

A CUTE COWBOY STOLE OUR MONEY: APPLE, IRELAND, AND WHY THE COURT OF JUSTICE OF THE EUROPEAN UNION SHOULD REVERSE THE EUROPEAN COMMISSION’S DECISION

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Abbreviations

AEHT: Amazon Europe Holding Technologies
 AJCA: America Jobs Creation Act
 AOE: Apple Operations Europe
 AOI: Apple Operations International
 APA: Advance Pricing Arrangement
 ASI: Apple Sales International
 BEPS: Base Erosion Profit Shifting
 CEO: Chief Executive Officer
 CJEU: Court of Justice of the European Union
 CUP: Comparable Uncontrolled Price Method
 EU: European Union
 IRS: Internal Revenue Service (US)
 MEO: Market Economy Operator
 OECD: Organisation for Economic Co-operation and Development
 ORC: Office of the Revenue Commissioners
 TFEU: Treaty on the Functioning of the European Union
 TNMM: Transactional Net Margin Method
 TRE: United States Department of the Treasury
 US: United States of America
 VAT: Value Added Tax

INTRODUCTION

As more countries participate in the global economy, multinational corporations look to countries with tax advantages to establish foreign offices. The Republic of Ireland's 12.5% corporate tax rate has drawn some of the largest multinational corporations in the world to its shores, including Apple.¹ While Ireland does not offer the lowest corporate tax rate in the European Union (EU), its resident-based tax system provides corporations like Apple with the "holy grail" of corporate tax loopholes.² Since Apple first entered Ireland in the 1990s, it has grown into one of the most valuable companies in the Fortune 500.³ While Apple's success has earned it a devoted following, it has also placed the company under scrutiny for its tax practices.

1. David Haugh, Ireland's Economy: Still Riding the Globalisation Wave 305 *OECD OBSERVER* 36, 36-37 (2016) see also Apple Tax Case: Why Is Ireland Refusing Billions? *BBC NEWS* (Sept. 7, 2016), <http://www.bbc.com/news/world-europe-37299430>; Cork as a Business Location *CORK CHAMBER*, http://www.corkchamber.ie/corks_economy.cfm (last visited Dec. 18, 2016).

2. Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.) Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Governmental Affairs U.S. Senate 113th CONG. 3 (2013) (statement of Sen. Carl Levin, Chairman, Permanent S. Comm. on Investigations) [hereinafter Permanent Subcommittee].

3. Stephen Gandel, These Are the 10 Most Valuable Companies in the Fortune 500 *FORTUNE* (Feb. 4, 2016) <http://fortune.com/2016/02/04/most-valuable-companies-fortune-500-apple/>;

Recently, the EU attacked Apple's tax structure in Ireland and found the company liable for more than €13 billion in back taxes, even though the company never violated Irish tax laws⁴. The European Commission (hereinafter the Commission) attacked Apple's tax structure in Ireland as violating state aid under the Treaty on the Functioning of the European Union (TFEU).⁵ Both Apple and Ireland appealed the decision to the Court of Justice of the European Union (CJEU).⁶ On appeal, the CJEU should reject the Commission's decision against Apple and Ireland since it violates EU member states' sovereign rights; Apple did not receive state aid within the meaning of TFEU, and the decision negatively impacts United States of America (US)-EU relations.

Part one of this comment provides background into EU laws, its implications for EU member states, Apple's structure in Ireland, and the European Commission's decision against Apple. Part two contends that Apple did not receive state aid since it did not receive an "advantage" which was "selective" within the meaning of the TFEU. Part three asserts that the CJEU should reject the Commission's decision since it jeopardizes US-EU relations because: 1) the Commission tends to target US-headquartered corporations; 2) the US will be unable to collect tax revenue when Apple repatriates its Irish earnings; and 3) the US has a financial interest in Apple's structure in Ireland. Part four consists of the conclusion and discusses the possible future of tax avoidance in the EU.

I. BACKGROUND

A. EU Law

The institutional framework of the EU consists of the European Parliament, the European Council, the Commission, the CJEU, the European Central Bank, and the Court of Auditors.⁷ The Commis-

see James Cook, A Deal Made in 1991 Paved The Way For Apple's Current Tax Issues, BUSINESS INSIDER (Aug. 30, 2016, 5:22 AM), <http://www.businessinsider.com/how-apple-managed-to-get-its-tax-deal-in-ireland-in-1991-2016-8?r=UK&IR=T>.

4. European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax

sion has the sole power to create proposals for new legislation, and the sole law-making power for competition law policy.⁸ The Commission was originally comprised of two commissioners from each member state, however, as the EU grew, it became unfeasible for each member state to have two commissioners; consequently, they currently only have one each.⁹ It is the duty of the commissioners to ensure that EU law is upheld.¹⁰ In order to uphold EU law, the Commission has the power to represent the EU externally and prosecute member states for breaches of EU law.¹¹

For the Commission to prosecute a member state, the EU must have competence to act. Competence can only be granted to the EU by the member states' transfer of sovereign power.¹² Any power not transferred remains with the member state.¹³ The EU does not have exclusive competence in controlling the internal market; rather, the member states and the EU share that competence.¹⁴ If the EU acts when there is shared competence, then it assumes exclusive power under pre-emption.¹⁵ However, the EU has not officially acted to set a uniform system for the internal market. Instead, member states must agree to establish national laws and policies that do not distort competition.¹⁶ Prior to the EU, many member states had multi-level taxes on goods and services resulting in tax being paid upon tax. The EU eventually agreed to adopt France's taxation system for goods and services, which is known as the Value Added Tax (VAT) system.¹⁷ VAT was the result of negotiations among member states since they retain the sole power to create tax legislation.¹⁸ This is an area where the US and the EU greatly differ.

