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The European Commission and the tax avoidance practices of multinationals: can the action based on state aid rules be really regarded an appropriate tool?

Doctoral thesis

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I. THE TOPIC OF THE THESIS AND THE RESEARCH TASK

With the liberalisation of markets and the removal of many obstacles to the free movement of capital, capital allocations and cross-border nature have become commonplace. Investors are almost free to choose between countries, which also have to fight with each other for potential investments. If the economic environment becomes unfavourable, they can relocate production to another country. Under these circumstances, competitiveness and the creation of the most favourable tax conditions have become more valuable.[1] Closely related to this fact that today the largest multinational corporations are comparable in size (based on their annual revenues) and socio-political influence to states. In support of this, it suffices to point out that according to a survey conducted shortly before the start of the Commission's investigations (2013-2014), 37 multinational companies could fit into the world's 100 largest economies if we equate their annual revenues with the countries' annual GDP. Walmart, for example, would rank twenty-eighth on this list and beat countries such as Austria, South Africa and Denmark.[2]

Therefore, it is no coincidence that multinational companies are able to significantly reduce their tax burden and sometimes even be exempted from their tax obligations by using various tax avoidance practices (e.g. profit shifting, hybrid entities), resulting in the significant loss of budget revenues for certain countries. The latter is well illustrated by the fact that, according to data from 2016, EU Member States lose on average 13% of their corporate tax revenue, i.e. EUR 60 billion, annually due to tax evasion by multinational companies.[3] However, this loss is unevenly distributed among member states, e.g. in 2017, Germany and France together lost nearly $34 billion corporate tax revenue, which is almost 25% of their collectable tax revenues.[4] However, other countries, including EU countries, benefited from this practice and explicitly sought to attract large multinationals (e.g. Apple, Starbucks, Google) to create preferential tax regimes, thus diverting international investment. In Ireland, for example, the corporate tax rate was very low (12.5%) and royalties were subject to a special rate of only 2%. In addition, until 2015, Irish law allowed companies to establish themselves in the country without becoming tax

[1] GALÁNTAINÉ Máté Zsuzsanna: Problémák és újabb törekvések az Európai Unió társasági adózásában. *PhD értekezés*, Multidiszciplináris Társadalomtudományi Doktori Iskola, Győr, 2008. szeptember. http://rgdi.sze.hu/images/RGDI/honlapelemei/fokozatszerzesi_anyagok/galantaine_mate_zsuzsanna_disszertacio.PDF; 44-45.

[2] Transnational Institute (2013): "Planet Earth: A corporate world". http://www.tni.org/article/planet-earth-corporate-world.

[3] Jakub SAWULSKI: Tax unfairness in the European Union – Towards greater solidarity in fighting tax evasion. *Polish Economic Institute*, January 2020. 7.

[4] https://missingprofits.world/

resident.[5] In the Netherlands, in the first half of the 2010s, the possibility of applying the participation exemption,[6] interest and royalties exempt from withholding tax, furthermore tax rulings issued by the Dutch tax authority which were usually very favourable, provided tax optimisation opportunities for many multinational companies.[7] Suffice it to say that more than half of the 500 largest U.S. multinationals had at least one subsidiary in the country in 2016.[8] In the case of Luxembourg, the LuxLeaks scandal revealed the country's tax policy: it turned out that hundreds of multinational companies had received favourable treatment in the previous period.[9] Although tax rulings were long and complex, in many cases applications were approved very quickly, even within a day.[10] It is not surprising that according to data from 2015, these three member states provided about 1/3 of the profits of US multinationals generated abroad.[11]

Against this background, international tax law started to increasingly focus on tackling various tax avoidance practices, including efforts by multinational companies to exploit mismatches created by tax treaties between states to avoid double taxation caused by differences between tax systems. The most important of these for us was the OECD BEPS Action Plan,[12] consisting of 15 proposals, adopted at the time of the opening of the Commission's investigations which had a significant impact on the Commission's perception: it aligned its action with the Action Plan. The aim of the package was to close legal loopholes facilitating profit shifting to tax

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[5] Tamás Zoltán WÁGNER: Role of tax havens in tax avoidance by multinationals with special regard to Ireland. In: Kristina HOGHOVÁ-DANIEL Klimovský-Boris Kolman (eds.): Social sciences from the perspective of young scientists IV.: Proceedings of the International Scientific Conference of PhD Students and Young Scientists. Trnava, Faculty of Social Sciences, University of St. Cyril and Methodius in Trnava, 2020. 338-339.

[6] This means that the shareholder is exempt from tax on dividends and potential capital gains arise from the sale of shares.

[7] Luyang LIU: Is American Multinational Enterprises' Honeymoon with the European Union Over? An Analysis of the European Commission's Investigations into American Multinational Enterprises' Tax Deals with Ireland, Luxembourg and the Netherlands. *Loyola of Los Angeles International and Comparative Law Review*, vol. 41., no. 1., art. 3. (2018) 91.

[8] Richard PHILLIPS-Matt GARDNER-Alexandria ROBINS-Michelle SURKA: Offshore Shell Games 2017 – The Use of Offshore Tax Havens by Fortune 500 Companies. *U.S. Public Interest Research Group Education Fund – Institute on Taxation and Economic Policy*, October 2017. https://itep.sfo2.digitaloceanspaces.com/offshoreshellgames2017.pdf, 1.

[9] WÁGNER Tamás Zoltán: Kiskapu az állami támogatásokra vonatkozó uniós szabályozásban, különös tekintettel a McDonald's ügyre. *Iustum Aequum Salutare*, 2019/4. 190-193.

[10] Ezzel kapcsolatban részletesen lásd: Inga HARDECK-Patrick U. WITTENSTEIN: Assessing the Tax Benefits of Hybrid Arrangements—Evidence From the Luxembourg Leaks. *National Tax Journal*, vol. 71., no. 2. (2018) 295-334., Chief Counsel Can Take Actions to Improve the Timeliness of Private Letter Rulings and Potentially Reduce the Number Issued. Sept. 10, 2010. https://www.treasury.gov/tigta/auditreports/2010reports/201010106fr.html.

[11] Kimberly CLAUSING-Emmanuel SAEZ-Gabriel ZUCMAN: Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals. UCLA School of Law, *Law-Econ Research Paper,* No. 20-12. https://eml.berkeley.edu/~saez/CSZ2021.pdf, 2-3.

[12] Action Plan on Base Erosion and Profit Shifting. *OECD Publishing*, 2013. https://www.oecd.org/ctp/BEPSActionPlan.pdf.

havens and prevent efforts to erode tax bases. In doing so, it sought to address issues such as taxation challenges arising from the digital economy, neutralising the effects of hybrid agreements or improving CFC rules.[13]

On the basis of the abovementioned, it is clear that the European Union could not escape this process either, and that combating tax avoidance practices is even more important at EU level, since with the completion of the internal market an area has emerged where physical, financial and technical barriers are gradually being removed in order to ensure the free movement of goods, persons, capital and services. However, tax avoidance practices by multinational companies and the tax systems in Member States that allow and facilitate tax avoidance fundamentally jeopardise the integrity of the internal market as they distort competition. This requires EU legislative action, in which the Commission has a key role as the initiator of legislation.

However, the situation is more difficult due to the crucial role of tax imposition for Member States' economic policy which is why Member States continue to regard tax policy, especially in relation to direct taxes, as part of their national sovereignty.[14] Therefore, it is no coincidence that EU law does not recognise the concept of a 'European tax': the European Union's parafiscal revenues come from a percentage of the Member States' turnover taxes, customs duties and agricultural levies. There is also no EU tax authority or EU-wide tax system.[15] Moreover, there are relatively few provisions on taxes in the Treaties. Thus, the principle of tax sovereignty continues to apply in EU tax law, and instead of unification, harmonisation is the goal. Pursuant to Articles 113 to 115 and 352 TFEU, the Council, acting unanimously in accordance with a special legislative procedure, adopts acts in the field of direct and indirect taxation (mainly directives). However, harmonisation progress, particularly in the area of direct taxation, has been very slow and Member States' tax systems still vary considerably.[16] In the European Union, which currently has 27 Member States, it is very difficult to reach consensus in the Council by reconciling the interests and points of view of the various Member States. The difficulty of reaching consensus makes the role of the Court of Justice more important. The Court of Justice also participates in harmonisation (negative) by formulating EU law through

[13] What is BEPS? https://www.oecd.org/tax/beps/about/.

