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Apple Case: State Aid Concerning the (Mis) allocation of Profits to Irish PEs – Opinion Statement ECJ-TF 2/2024 on the Decision of the CJEU of 10 September 2024 in *Commission v. Ireland and Others* (Joined Cases C-465/20 P)

In this CFE Opinion Statement, submitted to the EU Institutions in September 2024, the CFE ECJ Task Force comments on the CJEU's decision of 10 September 2024 in *Commission v. Ireland and Others* (Joined Cases C-465/20 P), in which the Court addressed the question of whether or not tax rulings issued by the Irish tax administration to Irish incorporated but non-resident companies that form part of the Apple Group are compatible with EU rules on State aid and, in particular, if the General Court's holding, that the Commission had failed to prove to the required standard that such aid had indeed been granted, was correct in law.

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Commission v. Ireland (Apple)* (Joined Cases C-465/20 P) [hereinafter the *Apple Case*], in which the Court of Justice of the European Union (Grand Chamber) delivered its decision on 10 September 2024.[1]

The *Apple Case* concerns the question of whether tax rulings issued by the Irish tax administration to Irish incorporated but non-resident companies that form part of the Apple Group are compatible with EU rules on State aid and, in particular, if the General Court's holding that the Commission had failed to prove to the required standard that such aid had indeed been granted, was correct in law.

The Court set aside the General Court decision of 15 July 2020 in *Apple Sales International and Apple Operations Europe v. Commission* (Joined Cases T-778/16 (*Ireland v. Commission*) and T-892/16),[2] which had annulled the European Commission's finding of State aid. The CJEU's Grand Chamber found that the General Court made errors in its understanding of the Commission's decision[3] that led it to wrongly conclude that the Commission had failed to demonstrate that the tax rulings led to favourable tax treatment of the non-resident entities in comparison to non-integrated standalone companies and other companies dealing at arm's length. In reaching this result, the Grand Chamber decision follows the Opinion of Advocate General Pitruzzella delivered on 9 November 2023.[4]

Rather than referring the case back to the General Court for reconsideration, as the Advocate General had recommended, the Court decided to render a final decision on

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1. IE: CJEU, 10 Sept. 2024, Case C-465/20 P, *Ireland v. Commission*, Case Law IBFD.
2. IE: CJEU, 15 July 2020, Joined Cases T-778/16 (*Ireland v. Commission*) and T-892/16 (*Apple Sales International and Apple Operations Europe v. Commission*), EU:T:2020:338, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=468995 (accessed 15 Oct. 2024).
3. Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2017:187:TOC (accessed 15 Oct. 2024) [hereinafter Commission Decision].
4. IE: Opinion of Advocate General Pitruzzella, 9 Nov. 2023, Case C-465/20 P, *European Commission v. Ireland, Apple Sales International, Apple Operations International, formerly Apple Operations Europe, Grand Duchy of Luxembourg, Republic of Poland*, EFTA Surveillance Authority, Case Law IBFD.

the validity of the Commission decision, reinstating it in full.

This Opinion Statement seeks to explain and analyse the CJEU's reasoning both with respect to the annulment of the General Court's decision and its final ruling on the granting of illegal State aid to the Apple Group.

2. Background, Facts and Issues

The CJEU decision brings the most high-profile tax State aid case to a close, more than ten years after the European Commission (Commission) had opened a formal investigation[5] into the tax treatment given to the Apple Group in Ireland through administrative rulings issued in 1991 and 2007. 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 the Republic, as they were "managed and controlled" elsewhere – arguably the United States, 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. The disputed profits in this case, amounting to around EUR 100 billion, were generated from IP licences owned by ASI and AOE pursuant to a cost-sharing agreement with Apple Inc.

Despite this fact, income tax liability in Ireland for Apple arose only in respect of income attributable to branches of both companies located in Cork (the "Irish branches"). 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, the tax rulings granted ASI tax breaks amounting to EUR 13 billion over the period of 2003 to 2014 by systematically misattributing almost all of the relevant profits outside its Irish branch, leading to illegal State aid in the same amount for the Apple Group.[6]

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 to artificially allocate income to the Irish subsidiaries in a way that had "no factual or economic justification":[7] 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.[8] 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 to 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.[9]

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 those 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".[10] 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),[11] second, the choice of operating expenses as a profit-level indicator[12] and third, the low profit margin applied to that indicator.[13] Additionally, the Commission argued, based on an "alternative line of reasoning",[14] that even if a much narrower reference system had to be chosen, the outcome of the challenged tax rulings granted to Apple[15] 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.[16]

The CJEU was called on to rule on the Commission's appeal against the General Court decision in *Apple Sales International and Apple Operations Europe v. Commission* (Joined Cases T-778/16 (*Ireland v. Commission*) and T-892/16),[17] which had held that the Commission had failed to show to the requisite legal standard that there was a selective advantage for the purposes of article 107(1) of the Treaty on the Functioning of the European Union (TFEU) (2007).[18] In particular, the General Court had rebuked the Commission for applying an "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 further whether the Irish branch did, in fact, have control over those assets. While allowing the Commission to use the arm's length principle and OECD guidance, in

