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EU Commission to appeal the Apple State aid judgement: the best is yet to come

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The European Commission has finally disclosed its [intention to challenge the Apple judgement](#) delivered by the General Court on the 15th of July.^[1] Although it has been a difficult choice, considering the highly political implications of the matter, the Commission's resolve is strategically sound as it offers the Court of Justice the possibility to correct the arguably formalistic approach of the General Court regarding the burden of proof in State aid and tax rulings cases.

The GC Judgment in a nutshell

The Apple judgement is in many respects in line with the precedents [FIAT](#) and [Starbucks](#): the legal reasoning behind the application of art. 107 TFEU to tax rulings is substantially confirmed and the flaws of the Commission's decision lie, again as it was in [Starbucks](#), in the lack of proof of «selective advantage».

First, the Commission's competence to scrutinize tax rulings under State aid control is confirmed. This is based on the application of the well-known principle according to which «while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law. Thus, instances of intervention by the Member States in the field of direct taxation, even if they concern issues that have not been harmonised in the European Union, are not excluded from the scope of the rules on State aid control».^[2]

Secondly, as far as the «notion of aid» is concerned, the Court confirmed that discrimination is at the core of the notion of selectivity in fiscal matters. In the present case, the assessment of the Commission was therefore rightly based on the comparison between *Apple Operations Europe* and *Apple Sales International* (hereinafter «AOE» and «ASI»), the Apple subsidiaries incorporated in Ireland, and the other operators economically active in Ireland, in order to ascertain whether the first enjoyed a reduction in the amount of tax «which would normally have been payable».^[3]

Finally, and most importantly, the General Court confirmed that the *arm's length principle* is inherent in the application of art. 107 TFEU to tax rulings. Recalling the Court of Justice's [Forum 187 Judgement](#), the Court held that «although so-called 'normal' taxation is to be determined according to the national tax rules (...), Article 107(1) TFEU gives the Commission the right to check whether the level of profit allocated to the branches that has been accepted by the national

authorities for the purpose of determining the chargeable profits of those non-resident companies corresponds to the level of profit that would have been obtained if that activity had been carried on under market conditions».^[4]

The Commission's assessment was overturned on the merits because, according to the General Court, none of the three alternative types of reasoning proposed could substantiate the finding that Ireland granted a selective advantage. The Commission's assessment is to a large extent based on the negligent and inconsistent nature of the Irish tax authorities' scrutiny on the contested tax rulings, incompatible with the behaviour which must be expected from a *prudent independent operator*.^[5] This led the Commission to consider that the profits should have been allocated to the AOE and ASI Irish branches instead of to the head offices, which were not fiscally resident anywhere. Moreover, as a subsidiary line of reasoning, the Commission considered that the method used by Ireland to calculate the taxable profits was erroneous. Finally, as an alternative line of reasoning, the Commission based its assessment on the absence of objective criteria limiting the discretion of Irish tax authorities.^[6]

The General Court, although acknowledging «the incomplete and occasionally inconsistent nature of the contested tax rulings»^[7], found the evidence brought forward by the Commission insufficient to prove the existence of a selective advantage. In this regard, the section focusing on the first line of the Commission's reasoning seems to be the most problematic from a legal standpoint. According to the EU judges, the Commission should have proven that the profits at issue were taxable under Irish law, as interpreted by the Irish High Court^[8], rather than attributing them to the Irish tax jurisdiction through an «exclusion approach» i.e. based on the fact that Ireland was objectively the most closely linked State to the production of «European» profits. This reasoning is surprising and arguably incorrect because the «notion of aid» loses its objective nature and becomes entirely dependent on the structure of Member States' tax systems, in clear contrast with consolidated fiscal State aid case law.^[9]

The final word is for the Court of Justice

The Commission has wisely decided to bring the case before the Court of Justice, which will have a final say on the matter. By contrast with Starbucks, where the State aid decision was annulled on the basis of the Commission's inaccurate factual assessment^[10], the case at hand concerns the standard of proof in State aid cases, a point of law clearly within the competence of the Court of Justice of the EU.

As briefly highlighted above, the most problematic issue seems to be the link between national law and the «notion of aid». The reasoning of the General Court equates *de facto* the application of State aid control to a mere conformity control on the application of domestic law by tax authorities. This would easily allow Member States to circumvent the application of art. 107 TFEU by simply including loopholes and contradictions in their legal systems, exactly what happened in the case of Ireland.

Although it is correct to focus the State aid assessment on the behaviour of national tax authorities, the scrutiny cannot be limited to the way they apply national law. The intrinsically distortive effects of tax rulings issued in legal systems which are designed to encourage unfair tax competition must be neutralised with a broader interpretation of art. 107 TFEU, which focuses on

the objective discrimination between operators. As mentioned above, the General Court recognised this point but failed to draw the logical consequences as far as the evidentiary standard is concerned. It seems reasonable for the Commission to try and pursue its interpretation of art. 107 TFEU in front of the Court of justice.

As far the standard of review is concerned, the Commission used in its decision the *prudent independent operator*^[11], another element which is worth proposing to the Court of Justice. The behaviour of the tax authority is compared to that of a diligent and fair administration in order to assess whether the aid was granted, thus forcing Member States to adopt anti-elusive tools and carry out careful *ex ante* evaluations of the tax rulings proposed by multinationals. The category clearly mirrors the Market Economy Operator Principle (MEOP), which has already been considered analogically applicable by the General Court in the Starbucks judgement.^[12]

In light of the above, it's the author's opinion that the assessment which the Commission must carry out should be focused on the behaviour of the State as tax authority rather than on the formal misapplication of tax law in the specific case.^[13] This means that the burden of proof imposed on the Commission is satisfied once the latter shows that the anti-avoidance tools inherent in the application of art. 107 TFEU to tax rulings (including the *arm's length principle*) have not been applied at all or blatantly misapplied: this is, in itself, sufficient to grant a selective advantage since it entails a derogation from the tax system, which cannot but be based on the assumption that companies are taxed on the real profits they make.

Once this has been established, the amount to be recovered should be determined separately, again by applying anti-avoidance tools like the "exclusion approach" proposed by the Commission in its decision. This is because, although the starting point of the assessment is the national tax system, the principle of non-discrimination between tax payers requires to erase the loopholes intentionally left by the Member State in its tax code. Finally, to avoid double taxation issues, the tax returns which have been paid on the same profits in other jurisdictions should be discounted from the recovery order, but this is of course for the beneficiary to prove.

What's next?

The difficult verdict is, once again, in the hands of the Court of Justice, which will have to balance the principle of legality in fiscal matters – tightly linked to the interpretation of art. 107 TFEU and the Commission's standard of proof – against the need to fight effectively against aggressive tax planning practices.

We are by now accustomed to brisk evolutions in the State aid field, often realized through clashes between the General Court and Court of Justice. Although it is hard to say if the Commission's standard of review will be upheld, one thing is for sure: the best is yet to come.

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References[+]

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