[14] BÉKÉS Balázs: A közvetlen adózás az Európai Unióban. *PhD értekezés*, PPKE JÁK Doktori Iskola, Budapest, 2012. március. https://jak.ppke.hu/uploads/articles/12332/file/B%C3%A9k%C3%A9s%20Bal%C3%A1zs%20PHD%20dolgozat.pdf; 17.

[15] ŐRY Tamás: Adóharmonizáció az Európai Unióban. *Magyar Köztársaság Külügyminisztériuma*, http://www.bmeip.hu/download/engemiserint/Adoharmonizacio%20az%20EUban.pdf; 3.

[16] By the time the Commission started its action based on state aid rules, only 3 directives had been adopted: the Parent and Subsidiary Directive, the Merger Directive and the Interest and Royalties Directive.

its judgments, thus defining Member States room for manoeuvre. The Court seeks to primarily comply with fundamental principles and to prevent discrimination between domestic and foreign taxpayers.[17]

In the current framework, Member States are indispensable in EU legislation: they can use their veto power to prevent proposals that are unfavourable to them from being adopted. Some Member States (e.g. Luxembourg, Belgium, the Netherlands) specifically operate tax systems that grant significant tax advantages to individual multinationals. Therefore, it is no coincidence that these Member States blocked initiatives to dismantle these mechanisms. In this respect, it is worth highlighting the issue of a Common Consolidated Corporate Tax Base, which has been on the agenda since 2001,[18] in which the Commission drafted a proposal in 2011,[19] but failed due to strong opposition from Member States (mainly Benelux and Ireland).[20] The Commission's proposal on a financial transaction tax also met this fate.[21] At the beginning of the 2010s, it became increasingly apparent that it was not possible or very difficult to achieve meaningful results through legislation.

This may have prompted the Commission to consider other methods. One of these options is to act through the fundamental freedoms of the EU, as exemplified by the Hervis judgment,[22] where the Court found progressive taxation applied by the Hungarian authorities to be incompatible with EU law.[23] However, the Commission did not go down this route, instead applying State aid rules. In addition to the difficulties encountered in connection with the EU legislation, the financial scandals that broke out in the early 2010s[24] and the social unrest that followed in its wake, as well as the possibility of abuse of tax rulings (primarily exploited by

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[17] BÉKÉS (2012) op. cit. 19-20.

[18] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, COM (2001) 582.

[19] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2011/0121 final, 16.3.2011., 1-87.

[20] Inga CHELYADINA: Harmonization of Corporate Tax Base in the EU: An Idea Whose Time Has Come? *Bruges Political Research Papers*, 76/2019. 7-10., 23.

[21] Proposal for a Council Directive on a common system of financial transaction tax amending Directive 2008/7/EC, COM(2011) 594 final of 28.9.2011., 1-33.

[22] Case C-385/12, Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága [ECLI:EU:C:2014:47].

[23] For details on the background of the case, see: JAKAB András-SONNEVEND Pál: A reklámadó és az európai jog. *Pázmány Law Working Papers*, 2014/14. 6-9.

[24] In this regard, it is worth highlighting the infamous Luxleaks scandal and the Panama Acts. For the former, see: Tax Games: The Race to the Bottom – Europe's role in supporting an unjust global tax system. *Eurodad*, 8 November 2017. https://eurodad.org/files/pdf/1546849-tax-games-the-race-to-the-bottom.pdf, 106., Massimiliano TROVATO: Tax Rulings and State Aid: A Treacherous Mix, *European Policy Information Center*. http://www.epicenternetwork.eu/wp-content/uploads/2015/04/Trovato-EPICENTER-Tax_Agreements-Full1.pdf, 1-2. For the latter, see: Bastian OBERMAYER-Frederik OBERMAIER: *The Panama Papers: Breaking the Story of How the Rich and Powerful Hide Their Money.* London, Oneworld Publications. 2017.

large American corporations) also played a decisive role in deciding on this policy. Furthermore, as we will see, the Commission recognised that it had specific powers in the field of competition law, particularly State aid control which it had not yet fully exploited and which could be suitable for comprehensive action against tax advantages granted by Member States to multinationals in the form of tax rulings. However, already at the beginning of the investigations launched in 2013-2014, the question arose whether State aid law was a suitable tool to combat tax avoidance practices by multinationals, especially since the Commission considered these investigations to be the main line of its action. In addition, criticism quickly emerged that the Commission, using its special powers in the area of State aid law, was essentially circumventing the Member States' veto power in the area of taxation which makes EU legislation in this area extremely difficult.

Therefore, in this dissertation we primarily seek to answer the following questions:

- whether the Commission has chosen an appropriate instrument when acting against tax avoidance practices by multinational companies under State aid rules, or whether expert criticism of the Commission's line over the years can be considered justified,
- whether the Commission's action achieved its objective, i.e. whether tax avoidance practices taking advantage of tax rulings issued by Member States' authorities reduced due to the change in the legal environment favourable to multinational companies.

II. RESEARCH METHOD

During the research, we aimed to process the Commission's action on tax evasion by multinational companies as thoroughly as possible. For this reason, the dissertation is not limited to Commission decisions and related EU court rulings but aims to see the process as a whole: state aid control and concept, the analysis of Commission motives are both part of the research. To this end, the available Hungarian and English literature was incorporated in detail into the dissertation, which is supplemented by newspaper articles, commission decisions and court case law. In the footnotes, only the sources were primarily indicated, but sometimes explanatory footnotes were also used if it was required for easier understanding of the topic and could not be placed in the main text without breaking the analysis. Among the explanatory footnotes, reflections on general principles of law are stood out, where, in addition to basic information, we analysed in detail the principles of legal certainty and the protection of legitimate expectations, citing the case-law of the Court of Justice.

Chapters 2 and 3 of the dissertation can be regarded primarily as theoretical foundations which highlight that despite the autonomy of the Member States, the Commission – also considering its innovative approach – prefers to use state aid law to national tax measures. In Chapters 4 and 5, we explored the Commission's motives and why it relied on State aid law during its investigations. Chapters 6 and 7 deal with specific Commission investigations and their evaluation. In this respect, when analysing the Commission's decisions, emphasis was placed on the findings that could be drawn from specific cases, which also helped to draw conclusions regarding the Commission's assessment. For this reason, some cases were analysed in detail, but others were only tangentially analysed and we focused on the common criteria (e.g. Commission market price, the question of integrated and non-integrated companies) in them. A similar method was used in the subsection of the court phase. In addition, several previous "charges" were omitted from the analysis for reasons of expediency. Regarding the attempt to interpret the tax treaties concluded by the Member States, the situation is clear: the Commission finally backed down on this issue, thereby confirming Member States' sovereignty in this area. Thus, obviously, this question could not even reach the EU courts. By contrast, allegations of undermining of international law and investigations specifically targeting US companies were no longer addressed because they remained US criticism and the General Court and the Advocate General adopted a specific rather than general approach which is well covered by the other aspects of the investigation.

Overall, we tried to deal with the topic with a strong literature background where we primarily relied on English-language literature. This is due to the fact that Hungarian literature is relatively scarce and focuses more on one aspect of the topic. In Hungarian, we can primarily access legislation, Commission decisions and Court case-law. Due to their length, the processing of the latter also required a kind of rationalization from us: we examined them by concentrating on certain priority issues (e.g. arm's length principle). Thus, in fact, by analysing the Commission's action against the tax avoidance practices of multinational companies within the framework of comprehensive research, we also served the purpose of launching new research in this field in the Hungarian literature in the future.

