral APAs becoming unaccountable and losing the legitimate expectations advantage for the taxpayers. Also, as explained in the previous section, the Oy AA and SGI cases are good examples of the law restriction yet clear and transparent, thus the restriction is considered proportionate. However, the opposite of the unilateral APAs proceedings, the certainty of rules is vanished due to the non-transparent APAs and when the APA is classified, it will never pass the proportionality test.

Moreover, the selectivity economic advantage that is provided by Member States to particular taxpayers in granting the APA request infringes the EU state aid rules. The APA brings the legitimate expectations to the taxpayers, while on the other hand it may breach the EU rules if the Member States accept APA request on purely discretionary exercise of authorization. This matter also makes the usefulness of APA be limited due to its legality issues where, under the principle of legality, there should not be a creation of private law and APA should exist for everyone.

¹⁰³ See para 4.147 of the OECD Guidelines.

¹⁰⁴ EC – Fact Sheet, *op.cit.*

Thus, to answer the critical needs of tax transparency within the EU, the EC has presented the tax transparency package and amended the Administration Cooperative Directive. When the package is enforced on 1 January 2016¹⁰⁵, all the Member States will have to enclose their tax rulings on a quarterly basis. This step will increase the awareness on any cross-border tax rulings within the EU and which rulings have impact to their tax base territory. Also, these actions of increasing tax transparency by the EC are in line with the Action Plan 13 of OECD's BEPS project. Action Plan 13 provides a guidance on publishing transfer pricing documentation and country-by-country reporting which includes the master file, local file and country-by-country report.

With the publication requirement in the automatic exchange of information, the unilateral APAs will gain the legitimate expectations back for the taxpayers and protect against the harmful tax competition. The requirement of three transfer pricing reports as mentioned in the Action Plan 13 will also provide the information of cross-border transactions between associated enterprises to the relevant tax jurisdictions involved and thus will assist to tackle the BEPS problem in the EU.

¹⁰⁵ EC Press Release, *Combating tax avoidance*, *op.cit.*

Bibliography

Books

Dennis Weber and Thidaporn Sirithaporn, *Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law*.

Leonard F.M. Besselink, Frans Pennings, Sacha Prechal, *Eclipse of the Legality Principle in the European Union*, Kluwer 2010.

M. Lang, P. Pistone, J. Schuch and C. Staringer, *Introduction to European Tax Law on Direct Taxation*, 3rd edition, Linde, 2013.

Journal articles

Ina Kerschner and Marion Stiastry, *The Experience with Advance Pricing Agreements*, Intertax Vol. 41 Issue 11, Kluwer Law International BV.

Lowell D. Yoder, *Recent Transfer Pricing Cases*, International Tax Journal (September-October 2014), CCH Wolters Kluwer.

M.T. Leão, *Advance Pricing Agreements and the Principles of Legality and Equality: The Problems Surrounding Contracts in Tax Law*, International Transfer Pricing Journal, July/August 2014.

Tom O'Shea, *Case Notes on the Direct Tax Jurisprudence of the Court of Justice of the European Union*.

Tom O'Shea, *News Analysis: Finland's Intragroup Financial Transfer Rules Compatible with EU Law*, Tax Notes International Vol 47 No. 7.

European commission official publications

European Commission Press Release, *Combating corporate tax avoidance: Commission presents Tax Transparency Package*, http://europa.eu/rapid/press-release_IP-15-4610_en.htm

European Commission, *Communication from the commission to the European Parliament and the Council on tax transparency to fight evasion and avoidance*.

European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg*, http://europa.eu/rapid/press-release_IP-14-1105_en.htm

European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)*, http://europa.eu/rapid/press-release_IP-14-663_en.htm

European Commission Press Release, *State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg*, http://europa.eu/rapid/press-release_IP-14-1105_en.htm

European Commission Legal Service, *Summaries of important judgments C-231/05 Oy AA*, judgement of 18 July 2007.

European Commission – Fact Sheet, *Combating corporate tax avoidance: Commission presents Tax Transparency*.

2003/755/EC: Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (Text with EEA relevance.) (notified under document number C (2003) 564) – official Journal L 282, 30/10/2003 P. 0025-0045.

2006/940/EC: Commission Decision of 19 July 2006 on aid Scheme C 3/2006 implemented by Luxembourg for ‘1929’ holding companies and ‘billionaire’ holding companies – notified under document number C (2006) 2956).

OECD documents

OECD (July 2010), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (“OECD Guidelines”), OECD Publishing.

OECD (2014), *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing. <http://dx.doi.org/10.1787/9789264219236-en>.

OECD Model Tax Convention on Income and on Capital

Internet

State aid law http://www.stateaidlaw.eu/46_193_news_2716.php

Table of Cases

ECJ case law

C-231/05 Oy AA, 18 July 2007

C-311/08 SGI, 21 January 2010

C-318/10 SIAT, 5 July 2012

C-6/12 P Oy, 18 July 2013

State aid proceedings

SA.38374 Netherlands alleged aid to Starbucks

SA.38375 Luxembourg alleged aid to FFT

SA.38944 Luxembourg alleged aid to Amazon

Advocate General's opinion

Joined cases C-106/09 P and C-107/09 P – Opinion of Advocate General Jääskinen

Joined Cases C-182/03 and C-217/03 – Opinion of Advocate General Léger delivered on 9 February 2006