

The problem with values: identifying the values within the observation of problems

1.1. Introduction

Ireland and Apple had a tax relationship, encapsulated in certain tax rulings issued by the Irish tax authorities to Apple in 1991 and 2007. These tax rulings are the view of Revenue, the Irish body charged with the administration of the tax system in Ireland, as to how Apple will be taxed in the future.

In June 2013 the European Commission asked Ireland for information on the practice of tax rulings in Ireland, and in particular on any tax rulings provided to subsidiaries of Apple Inc, a US company (the "2013 Communication"). This was followed, in June 2014 by an announcement by the European Commission that it was launching a formal action against Ireland in relation to the tax rulings granted to subsidiaries of Apple Inc (the "2014 Communication"). In August 2016 the European Commission concluded that Ireland was in breach of the state aid rules contained in the Treaty of the Functioning of the EU, which date from 1957 (the "2016 Communication"). A press release accompanied the 2016 Communication, in which the European Commission announced that Ireland's illegal behaviour involved the grant of "undue tax benefits of up to €13 billion to Apple" and that Apple was liable to pay the amount of the state aid plus interest to Ireland.

This above recital is the bare bones of a highly contested legal argument. This paper is not concerned with that legal argument, but focusses instead on the results of a functional analysis (Knudsen, 2010, Hanna, 2017) where the actions of the European Commission are posited as a solution to certain observed problems. We take these problems as variously described during interviews with 16 experts within the European Commission, Irish officials, former members of the judiciary and practising lawyers: tax avoidance by multinational enterprises, tax competition by member states, pursuit by the European Commission of a hidden agenda for tax harmonisation within the EU. These problems are complex, multi-faceted and familiar within the tax academic literature. These problems can be operationalised as environmental noise (Teubner, 1989, 1992), infused with contingency, and awareness that the solution of the legal system could have been otherwise (Luhmann, 1995a, 2004a). Identification of the

problems led to the following research interest: how are these problems observed in the environment of the legal system?

1.2. Structure of paper

In section 1.3, second order observation is explained as a technique of observing the problems observed in the environment of the legal system. Section 1.4 outlines how values are ascribed by observers to the communications of the legal system; the analytical strategy of identifying these values is outlined in section 1.5, which gives details of semantic analysis as an analytical strategy. Sections 1.6 and 1.7 outline the semantic expression of values which are inherent in the description of the problems. Section 1.8 gives details of the temporal semantics observable within the interview data. Sections 1.9 and 1.10 proffer some conclusions.

1.3. Observing the problems

Luhmann's (1995b) view is that observation is distinction : marking one side of a form through observation means that the other side of the form is unmarked (Andersen, 2003a). This necessitates a choice of distinction, a way of observing the interview data. How, then, is the choice of distinction through which to observe made?

The primary distinction in this research is between the internal and external perspective (Hart, 1961, Luhmann et al., 2004b). In an oscillating movement from data to analytical strategy (Andersen, 2003a), an examination of the results of the functional analysis – the construction of problems – led to a recognition that problems were often observed in moral language, laden with values, even sometimes by those who articulated, but did not acquiesce in, the problem. As an exercise in oscillation between theory and data, this process was both exemplified and suggested by ISAL3:

ISAL3: "I would use the word fairness. I think morality / decency / propriety / governance, all those sort of words are certainly relevant and you'd almost see it that the Commission is trying to make a point that the state aid, these tax rulings involved an excess of capitalism."

These words – fairness, morality, decency, propriety, governance – can be described as values. Values are “general, individually symbolized perspectives which allow one to prefer certain states or events” (Luhmann, 1995b, page 317). Luhmann cites as “useful and typical” Jurgen Friedrich’s definition: “Values are conscious or unconscious ideas of what is wanted that precipitate as preferences in choosing between alternatives for action” (Luhmann, 1995b, page 577). ISAL3 sees the state aid enforcement by the European Commission as an attack, motivated by values, on excessive capitalism. This is a large claim, without an echo from the internal perspective of the legal system.

By observing the 2016 Communication as a response to immoral or unfair tax practices by multinational enterprises or member states, the observer is attributing values to the legal system. In making a distinction between immoral and moral, unfair and fair, the observer sees the 2016 Communication as a reflection of these values, or possibly as an instrument of these values. The researcher, in turn, observes the observers making this distinction, and through the second-order observation, can see the blind spot of the interviewee. The point of observation remains acutely important: something can be observed as both moral and lacking in morality, fair and unfair, as the point of observation (Qvortrup, 2003) changes. This is a splintered reality, constructed through interviews where the interviewer is the only constant. It is consistent with Luhmann’s view that society is without a moral centre, without a common hierarchy of values (Lee, 2000).

1.4. The observation of values

Within systems theory, there has been some examination of values: in the context of organisations (von Groddeck, 2011a, Besio and Pronzini, 2014, Valentinov, 2019); business ethics (Schnebel, 2000, Schnebel and Bienert, 2004, Thyssen, 2009); and taxation (Hikaka and Prebble, 2010, Vilaça, 2012). Von Groddeck (2011a) examines value communications within organisations, and their propensity towards fuzziness. Empirically, this fuzziness in values, or elasticity of meaning (Thyssen, 2009), is linked to the complexity of the environment and the uncertainty of the future.

The analytical strategy for an examination of how the problems identified by the functional analysis were observed is based on a semantic analysis (Stäheli, 1997, Andersen, 2003a, Besio and Pronzini, 2008). This goes beyond the description of the problems outlined in the

functional analysis. It involves identifying how meaning is condensed in semantical form, bearing in mind that the functional differentiation of society results in each system having its own peculiar vocabulary (Moeller, 2013). This condensation of meaning is within each system's own semantic reservoir, which can change over time (Andersen, 2011).

Luhmann describes semantics as the commonality of meaning and writes: "All societies know not only language but also condensed modes of expression in language such as names or terms, sayings, situational definitions and formulas, proverbs and tales for saving communication worth preserving for reuse. I call such condensations "semantics" (Luhmann and Barrett, 2013, page 32). Semantics are, in short, a stock of stable meanings available for communication, worthy of preservation (Luhmann, 1993) and relatively independent of situations (Andersen and Born, 2000). Semantics are a ready form of meaning that communication preserves when communication is linked to communication (Luhmann, 1995b, Andersen and Born, 2000).