III. BRIEF PRESENTATION OF THE THESIS, PRESENTATION OF SCIENTIFIC RESULTS

By the early 2010s, the challenges posed by tax avoidance practices by multinational corporations were addressed not only at expert level, but increasingly also at government level, as many countries lost significant budget revenues. The problem could not be ignored by the European Union either, since the tax avoidance practices of multinationals – and the tax systems of Member States that tolerate or even facilitate them – jeopardised the integrity of the internal market. Therefore, meaningful action was needed. However, as mentioned earlier, in the early 2010s, due to opposition from Member States, it did not seem feasible for the Commission to take a legislative initiative. Instead, it opted for an alternative instrument, State aid law, where it seemed easier to act successfully based on expectations. At the beginning of the investigations in 2013-2014, Joaquin Almunia, then Commissioner for Competition, warned beforehand that the Commission knew no mercy for unjustified advantages: *"EU tax authorities are obliged to ensure a level playing field instead of treating companies in similar factual and legal situations differently"*.[25] The Commission reviewed more than 1,000 tax rulings and ordered refunds of prohibited state aid for tax rulings granted to prominent companies such as Apple, Starbucks and Amazon in formal proceedings against Member States.[26]

Considering the complexity of the area of law and the specific cases, we decided to go into detail about the background of the Commission's investigations, as this is the only way to truly understand why the Commission relied on State aid law. In doing so, we will analyse topics such as State aid control, the relationship between State aid law and tax measures, tax avoidance practices by multinationals or the reasons behind the line chosen by the Commission. Only then will we assess the Commission's action, analysing in detail the criteria used by the Commission to conduct its investigations in specific cases (the broad reference system and the Commission's arm's length price), how experts reacted and the judgments of the EU courts in the relevant cases. Finally, we were looking for the answers in the Conclusions whether the Commission chose an appropriate instrument and whether the action achieved its objective. Overall, on the one hand, we will see that the Commission's action based on State aid law is guided not only by a theoretical legal basis but also by several practical considerations, so that it is not really an

[25] Bertold Bär-BOUYSSIÈRE-Ortwin CARRON-Michael HARDGROVE: Tax rulings and fiscal state aid in the EU. *DLA Piper*, https://www.dlapiper.com/~/media/Files/Insights/Events/2015/06/EUStateAid.pdf; 3.

[26] Cleary GOTTLIEB: Three Years of EU State Aid Review of Tax Rulings: Taking Stock. *Alert Memorandum*, July 29, 2016. https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/three-years-of-eu-state-aid-review-of-tax-rulings-taking-stock.pdf; 2.

ad hoc decision, but a well-planned series of actions aimed at tackling the problem 'at its root'. On the other hand, it will also turn out that the Commission's innovative approach violates Member States' autonomy in the field of direct taxation in several respects.

Going into detail, in Chapter 2 of this dissertation we dealt with the question of why state aid control was necessary. In doing so, we examined the pros and cons of State aid and the need for EU control. The question is even more justified given that State aid rules are one of the most important areas of competition law today. It shows that it is not only companies that can engage in distortive behaviour (e.g. cartels, abuse of dominant positions, etc.), but also states themselves.[27] With the exception of multinational giants, states can take significantly more measures, and their available resources are also significantly larger than other market players.[28] The European Union has strict rules governing the granting of State aid: the Treaty of Paris establishing the European Coal and Steel Community in 1951 and the Treaty of Rome establishing the European Economic Community, adopted in 1957, laid down the general principle that State aid is prohibited and reproduced in the Treaties (Article 107 TFEU).[29] There are only a limited number of exceptions to the general prohibition, which are listed in Article 107(2) and (3) TFEU. The integrity of the internal market therefore overrides the interests of Member States, and only in cases of market failure can State aid be used. Several reasons for the need for EU control are given in the literature, such as:

- cross-border externalities,
- the issue of bailouts of companies (loose budgetary restraint),
- the logic of the internal market,[30]
- Member States with excessive budgetary expenditure would find it more difficult to implement the criteria of monetary union,
- achieving the EU's target of economic and social cohesion would be impossible, as richer Member States would be able to spend more on their own industry than poor ones, making EU cohesion/regional policy impossible,[31]
- this will help governments better resist lobbying by interest groups,

[27] VÖRÖS Imre: Az állami támogatások uniós jogi megítélésnek hatása a belső jogra. *Jogelméleti Szemle*, 2013/3. 131.

[28] NYIKOS Györgyi (szerk.): *Állami támogatások*. Budapest, Dialóg Campus Kiadó, 2018. 20.

[29] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008.

[30] Hans W. FRIEDERISZICK-Lars-Hendrik RÖLLER-Vincent VEROUDEN: European State Aid Control: an economic framework. September 28th, 2006. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.525.1875&rep=rep1&type=pdf; 21-26.

[31] ERDŐS Éva: A káros adóverseny elleni fellépés egyik eszköze az európai adójogban: az állami támogatások joga. *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXXI.* (2013) 185.

- the costs of rent-seeking can be reduced.[32]

Overall, we can conclude that State aid is a complex issue within EU competition law, where the control of individual aid at EU level is justified, mainly due to negative cross-border effects. Therefore, the combination of strict regulation and control serves to prevent Member States from circumventing competition rules from granting economic advantages to domestic and foreign companies,[33] which would ultimately threaten to replace the internal market with the situation before the establishment of the European Economic Community (1957), as ad hoc aid would result in different conditions of competition in the Member States and competition between Member States.[34]

In Chapter 3 of the dissertation, following the presentation of the EU legal framework for state aid, it was demonstrated through the conceptual elements of state aid that state aid rules could be an appropriate tool against tax measures distorting competition in Member States. In the light of the legislative framework described above, it may seem at first sight that Member States do not have to face many restrictions in the area of direct taxation. It is therefore not surprising that many Member States seek to support individual market players through tax measures rather than direct subsidies, which are much less conspicuous and more discreet.[35] Nevertheless, there are indeed several factors that may limit Member States' room for manoeuvre. These include, for example, the obligation to abolish tax measures that generate harmful tax competition, compliance with EU freedoms (in particular freedom of establishment, provision of services and free movement of capital)[36] and State aid rules.[37] With regard to the latter, even if it is not specifically mentioned in Article 107 TFEU, individual national tax measures may constitute prohibited State aid in the same way as direct aid. This is illustrated by the fact that the Court of Justice already held in a 1961 judgment in De Gezamenlijke Steenkolenmijnen in Limburg[38] that *'the concept of State aid nevertheless has a broader meaning than subsidies, since it covers*

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[32] David SPECTOR: State Aids: Economic Analysis and Practice in the European Union. In: Xavier VIVES (ed.): *Competition Policy in the EU: Fifty Years on from the Treaty of Rome.* Oxford, Oxford University Press, 2009. 178-179., 180-181.

[33] Justus HAUCAP-Ulrich SCHWALBE: Economic Principles of State Aid Control. *Discussion Paper*, no. 17, Düsseldorf Institute for Competition Economics, April 2011. 14.

[34] VÖRÖS op. cit. 133.

[35] Edouard FORT: EU State Aid and Tax: An Evolutionary Approach. *European Taxation*, vol 57., no. 9. (2017) 371.

[36] Influence of EU Law on Taxation in the EU Member States' Overseas Territories and Crown Dependencies, Directorate General for internal policies policy department A: Economic and scientific policy, *European Parliament, Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy*, June 2016. http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578989/IPOL_IDA(2016)578989_EN.pdf, 8-10.

[37] NYIKOS op. cit. 131-153.

[38] Case C-30/59, De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community [ECLI:EU:C:1961:2], paragraph 19.

not only positive benefits, such as subsidies themselves, but also measures which, in various forms, reduce the costs incurred by undertakings, which would normally be charged to their own budgets and which, without being subsidies in the strict sense, are of a similar nature and have the same effect'.

