State Aids and Tax rulings: An assessment of the Commission's recent decisional practice

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ABSTRACT: Tax rulings are binding decisions that taxpayers may seek from tax authorities to determine in advance how certain transactions will be treated fiscally. However, tax rulings can have an “alternative use”: that of granting a particularly advantageous fiscal treatment to specific taxpayers, typically large multinational groups willing to invest and create jobs in the tax jurisdiction concerned, without extending it to other taxpayers and without triggering a tax war with other jurisdictions. This article focuses on the European Commission's enforcement of State aids rules against certain EU Member States in respect of tax rulings issued to a number of multinational companies. After a brief account of the economic rationale for tax rulings and their potential relevance in the context of EU tax competition, the article provides an overview of the Commission's individual and general measures regarding tax rulings and their alleged use by Member States as confidential incentive measures designed to attract multinational investors in return for significant fiscal advantages. The central part of the article provides an analytical assessment of the Commission's on-going and closed proceedings on tax ruling practices, having regard to the four constituent elements of the notion of State aid. Regard is then had to the peculiar challenges involved with the recovery of State aids granted in the form of tax rulings and, finally, to the systemic implications of the Commission's initiatives for the division of competences between the EU and its Member States and for the establishment of a fiscal union.

KEYWORDS: tax rulings, transfer pricing, State aids, tax competition, ALP

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1. Introduction

Several jurisdictions enable taxpayers to request tax authorities prior binding decisions, commonly known as “Advance Tax Rulings” (“ATRs”), determining how national tax provisions (or provisions of a tax treaty) will be applied to a particular case.¹ “Advance Pricing Agreements” (“APAs”), are a particular type of ATRs by which taxpayers agree in advance with the tax authorities the transfer pricing methodology that will be applied to transactions between companies of the same group.²

Although these instruments were conceived to provide legal certainty and to increase the predictability of the application of general tax rules in complex cases, they have recently come under scrutiny in Europe as a means by which the fiscal authorities of the Member States can secretly provide more favorable tax treatment to select multinational companies, in return for their increased presence or investments in the national territory. The European Commission, however, recently started looking into this “alternative use” of ATRs as illegal State aids and, in four cases, it enjoined the Member State concerned to recover the unpaid taxes for a total of over 14 billion euros, stirring significant controversy, at the national and international level, over the limits of EU intervention in Member States’ fiscal policy choices.

This article seeks to analyse this ongoing development in EU State aids law by investigating, first and foremost, the economic rationale of ATRs and of their “alternative use” as fiscal benefits against the background of tax competition in the EU. The central part of this work, instead, will focus on the Commission’s initiatives in respect of ATRs: after an overview of the seven State aids investigations, a more in-depth analysis of the Commission’s legal reasoning will be carried out, having regard the four major elements of the notion of State aids as applied in this peculiar context. Subsequently, attention will be paid to the recovery of unlawful State aids and the unprecedented challenges that this obligation poses in the case of ATRs. Finally, the Commission’s ATR investigations will be appraised in the broader context of the initiatives taken by the EU legislature to curb this

¹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262/1 of 19 July 2016, paragraph 169 (hereinafter: the Notion of State aid Notice).

² Cf. Raymond Luja, *EU State Aid Law and National Tax Rulings: In-depth analysis for the TAXE Special Committee*, IP/A/TAXE/2015-02, 2015, 6 (“In this paper the term ‘ruling’ will refer to both advance tax rulings (ATRs) and advanced pricing agreements (APAs) or any other kind of advanced confirmation given by governments”).

practice, having regard to the systemic implications for the internal market and the creation of a fiscal union.

2. The economic rationale of ATRs and their “alternative use” as means of unfair tax competition

The economic rationale underling an undertaking's decision to seek an ATR has been widely studied in the United States to account for the relatively limited number of ATR applications.³ These studies have shown that, in addition to the direct costs of applying for ATRs (remuneration for the professionals involved in the preparation of the application, fee charged by the tax authorities upon submission, delay in the transaction pending the issuance of the ATR),⁴ there are a number of strategic reasons *against* recourse to an ATR that generally outweigh those in favour.⁵ First, applying for an ATR automatically increases to 100% the probability that the tax authorities review a given transaction, whereas the likelihood that the same transaction be subject to a subsequent audit is generally lower.⁶ Second, ATRs – which in the US are regularly published⁷ and easily accessible⁸ – have a *de facto* precedential effect,⁹ whereas tax audits – which remain confidential – cannot give rise to a precedent.¹⁰ Thus, if two interpretations of

³ See Yehonatan Givati, “Resolving Legal Uncertainty: The Unfulfilled Promise Of Advance Tax Rulings”, *Virginia Tax Review* 29 (2009): 151.

⁴ See Markus Diller and Pia Vollert, “Economic analysis of advance tax rulings”, *Arqus-Diskussionsbeiträge zur quantitativen Steuerlehre*. <http://hdl.handle.net/10419/49534> (employing decision theory to demonstrate that “for high net present values [...] the taxpayer will not be willing to” apply for an ATR “as he will carry out the investment anyway”, 122).

⁵ See Givati, *op.cit.*, 137.

⁶ *Ibid.*, 156 (“by applying for an advance tax ruling the taxpayer increases the probability of inspection by the Service from less than 1% to 100%”).

⁷ See 26 USCS § 6110 (regulating the disclosure and public inspection requirements for Internal Revenue public determinations, including private letter rulings).

⁸ See Donald Osteen, *et al.*, “The Private Letter Ruling Program at the Half Century Mark”, *Major Tax Plan* 42 (1990): 12-14 (noting that the Internal Revenue Service has disclosed private letter rulings as from 1977); Givati, *op.cit.*, 159 (mentioning that ATRs can be easily obtained from legal databases such as Lexis and Westlaw).

⁹ Although 26 USCS § 6110(k) (3) expressly states that IRS written determinations “may not be used or cited as precedent”, a *de facto* precedential status of ATRs can be inferred from the IRS’ duty of consistency *vis-à-vis* similarly situated taxpayers: see *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (“The Commissioner cannot tax one and not tax another without some rational basis for the difference”).

¹⁰ Givati, *op.cit.*, 161 (“while a favorable decision by the Service in an audit has no precedential value, since it is simply a decision to approve the taxpayer’s tax return, which remains unknown to the public, a favorable advance tax ruling has a *de facto* precedential effect”).

a tax provision are possible, tax authorities are more likely to embrace the one more favourable to the taxpayer in the context of an audit than in the context of an ATR, as the latter's *de facto* precedential effect would imply the surrender of a greater amount of tax revenues.¹¹

From the taxpayer's perspective, therefore, applying for an ATR is a rational decision only if the tax liability expected to arise from the ATR ("R") is lower than the tax liability expected to arise from an audit ("A"), multiplied by the probability of such an audit ("P"), plus the costs associated with the ATR application: $R < A \times P + C$. For instance, in 2013 the audit rate of large corporations in the US was 91.2%:¹² requesting an ATR, therefore, was sensible only for taxpayers that expected their tax liability to be reduced by at least 8.8% via the ATR procedure and to fully recoup the ATR application costs – a rather unlikely prospect, considering the *de facto* precedential effect that ATRs have in the US.¹³

In the EU, instead, the LuxLeaks scandal revealed that, at least in some Member States, ATRs are relatively frequent and are usually kept confidential.¹⁴ Assuming that the audit rate for large corporations by the fiscal authorities of EU Member States is comparable to that in the US, the higher number of ATRs in the EU seems to suggest that this instrument may have an "alternative use": that of providing secret fiscal advantages to select taxpayers. But why would an EU Member State do so? Since direct taxation in the EU is mainly a competence of Member States, there is still a significant potential for tax competition, i.e. to reduce fiscal pressure so as to attract foreign corporations. When large international corporations are at issue, the gains in terms of employment, investments, innovation, and industrial spin-off often outweigh the losses in terms of tax revenue. However, as "one country's tax incentive is another's base erosion", tax competition can easily

¹¹ See Michael Saltzman, *IRS Practice and Procedure*, 2007, paragraphs 3.03[3] [b]–3.03[6][b] ("where the result of denying the tax treatment specified in the ruling to another taxpayer (who requested a similar ruling) would be to apply the internal revenue laws in favor of the taxpayer who received the first ruling to the disadvantage of the other taxpayer, the Service may be required to issue the same ruling to both taxpayers").

¹² See John Kiernan, *IRS Audit Report*. <https://wallethub.com/edu/irs-audit-report/3433/>.

¹³ Cf. US Internal Revenue Service, *2015 Data Book*. <https://www.irs.gov/pub/irs-soi/15databk.pdf>, 23, noting that in 2015 the IRS audited only 64% of the tax returns by corporations with assets worth more than \$ 20 billion dollars.

¹⁴ See International Consortium of Investigative Journalists, *Luxembourg Leaks: Global Companies' Secrets Exposed*. <https://www.icij.org/project/luxembourg-leaks>.

lead to a race to the bottom between Member States.¹⁵ It is indeed no wonder that statutory corporate income tax rates in the EU fell from 35% to 23% between 1995 and 2014.¹⁶ Moreover, EU State aid rules preclude selective tax cuts “favouring certain undertakings or the production of certain goods”: so in order to attract large international investors, a Member State would have to forfeit its tax revenues from the whole economic sector concerned, a loss that may outweigh the positive externalities of such investments.

