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

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

Introduction

As more countries participate in the global economy, multinational corporations look to countries with tax advantages to establish foreign offices. The Republic of Ireland's 12.5% corporate tax rate has drawn some of the largest multinational corporations in the world to its shores, including Apple.[1] While Ireland does not offer the lowest corporate tax rate in the European Union (EU), its resident-based tax system provides corporations like Apple with the "holy grail" of corporate tax loopholes.[2] Since Apple first entered Ireland in the 1990s, it has grown into one of the most valuable companies in the Fortune 500.[3] While Apple's success has earned it a devoted following, it has also placed the company under scrutiny for its tax practices.

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

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

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

Recently, the EU attacked Apple's tax structure in Ireland and found the company liable for more than €13 billion in back taxes, even though the company never violated Irish tax laws.[4] The European Commission (hereinafter the Commission) attacked Apple's tax structure in Ireland as violating state aid under the Treaty on the Functioning of the European Union (TFEU).[5] Both Apple and Ireland appealed the decision to the Court of Justice of the European Union (CJEU).[6] On appeal, the CJEU should reject the Commission's decision against Apple and Ireland since it violates EU member states' sovereign rights; Apple did not receive state aid within the meaning of TFEU, and the decision negatively impacts United States of America (US)-EU relations.

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

I. Background

A. *EU Law*

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

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

4. European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016) [hereinafter Press Release on Ireland].

5. European Commission on State Aid – Ireland, Alleged aid to Apple SA.38373, 2014 O.J. (C 369) 22, 22-23 [hereinafter Ireland Alleged Aid to Apple].

6. Natalia Drozdiak, *European Commission Decision Isn't Endgame for Apple, Ireland*, Wall Street J. (Sept. 8, 2016, 2:00 AM), http://www.wsj.com/articles/european-commission-decision-isnt-endgame-for-apple-ireland-1473314400.

7. Consolidated Version of the Treaty on European Union art. 13, Oct. 26, 2012, 2012 O.J. (C 326) 22 [hereinafter Treaty on European Union].

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

For the Commission to prosecute a member state, the EU must have competence to act. Competence can only be granted to the EU by the member states' transfer of sovereign power.[12] Any power not transferred remains with the member state.[13] The EU does not have exclusive competence in controlling the internal market; rather, the member states and the EU share that competence.[14] If the EU acts when there is shared competence, then it assumes exclusive power under pre-emption.[15] However, the EU has not officially acted to set a uniform system for the internal market. Instead, member states must agree to establish national laws and policies that do not distort competition.[16] Prior to the EU, many member states had multi-level taxes on goods and services resulting in tax being paid upon tax.[17] The EU eventually agreed to adopt France's taxation system for goods and services, which is known as the Value Added Tax (VAT) system.[18] VAT was the result of negotiations among member states since they retain the sole power to create tax legislation.[19] This is an area where the US and the EU greatly differ.

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

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

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

11. *See id.*

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

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

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

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

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

17. *Id.* at 80-81.

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

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

In the US, there is a Federal tax code that is applicable to all US citizens and residents, regardless of their state of residence.[20] The Internal Revenue Service (IRS) is responsible for enforcing and collecting Federal taxes.[21] In addition to the Federal tax code, each state has its own tax code.[22] State taxes are only applicable to residents of the state. There is no uniformed collection agency for state taxes. When there is a conflict between Federal tax and State tax, the Federal tax code takes precedence under the US Constitution's supremacy clause.[23]

While the US operates under federalism, the EU does not. Although the EU founders envisioned federalism, years of negotiations and agreements ultimately resulted in the rejection of such a system.[24] As a result, the EU does not impose a tax on EU citizens and instead each EU citizen is taxed in his/her respective member state.[25] The Commission may only make proposals for tax legislation and in order for those proposals to become law, every member state must unanimously agree to adopt the law.[26] The EU hoped to operate under federalism, as in the US, in the form of a supreme European Constitution.

The EU hoped the Treaty Establishing a Constitution for Europe[27] (hereinafter the Constitutional Treaty) would not only symbolize a unified European identity, but also facilitate future growth and cooperation within the EU.[28] The Constitutional Treaty would empower EU institutions to enact laws governing EU citizens; in similar fashion, the US Congress enacts legislation that impacts all US citi-

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20. *Frequently Asked Questions (FAQs) About International Individual Tax Matters,* IRS, https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-international-individual-tax-matters (last updated Aug. 27, 2017).

21. *The Agency, its Mission and Statutory Authority*, IRS, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last updated Aug 6, 2017).

22. *See Tax Policy Center's Briefing Book: State (and Local) Taxes*, TAX POL'Y CTR. (2016), http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-governments; *see, e.g.*, CAL. REV. & T. CODE §17041(a)(1) (2010 & West Supp. 2017) ("There shall be [taxes] imposed for each taxable year upon the entire taxable income of every resident of this state . . . .").

23. U.S. CONST. art. IV, § 2; s*ee also* Bank v. Supervisors, 74 U.S. 26, 26-27 (1868).

24. FOSTER, *supra* note 15, at 14-15.

25. WILLIAMS, *supra* note 16, at 23-25.

26. EUROPEAN COMMISSION, THE EUROPEAN UNION EXPLAINED: PROMOTING THE INTERNAL MARKET AND ECONOMIC GROWTH—TAXATION 5 (Jan. 2015).

27. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1, 9.

