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Investigating the Circumstances When Tax Rulings Constitute State Aid

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Contents

Abstract

This thesis examines when tax rulings can be seen as state aid and violate EU competition law. In the process of the research, the doctrinal legal research method will be applied, and the topic will be explored through a case law, literature review, working paper, Etc. The thesis first discusses the background of state aid law and its general application in the EU. In doing so, it analyses when any aid granted from the state to undertakings can violate the EU State aid rules. In the process of the thesis, it discusses the relationship between state aid and tax rulings from a competition law perspective. It scrutinizes through case law, such as those of *Apple, Fiat, Engie, and Starbucks*.

The analysis of the Apple, Engie, Fiat and Starbucks cases illustrates, and this thesis concludes that the stringent criteria applied by the Commission in elaborating whether the tax rulings create unlawful state aid. Fundamental to this determination is the selectivity advantage criteria, which involves deviation from the arm's length principle and results in a lowered tax burden for certain companies compared to others in a similar and factual situation. Moreover, without adjusting to standard market conditions, such rulings distort competition and simultaneously impact trade in the internal market, violating Art.107(1) TFEU.

Keywords: *State aid, Tax rulings, unlawful aid, selectivity, advantage, competition*, incentives, undertakings

Abbreviations

APA	Advance Pricing Agreement
ALP	Arm's Length Principle
CUP	Comparable Uncontrolled Price
CJEU	Court of Justice of the European Union
CR	Commission Regulation
EU	European Union
EGC	European General Court
EC	European Commission
FFT	Fiat Finance and Trade
GBER	General Block Exemption Regulation
LUX	Luxembourg
OECD	The Organization for Economic Co-operation and Development
MS	Member States
MNC	Multinational Corporation
SME	Small and Medium-sized Enterprises
SAAP	State Aid Action Plan
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

One of the main focuses of the European Union's (EU) attempts to preserve fair competition inside its internal market is State aid control. State aid is defined as benefits granted by public authorities that affect trade between Member States and distort competition under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).[1] The relationship between State aid and tax rulings has attracted much attention in recent years, underscoring the crucial role tax laws play in guaranteeing fair competition within the EU. In her speech on June 21, 2016, EU Competition Commissioner Margrethe Vestager stressed the significance of tackling unjustified tax benefits. According to her, "It undermines the ability of businesses to pay their fair share of taxes." Companies that do not pay their fair share of taxes hurt countries' ability to fund public services and distort competition," We preserve fair competition within the single market by making sure that tax rulings do not favour selective advantage. Examining tax rulings in accordance with state aid regulations is essential for multiple reasons. First of all, tax decisions have the potential to provide specific multinational firms preferential treatment, which would disrupt the market.[2] The main goals of competition law, which are to avoid undue benefits and provide fair market conditions, are undermined by this selective treatment.[3] Second, maintaining the integrity of the EU's internal market depends on the appropriate regulation of tax decisions and state aid, which creates an atmosphere where businesses compete on merit instead of advantageous tax arrangements.[4]

Apple and Ireland v Commission: The Commission concluded that Apple received disproportionate tax benefits from Ireland's tax rulings, enabling it to pay a notably lower tax amount than other companies in a comparable legal and factual situation. These decisions were considered biased since they provided a significant financial benefit that other endeavours could not match.[5]

This thesis aims to investigate state aid's significance in relation to tax rulings from a competition law perspective. This research will clarify the challenges and difficulties in upholding competitive neutrality inside the EU Commission by looking at significant cases, regulatory frameworks, and the legal concepts driving tax and state aid.

[1] 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

[2] Bacon K, European Union Law of State Aid (Oxford University Press 2017)

[3] Hancher, L., Ottervanger, T., & Slot, P. J, EU State Aids. (Sweet & Maxwell 2012)

[4] Nicolaides, P,Tax Rulings and State Aid: Legal Implications. (European State Aid Law Quarterly, 2015)

[5] Judgment of the General Court of 15 July 2020, Cases T-778/16 and T-892/16 ECLI:EU:T:2020:338 Ireland and Others v European Commission

1.2 Purpose and research questions

The overall aim of the thesis is to explore whether, when and under what conditions tax incentives given from government bodies to undertakings can be regarded as state aid. In doing so, the thesis will investigate whether the assistance and incentives provided put recipient companies in a more advantageous position than those who do not receive any incentives. From a legal standpoint, such practices run the risk of violating the EU laws concerning state aid, which may, in turn, prompt the European Commission to take legal action to prevent such practices.

To better understand the processes mentioned earlier, in this thesis, I will conduct an analysis of several case laws and conclusions that have been adopted by the Court of Justice of the European Union and the European Commission regarding tax incentives as state aid. Notably, the *Apple v Commission* case, *Fiat Chrysler Finance Europe v. Commission,* and two other cases will be examined. The analysis of these cases will help the readers understand the relationship between state aid and tax measures, how state aid rules have an effect on the Member States, and how the European Commission addresses and acts in the cases mentioned above.

In analyzing the aforesaid research aims and legal processes, the following research question will be investigated and addressed in this thesis:

Whether, when and under what conditions can tax rulings be viewed as unlawful state aid, a practice that violates the EU competition law?

1.3 Delimitations

This thesis aims to cover when the tax rulings can be seen as unlawful State aid in competition law, in which the tax is given as incentives, reduction, or even temporary tax-free for certain undertakings. In contrast, others pay business or corporate tax in comparable legal and factual situations.

Additionally, it will discuss case laws which have already been decided by the European Commission on State aid and taxation in the EU. The thesis does not aim to challenge any error made by the Commission's decisions on the mentioned cases; instead, it will analyse its view of the ongoing discussions in the sphere.

One of the limitations of the thesis is the lack of deep discussion on the national tax rulings of the Member States of the EU since there are many members and many different tax rulings for undertaking aid in other Member States. The thesis intended to look at the cases related to 'state aid as tax incentives'[6] at the Union level.

Initially, from the standpoint of the notion of state aid, the thesis will discuss more from the perspective of state aid law. It does not delve deeply into analysing the tax side, except for corporate tax rulings and concepts which concern State aid rules.

[6] By saying that, it refers to any aid regarding any tax treatment for certain undertakings which aims to improve its position whatsoever.

Since this perspective is rooted in State aid law and competition, tax concepts will also be explored in the body of the thesis.

1.4 Method and materials

In the process of thesis writing, the most dominant legal method will be used, which is a legal dogmatic method. Legal dogmatic analysis is an essential aspect of legal research and provides a constant bedrock for analysing the laws.[7] It focuses mainly on systematically explaining unwritten and written European and international rules, principles, and concepts. It will be used to succeed in the objective of arguing what law is and analysing its problem regarding the case.

Art. 107 TFEU will be applied to the discussion as a primary law to understand the reasoning behind each case and judgments from the EU courts. In addition, the preparatory paper in the case of state aid law and taxation will be used to understand what state aid is, its applicability to tax measures, when it can be applied to national courts, Etc. To do this, the Commission's Notice on the application of State Aid rules Art.107 and 108 TFEU and Report on the implementation of this Notice's application on direct tax measures will be used throughout the research.

Furthermore, secondary laws, such as guidelines and working papers, will be employed. The case laws of the European Court of Justice (CJEU) will be a vital asset in this regard. To bolster the arguments, a literature review will be used to bring more debate to the area and allow for further reading, mainly in the analysing parts of the thesis. The Decisions made by the Commission will be applied to elucidate the reasoning behind the Commission's actions, given that the Commission is responsible for the enforcement of the State aid rules and their application. In this way, several relevant case laws will be displayed and analysed in the area, such as *Engie and Luxembourg v Commission, Fiat and Luxembourg v Commission case, and Apple and Ireland v Commission case*. *Starbucks v Commission.* Cases on appeal from the General Court will not be addressed, as the CJEU's case law is less systematic and pertains to only a few of the cases that form the basis of this analysis. Consequently, this case law does not significantly contribute to explaining the Commission's competition policy concerning taxes.

1.5 Outline

Upon completion of the introduction chapter, the second chapter will talk about the more general explanation of the State Aid law and its sub-sections will talk about in detail what is state aid law, specifically the Notion of State aid, its background, its application, and framework in EU legal system. It will also introduce the four criteria of state aid for which to be found lawful or unlawful aid. Finally, it will discuss exemptions[8] (these are aid exempted from notifying the Commission about granting aid) and procedural investigation steps with concluding remarks. The third chapter

[7] Jan M Smits What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, 2015, p 5

[8] See 'General Block Exemptions Regulation'

investigates the relationship between state aid law and tax rulings from a competitive law perspective. In the fourth chapter, the thesis analyses several Commissions' case decisions regarding tax and state aid issues from various countries and companies, as well as decisions from the EGC and judgements CJEU. Lastly, it highlights all the main matters discussed and analysis.

2 State Aid law.

2.1 Background to State Aid Law

Subsidies or state aid have always been focal points for the economic rise of companies and new start-ups, and there are such times when all undertaking may face significant challenges and hardships during their process of a business or in the time of unforeseen challenges from nature, which cannot be controlled by people as happened during Covid-19 times. During these times, all undertakings need the help of State Aid from governments, and it may trigger their business and prevent bankruptcy; those aids can be in different positions or values such as direct funding, equity investment, soft loan advances, guarantees, tax reduction, incentives, or exemptions from any kind of tax from national government to undertakings. It is reasonable that such aid should be given to companies in need; governments should support them to grow regionally and globally. For example, in 2021, all EU Member States (27) spent EUR 334.54 billion, 2.3%. Of their GDP this year on State Aid for COVID-19 and other measures. Specifically, for COVID-19, they spent EUR 190.65 billion, covering almost 57% of the total expenditure and covering 1.3% of all EU's GDP in 2021.[9] Namely, Malta, Hungary, and Germany spend the most on State Aid, each spending 3.4-4.7 % of their GDP. Ireland, 0.7%, Luxembourg, Sweden, Belgium, Portugal, and Denmark are the least spent with around 0.9-1.4 % respectively. Those aid are the direct grants, which cover 58% of the total expenditure in 2021, and the second is tax advantage with 32% in 2019 of the total spending. These two-state aids are the most used instruments, always placed first and second. The abovementioned figures show that these practices need to be controlled and regulated by the EU; otherwise, those grants could be used in other ways or would go to the wrong hands rather than where they should be. As a result, it may cause unbalanced economic success between companies or any financial activity, affecting their competition in the internal market. Therefore, the EU adopted the State Aid Law to regulate any kind of unlawful aid as an advantage for certain undertakings or tax reduction or exemption practices which may distort competition.