This context creates incentives for the “alternative use” of ATRs as means of unfair tax competition, *viz.* to enable Member States to grant secret sweet-heart tax deals to select multinational corporate groups without extending that favourable treatment to other taxpayers, thus avoiding triggering a tax war with other Member States. It is thus to the alleged “alternative use” of ATRs by certain EU member States that this article now turns.

3. The Commission's investigations on Member States' ATR practices

Although State aid rules have been applied to tax matters since the early days of European integration,¹⁷ the Commission first contemplated that ATRs could give rise to unlawful aids in its Direct Business Taxation Notice (December 1998).¹⁸ Further indications as to the Commission's general view on ATRs as State aids can be gleaned from its Notion of State aid Notice (May 2016)¹⁹ and its Tax Rulings Working Paper (June 2016).²⁰

Turning to individual enforcement initiatives involving ATRs, the Commission started investigating national practices in this area in June 2013. The EU enforcer followed a two-step approach: first, it asked Member States for a description of their ATR practice and relevant documents together with a longlist of all ATRs provided between 2010 and 2013; second, it selected certain ATRs – notably those concerning multinationals already under public scrutiny via the press, NGOs or in national

¹⁵ European Parliament Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect, *Report on tax rulings and other measures similar in nature or effect*, 5 November 2015, A8-0317/2015, recital M.

¹⁶ *Ibid*, paragraph 8.

¹⁷ See Judgment of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the European Coal and Steel Community*, 30/59, EU:C:1961:2.

¹⁸ Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3 of 10 December 1998, paragraphs 21 and 22 (referring indirectly to ATRs as possibly giving rise to illegal State aids).

¹⁹ See above footnote 1.

²⁰ DG Competition, *Working Paper on State Aid and Tax Rulings*. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.262.01.0001.01.ENG (hereafter: Tax Rulings Working Paper).

parliaments – for a case-by-case review as part of a non-public preliminary investigation.²¹ The Commission extended its information inquiry to all Member States in December 2014,²² in some cases after handing down injunctions to provide the necessary information.²³ As a result of its extensive probe into national ATRs practices, the Commission opened seven formal investigations (*Apple*, *Starbucks*, *Amazon*, *FIAT*, *Excess Profits*, *McDonald's*, and *GDF Suez*).²⁴ Four of them resulted in recovery decisions (*Starbucks*, *FIAT*, *Excess Profit*, and *Apple*)²⁵ that are currently being reviewed by the General Court.²⁶ At the time of writing, there are no spe-

²¹ See Lujá, *op.cit.*, 12.

²² See Commission, *Press release, State aid: Commission extends information enquiry on tax rulings practice to all Member States*, Brussels, 17 December 2014. http://europa.eu/rapid/press-release_IP-14-2742_en.htm.

²³ See Commission, press release IP/15/5140 of 8 June 2015, referring to information injunctions issued to Estonia, Luxembourg and Poland.

²⁴ The seven opening decisions are (in chronological order): Commission Decision C(2014) 3606 final of 11 June 2014, in Case SA.38373, OJ C 369, 17.10.2014 (“*Apple* opening decision”); Commission Decision C(2014) 3626 final of 11 June 2014, in Case SA.38374, OJ C 460, 19.12.2014 (“*Starbucks* opening decision”); Commission Decision C(2014) 7156 final of 7 October 2014, in Case SA.38944, OJ C 44, 6.2.2015 (“*Amazon* opening decision”); Commission Decision C(2015) 7152 final of 21 October 2015, in Case SA.38375 (“*FIAT* opening decision”); Commission Decision C(2015) 563 (final) of 3 February 2015 in Case SA.37667, OJ C 188, 5.6.2015 (“*Excess Profits* opening decision”); Commission Decision C(2015) 8343 final of 3 December 2014, in Case SA.38945, OJ C 258, 15.6.2016 (“*McDonald's* opening decision”); Commission Decision C(2016) 5612 final of 19 September 2014, in Case SA.44888, OJ C 258, 15.7.2016 (“*GDF Suez* Opening Decision”).

²⁵ The four closing decisions are (in chronological order): Commission Decision C(2015) 7143 final of 21 October 2015, in Case SA. 38374 (“*Starbucks* closing decision”); Commission Decision C(2015) 7152 final of 21 October 2015, in Case SA.38375 (“*FIAT* closing decision”); Commission Decision C(2015) 9837 final of 11 January 2016 in Case SA.37667 (“*Excess Profit* closing decision”), and Commission Decision C(2016) 5605 final of 30 August 2016, in case SA.38373 (“*Apple* closing decision”).

²⁶ Three appeals were lodged against the *Starbucks* closing decision: Case T-760/15, *Netherlands v. Commission* (“Netherlands’ appeal in *Starbucks*”), OJ C 59 from 15.02.2016, 50; Case T-636/16, *Starbucks and Starbucks Manufacturing Emea v. Commission* (“*Starbucks* appeal”), OJ C 462 12.12.2016, 25, and Case T-877/16, *Verschuur v. Commission*, nyr. The appeals against the *FIAT* closing decisions are only two: Case T-759/15, *Fiat Chrysler Finance Europe v. Commission* (“*FIAT* appeal”), OJ C 59 from 15.02.2016, 49; Case T-755/15, *Luxembourg v. Commission* (“Luxembourg’s appeal in *FIAT*”), OJ C 59 from 15.02.2016, 48. In the *Excess profit* ruling case, to date, appeals have been lodged by the Belgian State, Case T-131/16, *Belgium v. Commission* (“Belgium’s appeal in *Excess Profit*”) and a number of undertakings (for reasons of space, only the case numbers will be listed: T-444/16, T-681/16, T-370/16, T-373/16, T-278/16, T-858/16, T-263/16, T-265/16, T-319/16, T-311/16, T-321/16, T-335/16, T-369/16, T-363/16, T-343/16, T-350/16, T-324/16, T-371/16, T-388/16, T-420/16, T-467/16, T-357/16, T-201/16, T-351/16, T-637/16, T-800/16, T-832/16, and T-867/16). The *Apple* closing decision, finally, was appealed both by the eponymous undertaking,

cific ECJ rulings on ATRs²⁷ and the General Court has not yet ruled on the merits of the appeals.²⁸

The final decisions: Apple, Starbucks, FIAT, and Excess Profits

Apple is one of the earliest probes by the Commission into Member States' tax ruling practices, launched in June 2014. Apple Sales International and Apple Operations Europe are two Irish incorporated companies that are fully-owned by the Apple group, ultimately controlled by the US parent, Apple Inc. They hold the rights to use Apple's intellectual property to sell and manufacture Apple products outside North and South America, in return for yearly payments to Apple Inc. to fund its research and development activities. The taxable profits of Apple Sales International and Apple Operations Europe in Ireland are determined by a tax ruling granted by Ireland in 1991, which was replaced in 2007 by a similar second tax ruling, terminated in 2015. According to those ATRs, all the profits stemming from the sales were recorded in Ireland, but for the most part were transferred to a "Head office" with no employees, no premises and no taxable presence in any country. As a result, Apple's effective annual tax rate in Ireland ranged between 0.05% and 0.005%. In its *Apple* closing decision of August 2016, the Commission claimed that such an internal allocation of profits had no factual or economic justification, as the "Head office" lacked any operating capacity to handle and manage the distribution business, whereas it was Apple's Irish branch that generated income from the distribution of Apple products. Therefore, in the Commission's view, the sales profits should have been recorded and taxed in Ireland. Accordingly, the Commission enjoined Member States to recover unpaid taxes worth up to EUR 13.9 billion.

The Commission's investigation in *Starbucks* concerns the APA issued to that company by the Dutch authorities in 2008. Starbucks Manufacturing, established in the Netherlands, is the only coffee roasting company in the Starbucks group in Europe. It sells and distributes roasted coffee and

Case T-892/16, *Apple Sales International and Apple Operations Europe v. Commission* ("Apple appeal") and by the Irish Government, Case T-778/16, *Ireland v. Commission* ("Ireland's appeal in Apple").

²⁷ Although, as it will be explained in further detail below, the ECJ's judgment of 22 June 2006, *Belgium and Forum 187 ASBL v. Commission of the European Communities*, joined cases C-182/03 and C-217/03, EU:C:2006:416, constitutes the conceptual foundation of the Commission's enforcement initiatives concerning ATRs.

²⁸ Cf. Judgment of 9 November 2016, *Belgium v. Commission*, T-131/16 R, EU:T:2016:427, paragraphs 48-49 (dismissing Belgium's application for interim measures due to lack of the urgency condition, but expressly refusing to examine the existence of a *prima facie* case).

coffee-related products (e.g. cups, packaged food, pastries) to Starbucks outlets in Europe, the Middle East and Africa. Thanks to the contested APA, binding for a period of 10 years, Starbucks Manufacturing was able to reduce its tax burden by EUR 20-30 million by offsetting its profits against its royalty payments for coffee-roasting know-how and its expenses for coffee beans to two different companies of the Starbucks group. The Commission, in its *Starbucks* closing decision of October 2015, claimed that the royalty does not adequately reflect the market value of the coffee roasting know-how, considering that no other Starbucks group company or independent undertakings to which roasting is outsourced are required to pay a royalty for using the same know-how. Similarly, the Commission considered that the Starbucks price for coffee beans not reflect the market prices of those products, considering that the seller's profit margin has more than tripled since 2011.

