The Thin Redline or Where Does Aggressive Tax Planning Become an Unlawful State Aid

Thesis presented by: Aleksandar DORICH
for the Degree of Master of European Legal Studies
Supervisor: Prof. Massimo MEROLA
Assistant: Anna PEREGO
Department: European Legal Studies
Bruges Campus, College of Europe
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Statutory Declaration

I hereby declare that the thesis has been written by myself without any external unauthorised help, that it has been neither presented to any institution for evaluation nor previously published in its entirety or in parts. Any parts, words or ideas, of the thesis, however limited, and including tables, graphs, maps etc., which are quoted from or based on other sources have been acknowledged as such without exception.
Keywords
State Aid; Direct Taxation; Tax Sovereignty; Harmful Tax Competition; Harmonization; Coordination; Aggressive Tax Planning; Selective Advantage; Advantage; Transfer Pricing; Arm’s Length Principle; Transfer Pricing Methods; Comparable Uncontrolled Method; Resale Price Method; Cost Plus Method; Reduction of Tax Base; Profit Shifting; Fixed Mark-Up; Costs; Exclusion; Inclusion; Direct; Indirect; Beneficiary; Selectivity; Advance Pricing Arrangement; De Facto Selectivity; Margin of Discretion; Opacity; Justification; Notification.
Abstract

The thesis puts at the spotlight the issue of having state aid which is incompatible with the EU law, in so far as it stems from a selective advantage granted to multinational enterprises through the means of advance pricing arrangements.

It is submitted that advance pricing arrangements have a special position in the context of constant interaction between direct taxation, state aid and harmful tax competition, and in particular, a very specific position in the area of overlap between state aid and harmful tax competition.

Against this background, this contribution upholds the position that such a selective advantage can derive from a non-compliant with the internationally recognized principle of the arm’s length application of transfer pricing methods. In particular, the advantages take the form of either reductions in the tax base or consolidation of the market positions of the multinational enterprises as result of profit shifting.

The advantages are most commonly solicited ones as the multinational enterprises are approaching the tax authorities with the aim of getting an approval on tailor-made application of certain specific transfer pricing methods, all on the basis of their aggressive tax planning approaches.

In order to substantiate these submissions, the current contribution aims at showing that advance pricing arrangements are a specific type of tax measures different from advance tax rulings and as such can be de facto selective depending on the legislative structure of their system, the presence of margin of discretion of the tax authorities and their inherent opacity.

It is therefore argued that the thin redline of unlawful state aid is crossed the moment there is a selective advantage for the multinational enterprises, resulting from misapplication of transfer pricing methods, approved through an advance pricing arrangement, and that affects the trade between member states, while it is imputable to the state. In any such cases, EU state aid rules act as the necessary emergency break, as the tool that fights back against unlawful state aid measures and harmful tax competition.
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<td>AG</td>
<td>Advocate General</td>
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<td>APA</td>
<td>Advance Pricing Arrangement</td>
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<td>CJEU</td>
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Introduction

“Fair tax competition is essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level-playing field between our businesses. Our social and economic model relies on it, so we must do all we can to defend it.”

Algirdas Šemeta²

In the world of EU competition law, where “state aid policy protects the internal market from distortions and helps to steer public resources towards competitiveness-enhancing objectives”³, the integral parts of the EU (i.e. the member states), still dispose, economic and legal wise, of a very powerful policy making tool, namely, direct taxation.

At the same time, MNEs, applying their aggressive tax planning approaches, are craving for more tax incentives and tax measures and are thus trying to avail of existing loopholes in the tax system so as to alleviate their tax burdens.⁴

This combination is hazardous to the single market as it can produce effects that distort the latter. From an economic perspective national tax measures may become a tool for state aid granting and “can have an effect on the market structure by adjusting the allocation of resources in different economic sectors”.⁵ This by itself can lead to distortion of the efficiency between competitors.⁶

Against this background, it is possible that MNEs can trick the state into granting them an undue tax advantage that amounts to state aid. Such ‘solicited state aid’⁷ will be present where it is granted through a de facto selective tax measure such as an APA, subject to the presence of certain other conditions, as it will be further argued.

Therefore, this thesis upholds the position that state aid would occur where certain MNEs, which have prompted the national tax authorities for initiation and obtaining of an APA, receive an approval on the application of a transfer pricing method that is not compliant with the of arm’s length principle.

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² European Commissioner for Taxation and Customs Union, Audit and Anti-Fraud for the period 2010-2014.
⁵ C. MICHEAU, State Aid, Subsidy and Tax Incentives under EU law and WTO law, Kluwer Law International: Alphen aan den Rijn, 2014, p.3, hereinafter MICHEAU.
⁷ Notion introduced for the purposes of the thesis, explaining the particularity that MNEs are acting aggressively by prompting the tax authorities to enter into a tailor-made APA.
In any such case, from EU state aid law perspective, whenever such solicited selective advantage has an actual negative impact of rearranging the EU single market blueprint, the EU state aid rules should kick-in so as to damp down the member states’ actions distorting the competition at EU level.

Research Problem, Structure and Boundaries of the Thesis

In this context, the thesis focuses on a specific type of tax measures related to the corporate income taxation of the MNEs, namely the APAs. These tax measures are generally solicited by the MNEs for the purposes of obtaining an approval on the application of specific transfer pricing methods. Although transfer pricing methods and policies can be used for tax fraud or tax avoidance, the consideration of transfer pricing is one that should not be directly confused with or simplified to such problems. Only where “transfer pricing does not reflect market forces and the arm’s length principle, the tax liabilities of the associated enterprises and the tax revenues of [a] country could be distorted.” The MNEs’ tax liabilities and the state revenues can be affected in different ways by a non-compliant with the arm’s length principle application of a transfer pricing method. As it will be discussed, two of the most important negative consequences are the artificial lowering of the tax base of the MNEs and the profit shifting which leads to presence of indirect beneficiaries of state aid. Both issues are addressed by the OECD Base Erosion and Profit Shifting project.

Whenever such transfer pricing methods and policies are approved by the respective national revenue authorities they would most likely amount to “a measure granted by the state and through state resources that […] confers a benefit or advantage on the [respective undertaking, in a] selective [manner, that] is liable to distort competition and affect trade between Member States”, i.e. state aid.

Thus, this contribution focuses on the tax measures that influence the revenue-raising stage, i.e. the moment of assessment of the taxable base on which the calculation of the tax burden would be made.

As a starting point the thesis tries to pin-point the position of such tax measures in the context of the interaction between EU state aid rules and the policy of combating

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9 ibidem, p.31.
10 ibidem, p.32.
12 NIELS, JENKINS, KAVANAGH, supra note 6.
13 MICHEAU, supra note 5, p.6.
harmful tax competition. In its first chapter, the thesis seeks to do so through an analysis of the boundaries of national sovereignty in such situations, of the negative integration approach of the CJEU and its later consolidation into soft law instruments under the state aid modernization programmes. The chapter continues with the issue of establishing the necessary nexus between state aid and harmful tax competition and the boundaries of the state aid applicability in the fight against harmful tax competition. Against this background, the position of ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ would be determined (see Chapter I below).

In its second and third chapter, the thesis will examine the notion of state aid for tax purposes. In particular, the analysis, will focus on the issue of presence or lack of selective advantage. The scrutiny will be limited to the advantage and selectivity criteria, as proving immutability of the tax measure to the state and proving that the measure affects trade between member states is more straightforward.

Regarding the question of tax advantage the thesis first provides an analysis on the form and source of the advantage and the significance of the time period within which a tax measure would produce its effects. The examination then continues with the effects of misapplication of the traditional transfer pricing methods. For these purposes, the thesis considers the question of applicability of the internationally recognized arm’s length principle, as a proper benchmark for estimation of the question whether there is an advantage or not. The contribution then continues with an analysis on the interplay between transfer pricing methods and state aid by presenting the types of advantages stemming from the misapplication, such as reduction of the tax base and the spill-over effects of profit shifting (see Chapter II below).

Regarding the selectivity criterion the thesis seeks to demonstrate the significant difference between APAs and advance tax rulings, as this difference is essential for the determination of the relevant reference system against which the assessment for presence of selectivity will be made (see Chapter III below).

At the end, the thesis provides with certain final remarks on the unlawful character of such type of state aid.
Chapter I
Aggressive Non-Compliant Intra-Group Transfer Pricing: Pure State Aid, Harmful Tax Competition or Betwixt and Between?

Aggressive intra-group transfer pricing is an issue which becomes more and more acute as intra-group trades are a “growing proportion of the overall trade”\textsuperscript{14} flows. “Failure[s] to adhere to international transfer pricing principles”\textsuperscript{15} are acknowledged to be one of the harmful preferential tax regimes features.\textsuperscript{16} Such departures from internationally accepted principles by the MNEs for their intra-group transactions are explicitly listed as a harmful measure in paragraph B, item 4 of the Code of Conduct.\textsuperscript{17} Hence, ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ can result from harmful tax competition in the area of direct business taxation.\textsuperscript{18}

At the same time, this does not mean that ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ cannot amount to illegal state aid. Approval of application of transfer pricing methods which are not compliant with the principle of the arm’s length prices can indirectly distort competition between undertakings\textsuperscript{19} within the meaning of Article 107 TFEU. Deviation and misapplication of the principle of arm’s length can “enable certain taxpayers to obtain benefits which are not applicable to other taxpayers”\textsuperscript{20}, and are incompliant with the internal market. Therefore, ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ could also be an issue of state aid.

