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OPINION STATEMENT

Apple's 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 Case C-465/20 P, *Commission v Ireland and Others*

Prepared by the CFE ECJ Task Force

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Commission v Ireland (Apple)* case (hereinafter: the "*Apple Case*"), in which the Court of Justice of the EU (Grand Chamber) delivered its decision on 10 September 2024.[2]

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 legally correct.

The Court set aside the General Court judgment of 15 July 2020, which had annulled the European Commission findings 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 judgment follows the Opinion of AG Pitruzzella delivered on 9 November 2023.[4]

Rather than referring the case back to the General Court for reconsideration, as the AG had recommended, the Court decided to render a final judgment on 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 judgment and its final ruling on the granting of illegal state aid to the Apple Group.

I. Background, Facts, and Issues

1. The CJEU judgment brings the most high-profile tax state aid case to a close, more than ten years after the European Commission ('EC') 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 residents in the Republic 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. The disputed profits in this case, amounting to around EUR 100 bn, were generated from IP licences owned by ASI and AOE pursuant to a cost-sharing agreement with Apple Inc.

2. 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

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[2] IE: ECJ, 10 Sept. 2024, Case C-465/20 P, Ireland v Commission, Case Law IBFD.

[3] EC Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373, L:2017:187:TOC ('the EC 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 .

[5] EC Decision of 11 June 2014, C:2014:369:TOC (17 October 2014) ('Opening Decision').

Apple group across the world. In the EC's assessment, the tax rulings granted ASI tax breaks amounting to EUR 13 bn 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]

3. The EC identified two tax rulings from 1991 and 2007 addressed to AOE and ASI as the source of the tax advantage. Emphasising 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 EC 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.[9]

4. As a subsidiary argument, the EC 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 EC 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 EC argued, in 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]

5. The CJEU had to rule on the Commission's appeal against the GC judgment in joined cases T-778/16 and T-892/16[17], holding 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) TFEU.[18] In particular, the GC 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 had in fact control over those assets. While allowing the EC to use the arm's length principle and OECD guidance, in particular the OECD Authorized OECD Approach,[19] as a benchmark to analyse the correct attribution of income to Irish branches under Irish law (specifically, section 25 TCA 97), the GC held that the EC had made substantive errors in applying that benchmark, failing to conduct a detailed analysis of 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

[6] EC Press Release 30 August 2016, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923.
[7] Ibid.
[8] EC Decision EU 2017/1283, paras 264 et seq.
[9] Ibid., paras 276-293.
[10] Ibid., para. 325.
[11] Ibid., paras 328-333.
[12] Ibid., paras 334-345.
[13] Ibid., paras 346-359.
[14] Ibid., para. 369.
[15] 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.
[16] EC Decision EU 2017/1283, paras 369-403.
[17] General Court, T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338.
[18] 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 (2021), Journal Articles & Opinion Pieces IBFD, 109-116.
[19] See GC T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338, para. 240.

branches.[20] The GC 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 without the involvement of Apple's branches in Ireland.[21]

6. In its appeal, the EC raised several main pleas: First, that the GC had mischaracterised the EC Decision by disregarding the analysis it had made of the functions exercised in the Irish branches for which the use of the IP licences in question was crucial and claiming that the EC had relied on an "exclusion approach".[22] Second, the GC had erred by 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 GC, had held was not relevant for that analysis.[23] In this context, the EC claimed that functions performed by Apple Inc., even if performed "for the benefit" or "on behalf of" ASI and AOE, had to be disregarded;[24] it further asked the CJEU to hold evidence provided by Apple to show such functions to be inadmissible since it was not provided to the Commission during the administrative procedure.[25] Third, it argued that the GC wrongly accepted formal acts taken by the directors of ASI and AOE to constitute functions performed by their head offices in relation to the Apple Group's IP licences held by those companies.[26]

7. The EC's second ground of appeal, which related to the GC's dismissal of the EC's subsidiary line of reasoning, was ultimately not ruled upon in the judgment and is thus also omitted from this description.

8. Notably, neither Ireland nor Apple launched a cross-appeal against the GC judgment, even though the GC had ruled in favour of the EC decision in 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.