5. Commission Decision of 11 June 2014, OJ C 369 (17 Oct. 2014), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2014:369:TOC (accessed 15 Oct. 2024) [hereinafter Opening Decision].
6. Commission Press Release IP/16/2923 (30 Aug. 2016), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923 (accessed 15 Oct. 2024).
7. Id.
8. Commission Decision, *supra* n. 3, at para. 264 et seq.
9. Id., at paras. 276-293.
10. Id., at para. 325.
11. Id., at paras. 328-333.
12. Id., at paras. 334-345.
13. Id., at paras. 346-359.
14. Id., at para. 369.
15. Unless it is important to identify a concrete legal entity, this Opinion Statement will simply refer to "Apple" as including the Apple group and its various constituent parts, rather than identifying the legal entities separately.
16. Commission Decision, *supra* n. 3, at paras. 369-403.
17. *Ireland and Others v. Commission* (T-778/16 and T-892/16).
18. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD. CFE ECJ Task Force, *Opinion Statement ECJ-TF 3/2020 on the General Court Decisions of 15 July 2020 in Ireland v. Commission and Apple v. Commission (Joined Cases T-778/16 and T-892/16) on State Aid Granted under Tax Rulings Fixing the Attribution of Profits to Permanent Establishments in Ireland*, 61 Eur. Taxn. 2/3, pp. 109-116 (2021), Journal Articles & Opinion Pieces IBFD.

particular the Authorized OECD Approach (AOA),[19] as a benchmark to analyse the correct attribution of income to Irish branches under Irish law (specifically, section 25 of the Taxes Consolidation Act, 1997 (TCA 1997)),[20] the General Court had held that the Commission had made substantive errors in applying that benchmark, failing to conduct a detailed analysis of the functions exercised in the Irish branches that would justify its decision to attribute the IP licences giving rise to almost all of the entities' profits to those branches.[21] The Commission agreed with Ireland and Apple that both the strategic decisions relating to the relevant IP and their implementation through managerial decisions were, in essence, taken in Cupertino, CA without the involvement of Apple's branches in Ireland.[22]

In its appeal, the Commission raised several main pleas: First, that the General Court had mischaracterized the Commission decision by disregarding the analysis it had made of the functions exercised in the Irish branches in respect of which the use of the IP licences in question was crucial and claiming that the Commission had relied on an "exclusion approach".[23] Second, the General Court had erred in taking into account, in its analysis of the correct attribution of profits to the Irish branches, functions actually exercised by Apple Inc., which all parties, as well as the General Court, had held were not relevant to that analysis.[24] In this context, the Commission claimed that functions performed by Apple Inc., even if performed "for the benefit of" or "on behalf of" ASI and AOE, had to be disregarded;[25] it further asked the CJEU to declare the contracts provided by Apple as inadmissible evidence.[26] These contracts, negotiated and signed by the parent company Apple, were not to be considered admissible evidence provided to the Commission during the administrative procedure.[27] Third, it argued that the General Court wrongly accepted formal acts taken by the directors of ASI and AOE as constituting functions performed by their head offices in relation to the Apple Group's IP licences held by those companies.[28]

The Commission's second ground of appeal, which related to the General Court's dismissal of the Commission's subsidiary line of reasoning, was ultimately not ruled upon in the decision and is thus also omitted from this summary.

Notably, neither Ireland nor Apple launched a cross-appeal against the General Court decision even though the General Court had ruled in favour of the Commission decision in respect of several key elements contested by Ireland and Apple, such as the choice of reference framework, the application of the arm's length principle and reliance on the AOA as a benchmark for determining the correct attribution of profits to branches under Irish law.

19. *See Ireland and Others v. Commission* (T-778/16 and T-892/16), para. 240.
20. IE: Taxes Consolidation Act, 1997 (amended in 2021) [hereinafter TCA 1997].
21. *Ireland and Others v. Commission* (T-778/16 and T-892/16), paras. 242-243.
22. Id., paras. 296-309.
23. *See Ireland v. Commission* (C-465/20 P), para. 95.
24. Id., paras. 134-144.
25. Id., para. 137.
26. Id., para. 142.
27. Id.
28. Id., para. 224.

3. The Decision of the Court of Justice

3.1. Introductory remarks

The CJEU judgment consists of two separate parts: In the first part (paragraphs 71-259), it assessed the Commission's first ground of appeal and concluded that the General Court's decision should be annulled. In the second part (paragraphs 260-404), rather than refer the case back to the lower court, the CJEU proceeded to give its own decision on the merits of the claims made by Ireland and Apple against the Commission decision. In this respect, it rejected the claimants' arguments and thus decided to reinstate the Commission decision in full. While the CJEU's ruling in the first part fully reflects the conclusions of Advocate General Pitruzzella, the CJEU did not follow his Opinion with respect to its ability to rule on the merits of the case.

3.2. The first part of the decision: Errors made by the General Court

The CJEU considered four arguments[29] brought by the Commission to annul the General Court decision and in substance agreed, in virtually all respects, with the Commission.

The first argument brought forward by the Commission and accepted by the CJEU was that the General Court had misinterpreted the Commission decision when it found that it had applied the "exclusion approach", consisting in reliance on the lack of employees and physical presence in the head offices of ASI and AOE without an attempt to analyse the functions performed in the Irish branches in its assessment of the allocation of profits generated through the exploitation of Apple Group's IP licences.[30] In the CJEU's view, the Commission had, in fact, considered the various functions of ASI and AOE's head offices, branches and Apple Inc. and drawn its conclusion on the allocation of IP licences and related profits on the basis of two separate findings: First, the absence of critical functions performed and risks assumed by the head offices, and, second, the multiplicity and centrality of the functions performed and risks assumed by those branches.[31] It thus concluded, in agreement with the Advocate General, that the General Court's decision had distorted