In connection with the classification of tax measures from the point of view of state aid, before analysing the conceptual elements of state aid, we dealt in detail with the concepts of enterprise and tax. Both concepts are used more widely in competition law than in everyday life. Moreover, if the recipient of State aid is not an undertaking, then there is no State aid. Case law shows that an enterprise can be not only a business association, but any natural or legal person that carries out an economic activity, regardless of its legal form or the way in which it is financed. A key issue in this regard is how to distinguish between economic and non-economic activities. Although case law provides several clues to this, it is not easy to draw a distinction, and the Court has established a number of exceptions in certain areas (e.g. exercise of State authority, social security). Furthermore, an entity may qualify as an undertaking if it carries out both economic and non-economic activities or is not-for-profit. The concept of enterprise is so broad that even an individual lawyer, foundation, municipality or church can meet the conditions. The same applies to the concept of tax: it includes all taxes, duties, fees and contributions collected through sovereign State power, including municipalities. In this context, it does not matter whether the measure increases or decreases public revenues overall and in terms of indirect effects. Thus, a tax allowance, tax exemption, reduction of the tax base, deferred tax payment[39] and even tax legislation on loss carry-forward may constitute State aid.[40] Moreover, it is irrelevant at what stage of taxation the aid was granted, e.g. determination of tax offences, collection of tax.[41] Even before the Commission's specific investigation is launched, Member States are therefore in a difficult position to protect their tax measures.

Subsequently, the conceptual elements of State aid (advantage, state origin, selectivity, effect on trade between Member States, distortion of competition) were analysed using case law. In this context, it was confirmed that advantage and selectivity are of decisive importance in

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[39] STAVICZKY Péter: Adózás és állami támogatások – az indokolt szelektivitás. *Számvitel – Adó – Könyvvizsgálat,* 52. évf., 2010/3. 133.

[40] Case C-6/12, P v Veronsaajien oikeudenvalvontayksikkö [ECLI:EU:C:2013:525]. The case is analysed in detail: STAVICZKY Péter: Finn veszteségelhatárolás – állami támogatás vagy sem? *Számvitel – Adó – Könyvvizsgálat,* 55. évf., 2013/12. 567. Here, in the concrete case, the Court emphasised that the requirement of loss carry-forward to authorisation by the tax authority was not selective in itself, unless the discretion of the authority extended to determining the beneficiaries and the conditions of the relief measure. The latter includes, for example, maintaining employment, as this is an objective alien to the tax system.

[41] GYÜRKÉS Anita: Az uniós állami támogatási szabályok alkalmazása az adóintézkedések területén – a Bíróság esetjogának tükrében. *Állami Támogatások Joga*, 17 (2013/1), 8.

relation to tax measures, as the other conditions are usually met.[42] This further complicates the situation of the Member States since, among other things, the Commission interprets the concept of advantage broadly,[43] the only thing that matters is the effect, [44] the more favourable position of a competitor in another Member State cannot be invoked,[45] the Commission likes to combine it with selectivity,[46] and this is not facilitated by the fact that the burden of proving the advantage lies with the Commission, although it does not have to quantify it.[47] At the same time, Member States are guaranteed given that the principle of tax sovereignty continues to apply to direct taxes, a derogation from their normal tax system is necessary to establish the advantage since there is no default tax system in EU law as confirmed by the Court of Justice in Gibraltar.[48] Therefore, progressive tax rates cannot be considered an advantage.[49] During the examination of selectivity, undertakings in similar factual and legal situations must be considered. However, there is currently no generally accepted test for comparability.[50] This has given rise to disputes between Member States, the Commission and the EU courts in several cases in recent years. For example, the Commission allows progressive tax rates only to be applied to a very limited extent,[51] as it considers that in practice they lead Member States to favour small companies over large ones which constitutes discrimination on the basis of size. The latter also results in discrimination on grounds of nationality, since most of the companies covered are non-resident.[52] By contrast, the Court considered the Commission's practice to be an infringement of the tax sovereignty of the Member States and pointed out that the objectives

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[42] Liza Lovdahl GORMSEN: EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga. *Journal of European Competition Law & Practice,* vol. 7., no. 6. (2016) 374.

[43] *'An advantage is an economic advantage which an undertaking could not obtain under normal market conditions'.* See in this regard 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), C 262/1, 19.7.2016, 1-50., 15.

[44] 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), para. 67.

[45] 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), para. 72.

[46] GORMSEN, op. cit. 374.

[47] Case C-559/12 P, France v Commission [EU:C:2014:217] para. 62.

[48] Case C-106/09 P, Commission and Spain v Government of Gibraltar and United Kingdom [ECLI:EU:C:2011:732] para. 90.

[49] For example, see: Case T-20/17 Hungary v European Commission [ECLI:EU:T:2019:448] para. 70-111., Joined Cases T-836/16 and T-624/17, Poland v European Commission [ECLI:EU:T:2019:338], para. 55-111., Case C-323/18, Tesco-Global Áruházak Zrt. kontra Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága [ECLI:EU:C:2020:140], para 50-76.

[50] BORDÁCS Bálint: A digitális szolgáltatási adó állami támogatás jellegének kérdése. *Versenytükör,* XV. évf., 2019/2. 7.

[51] In its decisions, the Commission referred several times to paragraph 24 of its 1998 Communication: progressiveness for redistribution purposes is permitted only in the case of income or profit tax rates and not in the case of revenue.

[52] In detail, see: Ruth MASON-Leopoldo PARADA: Digital Battlefront in the Tax Wars. *Virginia Law and Economics Research Paper*, No. 2018-16, *92 Tax Notes International 1183 (2018)*. 1191.

of the tax system had been incorrectly established.[53] Overall, if we look at the Commission's practice, it is increasingly difficult for Member States to exempt some of their tax measures, which, although they are not direct aid, can also jeopardise the integrity of the internal market. As we will see later, this trend can also be observed in the Commission's investigations into tax rulings granted to multinationals. As a result, although direct taxation is essentially a national competence, Member States' room for manoeuvre is shrinking and governments are increasingly faced with de facto harmonisation efforts.[54] It will therefore be crucial how the EU courts will assess this Commission activism in the context of these investigations.

In Chapter 4 of the dissertation, we started from the hypothesis that within the framework of globalization, new regulatory powers (e.g. international organizations) appeared in addition to states, which nowadays increasingly cast doubt on the former "privileged" position of states. Among the winners of these processes are multinational corporations, which have become veritable giants in recent decades: some of them – economic – are already comparable in size to states. This, in turn, results in a new situation that significantly increases the room for manoeuvre of these companies, which is exploited not only to use loopholes for tax evasion, but also to influence the leadership of individual countries and the European Union. The latter gives them the opportunity to develop the legislative and judicial processes in a favourable way for them.

In the chapter, we first briefly reviewed the concept of multinational corporations and their role in the world economy, then we examined the problem of tax avoidance, including the tax avoidance practices of multinational companies. In connection with the latter, we also considered it necessary to clarify the conceptual framework beforehand, since nowadays it is increasingly doubtful what kind of taxpayer behaviour qualifies as actually illegal, which is decisive importance for demarcation. This is further complicated by the fact that there are several closely related concepts (tax planning – tax avoidance – tax evasion) in the literature,[55] which make it much more difficult to understand the topic. Here we finally came to the conclusion that it is indeed the criminal consequence that separates the concepts. Even then, however, we have to reckon with the fact that the legal systems of different countries may

[53] Joined Cases T-836/16 and T-624/17, Poland v Commission [ECLI:EU:T:2019:338] para. 56-111., Case T-20/17, Hungary v Commission, [ECLI:EU:T:2019:448] para. 78-83., 88-104., Case C-323/18, Tesco-Global Áruházak Zrt. kontra Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága [ECLI:EU:C:2020:140] para. 70.

[54] KOÓS Gábor: A sávos adórendszerek állami támogatási szempontú vizsgálata. In: VALENTINY Pál-KISS Ferenc László-NAGY Csongor István-BEREZVAI Zombor (szerk.): *Verseny és szabályozás*. Budapest, MTA KRTK Közgazdaság-tudományi Intézet, 2017. 156.

