

## **Advance Pricing Agreements and the Selectivity Criterion in EU State Aid Rules**

University of Helsinki

Faculty of Law

Master's Thesis in EU Law

April 2017

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<b>The Faculty of Law</b>			
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Työn nimi / Arbetets titel – Title			
<b>Advance Pricing Agreements and the Selectivity Criterion in EU State Aid Rules</b>			
Oppiaine /Läroämne – Subject			
<b>EU Law</b>			
Työn laji/Arbetets art – Level	Aika/Datum – Month and year	Sivumäärä/ Sidoantal – Number of pages	
<b>Master´s Thesis</b>	<b>April 2017</b>	<b>82 + XIX</b>	
Tiivistelmä/Referat – Abstract			
<p>The Commission of the EU has recently decided that Advance Pricing Agreement rulings (the APA rulings) that Ireland, Luxembourg and the Netherlands have granted for Apple, Fiat and Starbucks (respectively) constitute illegal State aid according to Article 107 of the Treaty on the Functioning of the European Union (TFEU). The Commission claims that the APA rulings deviate from the arm´s length principle and that they grant economic benefit for the beneficiary undertakings in a selective manner. Major part of the criticism towards the decisions concerns the selectivity criteria. According to this criticism, the APA rulings do not favour exclusively certain undertakings and therefore they are not selective. Since selectivity is one of the cumulative criteria concerning State aid, lack of selectivity would mean that the APA rulings are legal according to Article 107 TFEU.</p> <p>The Aim of this dissertation is to investigate whether the APA rulings are selective State aid. The method used in the dissertation is doctrinal legal research. Therefore, the selectivity of the APA rulings is assessed in the light of EU legislation and case law of the European Court of Justice (ECJ). In addition, the Commission has published the Notice on State aid in 2016 and it is an important soft-law instrument concerning the selectivity criterion. EU State aid rules are strongly objective-based. Therefore, also teleological argumentation plays a part in the analysis. In addition to the analysis of selectivity, I will analyse whether the Commission has merged two criteria, selectivity and advantage, together in its assessment, as some critics claim.</p> <p>The conclusion of the dissertation is that the APA rulings are selective as the Commission has claimed. The ECJ has been active in establishing new rules and principles for the selectivity assessment especially concerning tax measures. These rules, such as the effect-based approach, support even further the conclusion of selectivity of the APA rulings. Furthermore, in the dissertation it is concluded that contrary to the criticism, the Commission has separated the assessment of selectivity from the assessment of advantage in the decisions.</p> <p>The use of State aid rules in tax matters in general has caused criticism, and the APA decisions of the Commission have increased this kind of criticism. However, in the light of the findings of this dissertation, the use of State aid rules in taxation is justified. The wording and the objectives of EU State aid rules support the deployment of State aid rules in taxation matters, since it prevents the circumvention of the rules.</p>			
Avainsanat – Nyckelord – Keywords			
<b>state aid, subsidy, EU, tax relief, selectivity, competition law, advance pricing agreement</b>			
Säilytyspaikka – Förvaringställe – Where deposited			
<b>University of Helsinki, Main library</b>			
Muita tietoja – Övriga uppgifter – Additional information			

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## Abbreviations

AG	Advocate General
APA	Advance Pricing Agreement
BPOT	Business Property Occupation Tax
ECJ	The Court of Justice of the European Union
EEC	The Treaty establishing the European Economic Community
GC	The General Court of the European Union, previously the Court of First Instance of the European Union
OECD	The Organisation for Economic Co-operation and Development
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value-Added Tax

## 1. Introduction

### 1.1. Background

One of the EU's fundamental aims is to create a highly competitive social economy.<sup>1</sup> EU State aid rules play an important role in reaching this aim. The objective is to create a level playing field in the EU where undertakings compete on their merits, and this does not mean only on the merits of their tax advisers.<sup>2</sup>

Along with wide public demand for the prevention of tax evasion and tax fraud, the Commission of the EU (hereinafter the Commission) has lately been active in this field.<sup>3</sup> While lacking direct competence in tax matters, the Commission has deployed EU State aid rules to prevent tax evasion and tax fraud. In recent decisions, the Commission has stated that certain tax advantages granted by Member States to private undertakings have constituted illegal State aid. While still protecting undistorted competition, the decisions deploy State aid rules also to tackle tax avoidance. EU State aid rules are to protect competition from distortion by preventing selective support from Member States to undertakings. Preventing tax avoidance is not among the explicit objectives of EU State aid rules.

However, according to Article 107 TFEU (Treaty on the Functioning of the European Union), State aid can be in “any form whatsoever”. In line with this, in October 2015 the Commission decided that the advance pricing agreement ruling (APA ruling) issued by Luxembourg to Fiat Finance and Trade (hereinafter Fiat) and the APA ruling granted by the Netherland to Starbucks Manufacturing EMEA B.V. (hereinafter Starbucks) constituted illegal State aid.<sup>4</sup> According to the Commission, these rulings granted selective tax advantage by artificially lowering tax paid by the undertakings.<sup>5</sup> According to the Commission, this was done by transfer pricing transactions of services and goods in a way that did not correspond to market conditions.<sup>6</sup> This is against the arm's length principle, which is a fundamental principle in international taxation.<sup>7</sup> The arm's length principle prevents tax avoidance by ensuring that the transactions between different parts of multinationals follow market pricing.<sup>8</sup> In addition, in August 2016 the

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<sup>1</sup> Article 3(3) TEU.

<sup>2</sup> Commission Communication COM (2004) 0293 final, 20 April 2004.

<sup>3</sup> Commission Press Release 30 August 2016.

<sup>4</sup> Commission decision C(2015) 7152 State Aid SA.38375 2014/C which Luxembourg gave to Fiat, 21 October 2015, Article 1; and C(2015) 7143 State Aid SA.38374 2014/C implemented by the Netherlands to Starbucks, 21 October 2015, para 422.

<sup>5</sup> Commission Press Release 21 August 2015.

<sup>6</sup> Commission Press Release 21 August 2015.

<sup>7</sup> *See for example* Helminen 2016, chapter 8; OECD 2010, 36.

<sup>8</sup> See chapter 3.1.

Commission announced a decision that APA rulings Ireland had granted to Apple Sales International and Apple Operations Europe (hereinafter Apple) constituted illegal State aid by lowering artificially the tax burden of Apple (hereinafter these three rulings from Luxembourg, the Netherlands and Ireland are the APA rulings).<sup>9</sup> In the APA rulings, the Member States approved the transfer pricing practices in relation to national taxation.<sup>10</sup> In all these three decisions, the Commission ordered the illegal State aid to be recovered (hereinafter these Commission decisions are the APA decisions). In the cases of Starbucks and Fiat, the amount of the tax they have to pay back is 20-30 million euros, and in the case of Apple it is 13 billion euros.<sup>11</sup>

An APA ruling is an interim measure between a tax authority and a taxpayer. It determines the application of tax law regarding future transactions.<sup>12</sup> In an APA ruling, an undertaking and a public authority can, for instance, agree on transfer pricing methods beforehand. The granting of this kind of ruling as such is legal, and the Commission acknowledges this.<sup>13</sup> However, even an APA ruling has to be in accordance with EU law and therefore it cannot grant selective tax advantage.<sup>14</sup> Even though the main purpose of State aid rules is not to tackle tax fraud, fiscal aid can be illegal State aid.

The Commission has stated that the fight against tax fraud and tax evasion is one of its top priorities.<sup>15</sup> While most agree that the issue is of great importance, there has been criticism that these measures of the Commission undermine the international progress achieved to promote tax fairness.<sup>16</sup> In addition, taxation is considered a major part of the fiscal autonomy of the Member States.<sup>17</sup> The APA decisions of the Commission have also been claimed to be political and downright legally incorrect.<sup>18</sup> Furthermore, all these three decisions are brought to the General Court (the GC) by the Member States and at the moment they are pending.<sup>19</sup> There are, evidently, various interests at stake concerning these decisions of the Commission.

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<sup>9</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, 30 August 2016, Article 1.

<sup>10</sup> Lyal 2015, 1017.

<sup>11</sup> Commission Press Release 21 August 2015; Commission Press Release 30 August 2016.

<sup>12</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks.

<sup>13</sup> 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/C 262/01) OJ C 262, 19 July 2016, p. 1–50, para 169.

<sup>14</sup> 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/C 262/01) OJ C 262, 19 July 2016, p. 1–50, para 170.

<sup>15</sup> Commission Press Release 21 August 2015.

<sup>16</sup> U.S. Treasury 2016, 1.

<sup>17</sup> Article 3-6 TEU; European Parliament, Fact Sheet 9/2016.

<sup>18</sup> See for example U.S Treasury 2016, 1; Luja 2014, 356; Rushe 2016.

<sup>19</sup> Case T-778/16 Ireland v Commission (2016); Case T-760/15 Netherlands v Commission (2015); Case T-755/15 Luxembourg v Commission (2015).

The Organisation for Economic Co-operation and Development (the OECD) states that international tax issues have never been as high on the political agenda as they are today.<sup>20</sup> The Commission has been active in establishing a directive on the automatic exchange in the field of taxation, which aims to prevent aggressive tax planning and tax fraud.<sup>21</sup> Also the Commission has been active in adopting a directive working against tax avoidance that directly affects the internal market.<sup>22</sup> The Commission, however, sees that State aid rules can be used among other ways in order to prevent tax fraud and tax evasion.<sup>23</sup>

Even if the APA decisions have caused varied controversial debate, the legal analysis of them is based on EU State aid rules. Eventually, the legal scrutiny of these decisions of the Commission is based on the four cumulative criteria of illegal State aid that are found in Article 107 TFEU. All these criteria have to be fulfilled to conclude that the State aid measure is illegal. The criteria are as follows:

1. *There must be an advantage granted to an undertaking*
2. *It has to be granted by a Member State or through State resources*
3. *It has to be selective, favouring certain undertakings or the production of certain goods*
4. *It has to distort or threaten to distort competition and it has to affect trade between Member States*

Therefore, the APA rulings are illegal State aid if they fulfill all these criteria.

## 1.2. The Aim and Research Questions

This dissertation concentrates on the legal scrutiny of the Commission's APA decisions. The aim is to analyze if the decisions are in line with EU State aid rules, and hereby to analyze the possible outcomes of the APA cases in the GC, and possibly later on in the ECJ ( the European Court of Justice). While doing this, the aim of this dissertation is also to provide a view on the current state of EU State aid rules concerning the topics raised in this dissertation.

The APA decisions have caused a lot of political and legal criticism. A major part of the legal criticism concerns the selectivity criterion, claiming that the APA rulings are not selective in the meaning of the Article 107 TFEU. Also Ireland, the Netherlands and Luxembourg have

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<sup>20</sup> OECD 2015, 4.

<sup>21</sup> Council Directive 2015/2376/EU.

<sup>22</sup> Council Directive 2016/1164/EU.

<sup>23</sup> Commission Press Release 21 August 2015.

claimed this in their appeals to the GC.<sup>24</sup> As stated, to be illegal State aid, the measure has to be selective by favouring certain undertakings or the production of certain goods. Therefore, I will analyze whether the APA rulings fulfilled the selectivity criterion as the Commission claims to be the case. This comprises the major part of this dissertation.

Furthermore, there has been a lot of criticism that in the APA decisions, the Commission merged the conditions of selectivity and advantage together. Also Fiat and the Netherlands have claimed in their appeals that the Commission has merged these two conditions.<sup>25</sup> As all the four cumulative criteria of State aid have to be fulfilled in order to conclude that the State aid measure is against the EU rules, these criteria need separate assessment. Hence, I will analyze to what extent the assessment of selectivity and assessment of advantage have to be separated and if the two conditions are analyzed separately in the APA decisions.

The APA decisions have given rise to criticism concerning the fundamental objectives of EU State aid rules. Some legal scholars have claimed that State aid rules are not fitting to prevent tax fraud and tax evasion. Furthermore, it is claimed that wide deployment of State aid rules concerning tax measures limits the competence of Member States in tax matters.<sup>26</sup> The APA decisions of the Commission have widened the scope of State Aid rules in tax matters even further. This criticism is strongly linked with the selectivity criterion, since a wide interpretation of selectivity widens the scope of State aid rules in tax matters. Therefore, while analyzing the selectivity of the APA decisions, I will also analyze whether the APA decisions are justified in the light of this criticism.

Therefore, my research questions are the following:

- 1. Are the APA rulings granted by Ireland, Luxembourg and the Netherlands selective State aid according to Article 107 TFEU?*
- 2. In the context of State aid assessment of tax measures, how strictly the assessment of selectivity and the assessment of advantage have to be separated and has the Commission separated them accordingly in the APA decisions?*

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<sup>24</sup> Case T-778/16 Ireland v Commission (2016); Case T-760/15 Netherlands v Commission (2015); Case T-755/15 Luxembourg v Commission (2015).

<sup>25</sup> Case T-759/15 Fiat Chrysler Finance Europe v Commission (2015); Case T-760/15 Netherlands v Commission (2015).

<sup>26</sup> See for example Alkio and Hyvärinen 2016, 125; Nicolaidis 2004, 366.

### 1.3. Structuring and Delimitations

In addition to the decisions mentioned above, there have been other recent Commission decisions concerning State aid in taxation. In January 2016 the Commission concluded that Belgian “Excess Profit” tax scheme, which reduced certain multinational companies’ tax base artificially, was illegal State aid.<sup>27</sup> Furthermore, the Commission has initiated State aid investigations on Luxembourg’s tax treatment of McDonald’s<sup>28</sup> and Amazon<sup>29</sup>. However, this dissertation concentrates on the three abovementioned decisions of the Commission concerning the aid granted to Apple, Starbucks and Fiat. All these three decisions are about individually granted tax rulings that the Commission claims to be beneficial to the undertakings. The Belgian tax scheme case is about more general tax practice of a Member State and the McDonald’s and Amazon cases are still pending in the Commission. Since this dissertation concentrates on the legality of recent individual APA rulings from the perspective of State aid rules, this limitation is justifiable.

Naturally, the criticism of the APA decisions is not limited to the claims concerning the topics of the research questions of this dissertation. There has been a lot of criticism of the Commission’s application and definition of the arm’s length principle in the APA decisions. For example, the Netherlands and Ireland claim that the Commission has defined incorrectly the arm’s length principle it has used when assessing the existence of advantage in the APA rulings. Furthermore, all the appellant Member States claim that the APA rulings did not actually deviate from the arm’s length principle.<sup>30</sup> Also a number of legal scholars have criticized the Commission’s analysis of the derogation of arm’s length principle of the APA rulings.<sup>31</sup>

Nonetheless, this dissertation concentrates on the selectivity condition and the accessory issues presented in chapter 1.2. Therefore, in this dissertation I will not treat the questions about whether the APA decisions deviated from the arm’s length principle and whether the Commission’s application of arm’s length principle was correct. However, in order to be selective, the State aid measure has to *favour* certain undertakings. Therefore, the conditions of selectivity and advantage are strongly linked. In the case of the APA rulings, the advantage

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<sup>27</sup> Commission decision C(2015) 9837 The excess profit exemption State Aid Scheme implemented by Belgium, 11 January 2016, Article 1 of the conclusion.

<sup>28</sup> Commission decision C(2015) 8343 State Aid alleged aid to McDonald’s, 3 December 2015.

<sup>29</sup> Commission decision C(2014) 7156 State Aid alleged aid to Amazon by way of a tax ruling, 7 October 2014.

<sup>30</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 54; Case T-778/16 Ireland v Commission (2016), Case T-760/15 Netherlands v Commission (2015).

<sup>31</sup> See for example Taferner and Kuipers 2016; Jaeger 2017.



resulted from the deviation of the arm's length principle is practically a prerequisite for the selectivity criterion to be fulfilled, even though it is a question of advantage. Therefore, for being able to investigate the selectivity criterion in in-depth manner in this dissertation, I will investigate the selectivity of the APA rulings presupposing that the Commission has been right in stating that the APA rulings have deviated from the arm's length principle and therefore granted advantage to the beneficiary undertakings. This delimitation is based on a variety of reasons. First, a major part of the criticism, including the appeals, concentrates on the selectivity of the APA rulings. Second, the selectivity criterion raises the most important problems in State aid analysis concerning taxation.<sup>32</sup> Hence, the selectivity criterion is academically highly interesting topic and it is rather widely researched in a general context. However, in the context of the APA rulings, there is no extensive research of the selectivity condition.

When it comes to the structure of this dissertation, I will first introduce the topic of tax benefits in the context of EU State aid rules. Second, I will introduce the connection between the APA decisions and EU State aid rules. This involves introducing the political and legal criticism the APA decisions have faced. Third, I will analyze if the APA rulings are selective according to Article 107 TFEU and the case law it has triggered. This part will answer the first research question. Fourth, I will analyze if the Commission has been able to separate the analysis of the conditions of selectivity and advantage in the APA decisions in accordance with the State aid rules. This part answers the second research question. In the final part of this dissertation, I will summarize and conclude the results of this dissertation.

#### 1.4. Method and Materials

As the objective is to analyze the APA decisions from the point of view of EU State aid rules, doctrinal legal research is the main method used. Doctrinal legal research includes critical analysis of the relevant legislation and case law and using this analysis to treat the research questions.<sup>33</sup> In order to find out whether the APA decisions are in line with EU law, there is a need to analyze the legislation concerning State aid. For this purpose, doctrinal legal research and systematizing is needed.<sup>34</sup>

Although doctrinal legal research is the basis for this dissertation, teleological interpretation is also used. Teleological interpretation plays a part especially when analyzing if State aid rules are fitting to treat measures such as the APA rulings and if it is justified that the APA rulings

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<sup>32</sup> Micheau 2014, 220.

<sup>33</sup> Hutchinson 2014, 584.

<sup>34</sup> Hirvonen 2011, 21 and 25;

are deemed selective State aid. The objectives behind State Aid rules play a role in this analysis, since the Article 107 TFEU is highly objective-based. The objectives of State Aid rules are, inter alia, to prevent the distortion of competition in the internal market and create a level playing field for undertakings.<sup>35</sup> Therefore, “external” economic perspective on EU State aid rules is needed when analyzing the APA rulings in the light of the objectives of State aid rules.<sup>36</sup> These objectives are taken into account by the ECJ when assessing State aid cases, and this should play its part when analyzing the APA decisions.

The theoretical framework of the dissertation is based on the analysis of academic articles of legal scholars and EU legal sources. To answer the first research question I need to find out what in practice means the wording of Article 107 TFEU, “favouring certain undertakings or the production of certain goods”, and how does it relate to the APA decisions. In order to find out the answer, I will analyze the applicable legal norms concerning the selectivity condition in State aid law and apply the findings to the APA decisions. There is a lot of previous ECJ case law concerning the selectivity condition in general and also in the context of tax benefits. Also when it comes to answering the second research question, the ECJ case law will be largely used. For this purpose, legal analogy is used when applying the ECJ case law when analyzing the APA decisions, since there is not yet ECJ case law directly on individual APA rulings.<sup>37</sup>

As stated above, the APA decisions have triggered legal criticism. The underlying aim of the dissertation is to analyze the APA decisions in the light of the criticism. Hence, I will analyze if the criticism is based on solid grounds. Therefore, I will use legal and academic sources to find out the main critics directed towards the APA decisions and with abovementioned methods, I will answer to the critics.

The analysis and conclusions made in this dissertation are based on EU law. The fundamental EU law source of this dissertation is article 107 TFEU, which is the basis of the EU State aid law. As this provision cannot in itself answer all the relevant questions, I will use the case law of the ECJ as other major legal source, as it is a major player in shaping the EU law and its interpretation. In addition, the opinions of Advocates Generals (hereinafter AG) and the decisions of the Commission play their part in interpretation of EU law. There is no EU secondary legislation concerning directly the selectivity criterion. However, the Commission’s

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<sup>35</sup> See for example Opinion Of Advocate General Kokott of 26 May 2011 in case C-275/10 Residex (2011), para 67.

<sup>36</sup> Gestel and Micklitz 2014, 297.

<sup>37</sup> About legal analogy see for example Raitio 2013, 214.

2016 Notice deals with State aid rules and the selectivity criterion, and it has to be taken into account in the interpretation. This is guidelines- type of legal source, but ECJ relies on it when making decisions on State aid.<sup>38</sup>

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<sup>38</sup> See chapter 2.1.2.

## 2. Preferential Tax Treatment as State Aid

### 2.1. Development of the EU Legislation

The basis for EU State aid law is Article 107 TFEU. It states the following:

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

The four cumulative criteria are found in this article. Therefore, it is against the State aid rules if a Member State grants aid to undertakings and this aid grants economic advantage, it is granted by the State or through State resources, it is selectively granted and it distorts or threatens to distort competition and affects trade between Member States. The wording of this article has not evolved in past fifty years.<sup>39</sup> However, the ECJ has played a major part in developing the definition of illegal State Aid. The ECJ case law supports the deployment of State aid rules in tax matters.

#### 2.1.1. The Role of the ECJ

Article 107 TFEU states that State aid can be in any form whatsoever. Hence, in EU legislation, State aid does not occur only in cases where the public authorities grant subsidies in form of monetary aid to undertakings. It also occurs in cases where Member State selectively reduce the fiscal obligations of undertakings. Even if tax is a burden and not an advantage, it would naturally undermine the objectives of State aid rules to exclude taxes from the scope of article 107 TFEU.<sup>40</sup> The ECJ has been active in applying State aid rules in taxation matters.

Already in 1961, the ECJ stated that also “interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking” can be considered State aid.<sup>41</sup> This was the first case where the ECJ confirmed that also State measures that mitigate the normal expenses of undertakings can be illegal State aid. The first case that applied TFEU 107 (then Article 92 of the EEC Treaty<sup>42</sup>) to direct taxation is the *Italian Textile* case from 1974.<sup>43</sup> The case was about a reduction in social security contribution, which favoured the Italian textile industry. The Court of Justice stated that since the State aid can take *any form whatsoever*, the

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<sup>39</sup> Micheau 2014, 62.

<sup>40</sup> Nicolaides and Metaxas 2014, 51.

<sup>41</sup> Case C-30/59, *Gezamenlijke Steenkolemijnen* (1961), summary, para 3.

<sup>42</sup> The Treaty establishing the European Economic Community.

<sup>43</sup> Case 173/73 *Italy v Commission* (1974).

fiscal nature of the measure cannot suffice to exclude it from the scope of Article 107 TFEU.<sup>44</sup> This was a landmark case, since it stated the principle that Article 107 TFEU applies regardless of the fiscal form of the measure.<sup>45</sup> If the measure of tax benefit fulfills all the four cumulative criteria, it is illegal State aid, regardless of its form. The position of the ECJ was summarized in the *Banco Exterior de Espana* case in 1994.<sup>46</sup> In this case, the ECJ stated that if the tax exemption places the undertaking in a more favourable financial situation than other taxpayers, this constitutes State aid in the meaning of Article 107 TFEU.<sup>47</sup> Lately the ECJ has been rather strict concerning tax benefits in the light of State aid rules. There are many examples where the ECJ has overturned the judgment of the GC and concluded that the four criteria are fulfilled and the tax measure constitutes illegal State aid.<sup>48</sup> With particular relevance is the *Santander* judgment from late 2016, where the ECJ stated that even if the tax measure is formally open to every undertaking, it can be selective State aid.<sup>49</sup> The aim of the ECJ seems to be that State aid rules apply widely to tax measures that grant selective advantage to certain undertakings.