8. Id. art. 17; Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 172 [hereinafter TFEU].

9. Fact Sheets on the European Union EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.8.html (last visited Sept. 9, 2017); see TFEU, supra note 8, art. 244.

10. Institutional Affairs, EUROPEAN UNION, https://europa.eu/european-union/topics/institutional-affairs_en (last visited Sept. 2, 2017).

11. See id.

12. TFEU, supra note 8, art. 1-4.

13. Treaty on European Union, supra note 7, art. 4-5.

14. TFEU, supra note 8, art. 4.

15. NIGEL FOSTER, FOSTER ON EU LAW 80-81 (5th ed. 2015).

16. DAVID W. WILLIAMS, EC TAX LAW 82-84 (1998).

17. Id. at 80-81.

18. Id.; see TFEU, supra note 8, art. 121.

19. See Cecille Remeur, Tax Policy in the EU, EUROPEAN PARLIAMENT, PE 549.001, 6 (Feb. 2015).

zens:²⁹ Unfortunately, many EU citizens viewed European federalism as infringing upon member states' sovereignty.³⁰ The failure of the Constitutional Treaty to provide concrete reasoning for its need led to the EU's ultimate failure to pass such a constitution.

ing no effect on other EU member states.⁴⁰ Ireland was provided several guarantees including competence over its tax law.⁴¹ After receiving the protocol, two-thirds voted “yes” to ratify the Treaty of Lisbon.⁴² Although the EU still lacks competence over its member states’ tax codes, it participates on behalf of the EU in the Organisation for Economic Co-operation and Development (OECD).⁴³

B. Organisation for Economic Co-operation and Development (OECD)

The OECD provides influential tax policies and guidelines that have facilitated the elimination of harmful tax laws.⁴⁴ Over thirty nations, including several EU member states, participate in the OECD and assist in the development of policies and practices for greater economic cooperation.⁴⁵ The OECD’s Model Convention with Respect to Taxes on Income and on Capital (hereinafter the Model Convention) facilitated international tax cooperation.⁴⁶ Following its release, the Model Convention facilitated the growth of bilateral tax agreements—from less than one-hundred, prior to its publication, to over three-thousand since many nations relied on it as a model for treaty

40. *Id.*

41. *Id.*; see FOSTER, *supra* note 15, at 38; see also Ece Özlem Atikcan, Asking the Public Twice: Why do Voters Change Their Minds in Second Referendums on EU Treaties? EUROPP (Oct. 19, 2015), <http://blogs.lse.ac.uk/euoppblog/2015/10/19/asking-the-public-twice-why-do-voters-change-their-minds-in-second-referendums-on-eu-treaties/> (“Ireland, on the other hand, gained guarantees concerning . . . competency over tax rates . . . and workers’ rights after the Lisbon referendum.”); Ian Traynor, Promises Made to Irish on Lisbon Treaty to Become EU Law, THE GUARDIAN (June 19, 2009, 1:32 PM), <https://www.theguardian.com/world/2009/jun/19/lisbon-treaty-ireland-eu-law>.

42. Ireland Backs EU’s Lisbon Treaty, BBC NEWS, <http://news.bbc.co.uk/2/hi/8288181.stm> (last updated Oct. 3, 2009, 10:45 PM).

43. ELI HADZHEVA, POLICY DEP’T ECON. & SCI. POLICY, EU PARLIAMENT, THE EUROPEAN UNION’S ROLE IN 72/3

tions take advantage of differences between nations' tax systems, including Apple, which utilized the difference between the US and the Irish tax systems.⁶⁸

C. Ireland vs. US Tax Law

The difference between US corporate law and Irish corporate tax law creates an ideal tax haven for corporations. The US has an incorporation-based tax code, while Ireland has a residency-based tax code. Under the US incorporation system, a corporation is only subject to US tax when it is incorporated in the US.⁶⁹ Under the Irish tax system, a corporation is only subject to Irish tax when it resides in Ireland.⁷⁰ To further illustrate, ABC Corp. is incorporated in New York which subjects it to the US 35% corporate tax rate (since it is incorporated in the US). Now, let's say ABC Corp. is also incorporated in Ireland. The fact that ABC Corp. is incorporated in Ireland does not automatically subject it to the 12.5% Irish corporate tax; for ABC Corp. to be subject to Irish tax, it would need to meet the requirements for Irish residency.

