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BACKGROUNDER

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Apple, State Aids, Tax Competition, and the Rule of Law

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Abstract

High taxes, especially high marginal income tax rates, have an adverse impact on economic growth, and tax competition among governments imposes a limit on how high governments can raise tax rates and burden the private sector. Efforts to suppress tax competition or to harmonize taxes are generally an effort to create a "tax cartel" among like-minded governments to keep taxes high. The European Union's Apple ruling, similar to other recent EU investigations of tax reductions, may have the effect of discouraging beneficial tax competition among European nations. The United States should reject calls by the Organisation for Economic Co-operation and Development and other multinational bodies to promote "tax harmonization," which tends to promote overly high tax burdens that discourage economic growth. The United States also should lead by example, reducing its economically harmful tax burdens and encouraging other countries to do likewise.

On August 30, 2016, the European Commission (EC), administrative arm of the European Union (EU), ruled that Apple, Inc., owed Ireland €13 billion (roughly $14.5 billion) in back taxes. The EC claimed that an Irish tax ruling that benefited Apple allegedly constituted an illegal anticompetitive subsidy ("state aid") to the multinational high-tech company in violation of EU competition law.

In a rare moment of bipartisan unity, the Obama White House, joined by Republican and Democratic Members of Congress, decried that decision.[1] The EC's Apple decision comes in the wake of similar EC state aid decisions that Starbucks and Fiat had received illegal tax benefits from the Netherlands and Luxembourg, respectively, and a

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Key Points

- Discriminatory tax breaks are a form of corporate welfare, creating large special benefits for favored companies that spur wasteful "rent seeking" (special-interest lobbying to receive a benefit).
- Governments, however, should not use the mere possibility of such negative outcomes to undermine beneficial tax competition.
- The U.S. tax system reduces incomes, job creation, wages, savings, investment, entrepreneurship, innovation, and the international competitiveness of U.S. businesses.
- Fundamental tax reform would alleviate the harm caused by the tax system and substantially increase the size of the economy. This stronger economic growth would substantially improve the incomes of all Americans and enhance economic opportunities.
- Tax competition provides a strong incentive to countries to improve their tax systems and reduce the adverse economic impact that those systems have. The European Union and the Organisation for Economic Co-operation and Development have relentlessly supported costly efforts to suppress tax competition.

tentative determination that Luxembourg granted illegal state aid to Amazon.[2] Starbucks and Fiat have appealed to the EU courts, and Apple and Amazon may follow suit. Additional EC investigations and tax-related state aid condemnations may be in the works.[3]

Regardless of whether Ireland and the other companies succeed in having these EC state aid decisions overturned by the European courts, these matters bring into focus the broader question of "tax competition," in which different jurisdictions compete in offering tax reductions to lure businesses to their jurisdictions. Specifically, a properly structured tax system can spur economic growth within and attract business to a jurisdiction while creating healthy incentives for other governments to reduce their tax burdens, thereby benefiting producers and consumers alike.

Discriminatory tax breaks are a form of corporate welfare, creating large special benefits for favored companies that spur wasteful "rent seeking" (special-interest lobbying to receive a benefit). Governments, however, should not use the mere possibility of such negative outcomes to undermine beneficial tax competition. The Apple case and related investigations suggest that Europe has lost sight of that important lesson.

More broadly, these matters point to the inefficiency and welfare losses stemming from the existing corporate tax system in the United States and elsewhere and highlight the case for far-reaching beneficial tax reform. The U.S. tax code has a large negative impact on the American economy. The tax system unnecessarily reduces incomes, job creation, wages, savings, investment, entrepreneurship, innovation, and the international competitiveness of U.S. businesses. Fundamental tax reform would alleviate the harm caused by the tax system and substantially increase the size of the economy. This stronger economic growth would substantially improve the incomes of all Americans and enhance economic opportunities.[4]

Tax competition provides a strong incentive to countries to improve their tax systems and reduce the adverse economic impact that those systems have. The EU and the Organisation for Economic Co-operation and Development (OECD), however, have relentlessly supported costly efforts to suppress tax competition.