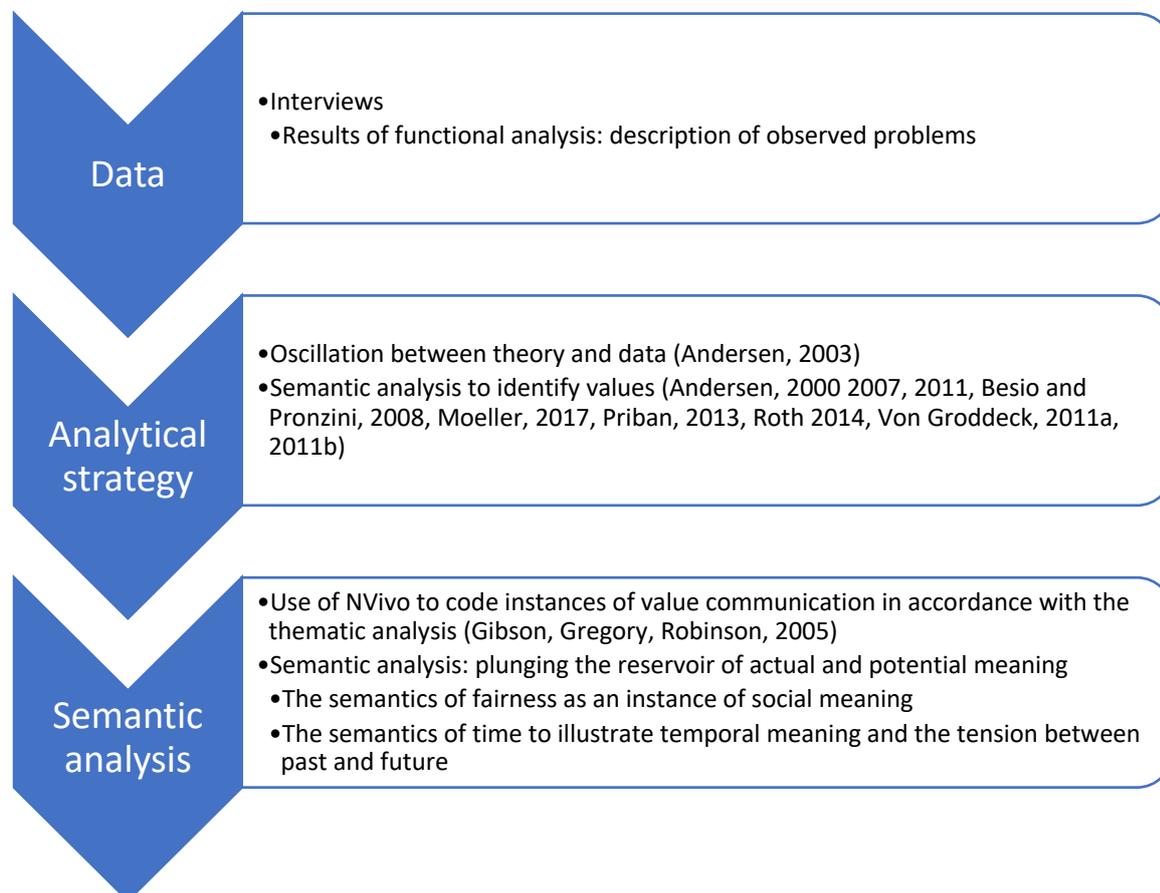
As with systems theory in general, this is a difficult theory to operationalise. Luhmann does not offer a precise method of semantic analysis, although Andersen (2003a) writes that it bears a resemblance to discourse analysis and Stäheli (1997) notes, as a partial explanation for the theoretical marginalisation of semantics within systems theory, that semantics predates discourse theory. It is apt to deal with the development of semantics in a historical context (Andersen, 2011, Rennison, 2007): for instance, Luhmann himself examined semantical shifts over hundreds of years in a number of areas (Stäheli, 1997). Such semantic shifts cannot be identified with any precision over the short period of time of the interviews. Furthermore, the aim of the semantic analysis in this research is more limited. Semantic analysis examines how different ideas, meanings and expectations are condensed into concepts within a semantic reservoir and provide a framework for future communication. As part of a second-order observation, we are looking at how observers describe what they identified as problems, what values they see in certain events, activities of multinational enterprises, member states and the European Commission. In observing these observations, the research pays attention to the semantics of expression of values in accordance with the process outlined in Figure 1.1.

We first need to look at how semantic analysis is defined and applied. Luhmann's concepts of meaning and semantics are the bedrock of the observation of the values communicated by

the interviewees. Semantics are defined as “a supply of possible themes that are available for quick and readily understandable reception in concrete communicative processes” (Luhmann, 1995b, page 163). Meaning is in a state of unrest, constantly unstable, shaping “anew the meaning-constitutive difference between actuality and potentiality” (Luhmann, 1995b, page 65). At a particular point in time, meaning is actualised in a particular context. But this actualisation is placed against the horizon of potential meanings. Meaning therefore exists in a symbiotic relationship with potential meanings. In the semantic analysis, we concentrate upon meanings, surrounded by possibilities, accepting that actualised meaning is always in a dynamic relationship with potential meanings (Andersen, 2011).

The methodology of identifying values will involve an explicit orientation towards arguments and observations laden with distinctions between good/bad or right/wrong and any associated measures of esteem or disapproval, respect or disdain. This has been labelled “value communications” or the “semantics of values” (von Groddeck, 2011a), and is consistent with a tendency to communicate about problems in terms of morality, fairness and ethics (Valentinov, 2019). Values are “silent persuaders” and “produce a semantic cover for unresolved conflicts” (Luhmann, 1996, pages 31, 32). It is this semantic cover which we now wish to uncover.

Figure 1.1: Semantic expression of values as analytical strategy



1.5. Semantic analysis of values as analytical strategy

Support for semantic analysis within systems theory can be gleaned from the application of systems theory in a number of diverse sites. Andersen has published a series of papers using semantic analysis: Andersen (2000) gives the example of the privatisation of old age care in Denmark changing the semantic meaning of public and private as the private company becomes part of the political system. Andersen (2000) examines data over a five year period, using internal corporate documents, local authority documentation, media reports and interviews. He carefully notes that the study does not produce a verified theory, but is instead a case study on which “heuristic theses” will be developed (Andersen, 2000, page 44). He studies a shift towards recourse to values, which is based on the premise that nobody is opposed to human values and freedom of choice. This is consistent with the view that “values bind too weakly” (Luhmann and Barrett, 2012), are fuzzy, lack coherence and are often in conflict with one another, thereby losing their “prescription value right at the moment it is

needed" (Luhmann, 1995b, page 318). As a corollary to that, values are difficult to dispute because of their abstraction and basis in morality (Luhmann, 1995b, Luhmann, 1996).