State aid law is a tool to regulate aid, which has been raising issues with many interests, and its relationship with tax matters has raised popularity and debate

[9] State Aid Scoreboard 2022 (EC; DG Competition, 2023).

tremendously lately. In the Treaty of Functioning of the European Union ('TFEU'), articles 107, 108 and 109 are the legal basis for controlling harmful aid from governments to undertakings. According to the legal framework, any assistance incompatible with Art.107 TFEU and any state intervention from Member States that distorts competition or threatens to distort competition is unlawful state aid and costs a penalty under the EU law. Firstly, State aid rules were introduced in EU law through the Treaty of Rome in 1957, which established the European Economic Community.[10] Its main objectives are more general, such as economic integration with a common market and customs union to smooth the free movement of goods and services, reducing trade barriers for creating a single market, increasing market size, and harmonizing the regulations between member states.[11] According to the article.107 TFEU, the definition of state aid, was updated in 2007 in the Treaty of Functioning of the European Union. Any granted aid from member states that threatens to distort competition by giving an economic advantage to a specific undertaking is incompatible with the internal market.[12]

During the period 2005 and 2009, the State Aid Action Plan was introduced, and it was a roadmap for formulating and reforming the EU's State aid policy. The critical elements of the SAAP were less and better-targeted state aid, a refined economic approach to state aid assessment, more effective procedures and enforcement, predictability, and better and open transparency. They shared responsibilities for effective reform outcomes between the EU Commission and Member States.[13] As Hofmann stated in his book, the Action Plan was committed to facing the difficulties experienced in the previous years; thus, the Commission decided to improve its governing policy on State aid law and its function aspects.[14] It then brought up the altering of the landscape of state aid. Thus, the Commission has produced a simplification package based on the Commission Notice with Best Practices of the Code of Conduct for specific State Aid controlling and a Notice on simplifying certain types of aids[15]. Furthermore, there were a number of other prominent notices and rules published on clarity and explaining the State aid rules to apply in their procedural action. In this respect, the General Block Exemption Regulation[16] was adopted to simplify and consolidate the exemption rules. Additionally, the *de minimis* Regulation[17] was also adopted in 2006, giving member states the freedom to use aid without further specific requirements.[18] These two simplification packages will be discussed later in this chapter.

Following the financial crisis 2008, its impact led to the creation of the State Aid Modernization (SAM) in 2012. The SAM is also based on the three key objectives as in SAAP; firstly, it aims at supporting growth in a competitive market by increasing quality aid and making better and more efficient public incentives. It also

[10] Gordon L. Weil, *A Handbook on the European Economic Community*, (Frederick A. Praeger, Inc, 1965).

[11] Ibid (n 10)

[12] Pier Luigi Parcu, Giorgio Monti and Marco Botta, *EU State Aid Law: Emerging Trends at the national and EU level*, (Edward Elgar Publishing Limited, 2020).

[13] Recital 18 of State Aid Actin Plan, SEC 2005/795.

[14] Hofmann H, Micheau C, State aid law of the European Union (Oxford University Press, 2016) p 32.

[15] Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, (2009/C 136/03)

[16] Commission Regulation (EC) 651/2014

[17] Commission Regulation (EC) 1998/2006

[18] Ibid, (n 17)

involves marinating the assessment of aid compatibility with the single market. Secondly, the SAP initiative converged to review the *de minimis* Regulation, GBER[19], and the Council Enabling Regulation for extending more simplified aid control.[20] Thirdly, it aimed to strengthen the procedural actions for the submission of State Aid rules in member states.

2.2 Legal framework of State aid in the TFEU

The core legality of the State Aid is regulated to prohibit the illegal actions, including in the articles 107, 108 and 109 of the Treaty on the Functioning of the European Union (TFEU).[21] These provisions aim to maintain competition, equality, and fairness between Member States. Expressly, in the art.107 of the TFEU, it is evidently stated that:

> 'Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market'. [22]

To this end, in the continuation of the same article's second paragraph, the aid compatible with the internal market is also mentioned. Namely, such aids, which have social characteristics and without discrimination against others, aid for those who are damaged by natural disasters or unforeseen events, and aid for the particular areas of Germany which are affected by the division of Germany as economic compensation.

On the other hand, art.108 TFEU talks about cooperation between Member states and Commisson, where both parties are required to review the system of the existing State aid within Union areas before any final judgement. This thesis's main arguments are with the help of Art.107 TFEU while Art.108 TFEU will be used in case of additional support for the arguments.

2.3 The notion of State aid

In the European Union's state aid, there are specific cumulative criteria for which of the aids to be found as illegal aid that certain undertakings or companies received from the government any kind of aid whether as incentives or while in the crisis. These criteria should be met and identified to access the assistance as illegal. Those criteria are as follows:

- Selectivity
- Advantage

[19] Council Regulation No 994/98 of 7 May 1998, amended by Council Regulation No 733/2013 of 22 July 201

[20] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid

[21] Treaty on the Functioning of the European Union 2012/C-326/01

[22] TFEU, art.107(1) (n 21)

- Competition distortion and affecting trade between Member States
- State Origin

Below, a detailed explanation of each of the criteria will be provided. Since there is a limitation for thesis measurement, the notion of State Aid's most important points will be discussed, which are, of course, relatable points to the main topic.

2.3.1 Selectivity

Selectivity is one of the notions of State aid. In simple words, selectivity is a grant for an undertaking which other undertakings do not have that grant. These grants can be in different forms in different sectors of the business. They could be in the form of money grants, tax incentives, tax reductions, and other practices. To fall within the scope of Art.107(1) TFEU, the measure should target certain economic undertakings in a selective manner. The Commission stated that, in this case, the measure could be selective regardless of the activities of the undertakings that benefit from the measure and get tax advantage without putting a minimum cost of action.[23] If the national measures, nevertheless of the nature of the activity, are for all undertakings without supporting certain undertakings that apply to all without discriminating, they should be classified and understood as not a selective measure.[24] There are two forms of selectivity measures according to the Notice from Commission: *material* and *geographical* selectivity.[25] **Material selectivity** is a measure that only applies to certain undertaking groups or sectors of the economy. From the Commission Notice, it is also built on two different forms of selectivity: *de jure* and *de facto* selectivity measures.

> De jure selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance, those having a certain size, active in certain sectors or having a certain legal form; companies incorporated or newly listed on a regulated market during a particular period; companies belonging to a group having certain characteristics or entrusted with certain functions within a group; ailing companies; or export undertakings or undertakings performing export-related activities.[26]

In other words, it is a form of determining a material selectivity of aid according to its sectors, size, and legal form of activities. To categorize such assistance as material selective, it should be compared with the other undertakings in similar market, legal and factual situations.[27] In this way, it identifies that some of the companies are being omitted from the others in terms of benefitting from a measure, which leads to discriminatory action.

[23] Judgment of the Court of 21 December 2016 European Commission v World Duty Free Group SA and Other Joined Cases C-20/15 P and C-21/15 P. para -4.

[24] C-20/15 P and C-21/15 P, para 25.

[25] Commission Notice, (n1) p119.

[26] Commission Notice, (n1) p 121.

[27] Commission Notice, (n1) p-122.

> De facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (as in the examples in the preceding sentence)[28]

De facto selectivity is another form of identifying a material selectivity measure, and it may occur when some conditions or bans are imposed by certain Member States to prevent some other undertakings from benefiting from the measure.[29] Suppose the measure generally applies to undertakings at its aim. In that case, it can still be constituted as State aid unless the aid givers justify the measure's nature and general scheme.[30]

2.3.1.1 Three-step analysis of selectivity

In the assessment of the selective aid by the Member States, there is a test so-called 'three-step test'. It is a pretty standard analysis in CJEU, used primarily on tax matters, and has a selective nature. The CJEU, in German tax exemption, found that the test is crucial to assess the selectivity in tax matters.[31] Because it clarified the differentiated exemption justified through this approach, and the exemption was intended to avoid double taxation.[32] The first step is the identification of the *reference system*. The reference system is a system that includes a set of rules which apply to all undertakings based on objective criteria within its scope of objective.[33] The second is to assess the *derogation* from the system. After the reference system is established, the next step is an examination of whether the measure has benefits over other undertakings in derogation from the previous system. Finding the measure's position requires determining if the measure favours certain groups or the production of goods as compared to the same factual and legal situation in light of the objective of the reference system. As a result, if the measure favours a particular group of undertakings in the same legal and factual situation, it ends up *prima facie* (a general measure which applies to all).[34] The third step is to assess the *justification by the nature or general scheme* of the system of reference. Upon assessment by the derogation of reference system, in case of justification of the measure in its nature or general scheme of that system, it is classified as a non-selective measure.[35] It is clearly stated in the case of *Paint Graphos*[36] that if, for example, the measure is used in the tax system, it can be justified even if it creates an exception to the application of the general tax system. However, it should result from the guiding principles of that tax system. This section of the thesis in relation to tax selectivity will be discussed more in the next chapter of the thesis.

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[28] Commission Notice, (n1) para-121.

[29] Commission, Notice, (n) para-122.

[30] Ibid.

[31] Judgement of Court of Justice of 21 September 1999,

[32] Leigh, Juan, Research Handbook on European State Aid Law (Edward Elgar, 2021) p.50.

[33] Commission Notice, (n1) para-133.

