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Tax Rulings as State Aid FAQ

by Ruth Mason

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In this report, the first in a series of reports on EU state aid, Mason provides background on state aid law as it applies to income taxes.

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On August 30, 2016, the European Commission announced its decision that Ireland granted illegal state aid to Apple Inc.[1] The European Union's state aid rules constrain how member states may subsidize businesses. The rules entitle the commission to order a member state that provides an illegal subsidy to recover the subsidy from the advantaged enterprise. The commission's Apple decision came with a shocking price tag: Apple must repay roughly €13.4 billion — plus interest — to Ireland.

This report provides background for Americans on EU state aid law.

What Are the Governing Authorities?

Article 107 of the Treaty on the Functioning of the European Union prohibits state aid, with some exceptions.[2] Article 108 obliges the commission, the EU's executive body, to monitor permissible aid and take enforcement actions against states granting impermissible aid. Article 108 also empowers the commission to determine whether a state has granted aid, subject to review by the EU courts. Article 109 allows the EU Council to promulgate state aid regulations.[3] The TFEU "duty of loyal cooperation" obliges the member states to cooperate with commission investigations.[4]

The most important state aid legislation is council regulation 2015/1589.[5] The regulation binds the commission and the member states, and it governs state aid procedures. The commission is also bound by enforcement policies and guidelines it has drawn up for itself. The most relevant guidelines for tax rulings were originally provided in a 1998 notice.[6] (The guidelines survive with amendment

[1]Commission press release on Apple decision, IP/16/2923 (Aug. 30, 2016).

[2]TFEU art. 107(1), 2007 O.J. (C 326) 91 (Oct. 26, 2012).

[3]TFEU art. 109 (the commission has to propose, and the EU Parliament has to approve, that regulation).

[4]TFEU art. 4(3) (duty of loyal cooperation).

[5]Council reg. 2015/1589 (July 13, 2015), providing detailed rules for the application of TFEU art. 108, 2015 O.J. L 248/9 (codification), superseding council reg. 659/1999 (Mar. 22, 1999), establishing detailed rules for the application of art. 93 of the EC Treaty, 1999 O.J. L 83/1. Under EU law, a regulation is legislation, meaning it was passed by the council, with approval by the Parliament, when necessary.

[6]Commission notice on application of the state aid rules to measures concerning direct business taxation, 1998 O.J. C-384/03, para. 9 (Dec. 10, 1998) (1998 notice). The 1998 notice was repealed and superseded by the 2016 notice on the notion of state aid.

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and augmentation in the commission's 2016 notice.[7]) In the 2016 notice, the commission announced its interpretation of the TFEU requirements concerning state aid, as informed by its own past enforcement actions and decisions by the EU courts.

What Is State Aid?

The TFEU forbids states aid using the following language:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.[8]

Originally designed to prevent protectionism, over time the scope of the state aid prohibition has expanded, and now, it embraces a stance against harmful tax competition. Recent statements by commission officials[9] suggest that the state aid rules enforce the single-tax principle, which is the idea that all of a multinational's income must be taxed exactly once.

To put it mildly, the unclear normative underpinnings for the state aid prohibition have made state aid enforcement unpredictable in the tax area.

The TFEU provides various exceptions to the state aid prohibition, including measures that respond to natural disasters and other exceptions unanimously agreed upon by the EU's Council of Ministers.[10] Those agreed exceptions cover aid granted to raise the standard of living in lesser-developed regions and aid granted in response to the financial crisis. States also can seek advanced approval from the commission to enact specific kinds of subsidies.

The current tax ruling cases involving U.S. multinationals all involve putative "unnotified aid" that has not been preapproved by the commission.

There are five elements to an illegal state aid. There must be (1) an advantage (2) granted by a member state (3) to an undertaking. The advantage must be granted (4) selectively, and it must (5) distort trade or competition in the internal market.[11] Under the current state of development of EU law, tax subsidies easily satisfy all the elements except for advantage and selectivity, so those are the only elements I will discuss here.[12]

What Is an 'Advantage'?

Under EU law, the concept of advantage clearly encompasses tax benefits, but it does not encompass mere legal certainty.[13] As a result, ordinary confirmatory rulings do not constitute aid,[14] but rulings that reduce taxes could be aid.

The commission often identifies advantages using the market economy operator test.[15] This test analyzes a member state's investment in an enterprise and asks "whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment" on the same terms.[16] This test works well when the advantage is a loan or equity infusion made by a state, but it does not directly translate into government activities that are never performed by private investors, such as granting tax rulings.

In a recent tax state aid case, *Adria-Wien*, the EU's highest court, the Court of Justice, stated:

> The concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.[17]

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[7]Commission notice on the notion of state aid as referred to in TFEU art. 107(1), O.J. C 262/1, at para. 74 (July 19, 2016) (2016 notice).

[8]TFEU art. 107(1).

[9]*See, e.g.*, speech by EU Competition Commissioner Margrethe Vestager to the European Parliament's TAXE II special committee on tax rulings, at 2 (Apr. 4, 2016) (noting that of 2,000 rulings examined by the commission, "around 100 . . . look at just one side of a transaction. They decide on an appropriate profit for the activities of just one company of a group. As for the profit that remains, it might be taxed somewhere else — or it might not be taxed at all. This creates a potential for loopholes.").

[10]TFEU art. 107(2)-(3).

[11]*See, e.g.*, joined cases C-393/04 and C-41/05, *Air Liquide Industries Belgium SA*, 2006 E.C.R. I-5293, para. 28.

[12]*See, e.g.*, commission decision initiating the formal investigation in SA.38373 (alleged aid to Apple), O.J. 2014/C 369/04, at para. 48 (Oct. 17, 2014) (noting that if the commission can show selective advantage, satisfaction of the other state aid elements is "relatively straightforward").

[13]2016 notice, *supra* note 7, at paras. 169-170.

[14]*Id.* at paras. 169 and 174.

[15]This approach, and others similar to it, have been accepted by the EU courts. *See, e.g.*, case C-39/94, *SFEI and Others*, 1996 E.C.R. I-3547, paras. 60-62 ("to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions").

[16]2016 notice, *supra* note 7, at para. 74.

[17]Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer and Peggauer Zementwerke GmbH v. Finanzlandesdirektion fur Karnten*, 2001 E.C.R. I-8365, para. 38.

