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OPINION STATEMENT

Opinion Statement ECJ-TF 3/2020 on the General Court judgments of 15 July 2020 in the Cases T-778/16 and T-892/16, *Ireland v. Commission* and *Apple v. Commission*, on State aid granted by tax rulings fixing the attribution of profits to permanent establishments in Ireland

Prepared by the CFE ECJ Task Force
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This is an Opinion Statement prepared by the CFE ECJ Task Force on the cases Ireland / Commission (T-778/16) and Apple Sales International and Apple Operations Europe / Commission (T-892/16), decided by the General Court (GC) on the 15 July 2020. This follows the earlier judgments rendered by the GC in the Starbucks and Fiat cases concerning the legality of EU Commission´s (hereinafter Commission) decisions considering as prohibited State Aid some transfer pricing (hereinafter TP) rulings granted by Member States to Multinational Enterprises (hereinafter MNE's).

The GC reached a balanced verdict: While agreeing the on the fundamental point regarding the applicability of the arm's length principle to Member States' tax rulings, it concluded that the Commission had failed to apply that principle so as to prove a selective advantage had been granted by the Irish revenue authorities. The Commission lodged an appeal against the GC's judgment before the CJEU (C-465/20 P).

This statement will focus on questions of law addressed by the GC rather than going into detail on factual/TP issues. It will particularly focus on aspects in which the Apple case provides clarifications or reveals changes in approach relative to the GC's the earlier decisions in Star-bucks and Fiat.

I. Background and Judgment of the GC

I.1. Issues

1. The GC was asked to annul the decision by the Commission condemning the Republic of Ireland to recover aid granted to the Apple group by way of tax rulings which endorsed a profit-allocation mechanism that understated taxable profits in Ireland compared to the proper application of the arm's length principle.
2. The addressees of the tax rulings in question were Apple Operations Europe (AOE) and Apple Sales International (ASI), two wholly-owned subsidiaries of Apple Inc in the United States. AOE and ASI were incorporated under Irish law, but not considered resident in Ireland as they were "managed and controlled" elsewhere – arguably the US, where most of their directors, who were also executives of Apple Inc, resided. Under US tax law, AOE and ASI were equally considered to be non-resident due to their foreign incorporation.
3. Income tax liability in Ireland would arise only in respect of income attributable to branches of both companies located in Cork. AOE's branch, which counted several hundred employees, manufactured and assembled a range of computer products, while ASI's branch, which operated through employees of AOE and related service contractors, was engaged in procurement and sales activities for the Apple group across the world. In the Commission's assessment, profits attributed to ASI over the period of 2003 to 2014 had been underassessed to the tune of EUR 100 billion, resulting in a tax charge of EUR 13 billion.[1]
4. The Commission identified two tax rulings from 1991 and 2007 addressed to AOE and ASI as the source of the tax advantage. Emphasizing that tax rulings are themselves legal and justified to give clarity to companies on their tax position, it asserted that the rulings in question had allowed Apple artificially to allocate to the Irish subsidiaries in a way that had "no factual or economic

[1] Commission Press Release 30 August 2016, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923.

justification"[2]: Since they had no employees, physical assets or definable activities outside of Ireland, the rulings endorsing the attribution of key Intellectual Property (IP) and, consequently, virtually all profits to non-existent head offices amounted to reducing the tax base in Ireland in a way that contradicted the arm's length principle.[3] Even if the existence of such head offices were accepted, the Commission would contend that the functions exercised by the PEs in Ireland would, under the right approach for the attribution of assets, result in them being considered to belong to the Irish PEs as no relevant functions were exercised by the head offices.[4]

5. As a subsidiary argument, the Commission contended that even if the IP licences had been correctly attributed to the foreign head offices, the functions exercised by the Irish PEs in relation to that IP licences would necessitate a greater attribution of profits using the correct transfer pricing methodology to arrive at a "reliable approximation of a market-based outcome in line with the arm's length principle".[5] Specifically, the Commission considered it a misapplication of the law by the Irish Revenue to accept, first, a one-sided allocation method resembling the transactional net margin method (TNMM),[6] second, the choice of operating expenses as profit-level indicator,[7] and third, the low profit-margin applied to that indicator.[8]
6. Finally, the Commission argued, in an "alternative line of reasoning",[9] that even if a much narrower reference system had to be chosen, the outcome of the challenged tax rulings granted to Apple[10] was inconsistent with the practice of allocating profits to the Irish PEs of other companies, i.e. that a benefit arose from discretion exercised by the Irish Revenue.[11]