II. The Judgment of the Court of Justice

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

The first part of the judgment: Errors made by the GC

10. The CJEU considered four arguments[27] brought by the EC to annul the GC judgment and, in substance, agreed in virtually all respects with the EC.

[20] Ibid., paras 242-243.
[21] Ibid., paras 296-309.
[22] See CJEU, C-465/20 P, supra n. 2, para. 95.
[23] Ibid., paras 134-144.
[24] Ibid., para. 137.
[25] Ibid., para. 142.
[26] Ibid., para. 224.
[27] In the description of the judgment, this Opinion Statement ignores the complaints the CJEU did not rule on and presents the arguments of interest in a simplified structure to improve legibility. 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 it necessary to rule (see e.g. para 133 noting that there was no need to rule on the second and third complaint 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.

11. The first argument brought forward by the Commission and accepted by the CJEU was that the GC had misinterpreted the EC decision when it found that it had applied the so-called "exclusion approach", consisting of 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 by the exploitation of Apple Group's IP licences.[28] 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.[29] It thus concluded with the AG that the GC's judgment had distorted the content of the EC decision when holding that it had applied an exclusion approach.[30]

12. The EC's second successful argument concerned the GC's taking into account of 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.[31] 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".[32] 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 GC had relied on them as evidence, although they had only been produced by Apple – if at all – during various stages of the judicial process,[33] and, second, that the EC could not be criticised 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.[34]

13. The CJEU also upheld the EC's third argument, according to which the GC had misapplied Irish law (specifically, section 25 TCA 97) 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 GC's assessment of the EC 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"[35].

14. Fourth and finally, the CJEU also upheld the EC's third part of its first ground of appeal relating to the GC's findings relating to the activities of the head offices of ASI and AOE. While rejecting several of the points made by the EC in this regard – in particular, the claim that GC had erroneously confirmed those head offices to have 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[36] and the criticism of the GC's reliance on a singular minute entry relating to the granting of powers of attorney to Apple Inc.[37] –, the CJEU confirmed that the GC had held the EC to an "excessive burden of proof" by precluding the EC 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 had not been taken.[38]

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[28] CJEU, C-465/20 P, supra n. 2, paras 117-132.
[29] Ibid., para. 129.
[30] Ibid., para. 130 and para. 254.
[31] Ibid., paras 180-193.
[32] Ibid., para. 183, citing CJEU, C-211/20 P, EU:C:2022:862, para. 85.
[33] Ibid., para. 187.
[34] Ibid., paras 188-189 and para. 255.
[35] Ibid., para. 221 and para. 256.
[36] Ibid., para. 250.
[37] Ibid., para. 247.
[38] Ibid., para. 245 and para. 257.

The second part of the judgment: CJEU ruling on the substance of the EC decision

15. Having thus concluded that the GC judgment had been vitiated by a number of legal errors, the CJEU considered the need for a referral back to the GC but concluded – contrary to AG Pitruzzella's Opinion – that it had all the information necessary to rule on the pleas made by Ireland and Apple against the EC decision and thus give a final judgment and bring the dispute to an end.[39] Accordingly, it devoted the second part of the judgment, amounting to just under 150 paragraphs, to rule on six main arguments made by Ireland and Apple against the EC decision, rejecting each of them in turn to uphold the latter. These pleas concerned the existence of a selective advantage for ASI and AOE (paras 294-311), the use of state resources (paras 314-321), the parties' right to be heard during the administrative procedure (paras 330-344), an alleged breach of legal certainty and non-retroactivity (paras 351-366), an alleged infringement of Ireland's fiscal autonomy (paras 370-384) and an alleged failure to state (sufficient) reasons in the EC decision (paras 389-397). In all those points, the CJEU held the objections made by Ireland and Apple to be unjustified.

16. The CJEU held, first, that the EC 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 by the nature and logic of the system of taxation in Ireland. It rejected the claim that the EC 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.[40] 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 GC's judgment had 'the force of res judicata'[41] in this respect. It followed therefrom that ASI and AOE, being non-resident entities, had to be considered comparable to any resident entity.[42] The CJEU subsequently endorsed the EC'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.[43] 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.