[34] Commission Notice, (n1) 137

[35] Paint Graphos and others (C-78/08) ECLI: EU:C: 2011:550, para- 69.

[36] Ibid, (n 35), para-70.

2.3.1.2 Regional selectivity

Regional selectivity is the applied measures involving a member state's entire territory. To fall within the regional selective, the reference system does have to be seen as a territory as a whole. Not all procedures that apply some undertakings of a particular territory of Member States are selective.[37] According to Cm Notice, three factors need to be separated to determine a regional selective measure. In the first factor, a member State must decide on a lower level of tax rate for certain regions only. The second factor refers to the *symmetrical devolution of tax powers*[38], which means that particular territories, sub-regions, or districts have self-governing powers in law to make applicable tax rates as the central government. In this case, it should not be classified as selective since it is hard to find whether a normal tax rate could constitute the reference system.[39] The third factor of the determination is *the symmetrical devolution of tax powers[40]*. It constitutes that only particular region or district authorities adopt, with their sufficiently self-governing powers to central authority within its competence, a specific level of tax rate which is lower than the rate in force nationally. It should target certain undertakings only in their competence ground.[41]

2.3.2 Advantage

Another criterion of the notion of State aid is 'advantage'. It is called an economic advantage for undertakings when it is granted by Member States. Thus, to find such an advantage in unlawful aid, it should be given to undertakings as a benefit. In this regard, the given economic advantage must have had an effect on the undertaking's situation financially or any other positive (payments) or negative (tax relief) outcomes. However, the investigation does not take into account the measure's aim or origin, only its effect.

Furthermore, a measure in any form, directly or indirectly, favours any undertakings in which the undertakings would be able to get such subsidies in normal market conditions are to be constituted as an economic advantage.[42] Here, a direct advantage is to grant from the state to any undertakings directly with any aid, while an indirect advantage is to grant any entity through another entity. It is likely to happen for such an indirect advantage between entities with vertical relationships.[43]

On the other hand, in the Court of Justice's decision, in the case of *Altmark Trans*, an indemnity was granted for undertakings for the disposal of waste oil as compensation for the collection disposal obligation set up by the y Member States.

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[37] Judgment of the Court of Justice of 6 September 2006, Portugal v Commission, C-88/03, ECLI:EU:C:2006:511, paragraph 57; Judgment of the Court of Justice of 11 September 2008, Unión General de Trabajadores de La Rioja, Joined Cases C-428/06 to C-434/06, ECLI:EU: C:2008:488, para -47.

[38] OPINION OF ADVOCATE GENERAL GEELHOED, C-88/03, Portugal v Commission, para-60.

[39] Portugal v Commission, C-88/03, (n 37) para-64.

[40]Opinion of Advocate General Geelhoed of 20 October 2005, Portugal v Commission, C-88/03, ECLI:EU:C:2005:618, paragraph 60

[41] OPINION OF ADVOCATE GENERAL GEELHOED, C-88/03, Portugal v commission

[42] Judgment of the Court of Justice of 24 July 2003, Altmark Trans, C-280/00, ECLI:EU:C:2003:415, para-84.

[43] Hoffmann, (n 14) 85p

The Court said that it is not an advantage outlined in State Aid rules since the indemnity did not exceed the annual uncovered cost displayed by the undertakings.[44] Furthermore, similarly, taxing on direct sales of pharmaceutical laboratories equalled extra costs by wholesale distributor when they discharge their public service obligations would not fall as State aid.[45] Additionally, freeing the distributors from tax payments could be assessed as compensation for their services. As a result, the Court stated that it had an equal effect on both parties, and the distributors would not get more benefits than the other party.[46] It is clear from the court judgement that assessing state aid as compensation for the services by undertakings to go away from the requirement of public services, putting them to equal treatment with other competitors, does not fall for Art.107(1) TFEU. However, the European Court of Justice (ECJ) outlined in its judgement about such compensation practices that some actions must be taken to avoid breaking the laws. Firstly, the recipient should comply with prescribed public service obligations, which must be stipulated explicitly. Secondly, the parameters for assessing damages are predetermined in an unbiased and open way. Thirdly, upon deducting significant receipts and reasonable profit to comply with those obligations, compensations should not go higher than what is needed to pay for any expense or part of it which was made with respect to public commitments. For it not to offer or to tend to create any competitive advantage to the receiver, this must be observed as it will help make the competition distortion or threats inexistent. Lastly, the undertakings responsible for fulfilling the public services obligations are not chosen through public procurement procedures, and the appropriate level of compensation should be ascertained by scrutinizing the cost based on well-run undertakings.[47] If the abovementioned factors are met, the compensations given to undertakings do not confer economic advantage and do not fall for Art.107 TFEU. Nevertheless, with these four factors, some argue that its establishment will bring some challenges in practice.[48]

2.3.2.1 Market economy operator (MEO) test

During the 1980s and 1990s, the Union Courts held several cases which involved granting economic advantage from public authorities to undertakings concerned with State aid law. It is because sometimes states play a role of the investor to undertakings in granting favours certain benefits. Thus, to evaluate the state's role in such consequences, the courts began to use such tests to detect any unlawful activities by states. It is primarily used when states carry out economic transactions. According to the Commission Notice, it was developed in different types; firstly, it detects states' presence in granting aid in forms of investment. It is 'the *market economy investor principle*[49].

[44] Altmark Trans, C-280/00, (n 42) para-85.

[45] Ibid, (n 42) para- 86.

[46] Judgement Altmark Trans, C-280/00, (n 42) para-87.

[47] Case Altmark, c-280/00, EU:2003:415, para-87-95 and Werner P, Vincent, V, EU State aid control law and economics, (Wolters Kluwer, 2021) p-69.

[48] Ibid.

[49] C-305/89, Italy v Commission, EU:1991:141, para-18, 19.

Moreover, the Court developed another test called the '*private creditor test*', which assesses the debt compensation of private investors if they show any mark of state aid compared to other investors in similar market conditions. Lastly, the Court developed another test under the name '*private vendor test'*[50] to determine if the sale of public bodies involved any aid. It also considers the private vendor's position, considering its price under regular market with other vendors in a similar market since it could have been better or the same.[51] However, these tests underline the principle of the MEO (Market Economy Operator) test, which determines the economic transactions by public bodies in usual market conditions concerning the aid granted to the market players.

It is also essential to distinguish the state's position when conducting such economic transition. The state can be an undertaking as a shareholder with merged firms when pursuing an entrepreneurial goal. It can be a state power which has the authority to regulate these firms as its nature. One can say that by looking at Art.345 of TFEU, which states the principle of neutrality and equality between public and private firms, based on public authorities having the right to engage in running a business at the same time while conducting its power obligations.[52] Therefore, it is vital to find out what the state's role is. If the state is a private investor, it gives MEIP the right to assess its activities to check for any favouring unlawful advantage as states act as private investors. On the other hand, if the state intervention is as an acting authority (regional or sectoral, fiscal, and other social policies, then MEIP is unable to assess the situation likewise.[53] In this situation, this test is held stricter for profitable undertakings than the one at a loss. The Court stated evidently that if the test is not used for profit-making, then states as entrepreneurs would make unlimited available financial assistance for their business long-term; as a result, it could harm competition and would not be in line with the standard market condition.[54]

In compliance with the MEO principle, there are two main ways to assess if a transaction by a public firm fulfils the MEO requirements. One way is *pari passu transactions*. It is a transaction carried out under the same terms and conditions alongside similar risks and benefits in a comparable market situation. This transaction does not confer an economic advantage since it is presumed that this practice is in line with the MEO test.[55] It is for both public entities and private investors who invest in the same condition by the market rules.

Additionally, to consider such a transaction as part pass, the operator's intervention should indeed have real economic implications.[56] For example, in a case, the Commission embraced the idea that two private operators receiving 1/3 shares of the total profit investment in a firm are considered to be in economic dominance. On the contrary, in another case, the private operator received 10 per cent while the state got 90 per cent; this leads to the conclusion that it was not in compliance with *pari*

[50] C-525/04, Spain v Commission, and Case 73/11, Furucona v Commission

[51] Commission Notice, (n1) para-74.

[52] TFEU, ART.345

[53] Judgment of the Court of 5 June 2012, European Commission v Électricité de France (EDF) C-124/10, **ECLI:EU:C:2012:318**, p-81.

[54] Ibid, (n 53)

[55] Case T-296/97, Alitalia v Commission, para-81.

[56] Case T358/94, Air France v Commission, para-148.

passu.[57] Another way is to comply with competition, openness, equal treatment, and absolute tender measures while involving transactions in the sale and purchase of assets, goods, and services. By complying with these methods, private or public investors and firms would maintain market rules and ensure pricing limits. However, another assessment method could be applied in the absence of these transactions.[58]

2.3.3 Competition distortion and affecting trade between Member States

The following Notion of State aid criterion is *competition distortion or threat to distort* and *affect trade* between Member states. To fulfil this criterion, the aid must violate these two conditions. As a general rule, these two aspects of the notion are used jointly to assess the aid. The Court stated in the *Philip Morris* v *Commission*[59] case that 'when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

2.3.3.1 Competition distortion

The first part of this criterion is competition distortion in Union territory. If the aid improves the undertaking's position relative to its competitors, it passes the frequently used test for distortion of competition.[60] The Commission pointed out several cumulative conditions that must be met to exclude a possible distortion of competition: first of all, a service is required to be a legal monopoly. Secondly, the legal monopoly must exclude competition on the market, for the market and it must be the only exclusive provider of the service over the competitor. Thirdly, the services provided are competitive with those of others. Fourth, if the service provider is active in competition in another market (product or territory) that is competitive, cross-subsidisation has to be excluded.