29. In the description of the judgment, this Opinion Statement ignores the complaint that the CJEU did not rule on and present the arguments of interest in a simplified structure to improve the flow. Technically, the judgment divides its analysis into the first and second "grounds" of appeal, ruling, however, only on the first ground. That first ground of appeal is, in turn, divided into three "parts", each of which consists of a number of "complaints", only some of which the CJEU found necessary to rule on (*see* e.g. para. 133 noting that there was no need to rule on the second and third complaints of the first part of the first ground of appeal and para. 223 as regards the first complaint of the second part of the second ground of appeal). Each complaint is further divided into different arguments.
30. *Ireland v. Commission* (C-465/20 P), paras. 117-132.
31. Id., para. 129.

the content of the Commission decision when holding that it had applied an exclusion approach.[32]

The Commission's second successful argument concerned the fact that the General Court had taken into account evidence submitted by Apple during the judicial procedure, namely email exchanges and powers of attorney granted by ASI to Apple Inc. in relation to contracts with several third parties concluded by Apple Inc. and ASI through signatures of its respective directors.[33] The CJEU recalled that the lawfulness of a State aid decision must be assessed "in the light of the information available to the Commission on the date when the decision was adopted and which could have been obtained, upon request by the Commission, during the administrative procedure".[34] The CJEU then dismissed the relevance of the email exchanges since they did not contain any reference to ASI. With respect to the powers of attorney, the CJEU noted that, first, the General Court had relied on them as evidence, although they had only been produced by Apple – if at all – during various stages of the judicial process[35] and, second, that the Commission could not be criticized for not having obtained them earlier, since it had only received "vague and unsubstantiated" information from Apple as to the existence of such powers of attorney during the administrative procedure.[36]

The CJEU also upheld the Commission's third argument, according to which the General Court had misapplied Irish law (specifically, section 25 of the TCA 1997) by comparing functions performed by the Irish branches with those performed by Apple Inc. when analysing the correct allocation of profits, despite its previous correct identification of the applicable standard being a comparison of the functions performed within the relevant entity. In this respect, it held that the General Court's assessment of the Commission decision was "based largely on an examination of functions performed at the level of Apple Inc., which the Court itself considered not to be relevant in the present case, according to its interpretation of Irish law".[37]

Fourth, and finally, the CJEU also upheld the Commission's third part of its first ground of appeal relating to the General Court's findings regarding the activities of the head offices of ASI and AOE. While rejecting several of the points made by the Commission in this regard – in particular, the claim that the General Court had erroneously confirmed that those head offices performed significant people functions in relation to the relevant IP licences on the basis of ASI and AOE's participation in negotiations and contract conclusions[38] and the criticism of the General Court's reliance on a singular minute entry relating to the granting of powers of attorney to Apple Inc.[39] –, the CJEU confirmed that the General Court had imposed on the Commission an "excessive burden of proof" by preventing the Commission from relying on the fact that a company's board minutes did not mention certain categories of decisions to support its assessment that those decisions do not exist.[40]

3.3. The second part of the decision: CJEU ruling on the substance of the Commission decision

Having thus concluded that the General Court decision had been vitiated due to a number of legal errors, the CJEU considered the need for a referral back to the General Court but concluded – contrary to Advocate General Pitruzzella's Opinion – that it had all the information necessary to rule on the pleas made by Ireland and Apple against the Commission decision and thus give a final decision and bring the dispute to an end.[41] Accordingly, it devoted the second part of the decision, amounting to just under 150 paragraphs, to rule on six main arguments made by Ireland and Apple against the Commission decision, rejecting each of them in turn and upholding the Commission decision. These pleas concerned the existence of a selective advantage for ASI and AOE (paragraphs 294-311), the use of state resources (paragraphs 314-321), the parties' right to be heard during the administrative procedure (paragraphs 330-344), an alleged breach of legal certainty and non-retroactivity (paragraphs 351-366), an alleged infringement of Ireland's fiscal autonomy (paragraphs 370-384) and an alleged failure to state (sufficient) reasons in the Commission decision (paragraphs 389-397). In respect of all of those points, the CJEU held the objections made by Ireland and Apple to be unjustified.

The CJEU held, first, that the Commission had correctly analysed the existence of a selective advantage through the jurisprudentially developed three-step test by identifying the appropriate reference system, assessing the derogation from that reference system through the application of the tax rulings at issue and inquiring into but rejecting the existence of a justification based on the nature and logic of the system of taxation in Ireland. It rejected the claim that the Commission erroneously relied on a presumption of selectivity attached to individual measures, noting that even if it had, "that error could not have affected its finding of selectivity" insofar as it correctly applied the three-step test.[42] The CJEU declined to reopen the question of the correct reference system, noting that, in the absence of a cross-appeal by Ireland or Apple, the General Court's decision had "the force of res judicata"[43] in this respect. It followed therefrom that ASI and AOE, being non-resident entities, had to be considered comparable to any resident entity.[44] The CJEU subsequently endorsed

32. Id., paras. 130 and 254.
33. Id., paras. 180-193.
34. Id., para. 183, citing ES: CJEU, 10 Nov. 2022, Case C-211/20 P, *Valencia Club de Fútbol v. Commission*, EU:C:2022:862, para. 85.
35. Id., para. 187.
36. Id., paras. 188-189 and para. 255.
37. Id., para. 221 and para. 256.
38. Id., para. 250.
39. Id., para. 247.
40. Id., paras. 245 and 257.
41. Id., paras. 260-267.
42. Id., paras. 300-301.
43. Id., para. 303.
44. Id., para. 305. Note that the CJEU lists, by way of example, a number of different resident entities to which ASI and AOE may thus be considered comparable, as "resident companies taxed in Ireland which are not capable of benefiting from such advance rulings by the tax administration, that is, in particular, non-integrated standalone companies, integrated group companies that carry out transactions with third parties or integrated group companies that carry out transactions with group

the Commission's conclusion that the tax rulings had indeed led to lower taxation of ASI and AOE compared to non-integrated companies whose taxable profit reflects prices determined on the market and negotiated at arm's length.[45] It, finally, rejected the argument made by Ireland that a different treatment could be justified by the nature and logic of the system of taxation in Ireland, namely the application of the territoriality principle.

