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„Consistency of tax rulings with the WTO Agreement on Subsidies and Countervailing Measures and the European legal framework “

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Introduction.

In the last couple of years, a lot of multinationals have gotten in the headlines because of their excessive taxation arrangements with tax authorities of certain member states of the European Union. My goal is to research these tax rulings and to find out what the position of the European Commission is regarding these rulings. I also would like to look into the accordance of these tax rulings with the WTO Agreement on Subsidies and Countervailing Measures since this is an important piece of legislation that needs to be complied with by European member states. I will briefly explain the meaning and provide examples of advanced tax rulings. Then I will take a look at the European legal framework and the European Commission's stand concerning tax rulings. I will cover the WTO Agreement on Subsidies and Countervailing Measures and place it within the WTO framework, which I will also summarize. Lastly, I will check whether these advance tax rulings are in accordance with the EU legal framework and the WTO Agreement on Subsidies and Countervailing Measures.

PART 1. Advance tax rulings

1. Advance tax rulings, also just called tax rulings, are a procedure that allows taxpayers to obtain legal certainty about the tax consequences of a certain transaction.[1] Given the ambiguity of tax legislation in most countries, different interpretation and thus different financial consequences can be the result of the application of the law. This legal uncertainty causes detrimental effects for some taxpayers. It will either lead to excess losses for taxpayers who do carry out these uncertain transactions or it will prompt taxpayers no to go forward with these transactions which could lead to a less favourable investment environment. Tax rulings provide a solid solution for these problems of legal uncertainty. Before carrying out certain transactions taxpayers can approach the tax authorities that are competent for the territory where the taxpayer is located. The tax authorities can assess the situation and apply the local tax rules to the transaction. They can provide the taxpayer with a binding ruling in which is explained what fiscal consequences the transaction will bring. These rulings bind the tax authorities, there are usually some exceptions concerning the binding power of these rulings provided for in the law, for example in case of manifest fraud or when essential information had been withheld.

2. Tax rulings can consist of all kinds of tax arrangements between the tax authorities and the taxpayer. They can be formal, meaning that they rely and are issued within a legal framework, or informal, when they are not based on such framework. The subject of these tax rulings can vary widely but the main subject of tax rulings usually is the application of transfer pricing principles. They usually do not come free of charge, in order to obtain a tax ruling the taxpayer usually has to pay a pre-determined fee[2]. The topic of tax rulings is very sensitive because they have to be in accordance with legal policy limitations on three levels: the national one, the international one and the European one.[3] In general tax rulings are binding for the tax authorities that have granted them, this can be on the basis of a legal or

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[1] Y. GIVATI, "Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings, Virginia Tax Review 2009, 1.

[2] M. DILLER, P. KORTEBUSCH, G. SCHNEIDER and C. SURETH-SLOANE, "Boon or Bane? Advance tax rulings as a Measure to Mitigate Tax Uncertainty and Foster Investment", European Accounting Review 21 May 2016, 1.

[3] E. VAN DE VELDE, "'Tax rulings' in the EU Member States: in-depth analysis, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf, 6-8.

administrative for certain tax rulings or pricing agreements or based on the principle of legitimate expectations for other tax arrangements.[4]

3. Most European member states have a legal framework concerning tax rulings[5]. Other countries mostly allow some form of informal arrangements between the tax authority and the taxpayer[6]. A lot of European member states combine both systems.[7]

4. In 2014 a huge financianal scandal was revealed by an international journalistic investigation conducted by the International Consortium of Investigative Journalists. It was called Luxembourg Leaks because the investigation was based on tax deals struck between Luxembourg and some of the world's largest international corporations.[8] This scandal brought attention worldwide to the tax avoidance practises of some of the world's largest companies and how Luxembourg authorities facilitated this behaviour by granting these companies secret deals containing beneficial tax treatment. Following these revelations, the European Union launched a special committee to investigate these complex tax rulings.[9] But it is clear that most tax rulings today are kept under the ground because they are not 100% clean. A greater obligation to disclose all tax rulings could be the solution to battle these secret sweet deals.

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[4] E. VAN DE VELDE, "'Tax rulings' in the EU Member States: in-depth analysis, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf, 36.

[5] AT, BE, BG, DK, EE, ES, FI, FR, DE, HU, IE, IT, LT, LU, MT, NL, PL, PT, RO, SE, SI, UK.

[6] (HR, CY, EL, IE, LV, also CH).

[7] E. VAN DE VELDE, "'Tax rulings' in the EU Member States: in-depth analysis, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf, 39.

[8] S. BOUWERS, "Luxembourg tax files: how tiny state rubber-stamped taks avoidance on an industrial scale, https://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale.

[9] J. CRISP, "Luxembourg 'made 172 secret taks deals" with companies in year after LuxLeaks, https://www.euractiv.com/section/euro-finance/news/luxembourg-made-172-secret-tax-deals-with-companies-in-year-after-luxleaks/.

PART 2. European legal framework concerning tax rulings

5. When it comes to the fight against tax avoidance and harmful tax competition, the European Union has developed extensive rules to deal with this kind of behaviour. It is the European Commission who is competent to investigate tax rulings in the context of the state aid rules.[10] In this part I will outline the main principles of the state aid rules, touching on what the notion of fiscal state aid really contains, what the investigation measures of the Commission are and how unlawful state aid can be recovered. Concluding, I will give some examples of recent cases between the Commission and certain Member States concerning state aid.

Chapter 1. Main principles state aid law.

A. Art. 107(1) TFEU

6. State aid control is part of the European Union rules on competition. The aim of these rules is to avoid a distortive effect on competition and to limit inefficient government spending.[11] State aid is defined as "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods*[12]. In so far as this state aid affects the trade between Member States it is incompatible with the internal market. The Commission has the competence to exempt certain aid schemes when they fulfil the conditions described in art. 107(2)(3) of the TFEU.

7. The definition of state aid in Article 107(1) is very broad and in order to trigger European state aid law four conditions which will be discussed below need to be fulfilled. At first this article was designed to envisage state subsidies or guarantees but later the CJEU confirmed that this definition also includes tax benefits that are given trough a certain tax system.[13]. First of all the aid must be present. The state aid must grant a competitive advantage to the beneficiary. The CJEU has explained an advantage as any State's measures

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[10] A. GUNN and J. LUTS, "Tax rulings, APAs and State Aid: Legal Issues", EC Tax Review 2015-2, 1.
[11] C. BUTS and M. JEGERS, "A Note on State Aid and Concentration: The Case of Belgium, European Competition Journal, 8:1, 153-162, 153.
[12] Art. 107 TFEU.
[13] CJEU 2 July 1974, 173/73, ECLI:EU:C:1974:71 (Italy v Commission).

which lightens a burden of the aid beneficiary in comparison to its competitors.[14] This can offcourse take various forms, when we look at the field of tax law, benefits can consist of tax base exemptions, tax credits, tax deductions, the application of special tax rates.[15] Whether or not a tax measure consist of a benefit for the beneficiary company should be determined set against the normal tax system of the state in question. Establishing whether or not a tax ruling entails a benefit can be tricky because tax rulings are usually used to provide legal certainty to taxpayers regarding their taxation. In tax disputes it can be unclear how the national tax law will be applied by the administration and courts depending on the circumstances of the particular case. This ambiguity will lead parties to want to settle their dispute or uncertain situation without going to court. The main standard that should be used when deciding if tax rulings should be considered as benefits in these kinds of uncertain situations should be whether or not the tax authorities made disproportionate concessions when settling the dispute.[16] The Commission has made it clear that if “certain concessions are made by the authorities that are clearly out of proportion to the concessions made by the taxable person given the circumstances”[17] that this tax ruling can be subject to the state aid rules. But quantifying whether or not a certain concession is disproportionate is not a black or white issue. This will depend on the circumstances of the dispute at hand and requires a case-by-case analysis.

8. In light of establishing whether or not a certain benefit is considered state aid for the beneficiary company the Court of Justice of the European Union has developed the private investor/creditor test. The Commission should compare the behaviour of the State with that of a potential private investor/creditor in similar market conditions and assess whether they would behave in the same manner. In the Frucona Kosice case[18] a Slovak company (Frucona) had benefited for several years of the deferral of their tax debt. Eventually the Slovak tax authority concluded a settlement with Frucona which consisted of the immediate payment of 35% of their previous tax debt, amongst other things. A competitor of Frucona decided to

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[14] CFI 16 March 2004, T-157/01, ECLI:EU:T:2004:76 (Danske Busvognmaent).
[15] R. LUJA, “EU State Aid Law and National Tax Rulings”, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 9.
[16] R. LUJA, “EU State Aid Law and National Tax Rulings”, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 8.
[17] Commission Decision 26 May 2010 2011/276/EU, para. 155.
[18] CJEU 24 January 2013, C-73/11, ECLI:EU:C:2013:32 (Frucona Kosice).

submit a complaint to the EU Commission and the Commission decided to consider this tax settlement as State aid. This decision was upheld by the General Court and finally appealed to the Court of Justice of the European Union (CJEU). The CJEU considered that Slovakia had two options as the creditor of Frucona. They could either let Frucona go to bankruptcy where the Slovak Tax Authority would be a privileged creditor. The second option consisted of allowing the tax settlement to get the Slovak Tax Authority to collect 35% of the tax debt immediately. The Commission and the General Court preferred the first option but the CJEU believed that a prudent and diligent creditor in a similar situation would take into consideration the length and uncertainty of the bankruptcy proceedings and thus favoured the second option. The CJEU annulled the EU Commission's decision and the previous judgement of the General Court. This case made it clear that different institutions can make different assessment regarding the beneficial character of a certain tax ruling so the private investor/creditor test is not always straightforward in its application.

