State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107(1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions

The author, in this article, explores whether or not the European Commission’s approach to the selectivity criterion in its recent State aid decisions in the area of transfer pricing is in line with ECJ case law.

1. Introduction

With its recent State aid decisions on transfer pricing tax rulings, the European Commission has demonstrated its full recognition of the power of the State aid provisions as a means to tackle (harmful) tax competition within the European Union. The non-confidential versions of the decisions demonstrate that the Commission has taken a new course, extending the scope of the State aid provisions into unchartered territory. The approach taken by the Commission has been heavily debated in the international media and literature, wherein the Commission has been accused of eroding the sovereignty of Member States in the area of direct taxation.

It is, therefore, interesting to assess the extent to which this approach is supported by the case law of the Court of Justice of the European Union (ECJ). To that end, the author first briefly sets out the conditions for the application of the State aid prohibition in article 107(1) of the Treaty on the Functioning of the European Union (TFEU) (2007). The analysis focusses on the selectivity criterion, as it is the most crucial criterion in respect of state aid granted in the form of a tax burden reduction (section 2.). Subsequently, the author elaborates in more detail on the key points of criticism brought forward by the European Commission in its recent State aid decisions that relate directly to the selectivity criterion (section 3.). Although interesting, the author does not address the technical transfer pricing aspects of the decisions.

2. State Aid – General Observations

2.1. Introductory remarks

According to article 107(1) of the TFEU (2007), any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the common market insofar as it affects trade between Member States. The characterization of a measure as aid within the meaning of article 107(1) of the TFEU requires that the aid:

1. be granted by the state or through state resources;
2. affect trade between Member States;
3. impact competition in the internal market; and
4. provide a selective economic advantage.

In section 2.2, the author addresses the criteria in (1) and (2) in a cursory manner, focusing more on the selectivity criterion in general, but also specifically in relation to tax rulings, which is the subject of the assessment in section 3.

2.2. Granted by the state or through state resources

State aid rules solely target measures granted by a Member State involving a transfer of “State resources”. “State resources” is a rather broad concept that is not limited to mere subsidies in the strict sense of the word. Furthermore, direct and indirect tax reductions can constitute State aid, as they result in lower tax revenues, which is regarded as equivalent to the consumption of State resources in the form of fiscal expenditure. The Commission, however, has acknowledged that advantages recognized at the level of a multinational group stemming from a cross-border situation, which are the result of disparities between the tax legislation of various Member States, do not fall within...
of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.

Consequently, a measure by which the public authorities grant certain undertakings a tax exemption that, although not involving a transfer of state resources, places the recipients of the exemption in a more favourable financial position than that of other taxpayers, amounts to State aid within the meaning of article 107(1) of the TFEU. State aid must furthermore be selective and thus distort the level playing field in an internal market between certain undertakings and their competitors, which is the most debated criterion in tax related State aid cases. "The measure must be specific or selective in that it favors certain undertakings or the production of certain goods\(^\text{10}\).

Though clearly distinct, the "advantage" and "selectivity" criteria are highly interconnected, as there is no advantage in circumstances in which economic operators, in a legally and factually comparable situation in light of the objectives pursued by a system, benefit from the same treatment. Measures that are de facto and legally open to all economic operators in the same legal and factual circumstances in that Member State are considered general measures and for that reason do not constitute State aid.\(^\text{11}\)

When assessing selectivity, a distinction needs to be made between\(^\text{12}\) individual aid measures and aid schemes.

With regard to individual aid measures, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.\(^\text{13}\) By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity. According to the ECJ,\(^\text{14}\) a national tax measure can only be considered selective if:

1. the general or normal tax regime of the Member State concerned is identified; and
2. it can be demonstrated that the tax measure in question derogates from that ordinary system, insofar as it differentiates between operators who, in light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation.