Ireland differs from the international tax residence definition. Under international tax law, residence is decided by the taxpayer's physical and economic presence in a state.⁷¹ Ireland's tax code did not define residence and instead adopted the United Kingdom's judicially-created residency test.⁷² In *De Beers Consolidated Mines Ltd. v. Howe*, De Beers was incorporated in South Africa where it operated several diamond mines, and also had an office in London, where nine of the company's sixteen board members were located.⁷³ The court found that a corporation is a resident where its central management and control were located; therefore, De Beers was a resident of the United Kingdom.⁷⁴

created_to_82_countries/\$FILE/2016G_01859-161Gbl_BEPS%20associates%20increased%20to%2082%20countries.pdf.

68. Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 N.Y.U. TAX L. REV. 207, 207-09 (2015) (citing Permanent Subcommittee supra note 2, at 284-89).

69. 26 U.S.C.A. § 7701(a)(4) (West 2014) see Classification of Taxpayers for U.S. Tax Purposes, IRS, <https://www.irs.gov/individuals/international-taxpayers/classification-of-taxpayers-for-us-tax-purposes> (last visited Sept. 2, 2017).

70. Taxes Consolidation Act 1997 (Act No. 39/1997) (Ir.), <http://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/pdf>.

71. W

The court later clarified what constituted central management and control of a corporation. *Bullock v. Unit Construction Co. Ltd.* involved an English company operating three subsidiaries which were incorporated and operated in Kenya.⁷⁵ The subsidiaries were eventually managed and controlled by the English parent company.⁷⁶ The court found that the determination of where a corporation's central management and control reside is a question of fact.⁷⁷ The court then examined several factors including where major contracts are negotiated, where board meetings are held, and where the important questions of policy are addressed in determining that Unit Construction Co. was a resident of the United Kingdom.⁷⁸ Ireland officially adopted the UK central management and control test for its own tax code in the case *WJ Tipping v. Louis Jeancard*.⁷⁹

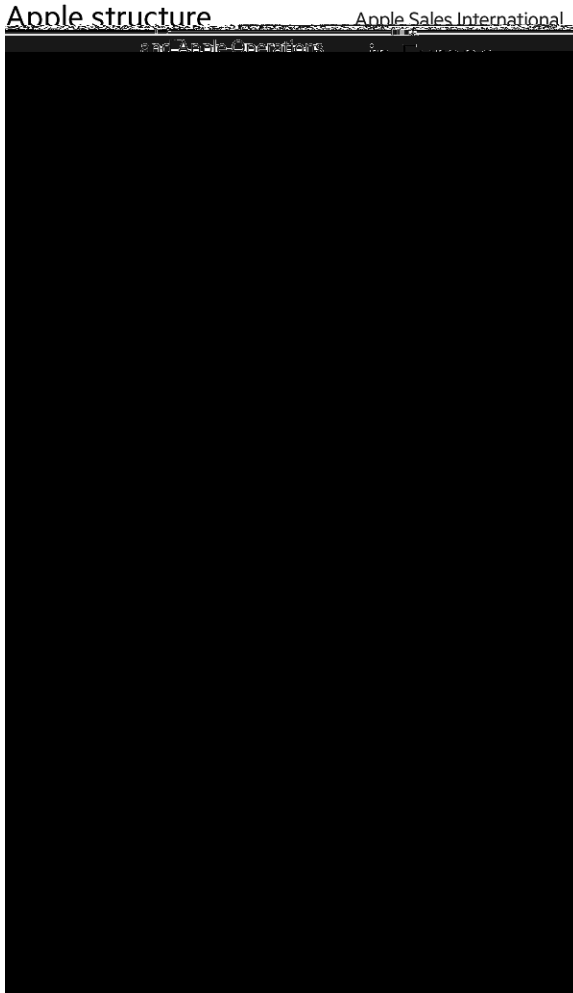
Now, let's say that ABC Corp. is incorporated in Ireland with its central control and management based out of its New York office. Under Irish tax law, the fact that ABC Corp. is incorporated in Ireland does not automatically subject it to the 12.5% Irish corporate tax. Instead, ABC Corp.'s central control and management are determinative for Irish tax purposes. As a result, ABC Corp. could effectively avoid being liable to any sovereign state for corporate taxes. The difference between the nations' tax systems helped Ireland attract some of the largest multinational corporation in the world, including Apple.

D. Apple in Ireland

In 1980, Apple went public on the NASDAQ and then CEO Steve Jobs announced the company's first manufacturing plant outside of the US, located in Hollyhill, Ireland.⁸⁰ ~~Apple~~ incorporated Apple

three corporations were out of Apple’s Cupertino, California headquarters.⁸³

Since AOI, AOE, and ASI were all incorporated in Ireland, none of the subsidiaries were subject to US corporate tax. Under Irish residency requirements, AOI, AOE, and ASI were not subject to Irish tax since their central management and control were located in Apple’s headquarters in the US. Apple’s structure in Ireland allowed it to create and operate three subsidiaries without a single tax residency; further legitimizing Apple’s structure as a bilateral tax treaty between the US and Ireland.



83. See id.at 26; Apple Corporate Info, INVESTOR APPLE, investor.apple.com/faq.cfm (last visited Sept. 3, 2017).

Utilizing the Model Convention, the 1997 US Tax Convention with Ireland (Tax Convention) codified Apple's tax loophole.⁸⁴ Article 4 provides that a corporation will be a resident based on the laws of the state in which it has residence, for Ireland, or place of incorporation, for the US.⁸⁵ Article 4 clarifies that a corporation will not be deemed a resident simply because it earns income in either state due to a permanent establishment.⁸⁶ That article left the loophole open for Apple to incorporate in Ireland while failing the Irish residency test, thus allowing its subsidiaries to have no tax residency.