With the case law of the ECJ, it is now clearly established that tax benefits can be illegal State aid. The ECJ has stated that tax subsidies can fulfill all the four cumulative criteria of illegal State aid. The ECJ has stated that they can be economic advantage and effectively from the state resources even if they are not subsidies in the strict meaning of the word.<sup>50</sup> As Gormsen says, any relief from tax is inevitably financed by the State or granted through state resources.<sup>51</sup> Furthermore, the ECJ has stated that mitigations from normal expenses can distort competition and affect the trade between Member States.<sup>52</sup> In addition, tax subsidies can be selective as well. This means that according to case law of the ECJ, tax subsidies can be illegal State aid.

### 2.1.2. The Role of the Commission

The Commission has lately also been active preventing harmful tax competition and tax fraud. It has, inter alia, proposed directives to tackle tax avoidance and it has submitted communications with the aim to promote more tax transparency.<sup>53</sup> However, harmful tax

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<sup>44</sup> Case 173/73 *Italy v Commission* (1974), summary § 2.

<sup>45</sup> Micheau 2014, 63.

<sup>46</sup> Micheau 2014, 63.

<sup>47</sup> Case C-387/92 *Banco Exterior* (1994), para 14.

<sup>48</sup> See for example Joined cases C-20/15 P and C21/15 P, *Santander* (2016); Joined Cases C-106/09 P and C107/09 P *Gibraltar* (2011).

<sup>49</sup> See chapter 4.8.

<sup>50</sup> Case C-387/92 *Banco Exterior* (1994), paras 13 and 14.

<sup>51</sup> Gormsen 2016, 369.

<sup>52</sup> Case C-172/03 *Heiser* (2005), paras 32 and 55.

<sup>53</sup> See for example Commission Communication COM(2015) 136 on tax transparency to fight tax evasion and avoidance, 18 March 2015.

competition measures can often be also illegal State aid contrary to article 107 TFEU.<sup>54</sup> This occurs if the state measure grants selective tax advantage to certain undertakings. The Commission has therefore progressively used the State aid rules to prevent this phenomenon, since the Commission is the authority to review the possible State aid measures of the Member States.<sup>55</sup> The activity of the Commission has largely started in the 1990's. The activity has shown for example in publishing non-binding Notices on how to apply the State aid rules in taxation matters.

In 1998, the Commission introduced a notice of the application of the State aid rules to measures relating to direct business taxation.<sup>56</sup> This was introduced to serve as a guideline in State aid cases of tax matters. Rather than introducing new guidelines of the issue, it worked as a clarification of the already existing rules, which were largely established by the ECJ.<sup>57</sup> In the Notice, the Commission states that TFEU empowers the Community to take measures to eliminate various types of distortion that harm the proper functioning of the common market.<sup>58</sup> Furthermore, the Commission states that in applying the Community rules on State aid, it is irrelevant whether the measure is a tax measure, since State aid rules applies to aid measures "in any form whatsoever".<sup>59</sup> However, the main objective of the Notice was to deal with substantial application of State aid rules in tax measures. It dealt with issues such as the selectivity and advantage conditions providing the Commission's view on the issues.

In 2016, the new Notice of the Commission was published. Its name is Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union. It deals with the issue of State aid in general, but with much wider scale than the 1998 Notice. For example, the selectivity in tax matters alone is addressed with 29 articles. The 2016 Notice deals with the selectivity in tax matters with more clarity and detail as the 1998 Notice. However, the Notice does not have binding legal effect. Nonetheless, it is likely that the ECJ will take it into account when deciding on State aid cases, since it is considered a soft law instrument in EU law. Although not having direct binding effect, Soft law often has important

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<sup>54</sup> Helminen 2012, 50.

<sup>55</sup> Article 108 TFEU.

<sup>56</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10 December 1998, p. 3-9.

<sup>57</sup> Micheau 2014, 70.

<sup>58</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10 December 1998, p. 3-9, para 5.

<sup>59</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10 December 1998, p. 3-9, para 8.

practical and legal consequences.<sup>60</sup> For example, in *Gibraltar* case in 2011 the ECJ stated that the Notice forms rules of practice from which the administration may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment.<sup>61</sup> Therefore, it seems that also the 2016 Notice is taken strongly into account when the ECJ decides on individual State aid cases.

## 2.2. The Need for Actions

As can be seen, EU has made initiatives to tackle the phenomenon of tax fraud and tax avoidance. The State aid rules have gained more importance as a legal tool for this.<sup>62</sup> Even though tackling harmful tax practices is not the main aim of State aid rules, this has been used as a support for deployment of State aid rules. Already in the 1998 Notice, the Commission stated that the State aid provisions will also contribute through their own mechanism to the objective of tackling harmful tax competition.<sup>63</sup> A numerous case law has given the ECJ opportunities to establish principles that give legal support for the use of State aid rules to prevent tax fraud and tax avoidance along with the contribution of other legal ways and other organizations, such as the OECD.

However, the legal development to prevent tax fraud and tax avoidance has not supported the work to prevent tax fraud and tax avoidance sufficiently, since for example the tax avoidance by form of transfer pricing misuse is still a serious problem concerning economic equality.<sup>64</sup> Therefore, it is important that various legal ways be used to prevent tax fraud and tax avoidance. The recent APA decisions by the Commission can be seen as a new further step in the proactive use of State aid rules in preventing harmful tax competition, tax fraud and aggressive tax planning. They can be seen as a welcomed reaction to the increased public interest towards the way undertakings, especially multinationals, pay their fair share of taxes.<sup>65</sup> However, in the case of using State aid rules to prevent tax avoidance and tax fraud, it is important that the actions of EU institutions, such as the decisions of the Commission, are in line with EU legislation, in this case Article 107 TFEU.

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<sup>60</sup> Stefan 2012, 881.

<sup>61</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 128.

<sup>62</sup> See for example Micheau 2014, 68.

<sup>63</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10 December 1998, p. 3-9, para 1.

<sup>64</sup> See for example European Commission - Fact Sheet: The Anti Tax Avoidance Package 21.6.2016.

<sup>65</sup> Lyal 2015, 1018.

### 3. APA rulings and EU State Aid Rules

#### 3.1. Advance Pricing Agreement and the Arm's Length Principle

As stated above, an APA ruling is an interim measure between a tax authority and a taxpayer. The APA rulings of Apple, Fiat and Starbucks determined the arm's length pricing of transactions between sub-companies of the undertakings over a certain period. For example, in the case of Starbucks, the period for which the application of the arm's length principle in the transfer pricing was determined was 10 years.<sup>66</sup> The remuneration determined by Starbucks' tax advisors in the transfer pricing was accepted as an arm's length remuneration by the Dutch authorities. According to the Commission, this reduced substantially the tax level of Starbucks since in reality, the transfer pricing of the APA ruling deviated from the arm's length principle in favour of Starbucks.<sup>67</sup> As a consequence, the taxable profit of Starbucks in the Netherlands was less than it would have been under market conditions.

Multinational undertakings differ from standalones in the sense that multinationals can transfer price transactions of goods and services between various parts of the same corporation. Standalones are non-integrated undertakings that do not include sub-companies. Therefore, they cannot transfer price transactions since they do not have internal dealings the way multinationals have.<sup>68</sup> Because the various parts, sub-companies, have a shared interest, the prices between various parts of the corporation might not be determined solely by market forces.<sup>69</sup> Since the aim of corporations is to create profit, the interest is often to pay as little taxes as possible. This is sometimes done by allocating as little profit to jurisdictions with higher taxation which can be done by determining transfer prices between the sub-companies which do not resemble the prices that would occur in normal market conditions. This, as stated, is possibly for only multinational undertakings. To avoid this kind of tax evasion, the *arm's length principle* has been established. The principle means that the prices between various parts of the multinational should be the same as if they were agreed with two independent companies negotiating at comparable circumstances at "arm's length".<sup>70</sup>

The arm's length principle is found in the OECD's Model Tax Convention. In the Convention, the rule is that if the transfer prices deviate from the arm's length principle and this results in economic advantage, the deviation should be included to the profit of the undertaking and taxed

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<sup>66</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 40.

<sup>67</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 341.

<sup>68</sup> See for example Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 229.

<sup>69</sup> Helminen 2012, 217.

<sup>70</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 85.



accordingly.<sup>71</sup> However, this model convention is not binding even in the member countries.<sup>72</sup> Since EU does not have competences in tax matters, it does not have binding arm's length principle either.<sup>73</sup> The rules on arm's length principles differ among the Member States.<sup>74</sup> For example, The Netherlands has a degree of arm's length principle which is based on the OECD Guidelines.<sup>75</sup> On the contrary, Ireland does not have regulations of arm's length principle.<sup>76</sup>

### 3.2. The Commission's APA Decisions

The Commission sees that the problem in the APA rulings are that they do not comply with the arm's length principle and that they are selective.<sup>77</sup> These inconsistencies have the result that the tax base of the beneficiary undertaking is lower than it would be in normal market conditions. This results in selective economic advantage for the beneficiary undertakings, in this case for Apple, Fiat and Starbucks. The selectivity of the APA rulings arises from the fact that they were granted to single undertakings and that the APA rulings of this kind are not in the reach of all undertakings, such as standalones undertakings. As the Commission states that this advantage granted by the APA rulings is also selective, the result is that the APA rulings grant illegal State aid which has to be recovered.

There is some case law that could quite directly apply to the APA rulings. In *Forum 187* case in 2006 the ECJ stated that measures to certain undertakings which grant deviation from the transfer prices that would occur in under conditions of free competition is selective advantage according to article 107 TFEU.<sup>78</sup> Furthermore, in a decision in 2003 the Commission stated that if a tax ruling is not in accordance with national tax rules and the result is lower tax base, the illegal State aid is at hand.<sup>79</sup> In 2010, the Commission stated that tax measures which are not in accordance with national tax rules and therefore result in lower tax base for certain

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<sup>71</sup> OECD 2014(2), Article 9(1).

<sup>72</sup> Ireland, The Netherlands and Luxemburg are all member countries of OECD, see OECD- List of OECD Member Countries <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm>.

<sup>73</sup> EU has for example a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union, Council Resolution on a code of conduct on transfer pricing documentation for associated enterprises in the European Union, (2006/C 176/01), OJ C 176, 2 July 2006, p. 1–7.

<sup>74</sup> Helminen 2012, 219.

<sup>75</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 87.

<sup>76</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 197.

<sup>77</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 149; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 130; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 156.

<sup>78</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), paras 96 and 97.

<sup>79</sup> Commission Decision C(2003) 569 (2003/601/EC) on aid scheme C54/2001 (ex NN55/2000) Ireland — Foreign Income, paras 33-35.

undertakings, is in principle selective advantage contrary to State aid rules.<sup>80</sup> Although this decision concerned subsequent tax agreement and not an APA type ruling, this view applies to the APA rulings as well.

### 3.3. Critics towards the APA Decisions

#### 3.3.1. Political Side of the Criticism

As there is high competing economic interests at stake concerning the APA decisions, it is not a big surprise that the decisions have triggered wide public interest.<sup>81</sup> The APA decisions have evoked also a wide variety of criticism which is not directed only to the very substance of the decisions, but rather to the wider political perspectives the APA decisions are claimed to entail.

Some scholars claim that State aid rules are not suitable to fight harmful tax competition. This would be for example because as used by case-by-case approach, they cannot solve the mismatches in national legislations that cause the root problems.<sup>82</sup> On the other hand, it is stated that harmful competition practically always entails State aid and therefore State aid rules would be useful legal way to tackle harmful tax competition.<sup>83</sup>

There has also been scholars that have criticized that the Commission, by extensive use of State aid rules in tax measures, limits substantially the autonomy of the Member States in the field of taxation.<sup>84</sup> Taxation is, indeed, in the scope of the competences of Member States and it is one of the few ways for Member States to control their economic policy. AG Kokott has stated that too broad an understanding of the selectivity of national provisions, entails a risk of adversely affecting the division of competences between the Member States and the European Union.<sup>85</sup> However, the Commission has stated that the APA rulings in themselves do not pose illegal State aid. The problem arises only if they grant selective advantage to certain undertakings. Furthermore, the Commission has stated in the 2016 notice that “*Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production. Nonetheless, Member States must exercise this competence in accordance with Union law.*”<sup>86</sup>

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<sup>80</sup> Commission decision C(2010)2538 concernant l’aide d’État sous la forme d’un accord fiscal transactionnel mise à exécution par la Belgique en faveur de la société Umicore S.A., para 155.

<sup>81</sup> Lyal 2015, 1018.

<sup>82</sup> See for example Traversa and Flamini 2015, 326; Luja 2014, 355 and 356.

<sup>83</sup> Kiegebeld 2004, 83.

<sup>84</sup> See for example Alkio and Hyvärinen 2016, 125; Nicolaidis 2004, 366.

<sup>85</sup> Opinion of AG Kokott in case C-66/14 Finanzamt Linz (2015), para 113.

<sup>86</sup> 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/C 262/01) OJ C 262, 19 July 2016, p. 1–50, para 156.

Furthermore, the choice of undertakings that the Commission has targeted has triggered critics. It has been argued that the Commission's APA investigations target U.S. undertakings in a disproportionate manner.<sup>87</sup> The U.S. Department of Treasury (the Treasury) has submitted a white paper concerning the APA decisions.<sup>88</sup> The Treasury criticizes the Commission's APA decisions in all the abovementioned grounds. The Treasury claims that the APA decisions undermine the international tax system and work against the prevention of tax fraud and tax avoidance.<sup>89</sup> The Treasury claims that by the APA decisions, the Commission misuses its competences and turns into a supra-national tax authority that reviews Member State transfer price determinations.<sup>90</sup> It also sees that the APA decisions target U.S. companies disproportionately.<sup>91</sup>

### 3.3.2. Criticism in the Light of State Aid Rules

However, this dissertation concentrates on the critics towards the APA decisions, which have their ground on substantial EU State aid rules. As stated, a major part of the legal criticism concerns the selectivity criterion. According to the claims of a number of legal scholars, the U.S. Department of Treasury and the appellants of the APA decisions, the APA rulings are not selective according to Article 107 TFEU. If this was the case and the APA rulings indeed were not selective, they would not be illegal State aid. This is because all the four cumulative criteria have to be fulfilled in order to conclude that the state measure is illegal State aid.

Another legal ground for the criticism is that in the APA decisions, the Commission has merged the condition of selectivity and the condition of advantage together, rather than assessing them separately. This also would question the illegal State aid nature of the APA rulings because of the cumulative nature of the conditions. This, again, has been a statement of legal scholars, the U.S. Treasury and a part of the appellants. Furthermore, the Commission's order to recover the unpaid taxes have caused criticism. It has been argued, that this order, considering the circumstances of the APA rulings, was against the principles of legal certainty and legitimate expectations.

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<sup>87</sup> See for example Gormsen 2016, 370.

<sup>88</sup> U.S. Treasury 2016.

<sup>89</sup> U.S. Treasury 2016, 17.

<sup>90</sup> U.S. Treasury 2016, 9.

<sup>91</sup> U.S. Treasury 2016, 5.

The aim of next chapters is to analyze whether the APA rulings are selective as the Commission claims to be, or whether the criticism that claims that the APA rulings were not selective is based on firm ground.

## 4. Selectivity Criterion and the APA Rulings

### 4.1. Background

Even if State aid measure grants advantage that distorts competition, it is not illegal under State aid rules if it is not selective.<sup>92</sup> Article 107 TFEU states that State aid has to “favour certain undertakings or the production of certain goods” in order to be contrary to EU State aid rules. For example, a tax measure is considered selective if it covers for instance only a part of a sector or only certain undertakings.<sup>93</sup> This is the case even if the measure covers a large amount of undertakings.<sup>94</sup> On the contrary, generally applicable tax measure is not selective.<sup>95</sup> At first glance, the selectivity criterion might sound simple.

However, the criterion of selectivity is arguably the most complex criterion of illegal State aid.<sup>96</sup> Especially in fiscal matters, such as the APA rulings, the selectivity criterion is seen highly problematic.<sup>97</sup> It has also given rise to a major part of the case law considering State aid.<sup>98</sup> The complexity of the selectivity assessment is also shown by the fact that often the views of the GC, AG and the ECJ about selectivity are distinct. For example, AG Jääskinen has stated in his opinion in the *Gibraltar* case that regardless the copious case-law on the subject, the selectivity criterion is difficult to tie down, in particular with regard to tax measures.<sup>99</sup> The complexity arises from the fact that tax measures are various and they can be selective in various manners.

In the light of this, it is not surprising that one main argument in the criticism towards the APA decisions is based on the selectivity criterion. Commission’s APA decisions have been criticized for failing to meet the selectivity requirement.<sup>100</sup> Indeed, the appeals brought by the Netherlands, Luxembourg and Ireland seeking to annul the decisions argue, inter alia, that the selectivity criterion was not fulfilled in the APA rulings.<sup>101</sup> Furthermore, the U.S. Treasury argues that the APA rulings are not selective according to Article 107 TFEU.<sup>102</sup>

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<sup>92</sup> Cisotta 2016, 129.

<sup>93</sup> Micheau 2014, 220.

<sup>94</sup> See for example case C-279/08, European Commission v Kingdom of Netherlands (2011), para 50.

<sup>95</sup> Micheau 2014, 224.

<sup>96</sup> Micheau 2014/2, 4; Micheau 2014, 220.

<sup>97</sup> Cisotta 2016, 129.

<sup>98</sup> De Cecco 2013 p. 97.

<sup>99</sup> Opinion of Advocate General Jääskinen of 7 April 2011 in joined cases C-106/09 P and C107/09 P Gibraltar (2011), para 176.

<sup>100</sup> See for example U.S. Treasury 2016; Taerner and Kuipers 2016, 136.

<sup>101</sup> Case T-760/15 Netherlands v Commission (2015); Case T-755/15 Luxembourg v Commission (2015); Case T-778/16 Ireland v Commission.

<sup>102</sup> U.S Treasury 2016, 9.

In this chapter, I will look into the criteria which fiscal State aid has to fulfill in order to be considered selective. I will assess whether the APA rulings fulfill this criteria or whether the arguments of the appeals of the Netherlands, Luxembourg and Ireland are well-founded. The analysis of selectivity in this dissertation is concentrated on the material selectivity, rather than regional selectivity.<sup>103</sup> Only material selectivity is of relevance when analyzing the selectivity of the Commission's APA-decisions. Material selectivity, according to the 2016 Notice, means that the measure applies only to certain undertakings or certain sectors of the economy in a given Member State.<sup>104</sup> Material selectivity can be based on variety of basis, such as size or structure of the undertakings that receive State aid. State aid can be materially selective to undertakings from certain sector.<sup>105</sup> Furthermore, material selectivity can occur due to sheer discretionary practice of the public authorities. Material selectivity can also occur de facto or de jure.<sup>106</sup> De jure selectivity results directly from the legal criterion for granting a measure that is formally reserved only for certain undertakings.<sup>107</sup> De facto selectivity means that the measure is selective *in practice* regardless on the formal wording of the measure.

Article 107 TFEU states that State aid has to “favour certain undertakings or the production of certain goods” to be selective. This is the only regulation on the selectivity criterion in EU primary law. That is why the analysis will mostly be based on the case law of the ECJ. Because of the complexity of the selectivity criterion, the ECJ has assessed selectivity in variety of cases. In the case law, the ECJ has established variety of rules and tests that are used in the assessment of selectivity.

Along with the ECJ case law, the Commission 2016 Notice deals extensively with the selectivity criterion.<sup>108</sup> The Commission has dedicated a whole chapter to the selectivity criterion concerning tax measures.<sup>109</sup> In assessing selectivity, the Notice largely builds upon the

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<sup>103</sup> Regional selectivity occurs if tax advantage is applied to only undertakings that act in certain geographical area of Member State. This can be because of a measure of the central government or a local authority. *See* Bartosch 2011, 176; 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/C 262/01) OJ C 262, 19 July 2016, para 144.

<sup>104</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 120.

<sup>105</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 120.

<sup>106</sup> See chapter 4.10.

<sup>107</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 121.

<sup>108</sup> 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/C 262/01) OJ C 262, 19 July 2016, p. 27-40.

<sup>109</sup> 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/C 262/01) OJ C 262, 19 July 2016, p. 34-40.

case law of the ECJ.<sup>110</sup> On some issues where there is not yet case law, the Commission has issued its point of view on how the notion of State aid should be construed.<sup>111</sup> As stated above, these rules are not binding, but the ECJ takes them strongly into account in its case law.

#### 4.2. Selectivity and the APA Rulings: Introductory Remarks

The issue of selectivity in the APA decisions differs from the majority of the case law in some notable ways. First, the APA rulings of the Member States have been addressed to single undertakings. This fact makes them presumably selective in the first place. The ECJ has stated this presumption in its case law as well. For example, in the *MOL* case the ECJ stated that in the case of individual aid the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.<sup>112</sup> Second, in the APA decisions the question of the differential treatment of multinational undertakings in comparison with standalones is important. The reason is that the APA rulings on transfer pricing are effectively only open to multinational undertakings. This follows from the structural differences between multinationals and standalones. Standalones do not transfer prize at all.

Gunn and Luts have stated that tax rulings may be problematic in two ways. First, the underlying provisions that authorize tax rulings may be against State aid rules. Second, the tax ruling themselves might have been granted in a way that is against State aid rules.<sup>113</sup> This view applies to the selectivity criterion concerning the APA rulings. If there are national rules that authorize the Member State to grant beneficial APA rulings only to certain undertakings or certain types of undertakings, these rules may be selective. On the other hand, if there is no such legislation but the APA rulings nevertheless grant selective advantage to certain undertakings, these APA rulings as measures themselves may be selective.

In any case, the assessment of selectivity concerning the APA rulings is based on EU State aid rules. These include Article 107 TFEU, the Commission Notice and the principles and rules that the ECJ has established in the case law. Therefore, in the next chapters I will assess whether the APA rulings are selective State aid deploying these rules in the assessment. The ECJ has established the derogation test to work as a basis for the selectivity assessment.

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<sup>110</sup> Cisotta 2016, 131.

<sup>111</sup> 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/C 262/01) OJ C 262, 19 July 2016, paras 3 and 4.

<sup>112</sup> Case C-15/14 *MOL* (2015), para 60; *see also* Case C-270/15 *P Belgium v Commission* (2016), para 49.

<sup>113</sup> Gunn and Luts 2015 2015, 120.