### 2.5. Selective economic advantage

The aid must constitute an economic advantage from a state body that an undertaking would not have received in the normal course of business. From settled case law of the ECJ it follows that:\(^\text{9}\)

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\text{[\ldots] the definition of aid is more general than that of a mere subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget.}\]

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5. Although the extent to which the Commission still supports this position is debatable given its decision in the Apple case, wherein the Commission openly invited other jurisdictions to basically challenge the transfer pricing applied by the Apple group, which could then be taken into account in calculating the amount of aid to be recovered (Commission Decision of 30 August 2016 on state aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland. Alleged aid to Apple C(2014) 3606 final, para. 451).


13. Id., at para. 60.

ures, as the existence of an advantage can only be established by comparing the actual taxation of an undertaking to "normal" taxation. The "normal" tax rate is the rate applicable in the geographical area constituting the reference framework.\textsuperscript{15} The reference system need not necessarily be defined within the limits of the Member State concerned, as it might be that an intra-state body is sufficiently autonomous in relation to the central government of a Member State to determine the political and economic environment in which undertakings operate.\textsuperscript{16} Nevertheless, when it comes to corporate taxation, generally, the reference framework is the set of rules that is used to determine the tax base applicable in the geographical area that is controlled by a Member State.

According to settled case law, the concept of State aid does not refer to state measures that differentiate between undertakings, and that are, prima facie selective where that differentiation arises from the nature of the overall structure of the system of charges of which they form a part.\textsuperscript{17} In addition, the mere fact that only taxpayers that meet the conditions to be eligible for a certain measure benefit from such a measure does not imply that the measure, as such, is selective.\textsuperscript{18} This would only be the case if it can be established that persons who are not eligible for the measure are factually and legally comparable to those who do benefit from the measure, in light of the objectives pursued by the measure.

As article 107(1) of the TFEU does not, however, distinguish between the causes or the objectives of State aid, but defines them in relation to their effects, the mere objective pursued by state measures is not sufficient to exclude those measures outright from aid classification for the purposes of article 107(1) of the TFEU. Nevertheless, it also follows from the decision of the ECJ in Gibraltar (Joined Cases C-106/09 P and C-107/09 P),\textsuperscript{19} that a measure can be selective if it does not derogate from the reference system, but is an integrated part thereof, i.e. if it can be established that the general system itself favours certain operators over others, although they are both in a comparable legal and factual situation, in light of the objective pursued by the system.

Whether or not economic operators are factually and legally in a similar situation needs to be determined on the basis of the objectives of the relevant law or legal provisions in place.\textsuperscript{20} The said classification presupposes not only familiarity with the content of the provisions of the relevant law, but also requires examination of their scope on the basis of administrative and judicial practice and information within the ambit ratione personae of those provisions.\textsuperscript{21} Hence, a high-level theoretical analysis of the text of the legal provisions does not suffice for the Commission to substantiate a negative decision. A full analysis, taking into account the administrative practice in a specific Member State, needs to be undertaken.

2.5.2. Derogation from the reference system justified by the nature and general scheme of the system

A derogation from the general system of reference for economic operators that are legally and or factually in a comparable situation can be justified by the nature and general scheme of the system applicable.\textsuperscript{22} For example, an exemption from taxation on profits for not-for-profit organizations can be justified on the basis that those organizations do not strive to earn profits. The same line of reasoning was applied by the ECJ in Paint Graphos (Joined Cases C-78/08 to C-80/08) wherein it held that:\textsuperscript{23}

In the light of those special characteristics peculiar to cooperative societies, it must therefore be held that producers' and workers' cooperative societies such as those at issue in the main proceedings cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies – provided, however, that they act in the economic interest of their members and their relations with members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance.