I.2 Judgment

7. The GC held that "the contested decision must be annulled in its entirety", since "the Commission did not succeed in showing to the requisite legal standard that there was a selective advantage for the purposes of Article 107(1) TFEU".[12]

I.2.1 Structure and summary of the judgment

8. The operative part of the 509-paragraph long judgment can be divided in four parts that correspond to the GC's assessment of pleas in law brought by the Republic of Ireland and Apple: (1) that the Commission had exceeded its competences by interfering with national direct tax rules, breaching the principle of fiscal autonomy;[13] (2) arguments against the Commission's primary line of

[2] Ibid.
[3] Commission Decision EU 2017/1283, paras 264 et seq.
[4] Ibid., paras 276-293.
[5] Ibid., para. 325.
[6] Ibid., paras 328-333.
[7] Ibid., paras 334-345.
[8] Ibid., paras 346-359.
[9] Ibid., para. 369.
[10] Unless it is important to identify a concrete legal entity, this OS will simply refer to 'Apple' to talk about the Apple group and its various constituent parts, rather than identifying the legal entities separately.
[11] Commission Decision EU 2017/1283, paras 369-403.
[12] *Ireland v. Commission* (T-778/16 & T-892/16), para. 507.
[13] Ibid., paras 103-124.

reasoning regarding the erroneous allocation of IP licences to Apple's head offices;[14] (3) arguments against the Commission's subsidiary reasoning regarding the inconsistent transfer pricing methodology found in Irish tax rulings;[15] and (4) the Commission's alternative reasoning that the tax rulings were issued on a discretionary basis.[16]

9. The first and fourth part concerned each rather straightforward questions that the GC managed to resolve in about 20 paragraphs, holding, respectively, (1) that the Commission had the power to assess direct tax measures from a state aid perspective and (4) that the Commission had failed to prove the exercise of broad administrative discretion in the case of Apple's tax rulings.
10. By contrast, the second and third part each took over 150 paragraphs and each had to be divided into several sub-questions. In regard to the Commission's primary reasoning (2), the GC accepted the Commission's methodological approach amounting to a joint assessment of advantage and selectivity, but rejected both the Commission's legal and factual assessment of the circumstances surrounding the two tax rulings: It concluded that, regardless of the benchmark applied to assess 'normal taxation' – i.e. the relevant Irish statutory provision of section 25 TCA 1997 (Taxes Consolidation Act 1997), the arm's length principle, or the Authorized OECD Approach (AOA) –, the Commission had to determine the functions actually exercised by Apple's Irish branches, which it had failed to do by relying, instead, on an 'exclusion approach' where it merely assessed the (alleged lack of) functions exercised outside of Ireland.[17] Following this repudiation of the Commission's legal assessment, the GC followed with its own assessment of the facts made "for the sake of completeness",[18] and concluded that the functions exercised by the Irish branches did not justify the allocation of the relevant IP licences there, as they were mere "support activities for implementing policies and strategies designed and adopted outside of that branch" (in case of ASI) or related to manufacturing and assembly of Apple products combined with the development of specific processes and manufacturing expertise (in case of AOE).[19]
11. With respect to the Commission's subsidiary reasoning (3) that the tax rulings supported flawed and inconsistent methodology that led to undervalue the profits chargeable to tax in Ireland, the GC analysed four separate arguments. First, it accepted the Commission's use of OECD guidance on the Transactional Net Margin Method (TNMM) because of its resemblance of the one-sided profit allocation method used in the tax rulings. Second, it rejected the Commission's preferred choice of the Irish branches as 'tested parties' under the TNMM as both incoherent and insufficient: since the Commission premised this (subsidiary) argument with the allocation of the IP licences outside of Ireland being correct – which indicated more complex functions being performed there,[20] on the one hand, and the need to identify the party performing less complex functions as the 'tested party', on the other hand, it could not claim that the choice of the Irish branches was inconsistent with the OECD's guidance;[21] nor would that claim, if it could be made, show an