28. Anca M. Pusca, *Is the Constitutional Project Dead? An Introduction*, *in* REJECTING THE EU CONSTITUTION?: FROM THE CONSTITUTIONAL TREATY TO THE TREATY OF LISBON 1, 3 (Anca M. Pusca ed., 2009).

zens.[29] Unfortunately, many EU citizens viewed European federalism as infringing upon member states' sovereignty.[30] The failure of the Constitutional Treaty to provide concrete reasoning for its need led to the EU's ultimate failure to pass such a constitution.[31]

After a failed attempt to establish a European Union Constitution,[32] the Treaty of Lisbon was pushed through to incorporate many of the principles in the EU Constitution.[33] All member states agreed to push the treaty through their respective parliaments, except for Ireland.[34] The Treaty of Lisbon was subjected to a public vote in Ireland, which ultimately resulted in a two-thirds "no" vote due to concerns over loss of Irish sovereignty.[35] The incorporation of a treaty into EU law requires the unanimous agreement of all member states.[36] As a result of Ireland's vote, the Treaty of Lisbon was not ratified and therefore did not become part of EU law.[37] Thus, the EU was forced to make specific concessions to Ireland to encourage a "yes" vote in a second referendum.[38]

The most important concession made to Ireland was regarding its tax law. In exchange for a "yes" vote, Ireland and other European leaders agreed to a special protocol,[39] specific only to Ireland and hav-

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29. U.S. CONST. art. I, § 1; Stephen C. Sieberson, *How the New European Union Constitution Will Allocate Power Between the EU and its Member States-A Textual Analysis*, 37 VAND. J. TRANSNAT'L L., 993 (2004); Elisabeth Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 IND. J. GLOBAL LEGAL STUD., 391, 393 (2005).

30. *French Say Firm 'No' to EU Treaty*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/4592243.stm (last updated May 30, 2005, 10:12 AM); Nicholas Watt, *EU Constitution a Grandiose Project that Failed, Says Beckett*, THE GUARDIAN (Oct. 17, 2006, 7:19 PM), https://www.theguardian.com/politics/2006/oct/18/uk.eu1.

31. *See* Soeren Kern, *Why Irish Voters Rejected the Lisbon Treaty*, THE BRUSSELS J. (June 16, 2008, 1:40 PM), https://www.brusselsjournal.com/node/3340.

32. Andrea Broughton, *European Council Fails to Agree on Constitutional Treaty*, EUROFOUND (Dec. 16, 2003), http://www.eurofound.europa.eu/observatories/eurwork/articles/european-council-fails-to-agree-on-constitutional-treaty.

33. *See* Henry McDonald, *Irish Voters Reject EU Treaty*, THE GUARDIAN (June 13, 2008, 4:08 AM), https://www.theguardian.com/world/2008/jun/13/ireland.

34. FOSTER, *supra* note 15, at 38; *see* McDonald, *supra* note 33. *See generally* Crotty v. An Taoiseach, [1987] 1 I.R. 713, 713 (H. Ct.) (Ir.) (indicating that public referenda are required for all EU treaties).

35. *See* Cathal M. Brugha, *Why Ireland Rejected the Lisbon Treaty*, *in* REJECTING THE EU CONSTITUTION?: FROM THE CONSTITUTIONAL TREATY TO THE TREATY OF LISBON 127 (Anca M. Pusca ed., 2009); Kern, *supra* note 31; McDonald, *supra* note 33.

36. *See* McDonald, *supra* note 33.

37. *Id.*

38. Simon Taylor, *Irish secure concessions on Lisbon treaty*, POLITICO, (Dec. 11, 2008, 5:47 PM), http://www.politico.eu/article/irish-secure-concessions-on-lisbon-treaty/.

39. Protocol on the concerns of the Irish people on the Treaty of Lisbon, 2013 O.J. (L60) 132, 132-33.

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

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

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

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40. *Id.*

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

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

43. ELI HADZHIEVA, POLICY DEP'T ECON. & SCI. POLICY, EU PARLIAMENT, THE EUROPEAN UNION'S ROLE IN INTERNATIONAL ECONOMIC FORA PAPER 3: THE OECD 14, 42 (Karine Gaufillet ed., 2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542192/IPOL_STU(2015)542192_EN.pdf.

44. Traynor, *supra* note 41.

45. OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS 2 (OECD Publishing 2010) [hereinafter OECD Report 2010] ("The OECD member countries: are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, [South] Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.").

46. OECD, MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL CONDENSED VERSION 9 (OECD Publishing 2014).

text.[47] The OECD has not only impacted bilateral treaties, but also sovereign states' national tax laws.[48]

In its 1998 project, the OECD asked member nations to analyze their own domestic tax policies and identify any tax laws that may harm tax competition.[49] The report led to forty-seven tax laws being deemed potentially harmful to tax competition.[50] In 2004, the OECD published an update to its 1998 harmful tax competition project.[51] The update demonstrated that OECD member nations took notice of the 1998 project and worked to change harmful tax laws.[52] Eighteen of the forty-seven harmful tax policies were abolished or were on the verge of being abolished; fourteen were revised to eliminate the possibility of a negative impact on tax competition; and thirteen were deemed not harmful.[53]

One of the OECD's most profound contributions to international tax has been its transfer pricing guidelines. Transfer pricing is the process multinational corporations use to assign values to goods and/or services that involve international transactions between related corporations.[54] The OECD's 1979 Transfer Pricing and Multinational Enterprises report (1979 Report) created the arm's length principle, which provides that transactions between associated corporations "should not be treated differently for tax purposes from similar transactions between independent parties solely by virtue of the fact that the enterprises are associated."[55] There are five methods to determine if transfer pricing conforms to the arm's length principle: 1) the comparable uncontrolled price method (CUP);[56] 2) the cost-plus

47. Mary Bennett, *The OECD's BEPS Final Report, Part II: OECD as a Standard-Setting Organization: Question Remain*s on Cultural Acceptance, 67 TAX EXECUTIVE 22, 22 (2015).

48. *See id.* at 22-23.

49. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 73-78 (OECD Publishing 1998).

50. OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: THE 2004 PROGRESS REPORT 4-6 (OECD Publishing 2004).

51. *See id.* at 4.

52. *Id.* at 5.

53. *Id.* at 7-10.

54. *See* WILLIAMS, *supra* note 16, at 146.

55. OECD, THE COMMITTEE ON FISCAL AFFAIRS, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (DRAFT TEXT OF PART II) 9 (1995).