Furthermore, the amount of distortion of competition or materiality is not the primary assessment of the unlawfulness. Nevertheless, if the aid given to the undertaking made its position better and maintained a stronger competitive position, then it would not have been put into such a position without aid. This is the main reason it can be classified as a distortion of competition.[61] Comparing the effect on trade part, assessing the competition distortion is a more straightforward test, which could be assumed by looking at the aid and its potential impact on competition. Recent years of experiencees have led to analysis based on the presumption and potential effect

[57] Commission Decision 2008/729Commission Decision 2008/729/EC of 11 December 2007 on State aid C53/2006 Citynet Amsterdam, the Netherlands, OJ L 247, 16.9.2008, p. 27, recitals 96-100.

[58] C-214/12 P, Land Burgenland v Commission, para 94-95.

[59] JUDGMENT OF THE COURT OF FIRST INSTANCE of 15 June 2000, T-298/97, para-81.

[60] C-730/79 Philip Morris Holland BV v Commission, EU:C:1980:209, para 11; and C148/04 Unicredito, EU:C:2005:774, para-56.

[61] Ibid, (n 60) p-189.

assessment, and based on these assessments, this always produces a certain level of distortion.[62]

2.3.3.2 Effect on Trade

Another part of this criterion under the notion of State aid is the effects of aid on trade in the Union. To classify an aid as unlawful State aid, it must affect commerce. This factor is also debatable. Calculating the quantity or level of any specific aid that affects intra-commerce between member states is not always precise. This is why the issue may not have a subtle effect even in places where competition is high between undertakings. Rosella argued that assessing the impact on trade requires concrete conditions to be met. It is not possible to find out from the provisions' wording as it does not allow for assumptions or possible assessment.[63] To evaluate the second criterion, which concerns the impact of the forbidden aid on trade, the European organisations have pursued a more thorough level of analysis. When an undertaking's position is strengthened relative to other undertakings competing in intra-community trade, the criterion in question is regarded to have been met.[64] Therefore, in order to demonstrate that the distortion exists in this instance, the European Commission once more limits itself to prove that the industry is open to competition. This prerequisite is assumed to be present in every situation where the industry in question has undergone European-level liberalisation.[65]

In the case of Van der, the Commission concluded in its Decision (85/215) that a particular gas tariff could affect trade between Member States.[66] It stated that special tariff rates charged in the Netherlands had been established for horticulture. The Commission considered it a special treatment and dissented from the Union law. Specifically, it pointed out in the present case that the Netherlands appears to have 65% of the hothouse production of tomatoes in the Community, of which 91% are exported, and 55% of the 91% is for only Germany. It could create a negative effect since it covers most of the trade. It might be challenging to understand how a measure would make exceptions to the general rule that could have an impact on interstate commerce. However, there are a few exceptions to the general rule. The Court held in *Italy and Sardegna Lines v. Commission* case that the Commission had neglected to consider the fact that the market in question had not yet undergone liberalization.[67] Later, the Commission came to a similar conclusion.[68] However, An undertaking may only assert the lack of effect within union trade in specific situations.

[62] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, *Official Journal C 101 , 27/04/2004 P. 0097 – 0118.*

[63] Rosella Miceli, The Role of State Aid in the European Fiscal Integration, (Springern, 2022).

[64] Judgment of the Court (Second Chamber) of 4 May 2016 Philip Morris Brands SARL and Others v Secretary of State for Health, C-547/14, ECLI:EU:C:2016:325.

[65]Frederik Boyer, The Liberalization of Intra-European Trade in the Framework of OEEC, (1995), https://www.elibrary.imf.org/view/journals/024/1955/001/article-A001-en.xml?ArticleTabs=fulltext, accecced on 14/05/2024.

[66] Commission Decision, 85/215.

[67] Cases C-15/98 & C-105/99 Italian Republic and Sardegna Lines v Commission, EU:C:2000:570, paras 68-70.

[68] Commission Decision of 20 July 2007, Aid to the Sardinian shipping sector, 2008/92/EC, Official Journal L29/24.

2.3.4 State Origin

The State origin criterion is another and the last cumulative notion of State aid. In this notion of aid, the grants are directly or directly given to undertakings through the State resources that constitute state aid based on the Art 107 TFEU. State aid is defined as when the State offers preference to one project over another, and it is forbidden since both public and private undertakings must be treated equally.[69] It follows from the case law of the Court of Justice that only advantages granted directly or indirectly through State resources are considered to aid within the meaning of Art.107(1) TFEU. The distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid.[70] This distinction is aimed merely to carry within that definition both advantages which are granted directly[71] or indirectly by the State and those granted by a public or private body designated or established by the State.[72] However, the advantage flowing among two private companies without State monitoring over the resources is not identified as State resources.

Additionally, the aid needs to come from the State. There are two cumulative sub-criteria in this criterion. State funds must aid, and they must be traceable to a specific Member State. *Imputability* denotes that the assistance is linked to the state, meaning it originates from the state in some capacity. Besides, the Commission defines it in its Notice to include other public authorities with a certain amount of autonomy in addition to state and federal authorities.[73] This is because a Member State should not be allowed to establish independent institutions or authorities to get around state aid laws.[74] Specific public endeavours may also be considered imputable; however, imputability is not always present just because an undertaking is public. Instead, a thorough examination of the particular public project, including its context and necessary actions, must be conducted.[75] There is no imputability when a Member State is required by EU law to provide specific state aid; however, when an MS exercises discretion in implementing a measure, state aid may be considered imputable to the state.[76]

[69] C-303/88, Italy v Commission, EU:C:1991:136, para-19–20.
[70] State Aid « Local Government Law. https://local-government-law.11kbw.com/state-aid-9/
[71] Ibid, (n 70).
[72] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para-5.
[73] Commission Notice on the notion of State aid as referred to in Article 107(1) para-39.
[74] Notice, (n 1).
[75] Judgement of 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, para 53-57.
[76] Commission Notice on the notion of State aid, para 44-46.

2.4 Procedural steps

The last part of this section is the procedural aspect of state aid investigations. There are several procedural stages. Initially, the Commission Notice[77] application of the State aid to tax measure and Council Regulations 2015/1589 clearly states how the procedures are conducted. Initially, according to art.108(3) TFEU, all Member states who are planning to grant aid to undertakings must notify the Commission about their plans, including tax treatment as well.[78] This notification part is vital for the Commission since it could prevent potential competition distortion between undertakings. The Commission conducts preliminary conduct to check its compatibility, and this needs to be done in two months for approval or additional examination as it raises doubts.[79]

Then, a formal investigation is conducted. In case of doubts about any state aid that has been recognized as being in breach of state aid rules, the aid is regarded as incompatible. This step requires all assessments and additional information regarding planned aid from alleged parties. This infestation period is crucial for ensuring the effectiveness of the aid against the internal market.[80] Based on the CR 2015/1589, after a formal investigation, the Commission must publish its decision vis a 'vis the aid; in case of an unfavourable decision, the member States are required to pay the recovery.

Regarding tax measures, if the aid is in the form of tax and found to be distorting the Union law, the recovery amount must be calculated by comparing how much tax was paid and how much tax should have been paid according to the law.[81] To make the recovery payment fair, thus the interest rate must be added to the basic aid amount in the standard rate put by the EU. Furthermore, in this sense, the Commission and Member States should work in close cooperation in reviewing the system of aid. It belongs to tax measures, too. In the field, MS must submit all the reports regarding the system of the aid and scheduling aids annually. For example, the Commission Notice clarified that when an MS provides tax due or total or partial tax exemption, in their reports to the Commission, they must include an estimate of the budgetary revenue that will be lost because of the given aid. By reviewing these complete reports, the Commission would be able to provide the most accurate suggestions on banning or altering the aid.[82]

One might ask if it is even possible to grant any aid to companies or entities for their businesses' prosperity. Although State aid rules are pretty strict in practice at controlling, at the same time, it consents to many opportunities for receiving subsidies from MS. In this regard, the Commission released two essential regulations. GBER and de minimis aid are already mentioned at the beginning of the chapter. The General Block Exemption regulation is a leading tool in the field of state aid, and it aims to provide undertakings that simplify the process. Because it

[77] Commission notice on the application of the State aid rules to measures relating to direct business taxation. **(**98/C 384/03).

[78] Commission Notice art/34, (n 67).

[79] Jonas A, 2016, EU Competition Law, p-243.

[80] Bacon, 2017, p-247.

[81] Commission Notice art/35, (n 67).

[82] Ibid, art/38.

allows MS to grant aid without notifying the Commission as long as they meet some criteria, this regulation embraces several types of aid, including regional aid, SME support, research and development, and environmental protection, training, and employment.[83] Despite the fact that it simplifies things, it requires MS to comply with the union law in terms of competition and trade.[84] In addition to this, the EU introduced *de minimis* aid, as it urges by its name, which refers to minor aid which is accessible from the notification requirement. It also applies to services such as GBER. The only central part is that this regulation limits the granting of soums. According to the newly adopted regulation, for a single undertaking, a country can grant aid at most 300.000 euros for three fiscal years for most services, unlike the previous *de minimis* regulation of 2013, which is for road transport aid as well.[85] This regulation requires several points to be met in relation to tax measures. They are as follows: the aid must have an incentive effect on undertaking as if they would not have done without the aid, the aid must ensure its transparency, and the aid intensity must not exceed the specific limits.[86]

2.5 Interim Conclusion

To sum up, this chapter discussed the general framework of the State aid rules and their application in general state aid situations. Since state aid rules have become the primary tool to maintain the competition among Member States and their aid for local undertakings and worldwide companies, it is crucial to understand and acknowledge what these rules are and what these rules apply to avoid stepping on these laws. Therefore, the undertakings need to be acknowledged since these rules mainly apply to generating companies with less investigation of the profit-losing side since the one with profit could harm competition and trade among similar undertakings.

State aid law plays a vital role in regulating government aid to undertakings in the EU. The primary objective of the State aid law lies under Art. 107 and 108 TFEU. It is set to maintain fair and equal competition and prevent distortion and trade effect-based practices in the internal market. The EU have documented many legal frameworks and guidance for effective enforcement to keep the market from such harmful practices.