The Commission's probe in *FIAT* focuses on Luxembourg-based Finance and Trade (FFT), which provides intra-group loans and other financial services to other FIAT group companies in Europe. Since FFT's activities are not different from those of a bank, its taxable profits can be determined as a calculation of return on the capital deployed for financing activities. However, according to the Commission's *FIAT* closing decision of October 2015, the Luxembourg authorities issued an ATR in 2012 endorsing an artificial methodology that significantly lowered that company's tax liability, by underestimating both FFT's capital (relative to that company's actual accounting capital) and the remuneration for that capital (relative to the current market rate). The Commission noted that if the estimations of FFT's capital and remuneration had corresponded to market conditions, FFT's taxable profits declared in Luxembourg would have been at least 20 times higher.

The *Excess Profits* case, opened in June 2015, concerns an ATR scheme implemented by Belgian tax authorities in favour of multinational companies. That scheme is based on the premise that multinational companies make "excess profit" as a result of being part of a multinational group (e.g. due to synergies, economies of scale, reputation, client and supplier networks, access to new markets). For this reason, Belgian tax authorities enabled some multinational companies to reduce, via binding ATRs, their recorded profits in Belgium to the level that a hypothetical average profit a stand-alone company (i.e. a company that is not part of a corporate group) would have made in a comparable situation. Thanks to this ATR scheme,

the beneficiaries were able to reduce their recorded profits by more than 50% (and in some cases up to 90%). According to the Commission's *Excess Profits* closing decision of January 2016,²⁹ this scheme derogated from normal practice under Belgian company tax rules, in that it accorded an unfair competitive tax advantage to multinational companies over their stand-alone competitors, thus creating a very serious distortion of competition within the EU's Single Market in a variety of economic sectors. The Belgian ATR scheme also derogated from the ALP under EU State aid rules, in that it did not reapportion the alleged "excess profits" between companies of the group in a way that reflects economic reality, but unilaterally discounted those profits from the tax base of a single group company. The Commission estimated the total amount to be recovered from the beneficiaries to be around EUR 700 million.

The ongoing investigations: Amazon, McDonald's and GDF Suez

The *Amazon* APA investigation, although opened at the same time as the *FIAT* one (i.e. October 2014), is currently still in progress. Amazon EU Sarl, based in Luxembourg, is the principal operator of the retail and business services offered through Amazon's European websites. Amazon EU Sarl pays royalties to exploit the Amazon group's IP rights to Amazon Europe Technologies Holding SCS, which is based in Luxembourg but is not subject to corporate taxation in that country. That royalty, approved by the Luxembourg authorities in a binding APA issued in 2003, enables Amazon EU Sarl to significantly lower its taxable profits. As apparent from the Commission's *Amazon* opening decision, the EU enforcers suspect that the amount of that royalty is not in line with market conditions and that the APA issued by the Luxembourg authority appreciably underestimates the taxable profits of Amazon EU Sarl, thus granting a selective advantage to that company.

The *McDonald's* case, opened in December 2015, focuses on two ATRs issued by the Luxembourg authorities concerning the application of the US-Luxembourg Treaty on double taxation. McDonald's Head Office in Luxembourg collects royalties from all the franchisees operating restaurants in Europe and Russia for the right to use the McDonald's brand and associated services. The Luxembourg Head Office, in turn, transfers those royalties

²⁹ For commentary of the closing decision, see Jan Blockx, "The Belgian Excess Profit Exemption: Tax Incentives for Multinational Groups as State Aid", *Journal of European Competition Law & Practice* 8, (2016): 25-26.

to its US branch, a company with no real activities, via its Swiss branch. The first ATR, issued in March 2009, confirmed that McDonald's Head Office was not due to pay corporate tax in Luxembourg insofar as the profits were to be subject to taxation elsewhere. To that end, McDonald's was asked to provide, on a yearly basis, proof that the royalties were actually declared and subject to taxation in the US and Switzerland. Contrary to that assumption, however, McDonald's profits were not taxed in the US, because the American branch of Luxembourg Head Office did not undertake sufficient business or trade in that country. A second ATR, issued by the Luxembourg authorities in September 2009, no longer required McDonald's to prove that the profits were subject to taxation in the US. In sum, this ATR confirmed that McDonald's profits were tax-exempt in Luxembourg even if the tax authorities of that country were fully aware that those profits were not subject to tax in the US either. According to the Commission's estimate, thanks to the two ATRs above, McDonald's was able to pay virtually no corporate tax in Luxembourg, nor in the US, since 2009.

The *GDF Suez* investigation, launched in September 2016, concerns the tax treatment of convertible loans between companies of that group. According to an ATR issued by the Luxembourg authorities, two of those loans were simultaneously characterised as loans and as equity. This resulted in a double non-taxation of profits arising in Luxembourg from those transactions: the borrowers could deduct the provisioned interest payments of the loan as expenses, whilst the lenders could avoid paying any tax on the profits generated by those transactions, because income from equity investment is exempt from Luxembourg taxation.

4. Legal analysis of the Commission's ATR decisions

In order to fall within the scope of Article 107(1) TFEU, a measure must meet, *inter alia*, four cumulative requirements: i) it must grant an economic advantage to an undertaking ("advantage"); ii) favour only certain undertakings or only the production of certain goods ("selectivity"); iii) be imputable to a Member State and be financed through State resources ("State origin"); iv) and potentially distort competition and affect EU trade ("effects on trade and competition").³⁰ The application of each of those

³⁰ Cf. Notion of State aid Notice, paragraph 5 ("the different constituent elements of the notion of State aid [are]: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition and trade between Member States. In addition, given the need for specific guidance

requirements to ATRs poses certain unique challenges, which deserve to be examined seriatim.

Advantage

The notion of “advantage” in State aids law is notoriously broad as it embraces not only positive benefits but also interventions that “mitigate the charges which are normally included in the budget of an undertaking”.³¹ Accordingly, any measure which places certain undertakings in a more favourable financial position than other taxpayers can be regarded as conferring an advantage on the recipient,³² in particular through a reduction in the taxable base or in the amount of the tax due.³³ That is the case, according to the Notion of State aid Notice, of ATRs that endorse a result that does not reliably reflect what would ensue from “a normal application of the ordinary tax system”, so as to lower the recipient’s tax liability compared to companies in a similar factual and legal situation,³⁴ as well as of APAs that “endorse[] a transfer pricing methodology for determining a corporate group entity’s taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm’s length principle”.³⁵

What is this arm’s length principle (“ALP”)? According to the Commission, it constitutes a corollary of the “general principle of equal treatment in taxation” inherent in Article 107(1) TFEU, which requires that similarly-situated undertakings be treated alike.³⁶ This argument is based on the ECJ’s judgment in *Belgium and Forum 187 v. Commission*,³⁷ where the judges in

expressed by Member States, this Notice provides specific clarification with respect to public funding of infrastructure”).

³¹ Judgment of 8 November 2001, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, C-143/99, EU:C:2001:598, paragraph 38.

³² See, e.g., Judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 61; Judgment of 18 July 2013, *P Oy*, C-6/12, EU:C:2013:525, paragraph 18; Judgment of 15 November 2011, *Commission and Spain v. Government of Gibraltar and United Kingdom*, joined cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 72 and 73; Judgment of 8 September 2011, *Paint Graphos and Others*, joined cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 46; and Judgment of 15 March 1994, *Banco Exterior de España*, C-387/92 EU:C:1994:100, paragraph 14.

³³ See Judgment of 15 December, *Italy v. Commission*, C-66/02, EU:C:2005:768, paragraph 78; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 132.

³⁴ Notion of State aid Notice, paragraph 170.

³⁵ *Ibid.*, paragraph 171.

³⁶ *Excess Profit*, *op. cit.*, paragraph 264.

³⁷ Judgment of 22 June 2006, joined cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 ASBL v. Commission of the European Communities*, EU:C:2006:416.

Luxembourg ruled that a tax scheme departing from the general tax system can be regarded as conferring an advantage if the tax base under that regime is composed in such a way that it cannot, by its very nature, resemble the tax base under the general scheme, in particular by endorsing “transfer prices [that] do not resemble those which would be charged in conditions of free competition”.³⁸ Insofar as the ALP stems directly from 107(1) TFEU, it can be used as a criterion for the assessment of ATRs and APAs regardless of whether it has been incorporated into the law of the relevant Member State.³⁹ Most commentators, however, argued that the *Belgium and Forum 187 v. Commission* judgment is too vague in that respect⁴⁰ and does not clearly articulate the ALP as understood by the Commission.⁴¹ It is thus unsurprising that the many of the appeals lodged against the closing decisions accused the Commission of failing to show “how it derives the ALP from Union law, or even what the principle is”⁴² and went as far as to argue that “there is no ALP in EU law and that that principle is not part of a State aid assessment”,⁴³ a view shared also in certain academic circles.⁴⁴

In its Tax Rulings Working Paper, the Commission added that its enforcement priority are “cases where there is a manifest breach of the ALP”,⁴⁵ i.e.