9. The second condition that needs to be fulfilled in order for a benefit to be considered as state aid is that it needs to be granted by a Member State or through State resources. In other words, the aid must negatively affect the State's budget. This was explained in this way by the CJEU in Preussen Elektra case. In this case there was an obligation under German law for electricity supplier to purchase green energy. Preussen Elektra, a producer who did not rely on green energy had to make additional payments to Schleswag, an electricity supplier, to purchase green energy from third producers of renewable energy. According to Preussen Elektra this German rule benefited producers of renewable energy only and this consisted as an equivalent to State aid. The CJEU confirmed that the applicable German law did create an advantage for producers of green energy but the obligation to purchase green energy did not negatively affect the budget of Germany so there was no transfer of State's resources and therefore also no state aid. The CJEU also mentioned that a potential reduction of the tax revenue for Germany because of the new law does not matter since there is no direct impact on the State's resources.[19]

10. The second condition usually is fulfilled when looking at tax rulings since only states, usually delegated to lower levels of government with autonomous rights, have the power to tax. However, it must be understood that a benefit is only considered as aid when it is directly

[19] CJEU 13 March 2001, C379/98, ECLI:EU:C:2001:160 (Preussen Elektra).

attributable to an independent action or decision of a Member State and it is not so when the benefit is merely the result of complying with legal obligations. Thus, regulatory measures that create an advantage for certain undertakings and indirectly affect the state's budget in the form of less tax revenues, are not considered state aid.[20]

11. The third criteria is the following: there must be a distortion of the intra-Community trade. This criteria is usually very easy to fulfil because of the broad interpretation of the CJEU. This was demonstrated in the Philip Morris case. The Netherlands wanted to grant aid to Philip Morris, a tobacco company, in order for them to be able to establish a new factory in the south of the Netherlands, which is a poorer area. The Commission considered this to be incompatible state aid. The Netherlands argued however that the aid involved a local factory and thus there was no impact on intra-community trade. This case was brought to the CJEU via an appeal by Philip Morris. The CJEU ruled that the aid did have an impact on intra-community trade since the aid would allow Philip Morris to increase their production and export of cigarettes to other European Member States.[21] There are some cases where intra-community trade is not affected, for example when the aid is de minimis, when only national markets are affected which is however very rarely the case or when the aid only had an impact on trade outside of the European Union, which can be case when Member States grant export aid.

12. The final condition is selectivity of the aid which entails aids that favour only certain undertakings. General measures of the State, for instance lowering the corporate taxes for undertakings, that are imposed on every undertaking can never be seen as unlawful aid. There are two main types of selectivity, namely material selectivity and geographic selectivity which will be explained below.

13. In the British Aggregates Association case the CJEU touched upon how it defines material selectivity. The British Aggregates Association is an UK association of quarrying companies. The UK decided to impose a levy on aggregates production because of environmental reasons which did not affect other quarrying companies who were not involved

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[20] R. LUJA, "EU State Aid Law and National Tax Rulings", http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 20.

[21] CJEU 4 May 2016, C-547/14, ECLI:EU:C:2016:325 (Philip Morris).

with aggregates production. The British Aggregates Association filed a complaint to the EU Commission about the levy. The Commission decided that the UK tax was not to be considered as a state aid since the levy was a general tax and there was no selectivity. The British Aggregates Association appealed this decision, firstly to the General Court who upheld the Commission's decision and secondly to the CJEU. The CJEU explained that material selectivity consists of aids that grant advantages to undertakings who find themselves in a comparable legal and factual situation as the beneficiary. In assessing whether or not the aid is selective, one must not look at the objective of the measure but at the factual effect of the aid. The CJEU decided that the UK levy was selective because it was discriminatory towards other quarrying companies. Because this levy was aimed at environmental protection it could however be justified under Art. 107(3) TFEU.[22]

14. Geographic selectivity was further explained by the CJEU in a case between Portugal and the Commission. Portugal had introduced a more favourable income and corporate tax regime for the Azores. The Commission viewed this as selective aid since companies who were established in the Azores received beneficial treatment in comparison with companies who were established in the mainland of Portugal. Portugal appealed this decision to the CJEU. The CJEU made it clear in its ruling under which three conditions aid granted by a local or regional authority is not selective. The local or regional authority must first of all enjoy political autonomy from the central government and the aid must be directly introduced by the local authority. Second of all the aid must be applicable to every undertaking within the jurisdiction of the local or regional authority, in other words there can't be material selectivity. Lastly the aid must have an impact on the budget of the local or regional authority so it cannot be offset by internal transfers from the central government or other regions. Since the Azores tax scheme did not comply with the last condition, the CJEU upheld the decision of the European Commission.[23]

B. Art. 107(2) and (3) TFEU

15. Above I discussed the four conditions in art. 107(1) that can lead to the decision that a certain aid is incompatible with the European internal market. Aids that are incompatible

[22] CJEU 22 December 2008, C-487/06 P., ECLI:EU:C:2008:757 (British Aggregates Association).
[23] CJEU 6 September 2006, C-88/03, ECLI:EU:C:2006:511 (Portugal v. Commission).

under art. 107(1) can however be justified under art. 107(2) and (3) TFEU. In Art. 107(2) TFEU there are three narrow exceptions mentioned which if the conditions are fulfilled will be considered compatible aid. Article 107 (3) TFEU contains a broader list of exceptions of aid that can be compatible which will be decided by the Commission.

16. The first exception mentioned in Art. 107 (2) TFEU is "*aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned.*" The conditions in this article must all be fulfilled in order to be able to refer to the article. Aid having a social character entails that the aid must be limited to disadvantaged persons. The aid cannot be granted to employers or undertakings but must be granted to individual consumers. Lastly, the aid must entail a general measure applicable to the entire population and does not discriminate when it is applied.

17. The second exception in art. 107 (2) TFEU consists of "*aid to make good the damage caused by natural disasters or exceptional occurrences*". Natural disasters must be interpreted as out of the ordinary, substantial and unpredictable events. Exceptional occurrences can be wars, strikes, demonstrations but financial crises can not be seen as exceptional occurrences. In order for States to be able to invoke this article there must be a direct link between the natural disaster or the exceptional occurrence and the economic disadvantage where the aid is being used for.

18. The third exempted aid in Art. 107 (2) TFEU is "*aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.* This is a specific provision to justify certain additional aid to East Germany but this justification has not been used recently. To this day it has not been repealed.

19. The exceptions in art. 107 (3) TFEU are of a different kind than those in art. 107 (2) TFEU. In this article there is a broader list of five exceptions on the grounds of which the Commission may decide that the aid is compatible. The Commission has released Guidelines

and Notices where is explained how they interpret and apply the conditions laid down in paragraph three specified for different industries.

20. The first exception in art. 107(3) TFEU is "*aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation.*" This is the exception that can be used to justify regional aid. The European Commission has elaborated in the Guidelines on regional State aid for 2014-2020 how the exception for regional aid can be fulfilled. It is mentioned in the guidelines that the Commission considers the conditions of Article 107(3)(a) TFEU fulfilled for regional aid to regions that have a gross domestic product per capita below or equal to 75% of the Union's average.[24]

21. Secondly, *"aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State"*[25] may also be exempted by the Commission. Projects of common European interest usually consist of trans-European projects to establish cross-border transportation networks. During the financial crisis in 2008 European Member States tried to rely on this article and claimed that there was a serious disturbance in the economy but the European Commission rejected this interpretation.

22. Thirdly, *"aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"*[26] can be exempted by the Commission. This is more commonly used to justify horizontal aid to certain disadvantaged areas, where the income lies below the national average income.

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[24] Art. 150 Guidelines on regional State aid from 2014-2020: Acceptance of the proposed appropriate measures pursuant to Artciel 108(1) of the Treaty on the Functioning of the European Union by all Member States, 2014/C 101/03.
[25] Art. 107(3)(b) TFEU.
[26] Art. 107(3)(c) TFEU.

23. The fourth exception consists of *"aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.*[27]

24. Lastly there is an exception for *"such other categories as may be specified by decision the Council on a proposal from the Commission.* This exception has not been used frequently in the past, except for two initiatives from the Council concerning the introduction of a framework for aid towards the shipbuilding sector and coal mines.[28]

25. The Commission has adopted numerous Guidelines in which it is explained how they intend to apply the exceptions mentioned in art. 107(3) TFEU. The Commission can adopt these guidelines because of their exclusive competence to enforce art. 107(3) TFEU. These guidelines are soft law but in the Germany v. Commission[29] case the CJEU has introduced a de facto legal value concerning these guidelines for the European Member States. The guidelines are generally considered to be positive for undertakings because they introduce some legal certainty for undertakings. They are however always limited in time, when their temporal scope has finished, the Commission will conduct a review and a new public consultation before adopting new guidelines. Below I will introduce a couple of the general criteria that the Commission has developed in these guidelines.