56. OECD Report 2010, *supra* note 45, at 24 ("A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.").

method;[57] 3) the resale price method;[58] 4) the transactional net margin method (TNMM);[59] and 5) the transaction profit method.[60] Even after the 1979 Report was officially repealed in 1995, the arm's length principle remained the standard in evaluating transfer pricing arrangements.[61]

The 2010 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter the Transfer Pricing Guidelines) reaffirmed the arm's length principle as the appropriate standard for evaluating transfer pricing.[62] Although OECD member nations are not required to formally adopt the Transfer Pricing Guidelines, many of the nations incorporated the guidelines into their national laws.[63] The OECD grew in importance following the 2008 global crisis as many nations faced a growing fiscal crisis.

In response, the OECD identified Base Erosion and Profit Shifting (BEPS) as a problem and created the BEPS project to address the mismatches in tax rules that allow a corporation to pay low-tax or no-tax on its profits.[64] The OECD published fifteen action plans for developing and developed countries to follow.[65] Actions 8-10 set out new guidelines for transfer pricing in hopes of assuring that pricing allocations are in line with the economic reality of value creation.[66] The BEPS project held its first meeting in 2016 and more than eighty countries participated including Ireland and the US.[67] While the BEPS project strives to reduce global tax avoidance, many corpora-

57. *Id.* at 26 ("A transfer pricing method using the costs incurred by the supplier of property (or services) in a controlled transaction. An appropriate cost plus mark up is added to this cost, to make an appropriate profit in light of the functions performed (taking into account assets used and risks assumed) and the market conditions.").

58. *Id.* at 28 ("A transfer pricing method based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. The resale price is reduced by the resale price margin.").

59. *Id.* at 30 ("A transactional profit method that examines the net profit margin relative to an appropriate base (*e.g.* costs, sales, assets) that a taxpayer realises from a controlled transaction . . . .").

60. *Id.* at 30 ("A transfer pricing method that examines the profits that arise from particular controlled transactions of one or more of the associated enterprises participating in those transactions.").

61. *See id.* at 32, 36-41.

62. *Id*. at 31-32.

63. *See id.* at 36.

64. OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT EXPLANATORY STATEMENT: 2015 FINAL REPORTS 4-5 (OECD Publishing 2015).

65. *Id.* at 5, 13-18.

66. *Id.* at 15-16; *see also* OECD, ALIGNING TRANSFER PRICING OUTCOMES WITH VALUE CREATION (OECD Publishing 2015).

67. ERNST & YOUNG, GLOBAL TAX ALERT: BEPS ASSOCIATED INCREASED TO 82 COUNTRIES (June 30, 2016), http://www.ey.com/Publication/vwLUAssets/BEPS_associates_in

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

C. Ireland vs. US Tax Law

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

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

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creased_to_82_countries/$FILE/2016G_01859-161Gbl_BEPS%20associates%20increased%20to%2082%20countries.pdf.

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

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

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

71. WILLIAMS, *supra* note 16, at 16.

72. W.J. Tipping v. Louis Jeancard [1947] 2 ITC 360 (H. Ct.) 365 (Ir.).

73. De Beers Consolidated Mines Ltd. v. Howe [1905] 2 KB 612 (AC) 612 (UK).

74. *Id.* at 631-32.

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

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

D. *Apple in Ireland*

In 1980, Apple went public on the NASDAQ and then CEO Steve Jobs announced the company's first manufacturing plant outside of the US, located in Hollyhill, Ireland.[80] Apple incorporated Apple Operations International (AOI), Apple Operations Europe (AOE), and Apple Sales International (ASI) in Ireland.[81] AOI was a wholly-owned subsidiary of Apple and AOE and ASI were wholly-owned subsidiaries of AOI.[82] The central management and control of all

75. Unit Constr. Co. Ltd. v. Bullock [1960] AC 351 (HL) 352 (UK).

76. *Id.* at 353.

77. *Id.* at 354.

78. Bullock v. Unit Constr. Co. Ltd. [1959] 2 WLR 437 (CA) 352 (UK) 444-45.

79. W.J. Tipping v. Louis Jeancard [1947] 2 ITC 360 (H. Ct.) 365 (Ir.).

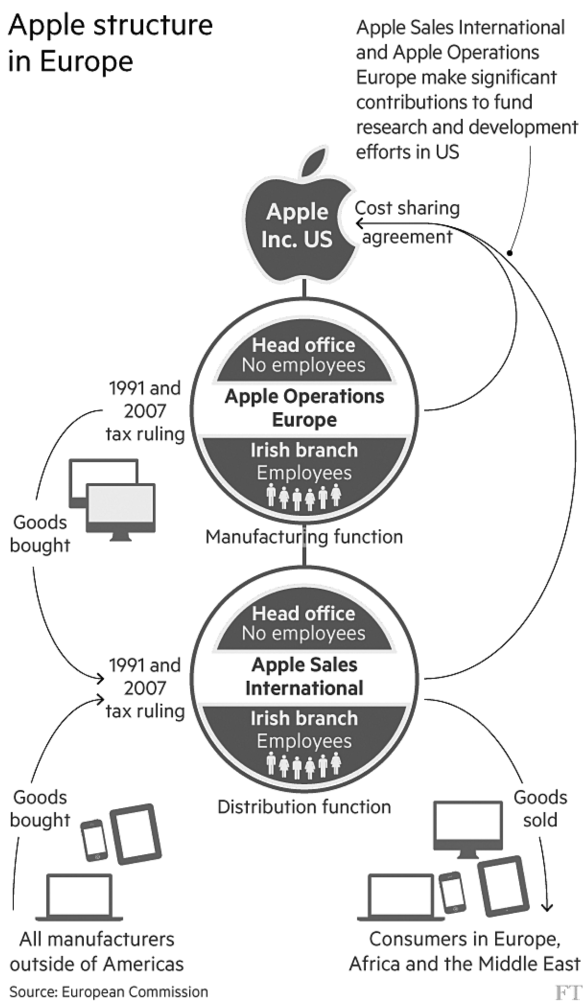
80. James Cook, *A Deal Made in 1991 Paved the Way for Apple's Current Tax Issue*, BUS. INSIDER (Aug. 30, 2016, 5:22 AM), http://www.businessinsider.com/how-apple-managed-to-get-its-tax-deal-in-ireland-in-1991-2016-8?r=UK&IR=T; Suzanne Deffree, *Apple IPO makes instant millionaires, Dec. 12, 1980*, EDN NETWORK (Dec. 12, 2016), http://www.edn.com/electronics-blogs/edn-moments/4403276/Apple-IPO-makes-instant-millionaires—December-12—1980.