[14] Ibid., paras 125-314.
[15] Ibid., paras 315-481.
[16] Ibid., paras 482-504.
[17] Ibid., paras 140-249.
[18] Ibid., para. 250.
[19] Ibid., para. 284 (as regards ASI's branch) and para. 295 (as regards AOE's branch).
[20] Ibid., para. 339.
[21] Ibid., para. 340.

advantage being granted to Apple, for which the Commission provided no concrete evidence.[22] Third, the GC rebuked the Commission's claim that operating costs were an inappropriate choice for the profit indicator under the TNMM, noting its argument as both 'imprecise' and 'not in line with the OECD Transfer Pricing Guidelines',[23] and held that even though Ireland and Apple had not been able to explain inconsistencies in the use of that profit indicator in the 1991 and the 2007 tax rulings, the existence of inconsistencies alone was insufficient to prove the existence of an advantage for purposes of Article 107 TFEU.[24] Fourth, the GC, when assessing the profit margin accepted in the tax rulings, once more concluded that the Commission had failed to prove the existence of an advantage both for the 1991 and the 2007 tax rulings, pointing to various flaws in the Commission's arguments while acknowledging methodological shortcomings also in the tax rulings.[25]

12. Even though the result of the case therefore seems a resounding victory for Ireland and Apple – ultimately succeeding in their claims on points (2)-(4) – the GC notably agreed with the Commission's legal analysis in the contested decision in many key aspects. Before providing commentary on some of these results, it seems useful separately to present the legal claims rejected by the GC and those that were accepted as invalidating the Commission decision.

I.2.2 Holdings supporting the Commission's position

13. The GC rejected the broad claim made by Ireland and Apple that the Commission's review of tax rulings violated the fiscal autonomy of a Member State by imposing a de facto harmonisation against the constitutional division of competences within the EU legal framework. Reiterating the well-known steps necessary to identify tax aid measures, it made it clear that the Commission was entitled to review any Member State measure as to its compatibility with Article 107 TFEU, including in the field of direct taxation.[26]
14. The GC sided with the Commission on the question whether a separate examination of two of the conditions for finding aid under Article 107 TFEU, namely advantage and selectivity, was obligatory, holding that "in so far as the Commission did in fact examine both the advantage condition and the selectivity condition, it is irrelevant that that examination covered both conditions simultaneously."[27]
15. The GC agreed with the Commission's definition of the relevant reference system as the "ordinary rules of taxation of corporate profit in Ireland, the intrinsic objective of which was the taxation of profit of all companies subject to tax in that Member State", including, but not limited to (as Ireland and Apple had argued) the provision governing the taxation of trading income arising from an Irish branch, section 25 TCA 1997.[28]

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[22] Ibid., para. 350.
[23] Ibid., para. 357.
[24] Ibid., paras 415-416.
[25] Ibid., paras 418-478.
[26] Ibid., paras 103-124.
[27] Ibid., para. 138.
[28] *Ireland v. Commission* (T-778/16 & T-892/16), para. 163.

16. The GC confirmed the Commission's approach to use the arm's length principle "as a tool" to check whether the level of profit allocated to the Irish branches corresponded to the level of profit that they would have obtained under market conditions.[29] While admitting that the arm's length principle cannot be considered a free-standing obligation on Member States deriving directly from Article 107 TFEU,[30] nor that that principle was itself formally incorporated in Irish tax law,[31] the GC concluded that it was sufficient for the application of the arm's length principle (as a tool) that Irish tax law foresees the taxation of trading profits of a branch "as if it were determined under market conditions".[32]
17. Similarly, the GC found no flaw in the Commission's reliance on the AOA to analyse the correct profit allocation to the branch in accordance with Irish tax law: Although not directly applicable by virtue of either tax treaty or domestic law, the GC considered it sufficient that "there is essentially some overlap between the application of section 25 of the TCA 97 as described by Ireland and the functional and factual analysis conducted as part of the first step of the analysis proposed by the Authorised OECD Approach".[33]
18. The GC upheld the Commission's right to use OECD guidance on the TNMM: recalling its earlier conclusion that the AOA could be used as a tool to assess the appropriate profit allocation and the AOA referred to the OECD TPG, it also agreed that the fact that the profit allocation method approved in the tax rulings resembled one-sided methods such as the TNMM described in those guidelines, on the one hand, and the fact that both Ireland and Apple had themselves submitted transfer pricing reports that relied on TNMM in order to show the profits allocated to Ireland had been made at arm's length were sufficient to show that the Commission had been entitled to make use of that guidance.[34]
19. The GC agreed with the Commission that the tax rulings provided to Apple regarding the calculation of chargeable profits contained methodological defects demonstrating their "incomplete and inconsistent nature",[35] although ultimately held that the Commission had not proven these errors to lead to a reduction of chargeable profits in Ireland.[36]