Andersen (2007) further develops his strategy of semantical analysis through an examination of the use by a welfare organisation of legal, economic, political and moral communication when addressing social contracts with clients of the welfare organisation. He focusses on "everyday social semantics" (Andersen, 2007, page 122) and uses a second order textual approach to observe how social welfare policy observes clients and citizens over a 25 year period. Values are not examined, instead the premise of the study is to examine a citizens contract which "undermines the values it was intended to defend" (Andersen, 2007, page 121). The empirical site of the current research can be distinguished as it is over a much shorter time frame and aims to probe whether values are attributed to the legal system, rather than ontologising them by attempting to turn them into a reality.

Further illustrations of semantic analysis can be found in the history of play and organisations (Andersen, 2009); the examination of semantic breaks in the historical discourses of public management in Denmark, comparing the semantics of traditional management values with new modern values (Rennison, 2007); and the ubiquitous copying of value semantics evident from corporate websites as an indicator of the contested nature of these values (Roth, 2013). Corporations, Roth argues, use value semantics as "moral shields" (Roth, 2014, page 178). This is consistent with Von Groddeck (2011a) observation of how value-based semantics achieve fuzzy communication by organisations.

There are three dimensions of meaning at which semantic analysis is directed: the social, factual and temporal dimensions (Luhmann, 1995b, Andersen, 2011). Luhmann sees meaning as "*a decomposition into differences*" (Luhmann, 1995b, page 75) and outlines the social, factual and temporal dimensions of meaning, each of which is meaningful and each of which must be assessed against the horizon of the others. None of these dimensions can be viewed in isolation of the others.

The factual dimension of meaning contrasts something from something which it is not. Luhmann notes that the fact dimension of meaning relates to "themes of meaningful

communication” (Luhmann, 1995b, page 76). Andersen (2011) sees the factual dimension of meaning as being the process of choosing themes and objects for communication. Certain observations relating to the relationship between Ireland and Apple are made factually: the primary distinction is to view it through themes of tax and state aid. This was an early choice in the research design. Such is the certainty with which we identify the Ireland-Apple relationship as one of tax (and not, in the case of Apple, as a designer or manufacturer or seller of computing devices or as an employer or a source of foreign direct investment or, in the case of Ireland, as a protector of the intellectual property inherent in those devices or an educator of employees or a location for foreign direct investment) that the factual dimension tends to fall into the background.

The social dimension is “what one accepts as like oneself” (Luhmann, 1995b, page 80). It is essentially a division into “them” and “us” or “Übermensch versus Untermensch” (Andersen and Born, 2000, page 304). The social dimension tends to boil down to morality, which Luhmann specifies “indicates the conditions under which persons can praise or blame one another and themselves” (Luhmann, 1995b, page 82). Interview data in which a moral stance is highlighted is therefore placed within the social dimension of meaning. Tax was observed within the social dimension, as being intimately involved with morality and ethics. State aid was also observed within a social dimension, for instance, as being a response to an *excess* of capitalism. These observations will form the bulk of the observation of values and will be explored further in section 1.6.

The third dimension of meaning is temporal, where a tension between the past, present and future is observed. This is the memorable past and unknowable future (Baeker, 2000) which bookend present observation. The legal system reduces the temporal complexity of society (Hendry, 2012) and reorders time to install a particular date as the fulcrum point in systemic time, around which the communications of the legal system revolved. When observing the observers within the environment of the legal system, we can again see how time is observed as meaningful. This aspect is dealt with in section 1.8.

1.6. Values: a second order observation

We saw, from the example given in section 1.3 of the oscillation between theory and data, that the description of the various problems identified through the functional analysis was couched

in values. The interview data was coded using NVivo to identify values, concepts of morality, fairness, ethical attributes. These were either overt observations of the values within the problems to which the functional analysis had identified the European Commission enforcement action as a solution, or covert communications of values. There were indicators of a changing semantic reservoir (Andersen, 2010) and a semantic analysis was employed to tease out the values either implicit or explicit in these moral observations. This was done by scanning all the interview data for the thematic (Flick, 2018) emergence of values and coding either a sentence or part sentence as displaying an expression of values.

Semantic analysis delves into the values espoused by the observers during the second order observation of the legal system. These values are a shorthand way of indicating approval or disapproval (Luhmann, 1995b). They can be disputed: "Values do not express consensus but motivate others to observe one's observations critically" (Luhmann and Fuchs, 1988, page 32). Deciphering the environmental noise involves identifying the latent values in these observations and provides an orientation in complex situations (von Groddeck, 2011a) or, as Luhmann notes, facilitates a probe of more concrete expectations (Luhmann, 1995b).

The values of fairness, morality, decency, propriety, governance, identified by ISAL3 and referred to in section 1.3, can be amorphous. It is difficult to ascertain with precision as to what is the exact meaning of moral or immoral, or the content of similar expressions of approval and disapproval. We meet this challenge by not allocating a stable content to these values (Schnebel and Bienert, 2004). Instead we are concerned with the second-order observation of values, that is the application of a code good/bad or, variously put, approval/disapproval (Rasch, 2000, 991); praise/blame (Luhmann, 1995b, page 82); or esteem/contempt (Luhmann, 1995b, page 156).

The second-order observation embraces the inchoate content of observations of values (von Groddeck, 2011a, 2011b) and, adopting a constructivist approach, merely records that observation of the legal system is, in the current empirical background, saturated with values. Recording the observation of values does not generate a tangible content of those values. For example, fairness is a nebulous value, too abstract to stabilise expectations of the legal system. This is recognised by ITL2:

ITL2: "I think it was John McCain and was it Carl Levin?...the two senior senators involved in the Republican and Democratic party. And they basically went through what I'd call the Apple tax structure, international tax structure in great detail and again basically lambasted Apple for not paying - quotes -'its fair share of tax.' We'll come back to what that means. And who knows what it means."