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In *Adria-Wien* and other cases, the Court of Justice confirmed that tax reductions can constitute state aid. Similarly, in the 1998 notice, the commission described illegal tax state aid this way:

> Firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in the firm's tax burden in various ways, including:
>
> - reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet),
> - total or partial reduction in the amount of tax (such as exemption or a tax credit),
> - deferment, cancellation, or even special rescheduling of tax debt.[18]

This description will remind U.S. readers of tax expenditures. As early as 1974, the Court of Justice established that tax expenditures could be state aid. In the *Italian Textile Case*, Italy argued that because a tax reduction was not a state aid, Italy did not violate the treaty when it excused the Italian textile industry from social security contributions. The court rejected that argument, declaring that the form of the aid did not matter.[19] The court's ruling in the *Italian Textile Case* highlighted the anti-protectionist goal that dominated state aid at that time.[20]

The basic idea is that if the state forgoes tax that otherwise would be due under its regular tax regime, that forgone tax is an advantage conferred on the taxpayer and, if granted selectively, a state aid. The 1998 notice made clear that the state aid concept also applies to actions taken by the tax administration:

> Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid.[21]

Again, the ''departure'' language probably evokes tax expenditures for many U.S. readers.

We are all familiar with the baseline problem in identifying tax expenditures. If tax expenditures are deviations from a normative (or reference-law) baseline, we need to be able to identify the baseline to determine if a particular provision constitutes a deviation. In the U.S. domestic context, the consequence of labeling an item a tax expenditure is that its revenue cost has to be estimated and reported. In Europe the stakes are considerably higher. If a state enacts an improper tax expenditure, the commission can order the state to recover it from the taxpayer.

In EU tax state aid cases so far, the state's own regularly applicable tax regime, however defined, has served as the baseline.[22] Proper identification of the reference base will be a major issue in the appeals in the recent cases. For example, if a state adopts the OECD transfer pricing guidelines as authoritative for transfer pricing rulings, do the guidelines become part of the reference baseline? If so, does adherence to the guidelines immunize the member state from state aid claims? The commission's final decision in the Starbucks case says no,[23] but this issue will be litigated.

What Is 'Selectivity'?

Selectivity doctrine is characterized by several different standards, and the application of those standards by the commission and the EU courts seems ad hoc. Selectivity likely will be another main contention in the appeals involving U.S. multinationals.[24]

The commission has long maintained that an advantage conferred by a state is selective unless it applies ''without distinction to all firms and to the production of all goods.''[25] Thus, a low tax rate that applies uniformly to all taxpayers is not selective.[26] Likewise, tax ruling practice that merely confirms

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[18]1998 notice, *supra* note 6, at para. 9.

[19]Case 173/73, *Italian Republic v. Commission*, 1974 E.C.R. 709. Similarly, in a more recent case, the court stated that ''a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of state resources, places the persons to whom the tax exemption applies in a more favorable financial situation than other taxpayers constitutes State aid within the meaning of . . . the Treaty.'' Case C-387/92, *Banco Exterior de Espana v. Ayuntamiento de Valencia*, 1994 E.C.R. I-877, at para. 14.

[20]The court noted that ''the Italian textile industry is in competition with textile undertakings in other Member States.'' Case 173/73, *Italy v. Commission*, 1974 E.C.R. 709, para. 19.

[21]1998 notice, *supra* note 6, at para. 22.

[22]This reference-base approach is similar to the one the Joint Committee on Taxation described in a 2008 report. JCT, ''A Reconsideration of Tax Expenditure Analysis,'' JCX-37-08, at 9 (May 12, 2008) (''Our determination of Tax Subsidies in most cases thus is made, not by reference to an alternative and hypothetical 'normal' tax chosen by the JCT Staff, but rather by reference to the face of the Internal Revenue Code itself (along with its legislative history and similar straightforward tools for identifying legislative intent).'').

[23]*On State Aid Implemented by the Netherlands to Starbucks*, Commission Decision COMP/SA.38374 (Oct. 21, 2015), para. 264 (Starbucks final commission decision).

[24]*See, e.g.*, Case T-760/15, *Dutch Annulment Action in Starbucks* (pleading that ''the Commission did not adequately — and separately — demonstrate that the selectivity criterion was fulfilled'').

[25]1998 notice, *supra* note 6, at para. 13.

[26]2016 notice, *supra* note 7, at paras. 126-128.

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the application of domestic law to the taxpayer's facts does not amount to a state aid, even if only some parties seek rulings.[27]

Commission guidance provides that generally applicable provisions ''of a purely technical nature'' (like depreciation rules) and ''measures pursuing general economic policy objectives'' (like research and development incentives) will not be regarded as incentives.[28] But to avoid characterization as state aid, those advantages must be available to all companies.

State aid expert Raymond H.C. Luja, a professor at Maastrict University, recently identified a non-exhaustive list of selective advantages:

> (i) benefits applicable to a particular sector of industry (sectoral aid), (ii) benefits applicable to a certain region of the territory the government competent to tax (regional aid), (iii) benefits conditional upon exporting goods or services (export aid), (iv) individual benefits (like rulings that are too advantageous compared to case law and general tax policy), and (v) benefits in size (such as using thresholds that effectively restrict tax benefits to large companies).[29]

Selectivity is a contentious legal issue in tax state aid enforcement actions. The lower EU court, the General Court, has annulled a series of recent commission tax decisions because the commission failed, in the General Court's view, to carry its burden on selectivity.[30] Preliminary indications from the Court of Justice, which hears appeals from the General Court, show a divergence of views among advocates general on the direction the doctrine should take.[31]

It suffices here to indicate that fundamental issues remain unresolved, and there are important pending cases that will be decided before the appeals in the recent transfer pricing cases involving U.S. multinationals. A crucial question is whether rulings are selective because they are available to multinational groups but not to stand-alone companies.[32] Another is whether transfer pricing rulings are automatically selective because they are issued to a particular taxpayer. Endorsement by the EU courts of such broad conceptions of selectivity would make any transfer pricing ruling that resulted in tax savings illegal aid, essentially vitiating selectivity as a separate criterion in rulings cases.

The forthcoming second part of this report will address whether tax rulings are selective. The short answer is that some are and some aren't.

What Is the Procedure?

EU law requires member states to seek the commission's permission before providing aid to enterprises. That did not happen for the rulings provided

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[27]*Id.* at paras. 169 and 174.

[28]*See* 1998 notice, *supra* note 6, at para. 13 (old guidance describing as not selective generally available rules on tax rates, depreciation, loss carryovers, provisions to prevent double taxation or tax avoidance, and generally available measures aimed at ''certain production costs, including R&D, the environment, training, [and] employment'').

[29]Luja, ''EU State Aid Control: Balancing Tax Benefits and Fair Competition in Pursuit of an Internal Market,'' in *Comparative Fiscal Federalism*, section 5.03(c) (2d ed. 2016).