81. Ireland Alleged Aid to Apple, *supra* note 5, at 26.

82. *Id.* at 27.

three corporations were out of Apple's Cupertino, California headquarters.[83]

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



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

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

While Apple was one of the top computer companies during the 1980s, Microsoft and Windows dominated the 1990s, causing Apple to restructure pricing allocation among its Irish subsidiaries.[87] In 1990, Apple met with the Irish Government to receive a tax ruling[88] regarding its proposed cost and revenue allocations for AOE and ASI.[89] In the 1991 ruling, Ireland agreed to Apple allocating 65% of operating expenses to AOE for revenue, up to $60-70 million and 20% of operating expenses for any excess revenue.[90] In 2007, Ireland approved Apple's reduced operating expenses allocation of 10-20% and its inclusion of a 1-9% Intellectual Property (IP) return to its AOE branch.[91] The 1991 ruling stated that all revenue attributed to ASI would be taxed at the 12.5% Irish tax and the 2007 ruling allocated 8-18% of operating costs to ASI.[92] It is those allocations that first caught the attention of the US government.

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

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

85. *See id.* § 1.

86. *See id.* § 2.

87. *See Permanent Subcommittee*, *supra* note 2, at 11, 39; Cook, *supra* note 80.

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

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

90. *Id.* at 29.

91. *Id.*

92. *Id.*

93. *Permanent Subcommittee*, *supra* note 2, at 2.

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

E. The Commission vs. Apple

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

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

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94. *See id.* at 37.

95. *Id.*

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

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

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

99. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 3.

100. *Id.* at 8.

101. *Id.*

102. *See* Tom Cahill, *10 Taxpayer Handouts to the Super Rich That Will Make Your Blood Boil*, US UNCUT (Oct. 28, 2015), http://usuncut.com/class-war/10-corporate-welfare-programs-that-will-make-your-blood-boil/ [https://web.archive.org/web/20170126004740/http://usuncut.com/class-war/10-corporate-welfare-programs-that-will-make-your-blood-boil/]; Niraj Chokshi,

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

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

In examining the Irish tax rulings, the Commission found that Apple received state aid in violation of the TFEU.[108] According to the decision, the tax rulings provided to Apple allowed for transfer pricing that did not reflect the economic realities of the transactions.[109] In doing so, Apple was able to allocate millions in profits to specific Irish subsidiaries, particularly AOI and ASI, which were not subject to taxation in any nation.[110] The Commission found that in

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The United States of Subsidies: The Biggest Corporate Winners in Each State, THE WASHINGTON POST (Mar. 18, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/17/the-united-states-of-subsidies-the-biggest-corporate-winners-in-each-state/.

103. Philip Mattera & Kasia Tarczynska, *Uncle Sam's Favorite Corporations: Identifying the Large Companies that Dominate Federal Subsidies*, GOOD JOBS FIRST 2, 8 (2015), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/UncleSamsFavoriteCorporations.pdf.

104. *Id.* at 10.

105. Nicholas J. DeNovio, et al., *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments*, 68 TAX EXECUTIVE, Mar.–Apr. 2016, at 15, 15.

106. *See* European Commission on State Aid – France, Restructuring aid to Areva SA.44727, 2016 O.J. (C 301) 2, 3 (scrutinizing France for providing €4 billion in aid to restructure Areva's energy operations); European Commission on State Aid – Austria, Klagenfurt Airport – Ryanair and Other Airlines Using the Airport SA.24221, 2012 O.J. (C 233) 28, 28-29 (scrutinizing the Austrian state government's direct payments to Ryanair to improve travel between Austria and the United Kingdom); *see also* DeNovio, *supra* note 105.

107. 26 U.S.C. § 45 (2012 & Supp. III 2015).

108. *European Commission Statement by Commissioner Vestager on State Aid Decision that Ireland's Tax Benefits for Apple were Illegal*, EUROPA (Aug. 30, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-2926_en.htm [hereinafter Commissioner Vestager Press Release].

109. KPMG, EURO TAX FLASH ISSUE NO. 300 (Aug. 30, 2016), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/08/etf-300-state-aid-decision-in-the-apple-case.pdf.

110. *Id.*

2011, Apple's tax rate was only 0.05% and dropped to 0.005% in 2014, well below Ireland's 12.5% corporate tax rate.[111]

In determining that Apple's transfer pricing was not proper, the Commission relied on the 2010 OECD Transfer Pricing Guidelines. The Commission found that Apple did not provide the Office of the Revenue Commissioners (ORC) with the proper documentation supporting its transfer pricing tax proposal, which went against Section V of the Transfer Pricing Guidelines.[112] Under the first tax ruling issued to Apple in 1991, ASI would only be allocated 12.5% of all operating costs, which changed in 2007 to 8-18%.[113] Ireland and Apple further agreed that the cost plus for ASI would be $28-38 million with capital allowances not exceeding $8-18 million.[114] Both agreed to a mark-up of 20% on costs that exceed $60-70 million.[115]