26. First of all the Commission has adopted different types of guidelines over the years. There are guidelines concerning certain sector specific rules which are typically used for industries that are more likely to be subsidized, like the audio-visual industry. Then there are some guidelines on horizontal rules, these concern horizontal aid that Member States can implement in every industry to accomplish a certain objective of general interest. The Commission also adopted a temporary framework to deal with the consequences of the financial crisis in 2008.[30]

27. The Commission has made it clear that certain aid that is below the minimum aid standard is not considered to have an impact on intra-community trade and will not be

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[27] Art. 107 (3)(d) TFEU.
[28] M. BOTTA, "Class III (13 January 2017): Aids justified undert Art. 107(2)-(3) TFEU.
[29] CJEU 14 October 1987,C)-248/84, ECLI:EU:C:1987:437 (Commission v. Germany).
[30] M. BOTTA, "Class III (13 January 2017): Aids justified undert Art. 107(2)-(3) TFEU.

considered to be state aid under Art. 107(1). The Commission also takes into account the aid intensity, this is the amount of the aid that is being granted in comparison to the total cost of the project. There are certain ceilings of aid intensity that cannot be breached. Cumulating aid is also forbidden. The beneficiary of aid cannot receive different kinds of aid for the same project. The Commission is not a supporter of aid that allows a failing firm to survive in the market without restructuring. When a major aid is being granted which does go along with the restructuring of the company, this can only be granted once. Export subsidies or aid are not accepted because this is forbidden under WTO law. Lastly, the European Commission can approve aid schemes that let European undertakings that are operating in international markets at a disadvantaged position than other foreign companies.[31]

[31] M. BOTTA, "Class III (13 January 2017): Aids justified undert Art. 107(2)-(3) TFEU.

Chapter 2. Competence of Commission concerning state aid.

28. The Commission has the exclusive authority to decide upon the compatibility or the incompatibility of State aid with the internal market. According to article 108 of the Treaty on the Functioning of the European Union "*The Commission shall, in cooperation with the Member States, keep under constant review all systems of aid existing in those States*". The Commission can decide to abolish or alter aid when they find that the aid granted by the Member States is not compatible with the internal market.[32]In this article, there is also a requirement for Member States that have plans to grant or alter aid to notify this to the Commission.[33] The Commission can initiate the procedure provided for in Art. 108, paragraph 2 if they consider that the proposed aid is not compatible with the internal market. Following this notification the Member State can't put these proposed measures into effect until the initiated procedure has resulted in a final decision.

29. Art. 108 TFEU only provides for the general competence of the Commission concerning the enforcement of European state aid rules. Art. 109 therefore specifies that "*The Council, on a proposal of the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which art. 108 (3) shall apply and the categories of aid exempted from this procedure"*. The Council only adopted a procedural regulation in 1999, namely Reg. 659/99 which was amended in 2013 by Reg. 734/2013. In 2015 the Council adapted a new regulation to codify the previous regulation and it amendments.[34] This regulation provides for the main procedural rules for the enforcement of the European state aid rules by the Commission.

30. First of all, the Commission should be notified in sufficient time of any plans from States to grant new aid[35]. This aid should be put on hold before the Commission has taken a decision authorising this aid.[36] The Commission shall conduct a preliminary examination[37] of the aid as soon as it received. They shall make a decision within two months and there are

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[32] Art. 108 (2) TFEU.
[33] Art. 108, (3)TFEU.
[34] Council Regulation (EU) 2015/1589 of 13 July 2015 layin down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.
[35] Art. 2 Reg. 2015/1589.
[36] Art. 3 Reg 2015/1589.
[37] Art. 4 Reg 2015/1589.

three possible decisions it can make. The notified measure can first of all not even constitute aid under Art. 107(1) TFEU. Second of all, the notified measure can be classified as aid but be compatible with the internal market. Thirdly, the notified measure can be deemed prima facie incompatible with the internal market. In the third case the Commission shall initiate a formal investigation procedure.[38] Within a period of 18 months from the opening of the procedure the Commission shall take a positive, negative or conditional decision.[39]

31. The procedure regarding unlawful aid is described in Art. 12-16 of the procedural regulation. Unlawful aid consists of aid that has been granted by a Member State without notifying the Commission. The Commission can, after starting a formal investigation and giving the Member State the opportunity to submit its comments, adopt a decision requiring the Member State to suspend this unlawful aid, until they have taken a decision on the compatibility of the aid with the internal market (suspension injunction).[40] They may also take the decision requiring the Member State to provisionally recover the unlawful aid until they have taken a final decision on the compatibility of the aid with the internal market (recovery injunction).[41] A recovery injunction does require the following conditions to be fulfilled: "*according to an established practice there are no doubts about the aid character of the measure concerned; there is an urgency to act and there is a serious risk of substantial and irreparable damage to a competitor.*"[42] Providing for the special procedure concerning the recovery injunction the Commission is not bound by any time limit when deciding on the compatibility of unlawful aid with the internal market.[43]

32. The Commission can take a positive, negative or conditional decision concerning unlawful aid. When a negative decision is taken, the Commission shall require the Member State concerned to take all necessary measures to recover the aid from the beneficiary.[44] The recover aid shall also include interest at an appropriate rate.[45] There is however a limitation

[38] Art. 6 Reg. 2015/1589.
[39] Art. 9 Reg. 2015/1589.
[40] Art. 13(1) Reg. 2015/1589.
[41] Art. 13(2) Reg. 2015/1589.
[42] Art. 13 (2) Reg. 2015/1589.
[43] Art. 15 Reg. 2015/1589.
[44] Art. 16 (1) Reg. 2015/1589.
[45] Art. 16 (2) Reg. 2015/1589.

period for the recovery of aid, the powers of the Commission to recover aid is limited to 10 years.[46]

33. Lastly the Commission shall keep existing aid schemes under review based upon information provided by the Member State.[47] When the Commission decides that based upon the provided information the aid scheme is no longer compatible with the internal market, it shall issue a recommendation proposing appropriate measures to the concerned Member State (for instance proposing serious amendments to the aid scheme, other requirements or requiring the abolition of the aid scheme) .[48] The concerned Member State can either accept the recommendation, in which case it becomes binding. When the Member State rejects the recommendation, the Commission shall open a formal investigation.[49] When monitoring existing aid schemes the Commission can also discover certain abuses or misuses of the aid schemes. In this case they can immediately open formal investigations.[50]

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[46] Art. 17 Reg. 2015/1589.

[47] Art. 21 Reg. 2015/1589.

[48] Art. 22 Reg. 2015/1589.

[49] Art. 23 Reg. 2015/1589.

[50] Art. 20 Reg. 2015/1589.

Chapter 3. Case law state aid rules: Commission versus Member States

34. When the Commission decides to initiate a state aid investigation into certain aid measures, like tax rulings, this usually starts with the preliminary phase which leads to a first decision of the Commission to start a formal investigation into to the contested measure. By taking this first decision the Commission expresses its doubts about the legality of the alleged aid. Member States offcourse take part in this investigation and have the right to counter the suspicions of the Commission. The decision to initiate this formal investigation is followed by a final decision which will either find the suspicions of the Commission not founded or which will conform the initial suspicions of the Commission, the latter will entail a negative decision for the Member State involved. In 2015 and 2016 such negative decisions have been ruled against Ireland, Belgium, The Netherlands and Luxembourg. In this chapter I will focus on the decision from the Commission that deemed that Ireland has granted up to €13 billion undue tax benefits to Apple.[51]

A. Background

35. The Commission has been investigating tax ruling practises of the European Member States since June 2013. In December 2014 the Commission made an information inquiry regarding this topic to all Member States. In October 2015, the first decisions about tax rulings were made by the Commission when it concluded that Luxembourg and the Netherlands had granted tax advantages to respectively Fiat and Starbucks. In January 2016, the next decision followed when the Commission deemed that Belgium had granted tax advantages to at least 35 multinationals under the so-called "excess profit" tax scheme. There are still ongoing investigations into illegal tax ruling issues in Luxembourg concerning Amazon and McDonald's.[52]

36. Because of the more persistent attitude from the Commission towards taxation issues there have been a lot of initiatives, both from the Commission as from the Member States itself to achieve greater transparency regarding taxation. Member States unanimously agreed

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[51] European Commission: Tax Rulings, http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.
[52] European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

upon new rules in October 2015 on the automatic exchange of information on cross-border tax rulings. These new rules should *lead to greater cooperation between the Member States when it comes to tax issues* and they can *act as a deterrent from using tax rulings as an instrument for tax abuse*.[53] The Commission announced an Action Plan for fair and effective taxation in June 2015 which consists of a series of initiatives to make the corporate tax environment in the European Union more efficient. This included a framework to make sure off effective taxation when there are profits being generated and much more.[54] In January 2016 the Commission presented further measures against corporate tax avoidance. These new measures are based around the three core pillars on which the Commission wants to base fairer taxation: ensuring effective taxation in the European Union, increasing the tax transparency and securing a level playing field.[55] Member States can feel the pressure from the Commission to make their tax system more efficient and have already agreed to tackle the loopholes in their domestic law that allows tax abuse to take place.