While Apple was one of the top computer companies during the 1980s, Microsoft and Windows dominated the 1990s, causing Apple to restructure pricing allocation among its Irish subsidiaries.⁸⁷ In 1990, Apple met with the Irish Government to receive a tax ruling⁸⁸ regarding its proposed cost and revenue allocations for AOE and ASI.⁸⁹ In the 1991 ruling, Ireland agreed to Apple allocating 65% of operating expenses to AOE for revenue, up to \$60-70 million and 20% of operating expenses for any excess revenue.⁹⁰ In 2007, Ireland approved Apple's reduced operating expenses allocation of 10-20% and its inclusion of a 1-9% Intellectual Property (IP) return to its AOE branch.⁹¹ The 1991 ruling stated that all revenue attributed to ASI would be taxed at the 12.5% Irish tax and the 2007 ruling allocated 8-18% of operating costs to ASI.⁹² It is those allocations that first caught the attention of the US government.

In 2013, the Permanent Subcommittee on Investigations of the United States Senate Committee on Homeland Security and Governmental Affairs (hereinafter the Subcommittee) opened an investigation looking into the off-shore profit sharing schemes of Apple.⁹³ Current Apple Chief Executive Officer (CEO) Tim Cook testified in

84. Tax Convention with Ireland, Ir.-U.S., art. IV, July 28, 1997, S. TREATY DOC. No. 105-31 (entered into force Jan. 1, 1998).

85. See id. § 1.

86. See id. § 2.

87. See Permanent Subcommittee^{supra} note 2, at 11, 39; Cook,^{supra} note 80.

88. Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 36 [hereinafter Notion of Aid Notice] ("The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances.").

89. Ireland Alleged aid to Apple, ^{supra} note 5, at 22, 24, 29. Advance Pricing Arrangements (APAs) allow for a corporation to get advance approval for intra-group transactions. *Id.* APAs set out the criteria for determining the transfer pricing over a specified period. *Id.*

90. *Id.* at 29.

91. *Id.*

92. *Id.*

93. Permanent Subcommittee^{supra} note 2, at 2.

front of the Subcommittee that offshore operations, such as AOI, provide cash management for Apple's international operations and are currently financing an expansion plant in Cork, Ireland.⁹⁴ Cook denied Apple's use of illegal tax schemes and suggested that US corporate tax law should be reformed to keep up with the new digital age.⁹⁵ Ultimately the Subcommittee found that current laws did not prohibit Apple's tax structure in Ireland.⁹⁶ However, the Subcommittee investigation led to further international scrutiny and eventually caught the attention of the Commission.

E. The Commission vs. Apple

In 2014 the Commission opened an investigation to determine if the 1991 and 1997 Irish tax rulings provided to Apple constituted state aid in violation of the TFEU.⁹⁷ A violation of EU state aid exists when there is a selective advantage granted by a member state which distorts or attempts to distort competition.⁹⁸ The Commission distinguishes between tax rules that impede the functioning of the internal market and those that distort competition;⁹⁹ the latter are considered a violation of state aid. All member states are required to receive the Commission's approval prior to granting state aid.¹⁰⁰ If a member state grants state aid in violation of the TFEU, it must recover the illegal state aid from the recipient.¹⁰¹

There is no equivalent for EU state aid in the US; as a matter of fact, the US takes a different approach to corporate subsidies. Corporations in the US enjoy a unique position because they can often receive subsidies in the form of grants, loans, and/or tax breaks from both the Federal and state governments.¹⁰² Federal government

94. See *id.* at 37.

95. *Id.*

96. *Id.* ("The facts are mighty clear to me that loopholes in our tax laws and regulations allow many companies, including Apple, to shift enormous amounts of income from this country to other countries where they pay little or no tax.")

97. See EU Panel Says Apple Gets Illegal Tax Benefits in Ireland, NBC NEWS (Sept. 30, 2014, 5:43 PM) <http://www.nbcnews.com/business/taxes/eu-panel-says-apple-gets-illegal-tax-benefits-ireland-n215281>.

98. TFEU, *supra* note 8, art. 107.

99. Commission Notice on the Application of the State Aid Rules to Measures Relating to

grants and tax credits to corporations often total billions of dollars, while Federal loans and bailouts exceed trillions.¹⁰³ It should be noted that the US Federal Government provides grants, credits, and loans to foreign corporations operating in the US, as well.¹⁰⁴ This is unlike the EU, which adopted strict guidelines on the use of government subsidies to corporations.¹⁰⁵

Subsidies to corporations in the EU are subject to heavy scrutiny from the Commission which even scrutinizes areas where the U.S. often provides subsidies, such as transportation, energy, and agriculture.¹⁰⁶ For US multinationals operating in the EU, state aid rules are difficult to navigate, especially when they come from a country that provides corporations with a tax credit for burning livestock feces.¹⁰⁷ Thus, the Commission's decision in Apple was uncharted territory for the US corporation.