Thus comes naturally the question: where should this issue be placed? With state aid only or with harmful tax measures only or with both of them?

In order to answer this question, the relationship between state aid and harmful tax competition should be examined in the light of underlying theme of direct taxation. A starting point for the examination of the merging and splitting of state aid and harmful tax competition is always the member states’ national tax sovereignty.

\textsuperscript{16} ibidem.
\textsuperscript{17} Council and the Representatives of the Governments of the Member States, Meeting with the Council, Resolution of 1 December 1997 on a Code of Conduct for business taxation, hereinafter the Code of Conduct.
\textsuperscript{18} OECD, Report on Harmful Tax Competition, supra note 15, pp.31-32.
\textsuperscript{19} ibidem.
\textsuperscript{20} ibidem, p.32.
1. Direct Taxation, State Aid Law and Harmful Tax Competition: A Constant Interaction

1.1. National Tax Sovereignty

In the contemporary EU law environment direct taxation continues to be considered as “part of the function-sovereignty of the Member States”.21 “The financing of government expenditure, the redistribution of income […], and macroeconomic stabilization”22 are three main functions that are “inherently connected to […] direct taxation”.23 They explain the necessity of keeping direct taxation as an area still in the powers of the member states.

In support of the foregoing, on one hand, EU law harmonization in the field of direct taxation can only be made with the aim of establishing and providing for the proper functioning of the internal market and is subject to the consent of all member states24 and on the other hand, neither EU law confers powers to any institution to levy direct taxes, nor is the EU directly financed by such type of taxes.25

Thus, where there is no outright EU harmonization it is not questionable that member states retain their competence regarding the introduction, modification, revocation and enforcement of laws and policies suitable to their economic needs in the area of direct taxation.26

Such type of discretion, however, may have derivative effects and can cause collateral damages to the competition between undertakings and to the tax competition between member states, and thus affect the trade between member states.27 It is in this

22 ibidem.
23 ibidem.
25 ISENBAERT, supra note 21.
context of constant necessity for adequate reaction to possible distortive effects, stemming from national tax measures, that the EU institutions and policy makers have adopted and developed supranational state aid rules and later on the policy of fighting harmful tax competition.

1.2. The ‘Red Pen Approach’ of the Court of Justice or How Did State Aid Infiltrate in National Direct Taxation Matters

Although, in the area of direct taxation, the EU is not strictly empowered to further the integration through positive integration methods, subject to few exceptions, positive results may be achieved through negative integration, or in other words through the use of the ‘red pen’ of the CJEU.

“The Court has effectively interposed itself alongside the Union legislature as an important lawmaker“.

This “judicial lawmaker” process is also present in the state aid law cases treating national direct taxation measures. It is settled case law of the CJEU that “although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with [EU] law.”

The first case on application of the state aid rules, evidencing the use of the ‘red pen’, is a case from 1961 on the application of Article 4 (c) of the European Coal and Steal Community Treaty (the “ECSC”). This is the De Gezamenlijke Steenkolenmijnen case. There, although the tax measure challenged was within the competence of the member state, it was considered to be a measure falling within the ambit of the wording of “any form whatsoever” of article 4 (c) of the ECSC.

Regarding Article 107(1) TFEU and in particular its statement that state aid can have “any form whatsoever”, the CJEU creates a construction under which state aid rules

30 ibidem.
33 MICHEAU, supra note 5, p.62; Judgement in De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community, 30-59, ECR, EU:C:1961:2 (‘De Gezamenlijke’).
34 MICHEAU, supra note 5, pp.62-63.
are applied even though this could result in an “intervention into the sovereign area of the member states”.

The seminal case in this respect is the Italian Textile case. As it was explicitly stated the CJEU is interested in the effects of the measure at issue and not of its form or intended use and “the alleged fiscal nature [of the measure at issue] cannot suffice to shield it from the application of article [107]”. In that way the CJEU explicitly confirmed the application of the state aid rules irrespectively of the tax form of the measure.

In this line of case law, it is appropriate to raise the landmark Banco Exterior de Espagna case. This is a case that consolidates the De Gezamenlijke Steenkolenmijnen case and Italian Textile, is thus perceived “[…] to have elevated awareness of the application of state aid law to direct business tax measures.”

This array of case law confirms the ability of state aid rules to be overriding in their application as opposed to national law measures dressed-up in direct taxation form.

In the mid-nineties, this impetus of the CJEU together with the emerging necessity to fight against harmful tax competition affecting national tax systems, tax bases, investment decisions, etc. resulted in the EU’s willingness to create policies and measures aimed at prevention and abolishment of harmful tax competition conduct, as well as in fortifying and clarifying the application of the state aid rules to direct taxation. These actions were carried out by the Council of the European Union (the “Council”) and the European Commission (the “Commission”).

1.3. EU Goes Soft on Harmful Tax Competition

“The nineties have marked a turning point in the application of Article 107 TFEU to direct taxation.” The Council and the Commission used the harmful tax competition theme and have broaden the aims of the application of state aid control to the combating against harmful tax competition. The policy making impulse provided by the

35 ibidem, p.62.
37 ibidem, paragraph 13.
38 MICHEAU, supra note 5, p.63.
40 Judgement in Banco Exterior de España v Ayuntamiento de Valencia, C-387/92, EU:C:1994:100 (‘Banco Exterior de España’).
41 ibidem, paragraph 13.
42 Judgement in De Gezamenlijke, ECR, EU:C:1961:2, supra note 33.
45 MICHEAU, supra note 5, p.63.
46 ibidem.
Commission, triggered an expectation for more rigorous application of the state aid rules towards direct business taxation measures that are capable of distorting the EU competition environment.47

Regarding intra group transactions, measures giving rise to incompatibility of the transfer pricing rules with the arm’s length principle were flagged and blacklisted in the Primarolo Report,48 rendered by the Code of Conduct Group established to determine tax measures which are covered by the Code of Conduct.49

The importance of compliance of the transfer pricing methods with the arm’s length principle was raised in the Primarolo Report explicitly:

“To prevent a multi national enterprise from shifting profits between countries by under or overvaluing transfer prices, the arms length principle envisages that taxable profits on cross-border transactions between associated enterprises should be computed as if the transaction had been between parties acting at arm’s length.”50

It is against this background that the Commission undertook the obligation to issue guidelines on the application of the state aid rules to measures relating to direct business taxation.51

1.4. The ‘Blue Pen Approach’ of the Commission

Pushed by the political wave which itself has created, the Commission follows firmly the line from harmonization to coordination with regard to direct taxation.52 Thus, the Commission saw the "way forward"53 not through "harmonisation of taxation systems for harmonisation's sake"54, but through coordination between member states. This coordination approach of the Commission fitted well under the catchphrase “do less, so as to do it better”,55 introduced by the Commission in one of its own opinions at that time and taking due account of the principle of subsidiarity.

47 Code of Conduct, supra note 17.
51 Code of Conduct, supra note 17, paragraph J.
54 ibidem.
As a result, the Commission issued the Notice on the application of the State aid rules to measures relating to direct business taxation (the “Notice”).

Two main questions need to be posed regarding this Notice. The first is: has the Commission exceeded the mandate that was given to it by the ECOFIN Council through the Code of Conduct? And, the second: is this actually a ‘blue pen approach’ for the Commission (i.e. a lighter way of complementing the legislation) or it is rather a type of ‘codification’ of the existing case law of the CJEU under the coordination approach?

Turning to the first question, Micheau upholds the view that the Commission has exceeded its mandate given by ECOFIN through extending the objective of the Notice to the completion of the internal market. This position, however, cannot be fully adopted as the “wider objective of clarifying and reinforcing the application of the State aid rules in order to reduce distortions of competition in the single market” set by the Commission is in compliance with the general aim of the combating against harmful tax competition. The aim of the Code of Conduct to abolish harmful tax competition is focused on the impact of tax measures on the “location of business activity in the Community”. Thus, it may be argued that both combatting harmful tax competition and state aid share “the same general goal of reducing the distortions of competition in the internal market”, as it is confirmed by the Implementation Report on the Notice. Given that line of reasoning, it may be accepted that the Commission has not exceeded its mandate, but has contributed in line with the aims and objectives of both fighting against illegal state aid and harmful tax competition.

Next, with regard to the second question, there is no doubt that the Notice is an interpretative instrument, a “soft law measure[] serving a ‘post-law function’”. It provides guidance on the application of the state aid rules to corporate tax matters.

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57 ibidem.
58 ibidem.
59 MICHEAU, supra note 5, p. 70.
60 Notice, supra note 56, paragraph 2.
61 Code of Conduct, supra note 17, paragraph A.
63 ibidem.
64 Notice, supra note 56.
65 H. GRIBNAU, “Improving the Legitimacy of Soft Law in EU Tax Law” (2007) 35 InterTax, p.34, hereinafter GRIBNAU.
67 GRIBNAU, supra note 65, p.35.
This guidance “did not constitute a new set of guidelines for assessing tax aid, in so far as it did not signal change in the Commission’s approach to assessing [state] aid”.68

The Notice69 is actually restating the case law of the CJEU and clarifies the application of the state aid rules to tax measures.70 This is a position later confirmed by the Territorio Histórico de Alava case71, where the Court confirms that the Notice “is substantially based on the case-law of the [CJEU]”,72 and that there is not “any change of practice in [the Commission’s] decisions concerning the assessment of tax measures in the light of [the state aid rules]”.73

Therefore, it can be concluded that the Notice74 is in its essence a valuable consolidation of the case law which guides through the application of state aid rules to direct corporate taxation.