### 4.3. The Derogation Test and the Reference Framework

#### 4.3.1. The Derogation Test

Micheau states that because of the complexity and variety of tax measures, the perfect test to assess selectivity of tax measures does not exist.<sup>114</sup> However, the ECJ has elaborated some rules and tests that work as tools in the selectivity assessment.

As stated, generally applicable tax measure is not selective. As the general tax system applies to all undertakings within its scope on basis of objective criteria, the general system itself cannot be selective.<sup>115</sup> In most cases, in order to be selective, the tax measure has to be an exception from the general tax system. From this viewpoint, the ECJ has established the *derogation test* to assess whether the State aid measure is selective. The objective of the test is to analyze whether the measure is a derogation from the general measure that applies without distinction to all undertakings. If the measure is a derogation and because of this it treats distinct undertakings in different manners, the selectivity is most likely at hand. The exact wording, and even the name, of the derogation test has been variant.<sup>116</sup> However, the ECJ has deployed this test in tax matters rather consistently and the test has worked as a founding principle of the selectivity assessment. The derogation test has especially been applied in the context of fiscal matters.<sup>117</sup> Indeed, Lyal states that the derogation test usually works well with the assessment of selectivity in corporate tax matters.<sup>118</sup> Already in 1974 in the *Italian Textile* case, the ECJ reasoned that because the fiscal measure was “measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the *normal application of the general social security system*”, the measure was selective.<sup>119</sup> In the Commission Notice of 1998, the Commission stated that a tax measure is selective State aid if it provides in favour of certain undertakings an exception to the application of *the common tax system*.<sup>120</sup>

The derogation test has been applied especially in tax matters. As the APA rulings are measures of corporate taxation, the derogation test is principally appropriate tool to assess whether they

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<sup>114</sup> Micheau 2014, 284.

<sup>115</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 133.

<sup>116</sup> Micheau 2014, 328-330.

<sup>117</sup> Cisotta 2016, 133; *See for example* Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 143; Commission Decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 230.

<sup>118</sup> Lyal 2015, 1029.

<sup>119</sup> Case 173/73, Italy v Commission (1974), para 15.

<sup>120</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation 98/C 348/03, para 16.



are selective. Therefore, the derogation test is a suitable starting point when assessing the selectivity of the APA rulings.

According to ECJ case law, the derogation test has three distinct steps. In the Commission 2016 Notice the three steps of the derogation test are described as follows:

1. *the identification of the reference system;*
2. *the analysis of whether the measure at issue is a derogation from the reference system and whether the measure differentiates the situation of undertakings in comparable situations;*
3. *the assessment if there is justification of the measure by the nature or the general scheme of the system itself.*<sup>121</sup>

The ECJ has confirmed this description of the derogation test in various cases.<sup>122</sup> For example in *Paint Graphos* case in 2011, the ECJ confirmed that the tax measure at issue is selective if it derogates from the “common” or “normal” tax regime and this way differentiates between economic operators in comparable situations.<sup>123</sup> In this case, the tax rule that granted tax benefit for cooperative societies was an exception from the general Italian corporation tax and therefore was a derogation from the system of reference. In the 2016 *Santander* judgment, the ECJ confirmed the use of the derogation test with a similar wording.<sup>124</sup> Thus, in order to be deemed selective, the tax measure has to be a derogation from the general tax system, which is the reference system. Furthermore, the derogation has to grant benefit to certain undertakings in comparison with other undertakings in comparable situations. As long as the measure is effectively available to all undertakings, it is not selective.<sup>125</sup> By contrast, if the measure derogates from the application of the general tax system, selectivity arises.<sup>126</sup>

To start with the derogation test, the reference system has to be defined first. Only after then it can be assessed if the measure at hand derogates from the reference system. Defining the general and specific measures, however, can be a complex task.<sup>127</sup>

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<sup>121</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 143; Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 19; 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/C 262/01) OJ C 262, 19 July 2016 paras 132-141.

<sup>122</sup> See for example Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 49; Joined cases C-20/15 P and C21/15 P *Santander* (2016), para 57.

<sup>123</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 49.

<sup>124</sup> Joined cases C-20/15 P and C21/15 P *Santander* (2016), para 57.

<sup>125</sup> Micheau 2014, 226.

<sup>126</sup> Micheau 2014, 224.

<sup>127</sup> Micheau 2014, 225.

#### 4.3.2. Defining the Reference System

The choice of the reference system can prove decisive in the selectivity assessment. If the reference system is deemed wide and general, it is more likely that a derogation takes place. The ECJ has deliberately acknowledged the importance of the choice of reference framework especially in tax matters relating to the assessment of the existence of an advantage.<sup>128</sup> Furthermore, the identification of the reference system plays a decisive role in analyzing which undertakings are deemed to be in a comparable situation.<sup>129</sup> The choice of the reference system is not a straightforward task. For example, the GC and the ECJ have had different views on the choice of the reference framework.<sup>130</sup>

In the case law, the ECJ has elaborated some principles on how the reference system can be identified. However, there is no unambiguous binding rule on the choice of the reference system. This is partly due to the fact that Member States have their own distinct tax systems, which makes it difficult to define commonly applicable rules for the definition of reference framework.<sup>131</sup> The Commission Notice of 2016 states that “*The reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective.*”<sup>132</sup> This rule is not very precise. To be generally applicable, the set of rules do not have to be fully even-handed or objective. For instance, progressive tax can be considered general.<sup>133</sup> There is a need for comprehensive and clear guidelines for the choice of reference framework, since now there is a lack of legal certainty of this essential matter.<sup>134</sup>

In the earlier judgments made before the derogation test was established as it stands now, the ECJ did not, at least seemingly, put much emphasis on the choice of the reference system in the judgments. In the *Italian Textile* case in 1974 the ECJ stated that for the selectivity assessment it was essential that the Italian measure exempted undertakings of a particular industrial sector from the financial charges arising from the *normal application of the general social security system*. This made the measure selective.<sup>135</sup> Furthermore, in *Forum 187* judgment in 2003 the ECJ stated that the tax measures under scrutiny “constitute derogations from the *ordinary*

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<sup>128</sup> Case C-88/03, Portuguese Republic v Commission of the European Communities (2006), para 56.

<sup>129</sup> See chapter 4.4.

<sup>130</sup> Micheau 2014, 277.

<sup>131</sup> Micheau 2014, 229.

<sup>132</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 133.

<sup>133</sup> Alkio 2010, 72.

<sup>134</sup> Ismer and Piotrowski 2015, 561.

<sup>135</sup> Case 173/73, Italy v Commission (1974), para 15.

*Belgian tax regime*” and with this conclusion deemed the measures selective.<sup>136</sup> These choices of reference systems were made without extensive scrutiny in the judgments. However, the Commission stated already in the 1998 Notice that selectivity arises if the measure provides in favour of certain undertakings in the Member State *an exception to the application of the tax system*. The common applicable system should thus first be determined.<sup>137</sup> Already in 1992 the Commission stated that selectivity arises if the measure departs from the generally accepted benchmark tax structure.<sup>138</sup>

As the choice of the reference system is based on ECJ case law, a few guiding principles are found there. In *Paint Graphos* in 2011 the reference system was the Italian general rules of corporate taxation.<sup>139</sup> The ECJ justified its choice in the following manner: “*the basis of assessment of the producers’ and workers’ cooperative societies concerned is determined in the same way as that of other types of undertaking, namely on the basis of the amount of net profit earned as a result of the undertaking’s activities at the end of the tax year. Corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective.*”<sup>140</sup> This reasoning is in line with the 2016 Notice. It is important to note that the ECJ regarded that it is important that cooperative undertakings and other undertakings were taxed by the same principles. Therefore, the reference framework was the set of rules that applied to both types of undertakings, namely the corporate tax rules in general.

Furthermore, the ECJ’s *Paint Graphos* judgment is in line with the *Heiser* case in 2005, where AG Tizzano considered the reference framework to be the ordinary VAT (value-added tax) rules that were generally applicable.<sup>141</sup> To justify this view, Tizzano considered that other sectors than medical sector were bound by ordinary VAT rules, which made the tax measure selective. The ECJ upheld the opinion, although not justifying the choice of reference framework as extensively as AG Tizzano.<sup>142</sup> In the *Azores* case, the ECJ stated that the reference framework was as wide as the “normal” tax rate, which was in force.<sup>143</sup> This view also supports the ECJ’s view in *Paint Graphos*.

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<sup>136</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), para 120.

<sup>137</sup> Commission notice on the application of the State aid rules to measures relating to direct business taxation 98/C 348/03, para 16.

<sup>138</sup> Micheau 2014, 229.

<sup>139</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 50.

<sup>140</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 50.

<sup>141</sup> Opinion of Advocate General Tizzano, Case C-172/03 *Heiser* (2004), para 43.

<sup>142</sup> Case C-172/03 *Heiser* (2005), paras 40-42.

<sup>143</sup> Case C-88/03, *Portuguese Republic v Commission of the European Communities* (2006), paras 56 and 57.

From this point of view, Micheau says that the system the ECJ deploys as a reference framework is really wide.<sup>144</sup> In the light of the ECJ jurisprudence, this seems to be true. The ECJ has defined the reference system to be wide, such as the general system of corporate taxation of general VAT rules. This makes it more likely that the State aid measure, which is under scrutiny, is a derogation. This is because the wider the reference system is, the more likely it is that special measures derogate from it. Even though there is still no unambiguous rule on the definition of the derogation system, the case law of the ECJ seems to support the choice of a wide reference system. The definition of the reference framework is followed by the second step of the derogation test.

#### 4.3.3. Derogation from the Reference System

The second step in the derogation test is the assessment of whether the measure in question derogates from the reference system. The derogation is not enough by itself, since in order to be selective, the measure has to differentiate the situation of undertakings in comparable situations.<sup>145</sup> The Commission 2016 Notice treats more questions relating to this differentiating effect of the derogation than the derogation in a technical way.<sup>146</sup> In practice, the differentiating effect means that the measure has to grant an advantage to certain undertakings or certain sectors in order to be selective. In tax matters this has normally been a lowering in the tax base of certain undertakings.<sup>147</sup> The advantage can occur in measures that grant advantage to various undertakings, but also in measures granting advantage for single undertakings. Of importance is if the measure grants advantage to a limited number of recipients, as the GC stated in 2004.<sup>148</sup> Even if the number of beneficiaries is large or indefinite, the measure can be a derogation.<sup>149</sup> In *Paint Graphos* the ECJ formulated the second step in a way that the measure is selective if it derogates from the rule which is generally applicable to legal persons and this derogation is liable to favour certain undertakings or the production of certain goods by comparison with other undertakings which are in a comparable factual and legal situation.<sup>150</sup>

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<sup>144</sup> Micheau 2014, 281.

<sup>145</sup> See chapter 4.4.

<sup>146</sup> 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/C 262/01), OJ C 262, 19 July 2016, p. 1–50, paras 135-137.

<sup>147</sup> See for example Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011); Joined cases C-20/15 P and C21/15 P *Santander* (2016).

<sup>148</sup> Case T-308/00, *Salzgitter AG v European Commission* (2013), para 38.

<sup>149</sup> See for example Case C-143/99, *Adria-Wien Pipeline* (2001), para 48; Joined cases C-20/15 P and C21/15 P, *Santander* (2016), paras 80 and 93.

<sup>150</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), paras 51 and 54.

#### 4.3.4. APA Rulings and the Derogation from the Reference Framework

The aim of the next chapters is to analyze whether the APA rulings can pass the derogation test or whether they, according to the test, are principally selective State aid. First, I will analyze what is the right choice of the reference framework in the APA cases. Second, I will analyze whether the APA ruling deviate from the defined reference framework.

In some cases the ECJ has concluded that the reference framework cannot even be defined. In the *British Aggregate* case, the question was about an environmental tax measure, which gave preferential treatment to recycled aggregates (granular materials used in construction) in comparison with other aggregates.<sup>151</sup> The GC held that the measure in question cannot be seen as part of a general system of taxation. Because of this, the GC held that it could not define the reference framework to be compared with the measure.<sup>152</sup> The ECJ decided in a similar way in the *Lippe-Ems* case in 2015, where it maintained that a tax measure for nuclear energy was not a part of any wider system of taxation with the result that the reference system could not be defined.<sup>153</sup> However, these kinds of limitations do not occur in the APA cases since the APA rulings belong to the wider set of rules of corporate taxation. Therefore, the reference framework is principally possible to define in the APA cases.

##### 4.3.4.1. APA Rulings and the Definition of the Reference Framework

As for the choice of the reference framework, in all the APA decisions, the Commission stated that the reference framework is the general rules of taxation of corporate profit in the Member State concerned.<sup>154</sup> In the absence of comprehensive guidelines for the choice of reference framework, the Commission did not clearly provide the rules on which the choice of the reference framework is based. The Commission merely cited the 2016 Notice, which says that “reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective.”<sup>155</sup> This choice of reference framework was subjected to criticism. For example, the Netherlands and Starbucks

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<sup>151</sup> Case T-210/02, *British Aggregates* (2006), paras 2 and 21.

<sup>152</sup> Case T-210/02, *British Aggregates* (2006), para 115.

<sup>153</sup> Case C-15/14 P, *MOL* (2015), para 79; the case followed the Opinion of Advocate General Szpunar in case C-15/14 P, *MOL* (2015).

<sup>154</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 228; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 194; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 232.

<sup>155</sup> See for example Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 231.

argued that the reference framework should not be as wide as the Dutch general rules of taxation of corporate profit.<sup>156</sup>

However, in the ECJ case law, there is support for the Commission's choice of this wide reference framework. In all the APA decisions, the Commission has referred to the ECJ's *Paint Graphos* case. Indeed, in *Paint Graphos*, the ECJ concluded that the reference system was the corporation tax rules in general.<sup>157</sup> The case was about a tax measure giving preferential treatment to cooperative societies. The ECJ justified this choice of reference framework by stating that the basis of assessment of the taxation of cooperative societies and other undertakings is determined in the same way, under the principles of the corporate taxation rules in general.<sup>158</sup> In the APA decisions, the Commission has justified the choice of the reference system in a similar manner; multinationals and standalones are taxed in a same manner under the general corporate tax rules. Even if there are differences in defining the taxable profits, the main principles of the corporate taxation apply to all undertakings.<sup>159</sup> The taxation of the beneficiary undertakings of the APA rulings are profit-based, just like the taxation of standalone undertakings.<sup>160</sup> Since the APA rulings form a part of the corporate tax rules in general, there is no such difficulty in defining the reference framework as there was, for example, in the *Lippe-Ems* case. The APA rulings are not self-standing because they form a part of the general corporate taxation. This justifies further the decision that general corporate tax rules form the reference framework.

In the 2016 Notice, the Commission states directly that the reference framework can be the corporate income tax system.<sup>161</sup> In addition to this wording used in *Paint Graphos*, in *Forum 187* case the ECJ used the term "ordinary tax system" and "ordinary Belgian tax regime".<sup>162</sup> In *Forum 187*, the ordinary tax system was defined as the system taxing the undertakings as if they were in conditions of free competition.<sup>163</sup> In this case the ECJ did not define further what actually was the "ordinary tax system". It could be the rules setting the arm's length principle

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<sup>156</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 193.

<sup>157</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 50.

<sup>158</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 50.

<sup>159</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 236; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 229; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 198.

<sup>160</sup> Jaeger 2017, 6.

<sup>161</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 134.

<sup>162</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), paras 95 and 120.

<sup>163</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), para 95.

or it could also be the general corporate taxation rules as in *Paint Graphos* and in the Commission's APA decisions.

In the *NOx* case, the ECJ stated that while the undertakings had fiscal liabilities under the measure in question, they were in a comparable situation.<sup>164</sup> The ECJ did not explicitly state what the reference framework was in this case, but the judgment suggests that the liability factor has to be taken into account when defining the reference framework. The findings of the ECJ in this judgment can be applied to APA cases as well. As the objective of the APA rulings is ultimately to set corporate tax liability on undertakings, all undertakings, whether multinationals or standalones, are in a comparable situation. This leads to the conclusion that in order to take all their positions into account in the same way as in the *NOx* case, the reference framework should be the corporate taxation rules in general also in the APA cases.

In the decision concerning Apple, the Commission further justified the choice of the reference framework. The Commission stated that the objective of the APA rulings was to arrive at an annual taxable profit that ensured that Apple was taxed in a similar manner to standalone companies under the ordinary rules of taxation of corporate profit in Ireland.<sup>165</sup> If this was not the objective of the APA ruling, it would raise suspicions of selectivity by its own account. This reasoning is well in line with the *Paint Graphos* case, where the ECJ put emphasis on the fact that the taxes of different undertakings were determined in the same way under the general rules of corporate taxation, which therefore was the reference framework.

It can therefore be concluded that in the light of the ECJ case law the Commission's choice of reference framework in the APA decisions was well-founded.

#### 4.3.4.2. *APA Rulings and Derogation from Reference Framework*

The next question after the definition of the reference framework is whether there is a derogation from the reference framework in the APA rulings and whether this derogation differentiates the situation of the recipients in comparison with other undertakings in a comparable situation. The assessment of whether there is a derogation is rather straightforward after defining the reference framework. In a case where there is a deviation from the arm's length principle in the APA ruling, there is a derogation from the general rules of taxation of corporate profits, because the general rules are based on the taxation of the real profits of

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<sup>164</sup> Case C-279/08, *European Commission v Kingdom of Netherlands* (2011), para 64.

<sup>165</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 243.

undertakings. This is what also the Commission stated in the APA decisions.<sup>166</sup> Therefore, a derogation has taken place in the APA rulings.

However, the derogation in itself is not enough to conclude that the APA rulings grant selective advantage. To be selective, the APA rulings have to differentiate the situation of the beneficiary undertakings compared to that of other undertakings in a comparable situation. Hence, an important question considering this assessment is that what undertakings are in a comparable situation. As the Commission has pointed out in the APA decisions, the deviation from the arm's length principle has granted the recipient undertakings advantage. If standalone undertakings are in a comparable situation with the recipient undertakings, the selectivity is, principally, at hand. This is because standalone undertakings cannot benefit from APA rulings. In the next chapters, I will analyze which undertakings are in a comparable situations concerning the APA rulings.

#### 4.4. Comparable Factual and Legal Situations

A deviation from the reference framework is not enough for the tax measure to be selective. As explained above, the tax measure is selective only if it also differentiates the situation between undertakings *in comparable situations*. The comparability principle was introduced by the ECJ in 2001 in *Adria-Wien Pipeline*. Here the ECJ stated that if the tax measure favours certain undertakings or the production of certain goods in comparison with other undertakings that are in a comparable factual or legal situation, the selectivity is at hand.<sup>167</sup> The ECJ has confirmed this view in various cases.<sup>168</sup>

Even if the ECJ has been quite consistent considering the very existence of the comparability principle in the selectivity assessment, the wording of the case law has varied in some significant aspects. In some cases, as *Adria-Wien Pipeline*, the ECJ has stated that the comparability of undertakings is assessed in the light of the objective pursued by *the measure in question*.<sup>169</sup> This means that in order to assess whether undertakings are in a comparable situation, the framework is the objective of the tax measure that is under scrutiny in the case in hand. In *Adria-Wien Pipeline*, the question was about an Austrian tax measure that taxed the

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<sup>166</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 361; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 217; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 253.

<sup>167</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), para 41.

<sup>168</sup> For instance Case C-308/01, *GIL Insurance* (2004), para 68; Case C-409/00, *Kingdom of Spain v Commission of the European Communities* (2003), para 47; Case C-88/03, *Portuguese Republic v Commission of the European Communities* (2006), para 54.

<sup>169</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), para 41.



consumption of energy of the undertakings. The tax measure granted tax compensation of taxes charged on natural gas. However, the compensation was granted only to undertaking that provided goods.<sup>170</sup> The ECJ saw that the objective of this measure was to decrease the harm made for the environment. From this point of view, the undertakings producing goods and undertakings producing services in the energy field were in a comparable situations and the selectivity was at hand.

In 2004, the ECJ changed the wording of the comparability assessment in the *GIL Insurance* case. In this case, the ECJ stated that comparability is assessed in the light of the objective of the *system in question*.<sup>171</sup> In *Paint Graphos* in 2011 the ECJ refined even further its view of the assessment of comparability. Here the ECJ stated that the comparability of the undertakings is viewed in the light of the objective pursued by the reference framework, namely the general tax measure. In *Paint Graphos* this reference framework was the corporation tax regime of Italy. The objective, according to the ECJ, of this measure was no less than the taxation of company profits in general.<sup>172</sup> This means that instead of assessing comparability in the light of the objective of the special tax measure that is being assessed, the assessment is made in the light of the general tax measure that serves as the reference framework. This can make a substantive difference since the objective of the reference framework can be a lot more general than the objective of the potentially selective measure that is being assessed. As a result of this development, a wider variety of undertakings is in comparable situations. For example, in the light of the objective of the taxation of company profits in general, it is hard to see which undertakings that make profit would not be in a comparable situation.

In the recent *Santander* judgment, the ECJ confirmed this view that was established in the *Paint Graphos* case. Here the ECJ stated that criterion for selectivity is whether the tax measure introduces a distinction between undertakings that are, in the light of the objective pursued by *the general tax system concerned*, in a comparable factual and legal situation.<sup>173</sup> In this case the ECJ accepted the view of the Commission that the reference framework was the general Spanish system for the taxation of companies.<sup>174</sup> This, in turn, had a strong consequence on the comparability assessment since now the comparability was assessed in the light of the objective of the General Spanish system for the taxation of companies.

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<sup>170</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), paras 4-8.

<sup>171</sup> Case C-308/01, *GIL Insurance* (2004), para 68.

<sup>172</sup> Joined cases C-78/08 and C-80/08, *Paint Graphos* (2011), para 54.

<sup>173</sup> Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 60.

<sup>174</sup> Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 63.

This change makes a difference since the more general the tax measure is, usually the more general the objective of the measure is as well. As comparability is assessed in the light of this objective, a more general objective places a greater amount of undertakings in a comparable factual or legal situation. *Paint Graphos* is a good example as there the ECJ held that the objective was the taxation of company profits in general. Although the final decision was left for the national court that had asked for the preliminary ruling, this potentially placed cooperative societies and other undertakings in comparable situations.<sup>175</sup>

However, the position of the ECJ about this matter has been rather inconsistent. In *Lippe-Ems* in 2015 the ECJ stated that the tax measure levying nuclear fuel was not selective. Before this conclusion, the ECJ viewed the situations of nuclear plants and other electricity undertakings in the light of the objective of this special tax measure that levied nuclear fuel.<sup>176</sup> In the light of the objective, namely the taxation of nuclear fuel, they were not in comparable situations. That was because the objective of this tax measure was to tax nuclear fuel. Other undertakings in the electricity field naturally did not use nuclear fuel and were therefore not in a comparable situation.