The CJEU held, second, that the requirements of state intervention and the use of state resources to find illegal State aid had been fulfilled: Tax rulings issued by Ireland's tax administration were clearly imputable to the Irish state;[46] and the mitigation of charges (renouncement of revenue) that are normally included in the budget of an undertaking, which are not considered direct subsidies *stricto sensu*, but are similar in character and effect to subsidies, are considered to be State aid.[47] Such was the case with the tax rulings insofar as the Commission showed that they granted a selective advantage to Apple.[48]

As regards, third, alleged infringement of the rights of Ireland and Apple to exercise their right to be heard during the administrative procedure, the CJEU found no violation of procedural requirements incumbent on the Commission. In particular, the CJEU declined to hold the Commission responsible for not requiring the disclosure of information that might have confirmed or refuted other relevant information, noting that any such information relating to the Irish tax system or the activities of Apple in Ireland ought to have been disclosed by the parties if they considered it relevant.[49]

Fourth, the CJEU found that the Commission had not violated the principles of legal certainty and non-retroactivity through the application of a novel interpretation of article 107(1) of the TFEU; instead, it held that the Commission's reasoning applied was not only not novel but "it could not have appeared to be unforeseeable in the light of the principles established by the earlier case-law relating to State aid of a fiscal nature".[50] It also rejected the argument that the Commission had retroactively applied the AOA, noting that the Commission had not relied on it but "referred to that framework only in so far as it offers valuable guidance for the purpose of determining whether a method for fixing the taxable profit of a branch produces a reliable approximation of a market-based outcome in line with the arm's length principle".[51]

Fifth, in relation to an alleged infringement of Ireland's fiscal autonomy, the CJEU recalled that areas not subject to harmonization under EU law are not excluded from the scope of the treaty provisions on State aid but that Member States are required to exercise their competence in compliance with EU law.[52] With respect to the specific claim that the Commission had imposed procedural rules for assessing national taxation that were unrelated to Irish law, such as the existence of profit allocation reports, their proper review prior to the issuance of tax rulings and specific investigation requirements for the tax administration, the CJEU rejected Ireland's claims, recalling that the Commission's finding of State aid was not based on an infringement of any such procedural rule.[53] Neither did the characterization of ASI and AOE as "stateless for tax purposes" found in various recitals to the Commission decision mean that it had relied on it in its assessment.

The CJEU also rejected the sixth and final plea, an alleged failure by the Commission to state reasons for its decision in a sufficiently clear manner. Ireland and Apple had raised this claim specifically with respect to the application of the arm's length principle, the possibility of reduced recovery in the event of a retroactive recording of profits in countries other than Ireland, a lack of reasoning in relation to the effect of the tax rulings on intra-EU trade and a contradiction in the Commission's claim that ASI and AOE were managed and controlled from the United States while also claiming that they were controlled from Ireland. The CJEU first set out the principle that arguments challenging the substance of the decision were irrelevant in the context of an appeal alleging the breach of an essential procedural requirement.[54] A statement of reasons, as required by article 296 of the TFEU, must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted that act. It is not necessary, however, for the reasoning to go into all the relevant facts and points of law since an assessment is to be made "with regard to not only its wording but also to its context".[55] Since Ireland and Apple were not only closely involved in the formal investigation procedure but also clearly in a position to effectively challenge the merits of the decision at issue – as evidenced by their submissions before the General Court[56] – and the CJEU found itself fully capable of exercising its power of review over the Commission decision in light of the reasoning provided therein,[57] the plea was held to be unfounded.

4. Comments

4.1. Preliminary remarks and consistency with prior case law (*Fiat*, *Engie*)

The CJEU's decision is the second ruling of the European Union's top court in a high-profile tax ruling case delivered by the Grand Chamber, which implies that the issues at stake are particularly complex and important.[58] Apart from the large sum at stake, this importance (rather than particular complexity) is in part due to its tension with

companies with which they are linked by fixing the price of those transactions at arm's length".

45. Id., para. 306.
46. Id., para. 316.
47. Id., para. 319.
48. Id., para. 320.
49. Id., para. 341.
50. Id., para. 358.
51. Id., para. 364.
52. Id., para. 370.
53. Id., para. 380.
54. Id., para. 390.
55. Id., para. 392.
56. Id., para. 393.
57. Id., para. 394.
58. *See* Rules of Procedure of the Court of Justice, OJ L 265, art. 60, para. 1, pp. 1-42 (29 Sept. 2012).

the decision in *Fiat* (Case C-885/19 P),[59] which was also decided by the Grand Chamber. The contrast between these two decisions is evident on several levels: the considerable difference in length (the later decision being more than three times the length of the earlier one), the opposite outcome and, most importantly, the apparent difference in its approach to the use of "parameters and rules external to the tax system".[60] While the Court had, in *Fiat*, applied a very high standard to the Commission, precluding the taking into account of any such parameters in the examination of the existence of a selective tax advantage "unless that national tax system makes explicit reference to them",[61] in Apple's case it appears to have found it sufficient for the application of the AOA as an effective assessment framework that the national rules "corresponded in essence"[62] to the process described in that OECD guidance.