AOE was granted a similar ruling with 10-20% operating costs allocated to its branch.[116] Once again the Commission found that Apple did not provide proper documentation to the ORC in its allocation.[117] The Commission noted that the ruling complied with the TNMM method of calculating allocations; however, there did not appear to be a viable reason for the allocation.[118] Additionally, the Commission found that AOI had no employees and no real activities, further demonstrating the lack of economic justification for the allocation.[119]

Also, particularly concerning to the Commission was the fact that both rulings were for an open-ended duration while other member states limited the duration of their tax rulings.[120] The Commission noted that several other member states restricted tax rulings to a fixed

111. Commissioner Vestager Press Release, *supra* note 108 ("Let me illustrate this for one tax year: In 2011, Apple Sales International made profits of 16 billion euros. Less than 50 million euros were allocated to the Irish branch. All the rest was allocated to the "head office", where they remained untaxed. This means that Apple's effective tax rate in 2011 was 0.05%. To put that in perspective, it means that for every million euros in profit, it paid just 500 euros in tax. This effective tax rate dropped further to as little as 0.005% in 2014, which means less than 50 euros in tax for every million euro in profit.").

112. Ireland Alleged Aid to Apple, *supra* note 5, at 39.

113. *Id.* at 30.

114. *Id.*

115. *Id.*

116. *Id.* at 31.

117. *Id.* at 30.

118. *Id.* at 33.

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

120. Ireland Alleged Aid to Apple, *supra* note 5, at 34.

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

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

II. Apple Did Not Receive State Aid

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

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

122. *Id.* at 35.

123. *Id.*

124. *Id.*

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

126. *Id.*

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

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

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

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

A. Undertaking

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

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

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

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

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

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

133. *Id.*

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

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

136. *Id.* at 29.

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

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

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

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

B. Advantage

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

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

140. *Id.* para. 5.

141. *Id.*

142. *Id.*

143. *Id.* para. 6.

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

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

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

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

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

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

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

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

148. *See* Case 173/73, Italy v. Commission, 1974 E.C.R. 710, 718; *see also* Case C-251/97, France v. Commission, 1998 E.C.R. I-6641, I-6651.

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

C. *From the State or Through State Resources*

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

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

D. *Selective*

Even if the Irish tax rulings constituted an advantage to Apple, they would fail to meet the selective requirement. For an advantage to be selective, it must be granted "in a selective way to certain undertakings or categories of undertakings or to certain economic sectors."[155] There are two types of selectivity: material and regional. Material selectivity applies to a particular undertaking or specific sectors of the economy within the member state.[156] To establish material selectivity the Commission may use *de jure* and *de facto* selectivity.[157] Regional selectivity involves measures that apply to the entire member state or a specific region within it.[158] If the member state can demonstrate that the region possessed institutional, procedural, or ec-

150. Notion of Aid Notice, *supra* note 88, at 10.

151. *Id.* at 11.

152. *Id.* at 9.

153. Ireland Alleged Aid to Apple, *supra* note 5, at 22.

154. *Role of Revenue*, REVENUE: IRISH TAX AND CUSTOMS, http://www.revenue.ie/en/corporate/information-about-revenue/role-of-revenue/index.aspx (last visited Aug. 28, 2017).

155. Notion of Aid Notice, *supra* note 88, at 27; *see also* Case C-15/14 P, Commission v. MOL Magyar Olaj-és Gázipari Nyrt., 2015 E.C.R. 1, 9 ("[R]equirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage . . . . ").

156. Notion of Aid Notice, *supra* note 88, at 27.

157. *See id.* at 27-28 ("*De jure* selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only . . . . *De facto* selectivity may be the result of conditions or barriers imposed by Member States preventing certain undertakings from benefitting from the measure."); Joined Cases C-78/08 to C-80/08, Paint Graphos, et al., 2011 E.C.R. I-7641, I-7663; *see also* Joined Cases T-92/00 and T-103/00, *Ramondin SA and Ramondin Cápsulas SA v Commission*, 2002 E.C.R. II – 1407.

158. *See* Notion of Aid Notice, *supra* note 88, at 32.

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

Tax rulings generally are not considered state aid. Tax rulings are provided when a taxpayer wishes to establish in advance how specific tax rules or transfer pricing principles will apply to a specific transaction.[160] However, a member state must comply with state aid rules in granting tax rulings.[161] If the tax ruling creates a result that would not be possible without the grant of such ruling, then the ruling may be considered selective.[162] For intra-group transactions, if the tax ruling does not resemble what would be available to the taxpayer in the free market, then it will be deemed to be selective.[163]

Revenue collecting agencies often enter into advance pricing arrangements (APAs) with corporations.[164] APAs provide corporations with an advance determination of intra-group transactions. Revenue agencies examine the factual issues of the intra-group transactions in determining whether proposed transactions conform to the nation's tax laws and international transfer pricing principles.[165] The intra-group transaction's commercial and financial relations should not differ from relations that would exist between independent corporations.[166] For APAs that are designed to allocate profits within an intra-group transaction, it must conform to the arm's length principle.[167]

The Commission relied on the OECD Guidelines in determining if the Irish tax rulings were selective within the meaning of the TFEU.[168] In doing so, the Commission relied heavily on the docu-

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159. *See id.* at 32-33.

160. *See id.* at 36-37.

161. *See id.* at 37.

162. *See id.*

163. *See id.* at 37; *see also id.* at 38 ("In sum, tax rulings confer a selective advantage on their addressees in particular where: (a) the ruling misapplies national tax law and this results in a lower amount of tax . . . .").

164. OECD Report 2010, *supra* note 45, at 23 ("An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (*e.g.* method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.").

165. *See* Ireland Alleged Aid to Apple, *supra* note 5, at 24 ("Transfer pricing refers in this context to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set of goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group.").

166. *See* OECD Report 2010, *supra* note 45, at 32.

167. *See id.* at 172.

