UNIVERSITY OF LEEDS

This is a repository copy of *Between Apples and Oranges: The EU General Court’s Decision in the ‘Apple Case’*.

White Rose Research Online URL for this paper:
https://eprints.whiterose.ac.uk/192412/

Version: Accepted Version

Article:

Parada, L (2021) Between Apples and Oranges: The EU General Court’s Decision in the ‘Apple Case’. EC Tax Review, 30 (2). pp. 55-63. ISSN 0928-2750

https://doi.org/10.54648/ecta2021007

© 2021 Kluwer Law International BV, The Netherlands. This is an author produced version of a paper published in EC Tax Review. Uploaded in accordance with the publisher's self-archiving policy.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

White Rose university consortium
Universities of Leeds, Sheffield & York

eprints@whiterose.ac.uk
https://eprints.whiterose.ac.uk/

Between Apples and Oranges: The EU General Court's Decision in the 'Apple Case'
Leopoldo Parada*

Abstract

This contribution provides a brief summary of the EU General Court's decision in the joined state aid cases T- 778/16 and T- 892/16 ("Apple case") and explores the main reasonings provided by the Court. In particular, it analyses the arguments related to the use of the arm's length standard as an "allocation benchmark" and the use of the OECD TP Guidelines for this purpose, including also issues of comparability and burden of proof. Finally, the commentary elaborates upon two more general implications with regard to this Court's decision, namely the use of state aid law as a tool to tackle tax avoidance both within and outside the internal market, as well as the general approach towards "stateless income".

1. Introduction

In a decision of 15 July 2020, the EU General Court (hereinafter, "General Court" of "the Court") annulled the Commission's state aid decision that condemned the Republic of Ireland (hereinafter, 'Ireland') to recover the aid granted to the Apple group in the form of tax rulings.[1] These rulings allegedly endorsed an allocation of profits mechanism that resulted in undertaxed profits that would not be possible had the arm's length standard been properly applied. The General Court agreed to annul the Commission's decision in light of the unsuccessful attempt of the Commission to prove the existence of a selective advantage, prohibited under Article 107(1) TFEU. [2]

This contribution provides a brief summary of the General Court's decision and explores the main reasonings provided by the Court. In particular, it evaluates the arguments related to the use of the arm's length standard as an "allocation benchmark" and the use of the OECD Transfer Pricing Guidelines (hereinafter, "OECD TP Guidelines") for this purpose, including also issues of comparability and burden of proof. Finally, the commentary elaborates upon two more general implications with regard to this Court's decision, namely the use of state aid law as a tool to tackle tax avoidance both within and outside the internal market, as well as the general approach towards "stateless income".[3]

(*) Dr Leopoldo Parada is a Lecturer in Tax Law at the University of Leeds School of Law in the United Kingdom.

[1] Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, OJ L 187, 19.7.2017, pp. 1–110 (hereinafter "Commission Contested Decision 2017").
[2] General Court Judgement of 15 July 2020 in *Ireland v Commission* and *Apple v Commissio*n, Cases T-778/16 and T-892/16, ECLI:EU:T:2020:338 (hereinafter, "GC Decision in Apple"), para. 507.
[3] The term *stateless income* has been baptised and defined by Edward Kleinbard as "the income derived for tax purposes by a multinational group from business activities in a country other than the domicile of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is not the location of the customers of the factors of the production though which the income was derived, and is not the domicile of the group's parent company". E. Kleinbard, *Stateless Income*, 11 Florida Tax Review 699, 701 (2011). Conceptually, therefore, it is not equivalent to double non-taxation or the total absence of taxation. *See* L. Parada, *Double Non-*

Electronic copy available at: https://ssrn.com/abstract=3818119

Section 2 summarises the background that surrounded the General Court's reasonings. Section 3 comments on four main issues related to the judgement: i) joint examination of advantage and selectivity for state aid purposes; ii) the use of the arm's length standard as an allocation benchmark and the use of the OECD TP Guidelines for this purpose, iii) comparability, and iv) burden of proof. Section 4 elaborates upon two more general implications from the Court's decision, namely the use of state aid law as a tool to tackle tax avoidance both within and outside the internal market, as well as the general approach towards stateless income. Section 5 provides some final remarks.

2. Background and Judgement

The main state aid issue of this case refers to two tax rulings issued by Ireland in 1991 and 2007 in favour of two Irish subsidiaries of the Apple group, namely Apple Operations Europe (AOE) and Apple Sales International (ASI).[4] These two subsidiaries are wholly owned by Apple Inc., a US Corporation, and each one of them has a corresponding branch in Ireland.[5] AOE's branch, on the one hand, has an important number of employees and was basically engaged in unrelated contracts with manufacturers in China to assemble Apple's products that were distributed later to Asia and Europe.[6] ASI's branch, on the other hand, operated through AOE's employees and service contractors, engaging mainly in the sale of products to other parts of the world.[7] Due to mismatches between the US and Irish tax laws, neither AOE nor ASI were considered residents either in the US or Ireland.[8] Therefore, tax liability in Ireland was strictly reduced to the profits potentially attributed to AOE and ASI's branches.