The notion of state aid embraces several principles, including *selectivity,* which refers to aid from Member States to certain undertakings while discriminating against others, and *advantage, which* refers to an economic benefit conferred on entities by state resources, which falls under Art.107(1) TFEU. Moreover, aid that *distorts competition and trade effects* among member states is also unlawful under this law. Lastly, *state origin*: In this notion, the aid must come from state resources and be imputable to certain entities that fall under a similar law.

[83] GBER, p-15.
[84] GBER, p-30.
[85] *De minimis* Regulation, 2023/2831, art-3.
[86] GBER, p-42.

All in all, State aid law is a tool to regulate the balance between undertakings and Member States to level the playing field in EU territory by scrutinizing the aid, which tremendously contributes to fair competition, market distortion and integrity of the single market in the EU.

3 State Aid and Tax Rulings from a Competition Policy Perspective

3.1 Background to Relationship between State aid and Tax rulings

At the beginning of the formulation and introduction of the state aid law, there were primarily no measures relating to tax issues or corporate or business taxation until such cases appeared. There were specific measures, but they were not examined with state aid law as excessively as they are now. Since tax policy is a sovereignty of the Member States, it was consequently monitored by the Member States and created national tax regimes and unlawful measures themselves. In this way, the Member States tried to help unlawfully or favour certain multinational enterprises (MNEs), putting them in a more enjoyable position than the other enterprises in comparable situations and knowing that such assistants were incompatible with union law. Moreover, some countries are committing such activities, specifically in tax rate reduction, allowances, unclear transfer pricing provisions, deduction from income tax, exemptions, and abusive tax rulings, to attract more influential companies to operate there in exchange for lower tax rates.

On the other hand, lack of international cooperation, unilaterally or multilateral, makes it difficult for some Member States to tackle such distortions, particularly tax base erosion, contributing to challenges, creating more unevenness, and leading to more empty rooms for tax evading within the internal market. Despite issuing several legislative policies or guidance in the field of tax, such as the Joint Transfer Pricing Forum, this was not enough to fight back. For this reason, more cooperation is needed in confrontations. State aid and strict penalties would be reliable instruments for addressing such abusive and distortive detrimental tax measures. They could block its significant negative effect since such hostile tax measures would be against the notion of State aid as it creates unequal treatment among undertakings.

To put an end to the harmful tax incentive issues, the Commission as a competition authority took action to tackle these harmful practices with the help of the existence of State aid rules, TFEU as a legal basis, and case laws from the CJEU. Since some of the harmful tax practices may fall within the State aid law under Art.107 TFEU.[87]

[87] Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect, p-60.

In recent decades, enormous analytical frameworks have taken place for tax-related state aid investigations, which made the definition and analysis of state aid via tax measures clear. As a result, in 1998, the Commission came up with the Notice on the application of State aid rules to measure regulating and controlling direct business taxation.[88] It is intended not only to affect business taxation but also to international trade and local production of goods at the EU level.[89] Commissions first intended to review the Notice under the State Aid Action Plan, which was run from 2005 to 2009. The Draft Notice of the Notion of State Aid was addressed, and it was launched by the Commission as an initiative to reform State Aid Modernisation in 2012. In this way, the Commission continued to adopt new guidelines to tackle harmful tax practices; in the framework of its State Aid Modernisation (SAM) initiative[90], it pointed out what practices create tax-related state aid and what is legal for intra-group transactions such as transfer pricing.[91] This helped to distinguish what might constitute unlawful and what may not by clarifying legal uncertainty for taxpayers and administrations. It is good to underline that in the EU, there are no harmonization tax rulings applying for all Member States at the Union level, but here, the EU's objective is for tax policies and practices to be in line with EU's law while allowing Member States to form their tax policies as they would wish. Having competence power does not mean that the Union law might be overlooked by Member States when designing their direct taxation system.[92]

The Commission State aid investigations overview pointed out that new entrants and firms, SMEs, who do not use aggressive tax practices are not penalised as compared to MNCs, which can shift their profit or implement other forms of aggressive tax planning via a variety of decisions and instruments, available to them only by virtue of their size and ability to arrange business globally. All other things are equal, resulting in lowering tax liabilities leaves MNCs with a higher post-tax profit and, thereby, creates an uneven playing field with the competitors in the single market who do not have the resources for aggressive tax planning and keep the connection between where they generate profit and their place of taxation, points out this distortion of a level playing field in favour of multinationals contradicts the fundamental principle of a single market.[93] Several studies by the OECD[94] showed that some MNCs are paying as low as five per cent in corporate tax while smaller firms pay up to 30 per cent because some countries allow MNCs to pay 30 per cent lower corporate tax if they are cross-border contributions than domestic companies operating in a single country.[95] This treatment brings contest to the free competition in a single market and creates unequal treatment by the selective nature of the tax measure. In 2006, the European Court of Justice validated the arm's length principle

[88] Claire Micheau, *Tax Selectivity in European law of State Aid- Legal Assessment and alternative approaches*, (European Law Review, 2014).

[89] Commission Notice, (n 67) art-78.

[90] Texts adopted - Tax rulings and other measures similar in nature or effect - Wednesday, 25 November 2015. https://www.europarl.europa.eu/doceo/document/TA-8-2015-0408_EN.html.

[91] Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect, p-129.

[92] DG working papers.

[93] Ibid, (n 92)

[94] Press Release 12/02/2013 – OECD urges stronger international co-operation on corporate tax.

[95] Special Committee on Tax Rulings, (n 91).

for assessing the selective advantageous sub art.107(1) TFEU.[96] It ensures that the fiscal measures do not approximate market condition outcomes and that low tax income confers selective advantages and possible violation of State aid law.

3.2 Application of State aid rules to tax measures

In recent years, the Court of Justice has made decisions on several big companies' tax matters concerning state aid law. They worried about possibly distorting the Union law by favouring measures from several Member States to international companies. Based on these issues, the Commission, in its Notice 1998, discussed specific matters regarding tax measures that could be seen as selective or not. In the Commission Notice and case of *Glaxo Welcome*[97], it is stated that Member States are free to decide the policy they think is most relevant. Specifically, in tax matters as well, they should not go beyond their competence and respect the Union laws. However, the Commission can intervene when a member state provides a subsidy to a company that constitutes an unfair advantage. For the Commission to identify a state aid, four elements should be present*: 1) use of state resources, 2) possible effect on trade in the Union, 3) advantage to a specific recipient, and 4) threat to competition*.[98]

Generally, in fiscal cases, CJEU has endorsed, in *Engie* and *Starbucks'* cases, the three-step analysis to determine whether the tax aid is selective.[99] Initially, the standard and regular tax regime must be identified in the alleged state, known as the reference system. Secondly, it questions whether the tax measure derogated from that system, which means this tax measure applies to all or only particular companies in a comparable factual and legal situation. Thirdly, if the tax measure is derogated from the reference system, the third and final step will be established, which needs to be justified by the system's nature or general scheme. If that measure is warranted in case that measure is derogated directly from the tax system's guiding principles. As a result, it qualifies as not being selective, and the burden of proof in the last step lies with the MS.[100]

3.2.1 The reference system

The first step of analysis is the reference system of the aid. It is crucial to identify whether the tax measure is from common tax laws in a specific state. The Court underlined that it is a benchmark for assessing the possible state aid. World Duty-Free Group is one of the vital cases that clarified the importance of these steps.[101] In this case, the Court also ruled that this step is to examine where the tax measure is coming from. It answers the question of where the measure derogates from.

[96] State Aid Rules and Transfer Pricing - Lexxion.https://www.lexxion.eu/stateaidpost/state-aid-rules-and-transfer-pricing/.
[97] C-182/08, para 34.
[98] Rene Repasi, EU State Aid law and Taxes Briefing Note, p-2.
[99] Starbucks, para 230.
[100] Engie, p-167.
[101] Ibid.

According to the Commission, a reference system for state aid analysis can be identified within various tax systems, such as the corporate tax system, the VAT system, or the general tax system for insurance.[102] This system also applies to stand-alone levies, which are taxes imposed on specific goods or activities that negatively affect the environment or health. This is how these levies may constitute their own reference system.[103]

3.2.2 Comparability

Upon completion of the reference system, a comparability examination is analysed. This step would question whether the tax relief recipient is in a comparable factual and legal situation to those who are not benefiting from the same tax relief. In the Belgian Excess Profit case, the General Court clarified this scrutiny step. The Court stated that the excess profit exemption applied to MNS is determined to be a selective advantage compared to stand-alone companies.[104] The Court cleared that both corporations are in similar and factual situations, both of which are in income tax policy.

In the *Paint Graphos[105]case*, the CJEU also stressed that selective conduct needs to be vindicated by objective reasons. In this case, it was ruled that treating intra-group companies differently from other entities is a tax measure. It must prove that the differentiation was based on the relevant characteristics of the tax measures' aims. The CJEU, in another case, pointed out that selectivity differs depending on the measures; first, it must be clear that it is its general scheme or individual aid. In the latter case, the presumption is sufficient that it is a selective advantage measure.[106]

3.2.3 Justification

As the burden of proof lies in Member States' hands, there should still be hope for justification for any aid and not as well. Even if a measure is considered selective, it can still be justified. In the case of *Hansen and Rosenthal[107]*, it illustrates the importance of the justification step for the aid. The Court held that, however, there were many cases that could not be justified, and their justification was not accepted by the Court. For example, in the case of *Gibraltar v Commission[108]*, the Court rejected the justification arguments for offshore companies' tax exemption, emphasizing that economic considerations only are insufficient to justify a selective measure.[109] It clarified that the justification must be grounded in the guidance tax system of the states and must be legitimate public policy rather than only being

[102] Notice, (1n) 133,134,

[103] Vincent and Philip, (n) p126

[104] JUDGMENT OF THE GENERAL COURT, of 20 September 2023, In Case T-131/16, Belgium v Commision

[105] Judgment of the Court (First Chamber) of 8 September 2011., C-78/08 - Paint Graphos and Others

[106] Judgment of the Court (First Chamber) of 4 June 2015, C-15/14. European Commission v MOL Magyar Olaj- és Gázipari Nyrt, ECLI:EU:C:2015:362

[107] Judgment of the General Court of 16 December 2008, Torres v OHMI - Navisa Industrial Vinícola Española, T-259/06, ECLI:EU:T:2008:575

[108] Judgment of the Court of First Instance, T-211/04 - Government of Gibraltar v Commission, ECLI:EU:T:2008:595

[109] Ibid.

economic interests. In this way, Szudocku argued that the justification step must show a stringent elaboration of the necessity and proportionality of the aid.