In examining the Irish tax rulings, the Commission found that

period; the allowable duration for tax rulings in other member states does not exceed five years.¹²¹

The Commission then turned to whether the aforementioned facts constituted state aid.¹²² Under the rules for state aid, it was apparent to the Commission that Apple received state aid from Ireland.¹²³ The Irish tax rulings were found to be selective since they were solely directed toward Apple.¹²⁴ Furthermore, the rulings provided Apple with an advantage in the EU since it was able to pay significantly lower taxes, allowing it to allocate more money to furthering its global operations.¹²⁵ The ability to avoid taxes allowed Apple to receive a significant benefit compared to other businesses, which in itself distorted competition in the internal market.¹²⁶ Apple was ordered to pay back €13 billion plus interest in back taxes to Ireland.¹²⁷ Both Ireland and Apple appealed the decision to the CJEU.¹²⁸

II. A PPLE DID NOT RECEIVE STATE AID

Apple's tax structure in Ireland did not constitute state aid within the meaning of the TFEU since it fails to meet the "selective" requirement. Alternatively, even if the Irish tax rulings meet the "selective advantage" requirement, they cannot be deemed to distort or attempt to distort competition without a unified EU tax system. Articles 107 through 109 of the TFEU outline the rules governing state aid.¹²⁹ To determine if state granted aid violates the TFEU, the Commission must find that undertakings received constitute an advantage from the state or through state resources and that the measure was selective

121. *Id.* at 31-32 (indicating that France, Germany, and Hungary permit an APA validity duration of 3-5 years while Portugal does not allow the duration to exceed 480 days).

122. *Id.* at 35.

123. *Id.*

124. *Id.*

125. Commissioner Vestager Press Release, *supra* note 108.

126. *Id.*

127. *Id.* It should be noted that under EU procedure, the ruling is against the member state, although the recipient of the illegal state aid may challenge the Commission's decision as well; however, failure to comply with the decision will fall solely on the member state. DeNovio, *supra* note 105, at 18.

128. Tom Bergin, Apple Appeal Against EU Tax Demand Would Break New Ground, *REUTERS* (Sept. 2, 2016, 3:04 AM), <http://www.reuters.com/article/us-eu-apple-tax-avoidance-court-idUSKCN118155>; Mark Scott, Dublin Appeals \$14.3 Billion Tax Charge Against Apple, *N.Y. TIMES*, Nov. 10, 2016, at B6.

129. TFEU, *supra* note 8, art. 107-09.

and distorted or attempted to distort competition.¹³⁰ The Commission found that Apple's tax treatment in Ireland met the requirements for state aid and thus violated the TFEU.¹³¹ However, under review, the European Court of Justice should find that Apple did not receive state aid because the Irish tax rulings were not an "advantage" and did not meet the "selective" requirement of the TFEU.

A. Undertaking

AOI, AOE, and ASI all constitute a single undertaking under the TFEU. Undertakings are entities engaged in an economic activity regardless of their legal status and the way in which they are financed.¹³² The Commission must look at the nature of the entity's activities regardless of whether the entity was designed to generate profits or not.¹³³ Undertakings may be comprised of several separate entities, which will then be deemed to constitute a single economic unit in applying state aid principles.¹³⁴

It is clear that AOI, AOE, and ASI were engaged in economic activity. Although AOE and ASI have no head office employees, their Irish branch has several employees. AOE's employees handle manufacturing of Apple products in Europe.¹³⁵ AOE's manufacturing operations have contributed significantly to the economic growth of Cork, Ireland.¹³⁶ AOE's and ASI's employees manage the distribution of Apple products outside of North and South America.¹³⁷ Furthermore, an examination of AceaElectrabel Produxine SpA (ACEA SpA)¹³⁸ makes it clear that AOI, AOE, and ASI constitute a single undertaking.

In *AceaElectrabel Produxine SpA v. Commision, Belgium electricity company Electrabel SA* was the parent corporation of Elec-

130. Case C-393/04 & C-41/05, *Air Liquide Indus. Belgium SA v. Ville de Seraing & Province de Liege*, 2006 E.C.R. I-5293, para. 38.

131. *Ireland Alleged Aid to Apple*, supra note 5, at 35.

132. *Notion of Aid Notice*, supra note 88, at 3.

133. *Id.*

134. Case C-480/09, *AceaElectrabel Produzione SpA v. European Comm'n*, 2010, E.C.R. I-13358, para. 47-50; Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA and Others*, 2006 E.C.R. I-325, para. 112-14.

135. *Ireland Alleged Aid to Apple*, supra note 5, at 28.

136. *Id.* at 29.

137. *European Commission Bouchtaou, Apple to Repay €13 Billion in Tax*, Commissioner Rules, KNECT365 (Aug. 30, 2016), <https://knect365.com/tp-minds-hub/article/3d76403f-1aae-45db-a83f-0e63784191c7/apple-to-repay-e13-billion-in-tax-commissioner-rules>.