In assessing whether a derogation from the reference system can be justified by the nature or general scheme, a distinction needs to be made between, on the one hand, the objectives attributed to a particular tax regime and that are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself that are necessary to the achievement of such objectives.\textsuperscript{24}

It should be noted, however, that any derogation must be necessary to achieving the objective aimed for and the measure must be proportionate, i.e. not go beyond what is necessary to achieve that objective. In addition, it is up to the Member State to introduce and apply appropriate control and monitoring procedures to ensure that the specific tax measures introduced are consistent with the logic and general scheme of the tax system.\textsuperscript{25}

2.5.3. Tax rulings

Tax rulings, by their very nature (they involve a discretionary power), are inherently potentially selective. Individual tax rulings are considered to constitute State aid where such rulings involve the exercise of discretionary powers that extend beyond the simple management of tax

\textsuperscript{15} PT: ECJ, 6 Sept. 2006, Case C-88/03, Portuguese Republic v. Commission of the European Communities, para. 56, ECJ Case Law IBFD.

\textsuperscript{16} Portugal v. Commission (C-88/03), at paras. 57-58.


\textsuperscript{18} IT: ECJ, 29 Mar. 2012, Case C-417/10, Ministero dell’Economia e delle Finanze, Agenzia delle Entrate v. 3 M Italia SpA, EU:C:2012:184, para. 42, ECJ Case Law IBFD.

\textsuperscript{19} Commission and Spain v. Gibraltar and United Kingdom (C-106/09_P).

\textsuperscript{20} Paint Graphos (C-78/08), para. 49.

\textsuperscript{21} FI: ECJ, 18 July 2013, Case C-6/12, P Oy, para. 20, ECJ Case Law IBFD.

\textsuperscript{22} Commission v. World Duty Free Group (Autogrill)(C-20/15_P), para. 58; NL: ECJ, 29 Apr. 2004, Case C-159/01, Kingdom of the Netherlands v. Commission of the European Communities, paras. 42 and 42, ECJ Case Law IBFD; and Paint Graphos (C-78/08), paras. 64 and 65.

\textsuperscript{23} Paint Graphos (C-78/08), para. 61.

\textsuperscript{24} Id., at para. 69 and Portugal v. Commission (C-88/03), para. 81.

\textsuperscript{25} Paint Graphos (C-78/08), paras. 73 and 74.
revenue in accordance with objective criteria. According to settled ECJ case law, the existence of discretionary powers, such as an authorization procedure, does not preclude a justification based on the nature of the general scheme, provided that the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent to the nature of the tax regime.

A delegation system that allows the competent authority to freely choose the beneficiaries or to establish conditions not inherent to the objectives of the tax system to be met is not considered general. Note that the ECJ takes the view that a certain degree of discretionary power is less likely to give rise to State aid when it relates to the ability to impose an additional burden to ensure an equal treatment versus a situation in which the discretionary power relates to the ability to award an advantage in favour of a certain undertaking.

The Commission Notice on the notion of State aid published in 2016 replaces the old Commission Notice that was published in 1998, although its scope is much broader than the old Notice. Interestingly, the new Notice also contains much more detail on the Commission’s view regarding tax rulings in general and transfer pricing rulings more specifically. Clearly, the Notice is aimed at providing further substance to the new direction the Commission has taken in its recent State aid decisions.

The Commission Notice outlines the Commission’s views on State aid and tax rulings in particular. As regards tax rulings confirming intra-group transfer prices, the Commission heavily relies on the decision of the ECJ in Belgium and Forum 187 v. Commission (Joined Cases C-182/03 and C-217/03) (Belgian coordination centres case). The Commission Notice specifically states the following with regard to tax rulings and transfer pricing:

172 This arm’s length principle necessarily forms part of the Commission’s assessment [...] independently of whether a Member State has incorporated this principle into its national legal system and in what form. [...] The arm’s length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. [...] 173 When examining whether a transfer pricing ruling complies with the arm’s length principle [...] the Commission may have regard to the guidance provided by the Organisation for Economic Cooperation and Development (‘OECD’), in particular the ‘OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations’. [...] The approach taken by the Commission has been heavily debated in the international media and literature, with the Commission often being accused of overriding the OECDTransfer Pricing Guidelines by transposing its own independent arm’s length principle. In section 3, the author elaborates on why the Commission’s approach is not in line with ECJ case law.