Further, she claimed that most of the time, the Member States present insufficient evidence as to why the measure is required for policy objectives.[110] Is it for the public or certain undertakings? These questions are pending unanswered. Thus, one can emphasize that the tax measure needs to be justified in a more fact-based manner and prove why this particular entity deserved it while others did not by justifying their nature and general scheme. However, the Commission pointed out the challenging part of justification by the logic of the system. When there are certain exceptions for non-resident companies, and if they are treated more favourably than the locals, it would not be easy to justify this situation.[111]

3.3 Briefly on arm's length principle

In most cases, the Commission used the arm's length principle in their assessment of the tax treatment. It comes to the stage when the exact transactions are absent from hand. The legal basis for this principle is Art. 107(1) TFEU. The Commission uses it when assessing the transfer pricing rulings under State aid rules and excludes unequal conduct in taxation among similar factual and legal undertakings.[112]

In investigating whether such treatment complies with the arm's length principle, it is advised to use guidance from the Organisation for Economic Cooperation and Development (OECD) 's Transfer Pricing Guidance for Multinationals Enterprises and Tax Administration. The Commission cleared that this guidance does not contain any provisions on State aid. Still, it would not be the case for unlawful tax treatment if enterprises comply with and respect this guidance while engaging in transfer pricing arrangements in their business operations.[113] In its investigation into *Apple*, the Commission looked at the type of possible tax rulings constituting a selective advantage. Initially, they examine whether the tax rulings misapply domestic tax law, resulting in lowered tax[114]. Moreover, it also helps when comparing all undertaking's legal and factual situations, whether it applies for all or some, besides whether the tax administration favours several operators in comparable situations and accepts their transfer prising's arrangement even if it does not comply with the arm's length principle.

Principally, this method is used in assessments when a group company is compared to a stand-alone company, whether that particular company is selected by the Commission.[115] Another case is *Amazon,* where the Commission used the same principle to conclude its decision regarding whether a tax ruling failed to produce an estimation based on this principle, which does not meet normal market conditions, confers that the advantage is there.[116] The Belgium and Forum 187 ASBL v

[110] Szudoczky, p 87
[111] Notice, (1) p-26.
[112] Notice, (1) p-27.
[113] Notice, (1) p-173.
[114] Commission Decision 2003/601/EC
[115] Apple decision, para-251.
[116] COMMISSION DECISION (EU) 2018/859, Amazon, para-404.

Commission case concerns using the cost-plus method to establish transfer pricing between coordination centres. The Commission seems to find the case relevant predominantly on twofold grounds. On the one hand, it is a confirmation that tax measures are not excluded from being deemed illegal under the State aid rules in Article 107(1) TFEU.[117] On the other hand, as established in the case, excluding certain costs necessary to obtain a correct cost-plus calculation in a transfer pricing transaction confers a selective advantage as per the State aid definition in article 107(1) TFEU.

3.4 Interim Conclusion

To sum up, this chapter discussed the relationship between State aid law and tax rulings. It underlined that State aid is a tool to combat harmful tax rulings in favour of certain undertakings, blasphemy in Union law. In this connection, competition law also plays an essential benchmark in maintaining the distortive practices of member states. This connection also helps to identify whether the tax measures from Member states are selective and advantageous by examining the three-step test in tax measures. This has become the main challenge in this sphere, distinguishing the selectivity of the measures in a compared legal and factual situation. However, the cases mentioned above shed light on this challenging unclarity as to when and how these tests are used in such instances, whether the measure derogation from the tax law in a given state and apply to every other undertaking without favouring only some of the entities in a comparable circumstance. Moreover, this test should compare between beneficiaries of the tax grant and those in all corporate tax law systems. It also gives the EU an advantage by allowing it to scrutinize the national tax rulings that fall under the law.107 TFEU. However, the fiscal competence of the Member States in terms of tax regime does not let the Member States avoid the EU law.

4 European Commission's decisions related to State aid and tax measures

In recent years, the Commission has released its decisions on several multinational companies and their 'supporters' as Member States in the EU, specifically Ireland, Luxembourg, and Netherlands. These decisions are based on unlawful State Aid, mainly different tax treatment on MNE by the abovementioned countries. Namely, MNEs are *Apple*, *Engie Group*, *Fiat* and *Starbucks*. This chapter is devoted to the decisions of the EU Commission on how it acted in such situations and its judgement

[117] C-182/03 and C-217/03, Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities, para-81.

and findings. Primarily, it gives readers a factual background of the cases and then the Commission's decisions. Lastly, the General Court's judgment will be displayed as well. These particular cases were chosen due to their controversial debates and relevance to the research topic.

4.1 *Apple case*, Factual and Legal Background

EU Commission requested Ireland to provide their tax ruling practices in favour of Apple Group companies AOI[118] , ASI[119] , and AOE[120] , which are all situated in Ireland. Then, the EU Commission began investigating possible unlawful aid to Apple and decided its rulings in 2017. *Apple*, based in the United States, is a multinational company engaged in designing, producing, and marketing their various devices and selling them globally. The company includes Apple Inc. and controls its branches, which are servicing the globe. The case was contested in two tax rulings by Irish Revenue in favour of ASI and AOE between 1991 and 2007. These rulings permitted both entities to share their profits among branches in Ireland, determining their yearly tax charge in Ireland based on the approved methods of profit distribution.[121] This case caught the Commission's eye, and it commenced its investigation on whether the tax rulings constitute EU State aid rules. Specifically, the Commission considered whether the rulings create a selective advantage and whether they are in line with OECD's arm's length principle in their transactions derived from art.107 TFEU.

Commission's decision

EU Commission concluded its decision by stating that the tax rulings granted by Ireland to Apple are found to be state aid, which is in breach of sub-state aid rules. In the extension, it reasoned that by deviating from market-based outcomes consistent with the arm's length principle, the disputed rulings endorse methods for allocating profit to the Irish ASI and AOE branches.[122] Consequently, it opens a way for a reduction in the taxable base of ASI's and AOS's compared to other non-resident entities operating via branches in Ireland.[123] Thus, it effectively lowers the corporate tax charge of ASI and AOE under the ordinary rules of taxation corporate profit in Ireland, resulting in a selective advantage that is in breach of the Art.107(1) TFEU.

To this end, Ireland argued that its tax law does not contain OECD's arm's length principle, and therefore, the tax rulings should not be assessed with external references.[124] However, the Commission cited from CJEU that using external references like the arm's length principle is binding for Member States.[125] On the

[118] Apple Operations International.
[119] Apple Sales Internationals.
[120] Apple Operations Europe.
[121] Commission Decision (EU) 2017/1283, on Apple, para-39.
[122] Ibid, (n 121) para-360.
[123] Ibid, (n 121) paras, 321, 413.
[124] Ibid, (n 121) para-153.
[125] Ibid, (n 121) para-257.

other hand, Apple claims that to scrutinize levy cases, the State aid procedure is not suitable, which is unfair to Member States in their business taxation.[126] Commission maintained that State aid rules were essential for preventing competition distortion and selective advantage cases in the Union.

4.2 *Engie Group* case, factual and legal background

This case started on 2015 March 23 by sending a request from the Commission to the Grand Duchy of Luxembourg concerning tax rulings to the Engie Group (later: GDF Suez). The Commission asked all the tax rulings to be treated in favour until the date of the letter sent in 2004. Luxembourg submitted tax rulings in the same year. The Commission investigated the case and approved the decision in 2018. The General Court upheld the case in 2021.

Engie group, formerly known as the GDF Suez group, consists of Engie S.A. and all companies controlled directly or indirectly by Engie S.A. The group resulted from a merger in 2008 between the French groups GDF and Suez. Engie is primarily involved in power production, natural gas, liquefied natural gas, energy efficiency services, and energy trading.[127]

In this case, two contested tax rulings exist in intra-group transfer transactions. All the parties are part of the Engie Group. It concluded that Luxembourg tax authorities issued two sets of tax rulings to Engie group companies between 2008 and 2014. This gave the group an opportunity to avoid taxation on almost all income made by Luxembourg subsidiaries.[128] The Commission determined that the two tax rulings granted to Engie Group were selective tax advantages resulting in State aid and incompatible with EU laws.[129] This led to the recovery of unpaid taxes from Engie group companies, which was estimated at 120 million euros.

Commission's decision

Based on the investigation and findings, the Commission concludes the case where Luxembourg was found in breach of Art 107(1) and 108(3) TFEU and an aid granted unlawfully to Engie by favoring tax rulings. In its assessment of tax rulings in the Engie case, the Commission considered a reference system to compare the granted tax advantage with standard rules. According to ECJ, the three-step test needs to be applied to classify any measure by Member States as selective. In addition to this, based on Luxembourg law, corporate income tax applies to all residents in Luxemburg.[130] The Commission argued that using the reference system only applicable to specific companies or certain transactions never constitutes derogation and is incompatible with Art.107 TFEU. A measure which creates an exception to

[126] Ibid, (n 121) para-173.
[127] COMMISSION DECISION (EU) 2019/421, on Engie.para-16.
[128] Ibid, (n 127)
[129] Ibid,
[130] Ibid, (n 127) para-173.

the application of the general tax system may be justified by the nature and overall structure of the tax system and if these are from basic and guiding principles of its tax system to be effective. Luxembourg could not advance its justification; thus, the Commission concluded that it is a tax advantage to LNG holdings and that the nature or general scheme can justify CEF.[131] Contrary, Luxembourg argued that merged companies who are using a direct ZORA agreement between two group firms residing in Luxembourg would benefit from such treatment as Engie; thus, it is *prima facie* selectivity, not a derogation from the reference framework.[132] On the contrary, the Commission argued that excluding certain operators from the benefit of the tax advantage over the normal tax system would be discrimination against other operators who are in comparable legal and factual situations.[133] For this reason, those who are using a direct ZORA would be at a better advantage than those who are not using it; therefore, this is not a *prima facie* selective.