138. *AceaElectrabel Produzione SpA*, 2010, E.C.R. at I-13358, para. 3 (defining AceaElectrabel Produxine SpA as an electricity generating company controlled equally by two other companies Electrabel Italia and AceaElectrabel).

trabel Italia.¹³⁹ AceaElectrabel was a joint venture between ACEA SpA, an independent Italian energy corporation, and Electrabel Italia.¹⁴⁰ The parties agreed to form two tiers of subsidiaries and transfer specific electricity generating assets through the subsidiaries.¹⁴¹ ACEA SpA was the majority owner (59.41%) of the joint venture.¹⁴² AceaElectrabel was sole owner of AE Energia and AE Elettricit a. AceaElectrabel also owned an interest in two additional companies, AceaElectrabel Produzione SpA and AceaElectrabel Trading.¹⁴³

In court, ACEA SpA argued that AceaElectrabel Produzione SpA and ACEA SpA could not constitute an undertaking as part of the joint venture because AceaElectrabel only owned 70% of AceaElectrabel Produzione SpA, which caused ACEA to only own 30% of AceaElectrabel Produzione SpA.¹⁴⁴ Since the Court of Justice determined that ACEA SpA and AceaElectrabel Produzione SpA constituted a single undertaking under the TFEU, then, it is clear that AOI, AOE, and ASI constitute a single undertaking.

B. Advantage

Apple did not receive an advantage within the meaning of the TFEU. An advantage is defined as “any economic benefit which an undertaking could not have obtained under normal market conditions.”¹⁴⁵ To determine if the same benefit could be obtained under normal market conditions, the court uses the market economy operator (MEO) test.¹⁴⁶ When the economic position of an undertaking improves as a result of the state, an advantage is deemed to be present.¹⁴⁷ The Commission must only look at the effect on the undertaking in question, regardless of whether the undertaking could refuse

139. *Id.* para. 5-7.

140. *Id.* para. 5.

141. *Id.*

142. *Id.*

143. *Id.* para. 6.

144. *Id.* para. 32-35 (“On the other hand, in a case where, as here, an undertaking is controlled by a joint venture, which itself is controlled by two separate groups, it cannot be inferred from that case-law that the Commission is entitled to conclude that there is an economic unit between the controlled undertaking and one of the two companies which control the joint venture.”).

145. Notion of Aid Notice, *supra* note 88, at 15.

146. *Id.* (“The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favorable position compared to that of its competitors.”).

147. See Case C-480/98, *Spain v. Commission*, 2000 E.C.R. I-8733, para. 19.

or avoid the advantage.¹⁴⁸ Since Apple could obtain the same tax benefits under normal market conditions, it did not receive an advantage within the meaning of the TFEU. To avoid paying taxes in both the US and Ireland, Apple simply needed to take advantage of the difference between the US and Irish tax systems.

Apple incorporated AOI, AOE, and ASI in Ireland. In doing so, all three subsidiaries were not subject to US corporate tax. To avoid subjecting AOI, AOE, and ASI to Irish tax, Apple did not utilize head offices at the three subsidiaries. Instead, Apple's headquarters in Cupertino, California were deemed to be the head office for all three subsidiaries.¹⁴⁹ This allowed the subsidiaries to be classified as managed and controlled outside of Ireland. As a result, none of the subsidiaries were subject to Irish tax on that basis alone. Therefore, Apple could receive the same economic benefit, tax avoidance, in normal market conditions without receipt of the two Irish tax rulings.

On the other hand, there is the contention that Apple did receive an advantage since the structure was not available to Irish corporations; that argument is simply unfounded. Irish corporations could incorporate in Ireland and establish management and control outside of Ireland. In doing so, they would escape Irish corporate tax. The fact that Irish corporations or any other corporation did not take advantage of the Irish residency tax system should not automatically create an advantage within the meaning of the TFEU for corporations utilizing the system.

If we applied to the weather the same logic used in the aforementioned argument, proponents of the argument would allege that any person that utilized the weather report to know when it was going to rain received an advantage of knowing when to use an umbrella. As a result, people who did not check the weather were unfairly unable to compete for taxi cabs since they could not stand out in the rain to hail a cab. Should we punish the people for checking the weather report and bringing an umbrella? Of course not! Similarly, the Court of Justice should not punish a corporation for doing its due diligence and utilizing a bona fide tax loophole.

148. See Case 173/73, *Italy v. Commission*, 1974 E.C.R. 710, 716. See also Case C-251/97, *France v. Commission*, 1998 E.C.R. I-6641, I-6651.

149. Commission Decision on State Aid (EU) No. 2017/1283 of 30 Aug. 2016, 2017 O.J. (L 187) 1, 7.

C. From the State or Through State Resources

If the Irish tax rulings were an advantage, it would be deemed to be granted by Ireland. A member state may provide aid through the direct or indirect use of its resources.¹⁵⁰ State resources include central bank credits and public sector resources.¹⁵¹ When a public authority grants an advantage to an undertaking, the act is imputable to the state.¹⁵²

The ORC granted the two Irish tax rulings to Apple.¹⁵³ The Irish Government established the ORC in 1923 “to serve the community by fairly and efficiently collecting taxes and duties and implementing Customs controls.”¹⁵⁴ Since the ORC is a public authority, if the Irish rulings were to constitute an advantage to Apple, then the act would be imputable to Ireland.