It should, however, be noted that under the State Aid Modernization programme the Commission will adopt a Notice on the notion of State aid (the “Draft Notice”).75 Nevertheless, this Draft Notice will prevail over the 1998 Notice.

Certain authors analyse this modernization approach of extraction of the state aid rules on tax matters from the framework of harmful tax competition as a blending of these rules ‘into the general framework of aids’.76 However, on the basis of all of the foregoing arguments, such a position cannot be accepted and where necessary the rules on state aid should be read in the light of the aim of combatting harmful tax competition.

2. Pinpointing the Position of Aggressive Non-Compliant Intra-Group Transfer Pricing

In the context of the above, the question of proper positioning of the ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ calls for establishing the nexus between state aid and harmful tax competition and examining the aim and scope of applicability

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68 Implementation Report, supra note 62, paragraph 3.
69 Notice, supra note 56.
70 Implementation Report, supra note 62, paragraph 3.
72 ibidem, paragraph 83.
73 ibidem.
74 Notice, supra note 56.
75 Commission Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU (draft), hereinafter the Draft Notice.
76 MICLEAU, supra note 5, pp. 72-73.
of state aid (in particular of the Notice\textsuperscript{77}) to cases involving ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’.

2.1. The Soft Nexus Leads to Hard Law Application of State Aid Law to Harmful Tax Competition Cases

The necessary nexus between state aid and harmful tax competition is in fact the Notice.\textsuperscript{78} This link is evident already in the first paragraph of the Notice: “the State aid provisions of the Treaty will also contribute through their own mechanism to the objective of tackling harmful tax competition”.\textsuperscript{79} The nexus is also underlined by the first sentence of paragraph J of the Code of Conduct, where the Council confirms that “some of the tax measures covered by [the] code may fall within the scope of the provisions on State Aid”.\textsuperscript{80} It is in that regard that the Commission has committed to issue and has adopted the Notice, thereby materializing the nexus between state aid and harmful tax competition.

Thus, “it goes without saying that, despite its formal non binding force, the Notice is the fundamental text in which to find the rules to determine which harmful tax measures may be regarded as State aid.”\textsuperscript{81}

This nexus, however, as it will be argued below, is pretty fragile and present only where certain conditions are fulfilled. It is not to be perceived as an absolute and unconditional one.

2.2. Boundaries of the State Aid Applicability in the Fight against Harmful Tax Competition

The Commission disposes of a de facto monopoly of the enforcement of the state aid rules.\textsuperscript{82} This means that the Commission, when going for the application of the state aid rules, has to take into consideration cases that are not only fiscal state aid \textit{per se}, but also such fiscal state aid cases, which are charged with the underlying theme of harmful tax competition. This is in conformity with the aims established in the Notice.\textsuperscript{83}

\begin{flushleft}
\textsuperscript{77} Notice, supra note 56.  \\
\textsuperscript{79} Notice, supra note 56, paragraph 1.  \\
\textsuperscript{80} Code of Conduct, supra note 17, paragraph J.  \\
\textsuperscript{81} FantoZZi, supra note 69, p.5.  \\
\textsuperscript{82} ibidem, p.1; see also F. Nanoetti, G. MameLI, “The creeping normative role of the EC Commission in the twin-track struggle against State aids and harmful tax competition”, (2002) 11 EC Tax Review, p. 185.  \\
\textsuperscript{83} Notice, supra note 56, paragraph 1.
\end{flushleft}
Thus, certain tax measures require an approach which takes into account not only pure fiscal state aid considerations, but also examines whether such measures are covered by the Code of Conduct\textsuperscript{84} and thus fall within the harmful tax competition category.

Article 107 TFEU is a legal instrument that can be used both for pure state aid issues and for combating harmful tax competition. At the same time it is true that “the legitimate objective of combating harmful tax competition cannot justify distortion of the European Union’s legal framework established in the area of competition law applicable to State aid”.\textsuperscript{85} In his Opinion in the Gibraltar case AG Jääskinen argues that not all harmful tax competition measures are covered by the State aid rules, because tax competition between member states is not the type of competition that is covered by Article 107 TFEU.\textsuperscript{86} This is a position already stated in the Implementation Report on the Notice which explicitly states that “to be classified as harmful, a measure must fulfil at least one of criteria listed in paragraph B of the code of conduct, which are not identical to those laid down in Article [107 TFUE].”\textsuperscript{87}

This, however, does not mean that a tax measure cannot fall both under the fiscal state aid rules and harmful tax competition. In other words the application of Article 107 TFEU is not fully excluded from being a tool for combating both against harmful tax competition and state aid, even though such a situation may appear to be a consequence of the application of article 107 TFEU at a \textit{prima facie} purely state aid issue. The Implementation Report emphasizes that the concepts of state aid and harmful tax competition “pursue the general goal of reducing distortions of competition within the internal market.”\textsuperscript{88} To further develop this argument it should be stated that AG Jääskinen, himself, confirms that a measure can be “liable to amount both to harmful tax competition and to State aid incompatible with the common market.”\textsuperscript{89}

Following this line of reasoning, it can be concluded that there could be a situation in which restoring the fair competition between undertakings through suppression of tax measures granting an undue selective advantage is not only a fight against illegal fiscal state aid, but is at the same time actual combatting against harmful tax competition.

\textsuperscript{84} Code of Conduct, \textit{supra} note 17.
\textsuperscript{86} \textit{ibidem}.
\textsuperscript{87} Implementation Report, \textit{supra} note 62, paragraph 64.
\textsuperscript{88} \textit{ibidem}.
Thus, a tax measure can fall both under state aid rules and Harmful tax Competition policy.

The problem here is that the ambit of fiscal state aid cases is larger than that of direct business taxation, and that at the same time harmful tax competition measures related to direct business taxation can fall out of the ambit of fiscal state aid. This is the case where the harmful tax competition measures are of general nature and are not selective. In such cases only the legally non-binding Code of Conduct would apply and state aid rules will remain isolated. Therefore, as Schön argues “it is crucial for the Commission’s practice to identify the line between general and selective tax incentives, the latter being under the control of State aid law.”

Against this background, the following graphic provides with mapping of the tax measures that will be covered both by state aid rules and the harmful tax competition policy.

**Graphic 1**

A final remark regarding the issue of applicability of the state aid rules to such type of tax measures is that it is possible to have a situation where tax measures are aimed at attracting foreign direct investments, and run counter the interests of the domestic companies, but are at the same time in favour of foreign competitors. Such tax measures can also result from harmful tax competition. Wherever such reverse discrimination is present, the only EU tool for reaction is state aid law, subject to the condition that all criteria for application are fulfilled.

Thus, although the state aid rules may be limited in their applicability to harmful tax competition measures, they are nonetheless broader than the fundamental freedoms. This is true because article 107 TFEU does not differentiate between

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91 *ibidem*, p.919.
92 *ibidem*, p.918.
'standard' discrimination and 'reverse' discrimination, meaning that state aid rules can be applied even in cases of reverse discrimination.

Against this background, as it will be argued below, tax measures under the form of acknowledged ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ by the respective national tax authorities, will be measures falling within the overlap area between state aid and harmful tax competition, even if they are applied only to ‘reverse’ discrimination cases (e.g. confirmation by the tax authorities of the application of intra-group transfer pricing methods for the transactions between a permanent establishment of a foreign MNE and another affiliate of the same group).

2.3. Situating the ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’

In this context, from fiscal state aid perspective, it can be accepted that aggressive intra-group transfer pricing which is not compliant to the principle of the arm’s length prices and is confirmed by the tax authorities, can amount to fiscal state aid within the meaning of Article 107 TFEU, where it is provided to specific MNEs. Such selective deviation from the arm’s length principle amounting to an advantage can distort indirectly competition between undertakings\(^{93}\) and such distortion is incompatible with the internal market.

At the same time from the perspective of harmful tax competition, the ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ can result in artificial tax base reduction or allocation of profits between member states and thus lower the overall tax burden of the respective MNE.\(^{94}\) Such transfer pricing policies and approaches, especially when they are maintained because of a government policy aimed at attracting foreign direct investments, are considered to be one of the faces of harmful preferential tax regimes.\(^{95}\) Moreover, the departure from internationally accepted principles by MNEs for their intra-group transactions is explicitly listed as harmful measure in paragraph B, item 4 of the Code of Conduct.\(^{96}\)

Therefore, on the basis of all of the foregoing elaborations, this thesis puts forward the perception that ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ can result from harmful tax competition between member states in the area of direct business

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95 ibidem.
96 Code of Conduct, supra note 17, paragraph B.
taxation, dressed in the form of illegal fiscal state aid, even in cases of ‘reverse’ discrimination.\textsuperscript{97}

Accordingly, this issue merits a further analysis of the notion of state aid and in particular of the criteria of advantage and selectivity as provided by Article 107 TFEU, the Notice\textsuperscript{98}, the Draft Notice\textsuperscript{99}, and the relevant case law, but all in the background light of the Code of Conduct\textsuperscript{100}.