I.2.3 Holdings supporting the position of Ireland and Apple

20. The GC held in favour of Ireland and Apple with regard to the correct allocation of IP licences to Irish branches in application of section 25 TCA 1997. Following Irish case law relied upon by the complainants, the GC rejected the Commission's "exclusion approach" under which it allocated IP licences to Irish branches on the basis that no significant functions were exercised outside of Ireland, holding that the Commission ought to have investigated whether the Irish branch had in fact control over those assets.[37]

[29] Ibid., para. 225.
[30] Ibid., para. 221.
[31] Ibid., para. 217.
[32] Ibid., paras 211 and 224.
[33] Ibid., para. 239.
[34] Ibid., paras 323-324.
[35] Ibid., para. 479.
[36] Ibid., para. 480.
[37] Ibid., paras 173-187.

21. The GC held that Article 107 TFEU does not give rise to a "free-standing obligation to apply the arm's length principle",[38] agreeing with the complainants' position that the Commission did not have the power independently to determine 'normal' taxation in disregard of national rules of taxation.[39]
22. Although it allowed the Commission to use the arm's length principle as a tool to determine the normal level of taxation for Apple in Ireland,[40] it concluded that the Commission had failed correctly to apply that principle by missing to analyse the activities carried out by the branches themselves.[41]
23. The Commission's approach was not in line with its own chosen standard: While upholding the Commission's right to make use of OECD guidance and in particular the AOA as a benchmark to determine the right profit allocation to the Irish branches, the GC held the OECD guidance in this respect was "at odds with" the Commission's actually used method – again because it did not analyse the functions actually exercised by the branches as the AOA would require.[42]
24. The Commission's assessment of the factual circumstances surrounding Apple's tax treatment was erroneous/insufficient to show an advantage being granted to them: The GC upheld the arguments by the Republic of Ireland and Apple regarding the functions exercised by ASI's and AOE's Irish branches being mere support or manufacturing-related activities not capable of attracting the allocation of the profit-creating IP licences to these branches.[43] It further rejected the Commission's claim that the lack of employees of the head offices meant that they could not exercise those companies' essential functions through their management bodies.[44] Instead, the GC agreed with the complainants that both the strategic decisions relating to the relevant IP and their implementation through managerial decisions were, in essence, taken at the Apple Inc Headquarters in Cupertino without the involvement of Apple's branches in Ireland.[45]
25. The GC held that the mere presence of methodological inconsistencies and inaccuracies in tax rulings pointed out by the Commission was not sufficient to prove the existence of state aid. It was incumbent on the Commission to show the reduction in a charge to tax on the alleged recipients of illegal aid by comparing the actual level of taxation to the 'normal taxation' under the reference framework, which it failed to do. In particular, the GC dismissed the Commission's transfer pricing analysis regarding the choice of an appropriate profit level indicator[46] and the appropriate profit margin[47] as insufficiently motivated to invalidate the transfer pricing reports submitted by the complainants.
26. The GC held that the existence of administrative discretion does not by itself give rise to an advantage for purposes of Article 107 TFEU. It furthermore followed the complainants' contention that the Commission failed to prove the exercise of broad discretion in the case at hand.