A key element of the Commission's case in all the prominent tax ruling decisions was that the correct application of domestic law in order to achieve equal treatment of integrated and non-integrated companies – if and when this objective could be derived from domestic law[63] – necessarily resulted in the application of the arm's length principle, a fact the Commission claimed could be derived from the CJEU's decision in *Belgium and Forum 187* (Joined Case C-182/03 and C-217/03).[64] While the Commission succeeded in this claim in all cases before the General Court, losing (in *Apple*, *Starbucks* and *Amazon*) merely on the question of whether or not the Commission had correctly applied that principle to the facts of the case, the CJEU explicitly rejected it in *Fiat*:[65]

> [C]ontrary to what the General Court held in paragraph 142 of the judgment under appeal, the judgment of 22 June 2006, *Belgium and Forum 187 v Commission* […], does not support the position that the arm's length principle is applicable where national tax law is intended to tax integrated companies and standalone companies in the same way, irrespective of whether, and in what way, that principle has been incorporated into that law.

Since the General Court's ruling in *Apple*, which was issued before the CJEU's decision in *Fiat*, relied on *exactly* the same argument – in fact, paragraph 213 of the General Court's decision in *Apple* is almost a copy of paragraph 142 of its decision in *Fiat*, which the CJEU held to be a misunderstanding of its own case law[66] – it is indeed a surprise that the CJEU, in reviewing that ruling, found no fault with that claim. In *Apple*, the CJEU remained entirely silent on the role and interpretation of *Belgium and Forum 187 v. Commission*.

An equally strong contrast exists with the Court's decision in *Engie*,[67] as it relates to the burden on the Commission to show a tax administration's derogation from its own law in a particular decision. The CJEU held, in that case, that the Commission could not conclude that the non-application of Luxembourg's GAAR by the tax authorities led to the granting of a selective advantage "unless that non-application departs from the national case law or administrative practice relating to that provision",[68] thereby setting a clear standard of review for the correct application of national legislation that the Commission needed to follow. By contrast, the CJEU did not consider whether the Commission had identified a departure from Irish case law or administrative practice in its assessment of the tax rulings in question, instead it was satisfied with the General Court's assessment as to the content of Irish law.[69] Unlike the General Court and Advocate General Pitruzzella, who had both cited and engaged with Irish case law,[70] the CJEU did not make any such reference. This

59. LU: ECJ, 8 Nov. 2022, Case C-885/19 P, *Fiat Chrysler Finance Europe, Ireland, Grand Duchy of Luxembourg v. European Commission*, Case Law IBFD.
60. Id., para. 96.
61. Id.
62. *See Ireland v. Commission* (C-465/20 P), para. 123.
63. Note that the Commission's earlier claim that this objective itself was necessarily a consequence of art. 107(1) TFEU (regardless of whether or not the principle could be found in a Member State's law, as put forward, inter alia, in the Commission Notice on the Notion of Aid in 2016, and its Opening Decision in *Apple),* had been subsequently changed to a different reasoning, evident from the legal arguments used by the Commission in particular in the course of the General Court judicial procedure.
64. BE: ECJ, 22 June 2006, Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium & Forum 187 ASBL v. Commission* (specifically para. 95 of that judgment), available at https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-182/03%20R&jur=C (15 Oct. 2024).
65. *Fiat* (C-885/19 P), para. 102.
66. Compare LU: GC, 24 Sept. 2019, Joined Cases T-755/15 and T-759/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v. European Commission*, para 142, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=218102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3619633 (accessed 15 Oct. 2024): "Furthermore, and as the Commission correctly stated in the contested decision, those findings are supported by the judgment of 22 June 2006, Belgium and Forum 187 v Commission (C 182/03 and C 217/03, EU:C:2006:416) concerning Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the 'ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'". *See Ireland and Others v. Commission* (T-778/16 and T-892/16), para. 213: "Those findings are borne out, mutatis mutandis, by the judgment of 22 June 2006, *Belgium and Forum 187 v Commission* (C 182/03 and C 217/03, EU:C:2006:416), as the Commission correctly pointed out in the contested decision. The case that gave rise to that judgment concerned Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the ordinary rules 'based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'".
67. LU: ECJ, 5 Dec. 2023, Case C-451/21 P, *Grand Duchy of Luxembourg and Others v. Commission*, Case Law IBFD. For analysis of this decision, *see*, e.g., F.A. García Prats et al., *Alleged State Aid in Relation to a Deduction/Non-Inclusion Structure in Luxembourg – Opinion Statement ECJ-TF 1/2024 on the Decision of the CJEU of 5 December 2023 in Engie (Joined Cases C-451/21P and C-454/21P)*, 64 Eur. Taxn. 6, p. 261 (2024), Journal Articles & Opinion Pieces IBFD.
68. *Engie* (Joined Cases C-451/21 P and C-454/21 P), para. 155.
69. *Ireland v. Commission* (C-465/20 P), paras. 278-279 (indicating that the General Court had accepted that national law required the application of the arm's length standard and, in essence, the logic underlying the AOA) and para. 305 (simply stating that the Commission had "demonstrated to the requisite standard that those tax rulings have the effect that ASI and AOE enjoy favourable tax treatment as compared to resident companies taxed in Ireland").
70. *Ireland and Others v. Commission* (T-778/16 and T-892/16), paras. 179-184 (referring to IE: HC, 28 Jan. 1988, *Murphy v. Dataproducts (Dublin)*, [1988] IR 10, para. 219 (referring to IE: HC, 14 May 1985, *Belville Holdings v. Cronin*, [1985] IR 465); and AG Opinion in *Apple* (C-465/20 P), para. 55 (referring to *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd.* ([1988] IR 10).