³⁸ *Ibid.*, paragraphs 95-97.

³⁹ Notion of state aids Notice, paragraph 172: (“This ALP necessarily forms part of the Commission’s assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form”). See also *Apple* closing decision, paragraph 257 (“the ALP [...] flows from Article 107(1) of the Treaty [...] which binds the Member States and from the scope of which national tax rules are not excluded [...] That principle therefore applies independently of whether the Member State in question has incorporated the ALP in its national legal system”).

⁴⁰ François-Charles Laprvte and Nikolaas Van Robbroeck, “Three Years of EU State Aid Review of Tax Rulings: Taking Stock”, *Cleary Gottlieb Alert Memorandum*, accessed 29 July 2016. <https://www.clearygottlieb.com/news-and-insights/publication-listing/>, 5-6; Liza Lovdahl Gormsen, “EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga”, *Journal of European Competition Law & Practice* 7, 6 (2016): 381.

⁴¹ Sjoerd Douma and Alexia Kardachaki, “The Impact of European Union Law on the Possibilities of European Union Member States to Adapt International Tax Rules to the Business Models of Multinational Enterprises”, *Intertax* 44, 10 (2016): 751.

⁴² *FIAT* appeal, *op.cit.*, paragraph 2.

⁴³ Netherlands’ appeal in *FIAT*, paragraph 2. See also the Ireland’s appeal in *Apple* (arguing that the ALP “is not part of EU law or the relevant Irish law in relation to branch profit attribution”) and the *Apple* appeal (alleging that the ALP “does not operate as the test for State aid in tax assessments under Article 107 TFEU”).

⁴⁴ Gormsen, *op. cit.*, 381 (arguing that “In the absence of clear case law precedent and given the lack of harmonisation, no such EU ALP can exist”).

⁴⁵ Tax Rulings Working Paper, *op.cit.*, paragraphs 14 and 23.

where no reasonable tax administration would consider the transfer pricing outcome as in line with a market-based outcome.⁴⁶ The Commission's ATR decisions suggest that there are several "red flags" capable of bringing an ATR in the spotlight. First, inherently suspect are the APAs issued in the absence of a "transfer pricing report" by the taxpayer, i.e. a document designed to substantiate the choice of the chosen transfer pricing method and its compliance with the ALP.⁴⁷ In *Amazon* and *Apple*, in particular, the Commission averred that, due to the lack of a transfer pricing report, it had doubts as to whether the national tax authorities had properly confirmed that the transfer pricing arrangement presented by the taxpayer reflected what a prudent independent operator acting under normal market conditions would have accepted.⁴⁸ Second, ATRs that pursue public policy goals are on the Commission's watch-list, because it assumes that they offer a more favourable tax treatment taxpayers in return for the taxpayer's contribution to the attainment of such goals. In the *Excess Profit* opening decision, for instance, the Commission strongly implied that the ATR scheme deviated from the ALP insofar as it was conditional upon the taxpayer creating jobs or making new investments in Belgium.⁴⁹

Third, the longer an ATR's validity, the less likely its (ongoing) adherence to the ALP. In *Amazon* and *Apple*, for instance, the Commission noted that even if the contested ATRs complied with the ALP at the time they were requested, that can hardly be the case after several years, given the changes to the economic context.⁵⁰

⁴⁶ Laprévôte and Van Robbroeck, *op. cit.*, 3

⁴⁷ Cf. Tax Rulings Working Paper, *op.cit.*, paragraph 12.

⁴⁸ *Amazon* opening decision, paragraph 63 (adding that the APA was issued within eleven working days from Amazon's request, "which is a very short period of time had a transfer pricing report been submitted and assessed in this case"); *Apple*, paragraph 262 (adding that it was only "after the Commission adopted its Opening Decision that Ireland and Apple each produced ad hoc profit allocation reports [...] to justify the profit allocation methods endorsed by the contested tax rulings *ex post facto*").

⁴⁹ *Excess Profit* opening decision, paragraph 77: ("Instead of using the profits recorded in Belgium as a tax base, the administration allows the company to recalculate an alleged arm's length profit that allegedly comparable companies receive. Any profit above that level is attributed to the costs savings or theoretical synergies related to a new investment and simply deducted from the tax base. The Commission does not understand why, if such a deduction was justified by the ALP, the deduction should only be awarded in respect of profits related to the relocation of activities to Belgium or to new investments made and jobs created in Belgium.")

⁵⁰ See *Amazon* opening decision, paragraph 76; *Apple* closing decision, paragraph 365 (adding that this reasoning "applies *a priori* to an open-ended rulings").

Moreover, ATRs endorsing methodologies that deviate from the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the “OECD Guidelines”)⁵¹ are more likely to raise the eyebrows of DG Comp officials.⁵² The Notion of State aid Notice, indeed, states that the OECD Guidelines are one of the criteria that may be used when examining whether a transfer pricing ruling complies with the ALP,⁵³ although the Commission itself conceded, in the Tax Rulings Working Paper, that some of the methodologies set out in the OECD Guidelines may be more reliable than others.⁵⁴ The individual decisions confirm the importance of the OECD Guidelines: in its closing decision in *Apple*, for instance, the Commission stated that an ATR that complies with the OECD Guidelines “is unlikely to confer a selective advantage upon its recipient”,⁵⁵ whereas departure from that framework does provide “an additional indication” that the ATR “does not result in a reliable approximation of a market-based outcome in line with the ALP”.⁵⁶ Yet, reliance by the Commission on the OECD Guidelines has been criticised insofar as it can be seen as indirectly requiring Member States to comply with international standards that were originally conceived as voluntary.⁵⁷

In a number of its ATR opening decisions, the Commission also referred to the “prudent independent operator acting under normal market conditions” as a benchmark to assess whether transfer pricing arrangements between related companies within a corporate group had been assessed at

⁵¹ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010, OECD Publishing, Paris, DOI: <http://dx.doi.org/10.1787/tpg-2010-en>.

⁵² Laprévote and Van Robbroeck, *op. cit.*, 3 (arguing that “in practice, any deviation from the OECD Transfer Pricing Guidelines is likely to raise problems from a State aid perspective.”)

⁵³ Notion of State aid Notice, paragraph 173 (“When examining whether a transfer pricing ruling complies with the ALP [...] the Commission *may have regard to* the [...] OECD Transfer Pricing Guidelines [insofar as] they capture the international consensus on transfer pricing and provide useful guidance [...] on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions”) (emphasis added).

⁵⁴ Tax rulings working paper, paragraph 19 (noting that “a ruling is based on the CUP method without any comparables being presented [...] may not result in a reliable approximation of a market-based outcome in line with the ALP”).

⁵⁵ *Apple* closing decision, paragraph 255.

⁵⁶ *Ibid.*

⁵⁷ See Dimitrios Kyriazis, “Actions for Annulment in the Fiat and Starbucks Cases: A First Taste of What Will Ensurue”, *Kluwer Competition Law Blog*, 2016, <http://kluwercompetitionlawblog.com> (noting that the Commission may be seen as “turning soft law (OECD documents) into hard law (Article 107 TFEU)”. See also Gormsen, *op. cit.*, 379-381.

arm's length in the context of a given ATR.⁵⁸ Just as an independent market operator would not accept that its revenues are based on a method which achieves the lowest possible outcome, tax authorities should not accept a method of taxation that fails to reflect market principles, thus enabling the recipients to depart from normal tax conditions in setting the conditions for intra-group transactions. Some commentators criticized that approach, claiming that whilst the “market economy operator” test (on which the “prudent independent operator” test is based) can be useful to assess the behaviour of a Member State in transactions that private operators can conceivably engage in (such as the provision of securities or capital increases), that test seems misplaced in relation to the application of tax law, which is a typical expression of public powers.⁵⁹ It is perhaps for this reason that the “prudent independent operator” is virtually absent from the four ATR closing decisions.

Selectivity

To fall within the scope of Article 107(1) TFEU, a State measure must favour “certain undertakings or the production of certain goods”, rather than all similarly-situated undertakings. One of the most controversial aspects of the Commission's ATR opening and closing decisions is the conflation of the “advantage” and “selectivity” prongs into a single “selective advantage” requirement.

According to the US Treasury, whilst the Commission had always examined the existence of an advantage and the selective nature of fiscal measures separately,⁶⁰ in the opening decisions in *Apple* and *Amazon*, it took the view that “selectivity was met simply because the ruling deviated from the ALP – the same analysis used to find economic advantage”.⁶¹ This new approach allegedly “reduces a State aid inquiry to whether the Commission believes that a transfer pricing ruling satisfies its view of the ALP” and expands the role of DG COMP “beyond enforcement of competition and State aid law under the TFEU into that of a supra-national tax authority that

⁵⁸ *Amazon* opening decision, paragraphs 53-55; *Fiat* opening decision, paragraphs 60-65.