Nonetheless, values "serve in the communication process as a kind of probe in which one can test whether more concrete expectations are also at work" (Luhmann, 1995b, page 318). Fairness or decency are values which it is difficult to define with precision, but they can be used to probe the expectations which observers have of the legal system. We now turn to probe values through semantic analysis.

1.7. Proliferation of moral communication

What is very evident throughout the interviews is the proliferation of moral communication (Valentinov, 2019): problems are presented in the context of values, with a widespread reference to the value of fairness. Although the point of observation (Qvortrup, 2003) is different, and the content of the observation is not uniform, much of the observation is couched in the language of values. The US Treasury Official even observes within a knowingly moral context, and puts it thus:

US Treasury Official: "So, then you're asking the question well, what is a company to do? And what comes back off the civil society is some kind of a morally tinged answer, okay?"

This is an interesting position; an observation as to lack of moral clarity within society. It is a denial of any common meaning of morality, and is consistent with Luhmann's identification of the amorality of systems (Valentinov et al., 2016) and Roth's (2014) scepticism as to the publication of values by corporations. While negating the semantic coherence of morality, in the sense of denying a clarity to morality, US Treasury Official is nonetheless observing within the distinction moral/not moral.

This is not an isolated incidence of moral observation. EC1 says:

EC1: "...there is some morality there, perception there that says it's unfair that some get away with not paying taxes and others do".

This connects fairness of tax treatment to some type of universal concept of social fairness. EC1 places this observation at one remove: there is a perception of unfairness, but there is ambiguity as to whether this perception is shared by EC1. There is also a deep ambiguity as to what concept of fairness is in play. Murphy and Nagel (2002) argue that the position of fairness within popular debate on the tax system is usually "related to differences over steep economic inequality, individual responsibility, the alleviation of poverty, equality of opportunity, universal guarantees []" (Murphy and Nagel, 2002, page 174). These are weighty and complex deconstructions of fairness within tax, to be compared to the shorthand semantic of fairness used by EC1. This shorthand can be viewed as connecting fairness of tax treatment to a universal concept of social fairness, an objection to multinational enterprises being privileged over other taxpayers. There is also a connotation of multinational enterprises conniving to pay less tax in the depiction of them *getting away with* paying less tax.

The Former Irish Judge does not make an overt moral judgment, but Apple's group structure is described as chimeric.

Former Irish Judge: "So, all the sales are made here but by a process which does seem utterly mysterious, all of, almost all of the activity is deemed not to take place in Ireland at all. It's the activity of something called a head office which is an almost chimeric type of being, whatever it is. That is the bit that, really it does influence the mind, you know."

Contrast this description with that of the 2016 Communication, where the description of Apple's affairs is shorn of all moral content, and there is only a recital of facts, without commentary:

2016 Communication: "ASI and AOE [Apple subsidiaries] did not have any taxable presence in any other tax jurisdiction besides Ireland during the time that the contested rulings were in force...As regards ASI's and AOE's head offices, those head offices lack any physical presence or employees and are not located in any jurisdiction."

No matter what the point of observation, some observation is in moral terms. From the point of view of the European Commission interviewees, there is an implicit rejection of the "morally tinged answer" noted by the US Treasury Official and a clear expression of moral stance:

EC1: "So yeah it was a competition issue, it was a fairness issue."

EC3: "I mean in essence - and this is what my Commissioner of course says very clearly - it calls into question some very basic principles of equity, calls into question fairness, fairness of the tax system."

EC5: "the new principle is whether or not it corresponds to economic reality. And there we have the debate whether taxation is fair, whether we are using the right, the right allocation formula, whether it is okay."

These three references to fairness are substantively different in ambit. EC1 links fairness with competition (Rixen, 2011), which is generally seen as a requirement that member states engage in fair tax competition. EC3's concept of fairness is broader, and more closely allied to a universal concept of fairness, a rejection of privilege for the few (Pogge and Mehta, 2016). EC5, on the other hand, sees fairness as substantively related to whether the allocation mechanism is sufficiently closely related to economic reality.

Similar observations are to be found from other points of observation:

ITL2: "I mean my initial reaction was also to a certain degree - God Lord what are these people at...I've never been keen on any kind of tax avoidance. I mean I've always paid bloody high taxes and, you know, so I have paid the price."

ISAL2: "Like any other taxpayer who pays over 40% of my income in tax, I feel it's outrageous that a company whose products are used should pay so little tax."

ISAL1: "I suppose there's a moral issue as well. There's... and this may be the social issue as well... it is, I suppose it is a worry, but this is not a question of state aid, this was a tax. People were going to get very upset. It is a massive issue for society if the Amazons and Googles and Facebooks cannot pay tax on their extraordinary profits."

These observations provide an interesting juxtaposition of state aid, tax avoidance and fairness, all of which are bound up with the 2016 Communication, which is observed as:

EC3: "definitely an element of morality and ethics in this case but it's not the stated case we're running".

This is an interesting formulation: the reference to the stated case draws a distinction between it and the unstated case, the *sotto voce* of the 2016 Communication, the fairness of the tax system. While this is unsaid in the 2016 Communication, it was part of the European Commission's self-observation in the 2016 Press Release where it was noted: "This Commission has pursued a far-reaching strategy towards fair taxation and greater transparency and we have recently seen major progress."

Irish Official 1, while disputing vigorously the quantum of the state aid in the 2016 Communication, observes, without proffering an opinion, the motivation of fairness:

Irish Official 1: "there's fairness, there's the point about seeing to make these companies accountable okay, the sort of the politics of accountability of business and showing the Commission to be relevant."

Not every observer sees the issues as being related to fairness or any type of morality. ITL1 adopts the traditional stance of a lawyer eschewing normative content and requiring strict adherence to the words of statute (Ostas, 2018, Prebble, 1998):

ITL1: "It's a question of law. When it moves away from being a question of law, it's a very difficult world for taxpayers to operate in."

The US Treasury Official also takes this position, saying that it is difficult to find the boundary between acceptable and unacceptable tax avoidance:

US Treasury Official: "Imagine I own a house, a million dollar house and I have a new mortgage deduction in the United States, and I tell my friends, 'Guess what, if I buy a two million dollar house I get double the mortgage deduction'. And I say to people, I cannot find the line between that moral question, you know whether buying a bigger house and doubling my mortgage deduction, how I would analyse that moral question and how I would analyse you know, a Bermuda cost-sharing arrangement, you know?"