[55] In this regard, experts use terms such as tax planning, tax avoidance, tax avoidance or tax evasion. For details, see: ERDŐS Éva: *A beruházásösztönzés adójoga*. Miskolc, Miskolci Egyetem, 2012. 168-171.

classify the same acts differently. Multinational companies engage in tax avoidance practices primarily out of self-interest, more precisely in the interest of their own shareholders, followed by other, mainly economic, reasons. Another factor contributing to tax avoidance is that the tax systems of most countries have become obsolete nowadays, e.g. multinational companies are not considered as a single organization, but each subsidiary is treated separately from the parent company. At the same time, large companies are gradually taking care not to damage their reputation: they only apply these practices if the expected profits exceed the reputational losses.[56] Over the past decades, multinational corporations developed various methods of tax avoidance, which can basically be divided into two groups: profit shifting techniques and exploiting legal loopholes. The latter include the institution of tax rulings – which are otherwise legal – where multinational companies reduce their tax liability in collaboration with the authority. The abuses related to tax rulings will be dealt with in detail in the second half of this dissertation. We conclude the chapter with the issue of tax havens and preferential tax regimes. This was justified by the fact that for a long time it was not possible to take meaningful action to combat tax avoidance practices of multinational companies because several countries – including EU Member States! – not only tolerated but actually facilitated multinational companies to significantly reduce their tax liability. The study was extended to preferential tax regimes because there is no generally accepted definition of tax havens: international literature uses this concept in a much broader sense[57] than international organisations (OECD).[58] However, a broader definition would jeopardise the reputation of many countries that are major international investment venues (e.g. Benelux, Ireland),[59] with political and economic consequences. It is no coincidence, therefore, that multinational companies found strong allies in these states in order to use their lobbying power to prevent the development of a stricter rating system, which would be an important basis for effective action. This, as we shown in

[56] Jasmine M. FISHER: Fairer shores: Tax havens, tax avoidance, and corporate social responsibility. *Boston University Law Review*, vol. 94, no. 1 (2014) 349.

[57] In this regard, see: Richard MURPHY: Out of sight. *London Review of Books*, vol. 33., no. 8. (2011) 21., Jules HENDRIKSEN: The role of offshore tax havens in the international tax system, *Análise Europeia,* vol. 1., no. 2. (2016) 51., Tax Games (2017) 47-50., John D. WILSON: Tax Havens in a World of Competing Countries. *CESifo DICE Report*, 2014/4., Gregory RAWLINGS: Shifting profits and hidden accounts: Regulating tax havens. 656. In: Peter DRAHOS (ed.): *Regulatory Theory: Foundations and applications*, Canberra, ANU Press, 2017.

[58] Countering offshore tax evasion: Some Questions and Answers. OECD Centre for Tax Policy and Administration, 28 September 2009. https://www.oecd.org/ctp/exchange-of-tax-information/42469606.pdf, 11.

[59] In this regard, see the cases of Luxemburg and the Netherlands from the near past: Nikolaj NIELSEN: Luxembourg not a tax haven, claims PM. *EUobserver*, 28 Jun 2017. https://euobserver.com/justice/138368., Luxembourg refuses to be labelled 'tax haven' by Illinois. *Luxembourg Times*, 09.04.2017. https://luxtimes.lu/archives/2660-luxembourg-refuses-to-be-labelled-tax-haven-by-illinois., Simon GOODLEY– Dan MILMO: Dutch Masters of Tax Avoidance. *The Guardian*, 19 October 2011. https://www.theguardian.com/business/2011/oct/19/tax-avoidance-in-netherlands-becomes-focus-ofcampaigners.

detail, deprived many EU Member States of significant budgetary revenue. All this highlights the need for the European Union to fight tax avoidance not only externally, but actually also internally. It was therefore 'legitimate' that sooner or later the Commission would also take concrete action on this matter.

Chapter 5 of this dissertation deals with question why the Commission ultimately chose state aid law in its investigations. In this context, we will see that there are many practical aspects that underpin this decision. One of the most important of these is that in the area of tax policy, due to the lack of qualified majority, the veto power of the Member State is still present. Indeed, Member States' tax policy is still a sensitive area: it is considered part of their sovereignty.[60] In this sense, they reject any legislative initiative that would reduce their room for manoeuvre. This means that progress in this area, especially in the case of direct taxes, is very difficult: unanimity of Member States is required. However, as mentioned earlier, not all Member States have an interest in cracking down on tax avoidance practices by multinationals, as they are 'winners' of this process. Since the 1990s, the Commission has developed a number of drafts to reduce distortions of competition law that jeopardise the integrity of the internal market, including tax avoidance practices by multinationals.[61] The Commission's determination is demonstrated in July 2001 when it initiated 15 state aid proceedings against special tax regimes in 12 Member States (including France, Germany and the United Kingdom), which granted various tax advantages mainly to multinationals.[62] However, due to the different interests of individual Member States, these efforts were only partially successful, with many harmful practices persisting, causing damage to EU economies amounting to billions of euros. In this context, we concluded that the main driving factor for the Commission to find alternative solutions was the calvary of the Common Consolidated Corporate Tax Base: it had been actively addressing this issue since 2001 and presented a proposal for a specific directive in 2011,[63] but this initiative also failed due to the opposition from Member States. The Commission therefore confronted with the fact that progress towards positive harmonisation in the area of tax policy, especially in the case of direct taxes, was extremely difficult due to opposition from Member States, and it remains a priority for the Court of Justice to shape this area with its judgments. Among other things, it became apparent that:

[60] ERDŐS (2012) op. cit. 255.

[61] In this regard, it is worth mentioning the Ruding report (1992), the Commission's proposals to introduce qualified majority voting in the field of tax policy or the Commission communication on the application of State aid rules to measures relating to direct business taxation.

[62] FORT op. cit. 373.

[63] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2011/0121 final, 16.3.2011., 1-87.

- ember States insist on unanimity in the legislative procedure and refuse to move to qualified majority voting (although in many cases this limits their own room for manoeuvre); [64]
- however, due to the unanimity requirement, even a single Member State can block an initiative that could waste years of work,
- however, despite Member States' commitment to comply with the non-binding Code of Conduct, harmful practices threatening the integrity of the internal market did not completely eliminated, as a significant number of Member States are interested in doing so (think of the various tax incentives granted to multinationals),
- although the Commission issued a Communication, analysing the relationship between tax measures and state aid, and made it clear already in 2001 that, if necessary, it was ready to take action against harmful practices based on state aid law, it could not eliminate these practices,
- in the area of negative harmonisation, although significant progress has been made thanks to the Court's legislative development, this process is slow and judgments can only be enforced asymmetrically (as the extent to which a decision concerning the tax law of one Member State can be interpreted over another is disputed).[65]

Public pressure stemming from tax scandals in the early 2010s, as well as the increasingly pronounced competitive advantage of American companies, also worked in this direction. Regarding the former, we found that the media and activists successfully thematised the public suffering from the aftermath of the economic crisis with individual leaks and articles with a constantly negative tone which became extremely critical of tax avoidance practices by multinational companies. This sentiment not only met similar ambitions of the Commission, but gradually put more and more pressure on it to act. It was primarily the LuxLeaks scandal that accelerated these processes and lead the Commission towards the use of state aid law: this quickly gave the proceedings a basis for legitimacy. The competitive advantage of American companies stemmed from the fact that before the tax reform introduced by US President Donald Trump in December 2017, the US tax system was based on the taxation of so-called world

[64] Although the requirement of unanimity ensures that all Member States can defend their interests, but it could constitute an obstacle later e.g. political perception changes in the Member State concerned, while other Member States do not agree to change the concrete provision of the law. As a result, Member States are generally fear major EU reforms and tend to reach the lowest common denominator. For details, see: Jussi JAAKKOLA: A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State? *German Law Journal*, vol. 20, no. 5 (2019) 675-677.