3. The Commission Decisions Assessed in More Detail

3.1. In general

In this section, the author addresses three lines of reasoning that seem to be of importance to the success of an eventual attempt by the Commission to uphold its view before the ECJ in any cases brought forward. The author first focuses on the identification of the reference system by the Commission. Subsequently, the Commission’s conclusion that an independent arm’s length principle can be derived from the decision of the ECJ in the Belgian coordination centres case is assessed. Lastly, the article comments on the Commission’s observations regarding the tax ruling practice in Ireland as brought forward in the Apple decision.

3.2. The reference system – Stand-alone companies factually and legally in the same circumstances as integrated companies of a (multinational) group of companies

The first underpinning of the Commission’s decisions is that the Commission considers the ordinary rules of taxation of corporate profits the reference system for purposes of assessing whether the individual rulings confer a selective advantage. Subsequently, the Commission considers standalone companies as being comparable to companies that are part of a (multinational) group of companies both from a legal and factual point of view, having regard to the objective of the domestic rules on corporate taxation. The underlying reason for this two-step approach is obvious; it is easier to substantiate that a certain measure derogates from the general system applicable when one can compare that provision to the broadest possible reference basis, instead of, for example, to the narrower scope of specific provisions governing transfer pricing that are

27. P Oy (C-6/12), paras. 23 and 24.
28. Id., para. 27.
29. Mid Magyar Olaj- és Gázpári Nyrt (C-15/14 P), para. 65.
30. Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (19 May 2016).
The conclusion that, in general, the ordinary domestic rules of taxation of corporate profits should be considered the reference system is, in the author’s view, in line with the decision of the ECJ in the *Paint Graphos* case. In this decision, the ECJ ruled that, with regard to the taxation of legal entities, the domestic corporate income act should be considered the legal system of reference insofar as the tax base of such legal entities is determined in the same manner, i.e. on basis of the net profit derived from its business activities at the end of a taxable period.

Nevertheless, as opposed to the Commission, the author has strong doubts as to whether stand-alone companies should be considered factually and legally comparable to integrated companies given the objective of domestic corporate income tax provisions. It is true that, in general, domestic corporate income tax systems aim to tax companies on profits generated through their dealings in the market. Other than integrated companies, however, the profits of standalone companies cannot, by definition, be affected by influences stemming from the shareholder relationship. As such, there is an obvious need for a separate set of rules to ensure that the taxable profit reported by integrated companies approximates the profit that would have been realized through dealings in an open market.

Support for this approach can be found in the Commission Decision regarding the Netherlands group interest box regime that was proposed by the Netherlands to provide for a lower effective tax rate on group interest income. In this decision, the Commission indicated that, with regard to financing activities with debt, stand-alone companies are not in a factually and legally comparable situation with companies that form part of a group of companies.

In the event that this observation is still valid, the question becomes whether the same cannot be said regarding intercompany transactions in general, in which stand-alone companies, by definition, cannot engage. As such, one could argue that stand-alone companies and integrated companies are indeed not comparable from a legal and factual point of view. It should be noted that the Commission emphasized in the Apple decision that the comparison was indeed limited to group companies only because of the objective of the regime, being the reduction of incentives for arbitrage between financing through a capital injection and a loan. Assuming this line of reasoning is considered sufficient to consider integrated companies not factually and legally comparable to stand-alone companies, the same can be said about the fact that profits of standalone companies cannot, by definition, be influenced by related-party transactions.