Even Irish Official 2, who disagrees with the 2016 Communication, sees the Commission's aims as related to fairness:

Irish Official 2: "I don't think that people focussed on [state aid's] importance. The evolution of where this is going, the Commission wanted to use all tools in the arsenal to make sure that everybody paid their fair share."

Yet Irish Official 2 does not see fairness as the preserve of the European Commission and views the lack of recognition that Ireland receives for having changed its tax behaviour as unfair:

Irish Official 2: "We're very much supportive of the agenda of tackling unfair taxation and we've done a tremendous amount of work ... We had not shied away from it and we have done everything that has been asked of us. We've gotten no credit for it in terms of it but others would say, 'Well why should you get credit for it? Because everyone needs to make sure that we are operating on this global level of fairness'. I personally, I agree with that but they also have to respect that from where we came from, we have actually done a lot. In doing a lot, you know, we now are one of the few jurisdictions globally who has the highest rate of transparency, we've a higher rating than Germany and they don't get any flak for it but we get no credit for what we have done and it's unfortunate."

The observation of morality at play is not universal. This is to be expected as the multiplicity of second-order observation means that universally valid values are hard to come by (Moeller, 2017). EC2 in fact says that the abstraction of moral considerations is necessary to be fair to Apple. Both EC2 and EC4 refuse to offer a moral view:

EC2: "I've tried to, and I think it's really helping me to separate anything that could pollute my opinions, to separate any judgment from the fact, because it's not only because you want to be fair to everybody including Apple, but also because that's how you make a stronger case because you will not be, I think, driven by emotions or by your personal opinions. You will be driven only by the facts."

EC4, said that he sat listening to a colleague saying that:

EC4: "we had to do something about these companies that weren't paying enough tax, which was outrageous to the public and I sat there squirming in my seat saying 'This is not what my conception of state aid was.'"

The Former EU Judge objects to fairness polluting the legal system unless, in a display of positivist circularity, the law is changed:

Former EU Judge: “[Mrs Hodge’s],¹ as I understand it, her approach yes you may have paid strictly the correct amount as assessed by the Revenue, but you really ought to pay a bit more in order to be fair and reasonable. But fair and reasonable is not the test in any British statute in relation to tax.”

The clearest concept which can be observed through the second-order observation is that of fairness. Taxation is described as fair, tax practices are described as unfair; with an economy of language which disguises the deep and murky semantical reservoir that holds the concept of fairness.

In the current research, the restriction placed on possibilities by each functional system is of crucial importance. This is derived from the very essence of functional systems, which sees the operational closure of the system as compelling communications based solely on the logic of that system, thus enabling the system to assume ever more complexity (Luhmann, 1995b). So, for instance, the legal system will not resolve a legal problem on the basis of what is politically palatable, or possible. Functional differentiation is a different classification to morality as the codes legal/illegal or pay/don't pay are not synonymous with the various iterations of the moral code of good and bad. This is recognised by EC4 who refers to the controversy surrounding the 2016 Communication:

EC4: “That is a bit my answer to the current outrage. I don't want to call it synthetic. People use whatever arguments they think will be heard by the court or heard by public opinion. In the cases before the court that have already been heard, Ireland has

¹ Margaret Hodge MP was the Chair of the Public Accounts Committee (PAC) in the United Kingdom in 2012-13 during which the PAC questioned various multinational enterprises about their tax practices in the UK. See PAC. 2010 - 15. *The work of the Committee of Public Accounts* [Online]. House of Commons Committee of Public Accounts. Available: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/1141/1141.pdf> [Accessed].

consistently been present and has been pushing very much the tax sovereignty line. 'It is outrageous that the Commission interferes in the tax sovereignty of member states' to which the answer is - 'No, you are going to have a system of taxation that taxes companies on a certain basis. Apply it.'

There is a recognition by EC4 that Ireland may well be appealing to both public opinion and the legal system (through an appeal to the European Court) but an insistence that only the legal system should deal with the application of taxation. The researcher can identify a blind spot of EC4 insofar as the European Commission itself, through the 2016 Press Release, used arguments outside the legal analysis, and categorised the enforcement action as informed by background considerations of fair taxation. This categorisation was absent from the 2016 Communication.

ITL1 views the semantics of taxation as changing, while at the same time observing these semantics as meaningless:

ITL1: "All these words – "tax scheme, tax avoidance, aggressive tax" are just words thrown around, spoken by politicians and by the media. What needs to be done is to analyse what the law says, and then see whether the taxpayer is acting in accordance with the law."

This is in accordance with EC4's observation about the law "Apply it". Both ITL1 and EC4 subscribe to functional differentiation involving mutually exclusive spheres of operation, although they do not agree with the merits of the 2016 Communication.

ITL1's blind spot, namely the realisation that what the law says is also "just words", or a "semantic artefact" (Luhmann, 1995b, page 456), is not identified by ITL1, but the second-order observation can see the freighted meaning of "avoidance", "aggressive" and "scheme" used within the political and media systems. In a non-hierarchical functionally differentiated society (Luhmann, 1995b), each system has its own semantic reservoir and ITL1 disapproves of the juxtaposition of tax with scheme, avoidance and aggressive as belonging to the political

or media systems, and specifies that this construction should not be adopted by the legal system. ITL1 almost fears this semantical shift, concerned that it will engender uncertainty:

ITL1: "Taxpayers need certainty, and now they do not have certainty."

1.8. Temporal semantics

This "*now*" noted by ITL1 is the departure of certainty, a distinction between present and past. This is an example of the temporal dimension of meaning (Luhmann, 1995b), where the "semantics of time" enable the separation of past, present and future (Luhmann, 1995b, page 78). Time is "the interpretation of reality with regard to the difference between past and future" (Luhmann, 1976, page 35). ITL1's reality is that there was certainty but now there is not.