168. Ireland Alleged Aid to Apple, *supra* note 5, at 24.

mentation guidelines required in granting APAs.[169] The issue is that, at the time Apple first negotiated with the ORC, the OECD only had two published reports. The first was the 1979 Report which established the arm's length principle as the appropriate test for transfer pricing.[170] The 1979 Report was not designed to provide detailed guidance on transfer pricing, but rather, addressed several emerging issues in the multinational corporations.[171] The second OECD report was published in 1984 and, once again, did not provide detailed guidance on transfer pricing.[172] The 1984 Report focused on transfer pricing within the banking sector.[173] Apple entered negotiations with the ORC in 1990 with the Irish tax ruling being granted in 1991.[174] At the time of negotiations there were no guidelines regarding the documentation required to determine if cost allocation provided in an APA to a non-bank intra-group transaction would be available in the free market; the same applies to the 1997 Irish tax ruling.

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

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

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

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

172. *See id.* at 8.

173. *Id.*

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

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

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

177. Rushe, *supra* note 176.

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

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

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

E. Distorts or Attempts to Distort Competition

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

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

179. *See id.*

180. *See id.*

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

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

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

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

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

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183. Case T-6/98 & T-23/98, Alzetta v. Comm'n of European Cmtys., 2000 E.C.R. II-2325, 2352, 2353-56, 2357; Case C-280/00, Magdeburg v. Nahverkehrsgesellschaft, 2003 E.C.R. I-7810, para. 45, *aff'd*, Case C-298/00 P, Alzetta v. Comm'n of European Cmtys., 2003 E.C.R. I-4092; Notion of Aid Notice, *supra* note 88, at 47, 47 n.246.

184. Notion of Aid Notice, *supra* note 88, at 47-48.

185. *Id.* at 48.

186. Daniel Eran Dilger, *Apple's competition is going to have a tough year in 2016*, APPLEINSIDER (Jan. 9, 2016, 1:23 PM), http://appleinsider.com/articles/16/01/09/apples-competition-is-going-to-have-a-tough-year-in-2016.

187. *Id.*

188. Daniel Eran Dilger, *Samsung Mobile smarphone profits decline; unit sales to shrink for 2015*, APPLEINSIDER (Oct. 28, 2015, 9:27 PM), http://appleinsider.com/articles/15/10/29/samsung-mobile-smartphone-profits-decline-unit-sales-to-shrink-for-2015.

189. Bart Jansen, *Samsung Galaxy Note 7 banned on all U.S. flights due to fire hazard*, USA TODAY (Oct. 14, 2016, 3:46 PM), http://www.usatoday.com/story/news/2016/10/14/dot-bans-samsung-galaxy-note-7-flights/92066322/.

III. Jeopardizes US-EU Relations

Global tax avoidance is one of the largest problems facing nations and requires global cooperation. US corporations are estimated to hold $2.4 trillion in offshore accounts.[190] The majority of that money is estimated to either have been subject to no-tax or subject to 10% or less tax rates.[191] The US and EU cannot reduce tax avoidance without collaborating with sovereign nations to adopt tax policies that are in line with the global economy. Many US government officials have formally condemned the Commission's decision against Apple.[192]

A. *Discriminatory Targeting of US-Headquartered Companies*

The Commission is targeting US-headquartered corporations' tax structures in EU member states. The US Department of the Treasury (TRE) announced that it believed the EU was reaching into US corporations to take US tax revenue.[193] In addition, other sources have examined the Commission's investigations into US corporations' tax structures in EU member states as discriminatory litigation.[194] The Commission's investigations have targeted some of the largest corporations in the world.

Indicative of the Commission's discriminatory practices against US companies are its recent investigations into Google and Amazon. Google was previously the subject of investigations for antitrust and data privacy violations.[195] Currently Google is under investigation regarding three member states' tax policies: United Kingdom, Spain,

190. *Fortune 500 Companies Hold a Record $2.5 Trillion Offshore*, Citizens for Tax Justice (Mar. 3, 2016), http://ctj.org/pdf/pre0316.pdf.

191. *Id.*

192. John Engler, *EU Has Gone Too Far Targeting US Companies*, CNBC (Feb. 24, 2016, 12:32 PM), http://www.cnbc.com/2016/02/24/eu-has-gone-too-far-targeting-us-companies-commentary.html ("While we recognize that state aid is a longstanding concept, pursuing civil investigations — predominantly against U.S. companies — under this new interpretation creates disturbing international tax policy precedents."); Naomi Jagoda, *Ryan: EU's $14.5B Tax Ruling Against Apple 'Awful'*, The Hill (Aug. 30, 2016, 2:28 PM), http://thehill.com/policy/finance/293829-ryan-eu-tax-ruling-against-apple-awful ("'Slamming a company with a giant tax bill — years after the fact — sends exactly the wrong message to job creators on both sides of the Atlantic,' Ryan said in a statement.").

193. Ali Breland, *Chamber Official: EU 'Targeting' US Companies*, The Hill, (Sept. 1, 2016, 1:18 PM), http://thehill.com/policy/technology/294125-chamber-official-eu-targeting-us-companies; Rushe, *supra* note 176.

194. Breland, *supra* note 193.

195. European Commission Press Release IP/17/1784, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.pdf.

and France.[196] The Commission is concerned with a tax settlement agreement between the United Kingdom and Google requiring the latter to pay £130 million in back taxes, an effective tax rate of approximately 2.77%, which is well below the United Kingdom's 28% corporate tax rate; the Commission considers this to be state aid.[197] Google is also under investigation in Spain and France for alleged tax evasion on the basis of its corporate structure in those countries.[198] Google's offices in Madrid, Spain and Paris, France were raided in 2016 as part of the investigation.[199]

Although Amazon has yet to have its offices raided, it too is under investigation for an alleged violation of state aid.[200] The Commission is currently looking into Amazon's tax structure in Luxembourg. Under Project Goldcrest, Amazon shifts its revenues to its subsidiary in Luxembourg, Amazon Europe Holding Technologies (AEHT), through a series of intra-group transfers of intellectual property.[201] Amazon's other Luxembourg subsidiary, Amazon EU Sarl, pays large royalties to AEHT to avoid paying taxes on its own revenue.[202] AEHT then avoids paying taxes in Luxembourg by claiming it must pay a large licensing fee to Amazon for the use of intellectual property; the cycle then repeats.[203] Following the investigation, Amazon changed its tax structure in Luxembourg to avoid future investigations.[204]

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196. Kelly Couturier, *How Europe is Going After Apple, Google and Other U.S. Tech Giants*, N.Y. TIMES (Dec. 20, 2016), http://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html?_r=0.