In addition, when looking at ECJ case law regarding the identification of the beneficiaries of an aid measure, there seems to be no doubt that integrated companies are not factually and legally comparable to stand-alone companies. More specifically, the ECJ has held that, “in competition law, the term ‘undertaking’ must be understood as designating an economic unit […] even if in law that economic unit consists of several persons, natural or legal”. In determining whether several entities form an economic unit, relevant indicators include whether there is a functional and/or economic and organic link, as well as the existence of a controlling share. It is exactly these elements that act as a differentiator between stand-alone companies and integrated companies, as the first category cannot, by definition, be included in a separate “ecosystem” that necessitates the allocation of profits between legal entities.

Lastly, it is difficult to understand that, irrespective of the fact that all member countries of the OECD have deemed it fit to develop extensive guidelines dealing specifically with issues arising in relation to dealings between related companies, stand-alone companies should be considered factually and legally comparable to integrated companies. This would, in the author’s view, be an unjustified disqualification and a contradictory position taken by the Commission.

3.3. System of reference – The general corporate income tax code or the narrower scope of specific transfer pricing provisions

Based on the observation that stand-alone companies and integrated companies are factually and legally comparable, the Commission considers the general corporate income tax act as a reference system instead of, for example, the narrower scope of specific legal transfer pricing provisions (including possible administrative practice). In fact, the Commission explicitly rejects such an approach, stating that the existence of such special rules would, in itself, lead to a finding of selectivity, if those rules only apply to certain (i.e. integrated) companies, but not all undertakings in a comparable factual and legal situation (such as, amongst others, stand-alone companies).

The author does not agree with this line of reasoning for the following reasons. First, as set out above, stand-alone

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36. See, for example, the Commission decision regarding aid granted to Starbucks, *supra* n. 34, at paras. 231-245, wherein the Commission considered the Netherlands Corporate Income Tax Law (NL: Corporate Income Tax Law 1969 (Wet op de vennootschapsbelasting 1969) (CITL), National Legislation IBFD), in general, the relevant reference system rather than article 8b CITL 1969 and the relevant transfer pricing decrees that the Commission considered too narrow a reference base.

37. *Paint Graphos* (C-78/08), para. 50.

38. *Groepsrenteboezen decision, supra* n. 4, at para. 117.


40. *Hydrotherm Gerätebau* (C-170/83), para. 11.


42. Commission decision on Starbucks, *supra* n. 34, at para. 250.
companies cannot, in the author’s view, be considered to be comparable to integrated companies from a factual and legal perspective in light of the objective pursued by general corporate income tax regulations. For example, looking at the Netherlands situation, it follows from established case law of the Netherlands Supreme Court that the phrase “profits derived through an undertaking” encompasses only profits stemming from an undertaking, but not those that stem from the shareholder relationship between a taxpayer and its parent company. By definition, the profits of stand-alone companies cannot be influenced by shareholder relationships between the standalone company and related companies. As such, they cannot be considered comparable from a legal and factual point of view in light of the objective pursued by the Netherlands Corporate Income Tax Law.

The same goes, in the author’s view, for specific transfer pricing provisions included in domestic legislation. Stand-alone companies cannot be considered factually and legally comparable to integrated companies in light of the objective pursued by these types of legislation. After all, the fact that the OECD member countries have deemed it necessary to draft specific guidelines dealing with the matter of intercompany pricing within multinational groups of companies in itself is a clear indication that there are fundamental differences between the two. It follows from settled ECJ case law that the definition of State aid does not include measures that differentiate between undertakings and are, therefore, a priori selective where that differentiation arises from the nature or scheme of the system of which they form a part. Again, taking the Netherlands situation as an example, the differentiation, i.e. a specific set of rules aimed at ensuring that arm’s length prices are applied, is a mechanism that is necessary to realize the objectives pursued by the system to tax the profits stemming from the undertaking.

Second, as set out in section 1, the ECJ has ruled that the identification of a measure as selective requires not only familiarity with the content of the provisions of the relevant law, but also an examination of their scope, based on administrative and judicial practice, as well as information relating to the ambit ratione personae of those provisions. By limiting its assessment to the deemed independent arm’s length principle under article 107(1) of the TFEU, the Commission is basically ignoring part of the legal framework applicable within a Member State and thus has erred in properly identifying the reference system.