This case serves as a clear example of the importance of the choice of the measure under which comparability is assessed. If the measure under which the assessment was made had been more general, other undertakings in the electricity field could have been in a comparable situation and consequently the tax measure would most possibly have been selective. The ECJ did not directly define the reference framework in this case but rather jumped to the comparability assessment. By doing this, the ECJ followed the view of Advocate General Szpunar that since the taxation of electricity production is so diverse, there is no reference framework for it.<sup>177</sup> This view of the assessment of comparability may seem casuistic, and it makes the legal situation harder to predict. In *Lippe-Ems*, there might have been casuistic objectives to encourage Member States to have political choices to ensure eco-friendliness according to the Commission Actions Plan on State aid, which mentions these kind of objectives.<sup>178</sup>

It seems, however, that lately comparability has been assessed in the light of the objective of the reference framework. For example, in *Navantia* case in 2014 the ECJ assessed comparability in the light of the reference framework, namely the Spanish tax regime and its

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<sup>175</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 63.

<sup>176</sup> Case C-5/14, *Lippe-Ems* (2015), para 74.

<sup>177</sup> Opinion of Advocate General Szpunar in case Case C-5/14, *Lippe-Ems* (2015), paras 70-72.

<sup>178</sup> European Commission, State Aid Action Plan - Less and better targeted state aid: a roadmap for state aid reform (2005 - 2009) para 46.

objective to tax the ownership or use of land.<sup>179</sup> In *P Oy* case in 2013 the ECJ also used the reference framework tax system as the basis of the comparability assessment.<sup>180</sup> Consequently, in the light of extensive case law and above all the *Santander* judgment in December 2016, the conclusion is that most likely comparability is viewed in the light of the objective of the general tax measure that works as the reference framework. The Commission has also confirmed this by using a following definition in the 2016 Notice: "...a similar factual and legal situation, in the light of the intrinsic objective of the system of reference."<sup>181</sup> This has effects on the APA cases as well.

Furthermore, the APA cases are not comparable with the situation in *Lippe-Ems* in that sense that there is no such a diversity of taxation measures in the field of the general taxation of corporate profit. Indeed, the Commission stated in all the APA decisions that the reference system was the general corporate income tax system of the Member State concerned. The objective of these reference systems was, as in *Paint Graphos*, the taxation of the corporate profits.<sup>182</sup> Considering the case law, this view seems plausible since in the case law the basis of the comparability assessment has predominantly been the objective of the reference framework. Furthermore, the exceptional situation as in *Lippe-Ems* was not at hand in the APA cases. In *Lippe-Ems*, the AG saw that the definition of the reference framework was not possible due to the various tax regimes of different energy productions. In the field of information technology, coffee resale and car manufacturing there is no this kind of fragmentation, so the reference framework is easier to define. All these fields are taxed by the principles of corporate taxation system in general.

It seems that when assessing comparability, the objective of the reference framework tax system is decisive. It is argued that for example in *Paint Graphos* the ECJ emphasized the fact that the undertakings in comparable situations competed in the same market.<sup>183</sup> Also some scholars underline the importance of the competition of the undertakings in the assessment of comparability.<sup>184</sup> This indeed should matter in the selectivity assessment considering the wording of Article 107 TFEU, "liable to distort competition". However, for example in *Lippe-*

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<sup>179</sup> Case C-522/13, *Navantia* (2014), para 38.

<sup>180</sup> Case C-6/12, *P Oy* (2013), para 19.

<sup>181</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 135.

<sup>182</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, paras 228 and 441; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 232; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 194.

<sup>183</sup> *Cisotta* 2016, 136; *Lang* 2016, 36.

<sup>184</sup> *See for example Nicolaidis and Rusu* 2012, 802.

*Ems*, the compared undertakings were competing in the same market but still the ECJ saw that they were not in comparable situations. This means that the assessment in the light of the objective of the reference system has to be the starting point when analyzing the comparability in the APA cases. Therefore, even if the tax measure is liable to distort competition, it may not be selective. The ECJ does not require unequal treatment of competing undertakings for selectivity.<sup>185</sup> This became clear for example in *Adria-Wien Pipeline*, where AG's view was that selectivity was not at hand because the undertakings benefiting from the measure and the undertakings not benefiting did not compete in the same market.<sup>186</sup> The ECJ quashed this view in its judgment. It held that the measure was selective even in these circumstances, because the objective of the measure was decisive when assessing the undertakings that are in comparable situations.<sup>187</sup> However, it is seen that even if there is no unequal treatment between competing undertakings within the Member State under consideration, the measure might have effect on competing undertakings in other Member States.<sup>188</sup>

#### 4.5. Comparability in the APA Decisions

##### 4.5.1. Background

An important question concerning the APA decisions is whether multinational undertakings and standalone undertakings can be in a comparable factual or legal situation. The question is important because if multinationals and standalones are in a comparable situation, the selectivity is most likely at hand in the APA rulings. This is because APA rulings differentiate the situation between multinationals and standalones, because standalones cannot benefit from the APA rulings the way multinationals can. This is because standalones cannot benefit from deviations from the arm's length principle, since standalones do not transfer price.

The U.S Department of Treasury argues that according to the case law of the ECJ, a difference in treatment between multinationals and standalones is not necessarily selective.<sup>189</sup> Furthermore, during the Commission investigation, the Netherlands also stated in the process of the APA decision that affiliated and unaffiliated companies are not always in comparable situations.<sup>190</sup> So was the statement of Starbucks itself.<sup>191</sup> Also some scholars have claimed that multinationals should be separated from standalones in the comparability assessment and the

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<sup>185</sup> De Cecco 2013, 98.

<sup>186</sup> Opinion of Advocate General Mischo, Case C-143/99, *Adria-Wien Pipeline* (2001), para 78.

<sup>187</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), para 41.

<sup>188</sup> De Cecco 2013, 42.

<sup>189</sup> U.S. Treasury 2016, 10.

<sup>190</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 185.

<sup>191</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 193.

assessment of selectivity of the APA rulings should be made comparing only multinationals.<sup>192</sup> Indeed, the question is whether multinationals and standalones can be in comparable factual or legal situations, and this is assessed by the method developed by the ECJ. In the next chapter I will analyze whether multinationals and standalones are in a comparable situation concerning the APA rulings.

#### 4.5.2. Comparability of Multinationals and Standalones

The objective of this chapter is to analyze whether standalone companies can be in a comparable situation with the beneficiaries of the APA rulings. The question is important since standalone companies cannot benefit from transfer pricing arrangements in a form of tax benefits like the multinationals can.<sup>193</sup> If standalones are in comparable situation, it most probably means that the APA rulings are selective. This is because the APA rulings exclude undertakings from the benefits of the tax measure, which is a key condition for selectivity.<sup>194</sup> The APA rulings of this kind are not in practice open to standalone companies.

As seen above, comparability should be viewed from the perspective of the objective of the general measure in question.<sup>195</sup> As explained above, this is an established rule in ECJ jurisprudence. This possibly makes a substantive difference in the selectivity assessment, since in this case it might not be only other multinationals that are in a comparable situation concerning the APA rulings. Perhaps because of this the U.S. Department did not raise this in its White Paper, but instead referred to ECJ case law which states the outdated rule that comparability is viewed in the light of the *measure* in question.<sup>196</sup> Indeed, leaning on this outdated case law, the U.S. Department argued that multinational and standalone companies are not in a comparable legal or factual position.<sup>197</sup>

The Netherlands claimed that the reference framework should be the rules in the corporate income tax law and a Dutch Decree that provides rules on the application of the arm's length principle.<sup>198</sup> This choice of reference framework would mean that standalones are not in a comparable situation with the beneficiary undertakings. Fiat also claimed that standalones do not belong to the same reference system, and as a consequence are not in a comparable

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<sup>192</sup> See for example Gormsen 2016, 377.

<sup>193</sup> See for example Szolno-Kogue and Twarowska 2014, 68.

<sup>194</sup> Micheau 2014 226; Kavanagh and Robins 2015, 360.

<sup>195</sup> See for instance Joined cases C-20/15 P and C21/15 P, Santander (2016), para 60.

<sup>196</sup> U.S. Treasury 2016, 10.

<sup>197</sup> U.S. Treasury 2016, 13.

<sup>198</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 183.

situation.<sup>199</sup> However, the *Paint Graphos* case gives us indications about how the result of the comparability assessment might be in the APA cases. As stated, the Commission estimated that the reference framework in the APA cases is the general corporate income tax system of the Member State concerned. The objective of this reference framework is the taxation of the corporate profits.

In the light of the ECJ case law, this choice of the reference system of the Commission is accurate. According to the Commission in the decision on Apple, the identification of the reference system depends on elements such as the taxable persons.<sup>200</sup> This is based on the 2016 Notice.<sup>201</sup> Also the ECJ has stated that since the measure in question did not apply to all economic operators, it could not be considered to be a general measure.<sup>202</sup> Furthermore, in the *Gibraltar* case the ECJ stated that the general measure is applicable without distinction to all economic operators.<sup>203</sup> The general corporate income tax system of the Member States concerned applies to all undertakings without distinction, and the choice is in line with the recent ECJ case law. This choice is in line also with the *Navantia* case, where the question was about a tax measure favouring certain operators who owned immovable property. The ECJ stated that the reference system was the tax regime that entailed a liability of property tax without distinction between operators.<sup>204</sup> This reasoning applies to the APA cases. Since the APA rulings that are under assessment decreased the corporate taxation, the reference framework should be a tax regime that taxes corporate profits without making a distinction between operators. This is why the general corporation tax regime is an accurate definition of the reference framework in the APA cases.

In its decision on Starbucks, the Commission emphasized the fact that also standalone companies can carry out functions that are similar to those of the sub-company of Starbucks.<sup>205</sup> So was the Commission's argument in the decision concerning Fiat and in the decision concerning Apple.<sup>206</sup> In this sense, it can be seen that the Commission put emphasis on the fact that also standalone companies can compete with Starbucks, Fiat and Apple. This led the

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<sup>199</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 200.

<sup>200</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 227.

<sup>201</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 134.

<sup>202</sup> Case C-148/04 Unicredito Italiano (2005), para 49; Joined cases C-393/04 and C-41/05, Air Liquide Industries (2006), para 32.

<sup>203</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 74.

<sup>204</sup> Case C-522/13, Navantia (2014), para 36.

<sup>205</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 243.

<sup>206</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 206; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 234.

Commission to conclude that the reference framework is the general rules of the corporation taxation of the Netherlands.<sup>207</sup> Taking into account the competitive status of the undertakings is in line with the wording of Article 107 TFEU and also with the wording of the ECJ, “in a comparable *factual* situation”. Also, as stated, the ECJ has, at least presumably, paid attention to the competition factor when assessing comparability in the *Paint Graphos* case. Here the ECJ held that cooperative societies can have a tax benefit that other undertakings cannot.<sup>208</sup> This statement of the Commission justifies the choice of the reference framework. If the framework was selected, as the Netherland and Starbucks wished, to be a more narrow set of rules concerning the arm’s length principle, it would not have applied without distinction to all undertakings and therefore would have not been general in a way that is in line with ECJ case law, as explained above.<sup>209</sup>

In addition, the ECJ noted and emphasized in *Paint Graphos* that cooperative undertakings tax is rated fundamentally in the same way as for other undertakings. “The basis of assessment of the producers’ and workers’ cooperative societies concerned is determined in the same way as that of other types of undertaking, namely on the basis of the amount of net profit earned as a result of the undertaking’s activities at the end of the tax year. Corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective.”<sup>210</sup> The Commission used similar reasoning in the APA cases.<sup>211</sup> Multinationals and standalones are taxed in a similar manner under the general tax laws of the Member States. This, according to the ECJ’s reasoning in *Paint Graphos*, supports the choice of this kind of wide reference system that includes all the undertakings concerned, in the APA cases multinationals and standalones.

As seen above, the Commission has stated that the objective of the reference system of the APA rulings, general corporation taxation rules, is taxation of corporate profits. In the light of this objective, the situation of standalones and multinationals is factually and legally similar. This objective applies to both multinationals and standalones. Since the comparability of undertakings is assessed in the light of the reference system in question, this makes

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<sup>207</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 244.

<sup>208</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 51.

<sup>209</sup> Case C-148/04 *Unicredito Italiano* (2005), para 49; Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 54.

<sup>210</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 50.

<sup>211</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 199; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 236, Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, paras 229 and 241.

multinationals and standalones comparable. As standalones cannot, due to their structural limits, benefit from deviations of the arm's length principle, the APA rulings are selective.

If standalones are in a comparable situation, selectivity is rather straightforward to assess. In this case, the analysis to determine if tax provisions are available to all undertakings is easy, since in practice standalones cannot benefit from the APA rulings that deviate from the arm's length principle. Selectivity would be at hand. Already in 2003 the Commission stated that a tax ruling granted selective advantage to certain undertakings when the benefit it granted was not available to other undertakings in comparable situations.<sup>212</sup>

The Commission has had, however, distinct opinions about the comparability of multinational and standalone undertakings. For example in its decision from 2009, the Commission held that loans between multinationals and standalones are not in a comparable situation.<sup>213</sup> So was the view of the Commission in another case from 2009, which treated a difference in tax treatment between multinationals and standalones.<sup>214</sup> However, when assessing comparability in the light of the objective of the reference framework, as the ECJ has established, the situation differs from these decisions, and multinationals and standalones are in a comparable situation in the APA cases.

As multinationals and standalones are in a comparable situation concerning the APA rulings, it can be concluded that according to first two steps of the derogation test, the APA rulings are selective. First, this is because the APA rulings derogate from the reference framework. Second, with the derogation, the APA ruling differentiate the situation between the beneficiary undertakings and standalone undertakings, which cannot benefit from the APA decisions.

The third step of the derogation test is to analyze whether there is justification the derogative measure.

#### 4.6. Justification by the Nature and General Scheme of the System

If the tax measure deviates from the defined reference system and hereby grants advantage to certain undertakings in comparison with other undertakings in a comparable situation, the measure is principally selective. The third step of the derogation test, however, is a possibility

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<sup>212</sup> Commission decision C(2003) 1868 (2004/77/EC) on the aid scheme implemented by Belgium — Tax ruling system for United States foreign sales corporations, para 62.

<sup>213</sup> Commission decision C(2009) 8130 on State aid C 10/07 (ex NN 13/07) implemented by Hungary for tax deductions for intra-group interest, para 111.

<sup>214</sup> Commission decision C(2009) 4511 (2009/809/EC) on the Groepsrentebox Scheme which the Netherlands is planning to implement.



for the Member State to prove that although being selective, the measure is not illegal State aid. In the third step, it is assessed whether there is justification for the measure by the nature or the general scheme of the system itself. The ECJ has confirmed this step in various cases.<sup>215</sup> Even if this third step concerns strictly the justification for the selectivity of the measure, since the conditions for State aid are cumulative, the existence of justification means that the measure is not illegal State aid.<sup>216</sup>

In *Paint Graphos* the ECJ explained the third step in a following manner: there is a justification if a measure derives directly from basic or guiding principles of the reference system.<sup>217</sup> The justification can be only based on the objectives inherent in the tax system itself. The measure has to be necessary for the achievement of such objectives. Extrinsic objectives, such as policy choices not directly derived from the reference system, cannot justify the derogation.<sup>218</sup> For example, the ECJ has stated that environmental objectives not derived from the reference system cannot be taken into account when assessing the justification.<sup>219</sup> The ECJ has also stated, inter alia, that advantages which are based on objectives unrelated to the tax system, such as employment, cannot be justified.<sup>220</sup> Instead, the derogation measure has to be necessary for the functioning and effectiveness of the general tax system that it serves as a reference framework.<sup>221</sup> In other words, the derogation has to result directly from the basic or guiding principles of the reference system.<sup>222</sup>

In *Paint Graphos* the ECJ stated that tax exemption for cooperative societies might be justified in the light of the nature and general scheme of the tax system concerned.<sup>223</sup> This can be justified because the tax burden is only on the level of the members of the cooperatives, which makes the exemption logical in the light of the nature of the reference system, which aims to tax profits. In addition, if the measure takes into account the different characteristics of undertakings and therefore a need for adapted tax rules, this can be a justification.<sup>224</sup>

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<sup>215</sup> Case 173/73, *Italy v Commission* (1974), paras 15 and 33; Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* (1999), para 33, Case C-143/99, *Adria-Wien Pipeline* (2001), para 42.

<sup>216</sup> Micheau 2014, 248.

<sup>217</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 69.

<sup>218</sup> Case C-88/03, *Portuguese Republic v Commission of the European Communities* (2006), para 81.

<sup>219</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), para 52; Case C-487/06 P, *British Aggregates* (2008), para 92.

<sup>220</sup> Case C-6/12, *P Oy* (2013), para 27.

<sup>221</sup> Case C-88/03, *Portuguese Republic v Commission of the European Communities* (2006), para 83.

<sup>222</sup> Case C-6/12, *P Oy* (2013), para 22.

<sup>223</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 76.

<sup>224</sup> Micheau 2014, 253.

However, in general, the application of the third step by the ECJ and the Commission has been strict and decisions of existing justification are scarce. In one decision the Commission maintained that when agricultural undertakings were exempted from land tax it could be justified because of the specific role of land in agricultural production.<sup>225</sup> However, in the Commission's view, a tax measure established to support the competitiveness of banking sector was not justified. This was the case even if there were some distinctive characteristics of banking sector that could justify special tax measures.<sup>226</sup> Also a tax measure with an aim to enhance the competitiveness of undertakings committing cross-border financial activities was not justified in the Commission's view.<sup>227</sup> Based on the ECJ jurisprudence, it seems that there has to be exceptional reasons for the justification to take place and the reasons are usually based on the specific conditions of the undertakings that benefit from the tax measures. There have been even claims that due to its narrow interpretation, the third step of the derogation test is quite useless.<sup>228</sup>

As a result, the Commission or the ECJ has rarely concluded that there is a justification for the measure once it has shown to confer selective advantage.<sup>229</sup> In the next chapter I will analyze whether the APA rulings could be justified by the nature or the general scheme of the system itself.

#### 4.7. Justification of the APA Rulings

As a mere concept, the APA rulings can be justified since they work to eliminate uncertainties inherent to tax laws.<sup>230</sup> However, if the APA rulings deviate from the reference framework and therefore grant a priori selective advantage to the recipients in comparison with other undertakings, the justification criterion is more difficult to fulfill.

APA rulings that deviate from the arm's length principle and this way give advantage to the recipient undertakings are hardly necessary for the functioning and effectiveness of the general tax system, in this case the general corporate profit tax system. As seen above, measures intended only to enhance competitiveness are not justified even if there would possibly be reasons for special tax measures due to certain distinctive characteristics of recipient

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<sup>225</sup> Micheau 2014, 253.

<sup>226</sup> Commission decision C(2001) 3955 (2002/581/EC) on the tax measures for banks and banking foundations implemented by Italy, para 32.

<sup>227</sup> Commission decision C(2003) 568 (2003/515/EC) on the State aid implemented by the Netherlands for international financing activities, para 94.

<sup>228</sup> Ismer and Piotrowski 2015, 565.

<sup>229</sup> Micheau 2014, 252.

<sup>230</sup> Ismer and Piotrowski 2015, 565.

undertakings. Indeed, the Commission stated in the APA decisions that it has not found grounds for justification for the selective tax advantage granted for Starbucks, Fiat and Apple.<sup>231</sup> This view, in principle, goes well in line with the ECJ case law and the Commissions prior decisions. The beneficiaries of the APA rulings do not have similar specific characteristics, as, for example, cooperative societies and agricultural undertakings, which would possibly support the justification. As Rossi-Maccanino says, the sole aim of providing more attractive tax conditions for cross-border investments is not a valid justification.<sup>232</sup>

Furthermore, based on the ECJ case law the burden of proof to show the justification is on the Member State.<sup>233</sup> This principle is also confirmed in the Commission 2016 Notice.<sup>234</sup> It would have been the task of Member States to show justification for the APA rulings which they, according to the Commission in the APA decisions, have not done.<sup>235</sup>

In *Paint Graphos* the ECJ introduced an additional obligation for Member States in order to fulfill the justification step. The ECJ stated that the Member State concerned has to introduce and apply appropriate control and monitoring procedures in order to ensure that specific tax measures introduced are consistent with the logic and general scheme of the tax system.<sup>236</sup> The ECJ stated explicitly that this has to be done in order to avoid the situation in which the undertakings take advantage of the tax benefits provided.<sup>237</sup> This seems like a further statement that the third step is interpreted strictly in order to ensure that the tax measure does not grant selective advantage that undertakings would be able to use to gain economic advantage. This interpretation of the ECJ makes it even harder to prove that the APA rulings were a justified measure. This is because it seems that the undertakings concerned in the APA rulings were exactly seeking economic advantage, and this advantage was granted by derogating from the reference framework.

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<sup>231</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 414; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 338; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 411.

<sup>232</sup> Rossi-Maccanino 2015(2), 373.

<sup>233</sup> See for example Case C-159/01, Kingdom of the Netherlands v Commission of the European Communities (2004), para 43.

<sup>234</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 141.

<sup>235</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 413; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 337; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 405.

<sup>236</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 74.

<sup>237</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 74.

Furthermore, in *Paint Graphos* the ECJ introduced that the measure, in order to be justified by the third step, has to be proportionate. The ECJ stated that it is also necessary to ensure that exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures.<sup>238</sup> Also in this light, the APA rulings could hardly be justified, as the deviations from the arm's length principle have been substantial and therefore they have given substantial tax benefits for the beneficiary companies. As the Commission's Directorate-General for Competition has stated in its working paper, the focus of State aid rule enforcement is on cases where there is a manifest breach of the arm's length principle.<sup>239</sup> In the APA cases, the breach has been manifest. To have indications of the lack of proportionality in the APA rulings, let it be said that the Commission assessed that the amount of tax benefit Ireland gave to Apple was up to 13 billion euros.<sup>240</sup>

Interestingly, in contrary to the APA rulings, the fight *against* tax avoidance can be a justification of a tax measure that derogates from the reference framework.<sup>241</sup> In the Commission 2016 Notice the need to fight fraud and tax evasion is stated as one possible ground for justification.<sup>242</sup> This was the case in the *GIL Insurance* case: the tax measure, which was a derogation from the reference framework was justified on this basis.<sup>243</sup> Furthermore, pursuing tax neutrality has been mentioned in one Commission decision as a ground for justification.<sup>244</sup> As the APA rulings, presumably, are made in order to *approve* tax avoidance of the undertakings, it is not surprising that the conditions of justification are particularly difficult to fulfill.

After analyzing the conditions of the third step based on jurisprudence, it is not a surprise that neither of the Member States concerned has claimed that the APA rulings fulfill the conditions of justification.<sup>245</sup> It would have demanded, indeed, a lot of imagination to justify the APA rulings in the light of the nature or the general scheme of the reference system.

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<sup>238</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 75.