[65] BÉKÉS Balázs: *Közvetlen adózás az Európai Unióban – A tagállami jogok harmonizációja és versenye*. Wolters Kluwer, Budapest, 2019. 42-43.

income at a high rate (35%).[66] In practice, this resulted on the one hand in the fact that American companies – taking advantage of one of the loopholes in the system, the deferred payment of tax *(tax deferral*) – did not bring home their profits realized abroad, and on the other hand, they tried to establish their headquarters in countries where corporate taxes are low and had the opportunity to use various tax avoidance techniques. In this respect, some EU Member States, notably Luxembourg, Ireland and the Netherlands, have proved to be particularly suitable locations: the largest US multinationals barely paid any taxes in these Member States, saving billions of dollars.[67] The Commission was therefore in a double grip: on the one hand, as we saw before, it came under considerable public pressure due to the tax avoidance practices amounting to billions of euros and, on the other hand, an action was also inevitable from the point of view of the functioning of the European Union, since various tax incentives distorted the internal market. Therefore, it was not the type of the action that was questionable, but only the method and specific reason for it. It was previously expected that American corporations would be primarily targeted during the investigations. For this reason, the Commission first had to choose the appropriate instrument which it found in State aid law, because:

- the European Union has long been committed to curbing unjustified subsidies,
- Article 107 TFEU allows only limited exceptions,
- State aid can take any form, including tax incentives (confirmed by Commission Communications of 1998[68] and 2016[69] and EU case law[70]), thus opening up a wide range of possibilities for Commission action,
- the competition law concept of the tax is significantly broader than the traditional interpretation,

[66] For details, see: CZOBOLY Gergely-CSABAI Róbert: Az USA adóreformja – új korszak kezdete a nemzetközi adótervezésben. *Adó*, 32. évf., 2018/4.
[67] In this respect, the 2015 figure that these three Member States provided about 1/3 of the profits of US multinationals generated abroad is telling. For details, see: Kimberly CLAUSING-EMMANUEL SAEZ-GABRIEL ZUCMAN: Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals. UCLA School of Law, *Law-Econ Research Paper,* No. 20-12, https://eml.berkeley.edu/~saez/CSZ2021.pdf, 2-3.
[68] Commission notice on the application of the State aid rules to measures relating to direct business taxation, 98/C 384/03, OJ L 384/3, 10.12.1998., 277-283.
[69] 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), C 262/1, 19.7.2016., 1-50.
[70]In this regard, it is worth pointing out here that the Court of Justice already held in its 1961 judgment De Gezamenlijke Steenkolenmijnen in Limburg (Case C-30/59, De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community. [ECLI:EU:C:1961:2] para. 19.) that *'the concept of State aid nevertheless has a broader meaning than subsidy, since it covers not only positive benefits, such as subsidies themselves, but also measures which, in various forms, reduce costs to undertakings which would normally be borne by their own budgets and which, without constituting subsidies in the strict sense, are of a similar nature and have the same effect'*.

- the Commission has specific powers in this area under Article 108 TFEU,
- by using state aid law, the Commission can take action against a "renitent" Member State much more quickly, even within months, than initiating infringement procedures which often take many years.[71]

After that, "only" the specific reason for action had to be found which was the abuse of the legal institution of tax rulings. This is briefly due to the fact that, in these cases, the tax authority deviates from the general tax legislation and grant the applicant a tax advantage by individual decisions that is not available or applicable to others.[72] This results in the loss of tax base and distortion of competition for other states, the latter leads to artificial capital flows and penalises less mobile companies and thus jeopardises the integrity of the internal market. The gravity of the situation was well illustrated by the fact that the LuxLeaks scandal revealed that many large companies in Luxembourg had had an effective tax burden of essentially zero percent, on the other hand, there had been no legal regulation in the case of tax rulings, and tax authorities had taken their decisions on the basis of general legal principles and institutional legal culture.[73] This highlights that it is not only the techniques used by multinationals that lead to a serious loss of tax revenue in the European Union, but also the discretionary practices of tax authorities in certain countries, including many EU Member States, which are most embodied in the tax rulings they issue that are extremely favourable to multinationals. The Commission could therefore anticipate that tax rulings issued by Member States maintaining preferential tax regimes (mainly Ireland, the Netherlands and Luxembourg) were likely to include tax rulings that did not comply with State aid rules, especially for large companies. Indeed, there was evidence to suggest that the favourable tax treatment practices of the Irish, Dutch or Luxembourg authorities conferred essentially a selective advantage on a number of major companies, most of them American, which also distorted competition and threatened the internal market. The Commission therefore set up a dedicated task force to analyse tax planning practices, reviewing more than 1000 cases. This confirmed the variety of preferences granted to multinationals in EU Member States, which formed the basis for the procedures that were launched. Overall, we concluded that the Commission's action based on State aid law was guided by a number of practical considerations in addition to the theoretical legal basis, so that

[71] WÁGNER Tamás Zoltán: A lengyel kiskereskedelmi adó és a progresszív adózás jövője. *Iustum Aequum Salutare*, 2020/3. 196.
[72] BÉKÉS (2019) op. cit., p. 206.
[73] For details, see: Leandra LEDERMAN: Avoiding Scandals Through Tax Rulings Transparency. *Florida State University Law Review*, vol. 50., no. 2 (2023) 220-224., 231-244.

it was not really an ad hoc decision, but a well-planned series of actions aimed at tackling the problem 'at its root'.

Chapter 6 focused on the Commission's action. We examined in detail the Commission's decisions, the expert criticisms and finally how the EU courts (General Court, Court of Justice) took positions on the most controversial issues based on defined criteria (e.g. use of a broadly defined reference system, arm's arm's length price interpretation by the Commission, selective advantage). It was at stake in these proceedings whether Member States' room for manoeuvre in the area of direct taxation would be further reduced or whether the Court would block the Commission's efforts.

Although the Commission took into account the OECD BEPS Action Plan adopted at the time when launching its investigations and, in response to social pressure, sought to incorporate fair taxation principles instead of the previous market-based approach,[74] it received a number of criticisms not only from the Member States concerned but also from experts.[75] Although experts welcomed the Commission's action, they also pointed out that the Commission is essentially implementing prohibited tax harmonisation in the area of direct taxation, which would significantly reduce Member States' room for manoeuvre. In particular, the introduction of the Commission's arm's length principle and the classification of independent and integrated companies being in similar factual and legal situation were sharply criticised. The Commission considered the two types of companies comparable, contrary to its own past practice and economic logic, arguing, inter alia, that in both cases the corporate tax system aims to tax profits and that integrated companies only have to use transfer pricing in transactions with companies in another group, otherwise those companies also conduct market-based transactions. The Commission's arm's length price was introduced without the Court clearly stating in Belgium and Forum 187 ASBL, to which it refers[76], that the arm's length price could be derived from Article 107 TFEU. Moreover, the situation of the Member States was further complicated by

[74] Alice PIRLOT: The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'. *Intertax*, vol. 48., no. 4. (2020) 402-415.

[75] In this regard, see: Nina HRUSHKO: Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings. *Brooklyn Journal of International Law*, vol. 43., no. 1. (2017) 331., Nihal ÖZKARDEŞ: Multinational enterprises and selectivity criterion in state aid cases. *Dokuz Eylul University Law Review*, vol. 23., no. 1 (2021) 808-812., Han VERHAGEN: State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107(1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions. *European Taxation*, vol. 57., no. 7. (2017) 282-283., Dimitrios KYRIAZIS: Actions for Annulment in the Fiat and Starbucks Cases: A First Taste of What Will Ensue. *Kluwer Competition Law Blog*, February 29, 2016. http://competitionlawblog.kluwercompetitionlaw.com/2016/02/29/actions-for-annulment-in-the-fiat-and-starbucks-cases-a-first-taste-of-what-will-ensue/., Raymond H.C. LUJA: Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty? EC *Tax Review*, vol. 25., no. 5-6. (2016) 323.