17. The CJEU held, second, the requirement of a state intervention and the use of state resources to find illegal state aid to be fulfilled: Tax rulings issued by Ireland's tax administration were clearly imputable to the Irish state;[44] and the mitigation of charges that are normally included in the budget of an undertaking is similar in character and equal in effect to direct subsidies are considered to be an aid.[45] Such was the case of the tax rulings insofar as the EC showed that they granted a selective advantage to Apple.[46]

18. 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 EC. In particular, the CJEU declined to hold the EC responsible for not requiring the disclosure of information which 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.[47]

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[39] Ibid., paras 260-267.

[40] Ibid., paras 300-301.

[41] Ibid., para. 303.

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

[43] Ibid., para. 306.

[44] Ibid., para. 316

[45] Ibid., para. 319.

[46] Ibid., para. 320.

[47] Ibid., para. 341.

19. Fourth, the CJEU found that the EC had not violated the principles of legal certainty and non-retroactivity through the application of a novel interpretation of Article 107(1) TFEU; instead, it held that the EC's applied reasoning 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"[48]. It also rejected the argument that the EC had retroactively applied the AOA, noting that the EC 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"[49].

20. Fifth, in relation to an alleged infringement of Ireland's fiscal autonomy, the CJEU recalled that areas not subject to harmonisation 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.[50] With respect to the specific claim that the EC 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 issuing of tax rulings and specific investigation requirements for the tax administration, the CJEU rejected Ireland's claims, recalling that the EC's finding of State aid was not based on an infringement of any such procedural rule.[51] Neither did the characterisation of ASI and AOE as "stateless for tax purposes" found in various recitals of the EC decision mean that it had relied on it in its assessment.

21. The CJEU also rejected the sixth and final plea, an alleged failure by the EC 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 case 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 EC's claim that ASI and AOE were managed and controlled from the US 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.[52] A statement of reasons, as required by Article 296 TFEU, must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that act. However, it is not necessary 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"[53]. 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[54] – and the CJEU found itself fully capable of exercising its power of review over the EC decision in light of the reasoning provided therein,[55] the plea was held to be unfounded.

III. Comments

A. Preliminary remarks and fit with prior case law (*Fiat*, *Engie*)

22. The CJEU's judgment is the second ruling of the EU's top court in a high-profile tax ruling case delivered by the Grand Chamber, implying the case's particular complexity or importance.[56] Apart from the large sum at stake, this importance (rather than a particular complexity) may be explained by the tension in which the

[48] Ibid., para. 358.
[49] Ibid., para. 364.
[50] Ibid., para. 370.
[51] Ibid., para. 380.
[52] Ibid., para. 390.
[53] Ibid., para. 392.
[54] Ibid., para. 393.
[55] Ibid., para. 394.
[56] See Article 60 para. 1 of the Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, p. 1–42.

decision stands to the judgment in *Fiat*,[57] which had itself been rendered by the Grand Chamber. The contrast between those two judgments is evident on several levels: The considerable difference in length (the later judgment 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"[58]. While the Court had, in *Fiat*, applied a very high standard to the EC, 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",[59] 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"[60] to the process described in that OECD guidance.

23. A key element of the EC'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[61] – necessarily resulted in the application of the arm's length principle, a fact the EC claimed could be derived from the CJEU's judgment in *Belgium and Forum 187.*[62] While the EC succeeded with this claim in all cases before the GC, losing (in *Apple*, *Starbucks*, and *Amazon*) merely on the question whether the EC had correctly applied that principle to the facts of the case, the CJEU explicitly rejected it in *Fiat*: "[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."[63] Since the GC'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 GC's judgment in *Apple* is almost a copy of paragraph 142 of its judgment in *Fiat*, which the CJEU held to be a misunderstanding of its own case law[64] – 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*.

