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Highlights & Insights on European Taxation

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FREE ARTICLE

– ***P, Commission v Ireland*** **(C-465/20)**. Advance tax rulings for the Apple Group. State Aid. Court of Justice

(comments by **Leopoldo Parada**) (*H&I* 2025/8)

This comment concentrates exclusively on the Commission's first line of reasoning, on which the appeal is grounded and is divided into three parts: i) the General Court's (GC) misinterpretation (or misreading) of the Commission allocation of profits to ASI and AOE's branches in Ireland (first part); ii) the GC's consideration of the functions by Apple Inc. for the purpose of profit allocation (second part), and iii) the infringement of the separate entity approach, the ALS, and consequently, Article 107 of the Treaty on the Functioning of the European Union (TFEU) (third part).

The first ground of appeal: first part

In its first ground of appeal, the Commission claimed that the GC had made several errors in criticising its primary line of reasoning concerning the existence of an advantage (para. 87 of the judgment of the Court of Justice of the European Union (CJ): hereinafter: the 'CJ decision'). In

brief, the Commission's primary line of reasoning was the following: since the head offices of ASI and AOE did not control Apple's group IP licenses, and had no employees, assets, or performed any functions related to those IP licenses, no profits should have been allocated to them in an 'arm's length context' (para. 88, CJ decision). Instead, those profits should have been allocated to the ASI and AOE branches. The GC dismissed this argument stating that the Commission decided to allocate profits to ASI and AOE's branches in Ireland relying exclusively on the lack of employees and physical presence in the head offices of ASI and AOE. That is, the Commission would have applied a sort of allocation of profits 'by exclusion', contradicting section 25 TCA 97 (Irish law), the arm's length standard (ALS), and the Authorised OECD Approach (AOA) approach (para. 106, CJ decision).

The CJ concluded that the GC had erred in law when it assumed that the Commission decided to attribute profits to ASI and AOE's branches rather than head offices based only on the lack of functions performed by the head offices in relation to the IP licenses (para. 128, CJ decision). The CJ considered that the Commission's approach derived from two separate – but interconnected – findings. First, the absence of active or critical functions and risks assumed by the head offices of ASI and AOE. Second, the multiplicity of functions performed by the Irish branches (para. 129, CJ decision). Interestingly, however, and even if the GC erred in law stating that the Commission did not attempt to establish the control of the IP licenses by the Irish branches, one would expect that if the Commission had failed to demonstrate such control, the fact of attempting goes to a second decree of relevance. Instead, the CJ focused on the fact that the Commission had attempted to show such control, that being enough to consider that the GC had erred in law (see also: Ruth Mason and Stephen Daly, *Rotten to the Core: The EU's Court of Justice Decision in Apple*, Tax Notes Int'l 116 (2024).

More importantly, perhaps, is the implicit recognition by the CJ, and confirmed by the silence of the parties in this appeal, of an alleged 'new prerogative' of the Commission to use an ALS, embodied in the AOA, as an allocation benchmark to check Member States' correct profit allocations, regardless of whether that Member State recognises the ALS in its national legal system. If we recall the GC's decision, the Commission, ratified by the GC, argued for the use of the ALS as a sort of allocation benchmark 'to ensure that transactions between integrated group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been carried out by non-integrated stand-alone companies' (para. 194, GC decision). Moreover, the GC confirmed that since section 25 TCA 97 resembles the AOA as contained in the OECD TP guidelines, its application was also allowed due to the 'overlap' between Irish domestic law and the OECD approach (paras. 238-239, GC decision).

The CJ confirmed in its decision that 'those findings must be taken as read, in so far as they have not been validly called into question by the other parties in the context of the present appeal' (para. 124, CJ decision), setting a dangerous precedent for the future (correct) application of State aid law in direct tax matters. Indeed, and as is noted above, accepting this approach not only violates the well-settled division of competences between the EU and Member States in direct taxation matters but also poses a serious risk upon the use of advanced legal certainty in the form of tax rulings (see Leopoldo Parada, *Between Apples and Oranges: The EU General Court's Decision in the 'Apple Case'* EC Tax Rev. 2 (2021), p. 57). In fact, the CJ, if not explicitly at least implicitly, recognises

that the assumed sovereignty of Member States in direct tax matters is not such, allowing a kind of 'arm's length control' by the Commission, which may be triggered by the mere resemblance between domestic laws of a Member State and the alleged internationally recognised ALS, even if that standard lacks any formal legal recognition in the domestic laws of a Member State. This issue is not superfluous, because the difference between formally recognising a free-standing obligation to apply an ALS based on Article 107 TFEU and what the Court confirmed to be an 'allocation benchmark' is practically nil (see also Aitor Navarro, *Transactional Adjustments in Transfer Pricing*, sec. 2.3.1.2 (IBFD, 2018)).