[76] Joined Cases C-182/03 and C-217/03, Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities [ECLI:EU:C:2006:416].

the fact that the Commission's arm's length principle was binding and it was irrelevant whether it had been incorporated into national law, thus overriding national tax legislation. Even though its own previous practice contradicted this step, as it applied the OECD Transfer Pricing Guidelines even in the opening decisions of the present investigations. We agree with the expert opinion which directly states that by interpreting arm's length prices deriving from Article 107 TFEU according to the OECD Transfer Pricing Guidelines, the Commission obliges Member States not only to incorporate soft law directives into their legal order, but also to interpret and apply them in accordance with the Commission's approach.[77] This duality can lead to legal uncertainty, since while State aid law focuses on the tax treatment of taxpayers within a Member State, the OECD Transfer Pricing Guidelines aim to prevent double taxation and profit shifting.[78]

It was anticipated that the EU courts would side with the Member States regarding the most controversial points (broad reference system, Commission arm's length price). However, the General Court nevertheless accepted the Commission's argument, albeit with restrictions which was a serious surprise in the light of the preliminary expert opinions. The Commission could feel itself victorious because:

- the Commission's line in the current investigations does not deviate from its previous practice which is confirmed by case law,
- the reference system consists, in principle, of the general corporate tax system, unless the tax provisions concerned can be clearly severed from the general corporate tax system,
- individual and integrated companies are in a similar factual and legal situation if national tax law does not distinguish between the two types of company for the purposes of corporate tax liability,
- the arm's length principle is one of the general principles of equal treatment in tax matters which forms part of the examination carried out under Article 107 TFEU, regardless of that principle is enshrined in the legal order of the Member State concerned.

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[77] Saturnina Moreno GONZÁLEZ: State aid, tax competition and BEPS: comments on the European Commission’s decisions on transfer pricing rulings. *University of Leicester School of Law Research Paper*, No. 17/00. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947870. 12.

[78] BÉKÉS (2019) op. cit. 226., Alexandra MILADINOVIC-Raffaele PETRUZZI: The recent decisions of the European Commission on fiscal state aid: an analysis from a transfer pricing perspective. *International Transfer Pricing Journal*, vol. 26., no. 4. (2019) 246.

The judicial constraints mostly applied to the transfer pricing method: member states have a margin of discretion and the Commission cannot require an accurate result from the member state. However, these constraints did not materially jeopardise the Commission's practice, since by modifying the methodology for transfer pricing, the Commission could avoid losing a case in the future due to unsuccessful demonstration of selective advantage. Following the General Court rulings, member states had reason to fear that, contrary to their expectations, their room for manoeuvre in the area of direct taxation would be reduced. In addition, previous critical expert opinions have also become more restrained, mainly due to the fact that the General Court annulled several Commission decisions and moderated the Commission's efforts, mainly in the area of transfer pricing methodology, due to the failure to demonstrate a selective advantage.[79] The Commission could therefore await the Court's judgments with positive omens, but it found itself in difficulty already after the Advocates-General's Opinion in Fiat.[80] Although the Advocates-General's opinions strengthened and refined the judgments of the General Court on issues such as the discretion of the authorities of the Member States in applying transfer pricing methods, the recognition of the possibility of limited reliance on general principles of law or the novelty of the Commission's approach in examining the present cases (which, according to the Advocate General, does not infringe the principle of legal certainty) but, at the same time, the Commission's efforts clearly curtailed in cardinal questions. Regarding the latter, the Advocate General stated that the arm's length principle was in national law and could not be inferred from Article 107 TFEU and applies only if it was actually incorporated (specific legislation!) into the tax system of the Member State serving as a reference system. Otherwise, no recourse can be made to administrative/judicial practice in a Member State or to the presumed purpose of the tax system. Although opinions of the Advocates General are not legally binding on the Court of Justice, judgments usually follow them. That was the case in Fiat: the Court confirmed the Advocate General's Opinion and found that the Commission had

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[79] In this regard, see: Ruth MASON: State Aid Enforcement After Amazon. *Tax Notes International*, vol. 102 (May 31, 2021) 1172., Cees PETERS: Critical Analysis of the General Court's 'EU Arm's Length Tool': Beware of the Reflexivity of Transfer Pricing Law! *EC Tax Review*, vol. 31., no. 1. (2022) 34., Dionysios PELEKIS: The Burden and Standard of Proof in the Tax Ruling Cases: A Practical Limit to the EU's Arm's Length Principle? *Journal of European Competition Law & Practice*, vol. 12., no. 9. (2021) 4-6., David G. CHAMBERLAIN: Apple, State Aid, and Arm's Length: EU General Court's Failure of Imagination. *Tax Notes Federal*, vol. 168. (August 31, 2020) 1628-1631, illetve 1633.

[80] Case C-885/19. P. Opinion of Advocate General Priit Pikamäe: Fiat Chrysler Finance Europe v Commission [ECLI:EU:C:2021:1028] and Case C-898/19. P. Opinion of Advocate General Priit Pikamäe: Ireland v Commission [ECLI:EU:C:2021:1029].

incorrectly defined the reference system and that its analysis of the reference system was therefore erroneous, which also led to the annulment of the General Court judgment.[81]

In light of the judgment, we assessed developments that the Commission was in an extremely difficult position, as it would now have to reckon not only with calculation errors in transfer pricing methods (to which it would probably be able to adapt easily in the future), but also with the annulment of the selectivity analyses as a whole. This may lead to a limited reliance on state aid law against tax avoidance practices by multinational companies in the future, e.g. the Member State concerned may successfully argue in favour of a narrower reference system if the Commission refers to the objectives of the tax system rather than specific legislative provisions. Member States, on the other hand, may consider the judgment that the Court took action against prohibited tax harmonisation and defended Member States' autonomy in the field of direct taxation.

In the final chapter, Chapter 7, we assumed that the Court's judgment in the Fiat case substantially restricted the Commission's room for manoeuvre, classifying the Commission's efforts as prohibited tax harmonisation. The previous general expert opinions at the stage of the Commission's investigations, which severely criticised the broad reference system and the Commission's arm's length price, were essentially confirmed. In this chapter, we sought to answer the two questions formulated at the beginning of the dissertation: whether the Commission chose a suitable instrument when using state aid rules in its investigations and whether it achieved its objective, i.e. whether – with changes in the legislative environment favourable to multinational companies in Member States – the opportunities offered by tax rulings issued by Member State authorities were reduced tax avoidance practices.

In the light of the Fiat judgment, it was questionable whether there was an alternative route for the Commission or whether it was better to return to the traditional legislative path. As a preliminary point, we considered that the Commission should follow the latter path, which does not preclude it from continuing to launch State aid investigations against Member States in parallel if it suspects prohibited State aid in certain tax rulings. At the same time, the Commission must accept that these investigations will be complementary and the legislative action will be the main path. The experts basically agreed with the first part of our previous reasoning but there was a debate among them whether there was an alternative route for the Commission. In this respect, they mostly saw the possibility of the Commission examining the

[81] Joined Cases C-885/19 P and C-898/19 P. Fiat Chrysler Finance Europe and Ireland v European Commission [ECLI:EU:C:2022:859], para. 65-113.

whole transfer pricing regulation of a given Member State.[82] However, in our opinion, this path does not necessarily seem more viable than the current one[83] and moreover, based on the Fiat judgment, it is quite possible that prohibited tax harmonisation would be established if the Commission resorted to excessively innovative methods in order to take tough action. Therefore, in the light of the Fiat judgment, we believe that action based on state aid law will no longer be the main direction but will only play a complementary role to EU legislation. The latter fact shows that the scope of state aid rules against harmful tax competition and base erosion is limited, since it focuses on the internal coherence of national tax systems and not on differences between tax systems.[84]

Nevertheless (answering to the second question), this failure does not mean that the Commission's action was completely ineffective: EU Member States with preferential tax regimes closed the most glaring loopholes in their tax systems[85] and, unlike vetoes in previous years, agreed to adopt EU legislation that will gradually reduce the possibility for multinationals to use tax avoidance techniques. Regarding the latter, it is sufficient to mention the implementation of the global minimum tax in EU law,[86] where Member States managed to agree on the content of the regulation relatively quickly compared to the period before the Commission's investigations.