Since all the criteria must be met to classify a measure incompatible with union law, in the present case, the Commission was found to be incompatible with aid by Luxembourg to Engie Group.[134] Interestingly, Luxembourg did not call any appeal against this allegation. The Commission argued that the tax relief in this case is operating aid (financial aid), which affects daily activities by reducing tax expenses. As a legal basis in the Art.107 TFEU, it is stated that operating aid is not compatible with the Internal Market. Thus, the grant given by Luxembourg to Engie Group is incompatible as this aid does not contribute to the development of specific actions or economic areas. Moreover, any assistance granted must be notified to the Commission grounded on art.108(3) TFEU if they are not in *de minis or block exemption*[135] position. In this case, Lux did not notify the Commission, which put themselves in breach of the Union law.

Furthermore, for the selective nature of the aid, the Commission stated that since the transaction between these companies by the contested tax ruling are subject to tax in Luxembourg, specifically the transfer of assets to the Engie Subsidiaries and the financing, these transfers are subject to tax in Lux[136]. In this way, Lux argued that complying with domestic rules is satisfactory in this situation. On the contrary, the Commission reacted that if this were the case, it would not have existed such rules as State aid.[137] The Commission's reaction is reasonable, and in such situations, both domestic and union law should be valued equally. The problem is here a breach of Union law regardless of whether any harm has been detected.

4.3 *Fiat case*, factual and legal background

The EU Commission initiated the case by sending a request to the Grand Duchy of Luxembourg to provide them with tax ruling practices in 2013. Upon trying to hide

[131] Ibid, (n 127), para
[132] Ibid, (n 127) para- 274.
[133] Ibid, (n 127) para-275.
[134] Ibid, (n 127) para-322.
[135] See chapter 2.
[136] Ibid, (n 127) para-246.
[137] Ibid, (n 127)

some information regarding tax rulings from 2010 to 2012 by Luxembourg, the Commission initiated an investigation of the tax rulings of Luxembourg for MNEs. Among 22 tax rulings between the mentioned years, one of them concerns the transfer pricing arrangement with a company sub-name FFT APA (Fiat Finance and Trade Ltd.).[138] The Commission decided to scrutinize more after finding out the tax rulings granted in favour of FFT's intra-group transactions as occurred in the Apple case. FFT is a part of the Fiat group (at the time of the contested ruling Fit SpA) incorporated in Turin, Italy. All parts are monitored by Fiat Group. Fiats operates in industrial and financial services in the automobile sphere. FFT is based in Luxembourg. The Commission thought that the disputed tax rulings granted state aid to FFT, which was incompatible with the meaning of Art.107(1) TFEU. Furthermore, the Commission is concerned with whether the rulings comply with ALP (Arm's Length Principle) and whether the chosen method for calculating remuneration is in its transfer pricing analysis.[139] The Commission's decision established that Luxembourg granted state aid to FFT via APA, which unduly lowered the tax. The General Court upheld the case in 2019.

Commission's decision

The Commission concludes that Luxembourg's disputed tax ruling in favour of FFT and Fiat Group was found to be a selective advantage that is imputable to Luxembourg. Besides, the grant was financed by State resources, and thereby, it is liable to affect competition and intra-Eu trade. From this conclusion, it was ruled that the grants given by Luxembourg constitute State aid under Art.107(1) TFEU.[140]

Luxembourg brought up their arguments in two phases. On the one hand, they contend that the standstill requirement cannot be implemented and that the Commission's decision to begin the inquiry does not clarify how the procedures qualify as state aid.[141] Additionally, it argued that the Commission did not indicate which formula should be used to determine the FFT tax due. Furthermore, Luxembourg claims that the Commission violated the sincere partnership principle. It contends that by conflating the use of discretion with the straightforward interpretation of a common law norm, the Commission abused its authority. It claimed that the FFT tax decisions are in accordance with Article 164(3) of the Luxembourg Income Tax Law (LIR) and do not represent an exercise of discretion by the Luxembourg administration. The Commission violates the Member States' authority over direct taxes.[142] On the other, Luxembourg argues that its administrative practice was not taken into consideration and that the Opening Decision was only evaluated in accordance with the OECD Transfer Pricing Guidelines.

Additionally, Luxembourg asserts that the Code of Conduct Group (business taxation) has specifically certified that its tax decision practices are in compliance with the OECD Code of Conduct and Guidelines. For the entire five-year validity

[138] Commision Decision (EU) 2016/2326, Fiat, p-10.
[139] Ibid, (n138) Fiat para-132.
[140] Ibid, (n 138) Fiat, para-346.
[141] Ibid, (n 138) Fiat, para-143.
[142] Ibid, (n 138) Fiat, para-146.

term of the tax decisions from September 3, 2012, FFT should be able to depend on them according to the concept of justifiable expectations.[143] FFT asserts that the Commission's selectivity analysis of conformity with the arm's length norm was accurate; however, the Opening judgement contained no proof that FFT received preferential treatment over other parties in comparable circumstances.[144] From the tax administration, FFT was entitled to an APA.

The Commission responds to these points by arguing that, first, the disputed decisions were made by the Luxembourg tax administration, which acknowledges a procedure for allocating intra-group profit inside the Fiat group, so it is attributable to Luxembourg. Second, according to the CJEU, State aid is defined as any form of assistance, regardless of whether it is a positive transfer or places an undertaking in a better position than other taxpayers.[145]

4.4 *Starbucks* case, factual and legal background

Starbucks Manufacturing EMEA BV (SMBV) is a Starbucks Group subsidiary resident established in the Netherlands. The group consists of Starbucks Corporation and all of its controlled companies. Its headquarters is based in Seattle, US. Starbucks Group specializes in coffee roasters, marketers, and retailers operating in 65 countries around the globe. SMBV made an APA agreement with Dutch authorities that allowed Starbucks to determine its corporate tax due in the Netherlands based on the payments for purchase and royalties paid by SMBS to Alki LP in 2008. After that, it became the focus of scrutiny as it is alleged to confer selective tax advantage to Starbucks, potentially illegal state aid under Union law. Based on this agreement, the Commission began its examination of APA in 2014 concerning the violation of Art.107(1) TFEU. However, the General Court annulled the Commission's decision in 2019.

Commission's decision

The Commission concluded the case on October 21, 2015. Based on the investigation's outcome, which is the same as the Fiat case, it was found that the APA between the Netherlands and Starbucks constituted illegal state aid.[146] The assessments were grounded on the examination that the APA did not reflect market conditions and thus conferred a selective advantage to SMBV by reducing its tax burden compared to non-integrated undertakings that are doing business under normal market conditions of the Dutch corporate tax system.[147] Thus, this tax treatment was found illegal under Art 107(1) TFEU.

[143] Ibid, (n 138) Fiat, para-157.
[144] Ibid, (n 138) Fiat, para-170.
[145] Ibid, (n 138) Fiat, para-188.
[146] Commission Decision (EU) 2017/502, on Starbucks, para-450.
[147] Ibid, (n146) Starbucks, para-415.

The Commission argued that the APA conclusion between the Netherlands and Starbucks was made up of a profit allocation to SMBV that was not in line with the ALP rules. More concretely, the APA allowed for a royalty payment to Alki Limited Partnership (Alki LP), which desperately lowered SMBV's taxable income in the Netherlands.[148] This particular payment is seen as excessive and abnormal to normal market conditions. To this end, on the other hand, Starbucks and Dutch authorities consented to the Commission's arguments that the APA was in line with OECD Transfer Pricing Guidelines and domestic Dutch tax law.[149]They argued that the ALP applied based on the laws and that the royalty payments were justified given the economic value of the services provided by the Alki.[150] Furthermore, they argued against the reference system by the Commission, stating that it is not rightly used, that selective advantage was not substantiated and that the APA did not confer any preferential treatment other than what is permitted in state aid rules.[151]

4.5 Findings by the General Court

This conclusion will discuss the abovementioned cases' final judgements from the General Court and its reasoning for final judgment. Moreover, it implies that the tax treatment is seen as a breach of state aid rules cited from the cases. It will outline the issues established in the cases and the Court's explanations.

In a nutshell, the abovementioned cases discussed how the debate between MNEs, and the Commission went on in their arguments related to State aid and tax treatment from Member States. It is visible from cases that the Commission has a more significant effect on even domestic tax monitoring when they think the tax measures have a potential impact on others in comparable situations. To assess this potential selective aid, the Commission used several methods to determine whether the measures were in line with the agreed rules. Since these cases concern transfer pricing transactions and profit allocation between intra-groups or separate groups, it is useful to determine whether they are in line with the law. It is derived from OECD's Guidelines on Transfer Pricing and is classified as non-binding guidance in Member States. It is used to allocate profit in corporate groups or a group within its branches. In letter case, the company should operate a permanent establishment in separate jurisdictions.[152] These transfer pricing rules require that the transaction occur at arm's length. For example, in *Apple's* case, the headquarters is located in the US, but it has branches in Europe, specifically in Ireland, and these intra-group companies make transactions between them; thus, this transaction must be conducted under arm's length principle. That means they must meet market conditions in their transactions. As a result, it ensures that these companies do not lower the tax due by making such transactions, which could possibly disturb State aid rules.