37. Beside the legislative steps that the Commission makes to avoid tax avoidance, they also use their competence regarding state aid to punish Member states who use tax rulings to benefit certain undertakings. In August of 2016 the Commission made their, meanwhile well-known, final decision regarding the state aid implemented by Ireland to Apple, which will be briefly discussed next.

B. Apple state aid case.

38. After conducting an in-depth investigation since June 2014, the European Commission decided on August 30th 2016 that two tax rulings issued by Ireland in favour of Apple had substantially and artificially lowered the due corporate tax by Apple since 1991. The Commission finally decided that the Irish authorities had to recover €13 billion plus interest from Apple.

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53 European Commission (press release), "Transparency: Commission welcomes agreement reached by Member States on the exchange of information on tax rulings, 6 October 2015, http://europa.eu/rapid/press-release_IP-15-5780_en.htm.
54 European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.
55 European Commission (press release), "Fair Taxation: Commission presents new measures against corporate tax avoidance", http://europa.eu/rapid/press-release_IP-16-159_en.htm.

39. When we take a look at Apple's tax structure in Europe, you find that there are two Irish companies, Apple Sales International and Apple Operations Europe, that are both fully owned by the Apple Group, which is ultimately controlled by the American parent company, Apple Inc. These two companies hold the rights to use the intellectual property owned by Apple and to sell and manufacture Apple products outside North and South America.[56] The agreement they have with the parent company, Apple Inc., requires these companies to make yearly payments to Apple Inc. to fund research and development efforts. These payments amounted to 2 billion dollar in 2011 and increased in the succeeding years. The payments funded more than half of the research done by the Apple group in the US to contribute to the worldwide development of their intellectual property. These expenses were deducted yearly from the profits of Apple Operations and Apple Sales International in Ireland. Since 1991 there was a special tax ruling in place in Ireland to determine the taxation of the profits of Apple Sales International and Apple Operation Europe, which was replaced in 2007 by a similar ruling. It was however terminated in 2015 because of a change in structure within both companies.[57]

40. Apple Sales International is the subsidiary company that is responsible for purchasing Apple products from different manufacturers globally and selling the products in Europe, the Middle East, Africa and India. The Apple sales operations within Europe are basically set up in such a way that every purchase of Apple products is deemed to be a contractual agreement between the costumer and Apple Sales International, rather than a contractual agreement between the customer and the specific store where the purchase took place. All of the profits resulting out of these sales were thus collected in Ireland. Under the tax rulings granted by Ireland however, most of these profits were reallocated to a head office within Apple Sales International where they remained untaxed. The so-called head office was not integrated in any country, did not own any assets nor did it employ anyone. Only a fraction of the massive profits Apple made in Europe were actually taxed in Ireland. According to figures released at US Senate public hearings, in 2011 only around €50 million euro were effectively taxed from

[56] European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

[57] European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

the €16 billion profit Apple Sales International made that year (this amounts to an effective tax rate of only about 0.05%).[58]

41. Apple Operations Europe benefitted from the same tax rulings that Ireland granted in that period of time. They were responsible for the manufacturing of certain types of computers for the Apple group. The same thing appeared here, most of its profits were reallocated internally to its head office and actually not taxed anywhere.[59]

42. The Commission ruled[60] that tax ruling as such are completely legal since they normally are mere agreement between tax authorities and tax payers to ensure clarity on the calculation of the tax or the application of certain specific rules. But these tax rulings cannot have the effect that some companies receive a better tax treatment than other and this is why the state aid rules are in place. One of the most important principles of international tax law is that the allocation of profits between different undertakings in a corporate group should be done in way that reflects the economic reality. This is the so-called at arm's length principle, namely that this allocation should be done in similar way like agreement between independent businesses. The Commission had to investigate in this case if the tax rulings granted to Apple by Ireland which were used to allocate profits from Apple Sales International and Apple Operations Europe gave Apple an unfair and illegal advantage under European state aid rules.[61]

43. The investigation lead by the Commission showed that the tax rulings issued by Ireland had resulted in an artificial allocation of profits within Apple Sales International and Apple Operations Europe, without providing any factual or economic justification.[62] The

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58 European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.
59 European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.
60 Commission Decision 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.
61 European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.
62 Commission Decision 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.

Commission found out that because of the tax rulings most of both companies' profits were allocated to its head office, but in reality, this head office has no operating competence to manage some of the distribution tasks or even had any other substantive business at all. The sales of Apple Sales International should have been taxed within the Irish branch since they were the only ones responsible for the generation of profits from the distribution of Apple products. On top of this the head office did not employ anyone or had premises from where it operated. The only activities that could be attributed to this head office were decisions on the distribution of dividends, administrative arrangements and cash management. These activities can only generate a limited amount of profit.[63]

44. Ultimately, the Commission ruled that the tax rulings granted by Ireland had lead to an artificial allocation of the profits within the Apple Group without actual taxation of most of the profits going through. This has made it possible for Apple to pay substantially less taxes then other (multinational) companies which is not allowed under EU state aid rules. The Commission has therefore ordered the recovery of the incompatible state aid in order to eliminate the distortion of the competition within the European Union created by the aid. Apple has decided to appeal the ruling made by the European Commission for which the court hearing is expected to take place later this year. [64]

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[63] European Commission (press release), "State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion", 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

[64] A. SIMON-LEWIS, "Apple takes on the European Commission over €13bn tax charge", 21 February 2017, http://www.wired.co.uk/article/apple-takes-on-the-european-commission-over-13bn-tax-charge.

PART 3. WTO Agreement on subsidies and Countervailing Measures

Chapter 1. WTO Law in general

45. The World Trade Organization is a global international organisation that deals with the rules of trade between the members of the organisation (nations). It was the Uruguay Round, which spanned from 1986 until 1994 that led to the creation of the WTO. The agreement establishing the World Trade Organization was eventually signed in Marrakech on April 15th 1994 and entered into force on January 1st 1995 and serves as an umbrella agreement. There are four annexes to this agreement: the Multilateral Agreements, the Dispute Settlement Understanding, the Trade Policy Review Mechanism and the Plurilateral Trade Agreements.

46. The Multilateral Agreements contain the important substantive law of the WTO's legal system. They are binding on all members.[65] The first annex can be further divided in three divisions, these are also called the three pillars where the WTO is build on. [66]

47. The first pillar contains the Multilateral Agreements on Trade in Goods. Most importantly, this comprises the GATT 1994 (General Agreement on Trade in Goods). This agreement was originally signed on October 30th 1948. After World War II there was a plan to set up an international organisation concerning trade to further obtain the goal of an enhanced international economic cooperation as had been done already with the creation of the Worldbank and the International Monetary Fund. The pillar also compromises the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Textile and Clothing[67], the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures (TRIMS), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (anti-dumping), the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation), the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards. On 22

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[65] Art. II:2 Agreement Establishing the World Trade Organisation.
[66] P. FISHER, "The Law of the World Trade Organization", 73p.
[67] This agreement has been terminated on 1 January 2005.

February 2017 the Agreement on Trade Facilitation entered into force but it only applies to WTO members that have accepted it.

48. The second pillar of the WTO contains the General Agreement on Trade in Services, the third pillar is formed by the Trade-Related Aspects of Intellectual Property Rights Agreement.

49. The Dispute Settlement Understanding was one of the major improvements of the Marrakech Agreement. Beforehand the GATT 1947 did not have an efficient mechanism to cope with trade disputes or violations of the treaty. Therefore countries were forced to take matters into own hands and enforce unilateral measures against the countries that were (supposedly) infringing the treaty.

50. Lastly, the Trade Policy Review Mechanism is a very important part of the WTO. It makes sure of the compliance of national trade policies with the WTO's legal framework. All of the countries that are members of the WTO get checked, the frequency of these surveillances depends on the market share of these countries in the world trade.

Chapter 2. Principles of WTO-law

51. In the preamble of the Marrakesh Agreement Establishing the World Trade Organisation three main objectives are put forward when the parties agree to establish the WTO. First of all "*should the relations in the field of trade and economic endeavour be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand"* Secondly the *"expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*[68] Lastly, *"there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.*[69] These objectives should be achieved by entering into various agreements reducing tariffs and other barriers to trade and by eliminating discrimination when dealing with international trade. Therefore the parties have decided *to develop an integrated, more viable and durable multilateral trading system*, the WTO.