The first ground of appeal: second part

The second part of the first ground of appeal is mainly a discussion surrounding the functions performed by Apple Inc. The Commission argued that the GC's acceptance of the functions performed by Apple Inc. for the profits allocated to ASI and AOE's head offices, when rejecting the Commission's argument to allocate profits to the ASI and AOE branches, constitutes a vitiated procedural breach and an infringement of the obligation to state reasons. It also disregards the separate entity approach and the ALS recognised by section 25 TCA 97 (paras 134-163, CJ decision). In simple words, the Commission tried to demonstrate here that the GC made a mistake considering functions and risks performed by Apple Inc. when in fact they were performed actively by the branches of ASI and AOE.

The CJ confirmed in several passages, and with specific references to the GC decision, that the GC had indeed considered functions performed by Apple Inc. when comparing functions performed within the MNE group in relation to the IP licenses (paras 205-215). Surprisingly, it also confirmed the position of the Commission and the 'erroneous allocation' of functions and risks (para. 222, CJ decision).

The above is worrisome because it makes transfer pricing closer to an exact science, when it is far from that (see in this regard: Peter Wattel, 'The Cats and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions', in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds.), *State Aid Law and Business Taxation*, 186 (Springer, 2016)). Indeed, if we assume for a second that the GC incorrectly considered the functions and risks of Apple Inc., would not that amount to anything other than a transfer pricing allocation error? Or is it now also a prerogative of the Commission to impose the highest allocation standards in the allocation of profits within an MNE group? This is not far away from the also arguable reliance by the GC in its 2020 decision on the uncontested Commission's election of the Transactional Net Margin Method (TNMM), as well as the existence of 'ad hoc reports' from tax advisors, to confirm the suitability of the TNMM as 'the best' transfer pricing method (paras. 323-324, GC decision). Moreover, confirming the Commission's position creates a permanent sensation of uncertainty for taxpayers who must now turn not only to national tax authorities to seek legal certainty (via tax rulings), but also to the Commission, which must confirm both the 'correct TP method' and its 'proper application' following a standard of sophistication regarding

attribution of profits that seems to be quite unrealistic (see in this opinion: Werner Haslehner and Antonio Ancora, *The Apple State Aid Case*, in M. Lang et al (eds.), *CJ – Recent Developments in Direct Taxation 2019*, 233-234 (Linde, 2020)).

The first ground of appeal: third part

In the third part of the first ground of appeal, the Commission argued that the GC had infringed the separate entity approach, the ALS and Article 107(1) TFEU, and distorted Irish law by concluding that formal acts from directors of ASI and AOE constituted functions performed by their head offices in relation to the Apple Group's IP licenses held by those companies. Specifically, the Commission claimed that by avoiding the explanations on why these acts were not functions performed by their head offices in relation to the Apple Group's IP licenses, the GC committed a breach of procedure and failed to state reasons, which would also be demonstrated in the GC's acceptance of inadmissible evidence supporting these conclusions (para. 224, CJ decision).

In practice, the Commission argued three main issues, which apparently affected the substantive decision of the GC. First, Apple and Ireland based their arguments to demonstrate that the functions performed by the directors were indeed those of their head offices only on ASI's and AOE's minutes of the board of directors. Second, by relying only on that evidence (minutes), the GC imposed an 'impossible' standard of proof upon the Commission. Third, and finally, the fact that the GC accepted the argument that granting (general) powers of attorney to Apple Inc. executives to sign contracts with OEMs and telecommunications operators 'on behalf of' ASI and AOE fell within functions performed by the head offices of those companies (paras. 225-227, CJ decision).