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[38] Ibid., para. 221.
[39] Ibid., para. 223.
[40] Ibid., para. 224.
[41] Ibid., para. 228.
[42] Ibid., para. 242.
[43] Ibid., paras 283 and 294.
[44] Ibid., para. 309.
[45] Ibid., paras 296-309.
[46] Ibid., paras 352-417.
[47] Ibid., paras 416-481.

II. Comments

II.1 Introduction

27. We have already commented extensively on the questions of the Commission's level of review of tax rulings, the applicability of the arm's length principle and the burden of proof demanded from the Commission in our Opinion Statement on the *Fiat* and *Starbucks* cases[48]. As the GC's judgment does not pretend to depart from any of those earlier holdings, we shall focus in this statement on the clarifications the judgment brings with regard to these points and on specificities related to the facts of the case, in particular the distinction between the situation of PEs as compared to that of resident entities.

II.2. Developments in state aid doctrine: the reference framework

28. From the perspective of general state aid doctrine, the judgment does not break any particular new ground. The GC's analysis follows the well-established steps to analyse the existence of state aid granted through tax measures, focusing on the identification of a selective advantage by way to derogation from 'normal taxation' as established by the appropriate reference framework. Since the GC concluded that the Commission had failed to establish the existence even of a prima facie advantage, it did not analyse possible justification grounds.
29. The GC's conclusions regarding the reference framework follow settled case law as it agreed with the Commission's view that the "ordinary rules of taxation of corporate profits, which include, in particular, the provisions of section 25 of the TCA 97"[49] formed the basis to determine normal taxation applicable to companies. The GC referred to the overall objective of the Irish corporation tax regime, which it determined to be "to tax the chargeable profits of companies carrying on activities in Ireland, be they resident or non-resident, integrated or stand-alone"[50] in order to assess the comparability of resident and non-resident companies, but also included the specific limitation on the taxation of non-residents carrying on a trade in Ireland as a constitutive element (rather than a derogation) of the reference framework. Based on this, the GC concluded that resident and non-resident companies are comparable if the latter carry on a trade through a branch in Ireland.[51]
30. The difference to the reference framework in *Starbucks* and *Fiat* cases, in which the GC relied on the objective of the corporate income tax system in general in order to determine comparability between integrated and stand-alone companies without singling out specific provisions to support that comparability[52] can be explained with the different factual circumstances of the case: since

[48] Opinion Statement ECJ-TF 1/2020 on the General Court Decisions of 24 September 2019 in The Netherlands v. Commission (Starbucks) (Joined Cases C-760/15 and T-636/16) and Luxembourg v. Commission (Fiat Finance and Trade) (Joined Cases T-755/15 and T-759/15), on State Aid Granted by Transfer Pricing Rulings, European Taxation 5, 222 (2020).

[49] *Ireland v. Commission* (T-778/16 & T-892/16), para. 246.

[50] Ibid., para. 155. Similarly, in para. 200, the EC described the "intrinsic objective" of the ordinary corporate tax rules to be "the taxation of profit of all companies subject to tax in that Member State".

[51] Ibid., para. 161.

[52] See OS ECJ-TF 1/2020, *supra* note 48, at 226.

the scope of taxation of residents and non-residents *generally* differs under the Irish corporate income tax system, it was necessary specifically to identify the provision – section 25 TCA 1997 – that circumscribed the conditions under which both categories of taxpayers would be comparable.

31. Although the GC stayed within the confines of the more traditional derogation approach, it explained that it was not necessary for a tax measure to derogate from an ordinary tax system for it to be selective,[53] thus acknowledging the Commission's wider scope of investigation in specific cases as acknowledged by the CJEU in *World Duty Free*[54] and *Gibraltar*.[55]
32. The GC took a commendable step towards confirming a more substantive rather than formalistic understanding of the traditional three-step test to identify a selective advantage, when it accepted the Commission's joint examination of advantage and selectivity under the condition that it shows both the existence of an economic advantage for a recipient and the exclusion from that advantage of other undertakings in a comparable factual and legal situation.[56] Given the inherent difficulties of separating both questions, as both the identification of an advantage and the identification of selectivity depend on a comparability analysis carried out in light of the objective of the reference system, it has always appeared unnecessary to try clearly to separate both steps. A joint examination has the advantages of greater economy and clarity.