<sup>239</sup> Directorate General Competition Working Paper On State Aid And Tax Rulings, 3 June 2016, para 23.

<sup>240</sup> Commission Press Release 30 August 2016.

<sup>241</sup> Micheau 2014, 253.

<sup>242</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 139.

<sup>243</sup> Case C-308/01, *GIL Insurance* (2004), paras 74 and 78.

<sup>244</sup> Commission decision C(2002) 2006 (2003/193/EC) on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding, para 81.

<sup>245</sup> Case T-778/16: Action brought on 9 November 2016 – Ireland v Commission; Case T-760/15: Action brought on 23 December 2015 — Netherlands v Commission; Case T-755/15: Action brought on 30 December 2015 — Luxembourg v Commission.

## 4.8. Open-Ended Groups and Selectivity

### 4.8.1. Background

As seen above, there is rather solid support for the claim of the Commission that multinationals and standalone undertakings are in a comparable situation in the APA rulings. The result of this view is that if the APA rulings grant advantage to the beneficiary undertakings, they are very likely selective State aid. This is because standalone undertakings cannot benefit from the deviation from the arm's length principle in a way that the beneficiary undertakings of the APA rulings have done.<sup>246</sup> This was one basis for the conclusion that the APA rulings are selective in the light of the derogation test.

However, if the case was that multinationals and standalone undertakings were not in comparable situations, the open-ended group argument would play an important role. This argument means that all undertakings in a similar situation have a formal opportunity to belong to the group. For example, in the case of the APA rulings, this would mean that all undertakings can obtain an APA ruling with similar benefits as Fiat, Starbucks and Apple did.

Indeed, the U.S. Department of Treasury claimed that the APA rulings are not selective because they are potentially open to all undertakings.<sup>247</sup> Furthermore, the appellants of the Commission's APA decisions argue that the reference system should be more limited than corporate taxation rules in general.<sup>248</sup> This would lead to the situation in which only multinational undertakings are in comparable situations. In this situation the fact that the APA rulings would be formally open to all undertakings would play a more significant role and could question the selectivity of the APA rulings.

In the following chapters, I will analyze whether this open-ended argument could have the effect that APA decisions would not be selective. However, this is secondary argumentation. That is because it would play a substantial role only in the situation where the multinationals and standalones would not be in a comparable situation.

### 4.8.2. *Santander* in the GC

The GC's *Santander* judgment might have played an inspiring role for the claim that APA rulings were not selective because they are potentially open to all undertakings.

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<sup>246</sup> See for example Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 252.

<sup>247</sup> U.S. Treasury 2016, 13.

<sup>248</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 210; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 183; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 369.

The *Santander* ruling was about a Spanish tax rule that allowed undertakings, which had shareholdings in foreign companies of 5 % or more, to deduct those companies' goodwill value from their taxable income.<sup>249</sup> This was a clear derogation from the general Spanish rules of corporate taxation benefiting undertakings with shareholdings in foreign companies. The GC acknowledged that there had been a derogation from the reference framework. The *Santander* judgment of the GC, however, was itself a derogation from the reference framework- approach.<sup>250</sup> The GC stated that the mere fact that the system derogated from the reference framework was not enough for the selectivity condition.<sup>251</sup> Therefore, even if there was a derogation from the general corporate taxation system and the derogation granted economic benefit for the beneficial undertakings of the rule, The GC stated that the measure was not selective. The main argument of the GC was that since the measure was “potentially available to all undertakings”, the category of undertakings that is favoured must be identified even if it is clear that the measure is a derogation of the reference framework.<sup>252</sup> Hence, because the measure was potentially open to all undertakings, selectivity was not at hand. Indeed, the measure was formally open to all undertakings since every undertaking can in theory acquire shareholdings in foreign companies. The GC claimed that this view is based on the ECJ’s view in many cases.<sup>253</sup> In failing to identify the undertakings favoured by the special tax rule, the Commission had not demonstrated that the selectivity criterion had been fulfilled.<sup>254</sup> The GC stated that the tax measure was not selective.

Gormsen claims that this additional demand of identifying the beneficiaries derives from the *Gibraltar* case, where the ECJ stated that the tax measure in question must characterize the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category.<sup>255</sup> However, in the *Gibraltar* case it was the offshore undertakings that benefited from the tax measure. This was not laid down in the tax measure in question but rather assessed to be a de facto consequence of the application of the contested tax measure.<sup>256</sup> Also in *Santander*, the consequence of the tax measure was that undertakings, which had acquired the foreign shareholdings benefited from the measure, unlike other undertakings.

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<sup>249</sup> Case T-399/11, *Santander* (2014), para 14.

<sup>250</sup> Case T-219/10, *Autogrill* (2014), is nearly identical to T-399/11 *Santander* judgment.

<sup>251</sup> Case T-399/11, *Santander* (2014), para 48.

<sup>252</sup> Case T-399/11, *Santander* (2014), paras 48-49 and 56.

<sup>253</sup> Case T-399/11, *Santander* (2014), para 45.

<sup>254</sup> Case T-399/11, *Santander* (2014), para 81 and 88.

<sup>255</sup> *Gormsen* 2016, 376; Joined Cases C-106/09 P and C107/09 P *Gibraltar* (2011), para 104.

<sup>256</sup> Joined Cases C-106/09 P and C107/09 P *Gibraltar* (2011), para 106.

As stated above, the claim relating to the open ended nature of the measure was raised also by the U.S. Department of Treasury when arguing against the selectivity of the APA rulings. The Commission has also taken this view in some cases. For example, in 2001 the Commission decided that an Italian tax measure that promoted the regularization of employees working in black economy was not selective because all undertakings could potentially benefit from it, even if the measure in practice benefited more certain undertakings than others.<sup>257</sup>

However, the GC itself has claimed in 2000 that even if there is no individually identified beneficiaries of a measure, this is not enough to call into question the selective nature of the measure. The measure was not aimed at one or more specific recipients defined in advance. The measure granted advantage to an indefinite number of beneficiaries who were neither initially nor individually identified. The condition for the advantage was an objective criteria that the undertakings had to fulfill in order to benefit from the measure. According to the GC, this could not suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid.<sup>258</sup> In this light, the *Santander* judgment was surprising.

The already mentioned *Lico Leasing* case, which was about a beneficial tax measure for shipping undertakings, was a judgment from the GC that is similar to *Santander*. Also in this case, the GC saw that as there was a formal availability for any undertaking to benefit from the measure, the selectivity condition was not fulfilled.<sup>259</sup> This case is, however, under appeal before the ECJ.

If we applied these findings to the APA rulings, we could see analogy in terms of the open-ended group argument. As the U.S. Department of Treasury claims, the APA rulings are formally open to all multinational undertakings. There is no any published rule from the Netherlands, Luxembourg or Ireland that categorically leave certain multinationals outside of the scope of the APA rulings. Because of this, if the GC's view of *Santander* prevailed, the APA rulings might not be selective. However, as stated, this would occur only if standalone undertakings were not in a comparable situations with multinationals.

Jaeger welcomed the *Santander* judgment by stating that it was a mere application of the rule established in the *Adria-Wien Pipeline* case, where the ECJ stated that a tax measure is not

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<sup>257</sup> Micheau 2014, 227; Commission decision of 13 November 2001, Italy- Scheme to promote the regularization of businesses in the internal economy, N 674/2001, p. 15.

<sup>258</sup> Case T-55/99, CETM (2000), para 40.

<sup>259</sup> Joined cases T-515/13 and T-719/13, Kingdom of Spain and Others v European Commission, (2015), para 180.

selective if it benefits all undertakings in national territory, without distinction.<sup>260</sup> However, the GC's judgment is not comparable with *Adria-Wien Pipeline* because in *Santander* the tax measure indeed set strict conditions that in effect differentiated the treatment of undertakings. Hence, the *Santander* judgment is also a derogation from the effect based approach. Even if there was a failure to demonstrate specific groups of undertakings benefiting from the measure, it is clear that the effects of the Spanish tax measure in hand were selectively advantaging multinational undertakings with assets in foreign countries. In this way, the GC's judgment also departs from the wording of Article 107 TFEU, which states that to be selective, the measure must "favour certain undertakings or the production of certain goods".

#### 4.8.3. Change in View, *Santander* in the ECJ

However, the recent *Santander* judgment by the ECJ departed from the GC's view. Being loyal to the reference framework- approach, the ECJ viewed that the derogation from the "normal" tax regime without justification was enough to raise the selectivity condition. Another condition was that the tax measure favours certain undertakings compared to other undertakings, which, in the light of the objective pursued by the reference system concerned, are in a comparable factual and legal situation.<sup>261</sup> As there are undertakings that have a foreign shareholding of at least 5% of the foreign undertaking and others that do not, and both types of undertakings fall within comparable situations, the Spanish tax rule is selective. The ECJ agreed with Advocate General Wathelet's opinion, in which the measures were deemed selective as well.<sup>262</sup> Wathelet stated that the GC's judgment had been excessively formalistic and restrictive in seeking to identify a particular category of undertakings that are exclusively favoured by the measure. This way, according to Wathelet, the GC had not concentrated on the essential question, which is whether the measure actually differentiates between undertakings in comparable situations.<sup>263</sup> Wathelet, like the ECJ, concentrated on the derogation test when assessing the selectivity of the measure.<sup>264</sup> Furthermore, the ECJ itself stated that the additional requirement of identifying certain undertakings that are favoured cannot be inferred from the Court's case law.<sup>265</sup>

In the judgment, the ECJ approached the conditions in a clear and simple manner. If the measure differentiates between undertakings which fall within the scope of the derogating measure and which fall within the ordinary measure and these undertakings are in a comparable situation,

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<sup>260</sup> Jaeger 2015, 353; Case C-143/99, *Adria-Wien Pipeline* (2001), para 35.

<sup>261</sup> Joined cases C-20/15 P and C21/15 P, *Santander S* (2016), paras 57 and 58.

<sup>262</sup> Opinion of Advocate General Wathelet, Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 140.

<sup>263</sup> Opinion of Advocate General Wathelet, Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 85.

<sup>264</sup> Opinion of Advocate General Wathelet, Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 91.

<sup>265</sup> Joined cases C-20/15 P and C21/15 P, *Santander S* (2016), paras 71 and 78.



selectivity is at hand.<sup>266</sup> This view applies to the APA rulings as well. Many undertakings, not only standalones, have in practice not acquired an APA with a beneficial derogation from the arm's length principle. Hence, they have fallen within the ordinary tax measure and, consequently, there has been different treatment between the beneficiary undertakings in the APA rulings and other undertakings.

The ECJ's *Santander* ruling is remarkable in two ways. First, it stated clearly that the derogation test is still an important starting point when assessing the selectivity of the issue. Second, the ECJ stressed the importance of the effects of the measure. Instead of looking at the measure in a highly formalistic way as the GC did, the ECJ considered the effect-based approach important, since the Spanish tax rule was indeed de facto selective. This is reasonable considering the wording and the objective of State aid rules themselves. This point is important considering the APA rulings. Even if there is a formal possibility for other multinationals to get an APA ruling, selectivity is at hand if there is a deviation from the arm's length principle, as there presumably is in the APA cases. According to the ECJ's *Santander* judgment, for the selectivity criterion it is enough to show that the tax measure favours certain undertakings. There is no need to identify certain category of undertakings that benefit from the measure. Although, in the APA cases the identification of the beneficiaries is easier than in the *Santander* case, since the APA rulings are directed to single undertakings.

The ECJ's previous case law supports the *Santander* judgment. The derogation test has consistently been a starting point for the assessment of selectivity in tax matters.<sup>267</sup> The ECJ has consistently held that even if the measure benefits a large amount of undertakings, selectivity can be at hand.<sup>268</sup> Furthermore, in 2003 the ECJ stated that even if a measure of subsidy is effectively open to large variety of undertakings, if the measure essentially benefits only certain undertakings, selectivity is at hand.<sup>269</sup>

Furthermore, in a decision from 2000 the Commission stated that tax measure was illegal State aid since it benefited steel undertakings which exported goods and which invested in foreign countries. The Commission stated that this was unfair for example for undertakings which invested domestically in Spain. This made the measure de facto selective.<sup>270</sup> This decision

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<sup>266</sup> Joined cases C-20/15 P and C21/15 P, *Santander S* (2016), paras 77 and 86.

<sup>267</sup> See chapter 4.3.

<sup>268</sup> See for example Case C-279/08, *European Commission v Kingdom of Netherlands* (2011), para 50; Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* (1999), para 32.

<sup>269</sup> Case C-126/01, *GEMO* (2003), paras 38 and 39.

<sup>270</sup> Commission decision C(2000) (2001/168/ECSC) on Spain's corporation tax laws, para 22.

supports the view of the ECJ in *Santander* since already in 2000 the Commission had taken a similar view of the State aid character of foreign investments.

#### 4.8.4. The ECJ's *Santander* Ruling and the APA Rulings

The difference between the ECJ and the GC might prove decisive considering the APA decisions because they share some substantial characteristics with the *Santander* judgment. It can be argued that the APA rulings can formally be open to all multinational undertakings just as the tax measure in the *Santander* case. If the view of the GC had prevailed, one could have even argued that every standalone company can make structural amendments and this way get an APA from the Member State. At least the U.S. Department of Treasury's argument that other multinational undertakings can attain a beneficial APA would have had more importance.<sup>271</sup> In analogy with the GC's *Santander* judgment, this claim could have resulted in a view that the APA rulings are not selective, because the Commission has not precisely specified which multinational undertaking fall outside the scope of the beneficial APA rulings. Since the ECJ's view in *Santander* judgment differs from the GC's view, these kind of argument do not play a decisive role anymore.

According to the ECJ's judgment, it is enough for the Commission to show that there has been a deviation from the reference framework and that the deviation benefits certain undertakings in comparison with others that are in a comparable situation. Even if the measure is formally open-ended, there is no need to identify all the undertakings that benefit from the measure. This view applies to the APA rulings as well. In the ECJ's judgment, the deviation from, the reference framework were seen more important than the formal open-ended nature of the measures. In addition, the effects of the measure were strongly taken into account. This is why even if standalones were not in a comparable situation with multinationals considering the APA rulings, selectivity might be at hand. Consequently, the U.S. Department of Treasury's argument of the open-ended nature of the APA rulings is not convincing.

In the next chapters I will analyze if the APA rulings are open-ended in the manner that the tax measure in the *Santander* case was according to the GC. If the APA rulings are structurally selective, they are not open-ended. In addition, I will analyze what the result of this analysis means in the light of the ECJ case law.

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<sup>271</sup> U.S. Treasury 2016, 6.

## 4.9. Structural Favouring

### 4.9.1. Background

In the APA decisions, the Commission put emphasis on the fact that standalones, due to their structure, cannot benefit from the beneficial APA decisions. As stated above, if multinationals and standalones are seen to be in a comparable situation, this implies selectivity. However, even if the measure differentiates between distinct multinationals due to their structural characteristics, selectivity is at hand even if standalones and multinationals were not in a comparable situation.

In 2004 the GC stated that what matters for a measure to be found to be selective State aid, is that the undertakings that benefit from the measure belong to a specific *category determined by the application, in law or in fact*, of the criterion established by the measure in question.<sup>272</sup> The determined category can be a structural characteristic that the recipient undertakings share. If the measure, de jure or de facto, benefits certain undertakings due to their structural quality, selectivity arises. The question whether some State aid measures favour certain undertakings due to their structural characteristics has been assessed also by the ECJ. This kind of structural favouring can occur between multinationals and standalones, but between different multinational undertakings as well. If this kind of differentiation is at hand in tax matters, the selectivity condition is most possibly fulfilled. If the tax measure differentiates between distinct multinationals due to their structural differences, it is not even necessary that multinationals and standalones are in a comparable situation. In this case, the selectivity criterion would most probably be fulfilled anyway.

Micheau mentions this kind of structural selectivity as one major form of tax selectivity in State aid matters.<sup>273</sup> Micheau mentions the legal form of the undertaking, its size, status or even financial or economic influence as a possible basis for the structural selectivity. In the next chapter, I will analyze the ECJ case law concerning the structural selectivity in State aid matters. The objective is to see what kind of structural selectivity is sufficient to fulfill the selectivity condition. Furthermore, I will apply the findings to the APA rulings in order to see if there is this kind of structural selectivity in the APA rulings that makes them selective. If the APA rulings are structurally selective, it means that they would not be even formally open to all

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<sup>272</sup> Case T-308/00, *Salzgitter AG v European Commission* (2013), para 38.

<sup>273</sup> Micheau 2014, 222.

undertakings as the GC claimed the case to be in the *Santander* case. This would further confirm the selectivity of the APA rulings.

#### 4.9.2. Structural Favouring and the APA Rulings

The APA rulings exclude a priori all standalone undertakings.<sup>274</sup> This, according to the Commission and the ECJ practice, is a strong signal of the selectivity of the measure. Even if the APA rulings exclude certain types of multinational undertakings due to their structural characters, the selectivity is most likely at hand. There is ECJ case law of cases, where undertakings have been treated differently because of their distinct structural characters.

The *Gibraltar* case is an interesting precedent considering the structural favouring of certain undertaking. In the *Gibraltar* case, the ECJ stated that if the tax measure characterizes the recipient undertakings by virtue of properties, which are specific to them and in this way favours these undertakings, the measure can be recognized selective.<sup>275</sup> In this case, it was the offshore companies that were favoured due to their inherent properties of not having employees and not occupying business premises in Gibraltar.<sup>276</sup> Even if this was not stated directly in the tax measure, the offshore companies were structurally favoured in the tax scheme of Gibraltar. According to the ECJ, this constituted selective State aid.<sup>277</sup> The demand of specific features of the undertakings that are favoured was enough to conclude that the measure was selective.<sup>278</sup> This view applies rather directly to the APA decisions. These kind of APA rulings are exclusively in favour of only multinational undertakings. Only multinationals can take the advantage of these kind of deviations of the arm's length principle offered by the APA rulings. In this way, the APA rulings characterize the recipient by virtue of properties which are specific to them, just like in the *Gibraltar* case. The multinational character is a property of undertakings and because of this property, they can be favoured in the APA rulings.

In the case of *Cassa di Risparmio di Firenze and Others* the ECJ stated that if the tax advantage is accorded on account of the undertaking's legal form, the measure is selective.<sup>279</sup> In this case, the advantage was granted for certain type of undertakings, which were governed by public law and had certain aims of public good. The tax measure treated undertakings differently due to their distinct legal forms and was deemed selective. This view of the ECJ also applies to the

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<sup>274</sup> See for example Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 267.

<sup>275</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 104.

<sup>276</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 106.

<sup>277</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 107.

<sup>278</sup> Joined cases C-20/15 P and C21/15 P, Santander (2016), para 74.

<sup>279</sup> Case C-222/04, Cassa di Risparmio di Firenze (2006), para 136.

APA rulings since the legal form of multinationals is different to that of standalone companies with their sub companies and their inherent linkages.

In *Unicredito Italiano* the ECJ stated that a measure, which favoured certain banks because they made certain type of transactions, was selective.<sup>280</sup> The tax advantages were granted for banks that had engaged in a certain type of restructuring of their structure.<sup>281</sup> The ECJ held that the measure, first of all, de facto benefited especially large banks, and second of all, benefited only certain transactions of banks which were structured in a certain way. There is a strong analogy between *Unicredito Italiano* and the APA decisions. As in *Unicredito Italiano*, in the APA rulings the advantage is possible to grant only to undertakings with certain structure, since the APA rulings can benefit only multinational undertakings. Furthermore, it is interesting to take note of the ECJ's view in *Unicredito Italiano* that the tax measure benefited especially large undertakings. This, according to the ECJ, strengthened the view of selectivity of the tax matter. Jaeger notes that the transfer pricing structures of Fiat and Starbucks were particularly complex.<sup>282</sup> This complexity has been pointed out also in the Commission's decisions.<sup>283</sup> Beneficial transfer pricing planning normally requires certain structural elements from the undertakings, which are likely to be in the reach of companies with a more complex structure and larger revenue.<sup>284</sup> Hence, like in the *Unicredito Italiano* case, the APA rulings most likely benefit large undertakings with certain characteristics in their structures. This raises the probability of selectivity in the APA rulings.

Also in the ECJ's *Forum 187* case the structural favouring was taken into account when assessing the selectivity of the tax measure. The ECJ held that the beneficial tax regime applied only to international groups having subsidiaries which are established in at least four different countries, which have capital and reserves of at least BEF 1 000 million, and have an annual consolidated turnover of at least BEF 10 000 million. The ECJ stated that the regime in question was selective because of these conditions.<sup>285</sup> These structural conditions were explicitly stated in the tax regime.<sup>286</sup> However, if the tax measure de facto excludes certain undertakings, whether standalones or multinationals, to be deemed selective there is no need for explicitly

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<sup>280</sup> Case C-148/04 *Unicredito Italiano* (2005), para 50.

<sup>281</sup> Case C-148/04 *Unicredito Italiano* (2005), para 8.

<sup>282</sup> Jaeger 2017, 3 and 4.

<sup>283</sup> Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 247; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 273.

<sup>284</sup> See for example Fuest 2013.

<sup>285</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), paras 122 and 123.

<sup>286</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), para 6.

stated conditions that exclude certain undertakings. The ECJ has confirmed this de facto based selectivity assessment in various cases.<sup>287</sup>

In addition to the cases of the ECJ, the Commission has stated that structural selectivity of a beneficial tax scheme constitutes selectivity. In *German Coordination Centres* in 2002, the Commission found that a scheme that benefited undertakings with headquarters abroad was selective in nature. Furthermore, the Commission found decisive in the selectivity assessment that the beneficial scheme applied only to intra-group activities.<sup>288</sup> The Commission confirmed this in a decision concerning *Dutch financing scheme*. It was deemed selective partly because some tax benefits of the scheme were targeted exclusively to intra-group services between distinct sub-companies of the multinational undertaking.<sup>289</sup> This view applies to the APA decisions since the APA rulings only apply to certain type of functions, namely intra-group functions, which are possible only for multinational undertakings.<sup>290</sup>

The Commission's *Åland* decision emphasizes the fact that if the tax measure de facto benefits only large undertakings, the measure is selective. The case was about a tax scheme that granted tax benefits for certain types of captive insurance companies located in *Åland*.<sup>291</sup> In fact, only undertakings with sufficiently large revenue could set up this kind of captive insurance company that could benefit from the benefits of the tax measure. The Commission held that the conditions under which the measure applies implicitly require a certain economic strength and therefore could apply only to sufficiently large companies. Therefore, the Commission considered that the measure was intended for groups of companies that were large enough to benefit from the measure, thus excluding other undertakings.<sup>292</sup> This was even though the measure did not explicitly state that only undertakings that are sufficiently large can benefit from it. Hence, de facto structural selectivity was enough. In the APA decisions, the Commission could have used similar reasoning, since they de facto most likely apply exclusively to undertakings with sufficient structural characters and with sufficient turnover

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<sup>287</sup> See chapter 4.10.