Whether or not the OECD Transfer Pricing Guidelines have to be taken into account in determining the reference framework solely depends on the relevant legal framework in the Member State concerned, i.e. does this framework either directly or indirectly encompass the OECD Transfer Pricing Guidelines in its domestic legislation. When analysing the domestic legislation, the Commission should also take into account administrative practice. After all, the OECD Transfer Pricing Guidelines are subject to multiple interpretations and Member States sometimes have opposing views as to how to deal with specific matters. As such, the Commission would also have to take into account the Member States’ own specific views on the OECD Transfer Pricing Guidelines, either as reservations brought forward or, for example, decrees in which the domestic views on transfer pricing are set out.

3.3.1. The Netherlands’ view on the arm’s length principle

As of 1 January 2002, the arm’s length principle has been codified in article 8b of the CITA 1969. Long before this codification, however, the arm’s length principle was well entrenched in Netherlands tax principles by means of settled case law of the Netherlands Supreme Court. Although the OECD Transfer Pricing Guidelines are not formally part of Netherlands law, they have been accepted as a reference system to be used in assessing whether arm’s length conditions have been applied in relation to intercompany transactions. The Netherlands tax authorities, however, have their own interpretation of the said guidelines, which is stipulated in the 2013 Transfer Pricing Decree.

In the said decree, the Netherlands Secretary of Finance, as head of the tax authorities, has laid down the Netherlands’ view on transfer pricing, in general, as well as in relation to the more specific items identified. Due to its nature, the decree forms an integral part of Netherlands legislation and administrative practice and applies to all taxpayers equally, i.e. each individual taxpayer can invoke the application of the arm’s length principle as set out in this decree to the extent that the relevant facts and circumstances match those described in the decree.

3.3.2. Preliminary conclusion

The author appreciates that having to analyse specific transfer pricing legislation and administrative practices of individual member states would make it much more difficult for the Commission to demonstrate the selectivity of a specific transfer pricing ruling. Nevertheless, the absence of harmonization in respect of direct tax within the European Union inevitably means that there is, to date, no common arm’s length principle binding upon all Member States. To put it differently, as opposed to what the Commission seems to be suggesting, there is simply no single prevailing or unanimously accepted view on the OECD Transfer Pricing Guidelines. It is also not up to the Commission to enforce such a prevailing interpretation within the European Union on the basis of the State aid provisions.

3.4. The principle of equal treatment for taxation or an independent arm’s length principle under article 107(1) of the TFEU

In its recent State aid decisions, the Commission has stressed repeatedly that the arm’s length principle it is

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44. 3 M Italia (C-417/10), para. 40.
referring to is not the one referred to in the OECD Transfer Pricing Guidelines, as the Guidelines are a non-binding instrument. In contrast, the Commission is of the opinion that an independent arm’s length principle (principle of equal treatment for taxation) can be derived from ECJ case law.46

The arm’s length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope.

The Commission is referring to the decision of the ECJ in the Belgian coordination centre case,47 dealing with the Commission decision regarding the Belgian tax regime that was available to companies meeting certain specific criteria in terms of size, the multinational character of the group and the nature of activities carried out within the group. The coordination centre regime, amongst others, provided for a fixed tax base calculated on a cost-plus basis, thereby excluding certain important elements from the basis. The ECJ ruled that the regime indeed constituted State aid on the basis of the following test.48

In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition. (emphasis added)

The Commission has been heavily criticized for this approach, but has attempted to mitigate such criticism by stating that, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method, and a reliable approximation of a market based outcome is the result, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.49 Although this may indeed be the case, the author has difficulty accepting the Commission’s approach for the reasons set out below.

Contrary to the Commission, the author is of the opinion that the ECJ did not formulate an independent arm’s length principle under article 107(1) of the TFEU, but merely established, on the basis of paragraph 95 of the Commission decision, that the ordinary tax system applicable in Belgium was thus based on the difference between profits and costs of an undertaking carrying on its activities under free competition conditions.