24. An equally strong contrast can be drawn between the Court's decision in *Engie*[65] as it relates to the burden on EC to show a tax administration's derogation from its own law in a particular decision. The CJEU there held that the EC could not conclude that the non-application of Luxembourg's GAAR by the tax authorities led to the grant of a selective advantage "unless that non-application departs from the national case law or administrative practice relating to that provision",[66] thereby setting a clear standard of review for the correct application of national legislation that the EC needed to follow. By contrast, the CJEU did not consider

[57] 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.

[58] Ibid., para. 96.

[59] Ibid.

[60] See CJEU, C-465/20 P, supra n. 2, para. 123.

[61] Note that the EC's earlier claim that this objective itself was necessarily a consequence of Article 107(1) TFEU whether or not it could be found in a Member State's law, which was put forward, inter alia, in the EC Commission Notice on the Notion of Aid in 2016, and its Opening Decision in *Apple,* had been superseded by a different reasoning in its final decision and also no longer relied upon or defended in the judicial procedure.

[62] CJEU, C-182/03 and C-217/03, *Belgium and Forum 187,* EU:C:2006:416 (specifically, para. 95 of that judgment).

[63] CJEU, C-885/19 P, *Fiat,* supra n. 57, para. 102.

[64] Compare GC T-755/15 and T-759/15, *Fiat*, ECLI:EU:T:2019:670, para 142: "*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 GC T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338, 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'*."

[65] 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., https://research.ibfd.org/#/doc?url=/collections/et/html/et_2024_06_e2_1.html, 261.

[66] Ibid., para. 155.

whether the EC had identified a departure from Irish case law or administrative practice in its assessment of the tax rulings in question, instead contenting itself with the GC's assessment as to the content of Irish law.[67] Unlike the GC and AG Pitruzzella, which had both cited and engaged with Irish case law,[68] the CJEU did not make any such reference. This is especially surprising insofar as the CJEU annulled the GC judgment 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 judgment in *Apple*, the CJEU reiterated its stance from *Fiat*, holding in *UK CFC*, that "the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member State concerned"[69] 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"[70].

25. In *Apple*, the CJEU did not require any threshold to find a relevant misapplication of national law. Instead, it seems to have upheld the EC'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"[71]. 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 details of their application up to that administration.

26. 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 judgment and provide insights on the likely implications for tax ruling assessments going forward.

B. Rules of evidence and burden of proof

27. 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 GC is solely competent to make assessments of fact and, in drawing its conclusions, is free in its decision on how to weigh evidence, without such decision being subject to review by the CJEU except in cases of distortion.[72] The CJEU further endorsed the GC's freedom to rely on a single piece of evidence, such as an entry in board minutes produced by a taxpayer, in its assessment.[73] At the same time, and in light of the ability of parties to a state aid procedure to provide evidence, the GC cannot fault the EC for taking the absence of specific evidence as evidence of absence for specific facts.[74]

28. Another important finding by the CJEU with respect to the rules of evidence concerned the limitation of parties' ability to bring new evidence in an appeal against an EC 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 GC committed an error which, insofar as the GC had relied on this evidence to rule against the EC,

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[67] CJEU, C-465/20 P, supra n. 2, para. 278-279 (indicating that the GC had accepted that national law required the application of the arm's length standard and, in essence, the logic underlying the AOA) and 305 (simply stating that the EC 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").

[68] GC T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338, para. 179-184 (referring to *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd.* [1988]), para. 219 (referring to *Belville Holdings v. Cronin [1985]*); Opinion AG Pitruzzella, 9 November 2023, supra n. 4, para. 55 (referring to *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd.* [1988]).

[69] 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.

[70] Ibid., para. 98.

[71] Ibid., 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 GC's choice of reference framework and interpretation of the constituent provisions of that framework (para. 175).

[72] Ibid., para. 242.

[73] Ibid., para. 247.

[74] Ibid., para. 245.

would by itself have resulted in its judgment being annulled. The limitation does not, however, apply to information the EC ought to have obtained during the administrative procedure. The EC being "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 the EC to the existence of such a system for the purpose of negotiating and signing contracts.[75] In this context, even though it is clear that the EC is reliant on parties' submission of evidence and the legal system must ensure proper incentives for collaboration in fact-finding, the CJEU appears to give the EC an easy win insofar as it considered the information provided by Apple during the administrative procedure to be so vague as to excuse the EC for not having obtained more exact information on those powers of attorney. This is especially notable in light of the importance of the EC's assessment regarding the lack of functions performed by ASI and AOE's head offices in its decision to consider the correct allocation of the IP licences in question to the Irish branches.