\textbf{Chapter II}

\textbf{The Advantage}

1. Form and Source of the Advantage

Starting with the question of the form and source of the advantage granted through an APA, one should keep in mind that APAs are in general tax measures capable of granting an advantage as they “determine[…] in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time.”\textsuperscript{101}

Entering into the details of the form of the tax advantage, in practical terms, an advantage can take various types of forms.\textsuperscript{102} Under paragraph 9 of the Notice a three-tier categorization of the forms of tax advantages is established by the Commission.\textsuperscript{103} Each category reflects “different stages of the revenue process: determination of the tax bases, the assessment of tax liability and the enforcement of claims.”\textsuperscript{104} At any stage a state intervention may amount to state aid.\textsuperscript{105}

Given the nature of the APAs and their content, they can be put in the first form of tax advantages, the one that concerns issues regarding reductions in the tax base.\textsuperscript{106}

Regarding the issue of the source of the advantage, again the nature and content of the APA need to be considered. The tax authorities need to take “great care […] if the APA goes beyond the methodology, the way it will be applied, and the critical

\textsuperscript{97} OECD, Report on Harmful Tax Competition, \textit{supra} note 15, p.31.
\textsuperscript{98} Notice, \textit{supra} note 56.
\textsuperscript{99} Draft Notice, \textit{supra} note 75.
\textsuperscript{100} Code of Conduct, \textit{supra} note 17.
\textsuperscript{101} OECD Guidelines, \textit{supra} note 8, p.23.
\textsuperscript{102} MICHEAU, \textit{supra} note 5, p. 191.
\textsuperscript{103} \textit{ibidem}, p. 193.
\textsuperscript{104} \textit{ibidem}.
\textsuperscript{105} \textit{ibidem}.
\textsuperscript{106} For further discussion on the nature of the APAs please refer to the Chapter III below.
assumptions [that are to be applied, especially where very] specific conclusions rely on predictions about future events."\(^{107}\) Given the preceding, the sources triggering the advantage may be analysed from two different perspectives:

- temporal aspects of the advantage; and
- application of the respective method.

1.1. Advantages from Short/Long-Term Predictions of the Future

APAs are issued to ensure legal certainty in taxation matters.\(^{108}\) This, however, does not mean that APAs can be open-ended in terms of validity, as a number of relevant circumstances change over time. That is why APAs are by the OECD definition limited in time.\(^{109}\)

Against this background, "[o]ne key issue in the concept of APAs is how specific [APAs] can be in prescribing a taxpayer’s transfer pricing over a period of years".\(^{110}\) This question arises, because establishing transfer pricing “method[s], [(unsuitable)] comparables, [(in)]appropriate adjustments […], [(in)appropriate] critical assumptions as to future events”\(^{111}\) for an unreasonably long period of time can itself create lack of certainty and have as a consequence the granting of an economic advantage to the respective MNE.

Therefore, the economic advantage can be born because of future emerging of inappropriateness of the above listed requisites of a respective APA.

Consequently, the presence or lack of economic advantage for state aid purposes, depends on both the time period of the APA and "the nature of the prediction [made in the APA] and the critical assumptions on which the prediction is based."\(^{112}\) Thus, it is highly possible to be in the presence of an economic advantage where the APA prediction of the future intra-group transactions is absolute and very specific in its nature, and where there are not any appropriate critical assumptions to tamper the absolute predictions of future intra-group transactions.\(^{113}\) Such an APA risks to breach the arm’s length principle and have as a consequence an economic advantage for the respective taxpayer throughout the years of its application.

\(^{107}\) OECD Guidelines, supra note 8, paragraph 4.124.
\(^{108}\) Draft Notice, supra note 75, paragraph 174.
\(^{109}\) OECD Guidelines, supra note 8, p.23.
\(^{110}\) ibidem, paragraph 4.124.
\(^{111}\) ibidem, paragraph 4.123.
\(^{112}\) ibidem, paragraph 4.125.
\(^{113}\) ibidem, paragraph 4.127.
An example of a situation with an APA which is limitless in terms of time could be one of the allegations for breach of the arm’s length principle made against Apple.\textsuperscript{114} There the Commission alleges that the 1991 open-ended APA, which was applied for fifteen years without revision\textsuperscript{115}, “was [possibly] negotiated rather than substantiated by reference to comparable transactions”.\textsuperscript{116} The Commission states that

“[e]ven if the initial agreement was considered to correspond to an arm’s length profit allocation, quod non, the open-ended duration of the [APAs’s] validity calls into question the appropriateness of the method agreed […] given the possible changes to the economic environment and required remuneration levels.”\textsuperscript{117}

Another example that can lead to presence of economic advantage within the meaning state aid is the use of a fixed percentage for intra-group loans over a long period of time instead of using for instance LIBOR plus a fixed percentage and credit rating assessment criteria.\textsuperscript{118} This is so because the interest paid would be acknowledged for tax purposes, subject to the applicable thin capitalization rules and the tax base of the entity paying the interest would be reduced and thus lower tax would be paid. Therefore, where such type of intra-group transaction is effectuated with the sanction of the tax administration through application of an open-ended or excessively long term APA, this would most likely amount to advantage for the respective MNE and later on for the group, as the after tax profits are estimated on a global basis.

Against this background, as OECD submits that

“the reliability of a prediction depends on the facts and circumstances of each actual case. Taxpayers and tax administrations need to pay close attention to the reliability of a prediction when considering the scope of an APA. Unreliable predictions should not be included in APAs.”\textsuperscript{119}

On the other hand in a normal situation, where APAs are concluded for a fixed period of time as per the OECD definition\textsuperscript{120}, the advantage may be temporary. From state aid perspective the temporary character of the APA does not preclude the application of the state aid rules as it was confirmed in the Ladbroke Racing case.\textsuperscript{121} The CJEU confirmed that the question of whether the measure “is temporary or permanent is not an adequate test for determining whether Article [107] (1) of the Treaty applies in

\textsuperscript{114} Commission decision of 11.06.14, Alleged aid to Apple, at § 58, [2014] O.J. C369/22.
\textsuperscript{115} ibidem, paragraph 65.
\textsuperscript{116} ibidem, paragraph 58.
\textsuperscript{117} ibidem, paragraph 65.
\textsuperscript{118} OECD Guidelines, supra note 8, paragraph 4.125.
\textsuperscript{119} ibidem, paragraph 4.128.
\textsuperscript{120} ibidem, p.23.
a particular case". An application of a test for permanency of the measure would undermine the predictability for application of the article 107 TFEU, which would contravene with the principle of legal certainty. Thus, it can be assumed that the time limitations of the APAs do not exclude them from the coverage of Article 107 TFEU.

1.2. Advantage Stemming from Misapplication of an Agreed Transfer Pricing Method

When it comes to assessing what the advantage under an APA could be from application of an agreed transfer pricing method contrary to the principle of arm’s length, first some preliminary observations on the applicability of the arm’s length principle at EU level should be made. After that the issue of application of transfer pricing methods would have to be examined.

1.2.1. Applicability of the Arm’s Length Principle

As stated above, the question of how to define a tax advantage, requires first “to determine the reference point in the scheme in question against which that advantage is to be compared”, or in other words the relevant benchmark. In transfer pricing terms this is the relevant allocation norm. Under the OECD Guidelines the benchmarks is the arm’s length principle. Thus, the relevant “yardstick [are the] market transactions”.

In its state aid law practice the Commission has confirmed the applicability of the internationally recognized tax principle of arm’s length. The CJEU has also confirmed the applicability of the principle in general terms. In Lankhorst-Hohorst AG Mischo confirms that the TFEU can be interpreted in accordance with the OECD model tax convention. In the judgement of that case the CJEU recognizes that Article 9 of the

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122 ibidem.
123 ibidem, paragraph 56.
125 OECD Guidelines, supra note 8, paragraph 1.8.
126 WITTENDORFF, supra note 94, p.7
129 Opinion of AG Mischo in Lankhorst-Hohorst, C-324/00, EU:C:2002:545, points 79-81.
OECD Model Tax Convention reflects the necessity of having transactions between affiliates on an arm’s length basis. The arm’s length principle, accepted by international tax law as the appropriate means of avoiding artificial manipulations of cross-border transactions, is in principle a valid starting point for assessing whether a transaction is abusive or not and the arm’s length test represents in this context an objective factor by which it can be assessed whether the essential aim of the transaction concerned is to obtain a tax advantage. Finally the SGI case consolidates the position that the arm’s length principle is an appropriate test by which to distinguish artificial arrangements from genuine economic transactions.

The arm’s length principle is also implicitly recognized as applicable through the Code of Conduct as there in paragraph B 4., where it is explicitly stated that “the rules for profit determination in respect of activities within a multinational group of companies should be measured against the internationally accepted principles.” In addition, the Interest and Royalties Directive and Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within the European Union explicitly recognise the arm’s length principle as the yardstick for measuring presence of tax avoidance.

Thus, it could be claimed that even at EU level “in the short and medium term the arm’s length principle will be retained as the [applicable] allocation norm in the EU.”