⁵⁹ Liza Lovdahl Gormsen, “EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga”, *Journal of European Competition Law & Practice* 7, 6 (2016): 378-379.

⁶⁰ U. S. Department of the Treasury, *White Paper of 24 August 2016 “The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings”* (“US Treasury White Paper”), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf>, 6-8.

⁶¹ *Ibid.*, 8.

reviews Member State transfer price determinations”.⁶² Similarly, in their appeals against the *Starbucks* and *FIAT* decisions, the Netherlands government argued that the Commission “did not adequately – and separately – demonstrate that the selectivity criterion was fulfilled”,⁶³ while Fiat argued that the Guardian of the Treaties had “misapplied the concept of selective advantage” altogether.⁶⁴

Those views found some support in certain academic circles. One commentator, in particular, argued that the assumption that a breach of the ALP amounts to a selective aid is a “potentially dangerous development in EU State aid law” insofar as the ALP “is not well equipped to assess whether the measure is selective or otherwise but rather is fit to assess whether an economic advantage was granted”.⁶⁵ Further arguments presented against the selectivity presumption are that “Member States have explicit sovereignty in relation to direct taxation” and that in matters of tax law “the other conditions laid down in Article 107(1) TFEU are almost always satisfied”.⁶⁶ In another case note, it was objected that the mere fact that an undertaking obtained an advantageous ATRs “does not necessarily mean that this undertaking is treated selectively better than other undertakings” either because the advantage is open also to similarly-situated taxpayers “irrespective of whether they obtained a tax ruling or not”, or because “taxpayers that requested and obtained a tax ruling are not in a similar legal and factual position as the taxpayers that freely decided not to request (and thus obtain) a tax ruling”.⁶⁷ Similarly, in the letter to its customers issued in the wake of the Apple decision, the Cupertino firm argued that it had sought from the Irish authorities “the same kind of guidance available to any company doing business there”.⁶⁸

A closer look at the Commission’s decisional practice and the case law of the EU courts, however, suggests that some of those concerns might be overstated. First, there appears to be no *fumus persecutionis* against US

⁶² *Ibid.*, 9.

⁶³ Netherlands’ appeal in *Starbucks*, paragraph 1.

⁶⁴ *FIAT* appeal, paragraph 1.

⁶⁵ Liza Lovdahl Gormsen, “EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga”, *Journal of European Competition Law & Practice* 7, 6 (2016): 375.

⁶⁶ *Ibid.*

⁶⁷ Anna Gunn and Joris Luts, “Tax Rulings, APAs and State Aid: Legal Issues”, *EC Tax Review* 24, 2 (2015): 122.

⁶⁸ Tim Cook, *A Message to the Apple Community in Europe*. Accessed August 30, 2016. <http://www.apple.com/ie/customer-letter/>.

recipients of ATRs, considering that the Commission had, as early as in its 1998 Direct Business Taxation Notice, expressly announced that in fiscal matters a “selective advantage” may derive “from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities”.⁶⁹ Since then, the Commission has repeatedly employed the “selective advantage” criterion in its decisional practice,⁷⁰ also in cases that do not involve fiscal matters,⁷¹ and also in respect of ATR practices that mostly involve EU-based companies.⁷²

Second, as some commentators expressly conceded,⁷³ the ECJ expressly endorsed the presumptively selective nature of individual aids: in *Commission v. MOL* the judges in Luxembourg noted that when a State aid measure is individual in scope (viz. is addressed to a specific undertaking) “the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective”.⁷⁴ Admittedly, this dictum does not imply that the advantage and selectivity conditions become one, but it does create a rebuttable presumption that individual measures granting an advantage are inherently selective,⁷⁵ thus ultimately meeting the requirements of Article 107(1) TFEU.

Third, regard must be had to the ECJ ruling in *World Duty Free Group* handed down in December 2016.⁷⁶ At the outset, the ECJ, in line with its past rulings, expressly referred to the conferral of a “selective advantage” on the recipient as one of the conditions to be fulfilled for the classification

⁶⁹ Direct Business Taxation Notice, paragraph 12.

⁷⁰ See, e.g., 2002/14/EC: Commission Decision of 12 July 2000 on the State aid granted by France to Scott Paper SA Kimberly-Clark, OJ L 12, 15.1.2002, 1-32, paragraphs 92, 135, 149, and 193.

⁷¹ See, e.g., Commission Decision of 19.12.2012, in cases SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) (*Tirrenia* extension decision), OJ C 84, 22.3.2013, paragraph 218 (applying the “selective advantage” test to a capital increase in a maritime transport company).

⁷² See the *Excess Profit* press release, IP/16/42, noting that the contested ATR scheme concerned “at least 35 multinationals mainly from the EU”

⁷³ Sjoerd Douma and Alexia Kardachaki, “The Impact of European Union Law on the Possibilities of European Union Member States to Adapt International Tax Rules to the Business Models of Multinational Enterprises”, *Intertax* 44, 10 (2016): 748 (“In the case of individual aid, the presence of an economic advantage results in a presumption of selectivity”).

⁷⁴ Judgment of 4 June 2015, *Commission v. MOL*, C-15/14 P, EU:C:2015:362, paragraph 60 (“It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.”)

⁷⁵ Kyriazis, *op. cit.*

⁷⁶ Judgment of 21 December 2016, *Commission v. World Duty Free Group SA*, joined cases C-20/15 P and C-21/15 P, EU:C:2016:981.

of a national measure as a “State aid”, within the meaning of Article 107(1) TFEU.⁷⁷ Moreover, on that occasion, the judges, in line with AG Wathelet’s Opinion,⁷⁸ expressly rejected the General Court’s argument that to establish selectivity the Commission must clearly identify the privileged category and cannot merely refer to the conditions under which an aid is granted (i.e., the fact that it derogates from the “normal” tax regime).⁷⁹ This ruling seems to lend some support to the Commission’s reasoning on selectivity in its ATRs decisions, a conclusion also shared by some commentators.⁸⁰

Fourth, in its closing decision in *Apple*, the Commission seems to have taken into account and, to some extent, pre-empted the argument based on the conflation of the “advantage” and “selectivity” requirements by showing how the second step of the selectivity analysis devised by the ECJ for fiscal State aids schemes (i.e. showing that the contested measures constitute a “derogation from the reference system”)⁸¹ necessarily coincides with the demonstration of whether the contested ATR confers an advantage on its recipient. That is because, as the Commission put it, “where a tax measure results in an unjustified reduction of the tax liability of a beneficiary that would otherwise be subject to a higher level of tax under the ordinary rules of taxation, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference system”.⁸² It is quite telling that, in their appeals to the General Court, neither Apple nor the

⁷⁷ *Ibid.*, paragraph 53 (“First, it must be recalled that, according to the Court’s settled case law, classification of a national measure as ‘State aid’, within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, *inter alia*, judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 24”).

⁷⁸ Opinion of Advocate General Wathelet, *Commission v. World Duty Free Group*, joined cases C-20/15 P and C-21/15 P, EU:C:2016:624.

⁷⁹ *Ibid.*, paragraph 94 (“the General Court erred in law by [...] by ruling, in the judgments under appeal, that the examination method applied by the Commission in the contested decisions, in failing to define a particular category of undertakings which were exclusively favoured by the tax measure at issue, was based on a misinterpretation of the condition relating to selectivity as laid down by Article 107(1) TFEU”).

⁸⁰ See Laprévote, and Van Robbroeck, *op. cit.*, 5-6.

⁸¹ See Judgment of 26 February 2015, *Orange v. Commission*, T-385/12, EU:T:2015:117, paragraph 53. On selectivity in tax matters, see generally Roberto Cisotta, “Criterion of Selectivity”, in *State Aid Law of the European Union*, ed. Herwig C. H. Hofmann and Claire Micheau (OUP, 2016), 132-150.

⁸² *Apple* closing decision, paragraph 224.

Irish government took issue with that particular aspect of the Commission's decision.⁸³

State origin

According to the Notion of State aid Notice, the granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State are two separate (and cumulative) elements of the notion of State aid. In line with that view, the four available closing decisions relating to ATRs deal with the two issues separately.

As to the imputability requirement, the Commission decisions simply state that the contested ATRs are imputable to the relevant Member States because they were issued by their respective tax authorities.⁸⁴ The Commission's inference seems beyond dispute, considering that the determination of an undertaking's tax burden is an expression of national fiscal sovereignty and is usually carried out by authorities that constitute an integral part of national governments. What if, however, the illegal ATRs were issued by one or more individuals abusing the discretion granted to them by the relevant national tax regulations, for instance as a result of corruption by the recipient of the sweetheart tax deal? Is there, in other words, a "rogue taxman" defence in State aid proceedings?