The CJ partially agreed with the Commission's arguments. Indeed, although the Court concluded that the Commission's misreading of the GC's decision regarding the powers of attorney to Apple Inc. executives to sign contracts with OEMs and telecommunications operators 'on behalf of' ASI and AOE fell within functions performed by the head offices of those companies (para. 250, CJ decision), and dismissed also the argument that the GC had based its decision 'only' on the ASI's and AOE's minutes of the board of directors (para. 247, CJ decision), it agreed with the Commission that the GC had indeed imposed on it an 'excessive burden of proof' since the minutes of the board of directors did not mention certain categories of decisions to support its assessment that those decisions did not exist (para. 245, CJ decision).

This part of the first ground of appeal requires us to recognise that Irish law, the only correct reference framework for State aid purposes, does indeed contemplate a 'separate entity' approach and that this approach resembles the AOA. From this starting point, the relevant question is: what are the functions relevant to attribute profits? The Commission before the GC relied on a quite overly simplistic assumption to disregard the acts of ASI and AOE's directors as relevant functions. They argued that since the directors were employees of Apple Inc., and since they acted on behalf of the Apple group rather than ASI and AOE, their acts should be disregarded. This is

certainly not convincing, at least if we consider the strict application of the AOA, which section 25 TCA appears to resemble. As noted by some commentators already, the mere use of IP does not amount to a 'significant people functions' according to the AOA. Therefore, concluding that all profits should be attributed to ASI and AOE's branches in Ireland seems to be at least a misinterpretation of the AOA (see Haslehner and Ancora, p. 236). Similarly, even following the application of the so-called 'DEMPE approach' would not allow us to conclude anything different (Ibid., p. 237). Interestingly, however, the CJ did not have to deal with any of these substantive transfer pricing issues because it simply dismissed the claims of the Commission regarding the directors' powers of attorney. Yet, it appears that the Commission enjoys a superpower, regarding both the interpretation and the correct interpretation of the AOA.

Nevertheless, the CJ took the Commission's side regarding the burden of proof. Indeed, the CJ concluded that the GC had imposed an 'excessive' burden of proof when found that 'the minutes of the board meetings do not give details of the decisions concerning the management of the Apple Group's IP licenses, of the cost-sharing agreement and important business decisions does not mean that those decisions were not taken' (para. 304, GC decision). This is intriguing because, although the CJ does not directly shift the burden of proof on to Ireland, it relieves the Commission from doing so. In practical terms, there is no difference. That is, relieving the Commission of its obligation to demonstrate that a proper allocation was not carried out – because it is almost an 'impossible proof' – seems to contradict the fact that the burden of proof is always upon the Commission (see, e.g., CJ 8 November 2022, C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europe v Commission*, ECLI:EU:C:2022:859), unless the Commission proves that the decisions taken by Ireland in the rulings were 'entirely discretionary'. In that case, there could be grounds for shifting the burden of proof on to Ireland (see Haslehner and Ancora, at 238. See also C-6/12 P *Oy*, ECLI:EU:C:2013:325, para. 27 and C-256/97 *DM Transport*, ECLI:EU:C:1999:332, para. 27). However, this is not the case here, and the CJ seems to forget not only that the Commission is the one called to demonstrate that a proper allocation was not performed, but also that an improper profit allocation may result in an advantageous treatment. That is, the causation link between the error and the reduction in the chargeable profits, which is what the GC, rightfully, considered unsatisfactorily proved in the decision under appeal (para. 333, GC decision).

Final remarks

The CJ's decision in *Apple* is certainly unsatisfactory from a strictly legal perspective, mainly because it has blurred many lines that appeared to have already been clearly stated regarding the proper application of State aid law in direct tax matters. This can be seen in at least four aspects. First, it implicitly confirms the alleged new prerogative of the Commission to use the ALS (embodied in the AOA) as an allocation benchmark to check Member States' correct profit allocations. Second, it portrays transfer pricing as a sort of exact science, granting the Commission the task to control the 'correct allocation' of profits, including methodological errors. Third, it leaves big question marks regarding the burden of proof in State aid law cases. Fourth, and more importantly, it demonstrates how legal rules can always be twisted to serve the political interests of any specific sector, in this case disguising anti-avoidance concerns behind anti-subsidy rules. Let

us hope this decision does not go beyond being a simple anecdote in the years to come.

Prof. Leopoldo Parada

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