1.2.2. Transfer Pricing Methods and State Aid

As transfer pricing rules are of key importance in computing the actual market value of a cross-border transaction between affiliated undertakings, they are a point

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133 ibidem, paragraph 71.
135 Opinion of AG Kokott in SGI, C-311/08, EU:C:2009:545, point 68; Judgement in SGI, C-311/08, EU:C:2010:26, paragraphs 65-69.
136 Code of Conduct, supra note 17, paragraph B 4.
139 ibidem, paragraph B.
140 WITTENDORFF, supra note 94, p.282.
141 MICHEAU, supra note 5, p.197.
of interest in the context of state aid law.\textsuperscript{142} Thus, as Micheau argues, “the core element is the method used to calculate the advantage.”\textsuperscript{143}

In that respect, the OECD Guidelines\textsuperscript{144} provide for five main transfer pricing methods divided in two main sets.\textsuperscript{145} The first set of methods – the traditional transactional methods, comprises of (i) the comparable uncontrolled price method, (ii) the resale price method and (iii) the cost plus method.\textsuperscript{146} The second set of is the so-called transactional profit methods which consists of (i) the transactional net margin method and (ii) the transactional profit method.\textsuperscript{147}

“Traditional transactional methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are arm's length.”\textsuperscript{148} Although there is no explicit hierarchy rule,\textsuperscript{149} the OECD Guidelines “contain a vaguely formulated best method rule [asking for] the method that will provide the most reliable measure of an arm’s length result.”\textsuperscript{150} As Wittendorff argues “transactional profit methods may be applied as methods of last resort.”\textsuperscript{151} Against this background, the thesis would focus on the traditional transactional methods and their application all in the light of the EU state aid law.

\subsection*{1.2.2.1. Types of Advantages Stemming from the Misapplication}

The state aid issues deriving from the improper application of the traditional transfer pricing methods can be associated to:

- reduction of the tax base for individual associated enterprises; and
- cross-border allocation of the tax base.\textsuperscript{152}

Thus, non-compliance with the arm’s length principle in the intra-group transfer pricing can lead to economic advantages for a respective MNE or the MNE group as a whole, both in cases of pure diminishing of the tax base or from profit shifting.

In theory, proper application of each of the transfer pricing methods should have the same results, subject to the condition that the controlled transactions were executed

\textsuperscript{142} ibidem.
\textsuperscript{143} ibidem.
\textsuperscript{144} OECD Guidelines, \textit{supra} note 8.
\textsuperscript{145} ibidem, paragraph 2.1.
\textsuperscript{146} ibidem.
\textsuperscript{147} ibidem, p.30 and p.77.
\textsuperscript{148} ibidem, paragraph 2.3.
\textsuperscript{149} WITTENDORFF, \textit{supra} note 94, p.710.
\textsuperscript{150} ibidem, p.708.
\textsuperscript{151} ibidem, p.710.
\textsuperscript{152} ibidem, p.3.
under the conditions of perfect competition.\textsuperscript{153} In practice, however, perfect competition does not exist.\textsuperscript{154} Therefore the result of an arm’s length test would differ depending on the transfer pricing method that is applied.\textsuperscript{155}

Against this background, the thesis continues first with the issue of reduction of the tax base as a state aid advantage and then with state aid consequences from profit shifting.

(a) Reduction of the Tax Base

(i) Comparable Uncontrolled Method

The CUP method is “the most direct and reliable way to apply the arm’s length principle”\textsuperscript{156}, subject to finding an adequate comparable uncontrolled transaction.\textsuperscript{157} For this method, the transfer price needs not to be calculated, but will emerge as a result of the comparison\textsuperscript{158}, as opposed to the other methods where calculations are necessary and their improper computation may lead to breach of the arm’s length principle and create an undue economic advantage. Although its application is being recommended over the other methods,\textsuperscript{159} it is extremely sensitive to differences in the comparable uncontrolled transactions. Even minor differences in the products compared\textsuperscript{160} may significantly impact the price.\textsuperscript{161} This is so because “in a state of imperfect competition, identical products may be traded at different prices and different products may be traded at identical prices.”\textsuperscript{162} In any such case adjustments need to be made.\textsuperscript{163}

Thus, both inadequate comparables or lack of and improper adjustments bear the risk of granting an undue advantage within the meaning of state aid law appears.

The OECD Guidelines explicitly provide that special factors other than product comparability should be taken into account.\textsuperscript{164} Such factors are the contractual terms, economic conditions, level of costs\textsuperscript{165} etc.

\textsuperscript{153} ibidem, pp.701-702.
\textsuperscript{155} WITTENDORFF, supra note 94, pp.701-702.
\textsuperscript{156} OECD Guidelines, supra note 8, paragraph 2.14.
\textsuperscript{157} ibidem.
\textsuperscript{158} WITTENDORFF, supra note 94, p.714.
\textsuperscript{159} OECD Guidelines, supra note 8, paragraph 2.14; see J. WITTENDORFF, supra note 94, p.714.
\textsuperscript{160} WITTENDORFF, supra note 94, p.715.
\textsuperscript{161} See OECD Guidelines, supra note 8, paragraph 2.15.
\textsuperscript{162} WITTENDORFF, supra note 94, pp.713-714.
\textsuperscript{163} OECD Guidelines, supra note 8, paragraph 2.15.
\textsuperscript{164} ibidem, paragraph 2.16.
\textsuperscript{165} WITTENDORFF, supra note 94, p. 715.
In any case where the end price stemming from the compared uncontrolled transaction is lower than the economic reality of the transactions of the controlled undertakings and this price is neither adjusted, nor adjusted properly this would amount to a breach of the arm's length principle and would create an undue economic advantage for the respective undertaking.

(ii) Cost Plus and Resale Price Methods

Turning to CPM and RPM, both cannot *per se* be regarded as incompatible with the arm's length principle, and as such cannot breach the state aid rules. It is their application that may lead to a tax advantage.

In order to test for presence of an advantage from the application of the CPM, a comparison between the gross profit mark-ups of a controlled transaction and a reference transaction should be made. “The tested party is the seller in the controlled transaction, which will normally undertake a manufacturing or service function.” The comparison can be carried out with internal or external reference transactions. In the assessment process of compliance with the arm’s length principle, the internal reference transactions are regarded as more reliable, since they do not offer many material differences.

Substantial differences between the controlled and the reference transactions may affect the calculation of the gross profit margin, and thereby create false indications for presence of an advantage. Thus, adjustments are to be carried out to the reference transactions, so as to avoid having economic advantages stemming from such differences.

“...the gross profit mark-ups of the reference transactions and the costs of goods [or services] sold of the tested party are thus the pivotal factors under the cost plus method.”

The non-estimation or not taking into consideration of these criteria, as well as any incorrect estimation of the foregoing criteria might lead to an undue economic advantage for the MNE.

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166 *WITTENDORFF*, *supra* note 94, p. 276.
168 *WITTENDORFF*, *supra* note 94, p. 726; See also *MICHEAU*, *supra* note 5, p.198.
169 *WITTENDORFF*, *supra* note 94, p. 726.
170 *ibidem*, p. 726.
171 *ibidem*, p. 735.
172 *ibidem*, p. 734.
173 *ibidem*, p. 726.
Advantages stemming from the CPM application may take various forms.\textsuperscript{174} Same applies to the RPM application.\textsuperscript{175} The most acute examples are:

- Systematic application of fixed profit margins, or arbitrary setting of such in disregard of the economic underlying and real nature of the transactions;\textsuperscript{176}
- Reduction in the tax due, because of inclusion/exclusion of expenditures.\textsuperscript{177}

Both examples will be examined in detail below.

a. Use of Fixed Mark-Up Leads to an Advantage

The CPM uses the costs incurred by the supplier and adds an appropriate cost plus mark-up, adjusted where necessary, in order to obtain the arm’s length price of the controlled transaction.\textsuperscript{178}

For the RPM, the resale price is

“reduced by an appropriate gross margin […] representing the amount out of which the reseller would seek to cover its selling and other operating expenses and […] make an appropriate profit. What is left […] can be regarded, after adjustment[s] […] as an arm’s length price for the original [transaction] between the associated enterprises.”\textsuperscript{179}

Against this background, where for both methods the tax authorities systematically use a fixed minimum mark-up percentage, but not one that stems from ‘safe harbours’ or ‘safe heavens’,\textsuperscript{180} an advantage may occur.\textsuperscript{181}

Safe harbours are generally established by the law and “do not include procedures whereby a tax administration and a taxpayer agree on transfer pricing in advance of the controlled transactions”,\textsuperscript{182} as compared to the APAs, where an individual approach is always a necessary prerequisite.

Systematic application of the same fixed by the practice minimum mark-up percentages to all companies from a certain economic sector can be effected through the use of APAs. For instance, that can happen where there is no safe harbour provision,

\begin{itemize}
\item \textsuperscript{174} Implementation Report, supra note 62, paragraph 10.
\item \textsuperscript{175} Commission decision of 07.10.14, Alleged aid to Amazon, [2015] O.J. C44/13, at § 54, n.31; Commission decision of 11.06.14, Alleged aid to Starbucks, [2014] O.J. C460/11, at § 76, n.45.
\item \textsuperscript{176} Implementation Report, supra note 62, paragraph 12.
\item \textsuperscript{177} Implementation Report, supra note 62, paragraph 11.
\item \textsuperscript{178} OECD Guidelines, supra note 8, paragraph 2.39.
\item \textsuperscript{179} ibidem, paragraph 2.21.
\item \textsuperscript{180} ibidem, paragraph 4.94.
\item \textsuperscript{182} ibidem, paragraph 4.95.
\end{itemize}
but the administrative practice of the tax authorities for companies from a certain industry is to impose the same fixed mark-up percentage. Such a situation would be close to having a *de facto* safe harbour, as there would be no actual estimation of the mark-ups between controlled and reference transactions and it is likely that an advantage would occur for certain companies.