is especially surprising insofar as the CJEU annulled the General Court decision and proceeded to give its own decision on the merits of the appeals raised by Ireland and Apple in the initial proceedings. It should be noted that, a week after its decision in *Apple*, the CJEU reiterated its stance in *Fiat*, holding, in *UK CFC* (Case C-555/22 P), that "the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member State concerned"[71] and "may depart from that interpretation only if it is able to establish, on the basis of reliable and consistent evidence … that another interpretation prevails in the case-law or the administrative practice of that Member State".[72]

In *Apple*, the CJEU did not require any threshold to find a relevant misapplication of national law. Instead, it seems to have upheld the Commission's view that "any error in the interpretation and application of national law constitutes an error in the interpretation and application of Article 107(1) TFEU".[73] Neither did it address the appropriate level of discretion that can be afforded to a national tax administration in the application of the law, especially where the legal provisions have a broad scope and leave the details of their application up to that administration.

The CJEU did not explain these apparent incongruities with its latest previous case law, despite the fact that *Fiat*, *Engie*, *Apple* and *UK CFC* had the same judge rapporteur. The following comments seek to address in more detail significant results from the decision and provide insights into the likely implications for tax ruling assessments going forward.

4.2. Rules of evidence and burden of proof

The first significant conclusion drawn by the CJEU concerned rules of evidence and the burden of proof in EU judicial procedure. On the one hand, it noted that the General Court is solely competent to make assessments of fact and, in drawing its conclusions, is free to weigh evidence according to its discretion. Such a decision regarding weighing evidence is not subject to review by the CJEU except in cases of distortion, which was not invoked by the Commission.[74] The CJEU further endorsed the General Court's freedom to rely on a single piece of evidence, such as an entry in board minutes produced by a taxpayer in its assessment.[75] At the same time, and in light of the ability of parties to a State aid procedure to provide evidence, the General Court cannot impose an excessive burden of proof on the Commission, nor fault the Commission for deeming the absence of specific evidence as proof of the absence of specific facts.[76]

Another important finding of the CJEU with respect to the rules of evidence concerned the limitation of the parties' ability to bring forward new evidence in an appeal against a Commission decision. The CJEU held that, by incorrectly taking into account such evidence relating to actions taken on behalf of ASI and AOE by employees of Apple Inc., the General Court had committed an error that, insofar as the General Court had relied on this evidence to rule against the Commission, would, by itself, have resulted in its decision being annulled. This limitation does not, however, apply to information the Commission ought to have obtained during the administrative procedure. As the Commission is "under no obligation to examine, of its own motion and on the basis of prediction, what information might have been submitted to it", the CJEU declined to hold it responsible for not obtaining further information on Apple's internal system of powers of attorney, even though it acknowledged that Apple had pointed out to the Commission the existence of such a system for the purpose of negotiating and signing contracts.[77] In this context, even though it is clear that the Commission is reliant on the parties' submission of evidence and the legal system must ensure proper incentives for collaboration in fact-finding, the CJEU appears to give the Commission an easy win insofar as it considered the information provided by Apple during the administrative procedure to be so vague as to excuse the Commission for not having obtained more precise information on those powers of attorney. This is especially notable in light of the importance of the Commission's assessment regarding the lack of functions performed by ASI and AOE's head offices in its decision regarding the correct allocation of the IP licences in question to the Irish branches.

4.3. The Impact of the CJEU's use of "*res judicata*" (reference system, comparability, arm's length principle)

On several key questions, the CJEU declined to reexamine issues raised against the Commission decision, instead considering them to be "*res judicata*". Although this may seem surprising given the multiple errors it considers the General Court to have made in its analysis and also in light of the fact that it annulled its decision, this is nevertheless a natural consequence of the failure of Ireland and Apple to "keep those questions alive" through a cross-appeal.[78]

In the first place, this concerns the choice of reference framework. By considering the reference framework to be established by the ordinary rules of taxation of corporate profits, including section 25 of the TCA 1997, the General Court had acknowledged comparability, in principle, of resident and non-resident companies.[79] Apple and Ireland had argued that there was a fundamental difference between them, thus establishing non-resident com-

71. UK: ECJ, 19 Sept. 2024, Case C-555/22 P, *United Kingdom of Great Britain and Northern Ireland v. European Commission*, Case Law IBFD, para. 97.
72. Id., para. 98.
73. Id., para. 171. Ireland and Apple had argued that this standard was a misinterpretation of previous case law; the CJEU rejected it without engaging with the argument in substance, focusing instead on its right to review the General Court's choice of reference framework and interpretation of the constituent provisions of that framework (para. 175).
74. Id., para. 242.
75. Id., para. 247.
76. Id., para. 245.
77. Id., para. 188.
78. Id., para. 273, citing ES: CJEU, 4 Mar. 20210, Case C-362/19 P, *European Commission v. Fútbol Club Barcelona*, EU:C:2021:169, para. 109 and CJEU, 23 Nov. 2021, Case C-833/19 P, *Council v. Hamas*, EU:C:2021:950, para. 81 as precedent on the *res judicata* effect of General Court judgments that have been set aside.
79. *UK CFC* (C-555/22 P), para. 276.

panies as a separate category of taxpayer. As such, for the purposes of identifying a selective advantage, they ought to have compared like with like.[80] In the second place, the *res judicata* argument was applied to reject any objection against the Commission's use of the arm's length principle in general,[81] and the AOA in particular.[82]

In light of the development in the CJEU's case law, as it relates to the arguments made before the General Court, it would certainly have been open to the CJEU to come to a different conclusion. Even accepting the reference system and thus the comparability of resident and non-resident companies, the CJEU was not bound to rule that equal treatment of both inevitably required the application of the arm's length principle. Notably, and as pointed out above in section 4.1., the CJEU had explicitly rejected the Commission and General Court's approach in this respect in *Fiat*. In *Fiat*, the CJEU had recognized that, even if it can be established that a version of the arm's length principle was applied under a Member State's national tax law, the concrete implementation of that principle – one might say, its "nation-specific variety" – remains a free choice of each Member State and the Commission must "take account of those legislative choices, aimed at clarifying the scope of the arm's length principle and its implementation"[83] in domestic law. No such deference to national administrative practice is apparent in the CJEU's decision in *Apple*.

