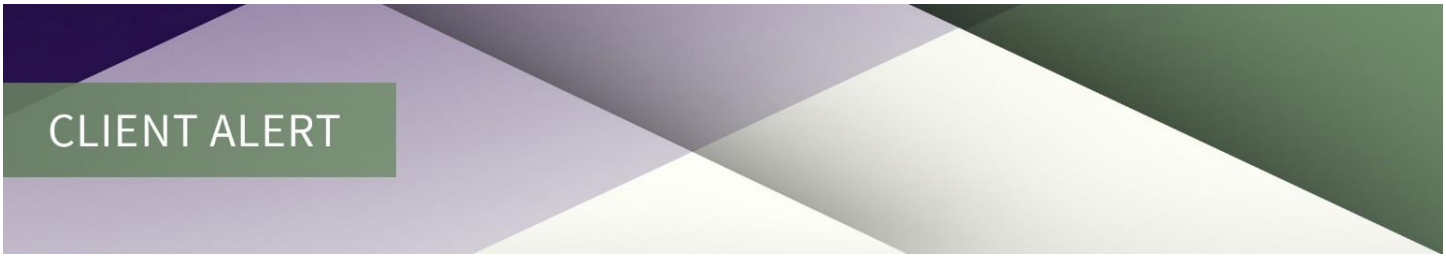

The General Court of the European Union Annuls the 2016 European Commission Decision that Ordered Apple to Pay Back EUR 13 Billion in Relation to Irish Tax Rulings

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On 15 July 2020, the EU's lower-tier General Court of the European Union (the "General Court") ruled that the European Commission (the "Commission") failed to show, in its 2016 decision, that Apple had received an "advantage" from the Irish government, via so-called "tax rulings," and therefore that these measures could be construed as State aid under EU law. As a result, Apple may not have to pay back EUR 13 billion plus interest to Ireland, as was ordered by the Commission. The Commission can appeal the General Court's decision to the Court of Justice of the European Union (the "Court of Justice") within two months and ten days of notification of the decision.

Legal background and the 2016 Commission decision

A measure that constitutes State aid under EU law needs to be notified to the Commission and cannot be implemented until the Commission has reached a final decision.[1] Conversely, measures that do not constitute State aid under EU law can be implemented without the need for notification to the Commission.

[1] Article 108(3) of the Treaty on the functioning of the European Union ("TFEU").

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Under EU law, State aid is defined as *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […], in so far as it affects trade between Member States."*[2] Therefore, the definition of State aid is composed of six elements under EU law, namely: (i) the existence of an undertaking, (ii) the imputability of the measure to a Member State, (iii) its financing through State resources, (iv) the granting of an advantage to an undertaking, (v) the selectivity of the measure and (vi) its effect on competition and trade between Member States. All of these elements need to be found for a measure to be deemed as constituting State aid.[3]

In 2016, the Commission considered that two successive tax rulings issued by the Irish government in 1991 and 2007, in effect for 23 years, unduly favoured Apple by enabling it to pay less than 1% tax on its European profits.[4] More precisely, the Commission had found that the tax rulings endorsed a way to establish the taxable profits for Apple Sales International ("ASI") and Apple Operations Europe ("AOE"), two Apple subsidiaries incorporated in Ireland, which did not correspond to economic reality as almost all sales profits recorded by the two companies were internally attributed to "head offices" that existed only on paper, and were not subject to tax in any country under Irish tax law.

The Commission therefore considered that the tax rulings constituted State aid, were unlawfully put into effect by Ireland (which had not notified the measures to the Commission), and that the measures were incompatible with the internal market. The Commission demanded the full recovery of the amount of the aid from Apple, that it had estimated at EUR 13 billion. Ireland[5] and Apple[6] challenged the 2016 Commission decision before the General Court.

The 2020 landmark General Court *Apple* decision

By all standards, the ruling handed down by the General Court in the *Apple* case is a landmark decision, not only in view of the record amount that Apple was asked to pay back, but also – and perhaps most importantly – from a legal perspective, as the legal challenge tested at its core the Commission's approach on tax rulings.

The *Apple* ruling comes after a string of Commission decisions on tax rulings, two of which had already been reviewed by the General Court:[7] while the EU's lower-tier court had already approved the methodology used by the Commission in its tax ruling cases, a high standard of proof was set and the Commission's evidentiary effort was deemed insufficient by the

2 Article 107(1) of the TFEU.

3 Commission notice of 19 July 2016 on the notion of State aid as referred to in Article 107(1) of the TFEU.

4 SA.38373, *Apple (Ireland)*, European Commission decision of 30 August 2016.

5 Case T-778/16.

6 Case T-892/16.

7 Cases T-760/15 and T-636/16, *The Netherlands/Starbucks v. Commission*, General Court decision of 24 September 2019; cases T-755/15 and T-759/15, *Luxembourg/Fiat v. Commission*, General Court decision of 24 September 2019.