European Competition Policy and State Aids

The General Approach to State Aids Analysis: A Vague and Uncertain Balancing Test. Articles 107–109 of the Treaty on the Functioning of the European Union (EU Treaty)—the EU's "constitution"—deal with the treatment of state aids. State aids are targeted economic preferences for favored firms that are imposed by individual EU states. They are not automatically banned by the EU Treaty, but rather are assessed on a case-by-case basis by regulators within the EC's competition law agency, the Competition Commission.[5]

Key to these assessments is whether a particular state aid excessively distorts competition and thereby undermines the broad goal of the EU Treaty to promote a "single market" within the EU. Then-EC Competition Commissioner Neelie Kroes described the EC's general approach to analyzing state aids in a 2007 speech:

> State aid is banned by the [EU] Treaty, if it damages the Single Market that is so beneficial to our economies. State aid can erect trade barriers and, by giving advantages to a select few, distort

1. Greg Robb, "Republicans and Democrats Agree: EU Tax Case Against Apple Is 'Awful'," *Market Watch*, August 30, 2016, http://www.marketwatch.com/story/us-taxpayers-would-be-poorer-if-eu-wins-apple-tax-case-white-house-spokesman-says-2016-08-30 (accessed March 16, 2017).
2. See U.S. Department of the Treasury, "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings," White Paper, August 24, 2016, https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf (accessed March 16, 2017).
3. Ibid., p. 4.
4. David R. Burton, "A Guide to Tax Reform in the 115th Congress," Heritage Foundation *Backgrounder* No. 3192, February 10, 2017, p. 2, http://www.heritage.org/sites/default/files/2017-02/BG3192.pdf.
5. "Competition law," which covers legal prohibitions on actions that distort competition, is referred to as "antitrust law" in the United States. U.S. antitrust law is aimed primarily at private restraints of trade, although it does reach certain unsupervised anticompetitive actions that are authorized by state governments; EU competition law applies to anticompetitive state-owned or state-controlled monopolies (see Article 106 of the EU Treaty) and certain state aids, in addition to private restraints.

> the incentives of all other companies to become more efficient and more innovative....
>
> But undoubtedly State aid may also be helpful at times, where the benefits to the common good outbalance the negative effects. The [EU] Treaty therefore tasked the Commission with the job of separating the sheep from the goats—the good State aid from the bad.
>
> Let's start with the goats. Bad State aid is often the polite face of an underlying rationale of protectionism.... [P]rotectionism always fails, because it can only lead to reducing competitiveness, weakening the economy, and impoverishing consumers....
>
> Yes, State aid can be abused as a protectionist instrument, and if so, it should be prohibited. But if it is well-targeted, it can be an instrument for the "common good", be it growth and jobs, the environment, [social] cohesion or culture....
>
> The [Competition Commission applies a] test to distinguish the positive effects of a given aid measure from its negative effects, evaluate them both and then weigh them. This requires us first to establish the purpose of an aid: is it to correct a market failure? Or is its objective "equity", redressing an efficient but undesirable market outcome? Then we look at the design of the aid measure: is State aid an appropriate instrument? Does it change the behaviour of the aid recipient? Is it proportionate? These focused questions enable us to circumscribe more precisely and in more economic terms the **positive effects** of an aid.
>
> The next step looks at its negative effects: does the aid reinforce market power? Does it distort the dynamic incentives of competitors? Does it support inefficient companies? Does it affect business location or trade flows? Again, these focused questions allow us to better identify and quantify the downsides of a measure. On that basis, it is then possible—albeit not always easy—to decide whether, on balance, the aid meets the common interest or not.[6]

The approach outlined by Commissioner Kroes provides for decisions based on the "balancing" of a large number of largely qualitative factors, each of which allows wide interpretive latitude. In short, while utilizing economics jargon, case-by-case EC state aid assessments are inherently highly subjective and uncertain. They give the EC bureaucracy broad discretion to determine whether a particular economic benefit accorded a company by an EU member state involves "permissible" or "impermissible" state aid. Although the EC has promulgated a variety of additional state aid guidance statements since 2007, including detailed sector-specific guidelines (for example, dealing with subsidies for research and development, environmental protection, airports, and banks),[7] the EC still retains a substantial ability to provide either a "thumbs up" or "thumbs down" to most (if not all) state aids under assessment, based on highly subjective (and potentially politically motivated) policy calls.

EC Treaty Provisions Dealing with State Aids: A Closer Examination.[8] Articles 107–109 of the EU Treaty provide a road map for analysis of state aids. An examination of these provisions supports the conclusion that state aid decisions involve subjective policy calls rather than dispassionate application of clear and objective principles.