4.4. The Authorized OECD Approach

Another key question under discussion since the emergence of the case in the public eye concerns the relevance of the AOA to the correct allocation of profits to the Irish branches. Considering the fact that this specific guidance was not published at the OECD level until 2008 and required significant rephrasing of article 7 of the OECD Model to be implemented, and the tax rulings in question were issued in 1991 and 2007, respectively, based on section 25 of the TCA 1997, it cannot likely be concluded that the correct application of that provision of Irish law requires an exact mirroring of the methodology advocated under the AOA.

It should be noted at the outset that the Commission decision under review explicitly did not rely on the AOA – a point accepted by the General Court and, in the absence of a cross-appeal by Apple or Ireland, the issue was held to be *res judicata* by the CJEU.[84] It did, however, invoke it as a "non-binding guidance document … as a further indication that the profit allocation methods endorsed by those rulings produce an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle".[85] In the same vein, both the General Court and the CJEU analysed the relevance of the AOA in assessing the correct application of Irish law and whether, by not following the right approach, the tax rulings in question derogated from the normal tax system/reference framework.

The General Court stated, with regard to Irish law and the AOA, that there is "essentially some overlap"[86] between the application of section 25 of the TCA 1997 and the analysis conducted as the first step of the AOA. Revisiting that point, the CJEU characterized that very statement as the General Court acknowledging "that … section 25 TCA 97 … *corresponded in essence* to the functional and factual analysis conducted as part of the first step of the AOA".[87] Does the difference between those phrases mean that the CJEU effectively mischaracterized the General Court's conclusions regarding Irish law? While it may appear so at first glance, that conclusion would be excessive. It should be noted that the General Court had also agreed that the application of section 25 by the Irish tax authorities "overlaps, *for the most part*, with the analysis proposed by the [AOA]".[88]

The CJEU ultimately supported the Commission decision insofar as it indeed analysed functions exercised in the Irish branches, which it concluded ought to have given rise to an allocation of the IP licences or, at the very least, a part of the profits derived therefrom to those branches.[89] In particular, the Commission identified the following functions related to the IP: "development and maintenance of the Apple brand on the local market",[90] "gathering and analysing regional data to estimate the expected demand forecast for Apple products"[91] and "operating the AppleCare customer support service".[92] Given its reliance on the guidance relating to an in-depth functional and factual analysis, and based on its rejection of one key argument – accepted by the General Court – which would make it inconsistent with that approach to allocate the IP licences for the most part to the Irish branches, namely the fact that Apple Inc. and ASI and AOE's head offices had effectively exercised important strategic functions in relation to the IP licences, the CJEU was bound to arrive at the same conclusion as the Commission and allocate those IP licences and the attendant profits entirely to the only entities in respect of which there was evidence to support the exercise of relevant functions. In substance, this result is difficult to understand insofar as it would suggest that the very limited functions exercised by persons in the Irish branches in relation to the relevant IP would, had they been separate and independent enterprises exercising those very functions, have given rise to a profit of about EUR 100 billion.

80. *See* General Court judgment (*Ireland and Others v. Commission* (T-778/16 and T-892/16)) discussing and dismissing the argument surrounding the selection of section 25 TCA 97 as a whole as compared to section 25(2) TCA 97, which sets out the circumstances under which non-resident companies would fall within the scope of corporation tax, namely referring to what constitutes "chargeable profits" for them (especially General Court judgment paras. 159-161).
81. *Ireland v. Commission* (C-465/20 P), para. 278.
82. Id., para. 279.
83. *Fiat* (C-885/19 P), para. 99.
84. *Ireland v. Commission* (C-465/20 P), para. 279.
85. Commission Decision, *supra* n. 3, at para. 322.
86. *Ireland and Others v. Commission* (T-778/16 and T-892/16), para. 239.
87. *Ireland v. Commission* (C-465/20 P), para. 123.
88. *Ireland and Others v. Commission* (T-778/16 and T-892/16), para 323.
89. *Ireland v. Commission* (C-465/20 P), para. 126.
90. Commission Decision, *supra* n. 3, at para. 297.
91. Id., at para. 298.
92. Id., at para. 299.