[30]*See, e.g.*, joined cases T-515/13 and T-719/13, *Spain v. Commission* (Spanish leasing cases), para. 178 (annulling commission state aid decision on selectivity grounds because the tax advantage was available to all undertakings).

[31]Advocates general are Court of Justice members, but they do not decide cases. It is ''the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which . . . require his involvement.'' TFEU art. 252. The opinion of the advocate general is generally available well before the decision of the Court of Justice, and although not legally binding, the court follows that opinion in about 80 percent of cases. Georg Kofler

(Footnote continued in next column.)

and Ruth Mason, ''Double Taxation: A European 'Switch in Time?''' 14 *Colum. J. Eur'n L.* 63, 74, n.62 (2007).

The two advocates general who write the most tax opinions have divergent views on selectivity. *Compare* joined cases C-20/15 P and C-21/15 P, *Commission v. World Duty Free Group*, formerly Autogrill España SA (opinion of advocate general Wathelet), para. 7 (arguing that ''once a tax measure derogates from the 'normal' or reference tax regime and benefits undertakings performing the transactions in question to the detriment of others that perform similar transactions and are therefore in a comparable situation, that measure is by definition discriminatory or selective, unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it forms part''), *with* case C 66/14, *Finanzamt Linz v. Bundesfinanzgericht*, Aussenstelle Linz (opinion of advocate general Kokott), para. 81 (''the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. On the other hand, a tax regime also cannot always be said not to be selective on the ground that all economic operators are able without distinction to avail themselves of the tax advantage which it makes available, provided that they satisfy its conditions. For, in that event, a tax regime would always have to be deemed not to be selective'' (citations omitted).).

[32]Starbucks final commission decision, *supra* note 23, para. 236. Letter from Vestager to Treasury Secretary Jacob Lew, at 2 (Feb. 29, 2016) (explaining that ''under EU state aid rules Member States cannot give multinational groups a more favorable tax treatment than standalone companies''). *See also* Luja, ''EU State Aid Law and National Tax Rulings: In Depth Analysis for the TAXE Special Committee,'' IP/A/TAXE/2015-02, at 9-11 (2015) (concluding in a report to the EU Parliament's TAXE committee that the commission's view is that ''that a de jure requirement of being internationally active would suffice to meet the selectivity criterion,'' but noting recent EU General Court decisions holding that the fact that a state required a cross-border element before conferring an advantage did not automatically make the regime selective).

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to Apple, Starbucks, Amazon, and others. For that so-called unnotified aid, the following investigatory procedure applies.

If the commission suspects that a member state granted state aid, it engages with the member state in a confidential exchange of information that allows the commission to make a preliminary assessment. After gathering more information, the commission could conclude that there was no aid and end the investigation. In the alternative, in the second step, the commission would make public (in the official journal) its investigation, allowing all interested parties to submit comments. The member state has one month to respond.[33] There is no deadline for the commission to complete its investigation.[34]

The commission has incredibly broad investigatory powers. The regulation empowers the commission "to obtain all necessary information enabling it to take a decision" on state aid.[35] The commission can compel information not only from the accused member state but also from competitors and other member states, which could help the commission establish comparables in a transfer pricing case.[36] For example, in reaching its final decision in the Starbucks case, the commission sought and received information about comparables, business organization, and business practices from Starbucks competitors, including Nestle and Melitta. The appropriate use of information available to the commission but not the taxing state may be litigated in the Dutch appeal of the commission's Starbucks decision.[37]

If the commission decides that the member state granted illegal state aid, the member state, the aided enterprise, or both can appeal the decision to the General Court and ultimately to the Court of Justice.[38] Whereas the commission gives an estimate of the state aid that must be recovered, it is up to the member state to calculate the exact amount in line with the commission's decision.[39]

Does the Taxpayer Participate?

Formally, the state aid investigation is against the member state, not the enterprise. Thus, the commission's decision is against Ireland, not Apple. The enterprise participates by responding to information requests from the commission and making arguments in the formal investigation phase.[40] Any member state can participate formally in the investigation, in a supportive or adversarial capacity. For example, Ireland regularly intervenes in support of other member states battling with the commission.[41] Once the commission decides that a state has granted illegal aid, the state or the undertaking (or both) can appeal.

What Is the Recovery?

This one's a doozy. The regulation expects the commission to order the member state to recover the aid (that is, the tax savings plus interest[42]) *from the enterprise*, and the offending state keeps the recovery.[43] The recovery period stretches back 10 years.[44] The unusual state aid recovery mechanism has its origins in judicial doctrine[45] that has since been codified.[46]

Because the idea behind recovery is to put the enterprise and the member state in a position as if the aid had never been granted,[47] the measure of recovery is the amount of tax the enterprise would have paid absent the aid, plus interest. In calculating the recovery amount, the commission and the aiding member state ignore behavioral effects that denial of the aid might have had on the taxpayer. For example, the Apple recovery estimate assumes that Apple would have had the same activities in Ireland absent the putative tax aid.

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[33]Council reg. 2015/1589, art. 6.

[34]Council reg. 2015/1589, art. 15.

[35]Council reg. 2015/1589, preamble, paras. 9 and 24.

[36]*See* council reg. 2015/1589, art. 7.

[37]One of the Netherland's pleadings in its action to annul the commission's decision in the Starbucks case alleges that "the Commission did not assess and include all the relevant information in the decision and also uses as a basis anonymous information, or at least information that has never been shared with the Netherlands Government." Case T-760/15, Action to Annul Commission Decision SA.38374.

[38]Council reg. 2015/1589, art. 7.

[39]Notice from the commission toward an effective implementation of the commission decisions ordering member states to recover unlawful and incompatible state aid, 2007 O.J. C 272/05, paras. 48-50 (2007 notice on recovery).

[40]*See, e.g.*, Starbucks final commission decision, *supra* note 23 (reviewing Starbucks's arguments).

[41]*See, e.g.*, case C-106/09, *Commission v. Gibraltar*, 2011 E.C.R. I-11113, para. 28.

[42]The measure of the recovery is the difference "between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied." 1998 notice, *supra* note 6, at para. 35.

[43]Council reg. 2015/1589, preamble para. 25, art. 16.

[44]Council reg. 2015/1589, art. 17(1). The recovery period can be longer than 10 years because it also includes the period from when the commission first contacts the member state to gather information and extends to when the case concludes.

[45]Case 70/72, *Commission v. Germany (Kohlegesetz)*, 1973 E.C.R. 813, para. 13 (holding that if the commission had the power to alter or eliminate the aid, it must have the lesser included power to recover it).