Article 107(1) provides very broadly that "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 [companies] or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market." Nevertheless, competitively distortive state aid *automatically is authorized* ("shall be

6. Neelie Kroes, European Commissioner for Competition Policy, "The Law and Economics of State Aid Control—A Commission Perspective," speech delivered at Joint ESTALI/ESMT Conference on "The Law and Economics of State Aid Control," Berlin, October 8, 2007, http://europa.eu/rapid/press-release_SPEECH-07-601_en.htm?locale=en (accessed March 17, 2017). Bold emphasis in original.

7. Official EC documents describing these developments are catalogued in chronological order at European Commission, "Speeches and Articles About State Aid," http://ec.europa.eu/competition/speeches/index_theme_6.html (accessed March 17, 2017).

8. For the text of the EU Treaty, see "Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01)," *Official Journal of the European Union*, Vol. 55 (October 26, 2012), pp. 1–390, https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf (accessed March 17, 2017).

compatible with the internal market") if it falls into a "safe harbor" under Article 107(2), and it *may be authorized* at the discretion of the EC ("may be considered to be compatible with the internal market") if it meets one of the conditions of Article 107(3).

Article 107(2) provides safe harbors that *immunize* three types of state aid: (a) aid "having a social character" that is granted in nondiscriminatory fashion to individual consumers; (b) aid to alleviate damage caused by natural disasters or "exceptional occurrences"; and (c) economic assistance to certain depressed areas of Eastern Germany in connection with German reunification.[9]

The key to the discretionary treatment of state aid is, however, Article 107(3), which *allows but does not require* EC officials to authorize (a) aid to promote economic development in very poor areas; (b) aid to promote an important project or remedy a "serious disturbance" in a member state; (c) aid to facilitate the development of certain economic activities or areas in a way that does not adversely affect trade; (d) aid to promote culture and heritage conservation in a way that does not affect trading conditions or competition; and (e) aid falling into categories that "may be specified by decision of the [European] Council on a proposal from the [European] Commission."[10] Subsection (e), in particular, affords the EC nearly unbridled discretion (subject to the oversight of the European Council) in determining whether or not to approve proposed aid.

Article 108 empowers the EC to "keep under constant review all systems of [state] aid." After giving notice to concerned parties to submit their comments, the EC shall require that a state abolish or alter state aid that is "[in]compatible with the internal market" or that "is being misused."[11] That power includes the authority to require a state to "claw back" inappropriate state aid from the beneficiary of the subsidy. The EC may bring an action in the European Court of Justice against a state that fails to comply with its state aid prohibition within a prescribed period of time. An aggrieved state may also, however, sue in the EU's General Court to have an EC state aid determination overturned.

Finally, Article 109 authorizes the European Council to promulgate regulations drafted by the EC for the application of Articles 107 and 108.

State Aids Policy in Perspective. In sum, EC state aids evaluation is an inherently political process far removed from the promotion of economic welfare. The broad goal of eliminating national subsidies that distort competition and commerce within the EU market is generally sound as a matter of economic theory. In practice, however, the EU Treaty provides for numerous exceptions to state aid prohibitions that take into account social and industrial policy interests of individual EU member states (perhaps a politically necessary concession to the sovereign interests of those states).

The Treaty further "muddles the message" by according broad bureaucratic discretion to the EC in deciding whether a particular example of state aid is justified "on balance." Furthermore, even though voluminous additional EC regulatory guidance on particular state aid topics has been issued in recent years, the economic merits of such advice (which may incentivize the "shaping" of individual state aid packages in bureaucratically favored ways) is doubtful.[12]

9. Although German reunification took place in 1991 and Article 107(2)(c) states that the European Council "may adopt a decision repealing this point," special assistance for depressed East German areas has not been eliminated. See European Parliament, "Parliamentary Questions: Answer Given by Ms[.] Vestager on Behalf of the Commission," October 20, 2015, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-012371&language=EN (accessed March 17, 2017).

10. The European Council is made up of "the heads of state or government of the 28 EU member states, the European Council President and the President of the European Commission." The Council "sets the EU's policy agenda, traditionally by adopting 'conclusions' during European Council meetings which identify issues of concern and actions to take." See European Council, "The European Council," last reviewed March 10, 2017, http://www.consilium.europa.eu/en/european-council/ (accessed March 17, 2017).