197. *See* Corporation Tax Act 2010, c. 4, Part 1, Chapter 2 (Eng.); *Corporate Tax Rates*, FIGUREWIZARD (last visited Aug. 25, 2017, 1:07 PM), https://www.figurewizard.com/list-uk-corporation-tax-rates.html; Daniel Boffey & Jill Treanor, *Google £130m UK Back-Tax Deal Lambasted as 'Derisory' by Expert*, THE GUARDIAN (Jan. 23, 2016, 5:05 PM), https://www.theguardian.com/technology/2016/jan/23/google-uk-back-tax-deal-lambasted-as-derisory.

198. Couturier, *supra* note 196.

199. Simon Goodley, *Spanish Tax Investigators Raid Google's Madrid Offices*, THE GUARDIAN (June 30, 2016, 7:29 AM), https://www.theguardian.com/technology/2016/jun/30/spain-tax-investigation-raid-google-madrid-offices.

200. Tax Analyst, *EU to investigate Amazon Tax Ruling for state and breach*, EY (Oct. 2014), http://www.ey.com/lu/en/newsroom/pr-activities/articles/article_201410_eu-to-investigate-amazon-tax-ruling-for-state-and-breach; *EU Commission publish a decision on its state aid investigation into Luxembourg tax rulings issued to Amazon*, KMPG (Jan. 16, 2016), https://home.kpmg.com/content/dam/kpmg/pdf/2014/11/etf-244.pdf.

201. Simon Marks, *Amazon: How the World's Largest Retailer Keeps Tax Collectors at Bay*, NEWSWEEK (June 13, 2016, 5:10 AM) http://www.newsweek.com/2016/07/22/amazon-jeff-bezos-taxes-479814.html.

202. *Id.*

203. *Id.*

204. *Id.*

The Commission's investigations into US corporations has resulted in the US retaliating against the EU. The TRE and the IRS issued Notice 2016-52 addressing proposed regulations for foreign tax credits used to offset US tax obligations.[205] The US is concerned that since the tax years the Commission is assessing are more than two prior to the current tax year, that US corporations will be able to offset current US tax obligations further reducing US tax revenue.[206] This means that if the Commission continues to target US corporations and assesses back taxes on the basis of state aid, the US will have a windfall in tax revenue loss as a result of foreign tax credits.

To avoid the tax credit windfall, the TRE and the IRS are taking preemptive measures to reduce foreign tax credits. In doing so, the limited use of foreign tax credits could reduce foreign investment as US corporations may be faced with the prospect of paying double taxation on certain foreign earnings. Since both the US and EU cannot afford reductions in their respective economies, it is best that the CJEU rejects the Commission's decision assessing Apple owes €13 billion in back taxes; this would serve to discourage the Commission's attack against US corporations and, in turn, reduce further US retaliation.

B. Hinders U.S. Repatriation

When US multinationals' foreign operations earn money abroad, the foreign-based income is subject to US tax.[207] However, the US will not tax the foreign revenue until it is repatriated to the US.[208] To encourage US corporations to repatriate foreign revenue, the US Senate often proposes "repatriation tax holidays."[209] Under the 2004

205. INTERNAL REVENUE SERVICE, NOTICE 2016-21 FOREIGN TAX CREDIT GUIDANCE UNDER SECTION 909 RELATED TO FOREIGN-INITIATED ADJUSTMENTS (2016).

206. *Id.* at 3 ("If accrued foreign taxes of a section 902 corporation are paid more than two years after the close of the taxable year to which such taxes relate, section 905(c)(2)(B)(i)(I) provides that such taxes are taken into account in the taxable year in which the foreign taxes are paid.").

207. 26 USC 901 (2014); *see also Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR. (2016) [hereinafter *Key Elements of the U.S. Tax System*], http://www.taxpolicycenter.org/briefing-book/how-does-current-system-international-taxation-work.

208. TAX POL'Y CTR., *supra* note 207.

209. Javier E. David, *Tim Cook Addresses Apple's US Taxes, Says No Repatriation Without 'Fair Rate'*, CNBC (Aug. 14, 2016, 2:38 PM), http://www.cnbc.com/2016/08/14/tim-cook-addresses-apples-us-taxes-says-no-repatriation-without-fair-rate.html; *see also* Richard Rubin, *U.S. Companies are Stashing $2.1 Trillion Overseas to Avoid Taxes,* ACCOUNTINGTODAY (March 5, 2015, 9:40 AM), https://www.accountingtoday.com/news/us-companies-are-stashing-21-trillion-overseas-to-avoid-taxes; Robert W. Wood, *Trump Tax Plan Could Impact 2016 Year-End Planning*, FORBES (Nov. 14, 2016, 9:06 AM), http://www.forbes.com/sites/robertwood/2016/11/14/trump-

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

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

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

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

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

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

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

212. LEVIN, *supra* note 210, at 1.

213. *Id.*; *see* JOINT COMMITTEE ON TAXATION, JCX-69-04, Item IV.22, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 4520, "THE AMERICAN JOBS CREATION ACT" 10 (2004).

214. CONFERENCE COMMITTEE, *supra* note 211 (explaining that stock repurchases and executive compensation increased after repatriation).