As noted by one commentator,⁸⁵ that argument seems unlikely to succeed before the ECJ, which has consistently held that a Member State cannot plead provisions, practices or circumstances in its internal legal system to justify failure to comply with its obligations arising from EU law.⁸⁶ More to the point, as observed by Advocate General Wathelet in *Commerz Nederland* "the imputation to the State of an aid measure is a purely objective matter, in which the subjective notion of fault on the part of its organs

⁸³ Apple and the Irish government, however, did contest the selectivity of the ATRs: see Ireland's appeal in *Apple* (claiming that the impugned decision "wrongly claims that the Opinions were selective" in that it "wrongly ignores the distinction between resident and non-resident companies"); and the *Apple* appeal (arguing that the Commission "failed to prove selectivity" insofar as it "wrongly treated the applicants as if they were Irish resident companies and as if they should be taxed on their worldwide profits").

⁸⁴ *Apple* closing decision, paragraph 221; *Excess profit* closing decision, paragraph 113; *FIAT* closing decision, paragraph 187; *Starbucks* closing decision, paragraph 225.

⁸⁵ Luja, *op. cit.*, 8-9.

⁸⁶ See, e.g., Judgment of 2 February 1982, *Commission v. Belgium*, 68/81, EU:C:1982:25, paragraph 5; Judgment of 8 June 1993, *Commission v. Netherlands*, C-52/91, EU:C:1993:225, paragraph 36; Judgment of 1 February 2001, *Commission v. France*, C-333/99, EU:C:2001:73, paragraph 54.

or agents or their motives play no role”.⁸⁷ The rationale for such a strict approach, espoused by the ECJ Judges,⁸⁸ is one of *effect utile*: the effectiveness of the rules on State aid, indeed, would be seriously undermined if their application could be set aside merely because the author of the aid measure acted illegally or is guilty of corruption.⁸⁹

Turning to the financing through State resources requirement, in its four closing decisions the Commission took the view that insofar as the ATRs had the effect of lowering the recipient’s tax liability in the Member State concerned, the latter renounced part of its tax revenues and thus “financed” the measure through a loss of State resources.⁹⁰ The counterargument here could be that a particular ATR, in fact, resulted in an increase of State resources because it favoured the establishment of a multinational corporation whose industrial spin-off generated tax revenues that exceeded, or at least equated, those allegedly forfeited due to the contested ATR.⁹¹ Moreover, attracting international investors may entail other positive externalities in terms of employment, technology transfer, productivity, consumer welfare, etc. Still, in *Italian banks* the Commission clearly stated that “[t]he fact that, overall, an aid scheme increases the number or the amount of taxable operations and therefore creates additional revenue for the State is not relevant” for the purpose of State aid rules.⁹² Besides, whilst the Commission recognised that Member States “can decide legitimately not to maximize the[ir] revenues” in order to pursue “public policy objectives”,⁹³ it insisted that those States do so in a “transparent and non-discriminatory

⁸⁷ Opinion of Advocate General Wathelet delivered on 8 May 2014, *Commerz Nederland NV v. Havenbedrijf Rotterdam NV*, C-242/13, EU:C:2014:308, paragraph 91.

⁸⁸ Judgment of 17 September 2014, *Commerz Nederland NV v. Havenbedrijf Rotterdam NV*, C-242/13, EU:C:2014:2224, paragraph 36 (“as observed by the referring court itself and by the Advocate General, in paragraphs 90 and 91 of his Opinion, the effectiveness of the rules on state aid would be considerably weakened if their application could be excluded, merely because a director of a public undertaking disregarded that undertaking’s statutes”). However, the ECJ ultimately left it to the referring court to determine whether, “in the light of all the relevant evidence”, the aid measure could or could not be imputed to the Netherlands. See *Ibid.*, paragraph 38.

⁸⁹ Opinion of Advocate General Wathelet delivered on 8 May 2014, *Commerz Nederland NV v. Havenbedrijf Rotterdam NV*, C-242/13, EU:C:2014:308, paragraph 90.

⁹⁰ *Apple* closing decision, paragraph 221; *Excess profit* closing decision, paragraph 114; *Starbucks* closing decision, 226; *FIAT* closing decision, paragraph 188.

⁹¹ Lujá, *op. cit.*, p. 8.

⁹² Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy, OJ L 184, 13.7.2002, 27-36, paragraph 42.

⁹³ Notion of State aid Notice, paragraph 54.

manner”⁹⁴ – a feature of which secret sweetheart tax deals seem to fall short. Thus, it seems that even if the loss in tax revenues inherent in an ATR is offset by higher tax revenues and other non-economic benefits, that ATR would still be regarded as granted through State resources for the purposes of Article 107(1) TFEU.⁹⁵

Effects on EU trade and competition

According to the Notion of State aid Notice, an aid measure can be regarded as one that “distorts or threatens to distort competition”, within the meaning of Article 107(1) TFEU, when it is liable to “improve the competitive position of the recipient compared to other undertakings with which it competes”.⁹⁶ Similarly, the same Notice defines an aid measure as susceptible to “affect[] trade between Member States” if it “strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade”.⁹⁷

The ATR closing decisions address both requirements rather perfunctorily. As to the capacity to affect EU trade, in all four decisions the Commission merely claimed that, since the beneficiaries of the ATRs were part of “a globally active multinational group operating in all Member States”, “any aid in their favour is liable to affect intra-Union trade”.⁹⁸ Only in *Excess Profits*, the Guardian of the Treaties added that, since the tax benefits envisaged by the ATRs were conditional upon increased investments in Belgium, the ATR scheme was “liable to influence the choices made by multinational groups as to the location of their investments within the Union and thus to affect intra-Union trade”.⁹⁹

Turning to the other requirement, all four decisions – almost tautologically – note that, “by strengthening the financial position” of the beneficiaries, the contested ATRs should be considered “to distort or threaten to

⁹⁴ *Ibid.*

⁹⁵ Luja, *op. cit.*, 8.

⁹⁶ Notion of State aid Notice, paragraph 187 (citing Judgment of 17 September 1980, *Philip Morris*, 730/79, EU:C:1980:209, paragraph 11 and Judgment of 15 June 2000, *Alzetta*, T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 80).

⁹⁷ Notion of State aid Notice, paragraph 190 (citing Case C-518/13, *Eventech v. The Parking Adjudicator*, EU:C:2015:9, paragraph 66; Joined Cases C-197/11 and C-203/11, *Libert and others*, paragraph 77).

⁹⁸ *Apple* closing decision, paragraph 222; *Starbucks* closing decision, paragraph 227; *FIAT* closing decision, paragraph 189.

⁹⁹ *Excess profits* closing decision, paragraph 115.

distort competition”.¹⁰⁰ Only in *Apple* the Commission further noted that, by relieving Apple of a tax liability which competing undertakings have to bear, the recipient could “free up resources [...] to invest in [its] business operations, thereby distorting competition on the market”.¹⁰¹

In its action for annulment in *FIAT*, the Luxembourg government claimed that the Commission did not adduce sufficient proof of a “restriction of competition”.¹⁰² According to a legal commentator, that passage must be read as referring to the “distortion of competition” requirement under Article 107(1) TFEU.¹⁰³ That claim might find some support in *Commission v. Italy and Wam*, where the ECJ ruled that the Commission is “obliged to examine whether the aid at issue is liable to affect trade between Member States and to distort competition, giving information relevant to their likely effects in the contested decision”.¹⁰⁴

Could a Member State claim that its illegal ATRs merely constitute a “tit-for-tat” reaction to unfair tax competition by other Member States? In other words, is “meeting (tax) competition” a valid defence in State aid proceedings just as it is under EU competition law?¹⁰⁵ The answer to that question clearly seems to be in the negative: as the ECJ put it in *Italy v. Commission (tax credits)*, “the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid”.¹⁰⁶ It is moreover well-established in the ECJ case law that “a Member State cannot, in any circumstances, [...] rely on a possible infringement of the Treaty by

¹⁰⁰ *Apple* closing decision, paragraph 222; *Starbucks* closing decision, paragraph 227; *Excess Profits* closing decision, paragraph 116, *FIAT* closing decision, paragraph 189.

¹⁰¹ *Ibid.*

¹⁰² Action brought on 30 December 2015, Case T-755/15, *Luxembourg v. Commission*, OJ C 59, 15.2.2016, 48-49.

¹⁰³ See Kyriazis. *op. cit.*

¹⁰⁴ Judgment of 30 April 2009, *Commission v. Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 57.

¹⁰⁵ See Judgment of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v. European Commission*, T-321/05, EU:T:2010:266, paragraph 672 (“the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked”). See also DG Comp, *Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, paragraph 81 (“to minimise the short run losses resulting directly from competitors’ actions can be a legitimate aim”).