In the relevant decision, the Commission50 first analysed that the Belgium system of reference, i.e. the corpo-rate income tax code, aimed to tax the profits generated, thereby explicitly referring to the OECD Transfer Pricing Guidelines as a reference. The Commission then established that the coordination centre regime provided for a derogation from this reference system, as it resulted in a reduction of the tax base by eliminating the said costs from the cost basis.

It was because of the observation in paragraph 95 of the Commission decision, i.e. that the Belgian legislation explicitly referred to the OECD Transfer Pricing Guidelines as a relevant reference framework, that the ECJ eventually referred to the “undertaking carrying on its activities in conditions of free competition” and not so much the intention to create an own arm’s length principle. For this reason alone, the author believes that the Commission’s approach is not supported by ECJ case law.

In addition, unlike what the Commission now seems to suggest, it certainly did accept, in its prior decision-making practice, that the OECD Transfer Pricing Guidelines could form part of the reference system and could thus be used to assess whether or not a specific provision provided for a selective advantage by allowing transfer prices that were not in line with the arm’s length principle derived from the OECD Transfer Pricing Guidelines. Although the Commission regularly claims that it is not bound by its earlier decision-making practice, the current dramatic change in course offends the principle of legal certainty.

In the author’s view, the Court of Justice could very well decide that, by introducing this new principle of equal treatment for tax purposes, the Commission has not established the reference system properly and for that reason annul the decisions of the Commission. It would have been for the good of the principle of legal certainty if the Commission had focused on a thorough analysis of the relevant provisions of law and administrative practices in the respective Member States.

3.5. Delegation systems lacking objective criteria

As an alternative line of reasoning, the Commission also took the position, in the Apple case, that a selective advantage was granted resulting from the exercise of discretion in the absence of objective criteria related to the tax system.51 The Commission came to this conclusion after an assessment of a variety of rulings that have been provided to the Commission by Ireland in the course of the investigation. The Commission first observed that section 25 of the TCA 9752 does not lay down any objective criteria for the allocation of profits between various parts of the same non-resident company. Second, whilst Ireland claimed that section 25 TCA 97 is not governed by the arm’s length principle, it did not put forward another objective standard for allocating the profits of a non-resident company.

Third, as regards the comment by Ireland and Apple that section 25 of the TCA 97 does not constitute the reference

46. See Commission decisions on Starbucks (supra n. 34), FIAT (supra n. 35) and Apple (supra n. 5).
47. Belgium and Forum 187 VZW v. Commission (C-182/03 and C-217/03).
48. Id. at para. 95.
52. IE: Taxes Consolidation Act 1997, National Legislation IBFD.
system, but rather the Irish Revenue’s tax ruling practice in relation to non-resident companies, the Commission noted that it was unable to identify any consistent set of rules that generally apply on the basis of objective criteria to all non-resident companies operating through a branch in Ireland.

It is noteworthy that the Commission did not bring forward this line of argumentation in its decision dealing with the Belgian excess profit ruling scheme.\(^{53}\) Perhaps the Commission considered that it had sufficient reasons under the primary line of reasoning. Nevertheless, given the guidelines given by the ECJ in \(P\) Oy (Case C-6/12), it appears that this element of the Belgian excess profit ruling regime also had a significant risk of being considered selective, at least to the extent that the Commission could substantiate that the granting of a ruling was made conditional on significant investments and the creation of new jobs. As ruled earlier by the ECJ, where the delegation system allows the respective body to establish conditions not inherent to the objectives pursued by the tax system, such a delegation system is not considered general, but rather selective. In particular, conditions related to the creation of new jobs were considered not inherent to the objectives of a corporate income tax.