General Court in one instance, leading ultimately to different outcomes.[8] In particular, the General Court had ruled that *"the mere finding of non-observance of the methodological requirements for the determination of transfer pricing is not sufficient to establish that there is State aid […]. The Commission must also demonstrate that the methodological errors that it identified […] resulted in a reduction of the taxable profit compared to a profit that would have been calculated in accordance with the arm's length principle."*[9]

Here, in its latest judgment (dated 15 July 2020),[10] the General Court annuls the 2016 Commission *Apple* decision, finding that the Commission did not succeed in showing, to the required legal standard, that the measures entailed an "economic advantage" under EU State aid law. Although the General Court endorses the Commission's assessment relating to the determination of what constitutes a "normal taxation" under Irish tax law,[11] with a view to comparing Apple's tax treatment with a "normal" counterfactual, the General Court nonetheless considers that the Commission incorrectly concluded that the Irish tax authorities had granted Apple an advantage.

In particular, the General Court notes in this regard that *"in so far as it has been established that the strategic decisions — in particular those concerning the development of the Apple Group's products underlying the Apple Group's IP — were taken in Cupertino [USA] on behalf of the Apple Group as a whole, the Commission erred when it concluded that the Apple Group's IP was necessarily managed by the Irish branches of ASI and AOE, which held the licences for that IP."*[12] The General Court also finds that *"the Commission erred when it considered that the functions and activities performed by ASI's Irish branch [i.e. quality control, managing risk exposure, data analysis, brand management, after-sales service, etc.] justified allocating the Apple Group's IP licences and the income arising from those licences to that branch."*[13]

In other words, although the Commission had established that Apple had paid minimal taxes in Ireland, it had not proven that another company, not benefiting from the contested tax rulings, should have paid more taxes in Ireland, in application of Irish tax law, insofar as a larger share of the IP licensing revenues of that company should have been allocated to Ireland. Interestingly, the General Court has indicated that it *"regrets the incomplete and occasionally inconsistent nature of the contested tax rulings,"*[14] but nonetheless concludes that these defects are not, in themselves, sufficient to prove the existence of an advantage under EU State aid law.

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8 An appeal is pending before the Court of Justice in the Luxembourgish case (C-885/19 P); the Dutch case was not appealed by the Commission.

9 Cases T-760/15 and T-636/16, para. 427.

10 Cases T-778/16 and T-892/16, *Ireland/Apple v. Commission*, General Court decision of 15 July 2020 (the "Decision").

11 In particular having regard to the tools developed within the Organization for Economic Cooperation and Development (OECD), such as the arm's length principle (i.e. intra-group transactions can be treated as though they were made between independent companies only if the price and other conditions are market conditions).

12 Decision, para. 302.

13 Decision, para. 284.

14 Press release (n°90/20) of the General Court of 15 July 2020.

Incidentally, the General Court also considers that the Commission did not prove (in its alternative line of reasoning), that the contested tax rulings were the result of discretion exercised by the Irish tax authorities and that, accordingly, Apple had been granted a selective advantage, or else that the methodological errors in the contested tax rulings led to an undue reduction in Apple's chargeable Irish profits.

What consequences, next steps?

Although the decision of the General Court is a serious setback for the Commission in its approach towards tax rulings, it must not be overstated (at least at this stage) for two reasons: (i) an appeal may successfully be brought by the Commission to the Court of Justice, and (ii) the General Court confirmed again the methodology applied by the Commission, as it previously had (see above), although not its application in the present case and the sufficiency of the supporting evidence presented by the Commission, thereby opening the door to a potential new, better-motivated decision from the Commission.

As a result, companies should be careful not to equate the General Court's judgment in the *Apple* case as a general approval by EU courts of tax rulings issued by Member States, which still need to be closely assessed on a case-by-case basis and may still constitute illegal or incompatible State aid depending on the specific circumstances of each case.

The Commission's Executive Vice-President Margrethe Vestager indicated that her services *"will carefully study the judgment and reflect on possible next steps."* Although Executive Vice-President Vestager confirmed the Commission's objective that all companies should pay their fair share of tax and that the Commission will continue to look at tax measures to assess whether they constitute illegal State aid, she seemed to suggest nonetheless that a legislative loophole needed to be filed to efficiently do so: *"State aid enforcement needs to go hand in hand with a change in corporate philosophies and the right legislation to address loopholes and ensure transparency."*[15]

On this last point, Apple declared, following the General Court's ruling, that it encouraged work to continue towards a global solution on how a multinational company's income tax payments should be split between different countries.

[15] Statement of Executive Vice-President Margrethe Vestager of 15 July 2020 (STATEMENT/20/1356).

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