C. The impact of the CJEU's use of "Res Judicata" (reference system, comparability, arm's length principle)

29. On several key questions, the CJEU declined to reexamine issues raised against the EC decision, instead considering them to be "*res judicata*". Although it may seem surprising given the multiple errors it considers the GC to have made in its analysis and also in light of the fact that it annulled its judgment, this is nevertheless a natural consequence of the failure of Ireland and Apple to "keep those questions alive" through a cross-appeal.[76]

30. 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 profit, including section 25 TCA 97, the GC had acknowledged comparability, in principle, of resident and non-resident companies.[77] Apple and Ireland had argued that there was a fundamental difference between them, thus establishing non-resident companies as a separate category of taxpayers, which, for purposes of identifying a selective advantage, ought to have been compared only to each other.[78] In the second place, the res judicata argument was applied to reject any objection against the EC's use of the arm's length principle in general,[79] and the Authorised OECD Approach in particular.[80]

31. In light of the development in the CJEU's case law, as it relates to the arguments made before the GC, 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 already above, the CJEU had explicitly rejected the EC and GC's approach in this respect in *Fiat*. In *Fiat*, the CJEU had recognised 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 EC must "take account of those legislative choices, aimed at clarifying the scope of the arm's length principle

[75] Ibid., para. 188.

[76] Ibid., para. 273, citing C-362/19 P, EU:C:2021:169, para. 109 and C-833/19 P, EU:C:2021:950, para. 81 as precedent on the res judicata effect of GC judgments that have been set aside.

[77] Ibid., para. 276.

[78] See GC judgment 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 what constitutes 'chargeable profits' for them (especially GC judgment paras. 159-161).

[79] CJEU, C-465/20 P, supra n. 2, para. 278.

[80] Ibid., para. 279.

and its implementation"[81] in domestic law. No such deference to national administrative practice is apparent in the CJEU's decision in *Apple*.

D. The Authorised OECD Approach

32. Another key question discussed since the emergence of the case in the public eye concerned the relevance of the Authorised OECD Approach (AOA) for the correct allocation of profits to the Irish branches. Considering the fact that that very specific guidance was only published at the OECD level in 2008 and recognised for its implementation to require significant rephrasing of Article 7 of the OECD Model Tax Convention, while the tax rulings in question were issued in 1991 and 2007, respectively, and were based on section 25 TCA 97 (i.e., the "Taxes Consolidation Act 1997"), it would seem an unlikely conclusion that the correct application of that provision of Irish law should require an exact mirroring of the methodology advocated in the AOA.

33. It should be noted at the outset that the EC decision under review did explicitly not rely on the AOA – a point accepted by the GC and, in the absence of a cross-appeal by Apple or Ireland, held to be *res judicata* by the CJEU.[82] 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"[83]. In the same vein, both the GC and the CJEU analysed the relevance of the AOA to assess 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.

34. The level of similarity of Irish law and the AOA is described by the GC as having "*essentially some overlap*"[84] between the application of section 25 TCA 97 and the analysis conducted as the first step of the AOA. Revisiting that point, the CJEU characterised that very statement as the GC 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". [85] Does the difference between those phrases mean that the CJEU effectively mischaracterised the GC's conclusions regarding Irish law? While it may appear so at first glance, that conclusion would be excessive, noting that the GC 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]".[86]

35. The CJEU ultimately supported the EC 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.[87] In particular, the EC identified the following functions related to the IP: "development and maintenance of the Apple brand on the local market" (EC decision para. 297), "gathering and analysing regional data to estimate the expected demand forecast for Apple products" (EC decision para. 298), and "operating the AppleCare customer support service" (EC decision para. 299). 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 GC – which would make it inconsistent with that approach to allocate the IP licences for the most part, to the Irish branches, namely 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 for which it accepted evidence to support any