215. *Id.*

216. Lindsay Drunsmuir, *Obama Urges Congress to Take Action on Corporate Tax Reform*, HUFFINGTON POST (Apr. 5, 2016, 1:18 PM), http://www.huffingtonpost.com/entry/obama-corporate-tax_us_5703e9c1e4b0a06d580701ce.

217. *Id*; *see also* Zachary A. Goldfarb, *Obama Proposes Lowering Corporate Tax Rate to 28 Percent*, THE WASHINGTON POST (Feb. 22, 2012), https://www.washingtonpost.com/business/economy/obama-to-propose-lowering-corporate-tax-rate-to-28-percent/2012/02/22/gIQA1sjdSR_story.html.

is required to pay Ireland the estimated $14.5 billion in back taxes, that is revenue the US can no longer collect taxes on. Under US tax law, corporations are granted dollar-for-dollar tax credits for taxes paid on revenue abroad.[218] This allows corporations to avoid paying double taxes on international earnings. As a result, Apple will be able to take a credit to offset its US tax liability when it repatriates its Irish revenues.

Therefore, if the CJEU upholds the Commission's decision it may result in a windfall of tax revenue loss for the US. If the US is unable to collect the revenue upon repatriation, it will negatively impact the US-EU relationship. The TRE stated that the US may no longer honor bilateral tax treaties with the EU if the decision against Apple is upheld.[219] In addition, risking the relationship of both nations is the use of Apple's foreign earnings to finance the US Federal Government.

C. May Reduce Apple's Investment in US Treasury Bonds

The US has a financial interest beyond repatriation of Apple's Irish revenues. Apple is the parent corporation of Nevada-based Braeburn Capital, Inc. (Braeburn), which was incorporated in 2006 and is responsible for managing Apple's investments.[220] One of Apple's largest investment is in US Treasury Bonds (T-Bond), which provide revenue to support the government's expenditures in return for interest income.[221] On Apple's annual 10-K report for the 2006 Fiscal Year it reported $234 million in T-Bond investments;[222] ten years later, Apple's investment in T-Bonds was reported in excess of $41 billion.[223] Apple's purchase of T-Bonds is significant since the US possesses unsustainable debt.

Following the September 11, 2001 attacks, the US increased its spending, focusing on the wars in Iraq and Afghanistan without in-

218. 26 U.S.C. § 901 (2014).

219. Craig Rose, *The EU Takes a Bite Out of Apple: But is the Commission's Legal Analysis Flawed?*, BLOOMBERG BNA (Sept. 2, 2016), https://www.bna.com/eu-takes-bite-b73014447171/.

220. *See* APPLE, INC., FORM 10-K: ANNUAL REPORT (2006); NEVADA SECRETARY OF STATE, BRAEBURN CAPITAL, INC., http://nvsos.gov/sosentitysearch/CorpDetails.aspx?l x8nvq=7JyaklER 4jQ8UonRlZOPSw%253d%253d (last visited Sept. 18, 2017); *see also* Tyler Durden, *Apple Owns the World's Largest Hedge Fund*, BUSINESS INSIDER (Oct. 3, 2012, 7:04 AM), http://www.businessinsider.com/apple-owns-the-worlds-largest-hedge-fund-2012-10.

221. APPLE, INC., *supra* note 220, at 83-84, 101.

222. *Id.* at Exhibit 21.

223. APPLE, INC., FORM 10-K: ANNUAL REPORT 49 (2016).

creasing taxes.[224] As a result, US national debt has reached almost $20 trillion causing scholars to debate the future of the US economy.[225] As long as the US Government chooses to keep tax rates low and amass large amounts of debt, the sale of T-Bonds is an important aspect of the short-term financing of the US government. Just to put it into perspective, if Apple were a sovereign nation it would be the 27th largest holder of T-Bonds behind Mexico.[226] So where does Apple's money to purchase the T-Bonds come from?

Braeburn uses money from Apple's Irish subsidiaries to buy T-Bonds.[227] As the manager of Apple's investments, Braeburn manages money from Apple and its subsidiaries including AOE and ASI.[228] Braeburn uses revenues from AOE and ASI to purchase T-Bonds, which are held in New York.[229] In exchange for purchasing the T-Bonds, Apple receives interest payments from the US Federal Government, which are estimated at $600 million to date, and are returned to its Irish subsidiaries.[230] While this practice is extremely costly to the US Government, as it is not only incurring an obligation to Apple but also losing tax revenue from Apple's international revenues, as long as corporate tax laws are not reformed this system may be one of the few ways for the US Government to supplement its tax revenues.

CONCLUSION

The CJEU should reject the Commission's decision against both Ireland and Apple because the Irish tax rulings did not constitute state aid and the decision jeopardizes US-EU relations. By doing so, the CJEU will help encourage countries to turn to global economic cooperation efforts, such as the OECD and BEPS project, which will help harmonize tax laws over time. If the CJEU leaves the Commission's decision intact, the EU may face backlash from foreign corporations

224. Thomas Grennes, *Diminishing Quality of Fiscal Institutions in the United States and European Union*, 33 CATO J. 91, 95 (2013).

225. *See* James Lankford, *The National Debt's Long Shadow*, THE WASHINGTON TIMES (Nov. 27, 2016), http://www.washingtontimes.com/news/2016/nov/27/there-are-20-trillion-things-that-have-not-changed/; *see also* David R. Henderson & Jeffrey Rogers Hummel, *The Inevitability of a U.S. Government Default*, 18 INDEP. REV. 527, 530-31 (2014); Michael Tanner, *Is America Becoming Greece?*, 33 CATO J. 211, 211 (2013).

226. UNITED STATES DEPARTMENT OF THE TREASURY, MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES (2017), http://ticdata.treasury.gov/Publish/mfh.txt.

227. Andrea Wong, *Americans are Paying Apple Millions to Shelter Overseas Profits*, BLOOMBERG TECH. (Dec. 7, 2016), https://www.bloomberg.com/graphics/2016-apple-profits/.

228. *Id.*

229. *Id.*

230. *Id.*

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