11. According to Article 108, the European Council, acting unanimously, under "exceptional circumstances" may accept the petition of a member state and authorize that state's otherwise illegal state aid. Such a special authorization is extremely rare, however, and Council deference to EC state aid decisions is the norm.

12. There have been serious attempts by EC economists in recent years to refine the economic analysis of state aid control. See, for example, Hans W. Friederiszick, Lars-Hendrik Röller, and Vincent Verouden, "European State Aid Control: An Economic Framework," Chapter 17 in *Handbook of Antitrust Economics*, ed. Paolo Bucirossi (Cambridge, MA: MIT Press, 2008), pp. 625–669, http://ec.europa.eu/dgs/competition/economist/esac.pdf (accessed March 17, 2017). Nevertheless, given imperfect knowledge and inevitable errors in evaluation by even the best-intentioned economists, and given the nearly untrammeled discretion afforded EC bureaucrats, it cannot be said with any confidence that EC state aid analysis on net enhances economic welfare.

EU Nations' Tax Policies and State Aids

Background. In general, the EU Treaty leaves it up to individual member states to set national tax policy, subject to a few narrow exceptions enumerated in Articles 110–113. Those articles essentially prohibit member states from applying "indirect taxation" (such as value added taxes and excise duties) in a discriminatory manner that favors domestically produced products over products from other member states. Income taxation and other key aspects of tax policy, however, are not addressed by the Treaty, leaving those matters to the sovereign discretion of member states.

Nevertheless, the EC has long claimed and EU courts have long recognized that the EU Treaty's state aids provisions apply to national tax laws that distort competition and trade within the EU.[13] In 1974, the European Court of Justice affirmed the EC's claim that state aid provisions apply to direct business taxation,[14] and in 2013, the court reaffirmed that tax measures that discriminate among similarly situated taxpayers on the basis of nationality are subject to state aid controls.[15] In 1998, the EC adopted regulations (updated and superseded in June 2016) on the application of state aid rules to direct taxation.

Beginning in 2001, the EC conducted a series of investigations into member states' tax schemes and subsequently issued state aid decisions condemning national tax provisions that appeared only to benefit certain companies. In particular, some of those decisions concerned national laws that allowed multinational corporations to price their intracorporate transactions in a manner that the EC believed did not reflect the conditions that apply to "arm's length" transactions between separate companies. An "arm's length" transaction is a transaction conducted at a price at which unrelated parties would have conducted the transaction. Tax authorities typically examine the "transfer price" of transactions between a subsidiary and its corporate parent for purposes of allocating income between or among countries. In 2013, the OECD released its Action Plan on Base Erosion and Profit Shifting (BEPS), designed to increase government oversight of transfer pricing.[16]

In 2006, the European Court of Justice endorsed an arm's-length principle for deciding whether a tax measure that prescribes a method by which an integrated group company can determine its taxable profit involves a non–market-based "selective advantage"—and thus an inappropriate state aid—under Article 107(1) of the Treaty.[17] The EC has taken the position that such a "selective advantage" occurs when a member state's tax ruling results in a reduced taxable profit—and thus a reduced corporate income tax liability—for a favored company. U.S. tax law also uses the arm's-length principle.[18]

In 2013, the EC's Competition Commission launched an inquiry into whether EU member states' transfer tax ruling practices had created illicit "selective advantages." That inquiry bore fruit. By the end of 2014, all EU member states had been asked to provide information about their tax ruling practices.

In 2014 and 2015, the EC opened formal state aid investigations on tax rulings granted by Ireland (to Apple); Luxembourg (to Fiat, Amazon, and McDonald's); the Netherlands (to Starbucks); and Belgium (excess profits scheme). In late 2015 and early 2016, the EC ruled that the excess profits scheme devised by Belgium and the tax rulings provided by the

13. The following historical summary and discussion of specific state aid cases draws primarily upon European Commission, "DG Competition Working Paper on State Aid Tax Rulings," June 3, 2016, http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf (accessed March 17, 2017).

14. Case 173/73, *Italian Republic v. Commission of the European Communities*, ECLI:EU:C:1974:71, Judgment of the Court, July 2, 1974, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0173 (accessed March 17, 2017).

15. Case C-6/12, *P Oy*, ECLI:EU:C:2013:525, Judgment of the Court (Fifth Chamber), July 18, 2013, paragraph 18 and the case law cited, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0006 (accessed March 17, 2017).