<sup>288</sup> Commission decision C(2002) 3298 (2003/512/EC) on the aid scheme implemented by Germany for control and coordination centres, para 32.

<sup>289</sup> Commission decision C(2002) 3298 (2003/512/EC) on the aid scheme implemented by Germany for control and coordination centres, para 87.

<sup>290</sup> *Information on intra-group services see for example* OECD 2014.

<sup>291</sup> Commission decision C(2002) 2410 (2002/937/EC) on the aid scheme implemented by Finland for Åland Islands captive insurance companies, para 5.

<sup>292</sup> Commission decision C(2002) 2410 (2002/937/EC) on the aid scheme implemented by Finland for Åland Islands captive insurance companies, para 52.

and capital flow between sub-companies. As Micheau states, the size of undertakings is one basis for structural selectivity.<sup>293</sup>

The Commission decided in the abovementioned decision concerning the *Dutch financing scheme* that a tax measure which grants benefit for only multinationals and on top of it to only certain multinationals, is a selective measure. In this case the beneficial tax measure benefited only the financing activities of internationally active groups operating in at least four countries or on two continents. This, according to the Commission, implied selectivity.<sup>294</sup> Considering the APA decisions, also this decision is relevant. First, the wording of the decision suggests that the fact that the tax measure grants benefit to multinationals in comparison with standalones constitutes selectivity. Second, if the measure differentiates between certain multinationals, it also indicates selectivity according to the Commission. Furthermore, in 2003 in a decision about *Belgian Coordination Centres*, the Commission found that the favourable tax scheme was not open to smaller multinational undertakings while granting benefits to certain large multinational companies.<sup>295</sup> The criteria for benefiting from the tax scheme included those relating to the size and multinational character of the group and the nature and type of activities carried out within it.<sup>296</sup> The U.S. Department of Treasury argues that this decision implies that the Commission's prior approach has been to compare multinational companies that were able to benefit from the regime to multinational companies that could not benefit from it.<sup>297</sup> However, this decision does not exclude the possibility that the selectivity criterion is fulfilled also in situations where the measure differentiates between multinationals and standalones. It merely states that the differentiation between different multinationals implies structural selectivity.

There have, however, been decisions from the Commission that the tax measure is not selective even though it treats multinationals and standalones in a different manner. For example in a decision concerning *Ireland Company Holding Regime* from 2003, the Commission stated that even though the measure is especially beneficial to multinational undertakings that have foreign subsidiaries, the measure was not selective. According to the Commission, this was because the measure did not favour any undertakings compared to other undertakings, which are in a

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<sup>293</sup> Micheau 2014, 222.

<sup>294</sup> Commission decision C(2003) 568 (2003/515/EC) on the State aid implemented by the Netherlands for international financing activities, para 87.

<sup>295</sup> Commission decision C(2003) 564 (2003/755/EC) on the aid scheme implemented by Belgium for coordination centres established in Belgium, para 102.

<sup>296</sup> Commission decision C(2003) 564 (2003/755/EC) on the aid scheme implemented by Belgium for coordination centres established in Belgium, para 104.

<sup>297</sup> U.S. Treasury 2016, 10.

comparable situation from the legal or factual point of view.<sup>298</sup> However, the assessment of the comparability of undertakings was quite narrow in this decision. Furthermore, after the ECJ's *Paint Graphos* from 2011, comparability is assessed in the light of the objective of the reference framework.<sup>299</sup> This view would possibly have led to the conclusion that multinationals and standalones indeed are in a comparable situation, and therefore the measure would have been structurally selective State aid.

Also in a decision concerning *Dutch Groepsrentebox Scheme* from 2009 the Commission held that the beneficial tax measure was not selective although it benefited multinationals while standalones were left outside of the scope of the measure. The Commission stated that since standalones can form another company and hence become multinational, the measure was effectively open for all undertakings. In the words of the Commission, there were no legal or economic obstacles to the establishment of a group.<sup>300</sup> Furthermore, like in the decision on *Ireland Company Holding Regime*, the Commission stated that standalones and multinationals are not in a comparable situation. Along with the U.S. Department of Treasury, all the undertakings considered in the Commission's APA decisions, Apple, Fiat and Starbucks, referred to the *Dutch Groepsrentebox Scheme* decision as an argument against the selectivity of the APA rulings.<sup>301</sup> However, what comes to the first argument of the Commission in this case, the *Santander* judgment of the ECJ is relevant. As the ECJ quashed the GC's argument of the lack of selectivity and stated that even if the tax measure is potentially open to all undertakings, it can be selective. Since the tax measure was a derogation from the reference framework and hence differentiated the situation between undertakings in a comparable situations, the measure was selective.<sup>302</sup> This being the case, the Commission's open-ended argument in the *Dutch Groepsrentebox Scheme* decision is no longer convincing. In the light of the ECJ's *Santander* judgment, even if there are no legal obstacles to establish a group, selectivity arises if the measure de facto differentiates between undertakings. What comes to the second argument, that standalones and multinationals are not in a comparable situation, in the light of the *Paint Graphos* judgment and the comparability assessment it established,

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<sup>298</sup> Commission decision C(2004)3498 State aid N 354/2004 – Ireland Company Holding Regime, para 16.

<sup>299</sup> See chapter 4.4.

<sup>300</sup> Commission decision C(2009) 4511 (2009/809/EC) on the Groepsrentebox Scheme which the Netherlands is planning to implement, paras 126 and 127.

<sup>301</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 231; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 178; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 238.

<sup>302</sup> See chapter 4.8.



standalones and multinationals would have probably been in a comparable situation also in this case.

#### 4.9.3. Conclusion: Structural Selectivity and the APA Rulings

As seen above, there is comprehensive ECJ case law and decision practice of the Commission concerning structural selectivity. Due to the development of the case law, the selectivity condition is highly likely fulfilled if the tax measure differentiates the situation between undertakings due to their structural characters. The *Paint Graphos* case affects the comparability assessment with an effect that multinationals and standalones are more likely to be in a comparable situation.<sup>303</sup> The ECJ's *Santander* judgment means practically that even if there is formal possibility to all undertakings to benefit from the measure, the measure is selective if it derogates from the reference framework and hence differentiates, in law or in fact, the situation of distinct undertakings.<sup>304</sup> The *Gibraltar* judgment emphasizes the effect-based approach with a result that if the practical effects of the measure differentiate the situation of undertakings, selectivity is likely to be at hand.<sup>305</sup> All these landmark judgments have made the structural selectivity more essential concerning the fulfillment of the selectivity criterion.

First, if the measure differentiates between multinationals and standalones, the selectivity criterion is likely to be fulfilled. This structural differentiation is essential in the APA rulings, since standalones cannot benefit from APA rulings in the way multinationals can. Although there has been variable decision making from the part of the Commission concerning structural selectivity, with the abovementioned landmark judgments of the ECJ in mind, this differentiation will probably fulfill the selectivity condition. First, the APA rulings were directed to single selected undertakings. Second, the APA ruling system de facto excludes standalone undertakings due to their different structure.

However, even if multinationals and standalones were not in a comparable situation, the selectivity condition is probably fulfilled if the tax measure differentiates between distinct multinational undertakings. Also this differentiation can happen de facto or de jure. The grounds for structural selectivity in this case can be various, such as the size of the company, the size of the turnover of the company or the amount of countries the undertaking is active in. As the ECJ stated in *Santander*, it is not enough that other undertakings can formally have the possibility to benefit from the measure. If the measure de facto differentiates between

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<sup>303</sup> See chapter 4.4.

<sup>304</sup> See chapter 4.8.

<sup>305</sup> See chapter 4.10.

undertakings, selectivity arises. Hence, if certain multinationals cannot benefit from the APA rulings as Apple, Fiat and Starbucks have done due to their structure, the selectivity arises. Hence, if it is found that the multinational undertaking needs to have, for instance, a turnover large enough or a sub-company system complex enough to have the benefits of an APA in the Member States concerned, the APA rulings are structurally selective.

The next chapters treat an approach in the selectivity assessment that is established by the ECJ. This effect-based approach may also prove decisive by its part when assessing selectivity of the APA rulings.

## 4.10. Effect-Based Approach

### 4.10.1. Background

Jaeger states that in the *Santander* case the situation was similar to that of the *Adria-Wien Pipeline* case because the tax measure in *Santander* benefited all undertakings in national territory, without distinction. As seen in chapter 4.8., this view is based on highly formalistic view and is rather disconnected from the reality. Probably in order to avoid these kind of formalistic views from prevailing in the case law, the ECJ has established the effect-based approach.

In the 2016 Notice the Commission distinguishes de jure selectivity and de facto selectivity. According to the Notice, de jure selectivity arises when selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only. This can be grounded for example on the legal form of the undertaking or the type of activities the undertaking performs.<sup>306</sup> For de jure selectivity, there have to be *legal criteria* in the measure. Therefore, selectivity has to be explicit and based on the law. The *Paint Graphos* case is a good example of de jure selectivity. In *Paint Graphos*, the tax measures explicitly stated that undertakings with a form of cooperative are exclusively entitled for the tax benefits of the measures.<sup>307</sup>

On the other hand, according to the Notice, de facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that *its effects* significantly favour a

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<sup>306</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 121.

<sup>307</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 6.

particular group of undertakings.<sup>308</sup> Unlike in de jure selectivity, to be de facto selective there is no need for explicit selectivity in the legislation. Tax rules may be formally objective and open to every undertaking. However, if *in practice* the effects of tax rules grant selective advantage to certain undertakings, the measure is de facto selective. For example, in the *SEAS* case, the Commission found that even though a Danish tax measure was formally potentially benefiting all electricity undertakings, it was designed in a way that only *SEAS*, an electricity company with economic difficulties at that time, could benefit from it in practice. Therefore, the Commission found that the measure was selective.<sup>309</sup> This approach that takes de facto selectivity into account is generally called effect-based approach.<sup>310</sup>

What comes to the objective of taking into account the de facto selectivity, Schön explains it in a simple way. Schön talks about disguised selectivity. The intention of effect-based approach is to affirm selectivity even if the selectivity is *disguised* and does not state selectivity explicitly.<sup>311</sup> This was the situation in the *SEAS* case for example, as the authorities designed the tax measure in a way that looked formally objective, but in reality it differentiated between distinct electricity undertakings.

Already in the *Italian Textile* case in 1974, the ECJ stated that EU State aid rules do not distinguish between the measures of State intervention concerned by reference to their causes or aims but *defines them in relation to their effects*.<sup>312</sup> This approach is consistent with the wording of Article 107 TFEU, where the question is whether the measure favours certain undertakings or production of certain goods. In the words of AG Darmon in his opinion of *Sloman Neptun* case, the selectivity of a State aid measure arises, when it, *by virtue of its actual nature*, constitutes a derogation from the general system.<sup>313</sup>

The aim of the next chapters is to see how the effect-based approach has evolved in the EU jurisprudence and to scrutinize what kind of effects this may have when assessing the selectivity of the APA rulings.

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<sup>308</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 121.

<sup>309</sup> The Commission's XXIVth Report on Competition Policy, 1994, Annex II pp. 513-514.

<sup>310</sup> Ezcurra 2016, 206.

<sup>311</sup> Schön 1999, 933.

<sup>312</sup> Case 173/73, Italy v Commission (1974), para 13.

<sup>313</sup> Opinion of Advocate General Darmon in case C-73/91, *Sloman Neptun* (1993), para 50.

#### 4.10.2. Effect-Based Approach in EU Jurisprudence

Ezcurra concludes that the concept of aid is an expansive concept that allows for a larger intervention of the Commission. With this, she refers especially to the expansion of the effect-based approach.<sup>314</sup> Indeed, in the light of the case law of the ECJ and the decisions of the Commission, it seems that the effects of tax measures play an essential role when assessing the selectivity. Indeed, in addition to the *Italian Textile* case from 1974, the ECJ and the Commission have taken the effects of the tax measures into account in various cases.

There has been consistent case law from the ECJ that has confronted the aims or causes of the measure on the one hand and the effects of the measure on the other. The ECJ has consistently held that the effects of the measure are essential when assessing if the measure constitutes illegal State aid, rather than the aims or causes of the measure.<sup>315</sup> For example, in the *Maribel* case from 1999 the question was whether a Belgian tax scheme reducing the social security payments of employers employing manual workers was illegal State aid.<sup>316</sup> The ECJ stated that even if Belgium claimed that the scheme had social character, it was not sufficient to exclude the measure from classification as State aid, because the effects of the measure are essential in this assessment.<sup>317</sup>

Furthermore, the GC and the ECJ have stated that a seemingly objective measure that is in effect for a brief period can constitute de facto selectivity. This was the case in the *Italy and Brandt Italia v Commission* case, where Italy had adopted a measure that benefited, seemingly objectively, undertakings which employed employees under certain rules and because of this the undertakings had been accepted to the scheme. However, the GC stated that the measure was selective partly because it was in effect only for a brief period of time, hence de facto excluding undertakings from the benefits of the scheme.<sup>318</sup> The ECJ stated similarly in 2011, when it assessed a tax relief measure that was available for a brief period. Because of de facto selective effect of the limited period, the ECJ stated that the tax measure was selective.<sup>319</sup>

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<sup>314</sup> Ezcurra 2016, 206.

<sup>315</sup> See for example Case C-241/94, *French Republic v Commission of the European Communities* (1996), para 20; Case C-56/93, *Kingdom of Belgium v Commission of the European Communities* (1996), para 79; C- Case C-159/01, *Kingdom of the Netherlands v Commission of the European Communities* (2004), para 51; Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* (1999), para 25; C- Case C-487/06 P, *British Aggregates* (2008), para 89.

<sup>316</sup> Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* (1999), paras 2-9.

<sup>317</sup> Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* (1999), para 25.

<sup>318</sup> Joined cases T-239/04 and T-323/04, *Brandt Italia* (2007), paras 106 and 107.

<sup>319</sup> Case C-458/09 P, *Italian Republic v European Commission*, (2011), paras 59 and 60.

The GC has also stated that if the tax measure grants in effect benefit only for undertakings with significant financial resources, selectivity arises. The GC stated this in the *Álava* case in 2002. The question was about a tax measure that allowed a tax incentive for certain investments that exceeded a certain monetary threshold.<sup>320</sup> The GC held that the measure in fact reserved the tax concession in question only to undertakings with significant financial resources. Therefore, the measure was selective State aid.<sup>321</sup>

The ECJ has stated that if the tax measure in effect benefits certain undertakings and therefore puts these undertakings in a more favourable position, selective State aid may be at hand even if there has not been a transfer of State resources.<sup>322</sup> This view applies especially to State aid conferred in form of tax benefits, as has been the case in the APA rulings. Also the question if the situation of the beneficiary undertaking is better or worse in comparison with the situation under the law as it previously stood does not matter in the assessment. Essential is only if there has been a selective beneficial treatment.<sup>323</sup> These judgments show the tendency of the ECJ to put the effects of the measures in the spotlight when assessing State aid. If there has been selective tax advantage formally or in practice, the State aid rules apply. In the ECJ's words from 1961, if the measure mitigate the charges which are normally included in the budget of an undertaking, there is State aid in hand.<sup>324</sup>

There have been, however, some decisions where the Commission has stated that selectivity is not at hand, even though it could be argued that the effects of the measure grant selective advantage to certain undertakings.<sup>325</sup> For example, the Danish tax measure, which was beneficial for undertakings that employed foreign workers with high earnings could have been seen favourable to certain undertakings. However, the Commission stated that as the measure was formally open to all undertakings, the measure was not selective.<sup>326</sup>

The ECJ's *Santander* judgment, however, emphasizes the effect-based approach. Even though the tax measure in question was formally available to all undertakings, the ECJ stated that the measure introduced, *through its actual effects*, differences in the treatment of distinct

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<sup>320</sup> Joined Cases T-92/00 and T-103/00, *Álava* (2002), para 4.

<sup>321</sup> Joined Cases T-92/00 and T-103/00, *Álava* (2002), para 39.

<sup>322</sup> Joined cases C-78/08 and C-80/08 *Paint Graphos* (2011), para 46; Case C-387/92, *Banco Exterior* (1994), para 14.

<sup>323</sup> Case C-143/99, *Adria-Wien Pipeline* (2001), para 41.

<sup>324</sup> Case C-30/59, *Gezamenlijke Steenkolemijnen* (1961), summary, para 3; *see also for example* Case C-342/96, *Kingdom of Spain v Commission of the European Communities* (1999), paras 41 and 42.

<sup>325</sup> Micheau 2014, 227.

<sup>326</sup> Micheau 2014, 227.

undertakings.<sup>327</sup> The ECJ continued by stating that *the consequence* of that measure is discrimination, in that it confers a tax advantage on certain resident undertakings and not on others. In his opinion, AG Wathelet stated that the GC had adopted an excessively formalistic and restrictive approach in seeking to identify a particular category of undertakings that are exclusively favoured by the measure at issue rather than concentrating on the essential question of whether that measure differentiates between undertakings that are in a comparable situation.<sup>328</sup> This can be seen as direct criticism towards the GC for not taking into account the de facto effects of the tax measure. The ECJ followed AG Wathelet's opinion in *Santander* by stating that Spain had granted selective advantage by the tax measure, therefore overruling the GC.

However, the ECJ's *Gibraltar* judgment from 2011 was a real landmark judgment concerning the effect-based framework. In the *Gibraltar* case, the question was whether the corporate tax reform of the Government of Gibraltar constituted illegal State aid. After the reform, undertakings were subjected under three distinct taxes: a registration fee, a payroll tax and a business property occupation tax (BPOT).<sup>329</sup> However, the payroll tax, taxing employees in Gibraltar, and BPOT, taxing property in Gibraltar, effectively taxed only companies that are physically set up in Gibraltar and not offshore companies. Hence, the question was whether the reformed corporate taxation system granted a selective advantage to offshore companies.

As seen above, the starting point of the assessment of selectivity is the derogation test.<sup>330</sup> After the Commission had decided that the Gibraltar's taxation reform was selective State aid, the case moved to the GC.<sup>331</sup> The GC stated that the Gibraltar tax system was not selective because it formed the general corporate tax measure in Gibraltar. Therefore, it was impossible to demonstrate that the tax system was a derogation of the reference system.<sup>332</sup> Hence, even though the tax system benefited offshore undertakings in comparison with undertakings based in Gibraltar, selectivity did not arise in the opinion of the GC.

However, the EJC overruled the GC. The ECJ emphasized that the legal form of the measure cannot be decisive when assessing selectivity. The ECJ stated that in order to be selective, the measure does not have to be formulated in a way that derogates from the general tax system.

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<sup>327</sup> Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 67.

<sup>328</sup> Opinion of Advocate General Wathelet, Joined cases C-20/15 P and C21/15 P, *Santander* (2016), para 85.

<sup>329</sup> Joined Cases C-106/09 P and C107/09 P *Gibraltar* (2011), para 12.

<sup>330</sup> See chapter 4.3.

<sup>331</sup> Commission decision C(2004) 929 (2005/261/EC) on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform, paras 150 and 151.

<sup>332</sup> Joined cases T-211/04 and T-215/04, *Gibraltar* (2008), para 170.

According to the ECJ, this kind of interpretation would mean that to be selective, the measure should be designed in accordance with a certain regulatory technique. The consequence of this would be that national tax rules would not be deemed selective only because they had been adopted under a different regulatory technique although they produce the *same effects in law and/or in fact*.<sup>333</sup> Therefore, the ECJ found that even though the tax system of Gibraltar did not formally derogate from the reference framework, it granted offshore undertakings selective advantage by its effects and therefore constituted illegal State aid.<sup>334</sup>

The ECJ's judgment in the *Gibraltar* case is interesting because it emphasized the importance of the effects of the tax measure even at the expense of the derogation test. It seems that de facto effects play a more important part in the assessment of selectivity because of the *Gibraltar* judgment. Even if some formal conditions of selectivity established in the ECJ jurisprudence are not fulfilled, selectivity might arise. The effects of the tax measure was deemed more important than the legal form. This might play a role also when assessing the APA rulings.

The *Gibraltar* case was taken into account also in the 2016 Notice. The Commission stated in the Notice that the three-step analysis cannot be applied in certain cases, taking into account the *practical effects* of the measures concerned. Therefore, it is not always sufficient to examine if there is a derogation from the reference system, but if taxation rules are designed in an arbitrary or a biased way with an effect of favouring certain undertakings, the rules are selective.<sup>335</sup>

The ECJ's judgment in *Gibraltar* was, again, in accordance with Article 107 TFEU. The article states that if the aid "favours certain undertakings or the production of certain goods", it is incompatible with the internal market. Instead, Article 107 TFEU does not state that if the aid is a derogation from the reference framework, it is incompatible with the internal market. The corporate tax system in Gibraltar, through its effects, favoured offshore undertakings in the expense of onshore undertakings. Therefore, in the light of Article 107 TFEU, the ECJ was right to conclude that the Gibraltar tax reform constituted illegal State aid. As the ECJ stated, if the effects of the tax measures were not taken into account, the State aid rules could be circumvented by using a suitable regulatory technique.

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<sup>333</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), paras 91 and 92.

<sup>334</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 104.

<sup>335</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 129.

#### 4.10.3. Effect-Based Approach and the APA Rulings

In the light of recent ECJ jurisprudence, it seems that the effect-based approach plays more essential part in the assessment of the selectivity condition of State aid measures. Especially the *Gibraltar* judgment and the recent *Santander* judgment of the ECJ show that the ECJ is willing to overrule the judgments of the GC in order to take the practical effects of tax measures into account in the selectivity assessment.

The Commission used the three-step derogation test to analyze if the APA rulings were selective. In all of the cases, the Commission found that the APA rulings were selective, since they derogated from the reference framework and therefore granted selective advantage for the beneficiary undertakings.<sup>336</sup> The Commission did not mention de facto selectivity or effect-based approach directly in the decisions. The Commission merely mentioned that the deviation from the arm's length principle confers an advantage to the beneficiary undertakings.<sup>337</sup>

However, in the light of the ECJ case law, the Commission could have used the effect-based approach more strongly in the APA decisions. It is rather clear that the APA rulings were both de jure and de facto selective. As the APA rulings were granted for identified multinational undertakings and they grant economic advantage for the beneficiaries, they are de jure selective. In the 2016 Notice, the Commission states that when Member States adopt ad hoc positive measures benefiting one or more identified undertakings, it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.<sup>338</sup> In addition, the Commission found that the APA rulings derogated from the reference framework.<sup>339</sup> If, as explained in chapter 4.9., the beneficial APA rulings are in practice granted to certain multinationals due to their structural characters, the Member States' rules of granting the APA rulings are de facto selective. For example, the Netherlands has rules on the application of arm's length principle.<sup>340</sup> However, if these rules are applied in a more beneficial manner for certain multinationals, such as Starbucks, and this is done within the framework of the rules, the rules are de facto selective if it permits authorities to grant selective

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<sup>336</sup> See chapter 4.3.