52. One of the key principles of the WTO is the non-discrimination principle. It contains two rules, namely the Most Favoured Nation Treatment (MFN) and the National Treatment. A MFN Treatment means that there can be no discrimination between like products or services that originate or are destined for other WTO members. Each trading partner that is a member of the WTO should immediately and unconditionally get the best treatment given to any other trading partner. This MFN principle is prescribed by Art I:1 GATT, Art. II:1 of the GATS and Art. IV of the TRIPS. The MFN principle does have specific exceptions. Under the GATT and GATS WTO members can depart from the MFN rule to grant more favourable treatment to trading partners that are part of the same customs union or free trade area.[70] There also is the so-called "Enabling Clause"[71] which allows the members to accord

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[68] Preamble Marrakesh Agreement Establishing the World Trade Organization.
[69] Preamble Marrakesh Agreement Establishing the World Trade Organization.
[70] Art. XXIV GATT 1994 and Art. V GATS.
[71] Decision of 28 November 1979, L/4904, concerning Differential and more favourable treatment reciprocity and fuller participation of developing countries.

differential and more favourable treatment under GATT to developing countries without having to accord such treatment to their other trading partners.

53. The other part of the non-discrimination principle is the principle of National Treatment. This is prescribed by Article III GATT, Article XVII GATS and Article III TRIPS. The National Treatment Rule entails that imported products can't be discriminated against and thus have to be treated like domestic products. This does not only cover higher financial burdens, like taxes but also other burdensome conditions, like administrative obligations.

54. It is in the vital interest of individuals and companies that are dealing with trade to know as much as possible about the trading conditions in other countries. Therefore, one of the other main principles of the WTO concerns transparency since it is important to ensure the transparency of the trade policies and rules from all of the members of the WTO. This transparency is achieved in two different ways. First of all, each Member has to report regularly to the Trade Policy Review Body. These reports should contain the trade policies and practices pursued by the member(s).[72] Members should in all cases provide information if they are significant changes in their trade policies. There is also an annual update of statistical information that has to be presented. Secondly, the WTO conducts regular reviews of individual member state countries' trade policies, that are called trade policy reviews. It is the task of the Trade Policy Review Body to carry out these trade policy reviews. The frequency of these reviews depends "*on the impact of the individual Member on the functioning of the multilateral trading system, defined in terms of their share of world trade in a recent representative period.*"[73] The four biggest traders (the European Union, the United States, China and Japan) are subject to a review approximately every two years. The next sixteen countries are reviewed every four years. The remaining countries are reviewed every six years, a longer period can be fixed for the least-developed country Members. There are two documents that are needed for the preparation of the review by the Trade Policy Review Body, firstly there is a policy statement supplied by the Member(s) under review and secondly there is the report written by The Secretariat.

[72] Art. D Trade Policy Review Mechanism.
[73] Art. C (ii) Trade Policy Review Mechanism.

55. Another principle that governs the WTO is the one of fairness in trade.[74] There rules include the anti-dumping and subsidies measures that can be taken against other states. When the WTO was dominated by a small group op developed countries, the principle of fairness was embodied by the previously talked about principles like non-discrimination and national treatment. To be fair meant that you granted these countries the same favours that you did with you most favoured partner and it entailed that you did not discriminate their products. There was however a great expansion in membership that included a lot of developing countries that lead to a different meaning of the principle of fairness because of their different economic conditions. In assessing whether a certain trading system is fair economic equity should be the guiding principle since this focuses on the distribution amongst nations of the rights and obligations that are part of the WTO trading system. Scholars put forward that this guideline is composed of two different principles: equality of opportunity and distributive justice. [75] Extremely put, equality of opportunity means that all firms located in different countries of the world should be able to do business in each other markets under the same conditions as they do in their domestic markets. This is off course far from the reality. There is however a trend towards the reduction of tariffs and towards the convergence of domestic regulatory trading rules but there are just too many historical, economical, institutional differences between all of the states to make a single world market happen. Distributive justice is supposed to counteract the unfair consequences of world trade towards developing countries. It does not only consist of the transfer of resources from developed countries towards developing countries but also entails the opening of foreign markets for these developing countries and allow developing countries to enact rules that make sure of a greater protection of their domestic markets[76], even if this goes against certain others WTO-principles.

[74] P. FISHER, "The Law of the World Trade Organization", 73p.
[75] A.G. BROWN and R.M. STERN, "Fairness in the WTO Trading System", IPC Working Paper 109, 2.
[76] A.G. BROWN and R.M. STERN, "Fairness in the WTO Trading System", IPC Working Paper 109, 10.

Chapter 3. Bodies of the WTO

56. The WTO has a complex subdivided organizational structure which will be briefly discussed in this chapter. There are three main bodies that are referred to in the WTO Agreement: the Ministerial Conference[77], serving as the representative body, the General Council[78], serving as the executive body and the Secretariat[79] who is in charge of the administrative affairs.[80]

57. The topmost decision-making body of the WTO is the Ministerial Conference. They usually come together every two years and consist of all of the 164 members of the WTO. The trade ministers of each country are competent for these meetings but they are usually represented by their ambassadors and/or delegates. The Ministerial Conference can make decisions about all matters under the multilateral trade agreements. These decisions must be taken by consensus. This consensus is reached when none of the present members formally object to the proposed decison. If a consensus is impossible, the decisions shall be taken by a majority of the votes.[81] The European Union have a number of votes equal to the number of their Member States which are also Members of the WTO.

58. The General Council is the WTO's highest-level decision-making body.[82] This executive body handles out the day-to-day functions of the Ministerial Conference in the interval between their meetings. It also consists of representatives of all Members. The General Council can also meet, under different agreements, as the Dispute Settlement Body[83] and as the Trade Policy Review Body[84]. Although the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Trade Policy Review Mechanism provide for institutional independence, also regarding the organizational structure for carrying

[77] Art. IV:1 Agreement Establishing the World Trade Organization.
[78] Art. IV:2 Agreement Establishing the World Trade Organization.
[79] Art. VI Agreement Establishing the World Trade Organization.
[80] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, p291.
[81] Art. IX Agreement Establishing the World Trade Organization.
[82] WTO: "The General Council"https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm.
[83] Art. IV:3 Agreement Establishing the World Trade Organization.
[84] Art. IV:4 Agreement Establishing the World Trade Organization.

out the functions of the settlement of disputes and the review of the trade policies of the Members, this has not lead to the creation of separate bodies.[85]

59. There are three specialised councils operating under the guidance of the General Council. These are the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights.[86] Membership of these Councils are open to representatives of all Members. The Council for Trade in Goods oversees the functioning of the Multilateral Trade Agreements, the Council for Trade in Services oversees the functioning of the General Agreement on Trade in Services and the The Council for Trade-Related Aspects of Intellectual Property Rights oversees the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights. Subject to the approval of the General Council these Councils can appoint subordinate committees and set up their own rules of procedure.[87]

60. The Councils have established a number of Committees dealing with certain specific subjects. The Trade Council has Committees dealing with subjects such as Market Access, Agriculture, Subsidies and Countervailing Measures, Anti-Dumping Practices, and many more.

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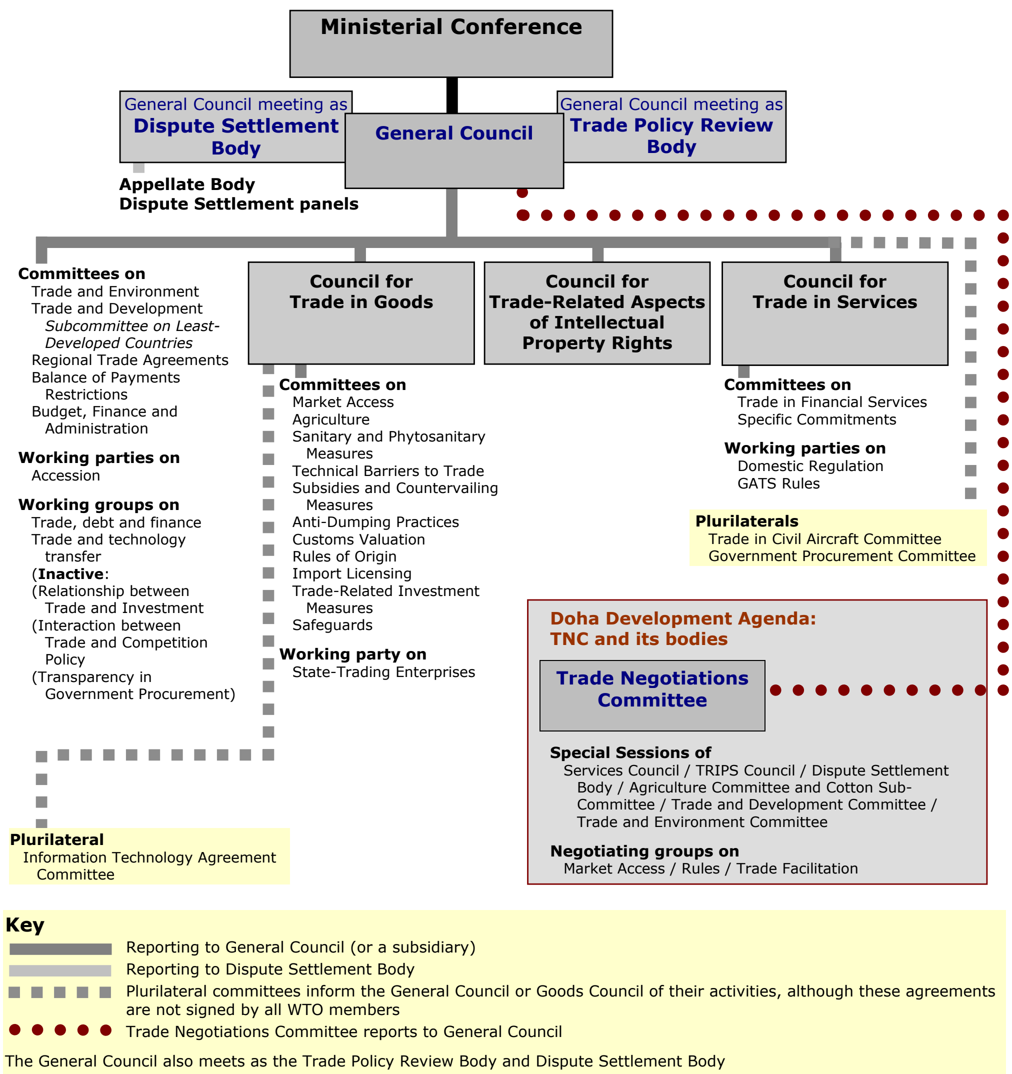
[85] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, p291.
[86] Art. IV:5 Agreement Establishing the World Trade Organization.
[87] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, p291.

