



The impact of Apple's General Court decision

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The facts and background

- Two companies, ASI and AOE, were registered in Ireland but were not resident there for tax purposes.
- The two companies had branches in Ireland, and the question concerns the attribution of profits to these branches.
- Through two rulings (advisory opinions) issued in 1991 and 2007, the Irish tax administration accepted certain methodologies to determine the remuneration of the branches.
- The European Commission found that the rulings implied the grant of illegal State aid, and ordered the recovery of such aids.

- **Primary argument:** The non-allocation of the Apple Group's IP licences to the Irish branches of ASI and AOE ;
- **Subsidiary argument:** The inappropriate choice of method for allocating profits to the 2 Irish branches (i.e. cost+ method not correct) ;
- **Alternative argument :** The discretionary manner with which the rulings had been granted (i.e. as there has not been a real comparability study performed) risked endorsing a method of attributing profits which results in State aid.

The Court's take on the European Commission's arguments



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- **Primary argument:** The non-allocation of the Apple Group's IP licences to the Irish branches of ASI and AOE ;
- **Subsidiary argument:** The inappropriate choice of method for allocating profits to the 2 Irish branches (i.e. cost+ method not correct) ;
- **Alternative argument :** The discretionary manner with which the rulings had been granted (i.e. as there has not been a real comparability study performed) risked endorsing a method of attributing profits which results in State aid.



- Accepted



- Rejected

The General Court's ruling – primary argument



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Background fact : the EC tried to apply Authorized OECD Approach (AOA) to the attribution of profits to the 2 Irish branches. In order to determine the profit to be attributed, a FAR analysis had to be performed.

Since the most valuable asset is the IP and nobody could be identified in the US managing it, **by a process of exclusion** the IP *was deemed* to be attributed to Ireland.

- The AOA was and still is not part of Irish legal framework;
- The EC was adopting an approach which is not part of Irish law;
- However, the General Court has ruled that even though the AOA was not part of Irish law and that there's no obligation on EU Member States to adopt the AOA, **nevertheless the EC can use the AOA as a tool to decide whether or not an advantage has been given to a branch of a non resident company by comparison to a separate standalone company in Ireland.**

The General Court's ruling – secondary argument



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Background fact : The EC challenged the choice of method for allocating profits to the 2 Irish branches. In the course of the EC investigation, both Apple and Ireland commissioned several TP experts to prepare ad hoc TP reports.

- The ad hoc reports operated on the assumption that if the AOA were to be applied in Ireland, the methodology applied by the Irish Revenue resulted in an arm's length outcome;
- They carried out an AOA type of approach by assessing the FAR;
- The appropriate methodology for TP would be the TNMM by looking at the less complex party (i.e. the Irish branches) and one should apply a Berry ratio to determine the profit attributable to the branch;
- If you do that you arrive at an interquartile range for the attribution of profits;
- The figures reached by the Irish Revenue Authorities in the advisory opinion were within the interquartile range determined by the ad hoc reports;
- Therefore, even if Apple applied a completely up to date TP approach – the remuneration endorsed by the Irish Revenue was still correct and at arm's length.

The EC attacked the ad hoc TP reports on all its points.
The General Court upheld the ad hoc TP reports.

The General Court's ruling – alternative argument



Background fact : The EC challenged the discretionary manner with which the rulings had been granted and asked to see equivalent advisory opinions/rulings given by the Irish state to other non resident branches there.

After analysing the advisory opinions and noticing the difference in outcome and treatment of companies in a “similar situation”, the EC concluded that the Irish Government had too much discretion, which resulted in State aid.

Although the General Court ruled that there was a lack of precision in the methodology adopted by Ireland in granting the advisory opinions, it also stated that the difference in outcomes was a reflection of particular facts of different cases.

The General Court also stated that the mere fact that there were no guiding principles under Irish law for the attribution of profits to a branch does not constitute State aid.

- Allowing the EC to use the **AOA as a tool** to assess whether State aid has been granted is a major development of the European tax jurisprudence;
- This is a development from the Fiat and Starbucks cases, where the GC recognized that the EC is allowed to use the **arm's length principle as a tool** to assess whether state aid has been granted;
- Although it could have been expected that the GC would have used the same approach in Apple as it did in Starbucks and Fiat, the novelty in the Apple case was that the two entities were branches, as opposed to being standalone entities as was the case in Starbucks and Fiat;
- However, even after accepting that the AOA can be applied by the EC as a tool, the GC ruled that the approach was wrongly applied by the EC;
- There is no warrant in the AOA for an **exclusion approach** (i.e. nobody can be found in the US managing the IP, therefore by exclusion the IP has to be attributed to the branches in Ireland).