[46]Council reg. 2015/1589, art. 16.

[47]This explanation is unpersuasive, given that the measure of recovery is the amount of tax the enterprise would have paid to the aiding state if the aid provision not been in place. But by assumption, nothing else changes. Thus, the recovery calculation assumes that Apple would have had the same activities in Ireland even absent favorable tax treatment.

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A major issue for U.S. multinationals, and a bone of contention for Treasury, has been whether the recovery will be regarded for U.S. law purposes as a creditable tax.[48]

Many aspects of the recovery give pause to observers in the United States.

First, the recovery is from the taxpayer, but the taxpayer is not formally a party to the investigation. As a result, the taxpayer cannot directly defend itself, although, as an interested party, it is entitled to submit comments to the commission. Once the commission concludes its investigation, the taxpayer can file its own appeal, so eventually there is the kind of adversarial procedure we are accustomed to in tax litigation in the United States. The accused member state might join the taxpayer's appeal or file its own. Other interested parties can appeal the decision as well — for example, competitors could appeal a commission decision not to seek recovery upon a finding of state aid. The procedural safeguards for multinationals during the investigatory period seem inadequate, considering that companies can suffer significant reputational harms from adverse commission decisions, even if those decisions are ultimately vacated by the EU courts.

Second, the recovery period is 10 years, which exceeds the domestic statute of limitations for tax in most countries. Under EU law, expiration of the domestic statute of limitations does not constitute an adequate defense for failure to recover, as will be discussed next.[49]

Third, the taxpayer remits the penalty to the very state that violated EU law by granting the subsidy. Even if it were generally agreed that imposing liability on the taxpayer makes sense — either because disgorgement serves the market goals underlying the state aid rules or from a deterrence perspective — it is not clear that the recovery should go to the state that violated EU law by granting the aid. As Michael Graetz has pointed out, the recovery seems to reward the state for actions contrary to EU law.[50] Under current rules, a state that poaches business from other states by delivering illegal subsidies ultimately may receive reimbursement of that illegal subsidy.

To put it differently, even if it's clear that Apple should pay, why should Ireland receive anything? Although EU officials are aware of this issue, the most common proposal to fix it — allowing the commission to keep the recovery — raises serious moral hazards.[51]

Another alternative might be to spread the recovery across the higher-tax states from which income was shifted with the help of the offending tax ruling. The commission press release announcing the final decision against Ireland in the Apple case noted that information revealed in the commission's final decision might lead other member states or even the United States to collect back taxes from Apple. The commission stated that if other states enforced those collections now, the new collections would reduce Apple's recovery obligation in Ireland.[52] Although this kind of indirect transfer of the recovery to other states might result in taxation more consistent with economic reality, it raises an important legal question about how the commission can establish that Ireland granted state aid to Apple by failing to collect taxes if those taxes actually should have been paid to some other state.

Are There Any Exceptions to Recovery?

Under EU rules, the obligation to recover trumps most domestic laws that stand in the way. The state is excused from recovering the aid only when recovery is "absolutely impossible," for example because the aided enterprise liquidates or because recovery would violate the state's constitution.[53] That the recovery merely would violate the state's statute of limitations or other domestic recovery rules does not excuse recovery.[54] If the state has a constitutional prohibition on retroactive taxation, the commission would expect the state to recover

[48]*See* Mindy Herzfeld, "Is the EU a Country?: Creditability of State Aid," *Tax Notes Int'l*, Sept. 19, 2016, p. 1004.

[49]*See* 2007 notice on recovery, *supra* note 39, para. 20 (noting that the EU courts have not accepted recovery defenses concerning the domestic statute of limitations). Commentators have suggested requiring member state legislation that would ensure recovery in state aid cases. *See* Luja, TAXE report, *supra* note 32, at 21.

[50]"The governments may appeal the EC's determinations in the European courts, but if they lose, they still win." Graetz, "Behind the European Raid on McDonald's," *The Wall Street Journal*, Dec. 3, 2015 (criticizing the commission's investigations for lack of procedural protections).

[51]Luja, TAXE report, *supra* note 32, at 21 ("State aid law as it stands today does not provide for a legal basis to withhold any part of the windfall benefit enjoyed by the Member State. No part of the recovered amount flows to the Union's resources. Introducing an obligation for a Member State to hand off part of amounts recovered to the EU might require a change of the Treaties, which is rather infeasible.").

[52]Commission's press release on its Apple decision, *supra* note 1, at 3-4.

[53]2007 notice on recovery, *supra* note 39, at para. 20 ("Community Courts have interpreted the concept of 'absolute impossibility' in a very restrictive manner.").

[54]*See, e.g.*, case C-232/05, *Commission v. French Republic*, 2006 E.C.R. 71, para. 36 (finding that national rules suspending recovery requirements during appeals could not be used to justify failure to recover state aid).

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the tax in a form other than a retroactive tax (for example, by levying a penalty).[55]

The Court of Justice has excused recovery in cases in which the commission conferred on an enterprise the ''legitimate expectation'' that there was no aid.[56] The Court of Justice interprets this standard to be fulfilled only when a community institution — not a member state — creates the legitimate expectation.[57] The standard applies, for example, when the commission unreasonably delays its aid decision[58] or when the commission preapproved an aid that it later decided was unlawful (either because the commission changed its view or because the state administered the aid improperly or expanded it).[59] In the Court of Justice's view, a diligent business person should be able to determine if his undertaking received aid and, if so, whether the state notified the commission of the aid and secured its approval.[60]

Just because recovery is legally required, however, does not mean that it will take place quickly. The EU annually reports on outstanding aid that has not been recovered.[61] The member states regularly miss recovery deadlines.[62] Although Apple is not expected to refuse to comply, if a taxpayer drags its feet on recovery, the commission has some collateral enforcement options short of bringing suit in the EU courts. For example, under EU rules, the commission can order a state to deny approved aid to an enterprise that has not made its recovery payment from an earlier case.[63] Monetary penalties can also be imposed on member states for failure to recover.[64]

Filing an appeal does not suspend the taxpayer's obligation to repay the aid with interest.[65] In practice, this means that Apple's 13.4 billion euros will remain in escrow as Ireland's appeal and its own appeal go forward.[66]

Is State Aid New?

There is nothing new about state aid, about state aid investigations of corporate tax practices, or even about state aid investigations of tax rulings. What I think is new is the commission's decision to investigate member states for rulings issued to particular companies rather than reviewing a member state's ruling practices more generally. Also, although member states have been forced to recover state aid before (including tax state aid), the commission has never sought recovery on the scale of the Apple case. The recovery mechanism is strange, but there is nothing new or secret about it, and it comes as no surprise to anyone reasonably informed about EU law.