Clear-cut examples of an advantage stemming from lack of estimation of the mark-ups between controlled and reference transactions are the Coordination Centres cases.\(^{183}\)

In these cases, the tax authorities have applied systematically and for a long period of time the same fixed minimum mark-ups either 0.25% or 5%, or 8% depending on the case.\(^{184}\) No assessment was made on a case-by-case basis. Thus, this type of application of the CPM with the fixed minimum mark-ups was considered to be “an advantage by dint of the fact that, in practice, [the tax authorities had] systematically granted the minimum rate without checking whether it corresponded to the economic reality of the underlying services.”\(^{185}\)

Similar results would occur in the application of the RPM, if the applicable resale price margin is fixed at a higher level than it should be and thus does not take into account the real economic underlying of the transactions. In such cases the end result – the tax base of the undertaking, would be lower than it should be.

On that basis it can be concluded that such “conduct of the tax administration [has] the effect of conferring an advantage.”\(^{186}\)

As it was already argued, the use of fixed mark-up rate is not the only way to gain an economic advantage. Improper estimation and/or inclusion or exclusion of costs may also lead to misapplication of both the CPM and the RPM and thus, to an advantage for the MNEs.

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183 See *supra* note 181.
184 *ibidem.*
185 *ibidem.*
b. Costs Exclusion/Inclusion

i. Cost Plus Method

The CPM application reveals certain particularities regarding determination of costs. In order to properly apply the CPM a comparable mark-up should be applied to a comparable cost basis.

Thus, unjustified cost exclusion is one of the ways among others (e.g. not taking into account or improperly assessing expenses that reflect the functional difference between the parties or expenses that “reflect efficiencies or inefficiencies of the enterprises”) to receive an undue economic advantage. Exclusion of expenditure may arise where an APA applies a predefined by the law set of costs that will be excluded, without taking into account the economic cost-related reality or where the comparable cost basis applied through the APA was improperly computed.

An example of a situation, where the applicable law provides for exclusion of expenditure are the Belgium Coordination Centres cases, where it was explicitly confirmed by the CJEU that exclusion of essential operational costs in the application of the CPM actually confers an economic advantage to the undertakings. Any “[underestimation of] expenditure […] necessarily results in a reduction in the tax due.”

In the case of Belgium Coordination Centres, it was claimed by Forum 181 that the exclusion of staff costs and financial charges is not contrary to the arm’s length principle. As AG Léger argues in its opinion, and was upheld by the CJEU in its judgement on the case, these costs are essential as they “make a major contribution to enabling the coordination centres to earn revenue [and thus] represent a material part of the overall operating expenses borne by those centres”. Thus,

“the exclusion of those charges and expenses from the costs which determine the taxable income of the centres […] does not result in transfer prices which are similar to those which are charged under conditions of free competition.

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187 OECD Guidelines, supra note 8, paragraph 2.43.
188 ibidem, paragraph 2.44.
189 ibidem, paragraph 2.45, item a).
190 ibidem, paragraph 2.45, item c).
191 Commission decision of 17.02.03, on the aid scheme implemented by Belgium for coordination centres established in Belgium [2003], O.J. L 282/25, at § 89 to 95; Judgement in Belgium v Commission, EU:C:2006:416, supra note 181, paragraphs 96 and 97; Commission decision of 13.05.03, on the aid scheme implemented by France for headquarters and logistics centres, [2004] O.J. L 23/1, at § 53.
193 Implementation Report, supra note 62, paragraph 11.
194 Opinion of AG Léger in Belgium v Commission, Joined Cases C-182/03 and C-217/03 and in Commission v Council, C-399/03, EU:C:2006:89, point 258.
196 ibidem.
Accordingly, such an exclusion does indeed afford an economic advantage to those centres and the groups to which they belong.\(^{197}\)

In any case, it should be stated that accounting consistency\(^{198}\), as well as differences in the historical costs\(^{199}\) should also be assessed when examining presence of an economic advantage.

ii. Resale price method

Where the resale price margin is determined and approved by the tax authorities through the use of “the resale price margin earned by an independent enterprise in comparable uncontrolled transactions”\(^{200}\), the question of proper exclusion and inclusion of costs for the purposes of adjustment becomes essential from state aid perspective.

When as a result of these adjustments the determined resale price margin is not close to the actual arm’s length price, they have the effect of reducing the tax base, and thus lowers the taxes that are due.\(^{201}\)

Risk of improper adjustment, hence an advantage, would be present where “there are material differences in the ways the associated enterprises and independent enterprises carry out their businesses [and] such differences […] affect the level of costs [that have to be] taken into account”.\(^{202}\)

For instance, where the independent enterprise has higher costs, because of material differences in organization of its business and these higher costs are included in the resale price margin without taking into account that the affiliated enterprise does not have such costs, this would unduly augment the resale price margin and affect the end computation of the transfer price which would result in a lower tax base.

Additional risk of improper adjustment exists where a long time has elapsed between the moment the reseller has purchased the goods from the affiliate and the moment the goods were resold.\(^{203}\) If in such a case a miscalculation of the costs results into augmentation of the end resale price margin again an advantage may occur.

(b) Spill-Over Effects of Profit Shifting

APAs are to be regarded as measures capable of providing both direct and indirect advantage. Thus, a differentiation should be made between the addresses of the

\(^{197}\) Opinion of AG Léger in Belgium v Commission, EU:C:2006:89, supra note 194, point 259.

\(^{198}\) OECD Guidelines, supra note 8, paragraph 2.46.

\(^{199}\) ibidem, paragraph 2.49.

\(^{200}\) ibidem, paragraph 2.22.

\(^{201}\) Notice, supra note 56, paragraph 9.

\(^{202}\) OECD Guidelines, supra note 8, paragraph 2.27.

\(^{203}\) ibidem, paragraph 2.30.
As Quigley argues, “state aid may be granted indirectly through, or may be passed on to, a third party”. In those cases the beneficiaries would not correspond to the persons who were directly addressed with the aid and the undertaking which has benefited from the automatic pass on would have to be treated as the end recipient. This is also confirmed by AG Lenz in his opinion in the Ijssel Vliet case. There he argues that in order to decide, who is the actual beneficiary of the state aid, an examination should be made of the spill-over effects of the subsidy.

At the same time “indirect advantages should be distinguished from mere secondary economic effects [therefore] the foreseeable effects of the measure should be examined from an ex ante point of view.” Consolidation of the market position of an undertaking is acknowledged by the CJEU as a possible advantage for an indirect beneficiary.

For the purposes of giving an example of a situation where an APA confers indirect advantage the following assumptions of certain factual circumstances need to be made:

- The APA provides for the application of a transfer pricing method allowing a transfer price which is inconsistent with the economic reality, and thus allows lucrative profit shifting;
- The undertaking which is the addressee of the APA should be located in a high tax jurisdiction;
- The holding company should be located in a low tax jurisdiction.

Under these circumstance the advantage would be the fortifying of the market positions of the holding company, as compared with the position of competitors in the
respective relevant market.\textsuperscript{211} This would stem from the fact that the profits of the holding company would be very high as a result of the profit shift towards it. As a result similarly to the Mediaset case logic, the MNE would “consolidate [its] existing position on the market – as compared with the position of new competitors – in terms of brand image and customer retention.”\textsuperscript{212} Evidence of such consolidation of market position can be, \textit{inter alia}, the augmentation of the market capitalization of the MNE on the respective stock exchange, as a result of the fortification of the reputation, trade name, and higher consolidated profit results.

A secondary effect would be present for the other undertakings of the MNE group, as they will avail of the higher global consolidated profit end result and the reputation stemming thereof.

Alternatively, where the holding company is the addressee of the APA, but is located in the jurisdiction with higher tax rates and the undertaking to which the profits are allocated is based in a low tax rate jurisdiction, then the latter would directly avail of the raise in profit and the holding company would be indirectly availing of the higher global consolidated profit, resulting from the profit shift.

\textbf{Chapter III}

\textbf{Selective Granting or Green Light for Aggressive Tax Planning}

The state aid test requires an examination of presence or lack of selectivity. The selectivity criterion is one that seeks to delineate granting of the aid to certain undertakings or in other words situations where “the measure only applies to a specific group and not to the entire system”.\textsuperscript{213} In order to determine whether there is deviation or not efforts should be made to put lines of demarcation between the general tax system measure and the specific tax measures.\textsuperscript{214} Such an exercise should always take into consideration that “the concepts of generality and selectivity are not mutuality exclusive”\textsuperscript{215} and that these relationships are more complex in tax law.\textsuperscript{216}

The process of determination of the boundaries of the reference system “does not necessarily turn on the question whether the specifically favoured economic actors

\begin{itemize}
\item \textsuperscript{211} \textit{ibidem}.
\item \textsuperscript{212} \textit{ibidem}.
\item \textsuperscript{213} \textsc{micheau}, supra note 5, p. 220.
\item \textsuperscript{214} \textit{ibidem}, p. 224.
\item \textsuperscript{215} \textsc{panayi}, supra note 39, p.294.
\item \textsuperscript{216} Opinion of AG Colomer in \textit{italy v Commission}, C-6/97, EU:C:1998:416, point 27.
\end{itemize}
are in a minority relative to those subjected to the 'normal' or general regime”. As the case law puts it, the number of beneficiaries is irrelevant. It is settled case law that the number of undertakings benefiting and/or the fact that they may come from different economic sectors can justify a conclusion that a respective tax scheme is part of the general tax system. This is why a case by case approach is necessary and all specifics should be taken into consideration alongside with the effects of the tax measure.