16. Organisation for Economic Co-operation and Development, "Action Plan on Base Erosion and Profit Shifting," July 19, 2013, esp. Actions 8–13, http://dx.doi.org/10.1787/9789264202719-en (accessed March 17, 2017).

17. Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 ASBL v. Commission of the European Communities*, ECLI:EU:C:2006:416, Judgment of the Court (Second Chamber), June 22, 2006, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0182 (accessed March 17, 2017).

18. See Internal Revenue Code §482 and the regulations thereunder.

Netherlands to Starbucks and by Luxembourg to Fiat constituted illegal state aid.[19] The EC issued a preliminary determination that Luxembourg's decision constituted illegal state aid, but it has not yet issued a final ruling.[20] Apple, Starbucks, and Fiat have appealed the EC's rulings to the EU General Court.[21]

The EC's Apple Decision. Most recently, on August 30, 2016, the EC ruled that two tax rulings issued by Ireland to Apple artificially lowered the taxes paid to Ireland by the company, in violation of state aid rules.[22] The EC alleged that:

> The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a "head office". The Commission's assessment showed that these "head offices" existed only on paper and could not have generated such profits. These profits allocated to the "head offices" were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force. As a result of the allocation method endorsed in the tax rulings, Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.... Ireland must now recover the unpaid taxes in Ireland from Apple for the years 2003 to 2014 of up to €13 billion, plus interest.[23]

The EC's Apple ruling immediately generated controversy. House Speaker Paul Ryan (R–WI) called the decision "awful," and White House Spokesman Josh Earnest said it "was getting a lot of attention behind the scenes at the White House, and the Obama Administration would fight for the interests of U.S. taxpayers and businesses."[24]

Within three days, Apple and the Irish government announced that they would appeal the EC's decision to the European courts,[25] and former EC Competition Commissioner Neelie Kroes published an article criticizing the decision.[26] Kroes argued that both the EC's recent transfer pricing investigations and its Apple decision ignore the principle that "[i]nternational corporate tax principles dictate that companies pay taxes where value is created...through design, marketing and intellectual creativity. It is where those activities take place that the profits really originate." Kroes also argued that the EC erred by overturning long-accepted tax rulings, thereby ignoring the "fundamental principle of tax law that changes will not apply retroactively."[27]

U.S. Treasury Department Critique of EC Transfer Tax Rulings. In a White Paper released six days before the EC's Apple announcement, the U.S. Treasury Department issued a general critique of the EC's investigations into and condemnations of EU nations' transfer tax rulings.[28] The critique advanced three detailed arguments.

- *The EC's approach in these cases departs from prior EU case law and EC decisions.* The White

19. European Commission, "DG Competition Working Paper on State Aid Tax Rulings," p. 3.
20. U.S. Department of the Treasury, "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings," p. 3.
21. Ibid. and Julia Fioretti, "Apple Appeals Against EU Tax Ruling, Brussels Says No Cause for Low Tax Bill," Reuters, December 19, 2016, http://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKBN148007?feedType=RSS&feedName=topNews&utm_source=twitter&utm_medium=Social (accessed March 17, 2017).
22. News release, "State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion," European Commission, August 30, 2016, http://europa.eu/rapid/press-release_IP-16-2923_en.htm (accessed March 17, 2017).
23. Ibid.
24. Greg Robb, "Republicans and Democrats Agree: EU Tax Case Against Apple Is 'Awful'."
25. Paul Hannon, "Ireland to Appeal EU's Apple Tax Ruling," *The Wall Street Journal*, September 2, 2016, http://www.wsj.com/articles/ireland-appeals-eus-apple-tax-ruling-1472820356 (accessed March 17, 2017).
26. Neelie Kroes, "Why EU State Aid Is Not the Right Tool to Fight Tax Avoidance," *The Guardian*, September 1, 2016, https://www.theguardian.com/technology/2016/sep/01/eu-state-aid-tax-avoidance-apple (accessed March 17, 2017).
27. Ibid.
28. The following discussion draws upon U.S. Treasury, "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings."

Paper maintained that the EC ignored prior cases requiring a separate inquiry into whether an EU state's transfer tax ruling that conveys an economic advantage conveys it *in a selective way* to certain companies or sectors. It also stressed that under prior EC decisions, an advantage available only to multinational companies is not necessarily selective.