<sup>337</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 260; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 219; Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 356.

<sup>338</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 126.

<sup>339</sup> See chapter 4.3.

<sup>340</sup> Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 249.



advantage. As Micheau states, it is therefore important to carry out an *in concreto* analysis to define whether the tax measures are available in practice to all undertakings.<sup>341</sup>

The U.S. Department of Treasury argued that the APA rulings are not selective since they are formally open to all undertakings.<sup>342</sup> The *Santander* judgment, however, practically denied this kind of formal argumentation. As the ECJ stated in *Santander* that even if the Spanish tax measure was formally open to all undertakings, *the effects* of the measure differentiated between the situations of distinct undertakings. This view was based on the effect-based approach, since the ECJ stressed that the practical effects of the measure are selective. This view can be used when assessing the APA rulings as well. Even if there are no rules that explicitly exclude certain undertakings, the effects of the beneficial APA rulings are selective, because they grant advantage exclusively to the beneficiary undertakings. Also in this way, the effect-based approach should play an essential part concerning the assessment of selectivity in the APA rulings. In the light of the ECJ jurisprudence, the effects do play an increasing role in the selectivity assessment and this might play its part in the APA rulings.

#### 4.11. Margin of Discretion

##### 4.11.1. Background

When assessing the selectivity of State aid, an important question is whether the public authorities have a margin of discretion when conferring State aid. In 1999 the ECJ stated that when the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature.<sup>343</sup> Therefore, this kind of degree of latitude means that the measure is selective. The ECJ has confirmed this view in various cases.<sup>344</sup> In addition, the Commission states in its 2016 Notice that measures, which at first seem to apply to all undertakings but are limited by the discretionary power of public administration, are selective.<sup>345</sup>

The view of the ECJ on the discretion of authorities is rather strict. First, there is no need to show that authorities have in fact exercised discretion. Only the existence of discretionary

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<sup>341</sup> Micheau 2014, 226.

<sup>342</sup> U.S Treasury 2016, 13.

<sup>343</sup> Case C-241/94, French Republic v Commission of the European Communities (1996), paras 23 and 34.

<sup>344</sup> See for example Case C-256/97, DMT, (1999), para 27; Case C-200/97, AFS, (1998), para 40.

<sup>345</sup> 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/C 262/01), OJ C 262, 19 July 2016, p. 1–50, para 123.

powers is sufficient to show that the measure is not general in nature.<sup>346</sup> In addition, even if the beneficiaries cannot be identified in advance, a possibility for discretion makes the measure presumably selective.<sup>347</sup> Hence, even if the tax rules are seemingly general, the existence of discretion de facto is enough for the selectivity condition.

However, there have been different views on how much of a discretion makes the measure selective. In the *Lico Leasing* case, the question was about a beneficial tax measure for shipping undertakings. To benefit from the measure, undertakings needed to get a prior authorization from tax authorities.<sup>348</sup> However, the GC saw that the measure was formally available, without restriction or discrimination, to all undertakings. Therefore there was not enough room for discretion that the selectivity criterion could have been fulfilled. Even if there was certain degree of latitude, there was not enough discretion to fulfill the selectivity criterion.<sup>349</sup> This case is, however, under appeal in the ECJ.<sup>350</sup> The GC's *Santander* judgment was in essence similar with *Lico Leasing*. Also in *Santander* the GC claimed that the formal possibility of other undertakings to benefit from the scheme made it non-selective. However, this view of the GC was overruled by the ECJ.<sup>351</sup> In the *P Oy* case the ECJ stated that if there are objective criteria by which the authority is bound, then there can be a "degree of latitude".<sup>352</sup> For example, in the case of *P Oy*, there was a guidance letter from tax authorities that set limits for discretion. This made it possible to ensure that there was not too wide discretion.<sup>353</sup> Micheau argues that these kind of guidelines are necessary to provide predictability and legal certainty for the enforcement of tax provisions.<sup>354</sup> However, there are certain limits for the discretion in the light of the selectivity criterion.

If financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion makes the measure selective.<sup>355</sup> In the *P Oy* case, which was brought to the court as a preliminary reference, the ECJ held that it did not have sufficient information about the degree of latitude in that precise case. However, if authorities have discretion that empowers them to base authorization decisions on criteria

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<sup>346</sup> Cases T-92/00 and T-103/00 *Álava* 2002, para 35.

<sup>347</sup> See for example Case T-55/99 *CETM* 2000, para 40.

<sup>348</sup> Joined cases T-515/13 and T-719/13, *Kingdom of Spain and Others v European Commission* (2015), para 28.

<sup>349</sup> Joined cases T-515/13 and T-719/13, *Kingdom of Spain and Others v European Commission* (2015), para 160.

<sup>350</sup> Case C-128/16 P: *Commission v Spain and Others*.

<sup>351</sup> See chapter 4.8.

<sup>352</sup> Case C-6/12, *P Oy* (2013), para 26.

<sup>353</sup> Case C-6/12, *P Oy* (2013), para 8.

<sup>354</sup> Micheau 2014, 234.

<sup>355</sup> Case C-6/12, *P Oy* (2013), para 27.

unrelated to that tax regime, selectivity is at hand.<sup>356</sup> However, the question on how wide the degree of latitude can be in general without the selectivity condition to be fulfilled, was left largely unanswered. In any case, considering prior case law of the ECJ, the degree of latitude must be particularly limited.

#### 4.11.2. Margin of Discretion and the APA Rulings

The existence of discretion may prove decisive when assessing the selectivity of the APA rulings. The question is whether tax authorities had a degree of discretion when granting the APA rulings for the beneficiary undertakings. Legal scholars have pointed out that in APA rulings there is possibly discretion involved. For example, Rossi states that tax authorities may abuse their discretion when granting an APA ruling.<sup>357</sup> Micheau says that if there is discretion and the tax measure in question departs from the general tax practice, the measure is presumably selective.<sup>358</sup>

As mentioned above, the ECJ has explicitly stated that discretion concerning the choice of beneficiaries is a matter that presumably makes the measure selective.<sup>359</sup> In *P Oy* the ECJ stated that if the competent authorities were able to determine the beneficiaries of the tax measure on the basis of criteria unrelated to the tax system, the tax measure would be selective.<sup>360</sup> Considering the case law of the ECJ, even if the basis of discretion would be directly related to the tax system in question, discretion would have to be strictly limited and bound to objective and transparent criteria. For instance, the Commissions 2016 Notice mentions that the authorization of tax relief should be based on objective, non-discriminatory criteria which are known in advance, thus circumscribing the exercise of discretion of public administration.<sup>361</sup>

In its decision concerning the APA ruling granted by Ireland to Apple, the Commission considers that Irish tax authorities have had discretion in applying the relevant tax provisions and also in choosing the beneficiary, Apple, to have the tax benefits of the APA.<sup>362</sup> The choice of beneficiary in this case cannot be based on criteria related to the reference system in this case, which is the tax system of corporate taxation in general with the aim to tax corporate

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<sup>356</sup> Case C-6/12, *P Oy* (2013), para 32.

<sup>357</sup> Rossi-Maccanino 2015, 69.

<sup>358</sup> Micheau 2014, 234.

<sup>359</sup> Case C-241/94, *French Republic v Commission of the European Communities* (1996), para 23.

<sup>360</sup> Case C-6/12, *P Oy* (2013), para 30.

<sup>361</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 125.

<sup>362</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 381.

profits.<sup>363</sup> Granting a beneficial APA does not contribute to the objective of taxation of corporate profits. Gunn and Luts state that the advantage granted through the tax ruling is equally available to all comparable undertakings.<sup>364</sup> However, as Luja has stated, there is a possibility that beneficial APA rulings are granted to selected companies, for instance to those committed to major investments and/or to the creation or maintaining of a large number of jobs.<sup>365</sup> It is plausible that it happens in order to boost economic growth. Public authorities might also have interest relating to domestic politics, since it should be beneficial for the authorities to be able to claim that during their governmental rule employment has risen. Tempting tax offers are also used for these kinds of objective. This phenomenon is largely known as harmful tax competition.<sup>366</sup> As a response to the Commission's decision on Apple, Apple's CEO Tim Cook wrote a public letter in which it criticizes the decision. In the letter, Cook lists economic advantages that Ireland has received because Apple has chosen to set its business there. The advantages include direct taxes paid by Apple, investments in the country and also employment benefits.<sup>367</sup> This is an understandable symbiosis to some degree, but if the benefits are granted by these kind of basis, the discretion of Irish tax authorities has no legal basis according to EU State aid rules. Indeed, the application of EU State aid rules have been developed partly to prevent harmful tax competition.<sup>368</sup>

There is analogy between the APA rulings and the ECJ's judgment concerning a waiver of a tax. The waiver of tax is a subsequent measure that lowers the tax burden of an undertaking. In the 2012 judgment, the ECJ stated that this kind of a tax waiver can be selective State aid.<sup>369</sup> The APA rulings that give tax advantage for the recipient undertakings can be considered an advance waiver of a tax from a Member State. The Commission has stated that the amnesties providing waiver of tax should be effectively open to all undertakings and that there should not be any discretionary power for authorities.<sup>370</sup> Even if not stated explicitly, this condition applies to APA rulings as well. Therefore, when giving tax benefits in APA rulings, the Member States should not use any kind of discretionary power.

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<sup>363</sup> See chapter 4.3.

<sup>364</sup> Gunn and Luts 2015, 122.

<sup>365</sup> Luja 2015, 384.

<sup>366</sup> *See for example* Helminen 2016, 113.

<sup>367</sup> Cook, Tim: A Message to the Apple Community in Europe, 30 august 2016.

<sup>368</sup> Micheau 2014, 41.

<sup>369</sup> Case C-417/10, 3M (2012), para 12.

<sup>370</sup> Commission decision C(2012) 4629 State Aid SA.33183 2012/N Latvia Tax Support Measure, paras 22 and 23.

Apart from the selection of beneficiaries, another question concerning discretion is the amount of State aid. The ECJ has explicitly stated that discretion considering the amount of financial assistance is a factor that may lead to selectivity.<sup>371</sup> As stated above, the amount of State aid in form of tax benefits has been substantial in the APA cases. This, taking into account the case law, exceeds the degree of latitude in a way that would make them selective.

As a conclusion, the statement of the Commission that there has been use of discretionary power when granting the APA rulings is an essential statement considering the selectivity of the APA rulings. If the view of the Commission prevails in the cases under appeal, this would most likely lead to the conclusion of selectivity in the APA rulings. Since there is hardly any justification for the discretion which is derived from the reference system, and since discretion has been, at least when it comes to the amount of the aid, wide, the exercise of discretion in the APA rulings should go well beyond the “degree of latitude” based on objective criteria that the ECJ has permitted.

#### 4.12. Conclusion: Selectivity of the APA Decisions

The legal critics of the State aid decisions of the Commission have often claimed that the State aid measure is not selective in the light of Article 107 TFEU. So is the case concerning the APA decisions of the Commission. All the Member States concerned, Ireland, the Netherlands and Luxembourg, have claimed that the APA rulings are not selective. Also U.S. Treasury, that has economic interests at stake with the APA decisions, have claimed that the APA rulings are not selective.<sup>372</sup>

The selectivity condition is the most complex of the four cumulative conditions of illegal State aid. The ECJ has been able to establish rules and principles that aim to support the assessment of selectivity. However, the selectivity assessment remains complex especially concerning tax measures, since the tax measures of Member States are often complex and various. However, these rules created by the ECJ help a lot when assessing the selectivity of the APA rulings.

First of all, it seems that the fundamental test for assessing selectivity of tax measures, the derogation test, applies in the assessment of selectivity of the APA rulings. If the reference framework is defined according to the case law of the ECJ, the APA rulings indeed are derogations from the reference framework. Also, in the light of the objective of the reference

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<sup>371</sup> Case C-241/94, French Republic v Commission of the European Communities (1996), paras 23 and 24.

<sup>372</sup> See the arguments of the Treasury about economic implications for U.S. that the APA decisions casue: U.S. Treasury 2016, 3-4.

framework, standalones and multinationals are in a comparable situations. This means that the APA rulings are selective State aid, since standalones cannot benefit from the APA rulings.

However, even if standalones were not in a comparable situation, the APA rulings would be selective. This is because the ECJ takes into account de facto effects of State aid measures in the selectivity assessment. The *Santander* judgment confirms that when the effects of tax measures differentiate between undertakings, the selectivity is at hand. Even if there is a formal possibility for other undertakings to benefit from the measure, the selectivity is at hand if the practical effects of the measures are selective. The direction of the development of the case law of the ECJ imply strongly that the APA rulings will be deemed selective when they are scrutinized by the ECJ.

The conclusion that the APA ruling are selective is in line with Article 107 TFEU, which is the fundamental rule about illegal State aid. According to the Article, the measure is selective if it favours certain undertakings or the production of certain goods. The technical claims of the appellants and U.S. Treasury cannot deny the fact that the APA rulings favour certain undertakings. Basing the assessment of selectivity on the formal claims of the appellants and the Treasury would only not run counter to the ECJ case law. It would also run counter to the wording and the objectives of State aid rules, such as preventing distortion of the internal market.

However, the criticism of the APA decisions has not been limited to claims that the APA rulings are not selective. Concerning the selectivity criterion, other main claim of the critics has been that the Commission has not assessed the conditions of selectivity and the condition of advantage separately. If this claim was true, it would raise suspicions that the APA decisions of the Commission are legally incorrect. This is because all the four conditions are cumulative and therefore they have to be fulfilled separately in order for the State aid measure to be illegal. In the next chapter, I will analyze this claim.

## 5. Selectivity and Advantage

### 5.1. Introduction

As stated above, all the four cumulative conditions have to be fulfilled in order to conclude that the State aid measure of the Member State is against EU State aid rules.<sup>373</sup> This has consistently been confirmed by the ECJ.<sup>374</sup> Also the Commission's 2016 Notice confirms this.<sup>375</sup> Therefore, even if the tax measure grants advantage, it is not illegal State aid if the advantage is granted effectively to all undertakings in a comparable situation and therefore is not selective. On the other hand, even if the tax measure is selective, it is not illegal State aid if it does not grant economic advantage to the recipient. As Jaeger states, the problem in taxes is not the selective character of a tax norm, but the effect of that selectivity for an undertaking's financial situation.<sup>376</sup>

The Commission's APA decisions have been criticized for failing to take into account this basic notion of State aid rules. For example, the U.S. Department of Treasury claims that the Commission does not assess the conditions of selectivity and advantage separately. The U.S. Department of Treasury argues that the Commission simply examined whether the APA rulings conferred a "selective advantage" on the companies under investigation, rather than separately assessing the existence of an advantage and the selective character of the measure, as it had done in prior decisions. This, according to the Treasury, departs from the past practice and is not in line with EU State aid rules.<sup>377</sup> Furthermore, a number of legal scholars have had the same view, and they have criticized this simplistic approach taken in the APA decisions.<sup>378</sup>

The aim of the next chapters is to analyze the grounds of the critics of the APA decisions for merging the conditions of selectivity and advantage together. I will analyze whether according to ECJ jurisprudence the two conditions have to be strictly separated and on which situations this obligation emerges. Furthermore, I will assess if the APA decisions in fact have merged these two conditions together or if the Commission in fact has assessed the conditions of advantage and selectivity separately.

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<sup>373</sup> See chapter 1.1.

<sup>374</sup> *See for example* Case C-280/00, *Altmark* (2003), para 74.

<sup>375</sup> 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/C 262/01), OJ C 262, 19 July 2016, p. 1–50, paras 66 (advantage) and 117 (selectivity).

<sup>376</sup> Jaeger 2015, 351.

<sup>377</sup> U.S. Treasury 2016, 6.

<sup>378</sup> *See for example* Jaeger 2015, 350; Gormsen 2016, 370; Ezcurra 2016, 203; Moreno González 2016, 6.

## 5.2. Critics

By its criticism, the U.S. Department of Treasury's allegedly states that because merging the conditions of selectivity and advantage together, the Commission's APA decisions are not in line with EU State aid rules. Thus, Treasury's criticism claims that the APA decisions are legally incorrect. The Treasury claims that the Commission has merely examined if the APA rulings conferred a "selective advantage" to the recipient undertakings.<sup>379</sup> There is quite a lot of support for this claim from legal scholars.

Gormsen, who agrees with the U.S. Treasury, argues that while merging the two conditions together, the Commission focuses only on advantage and ignores selectivity. Gormsen does not refer to the actual APA decisions but to the former decisions that initiate the formal investigation procedure.<sup>380</sup> However, Gormsen claims, that the decisions are in conflict with Article 107 TFEU and also with recent ECJ case law.<sup>381</sup> Indeed, if the condition of selectivity were downright ignored, this would be against EU State aid rules.

Jaeger states that by merging the conditions together The Commission deprives the parties' room for argumentation.<sup>382</sup> This is because the justification clause is connected with the selectivity condition.<sup>383</sup> According to Jaeger, now that the selectivity is at hand and the justification does not occur, the advantage is automatically deemed to be at hand as well. However, according to Jaeger, if the advantage condition would be separated from the assessment of selectivity and the justification would be assessed with advantage condition, the Member States could justify the advantage granted by the logics of the surrounding normative environment.<sup>384</sup> This could for example be a justification based on environmental reasons. However, it would be hard to justify tax benefits to certain multinational undertakings by the logics of the surrounding normative environment.

Moreno González also claims that the Commission focused primarily on the advantage condition. Like Gormsen, Moreno González cites only the Commission decision to initiate the investigation procedure, even though her article is published after the publication of the Commission's final APA decisions concerning Fiat and Starbucks.<sup>385</sup> Unlike Gormsen, Moreno

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<sup>379</sup> U.S. Treasury 2016, 6.

<sup>380</sup> Gormsen 2016, 369, in footnote 2.

<sup>381</sup> Gormsen 2016, 370.

<sup>382</sup> Jaeger 2016, 50.

<sup>383</sup> See chapter 4.6.

<sup>384</sup> Jaeger 2015, 351; Jaeger 2016, 49.

<sup>385</sup> Article of Moreno González is written 2 November 2016, see SSRN E-library [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2895692](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2895692) and the Commission decisions on Starbucks and



González did not go as far as stating that the Commission downright ignored the selectivity criterion. However, Moreno González claims that the Commission focused “less” on proving the selectivity of the APA rulings.<sup>386</sup> She sees the “blurring” of the two conditions problematic, since by doing so the Commission argues that the contested APA rulings constitute selective tax advantages as they depart from the arm’s length principle.<sup>387</sup> This, under the principle of primacy of EU law, includes the arm’s length principle in Article 107 TFEU, hence curtailing the sovereignty of Member States.<sup>388</sup> In addition to Moreno González, also Gormsen claims that by merging the two conditions together the Commission seems to equate the breach of the arm’s length principle with selective aid.<sup>389</sup> This is also the claim of the U.S. Treasury.<sup>390</sup> Nonetheless, what comes to Moreno González’ and Treasury’s argument that the Commission decisions undermine the tax sovereignty of Member States, it would be hard to imagine other ways to deal with the APA rulings without undermining the objectives of State aid rules. If the Member States could determine their own compliance with the arm’s length principle, State aid rules would be easy to circumvent.

As can be seen, there is support from legal scholars for the view that the Commission incorrectly merged selectivity and advantage together. In addition, the critics claim that this merging had practical effects to the outcome of the APA decisions. However, there are also dissenting opinions on this matter. Rossi-Maccanino states that since transfer pricing planning is only at the disposition of multinationals these kind of APA rulings are in their nature selective.<sup>391</sup> In addition, Lyal claims that since the APA rulings were granted for individual companies, they are presumably selective. Therefore, according to Lyal, there is no need to assess the selectivity of the APA rulings in an in-depth manner.<sup>392</sup> According to this view, that is why it would be according to State aid rules to assess “less” the existence of selectivity once the APA rulings are found to grant advantage to the recipient undertakings.

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Fiat were published in June 2016: see European Commission, Competition, cases: SA.38375 [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38375](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375) and SA.38374 [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_38374](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38374) .

<sup>386</sup> Moreno González 2016, 10.

<sup>387</sup> Moreno González 2016, 6.

<sup>388</sup> Moreno González 2016, 8.

<sup>389</sup> Gormsen 2016, 375.

<sup>390</sup> U.S. Treasury 2016, 9.

<sup>391</sup> Rossi-Maccanino 2014, 857.

<sup>392</sup> Lyal 2015, 1042.

Both of the views can claim support from the ECJ jurisprudence. In the next chapter, I will analyze how is the connection between selectivity and advantage seen in the light of EU jurisprudence.

### 5.3. Selectivity and Advantage in EU Jurisprudence

Many of the critics of the APA decisions base their views on the ECJ's *MOL* case from 2015. Also the U.S. Department of Treasury cites this case. The *MOL* case was preceded by opinion of AG Wahl. In his opinion, Wahl stated that selectivity must be clearly distinguished from the detection of an economic advantage. He went further by stating that once an advantage, understood in a broad sense, has been identified as arising directly or indirectly from a particular measure, it is then for the Commission to establish that this advantage is specifically directed at one or more undertakings. This is why in Wahl's opinion selectivity cannot be, at least completely, disconnected from the identification of economic advantage.<sup>393</sup>

The ECJ confirmed this view of AG Wahl in the *MOL* judgment. The ECJ stated that selectivity and advantage must be clearly distinguished. Therefore, to be illegal State aid, the advantage has to be granted selectively and that it must be liable to place certain undertakings in a more favourable situation than others.<sup>394</sup> In the light of this statement, it seems that selectivity and advantage indeed have to be strictly separated. However, in the next paragraph of the judgment the ECJ stated that in the case of individual aid measures from the Member States, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.<sup>395</sup> This does not, however, preclude the fact that to be illegal State aid, the measure has to grant advantage and in addition it has to be selective. It does not preclude the fact that to be illegal, the State aid has to fulfill all the four cumulative conditions of illegal State aid. Instead, this statement of the ECJ concerning the presumption of selectivity in the case of individually granted advantage most possibly means that in these cases the burden of proof of the Commission is lighter. If there is a presumption of selectivity, the Commission would probably not need to provide as strong evidence of selectivity as in a case without the presumption. This view is supported by the ECJ's wording that *the selectivity requirement differs* in the cases of individual aid.<sup>396</sup> This supports the view of Lyal that in these kind of cases of individually granted advantage there is no need for an in-depth assessment of selectivity.

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<sup>393</sup> Opinion of Advocate General Wahl in case C-15/14 P, *MOL* (2015), paras 47 and 48.

<sup>394</sup> Case C-15/14 P, *MOL* (2015), para 59.

<sup>395</sup> Case C-15/14 P, *MOL* (2015), para 60.

<sup>396</sup> Case C-15/14 P, *MOL* (2015), para 60.