Hence, the thesis continues first with an assessment of the essence and nature of the APAs and their distinctive character from advance tax rulings. It, then, delimits the boundaries between the general reference system and the APAs’ system and on that basis an estimation for presence or lack of selectivity would be made. Finally, the thesis would assess the presence of any possible justifications to the selectivity and the consequences thereof.

1. Differentiation between APAs and Advance Tax Rulings

In order to decide on the relevant reference system APAs need to be accurately placed in the tax system. For these purposes, account should be taken of the two widely accepted definitions of APAs and advance tax rulings.

Advance tax rulings are as per the universal definition in the International Guide to Advance Rulings “[…] a statement issued, upon request, to a (potential) taxpayer indicating the tax administration’s view of the tax treatment of a particular set of facts and circumstances contemplated, in the process completion, or completed but not yet assessed.”

Regarding APAs, the OECD provides the following definition:

“An advance pricing arrangement […] is 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.”

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220 Opinion of AG Tizzano in Ferring, C-53/00, EU:C:2001:253, point 39.
222 ibidem.
223 OECD Guidelines, supra note 8, paragraph, 4.123.
Against this background, this thesis upholds the position that APAs are substantially different from advance tax rulings.\textsuperscript{224}

It is true that both APAs and advance tax rulings aim at providing legal certainty for the taxpayers,\textsuperscript{225} and although it may be claimed that in certain specific cases advance tax rulings on transfer pricing issues may seem to be capable of producing the same legal effects as an APA would, this would amount to oversimplifying the legal nature of the APAs.\textsuperscript{226} Such a conclusion can only be made without taking into due account relevant criteria that show the material difference between those two. The criteria used for the comparison are:

- parties to the proceedings;
- the subject matter of the acts;
- their legal nature;
- their binding effects;
- publication requirements.\textsuperscript{227}

As regards the first criterion advance tax rulings are unilateral, as opposed to APAs which can be only bi- or multilateral.\textsuperscript{228} APAs cannot be unilateral with regard to the parties to the act criterion. They can only be regarded as unilateral on the basis of another, different criterion, namely the number of tax authorities being parties to the APA.\textsuperscript{229}

Regarding the subject matter criterion, APAs are aimed at providing legal certainty “through enhancing the predictability of tax treatment in [all] international transactions”\textsuperscript{230} of a certain MNE, contrary to advance tax rulings which are “normally referring to one or more specific [acts, facts] or transactions”.\textsuperscript{231}

APAs and advance tax rulings have differences in their legal nature as well. Contrary to the advance tax rulings which are treated as “one-sided statements by the tax authorities”,\textsuperscript{232} APAs are regarded as “agreements between (one or more) tax authorities and taxpayers.”\textsuperscript{233}

\textsuperscript{224}\textsc{Romano}, \textit{supra} note 221, p. 132.
\textsuperscript{225}\textsc{OECD Guidelines}, \textit{supra} note 8, par.4.142; See also \textsc{Romano}, \textit{supra} note 221, p. 134.
\textsuperscript{226}\textsc{Romano}, \textit{supra} note 221, p. 134.
\textsuperscript{227}\textit{ibidem}, p. 136.
\textsuperscript{228}\textit{ibidem}, pp. 134-136.
\textsuperscript{229}\textsc{ibidem}, paragraph 4.142.
\textsuperscript{230}\textsc{OECD Guidelines}, \textit{supra} note 8, paragraph 4.129.
\textsuperscript{231}\textit{ibidem}, paragraph 4.142.
\textsuperscript{232}\textsc{Romano}, \textit{supra} note 221, p. 135.
\textsuperscript{233}\textit{ibidem}.
From the differences in the legal nature stem the next two differences related to the binding effects and publication of the acts.234

The advance tax rulings are binding on the tax authorities, as opposed to APAs which have a binding effect on both the tax authorities and the taxpayer.235

Concerning the publication, advance tax rulings are generally published, but APAs as a rule are not published.236

Finally, as explicitly stated in the OECD Guidelines,

“The APA differs from the classic ruling procedure, in that it requires the detailed review and to the extent appropriate, verification of the factual assumptions on which the determination of legal consequences is based, before any such determination can be made. Further, the APA provides for a continual monitoring of whether the factual assumptions remain valid throughout the course of the APA period.”237

The following table reproduces in summary the differences between advance tax rulings and APAs, as presented by Carlo Romano, with certain modifications:

<table>
<thead>
<tr>
<th></th>
<th>Advance Rulings</th>
<th>APAs</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parties</strong></td>
<td>Unilateral</td>
<td>Bilateral or Multilateral</td>
</tr>
<tr>
<td><strong>Issues</strong></td>
<td>Various Domestic Legal Issues</td>
<td>Cross-Border Factual Issues <em>(Transfer Pricing Only)</em></td>
</tr>
<tr>
<td><strong>Objective scope</strong></td>
<td>Specific transactions</td>
<td>All Transactions or Categories of Transactions</td>
</tr>
<tr>
<td><strong>Legal Nature</strong></td>
<td>Statement, Opinion, Standpoint (rarely agreement)</td>
<td>Agreement</td>
</tr>
<tr>
<td><strong>Binding Effects</strong></td>
<td>On tax authorities only (generally)</td>
<td>On Tax Authorities and Often on Taxpayer</td>
</tr>
<tr>
<td><strong>Publication</strong></td>
<td>Generally Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

234 *ibidem*, p. 136.
235 *ibidem*.
236 *ibidem*.
Given all of the preceding, it should be assumed that APAs are different legal instruments from the advance tax rulings and the two notions should not be confused with one another. Therefore, APAs should be examined for the purposes of the specificity criterion always in the light of their specific characteristics and the specific system inherent to them, within which they exist.

2. Selectivity Assessment

2.1. Reference System

The reference system in this case is the set of rules and methods in the respective member state applied by the tax administration for the purposes of determining the arm’s length price between (non)affiliated undertakings, in the cases where they have used for their transactions between them a non-arm’s length price. The deviation from that reference system comes from the de facto application of the APAs, as they are available and thus to the benefit only of certain financially powerful MNEs (large taxpayers). This is true in spite of the fact that APAs may prima facie seem to be applicable in general to all affiliated undertakings, including small taxpayers.

2.2. Demonstrating Selectivity

As per paragraph 13 of the Notice “[t]ax measures which are open to all economic agents operating within a Member State are in principle general measures.” Pursuant to that same paragraph, tax measures of a purely technical nature are given the benefit of a doubt, i.e. there is a rebuttable presumption that rules such as the rules on tax avoidance are not considered as state aid, in so far as they apply without distinction to all undertakings. As the main aims of the APA system are to fight against tax avoidance and double taxation, it may be argued that this presumption is applicable. It is therefore important, as Micheau argues, to “go beyond the wording [and] assess [whether there is] de facto selectivity”, margin of discretion for the authorities in the application process and issuance of the APAs and whether the measures are opaque.

2.2.1. De Facto Selectivity

Turning to the issue of de facto selectivity, APAs should in general be opened to all affiliated companies and not only to a certain group of them. Although it may seem

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238 ROMANO, supra note 221, p.136.
239 In so far as there is an advantage (see Chapter II above).
240 Notice, supra note 56, paragraph 13.
241 ibidem.
242 MICHEAU, supra note 5, p.226.
that APAs can be *pirma facie* applicable to all affiliated undertakings, they can in fact be applicable only to a certain, specific group of affiliated undertakings – the financially powerful undertakings.

This issue of equitable access is one that has been discussed in the OCED Guidelines.\(^{243}\) There, the OECD explicitly confirms that “[…] the nature of APA proceedings may de facto limit their accessibility to large taxpayers [and that the] restriction of APAs to large taxpayers may raise questions of equality and uniformity, since taxpayers in identical situations should not be treated differently.”\(^{244}\)

Therefore, this risk of *de facto* selectivity is that the APAs are not accessible by all taxpayer, as the APA procedures are “expensive and time-consuming and small taxpayers generally may not be able to afford it […] especially [where] independent experts are involved”.\(^{245}\) Thus, although APAs may look as being opened to all affiliated companies, they are *de facto* available only to “large transfer pricing cases”\(^{246}\) of large MNEs and can therefore be treated as selective measures.

### 2.2.2. Margin of Discretion and Opacity

The issue of *de facto* selectivity, however, is not one to be analysed in isolation of the questions related to presence or lack of margin of discretion for the tax authorities in the application of the respective APA programme, as well as the issue of opacity.