- *Because the EC's approach departs from prior practice, it should not be applied retroactively because to do so would run afoul of EU legal principles.* The White Paper also emphasized that imposing retroactive recoveries would undermine the G20 nations'[29] efforts to improve tax certainty and would set an undesirable precedent for tax authorities in other countries.

- *The EC's new approach is inconsistent with international norms and undermines the international tax system.* The OECD Transfer Pricing Guidelines[30] are widely used by national tax authorities to ensure consistent application of the "arm's length principle," which generally governs transfer pricing determinations. Rather than adhere to those guidelines, the commission asserts that it is employing a different arm's-length principle that is derived from EU treaty law. The EC's actions undermine the international consensus on transfer pricing standards, call into question the ability of EU member states to honor their bilateral tax treaties, and undermine the progress made under the Base Erosion and Profit Shifting project, a reform effort jointly supported by the OECD and the G20 nations.

The Real Problem: EU Policy Undermines the Benefits of Tax Competition

The Nature and Benefits of Tax Competition. Tax competition is salutary and limits the degree to which governments can impose unwarranted and economically damaging taxation.[31] If a jurisdiction raises its tax burden too high or provides too little by way of useful government services funded by its taxes, people and businesses will tend to leave the jurisdiction. Moreover, the prosperity and competitiveness of those that remain will decline.

Stated differently, high taxes—especially high marginal income tax rates—have an adverse impact on economic growth, and tax competition imposes a limit on how high governments can raise tax rates.[32] Efforts to suppress tax competition or to harmonize taxes are generally an effort to create a tax cartel to keep taxes high.[33]

The EU–OECD Campaign to Undermine Beneficial Tax Competition. The OECD and the EU have engaged in a sustained campaign to undermine

29. "The G20 is an informal group of 19 countries and the European Union, with representatives of the International Monetary Fund and the World Bank. The finance ministers and central bank governors began meeting in 1999, at the suggestion of the G7 finance ministers in response to the global financial crisis of 1997–99. Since then, there has been a finance ministerial meeting every fall." University of Toronto, G20 Research Group, "G20 Information Center," last updated July 22, 2010, http://www.g20.utoronto.ca/g20whatisit.html (accessed March 17, 2017).

30. Organisation for Economic Co-operation and Development, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, July 2010, http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm (accessed March 17, 2017). The OECD is an international research organization funded by major developed countries that "provides a forum in which governments can work together to share experiences and seek solutions to common problems." Organisation for Economic Co-operation and Development, "About the OECD: Our Mission," 2016, http://www.oecd.org/about/ (accessed March 17, 2017).

31. Daniel J. Mitchell, "A Tax Competition Primer: Why Tax Harmonization and Information Exchange Undermine America's Competitive Advantage in the Global Economy," Heritage Foundation *Backgrounder* No. 1460, July 20, 2001, http://www.heritage.org/research/reports/2001/07/a-tax-competition-primer; Chris Edwards and Daniel J. Mitchell, *Global Tax Revolution: The Rise of Tax Competition and the Battle to Defend It* (Washington: Cato Institute, 2008); Richard Teather, *The Benefits of Tax Competition*, Institute of Economic Affairs , 2005, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=878438 (accessed March 17, 2017).

32. Barry W. Poulson and Jules Gordon Kaplan, "State Income Taxes and Economic Growth," *Cato Journal*, Vol. 28, No. 1 (Winter 2008), pp. 53–71, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.451.4669&rep=rep1&type=pdf (accessed March 17, 2017).

33. Andrew P. Morriss and Lotta Moberg, "Cartelizing Taxes: Understanding the OECD's Campaign Against 'Harmful Tax Competition,'" *Columbia Journal of Tax Law*, Vol. 4, No. 1 (2012), pp. 1–64, https://taxlawjournal.columbia.edu/article/cartelizing-taxes-understanding-the-oecds-campaign-against-harmful-tax-competition/ (accessed March 17, 2017); Chris Edwards and Veronique de Rugy, "International Tax Competition: A 21st-Century Restraint on Government," Cato Institute *Policy Analysis* No. 431, April 12, 2002, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa431.pdf (accessed March 17, 2017).

beneficial tax competition for at least two decades.[34] This is unsurprising since both organizations are dominated by high-tax European welfare states. In its 1998 report *Harmful Tax Competition: An Emerging Global Issue*, the OECD stated that "a harmful preferential tax regime will be characterised by a combination of a low or zero effective tax rate" and other factors.[35]

The OECD and the EU have since engaged in a series of initiatives designed to impede the ability of countries to have low taxes. These include:

- A sustained campaign against low-tax countries (pejoratively labelled tax havens);
- A financial information–sharing regime, the core of which is the protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, that would exchange private financial information with most foreign governments;[36] and
- The Base Erosion and Profit Shifting action plan.

