

# ECJ Advocate General: Apple State Aid Case to Be Referred Back to General Court for New Analysis (*European Commission v Ireland and Others* (Case C-465/20 P)) (Direct Tax) – Details

23 November 2023

Report from Angelika Xygka, Associate, IBFD

Advocate General (AG) Pitruzzella of the Court of Justice of the European Union (ECJ) has opined that the ECJ should set aside the General Court's judgment of 15 July 2020 and refer the case back to the General Court (GC). In the case of *European Commission v. Ireland and Others* (Case C-465/20 P), the AG considered whether the specific transfer pricing treatment granted to Apple and its Irish branches through Ireland's tax rulings constituted illegal State aid. Details of the opinion are summarized below.

(a) Facts. This case concerns the Irish part of the operations of US multinational Apple Group. Apple Inc. indirectly held Apple Operations Europe (AOE) which in turn held Apple Sales International (ASI). AOE and ASI were Irish incorporated entities but were not considered tax residents therein. AOE and ASI held two Irish branches. AOE's branch carried on manufacturing and assembling activities for Apple-branded products, and ASI's branch performed procurement, sales and distribution activities for Apple-branded finished products. As per a cost-sharing agreement valid between 1991 to 2014, Apple Inc., AOE and ASI shared all costs and risks emanating from R&D with respect to intangibles connected with Apple-branded products and services, while Apple Inc. remained the owner of such IP rights. In addition, Apple Inc. granted ASI and AOE each a royalty-free licence allowing those entities to manufacture and sell the Apple products concerned in the territory that had been assigned to them (i.e. worldwide coverage apart from North and South America) (the IP licences).

The tax treatment applicable to the US-Ireland intra-group transactions was secured through tax rulings. As confirmed by the Irish tax authorities through said tax rulings, the IP rights and greater part of the profits were essentially allocated outside the Irish branches and their head offices. On 30 August 2016, the European Commission concluded that said rulings were giving rise to a reduction in the tax charges that ASI and AOE would have been required to bear under arm's length conditions. On 15 July 2020, the GC annulled the EC's decision in its entirety. On 25 September 2020, the Commission appealed the GC's judgement.

(b) Issue. The appellant challenged in particular the General Court's conclusion on the fact that:

- (i) the Commission had not succeeded in demonstrating that the IP licences should have been allocated to the Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland (in view of the actual activities and functions performed by the Irish branches and of the strategic decisions taken and implemented outside of said branches) (*EC's primary line of reasoning*); and

(ii) the profit allocation methods approved through the rulings were based on inappropriate methodological choices, which led to a reduction in the amount of tax that ASI and AOE were required to pay in comparison to what would have been applicable following market conditions (*EC's subsidiary line of reasoning*).

(c) Advocate General's opinion. Generally, the AG concluded that both grounds of appeal raised by Commission are well founded. Specifically, The AG opined that the GC erred in law when it concluded that the Commission had adopted an "exclusion" approach (which goes against Irish law, the arm's length principle and the authorised OECD approach) in its primary line of reasoning. The AG agreed with the Commission that it was not the finding in itself that the head offices had neither employees nor physical presence that led the Commission to conclude that the IP licences and related profits had to be allocated to the Irish branches, but rather the linking of two separate findings, those being:

- the complete absence of functions and risks assumed by the head offices; and
- the multiplicity and centrality of those assumed by the branches.

The AG further opined that the GC erred in law when it reached the conclusion that there was insufficient evidence to allocate the IP licences to the branches by comparing the licences-related functions performed at branch level with those performed by Apple Inc. vis-à-vis Apple Group's IP. In his opinion, the comparison should have rather been made with the activities performed by the head offices in relation to those licences. The AG noted that the irrelevance of the functions performed by Apple Inc. with regard to the Apple Group's IP for the purposes of determining ASI's and AOE's chargeable profits in Ireland was expressly and repeatedly submitted by the Commission.

With respect to the ground of appeal linked to transfer pricing matters, the AG opined that the General Court's assertion that the Irish branches performed "routine" functions with regard to the IP licences is based on a comparison between those functions and those performed by Apple Inc. (vis-à-vis the Group's IP) and that, in making that comparison, the General Court infringed the arm's length principle. He observed that said error influences also the assessment which led the General Court to approve the choice of the Irish branches as tested parties. The AG agreed with the Commission as to the importance attributed to the choice of the tested party in the context of applying methods similar to the TNMM as such a choice decisively influences the reliability of the result of the analysis.

The AG further opined that (irrespective of the correctness of accepting the Irish branches as tested parties) the choice of taking ASI's and AOE's operating costs as the profit level indicator had led to chargeable profits of those companies in Ireland which did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle.

The AG concluded that the ECJ should set aside the judgement of the General Court of the European Union of 15 July 2020 and refer the case back to the General Court for it to provide a new assessment. In view of the errors of law committed by the General Court, which vitiate its assessments as regards both the primary line of reasoning and the subsidiary line of reasoning, the ECJ does not have before it the elements enabling it to give final judgment on the actions at first instance and that the cases must be referred back to the General Court, reserving the costs, so that the latter may carry out a new analysis and rule on the pleas not examined.

---

European Union; Ireland - ECJ Advocate General: Apple State Aid Case to Be Referred Back to General Court for New Analysis  
(European Commission v Ireland and Others (Case C-465/20 P)) (Direct Tax) – Details (23 Nov. 2023), News IBFD.

Exported / Printed on 9 Mar. 2024 by hkermadi@deloitte.lu.