II.3 Clarifications regarding the arm's length principle, OECD guidance, and the burden of proof

33. The GC's judgment brings few clarifications with respect to the questions already raised in earlier transfer-pricing cases. It had little difficulty confirming the application of the arm's length principle. Although it spent more than thirty paragraphs considering the question,[57] the steps to reach the result are quite straightforwardly contained in only a few paragraphs: The GC established, first, that, under Irish law, the profit of a branch "is to be taxed as if it were determined under market conditions".[58] It then confirmed that the determination of taxation under market conditions, according to Irish case law, involved "adjustments equivalent to those proposed on the basis of the arm's length principle, in particular in the OECD Transfer Pricing Guidelines".[59] It derived directly therefrom that the Commission was entitled to use the OECD TPG as a tool to assess the profit allocation agreed upon in the contentious tax rulings.[60] In the same vein, the mere fact that national administrative practice for the determination of profit allocation to branches in essence resembled the AOA was sufficient for the GC to allow the Commission to make use of that OECD guidance for purposes of its state aid investigation.[61]
34. It is notable that the GC appears to confirm the applicability of the arm's length principle (and, by extension, both the OECD TPG and the AOA) only by virtue of a domestic law proxy rather than as

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[53] *Ireland v. Commission* (T-778/16 & T-892/16), para. 148.
[54] *Commission v. World Duty Free Group and Others* (C-20/15 P, EU:C:2016:981), para. 76.
[55] *Commission and Spain v. Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).
[56] *Ireland v. Commission* (T-778/16 & T-892/16), para. 135.
[57] Ibid., paras 192-225.
[58] Ibid., para. 211.
[59] Ibid., para. 219. The GC further referred – in para. 220 – to the fact that Ireland had enshrined the arm's length principle in (certain of) its bilateral tax treaties, but this appears only to be an inconsequential remark.
[60] Ibid., paras 224-225.
[61] Ibid., para. 239.

a self-standing requirement that directly flows from the recognition of the comparability of non-residents' branches and resident companies. By contrast, in *Starbucks* and *Fiat*, the GC seemingly accepted the application of the arm's length standard as an inevitable consequence of a national corporate income tax system's objective to tax the total profit of both integrated and standalone companies.[62] Even if true, this apparent difference should, however, not be seen to indicate either a clarification nor a departure from those earlier judgments. It more likely only reflects the circumstances of the case: While the *Starbucks* and *Fiat* cases concerned the correct taxation of resident companies that were part of an international group, and thus focussed on the comparison of standalone companies with integrated companies, the *Apple* case concerned the correct allocation of income to branches on particular entities. The pair of comparison was thus quite different, as the GC briefly confirms by stating that the present case was "not linked to the prices of intra-group transactions within a group of undertakings".[63]

35. With regard to the use of the arm's length principle as a 'tool' or 'benchmark', in which form the GC has already accepted it in *Starbucks* and *Fiat*, the judgment does not bring further elaboration. The criticism aimed at the lack of clarity of that concept from our earlier Opinion Statement[64] thus continues to be pertinent.
36. The GC repeated its statement from *Starbucks* and *Fiat* concerning the Member State's margin of appreciation to be respected in the assessment of tax rulings under the arm's length benchmark that the Commission "can identify an advantage for the purposes of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation"[65]. However, it does nothing to elaborate that statement. In its detailed critique of the Commission's own transfer pricing study which it assessed in comparison to the expert reports submitted by Ireland and Apple, it did not substantively refer back to that statement, either. This may be so because it found grounds to dismiss the Commission's arguments without having to resort to the Member State's margin of appreciation as a defence, given the numerous methodological flaws it found in the Commission's study.
37. As already in its earlier transfer-pricing judgments, the GC maintained that it was incumbent on the Commission to prove the existence of an advantage being granted to the taxpayer. In effect, it put a high evidentiary burden on the Commission, rejecting the alternative view that Member States must prove the compatibility of an administrative decision with its own law: even though Apple admitted that there had been no scientific basis for the profit margin they proposed to the Irish Revenue,[66] and seemingly no objective basis for them existed at the time they were approved by the tax rulings, the Commission was still obligated to show that the tax assessments were materially lower than they ought to have been under Irish law. For instance, the GC considered the "lack of documented analysis … indeed a regrettable methodological defect",[67] but concluded that this defect was insufficient to show the existence of aid. The Commission could not "confine itself to

[62] *The Netherlands v. Commission* (T-760/15 and T-636/16), para. 139 and *Luxembourg v. Commission* (T-755/15 and T-759/15), paras. 26 and 131.