Time is a pre-occupation of this research: the internal perspective on the legal system involves a finding that something which had been in force since 1991 (Apple paying tax in accordance with a tax ruling from the Irish Revenue Commissioners), was investigated in 2013 and found to be illegal in 2016 and thereafter found to be legal in 2020. Showing empirically how something did not happen between 1991 and 2013 is clearly fraught with uncertainty (Knudsen, 2011) or contingency (Luhmann and Barrett, 2013). A causal analysis of such a continuum is virtually impossible: there are too many variables over too long a chronology. Luhmann (2013) draws attention to the inadequacy of causal analysis in taking account of unrealised possibilities. The 2013 Communication was a temporal ruption: all which came before is thereafter viewed in its light (Andersen and Born, 2000).

A temporal distinction (Baecker, 2001, Nobles and Schiff, 2014) can also be observed, where interviewees draw a line between before and after information became known or available, in an example of the application of systemic time (Luhmann, 1995b, King and Thornhill, 2003). The observation within the temporal dimension of meaning (Besio and Pronzini, 2008) is interesting because it illustrates the lack of synchronicity between system and environment (Nobles and Schiff, 2012): the legal system takes time to respond. This time to respond is observed in different ways.

From an external perspective, observers note an absence of enforcement between 1991 and 2013. Certain problems are presented in an innately temporal context by the observers. This is latent in the reasoning behind the delay in enforcement: EC5 explains the delay in dealing with Ireland and Apple's tax behaviour in the following terms:

EC5: "Why was it never addressed? Because of course Apple was not a big competitor at the time. Because in 1991 no one cared about Apple and today..."

This temporal observation by EC5 is that Apple has become more important, and that this is the difference between infringement (from 1991 to 2013) and enforcement (from 2013 to 2003).

EC1 is somewhat more forgiving of the delay in enforcement, but again harks back to the time before the time of clarity:

EC1: "I mean you can have many façades of the Irish, of the Apple ruling for example, no because I mean Apple was certainly in 1991 not the company it is today."

Both EC5 and EC1 see a distinction between Apple in 1991 and Apple "today". The semantics of these observations are informative. Apple, clearly or perhaps legally, is the same company it was in 1991 but EC1 and EC5 displace this meaning, and illustrate the tension between past and future (Andersen, 2011). This is the importance of temporal semantics: time does not run in the same circle for all observers (Besio and Pronzini, 2008).

This is consistent with the examination of systemic time, where time is of variable velocity (Philippopoulos-Mihalopoulos, 2009), and a decision is contingent until it is the subject of a system communication (Luhmann, 1995a, Luhmann, 1995b, Philippopoulos-Mihalopoulos, 2009, Přibáň, 2009). It is only upon selection of the case, subjecting facts which date from 1991 to a legal analysis, that the solution of the legal system is towards enforcement, rather than letting the 'infringement' continue. Thus the 2016 Communication is a possible, rather than necessary, solution to an environmental problem.

This contingency is evident in the doubts expressed as to selection and pursuit of the case.

Former EU judge: "I understand from the rumours floating around Brussels was at one stage - not far removed from before the decision was actually announced - that the thing was almost abandoned..."

EC3 accepts the contingency of this case being taken, at this time:

EC3: "Commissioners are free to set their investigative priorities, Mrs Vestager could have decided not to put so much emphasis on this but she did exactly the contrary, she put even more emphasis on it as you know."

Irish Official 1 agrees with this:

Irish Official 1: "The Commission has the ability to prioritise" and later "So the law is almost always wider than the set of cases that get brought and so consequently this is why, going back to my first point, prioritisation is so important because you have huge discretion."

The application of state aid rules disturbed what were perceived as being the certainties in the area of tax. ITL1, like US Treasury Official, while decrying any problem resonating within the legal system, views the 2016 Communication as engendering further complexity, mainly because of the overlay of state aid rules over Irish tax rules.

ITL1: "Tax law has been around for a long time, there might be difficulties of interpretation, and sometimes lack of clarity, it's sometimes complicated. But the transfer pricing rules and the tax rules are known and certain. Now there is no certainty."

This observation might be seen as at odds with, for example, Devereux who noted that “allocating profit among source countries is in practice a source of great complexity and uncertainty” (Devereux et al., 2008, page 713). Nonetheless, the reality of a tax lawyer’s practical knowledge of a tax code is to render it “known and certain” (ITL1) so long as it is isolated from the EU fragment of law (Walker, 2005, Hendry, 2012).

ISAL2 accepts an ever-expanding EU law over time, not only in the area of tax law:

ISAL2: “that’s not only particularly a criticism of tax lawyers, I think it is just a reality to European law as it has grown over time has gone into fields that no farmer ever expected to be tilled by European tractor.”

This is an observation which chimes with the argument about the colonisation (Lempert, 1987) or Europeanisation (Walker, 2005, Hesselink, 2009) of member state law. The temporal dimension is most pithily expressed by ISAL3:

ISAL3: “...state aid, it’s like comedy, it’s a factor of timing.”

Timing: what was knowable but not known. Time is “the interpretation of reality with regard to the difference between past and future” (Luhmann, 1976, page 35). One reality is that there was a blindness between 1991 and 2013, a form of inattentiveness, an obliviousness to potentially destructive information (Knudsen, 2011). This is hard to pinpoint empirically as it depends upon showing the absence of attention to information.

1.9. The value of values

The values observed by the interviewees in their commentary on the 2016 Communication are not pre-empirically defined: they have emerged throughout the analytical strategy as the semantic analysis probed the observation of problems. These observations involve the 2016 Communication being observed as representing certain values: fairness, curbing the excesses of capitalism, a shot across the bows of competing member states and peripatetic multinational enterprises.

But what observation can be made of these observations of values?

First, the presence of values in assessing a communication of the legal system is, in itself, instructive. Moral communication has proliferated (Valentinov et al., 2016) and is often an indicator of social conflict (Moeller, 2006). But it is diffuse, and there is no moral functional system. Luhmann was suspicious of recourse to morality within social communication and argued: "In normal everyday interaction, after all, morality is not needed anyway; it is always a symptom of the occurrence of pathologies" (Luhmann and Cross, 2000, page 79). Luhmann's somewhat cynical (Nobles and Schiff, 2012) verdict on ethics is to reject the possibility of paradigmatic ethics (Luhmann, 1991), but nonetheless to recognise that moral communication polarises and has been implicated in "a rapid fixation of positions, to intolerance, and to conflict" (Moeller, 2006, page 113). Morality is no longer societal, the precarious position of morality is matched by the semantic individualisation of moral reference, its insistence on "inner conviction (as opposed to external coercion)" (Luhmann and Barrett, 2012, page 149). This could describe the US Treasury Official's position that society issues a "morally tinged answer".