State aid was outlawed as early as the 1951 Treaty of Paris establishing the European Coal and Steel Community, and the prohibition has existed in its current form since the Treaty of Rome entered into force in 1958.[67] The European Commission has actively applied the state aid rules in all areas of market regulation since the 1970s.

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[55]Case C-183/91, *Commission v. Greece*, 1993 E.C.R. I-3131, para. 17 (''it is not correct to argue . . . that recovery of the aid in question must necessarily take the form of a retroactive tax. . . . [T]he Greek authorities merely have to take measures ordering the undertakings which have received the aid to pay sums corresponding to the amount of the tax exemption unlawfully granted to them.'').

[56]Commission decision 2003/512/EC (German coordination centres), 2003 O.J. L. 177/17, para. 43.

[57]Joined cases C-182/03 and C-217/03, *Belgium and Forum 187 v. Commission*, 2006 E.C.R. I-5479, para. 147 (''the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration.'').

[58]Case 223/85, *RSV v. Commission*, 1987 E.C.R. I-4617 (recipient of unnotified aid successfully challenged recovery order when the commission did not explain why it delayed for 26 months in adopting its decision on the alleged aid).

[59]German coordination centres commission decision, *supra* note 56, at para. 43; *see also* commission decision 2004/76/EC (French headquarters and logistics centres), 2004 O.J. L. 23/1, paras. 82-83; and commission decision 2004/77/EC (Belgian tax ruling system for U.S. foreign sales corporations), 2003 O.J. L. 170/20, paras. 74-78.

[60]Joined cases C-182/03 and C-217/03, *Belgium and Forum 187 v. Commission*, 2006 E.C.R. I-5479, para. 147. *See also* opinion of advocate general Jacobs at para. 73 in case C-39/94, *Syndicat Francais de l'Express International v. La Poste*, 1996 E.C.R. I-3547 (arguing that legitimate expectation could arise when the contested provision was not obviously aid, and when the commission upon preliminary inquiry decided not to pursue an aid investigation and then took three years to decide that there was aid). Under Jacobs's conception, the commission's failure to investigate tax rulings earlier would not appear to be sufficient to create a legitimate expectation of no aid, especially when it is unclear whether the commission had reason to know whether secret rulings conferred selective aid.

[61]*See* European Commission, ''State Aid Scoreboard 2015.''

[62]2007 notice on recovery, *supra* note 39, at para. 3 (''Experience shows that there is practically not a single case in which recovery was completed within the deadline set out in the recovery decision.''). *See also id.* (''Recent editions of the State aid Scoreboard also show that 45 percent of all recovery decisions adopted in 2000-2001 had still not been implemented by 2006.'').

[63]*See* 2007 notice on recovery, *supra* note 39, at para. 75 (describing the so-called Deggendorf principle).

[64]2007 notice on recovery, *supra* note 39, at paras. 72-74 (describing procedure).

[65]The president of the General Court can suspend the recovery pending appeal. Council reg. 2015/1589, art. 17.

[66]*See* commission's release on its Apple decision, *supra* note 1.

[67]Treaty establishing the European Coal and Steel Community (Treaty of Paris), art. 4(c) (Apr. 18, 1951); and treaty establishing the European Economic Community (Treaty of Rome), art. 92(1) (Mar. 25, 1957).

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The commission's focus on corporate taxation began in the late 1990s as part of the EU's Code of Conduct push. The Code of Conduct on business taxation was the EU's counterpart to the OECD's Project on Harmful Tax Practices. Adopted in 1997, the Code of Conduct set out factors for identifying harmful tax practices, and it requires member states to abolish those measures and refrain from adopting them in the future.[68]

A problem with the Code of Conduct was that it had no enforcement mechanism.[69] As part of the code, however, the EU Council[70] took note that tax measures that violated the Code of Conduct might violate the TFEU prohibition on state aid, and the council further noted the commission's intention to publish guidance on tax state aid after submitting draft guidelines to the member states. Also, the council noted that the commission "commits itself to the strict application of the state aid rules concerned."[71]

Thus, the council, which for this purpose would have been composed of the finance ministers of the member states, sanctioned the commission's strategy to examine Code of Conduct violations as possible state aid. Code violations are identified through a formal process involving the EU's Code of Conduct group.[72] For its part, the commission fleshed out that strategy in the 1998 notice.[73]

This approach by the commission had at least two strategic advantages. First, it provided an enforcement mechanism for the otherwise toothless Code of Conduct. Second, by investigating regimes that had already been identified as harmful in a multilateral process conducted by the member states themselves, the commission was able to enter the corporate tax state aid arena in a way that was relatively uncontroversial. Thus, the regimes initially targeted by the commission were at least putatively ones that the member states had already resolved to abolish under the Code of Conduct. The commission could thus establish the legitimacy of its enforcement authority in corporate tax cases without generating significant opposition from the member states.

Many of these cases involved rulings by member states confirming that taxpayers qualified for special low-tax regimes (such as coordination center regimes).[74] A difference between this earlier set of investigations that took place in the early 2000s and the current cases is that in the earlier investigations the commission looked at a state's ruling practices overall rather than focusing on rulings granted to a particular taxpayer. But analysis of a state's ruling practice necessarily involved analyzing rulings granted to particular taxpayers.

What we learned from this first spate of cases was that the commission found ruling practices to constitute impermissible state aid when those ruling practices clearly failed to conform with the OECD transfer pricing guidelines (for example, by allowing taxpayers to use a favorable fixed markup for cost-plus rather than conducting a particularized inquiry, or unreasonably allowing companies to ignore some costs when applying cost-plus[75]). In other words, failing to adhere to the OECD standards — standards that the member state imported into its own domestic law — constituted aid.

We also learned the regime features that the commission found suspicious, including relief provisions with no sunset and no ceiling, rulings with

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[68]*See* Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council, of 1 December 1997 on a Code of Conduct for Business Taxation, 1998 O.J. (C 2) 2, 2 (Code of Conduct).

[69]*Id.* at 3 ("the code . . . is a political commitment and does not affect the Member States' rights and obligations . . . from the Treaty").

[70]For this purpose, composed of the finance minister of each member state.

[71]Code of Conduct, *supra* note 68, at 5.

[72]*See* 1998 notice, *supra* note 6, at para. 1 ("State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition."). *See*, *e.g.*, commission decision 2003/755/EC (Belgian coordination centers), 2003 O.J. L 282/25, para. 1 (noting that the instant case was brought because "the Commission, acting in accordance with the state aid rules, began its examination of the measures identified by the code of conduct group as harmful").