[63] Ibid., para. 205.

[64] *Supra* note 48.

[65] *Ireland v. Commission* (T-778/16 & T-892/16), para 216.

[66] *Ireland v. Commission* (T-778/16 & T-892/16),, para. 432.

[67] Ibid., para. 500.

invoking a methodological error but must prove that an advantage has actually been granted, inasmuch as such an error has actually led to a reduction in the tax burden of the companies in question as compared to the burden which they would have borne had the normal rules of taxation been applied".[68]

38. The impact of the transfer pricing reports provided by the parties in response to the Commission investigation to justify—*ex post facto*—the amount of profits subject to corporate tax in Ireland is uncertain. An interesting question, which the judgment allows one only to speculate on, is whether the GC would have been equally strict on the Commission's factual assessment in the absence of such transfer pricing reports. An indication may be seen in the GC's statement that the "submission of those ad hoc reports by Ireland and Apple Inc. cannot alter the burden of proof concerning the existence of an advantage in the present instance, which rests with the Commission".[69] That is to say, even had the Commission succeeded in pointing to mistakes in the tax advisers' ad hoc reports, this would not have been sufficient proof of an advantage being granted to Apple.[70] It is unclear why the GC went on to examine the errors in those reports claimed by the Commission regardless.[71]

II.4 Allocation of income to non-residents and the application of the AOA

39. The GC might appear rather generous to have allowed the Commission to use the AOA guidance as a benchmark on the somewhat thin basis that Irish law required branch profits to be determined in a manner with "essentially some overlap" with "the functional and factual analysis conducted as part of the first step of the analysis proposed by the AOA".[72] Such a low standard of similarity between domestic law and practice, on the one hand, and an approach published as mere guidance by an international standard setter, on the other, is concerning.
40. First, it could lead to the de-facto import of rules that Member States have deliberately decided against adopting and may not even be able to adopt given their existing tax treaty obligations. While the GC asserts that the AOA "reflects international consensus regarding profit allocation to permanent establishments",[73] this is too generous a characterisation. Although the GC is undoubtedly correct to describe the AOA as based on work by groups of experts, the fact alone that that work was undertaken "not constrained by either the original intent or by the historical practice and interpretation of Article 7"[74] and the consequent fact that countries could only implement it fully if they concluded new tax treaties shows that it cannot be an approach that would by necessity be applied by all Member States. In this respect, it is also notable that the UN committee of experts rejected the AOA as incompatible with the UN Model Tax Convention.[75]

[68] Ibid., para. 416.
[69] Ibid., para. 453.
[70] Ibid., para. 452.
[71] Ibid., paras 454-463.
[72] Ibid., para. 239.
[73] *Ireland v. Commission* (T-778/16 & T-892/16), para. 237.
[74] See OECD, 2010 Report on the Attribution of Profits to Permanent Establishments (22 July 2010), p. 8.
[75] See United Nations Model Tax Convention between Developed and Developing Countries: Commentary on Article 7, para. 1 (2018), Models IBFD. While Article 7 of the UN Model Tax Convention differs from the OECD Model Tax Convention, this rejection shows clearly the thin ground on which the GC can claim the AOA to be reflecting "international consensus".