Morality has a unique status as it operates as a bacterial infection, a parasitic invader (Rasch, 2000) which would paralyse the autonomous functioning of the system, eventually causing it to lose its identity and disappear. An example, proffered by Luhmann (Rasch, 2000), may serve to elucidate Luhmann's mistrust of morality. The political system employs the distinction government/opposition, but cannot allow good to attach to only one side of this distinction. Government is not "the only good and respectable one, while the other side acts immorally and reprehensibly (Rasch, 2000, page 146). Similarly, legal cannot be coterminous with good, nor illegal with bad. Morality, itself a social system, has its own code.

There is certainly a semantic individualisation of moral reference: there is acceptance, indeed approval, that enforcement of state aid against Ireland and Apple has been actuated by issues of fairness. Tax avoidance by multinational enterprises, tax competition by member states are all observed as unfair or aggressive, examples of immoral or unethical behaviour, categorised as resulting in unfairness. This link was initially made by the European Commission itself in

its 2016 Press Release, not directly, but nonetheless clearly as the enforcement action was placed against a backdrop of curbing unfair tax behaviour, the state aid was quantified as “up to €13 billion, plus interest” and Apple was characterised as paying an effective tax rate of “only 0.005% in 2014”. This is in contrast to the 2016 Communication which states that “the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid”.² The 2016 Press Release embellished the communication of the legal system, making it more newsworthy in its references to a huge quantum of state aid and a tiny tax rate. This is identified by Irish Official 2:

Irish Official 2: “[The Commission] build the narrative and they selectively leaked throughout the process and in the build up to this, to ensure maximum damage and maximum impact in terms of themselves.

The emphasis on the observation of moral questions is particularly interesting in the context of tax, which has traditionally been an area of positivist legal reasoning, where interpretation was ostensibly divorced from a normative bias. Moving from this position is also viewed as unfair. This could be described as ITL1’s position in rejecting any normative description of tax avoidance as aggressive etc, and in putting certainty of treatment as the primary aim of the tax system. In short, this heterogeneity of interpretation is consistent with what has been observed about the place of morality in the discourse of climate change, specifically from the point of view of multinational enterprises (Besio and Pronzini, 2014). The effects of morality are multiple: morality is multidimensional.

Secondly, there is no clarity as to the content of the concept of fairness. It is very much a semantic in Luhmann’s terms, a short-hand description of something which is simple to utilise, but very difficult to deconstruct. The task of deconstructing the various possible philosophical meanings of fairness cannot be undertaken on so slender a basis as the second-order observation of interviews.³ It is simply not possible to say what exact meaning of fairness

² Paragraph 446, 2016 Communication

³ There is a vast literature on the interaction between tax and fairness. Fairness is seen as relevant both from the point of view of the design of the tax system, the public perception of the burden of the tax system, and as

attaches to EC3 and EC5, and in contrast, to the appeal to fair treatment of Apple (EC2) and Ireland (Irish Official 2). Further than this, the inchoate and fuzzy (von Groddeck, 2011a) recourse to fairness, or morality or governance is exactly the point. It allows the observer to fill in the blanks according to their own perspective, therefore crafting a subjective reality. From the point of view of the external perspective on the legal system, what is important is that observation of the 2016 Communication is imbued with the values of fairness, and unfairness, and is subjected to an inchoate assessment as to fairness, and unfairness.

Finally, the legal system is observed as having metabolised moral dicta relating to unfairness and tax avoidance, and internalised them. What is unusual about the legal system is the extent to which this moral discourse has been disguised: such is the rigour with which the legal system is autopoietic that it is difficult to identify any of the values, ethics or moral stances observed throughout the second-order observation within the 2016 Communication. The internal logic of the legal system requires a sedulous abstraction of values, which all observers had noted, into the ostensibly valueless language of the legal system.

It is too early to assess whether the semantic fusion of fairness and taxation or aggression and tax avoidance, noted by ITL1, will stabilise itself in the discourse of taxation, although there is some evidence that this is the case when the communications of the OECD, the European Commission and indeed certain communications of the legal system are examined (Hunt, 2020).

1.10. Summary of findings

Problems, observed as being solved by the European Commission enforcement action, are extensively viewed through the prism of values, inchoate, incomplete but nonetheless powerful semantic reservoirs of irreproachable and incontrovertible good. The key point is that subscription to these values is, even among 16 interviewees, not universal but a view of the legal system as having subscribed to values of fairness and morality is pervasive.

regards compliance with the tax system. Some conflicting meanings of fairness are discussed in MURPHY, L. B. & NAGEL, T. 2002. *The myth of ownership: taxes and justice*, Oxford, Oxford University Press. For a review of global tax fairness in specific tax areas, see POGGE, T. & MEHTA, K. 2016. *Global Tax Fairness*, Oxford, Oxford University Press. For a broad view of the importance of the public's perception of the tax system as fair and just, see BRAITHWAITE, V. 2017. *Taxing democracy: Understanding tax avoidance and evasion*, Routledge.

This is an opportune moment to consider any practical application of the analysis. The findings may bear some relevance to the policy process, particularly insofar as it shows how easily the purity of a positivist stance on taxation is confused by a moral stance. There is a note of bewilderment when Irish Official 2 states:

Irish Official 2: "we are not bad people".

Recourse to the semantical shorthand of fairness is "ethically seductive" (Přibáň, 2013, page 410). This is set, however, against Luhmann's recoil from a normative stance (Valentinov, 2019), which is consistent with Luhmann's theory of functional differentiation. As society became modern, and complex, the former moral certainties ceased to hold sway, and were replaced with a diffusion and profusion of normative values. There is no moral superiority inherent in one side of the code: the system is not making a moral judgment that legal is superior to illegal (Luhmann, 1992). The functional system is not integrated into society by means of morality: the functional systems are autonomous, communicate in their own binary code, and are amoral in the sense that the binary code is available for all operations of the system (Luhmann, 1991). Values are not synonymous with the correctness of an action, something Luhmann says is "often covered up" (Luhmann, 1995b, page 318). The danger in equating the legal system with fairness and morality is that the legal system may fail to act (from 1991 to 2013), or may select another case. The code of legality or illegality is autonomous: fairness is not synonymous with illegal state aid, nor unfairness with the position from 1991 to 2013.