Furthermore, ruling practices providing for fixed ratios without taking into consideration the relevant function and risk profile of the companies engaged in intercompany transactions are considered vulnerable in light of the conditions to be met on the basis of ECJ case law. It appears that the Commission is actively approaching Member States, pushing them to amend their ruling practices. An example of where this has already led to changes is Luxembourg, which recently amended its transfer pricing regulations regarding back-to-back financing activities.\(^{34}\)

### 3.5.1. Netherlands APA/ATR practice

As regards the Netherlands ruling practice, the Commission has acknowledged that it does not expect structural errors, as it considers the Netherlands ruling practice to be solid on the basis of the rulings analysed.\(^{35}\) Looking at the changes the Netherlands ruling practice underwent early in 2001 following comments from the EU Code of Conduct Group, and the way it has been embedded in Netherlands legislation and administrative practice, the author fully concurs with this observation.

The Netherlands has had a well-established APA/ATR practice for a long time, which is laid down in five related decrees,\(^{36}\) including the decree governing the organization and competence scheme of the APA/ATR practice. The latter decree sets out the rules used to determine which inspectorate within the Netherlands tax authorities is the competent inspectorate for which matters. In short, requests for APAs/ATRs need to be submitted to the competent tax inspector, who will engage the APA/ATR team of the Rotterdam office.

In order to ensure unity of policy, all agreements that have a forward-looking transfer pricing element and any forward-looking tax ruling confirming the tax consequences of the envisaged transactions need to be approved and signed by the APA/ATR team as well.

The Netherlands tax ruling policy sets out the rules to be adhered to by the APA/ATR team when entering into APAs/ATRs, and which thus apply without prejudice to each taxpayer applying for such an APA/ATR. One of the key conditions for entering into an APA/ATR is that such an agreement is in line with the relevant provisions of the law, case law and policy. Any agreement entered into that does not comply with this condition is considered contra legem and is, in principle, not binding for the Netherlands tax authorities, i.e. the taxpayer cannot invoke the principle of legitimate expectations in the event the tax inspector wishes to deviate from such an agreement.

When applying for an APA/ATR, a taxpayer needs to provide a full and comprehensive overview of all facts and circumstances deemed relevant to the agreement. Following a request, the APA/ATR team will review such a request and all relevant facts and circumstances in full detail to assess whether or not they can enter into the desired APA/ATR. The standard assessment term amounts to six to eight weeks provided that all necessary information has been provided on time. Further information may be requested if considered necessary.

Each APA/ATR contains a paragraph outlining the critical assumptions (kritische veronderstellingen). These are the assumptions deemed critical to entering into the agreement as such. If, at a certain point in time, these critical assumptions are no longer valid, the Netherlands tax authorities have the possibility to alter, postpone or cancel the agreement at their own discretion. The taxpayer has an obligation to inform the Netherlands tax authorities spontaneously of any significant changes in the relevant facts and circumstances that might influence the APA/ATR. Furthermore, taxpayers are required to refer to the APA/ATR in their annual Netherlands corporate income tax returns. This requirement enables the tax authorities to periodically assess whether the taxpayer has indeed acted in conformity with the APA/ATR.

APAs/ATRs are typically entered into for a period of four to five years, unless a longer term would be appropriate, for example, in view of long-term commitments the taxpayer has entered into or will enter into on the basis of the APA/ATR.
4. Concluding Observations

It is clear that the Commission is entering into unchartered territory with its recent State aid decisions involving individual tax rulings. These decisions clearly demonstrate that the Commission has conducted a thorough analysis of domestic legislation, settled ECJ case law, as well as the relevant facts and circumstances of each individual case. Although the decisions reveal that the supporting documentation and facts underlying some of the rulings are not always as solid as one would expect, the author still has doubts as to whether or not the Commission’s new course will ultimately be followed in full by the ECJ.

Irrespective of the answer to that question, it is without doubt that the Commission is utilizing the State aid provisions to the fullest extent possible to tackle perceived harmful tax competition within the European Union.