[81] CJEU, C-885/19 P, *Fiat,* supra n. 57, para. 99.
[82] CJEU, C-465/20 P, supra n. 2, para. 279.
[83] EC Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373, L:2017:187:TOC, para. 322.
[84] GC T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338, para 239.
[85] CJEU, C-465/20 P, supra n. 2, para. 123.
[86] GC T-778/16 and T-892/16, Ireland and Others v Commission, EU:T:2020:338, para 323.
[87] CJEU, C-465/20 P, supra n. 2, para. 126.

relevant functions to have been exercised. 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, given rise to a profit of about EUR 100 bn.

36. Despite the fact that this outcome is based on a very formalistic approach, which is not far from the "exclusion approach" the GC criticised the Commission for, it is not at all clear whether it corresponds to a correct understanding of the AOA (if it were relevant): Fundamentally, the AOA seeks to determine the appropriate profit arising from the functions performed in a PE, which is even independent of the profit made by the enterprise of which the PE forms part[88]. In stark contrast to the AOA's focus on PE functions, the CJEU, following the AG, started from ASI's profits and concluded that, given the fact that some relevant functions were found to be exercised at the PE, and none were accepted to exist elsewhere, all profits – by necessity, and under Irish law – had to be allocated to the PE.[89]

E. Relevance of the territoriality principle

37. 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 – with the territoriality principle. In deciding on the merits of the complaints brought by Apple and Ireland against the EC 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."[90]

38. 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".[91] 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 with 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 muddling 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.[92]

F. Recovery and the consequences of US taxation

39. With the annulment of the GC judgment, the EC decision has been fully reinstated, thereby making Ireland liable to recover the aid provided to the Apple Group, which meanwhile amounts to EUR 14.1 bn in taxes plus accrued interest.[93] Uncertainty arises in this respect, however, because the EC had, in its decision,

[88] AOA 2010, para. 50.

[89] See AG Opinion, 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." CJEU, 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".

[90] CJEU, C-465/20 P, supra n. 2, para. 309.

[91] Ibid., para. 292.

[92] CJEU, C-555/22 P, supra n. 69, e.g. para. 108 (noting that the principle of territoriality "largely characterises" the UK corporate tax system), and para. 127 (noting that the rules on CFC "supplement the [UK corporate tax system], and follow the same logic which is largely based on the principle of territoriality").

[93] Department of Finance of the Government of Ireland, Press Release 'Information Note RE Apple Escrow Fund and Third Country Adjustment' 10 September 2024 (https://www.gov.ie/en/press-release/24349-information-note-re-apple-escrow-fund-and-third-country-adjustment/)

allowed Apple to claim deductions from the amount of profit it was meant to pay tax on in Ireland. In para. 448-451 of its decision[94], the EC detailed deductions based on, in essence, amounts for which taxes would be paid in other jurisdictions either by ASI and AOE or by other entities.[95]

40. 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 for reductions in the amount to be recovered suggests that the situation where Apple Inc. 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 (para. 449 EC decision), 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.

IV. The Statement

41. The CFE takes note of the judgment in which the CJEU sought to bring an end to a long-running state aid dispute over the correct application of old Irish tax law to a complex business arrangement. It welcomes the CJEU's decision to give a final judgment in the case to prevent a prolonged uncertainty over the outcome. It wonders, however, how the judgment fits with recent case law of the Court, which had shown more deference to Member States' interpretation of their law in assessing derogations from 'normal taxation' in specific cases.

42. The CFE wonders whether the judgment's outcome, insofar as it sits in tension to holdings in its earlier judgments in *Fiat* and *Engie*, and the later judgment 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 but, in the absence of a cross-appeal by Ireland or Apple, had considered *res judicata* in this decision. In light of these considerations, the CFE expects the Court will clarify the status of its judgment in this case and its previous case law in future decisions.

[94] EC Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373, L:2017:187:TOC, para. 448-451.
[95] This stated method of calculation appears not to have been independently challenged by Ireland or Apple in the proceedings before the GC.