1.11. Limitations of study

The first point to note is that there are a number of easily identifiable drawbacks to the interview data: it is necessarily incomplete as only a handful of observers are observed; it is dynamic as it is not fixed in time but is apt to be changeable; it is a backward looking observation, as it relates to what is gone before, yet it is also forward looking as observers often point to the next step in the legal argumentation. Identifying the observers relied upon availability: most notably, there are no observers from Apple, which leads to a large unmarked space (Luhmann, 1993, von Groddeck, 2010). Yet all of these attributes draw attention to one of the most

notable aspects of Luhmann's radical constructionism, manifested in his observational stance: there can be no privileged position for observation (Andersen, 2003a). One larger paradigmatic issue is that interview data is, by definition, manipulated by the researcher, and so can be suspect as not being a naturally occurring part of a socially constitutive discourse.

Yet much of the criticisms of the empirical emptiness of Luhmann's systems theory displays a lack of awareness of Kuhn's (1962) identification of the incommensurability of conflicting paradigms. We are not seeking to identify a cause, or even many causes, for a particular phenomenon, namely, the tax relationship between Ireland and Apple and its translation to a state aid action taken by the European Commission from 2013-2016. The very statement of this phenomenon hints at the myriad factors which are relevant: Irish tax law, US tax law, EU state aid law, the failure to legislate for EU tax harmonisation, Apple tax practices globally, the financial success of Apple, state austerity after the global financial crisis, discontent at globalisation and the mobility of multinational enterprises. All of these themes are present in the interview data, and their complexity, and the contingency of all cohering at a particular temporal point, renders any empirical lesson singular and particular to "the instant case" (Luhmann, 1995a, page 289).

The theoretically informed analysis provides a stringent framework for the conclusion that values are absent from the communications of the legal system but, from an external perspective, freely observed as inherent in those communications. In observing values proffered by the interviewees as a perspective on the 2016 Communication, a distinction is drawn between the absence of (conscious) values within the 2016 Communication, as examined in the internal perspective on the legal system. The external perspective, in contrast, is replete with value-laden observation. This distinction between the internal perspective, absent values, and the external perspective, replete with values, is a major contribution of this research. It does, nonetheless, beg the question as to whether the judgment of the General Court in favour of Ireland in July 2020 nullifies these observations of values. This research will have to await another day.

The theoretical explanation for this contrast in the communication of values is to be found in the functional differentiation of society. These are communications from the environment of the legal system (which encompasses the political, economic and media systems) (King and

Thornhill, 2003) which may, via a structural coupling providing “‘food’ for its self-reproductive activity” (Hutter, 1992, page 265), prompt the legal system into its own inimitable operation (Harste and Febbrajo, 2016). There is not a clear-cut answer in relation to these environmental irritations: the environmental noise is cacophonous but confusing. The environmental prompts are sometimes observed as too complex for the system to consume.

It is salutary to reflect on what the second-order observation can illustrate about the operationally closed legal system. Knodt (1995), in her introduction to Luhmann’s Social Systems (1995b), describes modern society as a recursive universe in which “disorder, non-linear complexity, and unpredictability are the rule”. The enforcement action by the European Commission has been described as unpredictable. We see that environmental noise, even if heard by the system, can be too complex to be assimilated. Society is just too complex and contingent for effect to follow cause and any equation of cause and effect is facile. Showing the autonomy, complexity and contingency of the legal system, in one simple and segregated case study, is a major contribution of this research. This is an innovative use of systems theory in the current empirical setting.

1.11.1. The meaningfulness of values

The conclusion in relation to functional differentiation could be described as conservative, possibly elevating the legal system to something “quite frightening” (Sinclair, 1992a, page 97), as the legal system is (partially) observed as subject only to its own operational constraints and immune from external influences.

Against this, a more subtle point must be made: observing the legal system as an instrument of values imbues the environmental understanding of the legal system with these values. While the internal perspective on the legal system renders the researcher a “prisoner of a particular semantic” (Andersen, 2000, page 59), the environment does not subscribe to that semantic, but instead observes values as latent in systemic communications.

When this insight is allied to the epistemological basis of the research, where the radical constructivism dictates that the reality created is the reality of the observers, we can reach the conclusion that, for the purposes of the autopoiesis of the system, it is not relevant that the

legal system itself does not refer to morals, or tax avoidance, or unfairness, or lack of ethical considerations by either multinational enterprises or states. Instead the reality is constructed on the basis that observers consider the legal system to have acted on these bases and, based on these observations, this can be said to be a reality. In this way, communication is “a proposal of meaning, which can be understood or not understood, accepted or rejected” (Luhmann, 1995b, page 445).

This accords with the view of society as polyphonic (Andersen, 2011), where different codes vie with each other to be heard in the cacophony of communications. The legal system, itself resolutely communicating in the code of legal/illegal is observed as meaning vastly more. It is invested with motivations of fairness, the imposition of morality on multinational enterprises and the bringing to heel of member states who engage in – that deep semantic reservoir again – unfair or aggressive tax competition. This is the case even with the self-observation by the European Commission of the 2016 Communication which is contained in the 2016 Press Release.

This is not to deny the operationally closed nature of the legal system, something which is a central tenet of systems theory (Luhmann, 1995b). But it is a realisation of the chaotic and contingent nature of social communications; a manifestation of functional differentiation, a world where communications can be misunderstood (Luhmann, 1995b) as well as understood. In the current research, there is disagreement as to the often conflicting problems to which the state aid action was a solution; disagreement as to how, if at all, the legal system is an instrument of certain, disputed, values; and further disagreement as to how, if at all, the legal system was irritated to action. All this provides a nice, empirically justified application of Luhmann's systems theory to demonstrate, on the one hand, the boundary between system and environment and, on the other, the intertwining of system and environment.

Note that the internal perspective on the legal system, an analysis of how the legal system bestirs itself to recursive communication on a particular event, did not produce “textual sediments” (Luhmann et al., 2004b, page 84) of the normative assumptions and values of the legal system (Walker, 2005, Hesselink, 2009). There were only ambiguous and subtle hints of disapproval of the relationship between Ireland and Apple. Yet this muted trace of

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disapproval is in distinction to the external perspective of the legal system, where the interview data shows observers loud in disapproval.

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