In conclusion, we would like to highlight the following findings:

- the Commission's action based on state aid law is guided not only by a theoretical legal basis but also by a number of practical considerations, so that it is not really an ad hoc decision, but a well-planned series of actions,

[82] In this regard, see: Ryan FINLEY: The Fiat State Aid Judgment: Clarity or More Confusion? *Tax Notes International*, vol. 108 (Dec 5, 2022) 1189., Ryan FINLEY: Fiat and the Rejection of External Transfer Pricing Parameters. *Tax Notes International*, vol. 108 (Dec 12, 2022) 1354., Pierre-Antoine KLETHI-Peter ADRIAANSEN: The Fiat EU state aid case: swansong or phoenix reborn? *Tax Journal*, December 9, 2022. 17-18., Robert GOULDER: CJEU to the Rescue: As Goes Fiat, So Goes Apple. *Tax Notes*, December 2, 2022. https://www.taxnotes.com/featured-analysis/cjeu-rescue-goes-fiat-so-goes-apple/2022/12/02/7ff5w., Ruth MASON: Ding-Dong! The EU Arm's-Length Standard Is Dead. *Tax Notes International*, vol. 108 (Dec 5, 2022) 1251-1256.

[83] FORT op. cit. 373.

[84] GONZALEZ (2017) op. cit. 20-21.

[85] For example, see: ERDŐS Éva: A digitális gazdaság és kereskedelem árnyoldala: a digitális adóelkerülés nemzetközi tendenciái. *Miskolci Jogi Szemle*, 2019/2. különszám, 1. kötet. 237–239., Lisa O'CARROLL-RICHARD PARTINGTON: What does the Irish tax deal mean for multinationals? *The Guardian*, 7 Oct https://www.theguardian.com/world/2021/oct/07/why-is-ireland-key-to-taxing-multinationals 2021, Ruud de MOOIJ-DINAR Prihardini-Antje PFLUGBEIL-EMIL STAVREV: International Taxation and Luxembourg's Economy. *IMF Working Paper,* WP/20/264, pp. 8-11, Hélène CREPIN: Tax controversy evolution continues apace in Luxembourg. *EY Luxembourg International Tax Services Partner*, 25 May https://www.ey.com/en_lu/tax/tax-controversy-evolution-continues-apace-in-luxembourg 2022.

[86] Council Directive (EU) 2022/2523 of 14 December 2022 on a global minimum level of taxation applicable to MNE Groups and Large Domestic Groups in the Union. OJ L 328, 22.12.2022., 1–58.

- by the early 2010s, the Commission was confronted with the fact that it was not possible to achieve meaningful results through legislation on the harmonisation of direct taxation, or it was very difficult to achieve it due to strong opposition from Member States,
- the media and activists successfully – through individual leaks and negative articles constantly in the negative – thematised public opinion suffering from the aftermath of the economic crisis which became extremely critical of tax evasion practices by multinationals and this sentiment not only met similar ambitions of the Commission, but gradually put more and more pressure on it to act,
- in order to remain competitive, large US companies relocated their headquarters to preferential tax regimes – to a large extent to EU Member States, in particular Ireland, the Netherlands and Luxembourg – where taxes are low and they can use various tax avoidance techniques,
- Tax rulings, while legal, are problematic in several respects. By the early 2010s, it became apparent that not only the tax avoidance techniques used by multinational companies lead to a serious loss of tax revenue in the European Union, but also the discretionary practices of tax authorities in certain countries, including many EU Member States, which are most embodied in the tax rulings they issue that are very favourable to multinationals (sweetheart deals),
- during its investigations, the Commission – citing action against tax avoidance practices by multinationals – used its powers in the field of state aid law to circumvent the veto power of member states effectively conducting disguised tax harmonisation,
- contrary to the Commission's arguments, the arm's length principle cannot be inferred from Article 107 TFEU because it is in national law, i.e. it can only be applied if it is actually incorporated into the national tax system constituting general taxation and serving as a reference system,
- despite all its difficulties, the Commission's legislative action against tax avoidance practices by multinational companies is nevertheless more suitable than investigations based on State aid rules,
- although the Commission did not choose a suitable instrument to act, this does not mean that it was completely ineffective: EU Member States maintaining preferential tax regimes closed the most glaring loopholes in their tax systems and, unlike vetoes in

previous years, agreed to adopt EU legislation that will gradually reduce the possibility for multinationals to use tax avoidance techniques.

Utilization and utilization possibilities of scientific results: The questions examined during the research and the formulated research results can significantly facilitate the internal development of the field of law in Hungary, especially in Hungarian-language literature. Since, in the Hungarian-language literature, this topic was not analysed in such detail, rather only one aspect of it was examined by the authors concerned. Although numerous studies were published in foreign (English-language) literature on the subject, these did not deal with the topic comprehensively, e.g. the dissertation analyses the action against the tax avoidance practices of multinational companies in a unified structure, from the motives of the Commission to the Fiat judgment. Therefore, the results achieved go beyond the narrow topic of the thesis, they can expand the knowledge base of state aid law in general, and they can contribute to a better understanding of the Commission's efforts in the field of direct taxation, where it has been recently trying to circumvent the institution of the veto of the Member States with its innovative approach.

IV. LIST OF PUBLICATIONS ON THE TOPIC OF THE THESIS

1. WÁGNER Tamás Zoltán: A digitális adók kérdése, különös tekintettel a cseh szabályozásra. *Külügyi Műhely*, 2020/1. 97-125.
2. WÁGNER Tamás Zoltán: A lengyel kiskereskedelmi adó és a progresszív adózás jövője. *Iustum Aequum Salutare*, 2020/3. 193-219.
3. WÁGNER Tamás Zoltán: Multinacionális vállalatok adóelkerülési gyakorlatai. Miskolczi, Bodnár Péter (szerk.): XVII. Jogász Doktoranduszok Országos Szakmai Találkozója. Budapest, Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2020) 309-323.
4. WÁGNER Tamás Zoltán: Adókedvezmények megítélése az Európai Unióban, különös tekintettel az Európai Bizottság, illetve az uniós bíróságok joggyakorlatára. Miskolczi, Bodnár Péter (szerk.) XV. Jogász Doktoranduszok Országos Szakmai Találkozója. Budapest, Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2020) 193-207.

5. WÁGNER Tamás Zoltán: Egyház és az állami támogatások kérdése, avagy a Betania ügy. *A Jog tudománya, a mindennapok joga I. konferenciakötet*, DE Praetor Szakkollégium, Debrecen 2019. 222-236.
6. WÁGNER Tamás Zoltán: Kiskapu az állami támogatásokra vonatkozó uniós szabályozásban, különös tekintettel a McDonald's ügyre. *Iustum Aequum Salutare*, 2019/4. 181-204.
7. WÁGNER Tamás: A bányajáradékok és a szelektivitás kritériuma, avagy a MOL állami támogatásának ügye. Pázmány Law Working Papers, 2017/15. 1-17.
8. WÁGNER Tamás: Adójellegű állami támogatások - A magyar reklámadó és az uniós jog, *Miskolci Doktorandusz Konferencia Tanulmánykötet*, 2017. 286-300.
9. Tamás Zoltán WÁGNER: Detrimental effects of tax havens and the case of the Dutch tax system. *Pro Futuro*, 2019/3. Special Issue. 45-67.
10. Tamás Zoltán WÁGNER: Role of tax havens in tax avoidance by multinationals with special regard to Ireland. In: Kristína HOGHOVÁ-Daniel KLIMOVSKÝ-Boris KOLMAN (eds.): *Sociálne vedy z perspektívy mladých vedeckých pracovníkov IV.: Zborník príspevkov z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov*. Trnava, Fakulta sociálnych vied Univerzita sv. Cyrila a Metoda v Trnave, 2020. 333-341.