D. Selective

Even if the Irish tax rulings constituted an advantage to Apple, they would fail to meet the selective requirement. For an advantage to be selective, it must be granted “in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.”¹⁵⁵ There are two types of selectivity: material and regional. Material selectivity applies to a particular undertaking or specific sectors of the economy within the member state.¹⁵⁶

onomic and financial autonomy, then the measure will not be deemed to constitute state aid.¹⁵⁹ In the case of Apple, we are concerned with material selectivity since Apple is a particular undertaking.

Tax rulings generally are not considered state aid. Tax rulings are provided when a taxpayer wishes to establish in advance how specific tax rules or transfer pricing principles will apply.

mentation guidelines required in granting APAs.¹⁶⁹ The issue is that, at the time Apple first negotiated with the ORC, the OECD only had two published reports. The first was the 1979 Report which established the arm's length principle as the appropriate test for transfer pricing.¹⁷⁰ The 1979 Report was not designed to provide detailed guidance on transfer pricing, but rather, addressed several emerging issues in the multinational corporations.¹⁷¹ The second OECD report was published in 1984 and, once again, did not provide detailed guidance on transfer pricing.¹⁷² The 1984 Report focused on transfer pricing within the banking sector.¹⁷³ Apple entered negotiations with the ORC in 1990 with the Irish tax ruling being granted in 1991.¹⁷⁴ At the time of negotiations there were no guidelines regarding the documentation required to determine if cost allocation provided in an APA to a non-bank intra-group transaction would be available in the free market; the same applies to the 1997 Irish tax ruling.

In 2006 when Apple and the ORC entered negotiations, the 1984 Report was still in effect. The OECD did not publish an additional transfer pricing report until 2010, after Apple and the ORC came to an agreement.¹⁷⁵ The OECD Reports and Guidelines were not designed to act as law, let alone to be applied retroactively to transactions.¹⁷⁶ In doing so, the Commission is attempting to retroactively harmonize sovereign nations' tax codes to benefit the EU.¹⁷⁷ This is

169. See OECD Report 2010, *supra* note 45, at 168; see also Ireland Alleged Aid to Apple, *supra* note 5, at 24.

170. MARLIES DE RUITER, OVERVIEW OF THE OECD WORK ON TRANSFER PRICING, WRITTEN CONTRIBUTION TO THE CONFERENCE "ALTERNATIVE METHODS OF TAXATION OF MULTATIONALS" 1 (2012), https://www.taxjustice.net/cms/upload/pdf/Marlies_de_Ruiter_1206_Helsinki_text.pdf.

171. U.N. Secretariat, Ad Hoc Group of Experts on International Cooperation in Tax Matters Tenth meeting, Transfer Pricing: History C State of the Art C Perspectives, 7, U.N. Doc. ST/SG/AC.8/2001/CRP.6 (Sep. 10-14, 2001).

172. See *id.* at 8.

173. *Id.*

174. See Commission Decision on State Aid (EU) No. 2017/1283 of 30 Aug. 2016, 2017 O.J. (L 187) 1, 10; Press Release on Ireland, *supra* note 4.

175. See OECD Report 2010, *supra* note 45.

176. See OECD, THE OECD REPORT ON REGULATORY REFORM SYNTHESIS 2 (1997); OECD, OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (2004); OECD Report 2010, *supra* note 45, at 3; see also Dominic Rushe, European commission unfairly targeting US companies over taxes, official says THE GUARDIAN (Jan. 29, 2016, 4:52 PM), <https://www.theguardian.com/world/2016/jan/29/european-commission-unfairly-targeting-us-companies-starbucks-mcdonalds-amazon-apple-taxes-treasury>.

177. Rushe, *supra* note 176.

in violation of not only the aforementioned Irish sovereignty, but also of international tax principles.¹⁷⁸

The Commission determined that Irish tax rulings did not comply with modern OECD Guidelines because they were selective; this was an error.¹⁷⁹ Ireland expressed that APAs were available to any corporate taxpayer.¹⁸⁰ It was the sole burden of the corporate taxpayer to initiate APA negotiations. Apple utilized the APA system to ensure its proposed cost allocation was in accordance with Irish tax law. After several months of negotiations, the ORC reached an agreement with Apple and issued the 1991 tax ruling, and later the 2007 tax ruling. Therefore, the Commission could not reasonably find that the allocation methods assigned in the 1991 and 2007 tax rulings were not available on the free market since there were no detailed transfer pricing guidelines available prior to 2010.

A further indication of the Commission's failure to determine if the cost allocation was available on the free market was its focus on the lack of a fixed period in the rulings. The 2010 Guidelines provided the definition for APAs, which included the requirement of a "fixed period of time."¹⁸¹ Thus, the definition set out in the 2010 Guidelines should not apply to the Apple Irish tax rulings for the aforementioned reasons that the guidelines should not apply to the cost allocation. Furthermore, the Commission acknowledges that Ireland does not have a statutory requirement for APAs.¹⁸² Therefore, if Apple wanted to keep the 1991 tax ruling indefinitely, it could do so without violating Irish tax law.