Despite the fact that this outcome is based on a very formalistic approach, which is not far from the "exclusion approach", the General Court criticized the Commission, for it is not at all clear whether it corresponds to a correct understanding of the AOA (assuming it were relevant). Fundamentally, the AOA seeks to determine the appropriate profit arising from the functions performed in a PE, which is independent of the profit made by the enterprise of which the PE forms part.[93] In stark contrast to the AOA's focus on PE functions, the CJEU, following the Advocate General, started from ASI's profits and concluded that, given the fact that some relevant functions were found to be exercised by the PE, and none were accepted to exist elsewhere, all profits – by necessity, and under Irish law – had to be allocated to the PE.[94]

4.5. Relevance of the territoriality principle

The CJEU gave short shrift to the argument that the limited taxation of ASI and AOE's branches could be justified – in the third step of the selectivity analysis – according to the territoriality principle. In deciding on the merits of the complaints brought by Apple and Ireland against the Commission decision, it contented itself with the finding that "Ireland does not indicate why the territoriality principle, on which it relies, necessarily requires favourable treatment for non-resident companies".[95]

It is not clear exactly what the argument made by Ireland was; the CJEU described it as a claim that "the territorial limit to Ireland's taxing power" justified a "different treatment of non-resident companies".[96] It must surely be correct that a Member State's legislative choice not to subject a non-resident company to tax on its profits irrespective of where they arise – which is a clear derogation from the way most countries would tax their resident companies – is justifiable based on that principle. It may be that, in its written and oral submissions, Ireland did not succeed in showing that its tax rulings had effectively achieved an allocation of profits in accordance with that principle. It would have been preferable had the CJEU made this clear instead of mudding the waters by putting the territoriality principle itself in doubt. It should be noted, in this context, that the Court has since, in the *UK CFC* case, confirmed the validity of the territoriality principle as a legitimate basis for distinguishing between resident and non-resident companies in a national tax system.[97]

4.6. Recovery and the consequences of US taxation

With the annulment of the General Court decision, the Commission decision has been fully reinstated, thereby making Ireland liable to recover the aid provided to the Apple Group, which amounts to EUR 14.1 billion in taxes plus accrued interest.[98] There is uncertainty in this respect, however, because the Commission had, in its decision, allowed Apple to claim deductions from the amount of profit it was meant to pay tax on in Ireland. In paragraphs 448-451 of its decision,[99] the Commission detailed deductions based on, in essence, amounts in respect of which taxes would be paid in other jurisdictions either by ASI and AOE or by other entities.[100]

It is well known that Apple Inc. has meanwhile paid taxes on all of ASI and AOE's overseas profits in the United States following a change in US tax law. One may thus wonder whether recovery by Ireland might, ultimately, be rather limited. Such an outcome would avoid an effective punishment in the form of economic double taxation over vast profits. However, a close reading of the specific circumstances described by the Commission in its decision regarding reductions in the amount to be recovered suggests that any situation in which Apple Inc. has paid taxes in consequence of a legal change abroad is not covered. Rather, relevant deductions had to arise from retroactive changes in the way profits were accounted for by the Apple group,[101] including through changes to the cost-sharing agreement or a retroactive booking of ASI's profits in sales jurisdictions following a reassessment of effective risk-taking within the Apple Group.

5. The Statement

CFE Tax Advisers Europe acknowledges the CJEU's decision to bring to an end a long-running State aid dispute over the correct application of Irish tax law to a complex business (tax planning) arrangement. By giving a final decision in the case, the CJEU has put an end to prolonged uncertainty over the outcome. CFE wonders, however, how the decision fits with recent case law of the Court in tax State aid cases, which had shown more deference to the Member States' interpretation of their law in assessing derogations from "normal taxation" in specific cases.

93. OECD, *Attribution of Profits to Permanent Establishments* (2010), sec. C, para. 50: Determining the Profits of an Enterprise, regarding the Authorised OECD Approach ("AOA").
94. *See* AG Opinion in *Apple* (C-465/20 P), para. 59: "I would add that, in the present case, the need to limit the analysis to relations between the head offices and the Irish branches arises, however, from the choice made by Apple Inc., in its commercial autonomy, to transfer, under the cost-sharing agreement, part of its profits to ASI and AOE. *It is therefore a matter of distributing such profits to the various subdivisions of those companies*, from which Apple Inc. remains separate". *Ireland v. Commission* (C-465/20 P), para. 285: "the *allocation of profits generated by the use of those licences* stem directly from the correct application of the relevant tax principles to the structure of the apple Group as set up by Apple Inc. itself under the cost-sharing agreement" and para. 286: "the need to take into account … the allocation of assets, functions and risks between the Irish branches and the other parts of ASI and AOE without regard to any role that may have been played by Apple Inc., arises solely from the Apple Group's decision to transfer the costs and risks related to that group's IP under the cost-sharing agreement".
95. *Ireland v. Commission* (C-465/20 P), para. 309.
96. Id., para. 292.
97. *UK v. Commission* (C-555/22 P), e.g. para. 108 (noting that the principle of territoriality "largely characterises" the UK corporate tax system) and para. 127 (noting that the CFC rules "supplement the [UK corporate tax system], and follow the same logic which is largely based on the principle of territoriality").
98. Department of Finance of the Government of Ireland, Press Release, *Information Note RE Apple Escrow Fund and Third Country Adjustment* (10 Sept. 2024), available at https://www.gov.ie/en/press-release/24349-information-note-re-apple-escrow-fund-and-third-country-adjustment/ (accessed 15 Oct. 2024).
99. Commission Decision, *supra* n. 3, at paras. 448-451.
100. This stated method of calculation appears not to have been independently challenged by Ireland or Apple in the proceedings before the General Court.
101. Commission Decision, *supra* n. 3, at para. 449.

The CFE wonders whether the outcome of the decision, insofar as it conflicts with its holdings in its earlier decisions in *Fiat* and *Engie*, and the later decision in *UK CFC*, might be considered as specific to the circumstances of the procedure. In particular, this relates to the fact that the CJEU did not review the findings of the General Court it had rejected in that judgment given that, in the absence of a cross-appeal by Ireland or Apple, those findings were considered *res judicata* in this decision. In light of these considerations, the CFE expects the Court will clarify the status of this judgment vis-à-vis its previous case law in future decisions.

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