41. Second, it creates uncertainty as to when guidance by the OECD may be determinative of a state aid analysis into the profit allocation to a branch in cases where a Member State has a rather ill-defined approach in this respect that clearly does not 'resemble' the AOA, or, conversely, where a Member State has an elaborate set of rules as part of its own law or practice for that determination that directly contradicts elements of the AOA. Following the GC's reasoning in this case, it would seem unlikely that it would endorse the Commission relying on the AOA in either of these situations. Indeed, it transpires from the GC's explanations in paragraphs 238, 239, 240, 323 that it endorses an application of the AOA only to the extent it is in substance reflected in national law. For this to be fulfilled, it seems necessary at least that national law requires a functional and factual analysis of branch activities followed by the application of methods to determine the market value of these activities.
42. The abovementioned concerns are only partially alleviated by two counterbalancing holdings by the GC: First, the high standard of proof required by the GC, which forces the Commission concretely to identify the reduction in tax burden that resulted from any inaccuracy in the tax administration's application of the national rules relative to their following the OECD guidance. Second, the rather high threshold the GC demands to identify a derogation from the correct profit allocation that can be called an advantage under Article 107 TFEU, to wit a "variation between the two comparables [that] goes beyond the inaccuracies inherent in the methodology used" to obtain "a reliable approximation of a chargeable profit generated under market conditions".[76]

II.5 Open Issue: Member States' freedom to define their tax jurisdiction

43. Does the judgment give more clarity about MS' limits regarding the definition their own tax jurisdiction? The GC concluded that resident and non-resident companies find themselves in comparable circumstances, but only insofar as the latter are subject to tax in the MS.[77] This suggests that MS remain entirely free to define the territorial limits of their tax jurisdiction without risking a state aid challenge, at least as far as the taxation of non-resident companies is concerned. However, memories of the *Gibraltar* case may raise doubts about this: there, a seemingly fundamental decision regarding the substantive scope of the tax system applicable to companies with a strong territorial link to the exclusion of off-shore companies was held to be an inconsistent derogation from the general object and purpose of the tax system. In a similar manner, the Commission might have argued that Ireland's decision to consider ASI and AOE to be "non-resident" in Ireland would be fundamentally at odds with the objective of its corporate income tax system to tax all companies in Ireland, or, alternatively, that such companies as those, which have a stronger legal nexus to Ireland and no such connection to another state, ought – for Ireland's corporate income tax system to be consistent – to be taxed on the entirety of their profits regardless of their status as resident or non-resident. The special circumstances that premised the Commission's decision and confirming CJEU judgment in the *Gibraltar* case, namely the deliberate effort made by a legislature to arrange its tax law in such a way as to grant a benefit to certain types

[76] *Ireland v. Commission* (T-778/16 & T-892/16), para. 216.
[77] See *supra* paragraph 29.

of companies while maintaining a superficially neutral tax system would arguably have been equally fulfilled for Ireland.[78]

III. The Statement

44. The CFE welcomes the clarifications brought by the GC's judgment as regards the admissibility of the Commission's action in checking the compatibility of Member States' tax rulings with the TFEU's prohibition of State aid, in particular with respect to the Commission's evidentiary burden to show that a ruling provides a selective advantage and the need to take account of the inaccuracies inherent in the transfer pricing methodology when assessing the existence of State aid.
45. The CFE appreciates the GC's methodological clarifications concerning of the notions of advantage and selectivity, and the need to derive the methodology to be applied in the context of the allocation of profits to a branches of non-resident companies from the domestic law of a Member State, so that the Commission is permitted to use the arm's length principle and the Authorized OECD Approach as tools to assess the correct amount of taxation only where a sufficient basis for this application can be found in that Member State's domestic law.
46. In light of the pending appeal in *Apple* before the CJEU, the CFE alerts to the deficits of legal certainty that might be created from a more expansive interpretation of the Commission's powers to interfere with the ordinary application of domestic tax rules for businesses across Europe, particularly taking into account that the recovery of aid may be requested up to the ten previous years.

[78] Ireland's residence rules prior to 1999 were straightforwardly based on a "management and control" test developed by case law. To combat the growing number of "stateless" companies, Ireland enacted a statutory residence definition based on a company's place of incorporation, but allowed companies to escape that residence definition if they were controlled by companies in treaty partner states and carried on a trade in Ireland. A further change of the rules in 2013 ostensibly targeted entities such as ASI and AOE, but again provided a number of escape routes. For a description see *Antony Ting, Old wine in a new bottle: Ireland's revised definition of corporate residence and the war on BEPS*, British Tax Review 237 (2014).