¹⁰⁶ Judgment of 19 May 1999, *Italy v. Commission (tax credits)*, C-6/97, EU:C:1999:251, paragraph 21.

another Member State in order to justify its own default”.¹⁰⁷ The defendant Member State's situation would not be different even if it could show that the Guardian of the Treaties had turned a blind eye to the illegal ATRs of other Member States, as “any possible failure by the Commission to fulfil its obligations [...] cannot exempt” it from its duties under EU law.¹⁰⁸

5. *The recovery of unpaid tax*

When the Commission finds that a measure is at variance with the rules on State aids, Member States must take all necessary measures to recover the aid,¹⁰⁹ including interest from the date on which that aid was at the disposal of the beneficiary until the date of its effective recovery,¹¹⁰ subject to a limitation period of 10 years.¹¹¹ In the case of unlawful ATRs, the sum that Member States must recover is equal to the difference between the tax actually paid by the ATR recipient and the tax that the recipient should have paid if the generally applicable tax provisions had been applied to it, plus interest. In the *Apple* closing decision, for instance, the Commission estimated that sum in the range of EUR 13.9 billion,¹¹² an approximation that the Irish finance minister did not regard as manifestly incorrect.¹¹³

¹⁰⁷ Judgment of 14 February 1984, *Commission v. Germany (travellers' luggage exemption)*, 325/82, EU:C:1984:60, paragraph 11. See also Judgment of 25 September 1979, *Commission v. France (mutton and lamb)*, 232/78, EU:C:1979:215, paragraph 9.

¹⁰⁸ See Judgment of 16 June 1966, *Germany v. Commission (sheep for slaughter)*, joined cases 52 and 55/65, EU:C:1966:32. See also Judgment of 13 November 1964, *Commission v. Luxembourg and Belgium*, joined cases 90/63 and 91/63, EU:C:1964:80 (“the defendants [...] complain that the Community failed to comply with the obligations falling on it [...] and was thus responsible for the continuance of the alleged infringement of the Treaty [...] In their view, since international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own, the Commission has lost the right to plead infringement of the Treaty. However this relationship between the obligations of parties cannot be recognized under Community law”).

¹⁰⁹ Article 16(1) of Regulation (EU) 2015/1589.

¹¹⁰ *Ibid.*, Article 16(2). The methods Member States must employ for the calculation of recovery interest are set out in Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, 1).

¹¹¹ Article 17 of Regulation (EU) 2015/1589. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme.

¹¹² *Apple* press release.

¹¹³ See “Irish finance minister: Dublin, EU agree on Apple tax estimate”. <http://www.euractiv.com/section/euro-finance/news/irish-finance-minister-dublin-eu-agree-on-apple-tax-estimate/>. In its appeal against the closing decision, however, Apple did argue the Commission infringed the principle of legal certainty because the decision “does not contain any explanation of how much is to be recovered”.

Exceptions to the recovery obligation

The obligation to recover unlawful State aids is subject to derogations and limitations, which will be examined *seriatim* having regard to the peculiarities of ATRs. At the outset, it must be reminded that the recovery obligation does not apply to existing aids, i.e. aids that were put into effect before the entry into force of the TFEU in the Member State concerned.¹¹⁴ In *Apple*, for instance, the Irish government claimed that the contested ATRs, which allegedly failed to apply the ALP, should have been regarded, if anything, as an “existing aid”, considering that such a principle was not in force in Ireland when it joined the EEC on 1 January 1973 and had not been applicable at any time since.¹¹⁵ The Commission, however, clarified in its closing decision that it took no issue with Irish tax law in itself, but only with its application to Apple through the contested ATRs, which should thus be regarded as “a new aid, granted annually” by the Irish Revenue.¹¹⁶

Member States can also invoke general principles of EU law, notably the fundamental principles of legal certainty and the protection of legitimate expectations, as derogations from their recovery obligations.¹¹⁷ The Commission and the ECJ have taken a rather narrow view in this respect: the Member State granting the unlawful aid cannot plead the legitimate expectations of the recipient, as that would enable the national authorities to rely on their own unlawful conduct to escape the recovery obligation.¹¹⁸ It is thus only for the aid recipient to invoke the existence of exceptional circumstances that gave rise to legitimate expectations warranting the refusal to repay the unlawful aid.¹¹⁹ Indeed, in *FIAT*, the Commission considered Luxembourg’s reliance on legitimate expectations “inadmissible”, because the recipient of the aid had not submitted any argument to that effect.¹²⁰

The ECJ has also clarified that the source of a recipient’s legitimate expectations cannot be the Member State granting the aid, as otherwise

¹¹⁴ See Article 1(b) of Regulation (EU) 2015/1589.

¹¹⁵ *Apple* closing decision, paragraph 436.

¹¹⁶ *Ibid.*, paragraph 437.

¹¹⁷ Article 16(1) of Regulation No. 2015/1589 provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of EU law.

¹¹⁸ See Judgment of 20 September 1990, *Commission v. Germany*, C-5/89, EU:C:1990:320, paragraph 17, and Judgment of 7 March 2002, *Italy v. Commission*, C-310/99, EU:C:2002:143, paragraph 104.

¹¹⁹ See Judgment of 27 January 1998, *Ladbroke Racing v. Commission*, T-67/94, EU:T:1998:7, paragraph 183; See also Judgment of 5 August 2003, *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v. Commission*, joined cases T-116/01 and T-118/01, EU:T:2003:217, paragraph 203.

¹²⁰ *FIAT* closing decision, paragraph 357.

Member States could make the enforcement of State aids rules nugatory.¹²¹ Instead, legitimate expectations are worthy of protection when they arise from precise assurances granted by the Commission itself.¹²² Indeed, the Commission and EU Courts have been receptive to claims based on an undue delay by the Commission to initiate State aids proceedings, giving rise to an implicit assurance that a given measure was lawful,¹²³ or on the Commission's past decisional practice, warranting the inference that measures different from the ones vetted by the Guardian of the Treaties may be in line with the rules on State aids.¹²⁴

The four closing decisions contain several references to the principle of legitimate expectations. In *Excess Profits*, for instance, Belgium claimed that it had drawn precise assurances as to the legality of its ATRs scheme from a Report of the Code of Conduct for business taxation, on which the ECOFIN Presidency had based its conclusions of 19 March 2003.¹²⁵ The ECJ, however, had already rejected that contention in *Belgium and Forum 187 ASBL v Commission*, where it averred that Council Presidency's conclusions are political in nature and are not binding on the Commission in the exercise of its State aids review powers.¹²⁶ In *FIAT*, the Luxembourg government also sought to rely on the precise assurances it had allegedly received at a meeting of the OECD Forum on Harmful Tax Practices. The Commission, however, claimed that it was not bound by OECD acts, as the OECD "is not a Union institution, nor is the Union a member of that organisation".¹²⁷

Turning to legitimate expectations claims based on the Commission's past decisional practice, in *Apple*, the Irish authorities and the recipient

¹²¹ Adrien Giraud, "A Study of the Notion of Legitimate Expectations in State Aid Recovery Proceedings: "Abandon All Hope, Ye Who Enter Here?", *Common Market Law Review* 45 (2008): 1418 (noting that no claims based on legitimate expectations arising from conduct of the Member State granting the aid were successful).

¹²² *Ibid.*, 1413 *et seq.*

¹²³ See Judgment of 24 November 1987, *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission*, 223/85, EU:C:1987:502.

¹²⁴ See Commission Decision 2006/621/EC on the State Aid implemented by France for France Télécom, O.J. 2006, L 257/11–67 (not ordering the recovery of the aid because the recipient could legitimately believe, on the basis of the Commission's pre-existing decision practice, that mere oral declarations of the State could not have constituted State aid).

¹²⁵ See ECOFIN Presidency's conclusions of 19 March 2003, referring to the Code of Conduct Group's report with reference 7018/1/03 FISC 31 REV 1, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/75013.pdf.

¹²⁶ See Judgment of 22 June 2006, *Belgium and Forum 187 ASBL v. Commission*, joined cases C-182/03 and C-217/03, EU:C:2006:416, paragraphs 150–152.

¹²⁷ *FIAT* closing decision, paragraph 359.

sought to rely on the Commission's alleged undue delay of 22 years to bring State aid proceedings against the contested ATRs.¹²⁸ The Commission, however, argued that, as those ATRs had not been notified and were not publicly available, it had only learnt of their existence during hearings of the US Senate in May 2013 and had promptly taken action by sending Ireland an information request less than a month later.¹²⁹ In *Apple*¹³⁰ and *Fiat*¹³¹, moreover, the Commission rejected the claims based on the alleged novelty of its approach to ATRs, noting that it had identified ATRs as fiscal measures capable of giving rise to State aid as early as in its 1998 Direct Business Taxation Notice¹³² and that it had consistently applied the State aid rules to fiscal measures enabling integrated companies to determine their taxable profit in a series of decisions since then.¹³³

It is not sure, however, that the General Court will uphold the Commission's contentions, as its ATRs decisional practice undeniably displays significant elements of novelty. In particular, in its appeal against the Commission's decision in *FIAT*, the recipient of the alleged aid argued that the Commission had "created a legitimate expectation that for State aid purposes it [would assess] transfer pricing arrangements on the basis of the OECD Guidelines", yet had fallen short of those expectations by departing from those guidelines in the impugned decision.¹³⁴ Likewise, the Irish government and Apple claimed, respectively, that the Commission's decision relied upon "alleged rules of EU law never previously identified" whose "scope and effect are wholly uncertain"¹³⁵ and that it ordered recovery "under an unforeseeable interpretation of State aid law".¹³⁶

¹²⁸ *Apple* closing decision, paragraph 439.

¹²⁹ *Ibid.*, paragraph 440.

¹³⁰ *Ibid.*, paragraph 443.

¹³¹ *FIAT* closing decision, paragraph 361.