[73]1998 notice, *supra* note 6, at para. 1 (noting that the commission's promulgation of guidelines for state aid in business taxation was motivated by the Code of Conduct). *Id.* at para. 30 ("The qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid. However the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, *inter alia*, the effects of aid that are brought to light in the application of the code of conduct.").

[74]Commission, "Report on the Implementation of the Commission Notice on the Application of State Aid Rules to Measures Relating to Direct Business Taxation," C(2004)434 (business tax state aid implementation report). *See also* the commission's state aid and tax rulings website, which lists 15 cases between 2001 and 2006, *available at* http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.

[75]Belgian coordination centers commission decision, *supra* note 71 (reviewing a Belgian system granting U.S. companies with Belgian permanent establishments cost-plus transfer pricing rulings using fixed costs of 8 percent and also ignoring some costs). In its decision, the commission determined that companies consistently obtained better results under the Belgian ruling practice than were available under the regular Belgian tax regime. *Id.* at para. 90.

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no expiration, and rulings with inadequate documentation.[76] The commission has objected to similar features in the recent cases. For example, in its notice to Ireland that it would commence the investigation in the Apple case, the commission noted that one of the rulings "was applied by Apple for fifteen years without revision."[77] To provide context, the commission included a chart listing the typical duration of advance pricing agreements in other EU member states.[78] The commission also questioned the "appropriateness" of the pricing method used by Ireland for Apple because it did not account for "possible changes to the economic environment and required remuneration levels."[79]

In addition to announcing its strategy to investigate the regimes identified by the Code of Conduct group,[80] the 1998 notice marked an important difference in the commission's stance on tax state aid. State aid enforcement was no longer just about protectionism or distortions to the internal market. Instead, the commission expressed concern about the allocation of tax revenue among the member states. In laying out its charter for future state aid enforcement actions, the commission stated:

> Account must also be taken, in the common interest, of the major repercussions which some aid granted through tax systems may have on the revenue of other Member States.[81]

Other aspects of the 1998 notice previewed the current investigations. Among other tax practices, the 1998 notice specified that tax benefits restricted to intragroup activities and discretionary administrative practices, including tax rulings, could be state aid.[82] The notice expressed special concern for nontransparent administrative decisions.[83] The 1998 notice was superseded by the 2016 notice on the notion of state aid, but the 2016 notice adopts much of the 1998 notice.[84]

Another banner year in the development of business tax state aid doctrine was 2012. That year marked so-called state aid modernization. Under this approach, the commission resolved to focus on the highest-impact cases, expressly including tax measures.[85]

In the period between the mid-2000s and 2013, the commission stepped down its enforcement of tax state aid. In addition to a false sense of security engendered by this quiescent period, another reason that state aid seemed to Americans to come from nowhere is that the commission's prior investigations mostly involved European, not American, companies.

How Does the Commission Pick Its Cases?

In contrast to the commission's early foray into state aid enforcement, the commission's efforts against transfer pricing rulings since 2013 have not had broad member state support, and there has been no agreed list of regimes to target.

The commission's lack of transparency on how it selects state aid cases has fueled concerns that it selectively targeted U.S. multinationals. Treasury Secretary Jacob Lew's letter to commission President Jean-Claude Juncker reflects these concerns.[86] Although Treasury's white paper does not address this issue, U.S. observers presumably still have concerns about why U.S. multinationals appear to have been disproportionately targeted.

The commission does not publicly release its criteria for selecting cases. However, under the commission's own rules, it must "examine without

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[76]Business tax state aid implementation report, *supra* note 74, at para. 4 ("Since there were relatively few tax aid cases before 2001, the Commission preferred to build up a larger body of experience before carrying out any review.").

[77]*Alleged Aid to Apple*, commission decision COMP/SA.38373, 2014 O.J. C 369/22, para. 65 (Apple opening decision).

[78]Apple opening decision, *id.* at para. 45 (most states' advance pricing agreements have maximum durations of five years or shorter).

[79]*Id.* at para. 65.

[80]The Code of Conduct group still exists; it monitors compliance with the code. In March 2016 the European Council (ECOFIN, consisting of the finance minister of each member state) resolved that the Code of Conduct group should reexamine the Code of Conduct criteria to support anti-BEPS measures. *See* European Council, 6900/16, FISC 35, ECOFIN 208 (Mar. 8, 2016).

[81]1998 notice, *supra* note 6, at para. 3.

[82]*Id.* at paras. 20 and 22 ("Some tax benefits are on occasion restricted to certain types of undertakings, to some of their functions (intra-group services, intermediation or coordination) or to the production of certain goods. In so far as they favour certain undertakings or the production of certain goods, they may constitute State aid.").

[83]*Id.* at para. 22 ("As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances.").

[84]*See* 2016 notice, *supra* note 7. The 2016 notice had been released in draft form in 2014. The 2014 draft was substantially similar to the final 2016 notice. The 2016 notice also sets out the commission's view of state aid doctrine — as informed by its prior decisions and court cases — and it binds the commission.

[85]Communication from the commission to the European Parliament, the council, the European Economic and Social Committee, and the Committee of the Regions, EU State Aid Modernization (SAM), COM(2012) 209 final, at para. 19 (May 8, 2012) (SAM communication).

[86]Lew letter to Juncker, at 2 (Feb. 11, 2016) ("DG COMP appears to be targeting U.S. companies disproportionately.").

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undue delay any complaint submitted by any interested party.''[87] Interested parties include member states, the putative aid recipient, and competitors of the putative aid recipient.[88] But we do not know if complaints were lodged in the recent cases.

Absent a complaint, the commission investigates according to its own discretion. Commission officials have openly admitted that politics and public opinion guided their investigation decisions. For example, Joaquín Almunia, outgoing vice president of the commission, said, ''It is well known that some multinationals are using tax planning strategies to reduce their global tax burden. These aggressive tax planning practices erode the tax bases in our Member States.'' He added that ''when public budgets are tight, and citizens are asked to make efforts to deal with the consequences of the crisis, it cannot be accepted that large multinationals do not pay their fair share of taxes.''[89]

The commission's rules entitle it to investigate all state aid that it learns about from any source.[90] Thus, if commission staff followed the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations (PSI) hearings on Apple in 2013, or if staff read then-Sen. Carl Levin's memorandum on Apple, this arguably would have triggered an obligation to investigate. After being pressed by the PSI, Apple admitted that some of its most profitable subsidiaries were tax resident nowhere on earth, and they paid little tax to Ireland, where they were incorporated. As part of the hearings, the PSI released a memorandum in which it described Apple as having ''*negotiated* [with Ireland] a special corporate tax rate of less than two percent.''[91] Even though Apple and Ireland disputed that characterization,[92] it would be surprising if reports of tax rate negotiations did not trigger alarms with the director-general of competition that Apple might be getting a sweetheart deal from Ireland.