The Commission states in the 2016 Notice, inspired by the *MOL* case, that when Member States adopt ad hoc positive measures benefiting one or more identified undertakings, it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.<sup>397</sup>

In her opinion on the *Finanzamt Linz* case, AG Kokott stated that particularly in matters of tax law the decisive criterion is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied.<sup>398</sup> This is why, according to AG Kokott, the selectivity criterion requires careful assessment.<sup>399</sup> This opinion receives support from Gormsen and Moreno González who argue that the Commission, in case of not assessing carefully selectivity, did not follow the ECJ jurisprudence in the APA decisions. However, as AG Kokott continues, if the provision concerns neither one nor more individually identifiable sectors capable of being defined by reference to their economic activity, nor individually identifiable undertakings, then the provision in question cannot in principle be assumed to be selective.<sup>400</sup> As the APA rulings are indeed granted for individually identifiable undertakings, it seems, according to AG Kokott, possible to assume that the APA rulings are selective. AG Mengozzi went even further in the opinion on *Deutsche Lufthansa* in 2013. The case was about a measure, which benefited only airlines which enter into commercial relations with Frankfurt airport. Mengozzi stated that in this kind of case, where selectivity is plausible, there is not even need for the derogation test in order to assess selectivity.<sup>401</sup> However, the ECJ neither confirmed nor disputed this statement in its judgment.<sup>402</sup>

There is ECJ case law where the conditions of selectivity and advantage are not clearly separated. For instance, in the *Sardegna* case from 2009, the ECJ did not clearly separate selectivity and advantage in the assessment, even though the case was not about a measure for individually named undertakings.<sup>403</sup> In this case, there was only a brief assessment of selectivity, and no separate assessment of the advantage granted by the tax measure was

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<sup>397</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 126.

<sup>398</sup> Opinion of Advocate General Kokott in case C-66/14 *Finanzamt Linz* (2015), para 114.

<sup>399</sup> Opinion of Advocate General Kokott in case C-66/14 *Finanzamt Linz* (2015), para 115.

<sup>400</sup> Opinion of Advocate General Kokott in case C-66/14 *Finanzamt Linz* (2015), para 115.

<sup>401</sup> Opinion of Advocate General Mengozzi in Case C-284/12, *Lufthansa* (2013), paras 51 and 52.

<sup>402</sup> Case C-284/12, *Lufthansa* (2013).

<sup>403</sup> Case C-169/08, *Sardegna* (2009), para 61.

undertaken. Indeed, Lang claims that this case, along with *Paint Graphos* and *Gibraltar* cases, merges selectivity and advantage together.<sup>404</sup>

Other kind of example is the *Forum 187* case from 2006. The case was about a Belgian tax regime which conferred advantage to some multinationals which fulfilled certain criteria.<sup>405</sup> Hence, the case was not about individual aid. In this case, the ECJ clearly separated the conditions of advantage and selectivity. After concluding in light of its assessment that the measure granted advantage, the ECJ assessed the selectivity of the measure separately.<sup>406</sup> Also the Commission has treated the two conditions separately in its earlier decisions. For example, in *Belgian Coordination Centres* case from 2003 the Commission separated the assessment of advantage and the assessment of selectivity.<sup>407</sup>

Therefore, concerning the two conditions, there has been varying cases. In some, the conditions of selectivity and advantage has been clearly separated. In others, they are not clearly separated even if the case has not been about individual aid. In the light of ECJ jurisprudence, it seems that there have been various views of the need to separate strictly the conditions of advantage and selectivity. This assessment of the relation between the two conditions usually results in an assessment of whether there is need to assess selectivity in an in-depth manner. It seems that in the cases of individual aid, such as the APA rulings, there is an assumption of selectivity, which might reduce the Commission's obligation for a separate in-depth assessment of selectivity. The *MOL* judgment clarified the jurisprudence in this regard. However, the four criteria of illegal State aid remain cumulative. Therefore, there has to be both advantage and selectivity to conclude that the State aid measure of Member State has been against EU State aid rules. In the next chapter, I will analyze whether the Commissions APA decisions fulfill the requirements of assessment of both advantage and selectivity in the light of ECJ jurisprudence.

#### 5.4. APA Rulings and the Separation of Advantage and Selectivity

The APA rulings were directed to single multinational undertakings. In the light of ECJ jurisprudence, this can have an impact on the demand of separate assessment of advantage and selectivity. As the ECJ has stated in the *MOL* case and as AG Kokott and AG Mengozzi have stated in their abovementioned opinions, in the cases of individually granted aid, the requirement for a separate in-depth assessment of selectivity might be different compared to

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<sup>404</sup> Lang 2016, 28; Lang 2012, 418.

<sup>405</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187 ABSL* (2006), para 6.

<sup>406</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187 ABSL* (2006), para 118 and onwards.

<sup>407</sup> Commission decision C(2003) 564 (2003/755/EC) on the aid scheme implemented by Belgium for coordination centres established in Belgium, paras 75 and 104-106.

that of general aid measures. This practically means that there is a lower level of demand for demonstrating the selectivity of the measure. According to the ECJ's statement in *MOL* case, in the APA rulings there is a presumption of selectivity.

There seems to be a wide consenting opinion that the Commission APA decisions did not assess advantage and selectivity separately. It is correct that in order to be illegal State aid, both of these two conditions have to be fulfilled. The legal scholars criticizing the APA decisions for merging selectivity and advantage conditions do not, however, justify their claim very extensively. As stated above, they merely talk about blurring the conditions and the Commission assessing "less" the selectivity requirement or not assessing it at all. The U.S. Department of Treasury goes a little deeper into substance when explaining this claim. The Treasury mentions that the Commission stated in the APA decisions concerning Fiat and Starbucks that "*where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the system of reference.*"<sup>408</sup> This, according to the U.S. Treasury, is an explicit departure from the past practice of assessing advantage and selectivity separately.<sup>409</sup> However, this statement of the Commission does not as such mean that selectivity and advantage are not assessed separately. The Commission merely stated that the reduction of tax liability contributed to the fulfillment of both the conditions of advantage and selectivity. In addition, only the fact that the Commission has used the term selective advantage in the APA decisions does not mean that the conditions are merged, as U.S. Treasury implies the case to be.<sup>410</sup> The use of this term is not even novel, since also the ECJ has used this term in its judgments when concluding that illegal State aid has been at hand.<sup>411</sup> It can be seen in the practice of the ECJ that these two conditions are tightly related. Indeed, Caoimh and Sauter state that selectivity is sometimes treated as a dimension of the advantage criterion.<sup>412</sup>

However, if the APA decisions are read thoroughly, it is possible to note that the Commission actually has assessed advantage and selectivity separately.

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<sup>408</sup> U.S. Treasury 2016, 8; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 253; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 217.

<sup>409</sup> U.S. Treasury 2016, 8.

<sup>410</sup> U.S. Treasury 2016, 6.

<sup>411</sup> See for example Case C-270/15 P *Belgium v Commission* (2016), para 31-32.

<sup>412</sup> Caoimh and Sauter 2016, 87.

#### 5.4.1. Assessment of Advantage

In the Commission's 2016 Notice advantage is explained as any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention.<sup>413</sup> This is also a citation from the ECJ's SFEI case from 1996.<sup>414</sup> In the *Altmark* case in 2003 the ECJ stated even more widely that advantage is at hand if the measure is likely, directly or indirectly, to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions.<sup>415</sup> In the *Forum 187* case, the ECJ stated that if the transfer prices do not resemble those which would be charged in conditions of free competition and this reduces the tax burden of an undertaking and is granted through state measure, the advantage is at hand.<sup>416</sup>

The Commission has assessed the existence of advantage in the APA decisions. The Commission compared the tax rates of the beneficiary undertakings with the rates they would have been between non-integrated undertakings in the market, or without the APA rulings.<sup>417</sup> The Commission concludes that in the APA rulings the concerned Member States accepted the derogation from the arm's length principle which resulted in lowering the tax base of the beneficiary undertakings.<sup>418</sup> The Commission analyzes the existence and the economic consequences of the derogation very extensively in the APA decisions.<sup>419</sup> The Commission's assessment of advantage is in line with abovementioned ECJ case law. According to the Commission, the beneficiary undertakings would not have obtained the tax advantage under normal market conditions. The state measures, namely the APA rulings, grant these economic advantages in the form of tax reductions. Furthermore, the derogation from arm's length principle results in a situation where the transfer prices do not resemble the conditions of free competition and this reduces the tax burden, as was the case in the *Forum 187* case. The Commission stated already in 2004 report on the implementation of the 1998 Notice that

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<sup>413</sup> 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/C 262/01) OJ C 262, 19 July 2016, para 66.

<sup>414</sup> Case C-39/94, SFEI (1996), para 60.

<sup>415</sup> Case C-280/00, *Altmark* (2003), para 84.

<sup>416</sup> Joined cases C-182/03 R and C-217/03 R *Forum 187* (2006), paras 96 and 97.

<sup>417</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 254; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 227; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 263.

<sup>418</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 259; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 301; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 341.

<sup>419</sup> One extensive part assessing the advantage resulting from the deviation of arm's length principle: Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, chapter 8.2.2.4.; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, chapter 7.2.2.1.; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, chapter 9.2.3.

advantage is at hand if the tax method applied does not take proper account of the economic reality of the transactions and thereby results in a lower rate of taxation than if the standard method had been applied.<sup>420</sup>

The claims of the abovementioned legal scholars and the U.S. Treasury that the Commission merges advantage and selectivity together do not have a solid basis at least when it comes to the assessment of advantage in the Commission's APA decisions. The assessment of advantage in the APA decisions is extensive and in addition, it is separated from the selectivity assessment.

#### 5.4.2. Assessment of Selectivity

However, in the criticism, the legal scholars have emphasized that the Commission has not sufficiently taken into account the selectivity criterion of State aid rules.

In spite of the criticism, in the APA decisions there is an extensive analysis of the selectivity of the APA rulings. In each APA decision, the analysis includes the identification of the reference system.<sup>421</sup> It includes the assessment of the existence of derogation from the reference system.<sup>422</sup> Furthermore, the Commission assesses which companies are in a comparable situation in the light of the purpose of the reference system and if the derogation excludes undertakings which are in a comparable situation.<sup>423</sup> The Commission also assesses the possible existence of justification for the derogation.<sup>424</sup> In other words, the Commission analyzes the selectivity of the APA rulings extensively and in accordance with the three-step derogation test, which is established by the ECJ for the task of assessing the selectivity condition in State aid matters.<sup>425</sup> The Commission also explained the three-step derogation test openly in the APA decisions.<sup>426</sup> In the light of the *MOL* case, there is a presumption of selectivity in cases of

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<sup>420</sup> Commission report C(2004)434 on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, para 10.

<sup>421</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, chapter 8.2.1.; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, chapter 7.2.1.; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, chapter 9.2.1.

<sup>422</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, chapter 8.2.2.; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, chapter 7.2.2.; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, chapter 9.2.2.

<sup>423</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, paras 243 and 412; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, paras 214 and 339; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, paras 243 and 415.

<sup>424</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 411; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 338; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 414.

<sup>425</sup> See chapter 4.3.

<sup>426</sup> Commission decision C(2016) 5605 State Aid implemented by Ireland to Apple, para 226; Commission decision C(2015) 7152 State Aid which Luxembourg gave to Fiat, para 192; Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, para 230.

individual aid, such as the APA rulings. However, the Commission has assessed the existence of selectivity as profoundly and with the same principles as the ECJ has done in cases where the question was not of an individual aid.<sup>427</sup>

In this light, there is hardly any basis for the statement that the Commission has ignored or even assessed “less” the selectivity condition in the APA rulings. The articles by Gormsen and Moreno Gonzáles were published after the publication of the Fiat and Starbucks decisions.<sup>428</sup> Therefore, especially Gormsen’s argument that the Commission ignored selectivity is hard to understand because the Commission did not ignore selectivity. A possible explanation for the claim is that Gormsen did not read the final APA decisions before the publication of her article. What comes to the arguments of U.S. Treasury, it seems that the Treasury has paid excessive attention to the term “selective advantage” used in the APA decisions and uses this as a basis for the argument that the Commission has merged the two conditions. However, the use of this term does not play a decisive role if both the conditions are assessed extensively and separately as they have been in the APA decisions. The U.S. Treasury has explicitly cited the Commission’s final APA decisions concerning Fiat and Starbucks.<sup>429</sup> Therefore, it is hard to understand the claims of the Treasury since the Commission has indeed separated advantage and selectivity in the assessment.

As a conclusion, even if Lyal states that there is no need to undertake an in-depth analysis of selectivity in the cases of individual aid, the Commission has assessed selectivity and advantage separately and extensively in the APA decisions. The Commission has examined, as stated above, the selectivity according to the well-established three-step derogation test. In addition, the Commission assesses the existence of advantage granted by the APA rulings. In this light, it is quite hard to understand the seemingly solid consensus among the legal scholars and the U.S. Treasury.

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<sup>427</sup> See for example Joined cases C-20/15 P and C21/15 P, Santander S (2016); Joined cases C-78/08 and C-80/08 Paint Graphos (2011).

<sup>428</sup> The article of Gormsen is published 22 July 2016, see *Journal of European Competition Law & Practice*: <https://academic.oup.com/jeclap/article/7/6/369/2357859/EU-State-Aid-Law-and-Transfer-Pricing-A-Critical?searchresult=1>; the publication of the article of Moreno Gonzáles and the APA decisions concerning Fiat and Starbucks, see footnote 469.

<sup>429</sup> U.S. Treasury 2016, 3, footnotes 5 and 7.



## 6. Summary of the Main Findings and Conclusions

### 6.1. Selectivity of the APA Rulings

There are often strong economic interests involved in the State aid decisions of the Commission. So is the case concerning the APA decisions as well. The scope of the interests in this case, however, has not been limited to the direct parties of the decisions. Also the U.S. Treasury has openly stated that it has strong economic interests involved in the APA decisions.<sup>430</sup> Therefore, the decisions of the Commission have given rise to a variety of criticism. Some of the criticism have been openly political and some are based on the substantive EU State aid rules. In this dissertation the main focus has been in analyzing the criticism based on EU State aid rules.

More precisely, the aim of this dissertation has been to research the following questions:

- 1. Are the APA rulings granted by Ireland, Luxembourg and the Netherlands selective State aid according to Article 107 TFEU?*
- 2. In the context of State aid assessment of tax measures, how strictly the assessments of selectivity and the assessment of advantage have to be separated and has the Commission separated them accordingly in the APA decisions?*

The first question was whether the APA rulings are selective. The active construction of rules and principles of the ECJ in the case law plays its part when assessing the selectivity of the APA decisions. As discussed above, the ECJ has been rather strict concerning the selectivity of State aid concerning tax measures. In the case law, the ECJ has created rules that practically extend the scope of the selectivity criterion. These rules, such as the effect-based approach and taking into account the margin of discretion, play their part in the assessment of selectivity of the APA rules. The effect-based approach is particularly relevant concept concerning the APA rulings. Because de facto effects are taken into account in the selectivity assessment, Member States cannot disguise selective effects of tax measures with certain law making technique. According to the formal criticism, the APA rulings could also be seen formally objective. The Member States concerned in the APA decisions do not have rules expressly stating that beneficial APA rulings are restricted exclusively to certain undertakings or certain type of undertakings. In this light, it can be claimed that the APA rulings are not formally selective. However, when deploying the effect-based approach, it is rather obvious that by their effect,

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<sup>430</sup> U.S. Treasury 2016, 3 and 4.

the APA rulings grant selective advantage to Apple, Fiat and Starbucks. Other undertakings have not benefited and standalone undertakings could not benefit from these APA rulings.

On the other hand, even without deploying the rules of de facto selectivity or margin of discretion the APA rulings are selective. Using the fundamental tool of selectivity assessment established by the ECJ, the derogation test, is enough to conclude that the APA rulings are selective. However, the criticism of the appellant Member States and the U.S. Treasury deny this. Nonetheless, if the three steps of the derogation test are applied in accordance with the ECJ case law, the conclusion is that the APA rulings are selective in the light of the derogation test as well.

The conclusion of selectivity of the APA rulings are in line with the purpose of Article 107 TFEU. The wording of Article 107 TFEU is rather effect-based. According to the Article, if the tax measure favours certain undertakings, the selectivity is at hand. In the wording of Article 107 TFEU, there are no additional formal burdens for the selectivity. In this light, some judgments of the GC, such as the *Santander* judgment, have been excessively formal and therefore, according to my understanding, they have run counter to the wording and the meaning of State aid rules. The ECJ has often had a similar view, and in the light of the case law of the ECJ, it seems more likely that the selectivity of the APA rulings is assessed through their practical effects rather than their formal appearance. This makes it more likely that the APA rulings will be deemed selective already in the GC and, if necessary, in the ECJ. As stated, all three APA decisions are under appeal in the GC.

Still concerning the selectivity criterion, the APA decisions of the Commission have received criticism about merging the conditions of selectivity and advantage together. As the four conditions for illegal State aid are cumulative, they all need separate assessment.

However, it seems that the criticism that the Commission had merged these two conditions is downright incorrect. The Commission has assessed all the four conditions separately.<sup>431</sup> This includes the separate assessment of the conditions of selectivity and the condition of advantage. In fact, these two conditions are assessed more extensively than the other conditions. This is usually the case, since the conditions that State aid has to be granted through State resources and distort competition or affect trade between Member States are normally presumably

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<sup>431</sup> See for example Commission decision C(2015) 7143 State Aid implemented by the Netherlands to Starbucks, where the assessment of whether the aid is granted through State resources in para 188 and the effect in competition and intra-state trade is assessed in para 189.

deemed fulfilled without thorough examination.<sup>432</sup> Therefore, as stated above, it seems that the criticism concerning the Commission merging the two conditions is not well-founded.

As stated above, the Commission has ordered that the illegal State aid granted by the APA rulings must be recovered. In the cases of Starbucks and Fiat, the amount of the tax they have to pay is 20-30 million euros, in the case of Apple it is 13 billion euros.

Supporting on the abovementioned claims concerning the selectivity condition, the U.S. Treasury claims that the Commission's APA decisions deviate from established ECJ case law.<sup>433</sup> Therefore, the Treasury has claimed that the recovery of the State aid in the APA cases would run counter to legal certainty, which is a fundamental principle of EU law.<sup>434</sup> In addition, the appellants of the APA decisions claim that the Commission has infringed legal certainty in the APA decisions.<sup>435</sup>

However, as the findings of this dissertation show, the Commission has not deviated from established ECJ case law when assessing the conditions of selectivity and advantage in the APA decision. Therefore, it seems that also the claims of the critics concerning legal certainty are not well-founded when it comes to the issues raised in the research questions of this dissertation. From the perspective of the research questions of this dissertation, the recovery of the State aid granted by APA rulings is justified in the light of State aid rules.

## 6.2. State Aid Rules and Taxation

In addition to the legal criticism, the APA decisions of the Commission have given rise to criticism concerning the fundamental objectives of State aid rules. Some scholars have stated that State aid rules are not suitable to fight harmful tax competition. Therefore, according to some scholars, the role of State aid rules in preventing harmful tax competition and tax fraud should be limited.<sup>436</sup> The U.S. Department of Treasury has claimed that the APA decisions undermine the international cooperation in preventing tax fraud and tax avoidance.<sup>437</sup> In addition, some scholars have criticized that the Commission, with extensive use of State aid rules in tax measures, limits substantially the autonomy of the Member States in the field of taxation.<sup>438</sup> This criticism is strongly linked with the selectivity criterion, since the decision

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<sup>432</sup> See for example Luts 2014, 260.

<sup>433</sup> U.S. Treasury 2016, 6.

<sup>434</sup> U.S. Treasury 2016, 14.

<sup>435</sup> See for example Case T-778/16 Ireland v Commission (2016).

<sup>436</sup> See for example Luja 2014, 355.

<sup>437</sup> U.S. Treasury 2016, 1.

<sup>438</sup> See for example Alkio and Hyvärinen 2016, 125; Nicolaidis 2004, 366.

practice of the Commission and the case law of the ECJ have widened especially the scope of selectivity. The ECJ has further given rise to this kind of criticism with its case law where the ECJ has established new rules that widen the interpretation of selectivity.

It is true that the use of State aid rules in tax matters has effects on the tax autonomy of Member States. However, even though State aid rules were sometimes openly deployed to prevent harmful tax competition, the use of State aid rules for this purpose can be justified in the light of wording of Article 107 TFEU and the objectives of State aid rules.<sup>439</sup> The APA decisions work as a practical example of this.

As discussed above, Article 107 TFEU is rather practical in its wording concerning selectivity. According to Article 107 TFEU, State aid is selective if it favours certain undertakings. This is in line with the objectives of State aid rules, such as prevention of market distortions and protection of free intra-state trade. If some form of State aid were left outside of the scope of State aid rules, it would be easy for Member States to grant selective economic advantage to undertakings. Therefore, it is important and it is in line with Article 107 TFEU to include tax advantage inside the scope of State aid rules. The ECJ confirmed already in the Italian Textile case in 1974 that taxation is not outside the scope of EU State aid rules.<sup>440</sup> As pointed out, in Article 107 TFEU it is stated that State aid can be in any form whatsoever. The wide interpretation of selectivity of the ECJ is justified in the light of Article 107 TFEU. The *Santander* case is a good example of this. If the view of the GC had prevailed in the *Santander* case, Member States would be able to grant selective tax advantage to undertakings by using legislation technique that *formally* is objective, even if the practical effects of the measure would be selective. This would undermine the objectives of State aid rules. If the assessment of selectivity of tax measures were not as strict as when it comes to other types of State aid, Member States would have possibilities to circumvent State aid rules. The *Gibraltar* case is a good example of this. If the ECJ had not assessed the selectivity in a wide manner in this case, the State aid rules would have been circumvented by using a certain regulatory technique. Since the practical effects of the tax measure would have remained selective, this would have compromised the objectives of State aid rules. This is what the ECJ stated as well.<sup>441</sup> In addition, if the ECJ had not assessed the selectivity criterion in a wide manner, the result would have been against the wording of Article 107 TFEU.

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<sup>439</sup> Micheau 2014, 41.

<sup>440</sup> Case 173/73 Italy v Commission (1974), summary § 2.

<sup>441</sup> Joined Cases C-106/09 P and C107/09 P Gibraltar (2011), para 92.

As stated, the APA rulings are selective de jure and de facto. However, also in the APA cases, it is important to take the effects of the APA rulings into account rather than only their formal wording. This is important in the light of consistency of the interpretation of State aid rules. Taking into account the effects of State aid measures is essential considering the wording and the objectives of State aid rules. This justifies the wide interpretation of the selectivity criterion also in the APA cases. Otherwise, if the effects were not taken into account in the selectivity assessment, the objectives of State aid rules could be undermined and the State aid decisions might not be in accordance with the wording of Article 107 TFEU. As the ECJ stated in 2009, although direct taxation is a competence of the Member States, they must nonetheless exercise it consistently with EU law.<sup>442</sup>

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<sup>442</sup> Case C-182/08, *Glaxo Wellcome* (2009), para 34.