¹³² OJ 2002 C 147, 2.

¹³³ See, e.g. Commission Decision of 22 August 2002 in Case C 48/2001 (ex NN 43/2000) on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, 6.2.2003, 26; Commission Decision of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, 16.7.2003, 17; Commission decision of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) – Coordination Centres – Implemented by Luxembourg, OJ L 170, 9.7.2003, 20, paragraph 53; and Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, 25.

¹³⁴ *FIAT* appeal.

¹³⁵ Ireland's appeal in *Apple*.

¹³⁶ *Apple* appeal.

Finally, since the recovery shall be effected “in accordance with the procedures under the national law of the Member State concerned”, if that Member State generally grants a tax credit to a resident company for taxes paid abroad on foreign activities or foreign sources of income, the amount of unpaid taxes to be recovered may be reduced if other EU or non-EU jurisdictions were to require the recipient of the aid to pay additional taxes.¹³⁷ For instance, in *Apple* the Commission took the view that other jurisdictions may lay claim to record Apple's commercial risks, sales and other activities, which would reduce Apple's taxable profits in Ireland and, accordingly, the amount of unpaid taxes owed to the Irish authorities.¹³⁸

A windfall benefit for the offending Member States?

Having regard to the “alternative use” of ATRs, the obligation to recovery the ensuing state aids may turn into a “windfall benefit” for the offending Member State, which would profit both from the investments and industrial spin-off generated by the ATR recipients and from the recovery of tax revenues from activities that, at least in part, would have not been located in that Member State without the incentives provided by the unlawful ATR.¹³⁹

It seems unlikely that the ATR recipients can avoid the recovery obligations by claiming that they would have structured their operations differently, at least in the Member State concerned, in the absence of the unlawful ATR. In *Unicredito* the ECJ squarely held that the offending Member State's obligation to “re-establish[] the status quo” only means eliminating the unlawful tax relief, not “reconstructing past events differently on the basis of hypothetical elements such as the choices [...] which could have been made by the operators concerned” in the absence of the unlawful aid measure.¹⁴⁰ The ECJ added that it would be inappropriate to determine the amounts to be recovered “in the light of various operations which could have been implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid”,¹⁴¹ because those undertakings acted “in the knowledge of the risk of recovery of aid” granted

¹³⁷ Luja, *op. cit.*, 20.

¹³⁸ See *Apple* closing decision, paragraphs 448-451.

¹³⁹ Luja, *op. cit.*, 20.

¹⁴⁰ Judgment of 15 December 2005, *Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio Genova 1*, C-148/04, EU:C:2005:774, paragraph 117.

¹⁴¹ *Ibid.*, paragraph 114.

contrary to the rules on State aids,¹⁴² a risk that could have been avoided “by opting immediately for operations structured in other ways”.¹⁴³

The recovery obligation may dissuade other undertakings from seeking illegal ATRs and may undermine the ability of the offending Member State to grant further tax deals.¹⁴⁴ Also, the ensuing loss of business activities or investments may be worth more than the recovered sums in the long run.¹⁴⁵ Nonetheless, as the EP TAXE Committee Report put it, the recovery obligation “constitutes *de facto* a reward for non-compliance, which is unlikely to discourage Member States [...] from [...] granting abusive tax benefits, but, instead, relieves them of their responsibility to comply with EU state aid rules and does not mitigate the financial loss to the budgets of the [other] Member States affected”.¹⁴⁶

For this reason, the EP TAXE Committee called for the introduction of that sanctions against the offending Member States,¹⁴⁷ whilst some authors suggested that part of the recovered amounts be transferred to the EU budget.¹⁴⁸ Both solutions, however, would require an amendment of the TFEU rules on State aids, a cumbersome process whose requisite political consensus seems to be lacking, at least at the moment.¹⁴⁹

6. Conclusions

The Commission’s investigations on national ATR practices have momentous systemic implications. The US Treasury claimed that DG Comp acted as “a supra-national tax authority that reviews Member State transfer price determinations”, using as standard of review “its view of the ALP”, regardless of whether Member States have incorporated that standard into their national legal system.¹⁵⁰ By the same token, Apple and the Irish government accused the Guardian of the Treaties of abusing its enforcement powers to

¹⁴² *Ibid.*, paragraph 115.

¹⁴³ *Ibid.*, paragraph 116.

¹⁴⁴ Lujá, *op. cit.*, 20-21, footnote 48 (referring to this consequence as the “reputational damage” of the recovery obligation for the offending Member State).

¹⁴⁵ *Ibid.*

¹⁴⁶ EP Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect, Report on tax rulings and other measures similar in nature or effect, A8-0317/2015, paragraph 71.

¹⁴⁷ *Ibid.*: “[the Committee] considers that state aid rules should provide for sanctions that constitute an effective deterrent against illegal state aid”.

¹⁴⁸ Lujá, *op. cit.*, 21.

¹⁴⁹ *Ibid.*

¹⁵⁰ US Treasury White Paper, 9.

pursue the harmonisation of national laws in the area of direct taxation,¹⁵¹ although pursuant to Article 115 TFEU that result can only be achieved by the Council acting unanimously, in accordance with a special legislative procedure involving the consultation of the European Parliament and the Economic and Social Committee.

However, at the present state of development of EU law, direct taxation can hardly be regarded as a national *domaine réservé*.¹⁵² This is because the functioning of the internal market, as an area without frontiers where competition is not distorted by either private or public intervention, is a far-reaching imperative, whose pursuit may limit the exercise even of the competences that Member States have refused to transfer to the EU, such as that in the area of direct taxation. The ECJ, indeed, has consistently held that “although direct taxation does not as such fall within the purview of the European Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law”.¹⁵³ It is likewise well-established in the ECJ case law that fiscal measures granting a selective advantage to certain undertakings fall foul of Article 107(1) TFEU.¹⁵⁴ Therefore, it does not seem too much of a stretch to maintain, as the Commission does, that also ATRs “must comply with State aid rules, which bind the Member States and enjoy primacy over their national legislation”¹⁵⁵ and that the ALP forms part of its assessment of ATRs “independently of whether a Member State has incorporated this principle into its national legal system and in what form.”¹⁵⁶

¹⁵¹ See Ireland's appeal in *Apple* (alleging that the Commission is attempting “to re-write the Irish corporation tax rules so that, in respect of Opinions, the Revenue Commissioners should have applied the Commission's version of the ALP”, which would be “inconsistent with Member State sovereignty in the area of direct taxation”); *Apple* appeal (claiming that the Commission has “exceeded its competence under Article 107 TFEU by attempting to redesign Ireland's corporate tax system”).

¹⁵² But see Ireland's appeal in *Apple* (arguing that the impugned decision undermines “Member State sovereignty in the area of direct taxation” as well as “the principle of fiscal autonomy of Member States”).

¹⁵³ See Judgment of 19 June 2014, *Strojírny Prostějov, a.s. and ACO Industries Tábor s.r.o. v. Odvolací finanční ředitelství*, joined cases C-53/13 and C-80/13, EU:C:2014:2011, paragraph 23; Judgment of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 30.

¹⁵⁴ See Judgment of 15 December 2005, *Italy v. Commission*, C-66/02, EU:C:2005:768, paragraph 78; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 132.

¹⁵⁵ *Apple* closing decision, paragraph 249.

¹⁵⁶ Notion of State Aids Notice, paragraph 172.

Whilst the *ultra vires* argument appears unfounded, it is nonetheless plausible that, if the Commission's ATR decisions survive the barrage of appeals brought before the EU Courts, they may bring about a voluntary approximation of Member States' laws in the area of corporate taxation. The Commission's investigations, indeed, form part of a broader framework of initiatives prompted by the OECD/G20 Project on Base Erosion and Profit Shifting (BEPS).¹⁵⁷ In particular, the EU legislature adopted Directive 2015/2376,¹⁵⁸ which requires, as from 1 January 2017, national tax authorities to communicate their recent ATRs involving cross-border transactions to the authorities of other Member States and to the Commission.¹⁵⁹ Thus, even though the ban on State aids may appear toothless when considered in isolation, the added transparency ensuing from the automatic information exchange mechanism set up by Directive 2015/2376 may play a pivotal role in the crackdown on ATRs as instruments of unfair tax competition, as peer-pressure and the prospect of retaliation by other Member States may reduce the incentives for the "alternative use" of ATRs. An even more ambitious harmonisation initiative, still currently underway, is the Commission's proposal on a Common Corporate Tax Base,¹⁶⁰ which seeks to lay down a single set of rules to calculate companies' taxable profits in the EU so as to apportion taxable profits between the Member States where value is created, thus substantially eliminating the regulatory mismatches allegedly exploited by Member States' authorities in the contested ATRs. The Commission's enforcement initiatives against national ATR practices, therefore, should be probably understood as a nudge towards the creation of a fiscal union – arguably, the missing keystone in the EU sixty-year-old internal market.

¹⁵⁷ See <http://www.oecd.org/ctp/beps-actions.htm>.

¹⁵⁸ Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332, 18.12.2015.

¹⁵⁹ *Ibid.*, Article 8a(2).

¹⁶⁰ Commission proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final.

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