As argued in the OECD Guidelines, “resource implications of an APA program may limit the number of requests a tax administration can entertain. In evaluating APAs, tax administrations can alleviate these potential problems by ensuring that the level of inquiry is adjusted to the size of the international transactions involved.”\(^{247}\)

From state aid perspective, presence or lack of discretionary practice and opacity are a litmus for presence or lack of selectivity. Both opacity and the “the room for manoeuvre”\(^{248}\) of the tax authorities could trigger a presumption of selectivity as per the Notice\(^{249}\) and the Draft Notice.\(^{250}\) This is confirmed by the CJEU.\(^{251}\)

\(^{243}\) OECD Guidelines, *supra* note 8, paragraph 4.163.
\(^{244}\) ibidem.
\(^{245}\) ibidem, par. 4.158.
\(^{246}\) ibidem.
\(^{247}\) ibidem.
\(^{248}\) Notice, *supra* note 56, paragraph 22.
\(^{249}\) ibidem.
\(^{250}\) Draft Notice, *supra* note 75, paragraph 175.
Turning first to the question of discretion, an adequate indicator for presence of ‘room for manoeuvre’ is whether the tax authorities have the discretion to reject an application for entering into an APA with a taxpayer without using objective criteria or giving reasons for the rejection. For these purposes, one could use as a reference point the OECD paper which discusses the drafting of country legislation on APA systems.\(^{252}\)

The essence of this paper is to present, through illustrative APA legislation “various issues that country APA legislation typically needs to address, and to illustrate possible approaches.”\(^{253}\)

In article 6 of the Illustrative Country Legislation, it is stated that “[t]he tax administration may reject the taxpayer’s request to enter into an advance pricing arrangement.”\(^{254}\) If there are no clear objective criteria, on the basis of which the rejection is made and the tax authorities do not provide reasons for their rejection,\(^{255}\) then the decision to enter into an APA procedure is at the uncontrolled margin of discretion of the respective tax authorities. This non-objective use of the margin of discretion can be invoked at different stages (e.g. in the process of assessment for presence or lack of legitimate interest or later on for document requests).

Next, where:

- the APA system is designed in such a manner so as to allow the tax authorities to use their discretionary powers in assessing the complexity of a transfer pricing case, as a criterion for entering into an APA\(^{256}\), and this complexity criterion is not objective and/or not well defined, or
- the tax authorities may decide to enter into an APA only for transactions for which “there is uncertainty over the application of the most appropriate transfer pricing method”,\(^{257}\) or
- the tax authorities may decide to enter into an APA only if “the taxpayer seeks to implement a method which is highly tailored to its own particular circumstances”\(^{258}\),


\(^{253}\) ibidem, p.3.

\(^{254}\) ibidem, p.7.

\(^{255}\) ibidem, p.9.


\(^{257}\) OECD Approaches to Legislation, supra note 252, p.9.

\(^{258}\) HMRC Statement of Practice, supra note 256, paragraph 14.
the presumption of selectivity under the Notice\textsuperscript{259} or the Draft Notice\textsuperscript{260} would be triggered and the APAs issued would be regarded as selective measures.

This is true because the combination between non-objective eligibility criteria and the presence of margin of discretion of the tax authorities to determine the essence and interpret freely these criteria, leads to a \textit{de facto} selectivity situation where “the structure of the measure is such that its effects significantly favour a particular group of undertakings.”\textsuperscript{261}

In particular, the group of undertakings that are being favoured is the group of the large MNEs, which actually can have complex intra-group transactions, can seek the implementation of a highly tailor-made transfer pricing methods, and can invest time and material resources in the preparation of the necessary documentation.

Turning to the issue of opacity, APAs are not fully disclosed and made public as they are subject to confidentiality rules and non-disclosure clauses.\textsuperscript{262} Opacity is, therefore, to be considered as an inherent characteristic of APAs.

All of the above elaborations confirm that affiliated companies which stay out of the APA system would be taxed under the general reference system and at the same time, only certain undertakings as per article 107 TFEU would be \textit{de facto} capable of availing of the APA system and will therefore be treated selectively.

\textbf{2.2.3. Justification?}

Although the principle of possible justification as established in the Italian Textile case\textsuperscript{263} can be invoked\textsuperscript{264}, and fighting tax avoidance is considered to be a valid justification\textsuperscript{265}, when there is “consistency of a specific tax measure with the internal logic of the tax system in general”\textsuperscript{266}, in an APA system designed with flaws like the ones described above, arguing successfully the application of such a justification is highly unlikely. To the contrary, justification may be argued where the APA system alongside the complex cases APAs provides for a “streamlined access for small taxpayers”\textsuperscript{267}, through simplified APAs “for taxpayers with low value or low risk international related

\textsuperscript{259} Notice, \textit{supra} note 56, paragraph 22.
\textsuperscript{260} Draft Notice, \textit{supra} note 75, paragraph 175.
\textsuperscript{261} \textit{ibidem}, paragraph 122.
\textsuperscript{264} \textit{Micheau}, \textit{supra} note 5, p. 248.
\textsuperscript{265} \textit{ibidem}, p.253.
\textsuperscript{267} OECD Guidelines, \textit{supra} note 8, paragraph 4.163.
party dealings” and standard APAs “for dealings that do not qualify for the simplified or complex type.”

2.2.4. Conclusion on the Selectivity Criterion

As a conclusion, an APA system working under the conditions described above would be de facto selective as compared to the reference system. Therefore, the criterion of selectivity would be fulfilled.

This, however, does not mean that there will be state aid by definition, because all relevant criteria of Article 107 TFEU need to be present. Therefore, even though the APA system of a certain country may appear to be meeting the selectivity criterion, there should also be an advantage, in order to have a ‘selective advantage’. The other two criteria – immutability to the state and the criterion requiring the measure to affect trade between member states, should also be present.

Final remarks

Even properly notified to the Commission, an APA system which meets the conditions (as presented above) with regard to selectivity, advantage, immutability to the state and which affects the trade between member states, is one that can be expected to be pronounced as incompatible with the EU state aid rules.

However, the aid may be proclaimed as ‘unlawful’ within the meaning of Regulation on rules for application of Article 108 TFEU, where it is “a new aid put into effect in contravention of Article 108(3) of the Treaty.” In any such case the Commission would initiate an examination without delay, which can result in the end of a formal decision proclaiming the measure as incompatible, subject to the foregoing elaborations. In cases of such unlawful aid the Commission has the possibility to impose an injunction so as to suspend or provisionally recover such unlawful aid.

268 OECD Approaches to Legislation, supra note 252, p.15.
269 ibidem.
271 ibidem, Article 1, item f).
272 ibidem, Article 10(1).
273 ibidem, Article 11.
Conclusion

In a world of globalization where “a third of global trade is intra-firm”\(^{274}\), and aggressive tax planning is a normal mode of functioning for MNEs, EU state aid rules become the “freins de secours” pulled at supranational level to prevent or where necessary to stop both the “tax planning strategies that exploit gaps and mismatches in tax rules”\(^{275}\) and the harmful tax competition between member states.

This thesis sought to establish the perception that aggressive intra-group transfer pricing, which is not compliant with the principle of arm’s length and is confirmed by the tax authorities through tax measures such as the APAs is in fact an unlawful state aid, as it gives selective advantage to certain undertakings and affects trade between member states. Such state aid can result from a combination between aggressive tax planning of an MNE and harmful tax competition between member states in the area of direct business taxation, where the former pushes for trespassing against the limits of the arm’s length principle and thereby ‘securing’ the presence of the advantage criterion and the latter providing mainly for the presence of the selectivity criterion.

In essence, where an APA system is structured in a way so as to be de facto selective, because of the fact that access is restricted only to large MNE taxpayers having the necessary financial resources, because the tax authorities enjoy an unjustified margin of discretion, and because of the opacity of the measures, the ‘thin redline’ or in other words “the limit that should not be passed”\(^{276}\) is the internationally recognized arm’s length principle. Once this arm’s length principle is breached through issuance of an APA, confirming an ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’ methodology, then a selective advantage would be present, and subject to the existence of the other two state aid law criteria, which can easily be proved in such circumstances, an incompatible (unlawful) state aid will occur.

As it was argued, the ‘thin redline’ is in practice formally crossed by the tax authorities. Nevertheless, stating that this is only the tax authorities fault would be somewhat oversimplifying the issue, because this type of aid is more than every other kind of state aid a solicited type of state aid, an aid that would be granted because the state authorities would be contacted and thus prompted to apply an aggressive tax planning scheme of an MNE, which goes counter to the EU state aid law. The authorities


\(^{275}\) OECD, BEPS FAQ, supra note 4.

are thus pushed beyond the point of no return by the MNEs. This does not exonerate the state authorities from their obligations to abide by the state aid rules, it only takes account of the negative effects of the aggressive tax planning on the decision making process of the tax authorities. This is especially true where the tax authorities are working under the pressure of a government policy aiming at the attraction of foreign direct investments, because such policies may trigger harmful tax competition behaviour.

Thus, the discussion raised by the issue of granting selective advantage through an APA system, confirms the necessity of the CJEU’s negative integration approach, as it is namely that approach which gave an impulse for consolidation of the state aid rules in the fight against harmful tax competition and still continues its influence, as this is evident from the state aid modernisation programme.

As it was argued, the Draft Notice277 which forms part of that programme is not aimed at an extraction and consequently isolation of the state aid tax matters from the harmful tax competition issues. The Draft Notice, as successor of the current Notice278, in the part referring to direct business taxation measures, especially in the area of transfer pricing, is to be treated as the further clarification and a next step in process of fighting against harmful tax competition through state aid regulations, as tax measures such as APAs confirming ‘Aggressive Non-Compliant Intra-Group Transfer Pricing’, linked to the necessity of attracting more foreign direct investments, fall within the ‘grey’ area between state aid and harmful tax competition.

It is in these situations, where the application of the state aid rules over national sovereignty in direct business taxation, tackles both harmful tax competition and incompatible state aid, granted under the pressure of aggressive tax planning.

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