Likewise, we can probably trace the commission's investigations of Starbucks and Amazon to the U.K. House of Commons Committee of Public Accounts. Reading testimony, like the following exchange between Tory member of Parliament Stephen Barclay and Troy Alstead, Starbucks's global CFO, would have put the commission on alert:

> **Barclay:** What is the tax rate you pay in the Netherlands?
>
> **Alstead:** I am very happy to provide that to the Committee, but I am bound by confidentiality to the Dutch Government on that. My request would be: could I follow up afterwards and provide it just to the Committee? I am very happy to do that — just confidential.
>
> **Chair:** Confidential to whom?
>
> **Alstead:** The tax authority, under our Dutch ruling, has asked us not to share that publicly. I will absolutely share it with the . . .
>
> **Barclay:** You have just answered my next question, which was whether you have a Dutch tax ruling — you do.
>
> **Alstead:** Yes, I do.
>
> **Barclay:** You have a special arrangement to allow you to pay less tax in the Netherlands.
>
> **Alstead:** Yes, it is a low-tax ruling that we have in place.
>
> **Barclay:** And it is for that reason that you transfer the profits from the U.K., which are booked as losses in the U.K., into the Netherlands. Some of that then goes back to the States, but the rest of it pays a lower rate in the Netherlands under a Dutch tax ruling. That is correct, is it?[93]

Dutch authorities later disavowed that they asked Starbucks to keep the ruling secret, and so did Starbucks,[94] but officials in the commission

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[87]Council reg. 2015/1589, art. 12(1). *See id.*, preamble para. 32 (''complaints are an essential source of information for detecting infringements of the Union rules on State aid'').

[88]Council reg. 2015/1589, art. 1(h).

[89]European Commission release, including statement by Almunia on the opening of three investigations on transfer pricing arrangements on corporate taxation of Apple (Ireland), Starbucks (the Netherlands), and Fiat Finance and Trade (Luxembourg) (June 11, 2014).

[90]Council reg. 2015/1589, art. 12(1).

[91]*See* PSI, ''Offshore Profit Shifting and the U.S. Tax Code — Part 2,'' at 2 (May 21, 2013) (emphasis added). The PSI investigation revealed that one of Apple's foreign affiliates, AOI, had 30 percent of Apple's total worldwide net profits from 2009 to 2012, yet AOI did not pay any corporate income tax to any country in that period. *Id.* at 2 (describing Apple as shifting ''billions of dollars in profits away from the United States and into Ireland''). Phillip Bullock, the tax operations head of Apple, told the PSI that Apple negotiated a special rate with Ireland. Apple CEO Tim Cook denied this claim in his own testimony. *Id.* at 20.

[92]Associated Press, ''Apple CEO Tim Cook Grilled on Irish Tax Scandal,'' May 21, 2013 (''Irish Prime Minister Enda Kenny on Tuesday denied the assertion in the subcommittee's report that Apple had negotiated an Irish corporate tax rate of less than 2 percent. 'All companies pay the standard rate of 12.5 percent on profits from Irish operations,' the prime minister said.'').

[93]House of Commons, Comm. of Public Accounts, HM Revenue & Customs: Annual Report and Accounts 2011-12 (19th Rep. Sess. 2012-13), at EV 26 (Alstead testimony).

[94]Starbucks amended Alstead's testimony to include the following note: ''To clarify, Mr. Alstead is referring to the mutual understanding of confidentiality relating to information shared

(Footnote continued on next page.)

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might have been alerted by Alstead's testimony that something worth investigating might be going on between the Netherlands and Starbucks.

Amazon's director of public policy, Andrew Cecil, was called before the same U.K. committee, and he stonewalled them, leading members of the committee to remark that it was not credible that Cecil did not know the answers to the questions they were asking, which included the country-by-country profitability of Amazon and the identity of the owner of the Dutch entity that reported the lion's share of Amazon's European profits.[95] During the testimony, MPs described Cecil's answers as "totally evasive," "circuitous," "annoying [and] insulting to everyone's intelligence," "unacceptable," "incredible . . . and just not credible," and "ridiculous." At one point in the questioning, the committee's chair, Labour MP Margaret Hodge, concluded, "Cecil, you don't have anything. Honestly, you have come to me with absolutely no information. . . . The idea that you come here and simply do not answer the questions, and pretend ignorance, is just not on. It is awful."[96]

While some of the hostility of the U.K. committee was attributable to political posturing, the entire hearing is worth reading as a list of "don'ts" when testifying before a public investigatory body.

So to an outside observer, it looks like the Senate's PSI and the U.K.'s Public Accounts Committee set the commission's agenda.[97] Several years after the initiation of the actions in the current set of cases, Director-General of Competition Johannes Laitenberger seemed to confirm the origin of the cases in a speech to a meeting of competition law specialists in Switzerland. Referring to the Senate and U.K. investigations, Laitenberger said, "The Commission regarded the media reports and the parliamentary debates of a few years back as market information. The Commission listened and decided to look deeper into the matter."[98] The recently released redacted version of the commission's final decision in the Apple case confirmed that the commission first learned about Ireland's rulings for Apple from the U.S. Senate hearings.[99]

Readers may be wondering about the commission's investigation of Luxembourg's McDonald's and Fiat rulings.

While I do not know what triggered the McDonald's investigation (and that investigation involves a permanent establishment status ruling, not a transfer pricing or profits allocation ruling), just before the commission started its investigation, McDonald's was the subject of a report on tax avoidance by a coalition of U.S. and European labor groups.[100] The report received significant media attention.

Fiat is the only of the four recent transfer pricing rulings investigations that involved an EU-based multinational. Professor Werner Haslehner wrote a fascinating article on whether the commission had legal authority to compel Luxembourg to turn over its tax rulings, and his account included an explanation for how the Fiat case arose.[101] The commission demanded that Luxembourg hand over all its rulings going back 10 years. Luxembourg refused to comply with the order, arguing that identity information about the taxpayers could not help the commission establish its state aid case. Instead, Luxembourg turned over a subset of rulings that it described as representative, and it redacted them to obscure the identities of the taxpayers. But Luxembourg failed to properly redact its ruling for Fiat,

with and received from the Dutch tax authorities in our confidential but arm's length negotiations with them. We do not have a formal written confidentiality agreement with the Dutch tax authorities." Alstead testimony, *supra* note 93, at EV 26 n.6.