61. Structure of the WTO[88]

WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, and plurilateral committees.



[88] https://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf

Chapter 4. Dispute settlement under the WTO.

62. Resolving disputes between Members that arise out of trade situations is one of the core activities of the WTO. Under the old GATT 1947 regime there was not an efficient system in place for the settlement of disputes since the responding party could easily block proceedings by obstructing the establishment of a panel or block the adoption of the report from the panel. This was because in order to refer a dispute to a panel or in order to adopt a binding report there had to be a positive consensus amongst all Members, meaning that there could not be an objection from any contracting Party. Because of these problems with dispute settlement under GATT 1947, a lot of the contracting Parties felt the need to improve and strengthen the dispute settlement system so this issue was given high priority on the agenda of the Uruguay Round negotiations.[89]

63. In 1994, the WTO Members agreed upon the "Understanding of Rules and Procedures Governing the Settlement of Disputes". This agreement introduced major changes to the dispute settlement to ensure a more prompt and binding settlement of disputes. The entire procedure of dispute settlement is strictly regulated. Furthermore there are many bodies that are involved in the system of settling disputes within the WTO.

64. First of all and most importantly we have the Dispute Settlement Body. "*The Dispute Settlement Body is established to administer the rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. They have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered Agreements.*[90]"It is the General Council that convenes as the Dispute Settlement Body so this body is composed by all of the Members of the WTO. An important innovation regarding all of the tasks of the Dispute Settlement Body consists in the fact that the Dispute Settlement Body can only decide by negative consensus. This entails that they can only obstruct the procedure or the adoption of the report in the rare case that there is a consensus by all Members, including the disputing parties. This is a major improvement in comparison with the GATT 1947 system since it abolishes the shortcoming of the GATT 1947 system that

[89] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 75-76.
[90] Art. 2 Understanding on rules and procedures governing the settlement of disputes.

there needed to be a positive consensus amongst all members to make the decisions surrounding dispute settlement.

65. Another important body in the dispute settlement regime of the WTO are the panels. They are composed at an ad hoc basis by the Dispute Settlement Body for each specific case at the request of a party. The panel must be established *at the latest at the Dispute Settlement Body meeting following that at which the request first appears as an item on the Dispute Settlement's Body's agenda, unless at that meeting the Dispute Settlement Body decides not to establish a panel*.[91] This is often called 'the right to a panel', which is a complete turnaround from the decision making of the Dispute Settlement Body under GATT47, since it was necessary then to have a consensus amongst the Contracting Parties to establish the panel and now is the Dispute Settlement Body obliged to establish a panel unless the Members decide by consensus not to do so. [92] The panels should be composed of three panellists who are "well-qualified governmental and/or non-governmental individuals". [93] They should be selected to ensure *the independence of the members, a sufficiently diverse background and a wide spectrum of experience*.[94] It is the Secretariat who proposes the nominations for the panel to the parties of the dispute. [95] The panellists *serve in their individual capacities and not as government representatives, nor as representatives of any organisations. Member states cannot give them instructions nor seek to influence them as individuals with regard to matters before a panel.*[96]

66. One of the main improvements of the dispute settlement mechanism under the new rules of the WTO is the introduction of the Appellate Body. The composition of the Body and the procedures that need to be followed to appeal a decision is described in Article 17 of the Dispute Settlement Understanding. The Appellate Body is a standing organ of the WTO, unlike the panels that are established ad hoc. It is composed of seven persons, three of them

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[91] Art. 6 (1) Understanding on rules and procedures governing the settlement of disputes.
[92] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 77.
[93] Art. 8(1) Understanding on rules and procedures governing the settlement of disputes.
[94] Art. 8(2) Understanding on rules and procedures governing the settlement of disputes.
[95] Art. 8.6 Understanding on rules and procedures governing the settlement of disputes.
[96] Art. 8.9 Understanding on rules and procedures governing the settlement of disputes.

will serve on every case. *Persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements*[97] can be appointed by the Dispute Settlement Body for a four-year term, which can be extended once.[98] They can not be affiliated with any government and the Appellate Body membership should be representative of membership in the WTO.[99] Only parties to the dispute can appeal a panel report, third parties do not have this possibility.[100] The appeal proceedings in general shall not exceed 60 days from the date when a party formally notifies the decision to appeal to the date the Appellate Body circulates its report.[101]

[97] Art. 17 (3) Understanding on rules and procedures governing the settlement of disputes.
[98] Art. 17 (2) Understanding on rules and procedures governing the settlement of disputes.
[99] Art. 17 (3) Understanding on rules and procedures governing the settlement of disputes.
[100] Art. 17 (4) Understanding on rules and procedures governing the settlement of disputes.
[101] Art. 17 (5) Understanding on rules and procedures governing the settlement of disputes.

Chapter 5. Agreement on Subsidies and Countervailing Measures

67. The Agreement on Subsidies and Countervailing Measures was one of the major achievements of the Uruguay Round. Art. XVI GATT 1947 originally only contained one paragraph regarding subsidization, requiring the Contracting party granting or maintaining a subsidy to directly or indirectly increase exports of reduce import to notify the other Contracting Parties. GATT 1994 added some amendments to this article mainly countering the use of export subsidies. In Art. VI:3 GATT 1994 the opportunity for Members to apply countervailing duties in case of material injury caused by subsidies is introduced. Neither of these articles provide a clear framework on the procedural steps in case of subsidization. Therefore, there was a draft framework Agreement composed during the Tokyo Round, called "Subsidies Code". The amendments and the Subsidies Code however were only adopted by a few, mainly industrialized countries. Then came the Uruguay Round where the Agreement on Subsidies and Countervailing Measures was adopted. It incorporates the main provisions of the Subsidies Code but also adds some improvements. The Uruguay Round did not only improve the substantive content of the Agreement but also broadened its membership since the single undertaking approach of the Uruguay Round made the rules of the Agreement on Subsidies and Countervailing Measures binding for all WTO members.[102]

68. The Agreement on Subsidies and Countervailing Measures is part of the Multilateral Agreements on trade in goods. The Agreement addresses two different, but closely related topics namely multilateral disciplines regulating subsidies and the use of countervailing measures to remedy injury caused by subsidized imports.

A. Subsidies

69. For the purpose of the Agreement on Subsidies and Countervailing Measures the definition of a subsidy contains three elements.[103] First of all, there must be a financial contribution. Secondly, in order for this financial contribution to be a subsidy[104] it must be made by a government or any public body within the territory of a Member. Lastly, the financial contribution made by a government must entail a benefit for a third party. The

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[102] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 163-164.
[103] Article 1.1 Agreement on Subsidies and Countervailing Measures.
[104] WTO, Agreement on Subsidies and Countervailing Measures, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

agreement provides with an exhaustive list what is considered a financial contribution. It can be a direct transfer of funds such as grants, loans and equity infusion or a potential direct transfer of funds or liabilities such as loan guarantees.[105] It can also be government revenue that is otherwise due that gets foregone or not collected.[106] When the government provides goods or services other than the general infrastructure or purchases goods for a third party, this is also considered a financial contribution.[107] Lastly, the making of payments by a government to a funding mechanism, or entrusting or directing a private body to carry out one or more of the type of functions mentioned above which would normally be vested in the government and the practice differs in no real sense from practices normally followed by governments.[108] This agreement does not only apply to measures of national governments but also to those of sub-national governments or other public bodies (for example: state-owned companies).