In the ***Fiat and Starbucks*** cases, the General Court ruled differently despite the similarity of the issues. The General Court dismissed Fiat's appeal on September 24,

[148] Ibid, (n146) Starbucks, para-412.
[149] Ibid, (n146) Starbucks, para- 413.
[150] Ibid, (n146) Starbucks, para-152.
[151] Ibid, (n146) Starbucks, para-413.
[152] Commission Decision (EU) 2017/1283, on Apple, para-80.

2019. The European Commission's conclusion that Fiat's tax ruling, which was issued by Luxembourg, amounted to unlawful state assistance was affirmed by the Court.[153] According to the verdict, the tax arrangement did not represent economic reality and gave undue benefit. In contrast, The General Court overturned the Commission's ruling against *Starbucks* on the same day as *Fiat* in 2019.[154] The Commission failed to provide sufficient evidence to support its findings that Starbucks granted selectively and economically from the tax measures issued by the Netherlands authority. However, for some scholars, for the sake of future cases, the Commission won it with its reasoning.[155] All cases discussed in the previous section were concerned with whether the ALP method was complied or not.

The Court explained that the lack of compliance or non-compliance of the method requirement does not determine the beneficiary's advantage. Consequently, in its judgement, the Court ordered the Commission to confirm that the possible mistake in the decisions resulted in an outcome that was outside of the ALP range.[156] As a result, it can be concluded that any Member state is free to work with companies who want to make intragroup transactions as long as it is in line with State aid rules.[157] Additionally, the Court in the *Starbucks* case disregarded the Commission's argument on *Starbucks'* possible benefit from the tax treatment. However, the Commission considers that the CUP method is more reliable and direct and would give a more exact calculation of market conditions.[158] It was determined that there was a benefit to using the transactional net margin method (TNMM) rather than the comparable uncontrolled pricing technique (CUP) for the Alki royalties when analysing SMBV's paying.[159] Because the Commission did not provide an analysis of the assistance that would have been acquired using the CUP technique, it was unable to demonstrate that the decision was not made in an arm's length way. Therefore, in order to draw a conclusion on selective advantage, it must be thoroughly examined in all situations to determine whether the intragroup transaction mechanism complies with ALP.

Furthermore, as Lyal argued, even the most accurate approach for estimating market pricing, the (CUP) technique, may need to be modified to take into consideration variations between intra-group and market transactions, such as function performance or risk allocation.[160] Additionally, uncertainty is introduced by methods that use average values for comparable uncontrolled margins. The Commission verifies that authorised transfer pricing techniques are utilised consistently, that they do not unjustly benefit certain enterprises, and that any alternative methods allowed by national law still fairly represent market prices. He also added that it is difficult to distinguish between what is an acceptable approximation of an arm's-length price

[153] https://www.pwc.nl/en/insights-and-publications/tax-news/enterprises/EU-General-Court-annuls-EC-State-aid-decision-Starbucks.html, Accecced on 17/05/2024.

[154] Judgement of the General Court, Cases T-760/15 and T-636/16, ECLI:EU:T:2019:669.

[155] Guido, Bellinghi, The General Court in Amazon and Engie: A New Effect-based Approach Aimed at the Endorsement of the 'Vestager Doctrine'? https://www.europeanpapers.eu/en/europeanforum/general-court-in-amazon-and-engie-endorsement-of-vestager-doctrine, Accecced on 20/05/24.

[156] Starbucks, para 201, 211, Skadden, Arps, Slate, Meagher & Flom LLP, 2019 last accessed 1 April 2020.

[157] James Anderson, Niels Baeten, EU General Court Rules on Starbucks, and Fiat State Aid Cases, (Skadden, 2019).

[158] Fiat, para-245.

[159] Fiat, para-247.

[160] R Lyal, Transfer Pricing Rules, and State Aid, 2015

and what is State aid.[161] Thus, the Commission has to demonstrate that a particular decision improperly applies objective standards to identify state aid. Because the purpose of the State assistance rules and the Commission is to ensure these regulations are implemented, not to impose their system or enforce tax laws. In this regard, the Court annulled the Starbucks case since no satisfactory accusations were found.

The Commission used a reference framework to assess the selectivity of the measure in the abovementioned cases. In the Fiat case, the Court rejected the argument by Ireland, claiming that the reference framework must be based on the domestic tax law, not an external or hypothetical system.[162] It held in its judgement on *Belgium* coordination centres that the Commission has the competence to use APA as a tool or benchmark to assess whether the tax rulings confer a selective advantage, even if this principle is not labelled in the domestic laws.[163] To this act, Ireland suspected that the Commission's examination was wrong in using APA for finding selectivity. As a reason for this argument, the Court said the associated companies do not operate under market conditions, so their tax treatment is to be compared to stand-alone companies to identify their selectivity. Moreover, Ireland's argument is that non-resident and resident companies should be taxed differently based on their territoriality, as residents are taxed on all-inclusive income and non-residents are taxed on their source income.[164] But this argument was clarified by the Commission and the Court: there is no justification for headquarters sitting in another state, but its branch operates in another state as a non-resident, both integrated and non-integrate, resident and non-resident are all in comparable legal and similar situations.[165] In Addition to this, the Court and the chapters mentioned earlier that, in general, using the arm's length principle as a benchmark tool is relevant when examining companies between stand-alone and group companies and whether they are in comparable legal and factual situations. To identify whether the measure is selective or not, the three-step test must be conducted to conclude the case as selective compared to the case with a regular tax system.[166]

4.6 Interim conclusion

This chapter has delved into the European Commission's decisions regarding State aid and tax measures involving multinational enterprises (MNEs) such as Apple, Engie Group, Fiat, and Starbucks, and their interactions with Member States like Ireland, Luxembourg, and the Netherlands. Through a detailed examination of these cases, it is visible how the Commission investigates and adjudicates potential breaches of EU State aid rules, particularly focusing on tax rulings that provide selective advantages to MNEs, thereby distorting competition.

[161] Ibid, Lyal (n 169).

[162] Opinion Of Advocate General Pikäme delivered on 16 December 2021, Case C-898/19 P Ireland V European Commission.

[163] Apple, (n 121) para-251.

[164] Apple, (n 121) para-237.

[165] Apple, (n 121) paras-239, 242, also in Royal bank of Scotland plc v Elliniko Dimosio, C-311/97.

[166] Judgement, Engie, para-107.

The cases of Apple, Engie, Fiat, and Starbucks illustrate the complexities involved in determining whether tax rulings constitute unlawful State aid. The Commission's decisions articulate on whether these rulings deviate from market conditions, particularly the arm's length principle (ALP), and whether they confer a selective advantage to the companies involved.

The General Court's judgments in these cases underscore the nuanced and contentious nature of applying State aid rules to tax rulings. The differing outcomes in the Fiat and Starbucks cases, despite similar issues, reflect the complex balance between national tax sovereignty and EU competition law enforcement. The Commission's reliance on the ALP and reference frameworks to assess selectivity and compliance with State aid rules is evident across these cases. However, the varied judicial outcomes suggest that a thorough and context-specific analysis is crucial to substantiate claims of selective advantage and unlawful State aid

5 Concluding remarks

This thesis has illustrated the importance of the State aid law in the general framework and its application to tax rulings to determine when and how the tax rulings can be seen as state aid under EU law, specifically Art.107(1) TFEU. Moreover, the Commission’s approach in the recent decisions on tax rulings and state aid has been controversial and problematic in terms of methodological aspects.

First of all, the thesis’s investigation brought up the importance of the State aid law to maintain a level playing field in the EU by ensuring the internal market competitive and free trade flow without affecting by giving favours certain undertakings and putting them in a more favourable position. In particular, it highlighted that to fall within the scope of Art.107(1) TFEU, the measure needs to be selective, it should give economic advantage, it should come from state resources, and lasty, it should distort competition and impact trade between Member States.

Secondly, state aid rules are also essential in terms of scrutinizing the corporate tax regimes in Member States when they cooperate with worldwide companies to attract them to operate in their areas and improve their investment flow. In this way, the Member States predominantly offer more advantages to influential and foreign companies with their tax-related issues by lowering the tax burden while others pay their taxes. This distorts competition and the principle of equal treatment under EU law. For this motive, the state aid rules are crucial.

The Commission’s state aid investigation into tax rulings have significantly impacted how tax authorities and multinational companies structure their transfer prising arrangements. The cases discussed above, demonstrate the Commission’s

increased scrutiny of tax rulings that could provide selective advantages to certain companies over others in comparable situations.

The analysis of the Apple, Engie, Fiat and Starbucks cases illustrates the stringent criteria applied by the Commission in elaborating whether the tax rulings create unlawful state aid. Fundamental to this determination is the selectivity advantage criteria, which involves deviation from the arm's length principle and results in a lowered tax burden for certain companies compared to others in a similar and factual situation. Moreover, without adjusting to standard market conditions, such rulings distort competition and simultaneously impact trade in the internal market, therefore violating Art.107(1) TFEU.

Furthermore, to maintain fair competition across the EU, the Commission provides a robust mechanism for evaluating the compliance of tax rulings with competition law with the help of the reference system and OECD's guidelines. These tests help to assess the tax rulings whether they are selective or not. As discussed above, it should examine the tax aid with a regular tax regime. If this step is fulfilled, compare the tax beneficiary with another undertaking in a legal and factual situation. If this is also positive, the third step will not be required, and the aid applied for all, thus, does not fall within the scope of Art.107 TFEU. Apart from this, the Commission used the arm's length principle; however, this was not accepted by some states. They claimed that to use such methods in fiscal measures, national laws should have implemented it. To this argument, the Commission claimed it is inherited from the Art.107 TFEU, and it is bound by Member States. Although this interpretation method was seen as weak in the legal debates, it brought challenges and unclarity to the viewers. By doing so, the Commission tried to harmonize that method among the domestic policies in the EU, which created a political view of the situation. The Court annulled the Commission's actions and stated that national tax provisions are relevant to determining the standard tax system without harmonization at the EU level. In this way, the Court reasoned that associates' companies do not operate in normal market conditions; thus, they cannot be compared with stand-alone companies.

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