The protocol amending the Convention on Mutual Administrative Assistance in Tax Matters is part of a contemplated new and extraordinarily complex international tax information–sharing regime involving two international agreements and two OECD intergovernmental initiatives. It will result in the automatic sharing of bulk taxpayer information among governments worldwide, including many that are hostile to the United States, are corrupt, or have inadequate data safeguards. It will add another layer to the already voluminous compliance requirements imposed on financial institutions and will have a disproportionately adverse impact on small banks and broker-dealers.

The protocol also will lead to substantially more transnational identity theft, crime, industrial espionage, financial fraud, and suppression of political opponents and religious or ethnic minorities by authoritarian and corrupt governments. Additionally, it puts Americans' private financial information at risk. The risk is highest for American businesses involved in international commerce.[37]

The BEPS action plan is a series of 15 complex recommendations, supported by the Obama Administration, designed to shore up the current international income tax system.[38] The EU's abuse of its competition policy to raise taxes in Ireland is simply the latest in a long line of anti–tax competition initiatives by European governments.

34. Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue*, 1998, https://www.oecd.org/tax/transparency/44430243.pdf (accessed March 17, 2017); Organisation for Economic Co-operation and Development, "Recommendation of the Council on Counteracting Harmful Tax Competition," April 9, 1998, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=92&InstrumentPID=89&Lang=en& (accessed March 17, 2017); Organisation for Economic Co-operation and Development, "Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, Progress in Identifying and Eliminating Harmful Tax Practices," 2000, https://www.Oecd.Org/Tax/Transparency/About-The-Global-Forum/Publications/Towards-Global-Tax-Cooperation-Progress.pdf (accessed March 17, 2017); Daniel J. Mitchell, "An OECD Proposal to Eliminate Tax Competition Would Mean Higher Taxes and Less Privacy," Heritage Foundation *Backgrounder* No. 1395, September 18, 2000, http://www.heritage.org/research/reports/2000/09/oecd-proposal-to-eliminate-tax-competition; David R. Burton, "Towards a Global Tax Cartel?" *Policy*, Vol. 18, No. 4 (Summer 2002–2003), pp. 9–11, https://www.cis.org.au/app/uploads/2015/04/images/stories/policy-magazine/2002-summer/2002-18-4-david-r-burton.pdf (accessed March 17, 2017); Commission of the European Communities, "A Package to Tackle Harmful Tax Competition in the European Union: Communication from the Commission to the Council and the European Parliament," COM(97) 564 Final, Brussels, May 11, 1997, http://aei.pitt.edu/3494/1/3494.pdf (accessed March 17, 2017).
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What Should Be Done

To deal effectively with this EU–OECD overreach will require action by both the European Union and the United States. Specifically:

- The EU should confess error, rescind its Apple ruling, discontinue similar cases, and explain publicly that it will apply state aids rules only to truly non-neutral anticompetitive tax distortions. State aids rules regarding taxes should be procompetitive.

- The Trump Administration should publicly abandon support for the OECD's high-tax cartel plans and withdraw the protocol amending the Convention on Mutual Administrative Assistance in Tax Matters from Senate consideration.

- Rather than support efforts to rein in tax competition, the United States should reform its tax system to promote economic growth, job creation, and higher wages. It should reduce both marginal tax rates—the U.S. has the highest corporate tax rate in the OECD—and the multiple taxation of savings and investment.[39]

Conclusion

High taxes—especially high marginal income tax rates—have an adverse impact on economic growth, and tax competition among governments imposes a limit on how high governments can raise tax rates and burden the private sector. Efforts to suppress tax competition or to harmonize taxes are generally an effort to create a tax cartel among like-minded governments to keep taxes high. The EU's Apple ruling, similar to other recent EU investigations of tax reductions, may have the effect of discouraging beneficial tax competition among European nations.

The United States should reject calls by the OECD and other multinational bodies to promote "tax harmonization," which tends to encourage overly high tax burdens worldwide and discourage economic growth. The United States also should lead by example, reducing its economically harmful tax burdens and encouraging other countries to do likewise.

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