E. Distorts or Attempts to Distort Competition

If the tax rulings were an advantage that was selective, then competition was distorted. Competition is distorted "when the State grants a financial advantage to an undertaking in a liberalised sector

178. Tim Worstall, Ireland And Apple Ready Their Appeals Against The EU Commission's \$14 Billion Tax Decision, *FORBES* (Dec. 19, 2016, 3:57 AM), <https://www.forbes.com/sites/tim-worstall/2016/12/19/ireland-and-apple-ready-their-appeals-against-the-eu-commissions-14-billion-tax-decision/#3515d8b7498d>.

179. See *id.*

180. See *id.*

181. OECD Report 2010, *supra* note 45, at 168.

182. Ireland Alleged Aid to Apple, *supra* note 5, at 31 n.19 ("International Transfer Pricing 2013/2014, PwC and Information on bi- or multilateral mutual agreement procedures under double taxation agreements for reaching Advance Price Agreements ('APA') aimed at granting binding advance approval of transfer prices agreed between international associated enterprises, 5 October 2006, German Federal Ministry of Finance.").

where there is, or could be, competition.”¹⁸³ The distortion can occur even when an undertaking does not gain a substantial portion of the market share.¹⁸⁴ The avoidance of tax liability may be considered a distortion of competition since it provides an undertaking with “an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.”¹⁸⁵

If Apple were to owe back taxes to Ireland, then it would have avoided an expense that naturally arises from day-to-day operations. As a result, Apple’s competitors, assuming none have similar APAs, were at a disadvantage since Apple could spend larger amounts on research and development. Of course, that argument is true from a purely economic view, but consumer behavior does not fall in line with the purely economic view.

For example, when Google released its Nexus 7 tablet to compete with Apple’s iPad, the Google tablet was priced at \$199, well below Apple’s iPad.¹⁸⁶ Despite the price difference, Apple’s iPad was more successful than the Nexus 7 without Apple ever altering the iPad’s price.¹⁸⁷ Then there is the Apple iPhone. One of Apple’s largest competitors, Samsung, was expected to cut into Apple’s iPhone market share with its Samsung Galaxy. Apple still consistently outsells Samsung in the mobile phone market.¹⁸⁸ In 2016, Samsung became the creator of the only mobile phone that Homeland Security banned from airplanes.¹⁸⁹ So the question remains, did Apple outsell its competitors because it avoided taxes or did Apple outsell its competitors because consumers prefer Apple products?

and France.¹⁹⁶ The Commission is concerned with a tax settlement agreement between the United Kingdom and Google requiring the latter to pay £130 million in back taxes, an effective tax rate of approximately 2.77%, which is well below the United Kingdom's 28% corporate tax rate; the Commission considers this to be state aid.⁹⁷ Google is also under investigation in Spain and France for alleged tax evasion on the basis of its corporate structure in those countries.⁹⁸ Google's offices in Madrid, Spain and Paris, France were raided in 2016 as part of the investigation.⁹⁹

Although Amazon has yet to have its offices raided, it too is

America Jobs Creation Act (AJCA), corporations were able to repatriate offshore profits while incurring only 5.25% tax liability instead of 35%.²¹⁰ The US Senate hoped that the lower repatriation tax rate would encourage US corporations to repatriate foreign money and re-invest in the US economy.²¹¹

Ultimately, the AJCA led to the repatriation of \$312 billion generating tax revenues of approximately \$ 16.38 billion.²¹² However, the long-term effect of the AJCA tax holiday was not known until 2011. The Joint Tax Committee estimated that the AJCA resulted in the loss of an estimated \$3.3 billion in tax revenue.²¹³ Additionally, the limited number of corporations that participated in the AJCA reduced their US workforce.²¹⁴ Although the Permanent Subcommittee on Investigations recommended against enacting additional repatriation tax holidays, repatriation itself is still feasible for the US.²¹⁵

Corporate tax reform is essential to successful future repatriations. Instead of the US granting short-term tax holidays, it needs to move toward comprehensive corporate tax reform. In doing so, proponents of such tax reform, including former President Barack Obama, hope Congress will close tax loopholes allowing US corporations to store profits in offshore tax havens.²¹⁶ This will cause US corporations to repatriate offshore profits and increase tax revenue. However, in doing so, proponents also argue for a reduction in the corporate tax rate to encourage further economic growth.²¹⁷

Whether the US solves its corporate tax repatriation problem will not matter if Apple is required to pay back taxes to Ireland. If Apple

tax-plan-could-impact-2016-year-end-planning/#1facb2fb530d (proposing an additional tax repatriation holiday under his administration).

210. CARL LEVIN, S. REP, PERM. SUBCOMM. ON INVESTIGATIONS, REPATRIATING OFFSHORE FUNDS: 2004 TAX WINDFALL FOR SELECT MULTATIONALS 10 (Comm. Print 2011).

211. CONFERENCE COMMITTEE, "A AMERICAN JOBS CREATION ACT OF 2004," CONFERENCE REP. accompanying H.R. 4520, H.R. REP. No. 108-755, at 314-15 (2004).

212. LEVIN, supra note 210, at 1.

213. Id.; J C-4D 0614.051.6(FOR)JTJ 8.0000 0 59: 2004 TREATION O O

and governments. At a time when economic uncertainty lingers over both the US and the EU, it is imperative that countries work together to solve revenue and debt issues instead of embracing unilateral solutions.