70. A financial contribution by a government must confer a "benefit" for a third party for it to be considered a subsidy. What a benefit precisely entails is not always crystal clear since it is not defined in the Agreement. The Appellate Body confirmed in the Canada-Aircraft case that "*a financial contribution confers a benefit and constitutes a subsidy under article 1 when it is provided on terms that are more advantageous than those that are otherwise available for the recipient on the market*." [109]

71. If a financial contribution can be seen as a subsidy within the meaning of the Agreement on Subsidies and Countervailing Measures, it is only subject to this agreement if the subsidy is considered as specific in accordance with the provisions of Article 2 of the Agreement. A subsidy is specific when it has been specifically provided to an enterprise or industry or a group of enterprises or industries.[110] Also, subsidies that are limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall also be deemed specific.[111] Prohibited subsidies under Article 3 of the

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105 Art. 1.1 (a)(1) (i) Agreement on Subsidies and Countervailing Measures.
106 Art. 1.1 (a)(1) (ii) Agreement on Subsidies and Countervailing Measures.
107 art. 1.1 (a)(1)(iii) Agreement on Subsidies and Countervailing Measures.
108 art. 1.1 (a)(1)(iv) Agreement on Subsidies and Countervailing Measures.
109 Dispute Settlement Body WTO, 2 August 1999, DS70 (Canada-Aircraft).
110 Art. 2.1 Agreement on Subsidies and Countervailing Measures.
111 Art. 2.2 Agreement on Subsidies and Countervailing Measures.

Agreement will always be seen as specific.[112] These are subsidies contingent upon export performance or subsidies contingent upon the use of domestic goods over imported goods.[113]

72. The Agreement originally distinguished three kinds of subsidies, namely prohibited subsidies, actionable subsidies and non-actionable subsidies. There was also a traffic-light categorization used to distinguish these subsidies, with the prohibited subsidies referred to as red-light, the actionable subsides as yellow-light and the non-actionable subsidies as green-light. The provisions regarding the non-actionable subsidies however only remained in force until December 1999 because no consensus was reached among the WTO Members on the extended application of this provisional article.[114] As of then there are only two remaining categories of subsidies in force.[115]

73. First of all there are the prohibited subsidies. Article 3 of the Agreement deals with these kinds of subsidies. They are two different kinds of categories within the prohibited subsidies. Firstly there are "*the subsidies contingent, in law or in fact whether solely or as one of several other conditions, upon export performance*".[116] They are also called export subsidies. A detailed list of these kind of subsidies is illustrated in Annex I to the Agreement. The second category of prohibited subsidies are "*subsidies, contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods*".[117] They are also called local content subsidies or import-substitution subsidies. These kind of subsidies are prohibited because they directly and gravely affect international trade and because of this they are very likely to have adverse effects on the interest of the other Members.[118] Article 4 of the Agreement deals with the remedies concerning the prohibited subsidies. Initially, consultations should be requested if a Member believes that another Member is granting a

[112] Art. 2.3 Agreement on Subsidies and Countervailing Measures.
[113] Art. 3 Agreement on Subsidies and Countervailing Measures.
[114] Article 31 Agreement on Subsidies and Countervailing Measures.
[115] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 167-168.
[116] Art. 3.1 (a) Agreement on Subsidies and Countervailing Measures.
[117] Art. 3.1 (b) Agreement on Subsidies and Countervailing Measures.
[118] WTO, Agreement on Subsidies and Countervailing Measures, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

prohibited subsidy.[119] If there has been no mutually agreed solution within 30 days of the request for consultation, they may refer the matter to the Dispute Settlement Body.[120]

74. The second category of subsidies that are dealt with in the Agreement are the so-called actionable subsidies. Most of the subsidies fall under this category, they are not per se prohibited but they still may be challenged if it is proven that the subsidy at stake has adverse effects to the interest of other Members. Article 5 of the Agreement defines what these adverse effects can entail. There are adverse effects to the interests of other Members when there is *injury to the domestic industry of another Member, nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994* or when there is *serious prejudice to the interest of another Member.*[121]

B. Countervailing Measures

75. The Agreement on Subsidies and Countervailing Measures offers two different kinds of remedies to the affected Members when they are concerned about the legality of subsidies granted by another Member. They can invoke a ("normal") dispute settlement procedure against another Member concerning a breach of the Agreement, this is also called the multilateral track. The second option that Members are provided with is the enactment of counter-measures to offset the negative effects of the granted subsidies, this is often called the unilateral track.[122]

76. The multilateral track that is provided for in Articles 4 (for prohibited subsidies) and 7 (for actionable subsidies) of the Agreement on Subsidies and Countervailing Measures is basically a fast-track equivalent of the normal dispute settlement procedure that is set out in the Dispute Settlement Understanding.[123] Both of these provisions stipulate that consultations should be tried first and provide strict and short time limits for the settlement of the dispute. The time limit for actionable subsidies is as following: a Panel should be established within

[119] Art. 4.1 Agreement on Subsidies and Countervailing Measures.
[120] Art. 4.4 Agreement on Subsidies and Countervailing Measures.
[121] Art. 5 Agreement on Subsidies and Countervailing Measures.
[122] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 170.
[123] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 170.

75 days[124], the report of the Panel should be circulating within 120 days[125] and the report of the Panel should be adopted within 150 days[126] (with a possibility to appeal). As mentioned before, are the time limits for the settlement of a dispute regarding prohibited subsidies even stricter. A Panel should be established within 30 days[127], the report of the Panel should be circulating within 90 days[128] and the report should be adopted within 120 days[129] (with a possibility to appeal).

77. While the access to the above mentioned multilateral track is quite unrestricted, there are elaborate requirements set out in the Agreement on Subsidies and Countervailing Measures for Members to be allowed to resort to unilateral measures.[130] Part V of the Agreement imposes these requirements. Countervailing duties can only be *imposed by Members pursuant investigations initiated and conducted in accordance with the Agreement.*[131] A Member can't impose a countervailing measure unless it is determined that there are subsidized imports, injury to a domestic industry and a causal link between the subsidized imports and the injury.[132]

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[124] Art. 7.4 Agreement on Subsidies and Countervailing Measures.
[125] Art. 7.5 Agreement on Subsidies and Countervailing Measures.
[126] Art. 7.6 Agreement on Subsidies and Countervailing Measures.
[127] Art. 4.4 Agreement on Subsidies and Countervailing Measures.
[128] Art. 4.6 Agreement on Subsidies and Countervailing Measures.
[129] Art. 4.8 Agreement on Subsidies and Countervailing Measures.
[130] P.-T. STOLL and F. SCHORKOPF, *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 170.
[131] Art. 10 Agreement on Subsidies and Countervailing Measures.
[132] Art. 11.2 Agreement on Subsidies and Countervailing Measures.

PART 4. Accordance of tax rulings with the European framework and the WTO Agreement on Subsidies and Countervailing Measures

78. When assessing the compliance of tax rulings with the European framework and the WTO Agreement on Subsidies and Countervailing Measures, one should first notice that both legal systems do not oppose tax rulings as such. The advantages of tax rulings for taxpayers are apparent, especially for large undertakings, since it provides them with certainty[133] regarding the legal consequences of particular decisions leading them to be able to take these decisions with knowledge of their true cost.[134] In the latest years however these tax rulings have gotten some attention, especially regarding the potential unfair effects they can have vis-à-vis other undertakings. Both the European Commission as the WTO have come up with ways to sanction illegal tax rulings that provide certain undertakings with unfair advantages in comparison with other undertakings.

79. The European Commission is using its competences regarding state aid to monitor the legality of tax rulings. It is currently monitoring the use of tax rulings of Member States by applying a two-step approach. Firstly the Commission asks the Member States to provide them with a description of their tax ruling practises along with the relevant documents that contain all rulings that haven been granted the previous years. Then it selects certain eye-catching rulings out of that list for a closer review as part of a non-public preliminary investigation. The Commission clearly has a focus on multinationals who have already been under public scrutiny in the press or other national forums.[135] If the preliminary investigation raises serious doubts about the compatibility of the tax ruling with the internal market, the Commission will open a formal investigation and collect more information from all interested parties, such as the beneficial company, the concerned Member state, other potentially involved Member States or certain competitors of the company. The current investigations mainly focus on transfer pricing issues.

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[133] M. DILLER, P. KORTEBUSCH, G. SCHNEIDER and C. SURETH-SLOANE, "Boon or Bane? Advance tax rulings as a Measure to Mitigate Tax Uncertainty and Foster Investment", European Accounting Review 21 May 2016, 1.
[134] Y. GIVATI, "Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings, Virginia Tax Review 2009, 5-10.
[135]R. LUJA, "EU State Aid Law and National Tax Rulings", http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 12.

80. When it comes to assessing whether transfer pricing tax rulings are compatible with the internal market, the Commission usually uses the OECD transfer pricing guidelines as a standard. Most Member States use the at arm's length principle when determining where profits should be allocated within group companies that engage in international transactions.[136]

81. Another important issue is that certain profits within multinational groups may not be taxed because of mismatches between the legal tax systems of different Member States. These mismatches are caused by the fact that two member states qualify the same set of facts in a different manner to fit in their domestic tax system. Genuine mistakes do not fall under the scope of the state aid regime. However it is possible that certain Member States deliberately creates such a situation of mismatch to benefit a certain undertaking. This should be banned under the state aid rules since these rulings deliberately divert from usual domestic law and jurisprudence.