[95]*See id.* at EV 33. In response to Cecil's claim that he did not know how much revenue Amazon had in the United Kingdom, MP Ian Swales said "You must be joking. Come on, you can't be serious." He continued, "I used to be a finance director of a pan-European business. If somebody asked me, 'What do you sell in each country?' I would be fired immediately if I did not have the answer to the question. That's ridiculous." Cecil backtracked in his next response, stating that although Amazon never released those figures publicly, he could provide them privately. *Id.*

[96]*See* Alstead testimony, *supra* note 93, at EV 33-36.

[97]According to the commission's website, "A dedicated Task Force Tax Planning Practice was set up in summer 2013 to follow up on public allegations of favourable tax treatment of certain companies (in particular in the form of tax rulings) voiced in the media and in national Parliaments." *See* European Commission, "State Aid-Tax Rulings," *available at* http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html. *See also* Johannes Laitenberger, "State Aid Tax Cases: Sine Timore Aut Favore," DG Competition, keynote address at St. Gallen International Competition Law Forum, at 4 (May 20, 2016) (confirming that the commission became interested in investigating rulings practices after "media reports and the parliamentary debates," specifically mentioning the United States and the United Kingdom).

[98]Laitenberger, *supra* note 97.

[99]Commission Decision initiating the formal investigation in SA.38373 (Alleged Aid to Apple), O.J. 2014/C 369/04 (Oct. 17, 29014) [hereinafter *Apple Final Decision*], at para. 440 ("the Commission could only have learnt of the existence of those rulings when their existence was publicly disclosed, which happened for the first time during hearings of the U.S. Senate").

[100]*See* European Public Service Union, "Unhappy Meal: €1 Billion in Tax Avoidance on the Menu at McDonalds" (Feb. 24, 2015).

[101]Haslehner, "Advance Rulings and State Aid: Investigative Powers of the EU Commission (T-258/14)," in *ECJ — Recent Developments in Direct Taxation* (2014) (discussing the standard the commission has to meet before pursuing a state aid investigation).

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which allowed the commission to identify the company and, according to Haslehner, led to its investigation.[102]

Like the United States, Luxembourg claimed that the commission was engaged in selective prosecution. According to Haslehner, Luxembourg dropped that claim when the commission demanded in December 2014 that every EU state turn over all its rulings for the past 10 years.[103] That later development may have been partly in response to LuxLeaks, which in November 2014 released hundreds of Luxembourg tax rulings online.[104] Although the LuxLeaks disclosures occurred after the commission opened most of the recent state aid investigations, it may have contributed to political pressure on the commission, and it highlighted the role that tax rulings could play in harmful tax competition.[105]

So how did the commission come to target four U.S. multinationals — and only one European multinational — in its recent ruling investigations? One possibility is discrimination: The EU commissioners targeted U.S. multinationals specifically because they are American. In a time of fiscal crisis, U.S. multinationals may be attractive revenue sources. Another possibility is that U.S. multinationals made up more of the pool of potential targets for the commission because U.S. multinationals were particularly aggressive or successful in securing favorable tax rulings. This would be consistent with evidence from LuxLeaks.[106] When the commission opened its state aid investigations, U.S. multinationals were being held up as prime examples of international tax avoidance, and news reports on their activities contributed to the international outcry that led to the OECD and G-20 base erosion and profit-shifting project.[107]

Another possibility is that the commission sought to send a clear message — to get bang for its buck — and investigating the largest companies in the world would accomplish this goal.[108] Some may be reminded of the IRS's decision to prosecute Wesley Snipes for tax evasion. Investigating larger and more serious state aid breaches also accords with the commission's best practices rules for dealing with state aid complaints.[109] Under these rules, the commission is free to prioritize complaints by, among other factors, the scope of the alleged infringement, the size of the beneficiary, the sector affected, and the existence of other complaints.[110]

Because the commission does not disclose how it picks its cases generally or how it came to investigate particular companies, we are left to speculate. Moreover, there is little formal regulation constraining the commission in its state aid investigations. The commission's rules require it to investigate all cases of suspected state aid, but limited resources make that impossible. Under commission rules[111] and the case law of the General Court,[112] the commission must follow the principle of equal treatment when applying its guidelines. At the same time, the commission "may on its own initiative examine information regarding alleged unlawful aid from whatever source."[113] When public officials exercise broad discretion, they should expect to be held accountable for the manner in which they exercise it. To date, the commission has not provided a satisfactory answer to how it targets companies for state aid investigations. ■

[102]*See id.* at 92.

[103]European Commission press release, "State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to All Member States," IP/14/2742 (Dec. 17, 2014).

[104]Leslie Wayne and Kelly Carr, "'Lux Leaks' Revelations Bring Swift Response Around World," International Consortium of Investigative Journalists (Nov. 7, 2014).

[105]It also may partly explain why the commission opened its later investigation of the ruling granted to McDonald's by Luxembourg.

[106]According to Omri Marian's analysis of the LuxLeaks rulings, more rulings were granted to U.S. companies than companies from any other state, and rulings issued to U.S. and U.K. companies comprised two-thirds of the sample. Marian, "The State Administration of International Tax Avoidance," 7 *Harv. Bus. L. Rev.* (coming); *see also* Allison Christians, "Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time," *Tax Notes Int'l*, Dec. 22, 2014, p. 1123.

[107]OECD, Action Plan on Base Erosion and Profit Shifting (July 19, 2013). *See also* Vanessa Barford and Gerry Holt, "Google, Amazon, Starbucks: The Rise of 'Tax Shaming,'" BBC News Magazine, May 21, 2013.

[108]A de minimis exception also applies to state aid, which would exclude smaller cases. *See* discussion in Luja, *supra* note 29, at section 5.06.

[109]SAM communication, *supra* note 85, at para. 19.

[110]Commission notice 2009/C 136/04, code of best practice for the conduct of state aid control procedures, 2009 O.J. C 136/13, para. 48.

[111]*See* 1998 notice, *supra* note 6, at para. 4 ("this notice also aims to ensure consistency and equality of treatment between Member States").

[112]Case C-300/04, *M.G. Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag*, 2006 E.C.R. I-8055, para. 57. *See also* council reg. 2015/1589, preamble para. 34 (commission should "address similar issues in a consistent manner across the internal market").

[113]Council reg. 2015/1589, art. 12 (1); preamble para. 23.

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