82. It is also possible to combat certain unfair tax rulings under WTO law. Just this week a WTO panel has upheld a ruling against a tax reduction ruling worth $800 million from the state of Washington, USA granted to Boeing.[137] Interested parties that have serious doubts about the legality of certain tax rulings have two different option. They can invoke a dispute settlement procedure requiring a panel to state that the given ruling is illegal and must be fixed. The second option for members of the WTO are imposing some countervailing measures against the country that has provided the illegal tax ruling but there are more restrictions for this option.

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[136]R. LUJA, "EU State Aid Law and National Tax Rulings", http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 12-14.

[137] D. GATES, "WTO upholds ruling against Washington's tax reduction for Boeing, Seattle Times, 9 June 2017http://www.seattletimes.com/business/boeing-aerospace/wto-upholds-ruling-against-washingtons-tax-reduction-for-boeing/

Conclusion.

83. This master thesis touched upon the accordance of tax rulings with the European legal framework concerning state aid and the WTO Agreement on Subsidies and Countervailing Measures. This seemed like an appropriate topic to me given the increasing amount of attention certain tax rulings towards huge multinational companies. Tax rulings can be a very convention tool to eliminate uncertainty for the taxpayer given the complexity of today's tax system and the frequent changes in tax law can be a real struggle for companies in order for them to go through with certain transactions and estimate their costs. Tax rulings have however been used in the past and are still being used to give certain undertakings huge advantages often in order for these huge companies to be incorporated in a certain State. This cannot be the goal of tax rulings and therefore several institutions have set up or are using an existing framework in order to battle these illegal and unfair tax rulings. When it comes to the European Union it is the European Commission that is using its exclusive competence regarding state aid to make sure that certain tax rulings are being revoked. The WTO has also adapted a separate agreement in order to make it possible for interested parties to stand up against illegal tax rulings. There is always the question offcourse if more can be done because it seems that both institutions are focusing mainly on tax rulings with huge multinationals, letting the rulings with smaller entities slip through the cracks. Perhaps a more transparent system with immediate disclosure of every single tax ruling could be a stepping stone to a more fair line of action regarding illegal tax rulings.

Bibliography.

Legislation

- Agreement Establishing the World Trade Organization
- Agreement on Subsidies and Countervailing Measures
- Council Regulation (EU) 2015/1589 of 13 July 2015 layin down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.
- Decision of 28 November 1979, L/4904, concerning differential and more favourable treatment reciprocity and fuller participation of developing countries.
- GATS
- GATT
- Guidelines on regional State aid from 2014-2020: Acceptance of the proposed appropriate measures pursuant to Artciel 108(1) of the Treaty on the Functioning of the European Union by all Member States, 2014/C 101/03.
- TFEU
- Trade Policy Review Mechanism
- Understanding on rules and procedures governing the settlement of disputes.

Jurisprudence

- Commission Decision 26 May 2010 2011/276/EU.
- Commission Decision 30 August 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.
- CFI 16 March 2004, T-157/01, ECLI:EU:T:2004:76 (Danske Busvognmaent).
- CJEU 2 July 1974, 173/73, ECLI:EU:C:1974:71 (Italy v Commission).
- CJEU 14 October 1987, C-248/84, ECLI:EU:C:1987:437 (Commission v. Germany).
- CJEU 13 March 2001, C379/98, ECLI:EU:C:2001:160 (Preussen Elektra).
- CJEU 6 September 2006, C-88/03, ECLI:EU:C:2006:511 (Portugal v. Commission).
- CJEU 22 December 2008, C-487/06 P., ECLI:EU:C:2008:757 (British Aggregates Association).
- CJEU 24 January 2013, C-73/11, ECLI:EU:C:2013:32 (Frucona Kosice).
- CJEU 4 May 2016, C-547/14, ECLI:EU:C:2016:325 (Philip Morris).
- Dispute Settlement Body WTO, 2 August 1999, DS70 (Canada-Aircraft).

Legal doctrine

- BOTTA, M., “Class III (13 January 2017): Aids justified undert Art. 107(2)-(3) TFEU. BOUWERS, S., “Luxembourg tax files: how tiny state rubber-stamped taks avoidance on an industrial scale, https://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale.
- BROWN, A.G. and STERN, R.M., “Fairness in the WTO Trading System”, IPC Working Paper 109, 27p.
- BUTS, C., and JEGERS, M. “A Note on State Aid and Concentration: The Case of Belgium, European Competition Journal, 8:1, 153-162, 10p.
- CRISP, J., “Luxembourg ‘made 172 secret taks deals” with companies in year after LuxLeaks, https://www.euractiv.com/section/euro-finance/news/luxembourg-made-172-secret-tax-deals-with-companies-in-year-after-luxleaks/.
- DILLER, M., KORTEBUSCH, P., SCHNEIDER, G. and SURETH-SLOANE, C., “Boon or Bane? Advance tax rulings as a Measure to Mitigate Tax Uncertainty and Foster Investment”, European Accounting Review 21 May 2016, 28p.
- European Commission (press release), “Transparency: Commission welcomes agreement reached by Member States on the exchange of information on tax rulings, 6 October 2015, http://europa.eu/rapid/press-release_IP-15-5780_en.htm.
- European Commission (press release), “State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion”, 30 August 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm.
- European Commission (press release), “Fair Taxation: Commission presents new measures against corporate tax avoidance”, 28 January 2016, http://europa.eu/rapid/press-release_IP-16-159_en.htm.
- FISHER, P., “The Law of the World Trade Organization”, 73p.
- GATES, D., “WTO upholds ruling against Washington’s tax reduction for Boeing, Seattle Times, 9 June 2017http://www.seattletimes.com/business/boeing-aerospace/wto-upholds-ruling-against-washingtons-tax-reduction-for-boeing/
- GIVATI, Y., “Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings, Virginia Tax Review 2009, 34p.

- GUNN, A. and LUTS, J. "Tax rulings, APAs and State Aid: Legal Issues", EC Tax Review 2015-2, 7p.
- LOVDHAL GORMSEN, L., "EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga, Journal of European Competition Law & Practice (2016) 7 (6), 369-382.
- LUJA, R., "EU State Aid Law and National Tax Rulings", http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563453/IPOL_IDA(2015)563453_EN.pdf, 24p.
- SIMON-LEWIS, A., "Apple takes on the European Commission over €13bn tax charge", 21 February 2017, http://www.wired.co.uk/article/apple-takes-on-the-european-commission-over-13bn-tax-charge.
- STOLL, P.-T. and SCHORKOPF, F., *WTO: World Economic Order, World Trade Law*, Leiden, Nijhoff, 2006, 291p.
- VAN DE VELDE, E., "'Tax rulings' in the EU Member States: in-depth analysis, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf, 59p.

Abstract.

English

The aim of this thesis is to investigate the consistency of tax rulings granted by states to – often- multinational companies with the WTO Agreement on Subsidies and Countervailing Measures and the European legal framework concerning state aid. It consists of four parts. In the first part of this master thesis the concept of advance tax rulings gets defined. The second part focusses on the European legal rules concerning these tax rulings, both the substantive and the procedural rules are explained and the example of the Apple case is used to demonstrate the use of the European regulatory framework concerning state aid to battle unlegal tax rulings. The third part introduces the WTO Agreement on Subsidies and Countervailing Measures. A brief overview of the WTO legal and institutional framework is given, followed by a summary of the rules defined in the WTO Agreement on Subsidies and Countervailing Measures. In conclusion, the final part offers a brief review of the accordance of tax rulings with the above mentioned legal rules.

Deutsch

Das Ziel der vorliegenden Masterarbeit ist es zu überprüfen inwiefern Steuervorteile, welche die Staaten oftmals multinationalen Unternehmen einräumen, mit jenen Subventionen und Ausgleichsmaßnahmen der WTO und dem europäischen Rechtsrahmen im Hinblick auf staatliche Beihilfe, übereinstimmen. Die Masterarbeit lässt sich in vier Abschnitte gliedern. Im ersten Abschnitt wird das Konzept von steuerrechtlichen Regelungen definiert. Der zweite Abschnitt behandelt die europäische Rechtslage bezüglich steuerrechtlichen Regelungen. Hierbei werden sowohl materielles Recht als auch Verfahrensrecht analysiert. Anschließend wird an Hand des Apple Beispiels der Gebrauch des europäischen Rechtsrahmen im Hinblick auf staatliche Beihilfe analysiert, welche dazu dienen sollen rechtswidrige Steuerbeschlüsse zu bekämpfen. Im dritten Teil werden WTO Subventionen und Ausgleichsmaßnahmen diskutiert. Anschließend wird eine Übersicht über den WTO Rechtsrahmen und den institutionellen Rahmen dargelegt. Darauffolgend werden die Rechtslagen, welche das WTO Abkommen hinsichtlich Subventionen und Ausgleichsmaßnahmen liefert, zusammengefasst. Abschließend trifft diese Masterarbeit eine zusammenfassende Aussage darüber, inwiefern steuerliche Regelungen mit den oben genannten Rechtslagen übereinstimmen.