The Commission main argument in the case under analysis was that these two tax rulings allowed the artificial shift of profits within the group. This could have been done because, despite of the fact that the head offices of ASI and AOE's branches had no employees, assets or performed any functions, the tax rulings allocated to them key intellectual property (IP licenses), and therefore, conveniently attributed profits derived from it.[9] The Commission argued that this amounted to reduce Ireland's taxable base and it was contrary to the arm's length because a proper analysis of functions and assets would have resulted in the profits derived from the IP being attributed to ASI and AOE's branches.[10] Similarly, and as a

Taxation and the Use of Hybrid Entities: An Alternative Approach in the New Era of BEPS, 17-19 (Kluwer Law International, 2018). However, and for purposes of this contribution, I will take both concepts 'stateless income' and 'double non-taxation' as equivalent concepts since that seems to be the meaning assumed for most of the recent state aid cases in relation to tax rulings.

[4] GC Decision in Apple, paras. 12-21 (detailing the scope of the tax rulings).

[5] GC Decision in Apple, paras. 1-3.

[6] GC Decision in Apple, para.10.

[7] GC Decision in Apple, para. 9.

[8] Ireland and the US define corporate tax residence using different factors. Whilst Ireland used by then the place of management and control, the United States uses the place of incorporation. Therefore, as both AOE and ASI were managed and controlled in the United States, neither of them was to be considered tax resident in Ireland. Similarly, as neither AOE nor ASI were incorporated in the United States, they were not US tax resident either. For a full analysis of all the issues concerning the Apple structure and the double non-taxation issue, *see* A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014).

[9] GC Decision in Apple, paras. 37- 40. See also, Commission Contested Decision 2017, paras. 264 et seq.

[10] Id.

Electronic copy available at: https://ssrn.com/abstract=3818119

subsidiary argument, the Commission argued that even if one agrees on how the IP licenses were assigned to ASI and AOE, the attribution of profits should have been more generous if a "correct transfer pricing methodology", following the arm's length standard, would had been applied.[11] In other words, the Commission argued that the method applied, which as per the Commission resembled the transaction net margin method (TNMM), departed from an alleged arm's length and granted an advantage to ASI and AOE. Finally, the Commission used an alternative argument that questioned the excessive discretion of the Irish tax authorities with regard to the allocation of profits to branches, challenging again the outcome of the tax rulings.[12]

Although the General Court finally ruled against the Commission, it is not possible to affirm that the Commission necessarily lost all the battles. Indeed, the General Court leaves us with several questions, particularly as regards the use of the arm's length standard as an allocation benchmark and the use of the OECD TP Guidelines for this purpose. These and other questions are analysed in the subsequent parts of this contribution.

3. Comments

This Section turns now the analysis onto the main reasonings provided by the Court, which are divided as follows: (A) joint examination of advantage and selectivity for state aid purposes; (B) the use of the arm's length standard as an allocation benchmark and the use of the OECD TP Guidelines for this purpose, C) comparability, and (D) burden of proof.

A. Joint Examination of Advantage and Selectivity

One of Ireland's argument in the case under analysis was merely a formality. Ireland argued that the Commission disregarded principles well-stated in case law by which the conditions of advantage and selectivity in the state aid analysis should have been done separately. Therefore, the Commission would have, in principle, erred in law in relation to determining the existence of an illegal state aid.[13]

It is undoubtful that advantage and selectivity are indeed two separate conditions that are part of the doctrinal analysis to determine illegal state aid. Whilst the former refers to the fact that the financial position of the undertaking has improved due to the aid,[14] the latter attempts to demonstrated that such undertaking enjoys a privileged position in comparison to other undertakings in a similar legal and factual situation, always in light of the objective of the reference framework.[15] However, in practice both conditions are strictly connected and they

[11] GC Decision in Apple, para. 41. See also, Commission Contested Decision 2017, paras. 328-333.
[12] GC Decision in Apple, para. 42. See also, Commission Contested Decision 2017, para 369.
[13] GC Decision in Apple, para. 133.
[14] Judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, para. 15.
[15] Judgment of 8 September 2011, *Paint Graphos and Others*, C 78/08 to C 80/08, EU:C:2011:550, para. 49.

Electronic copy available at: https://ssrn.com/abstract=3818119

constantly overlap with each other. This is why the CJEU has ruled in the past that nothing in law prevents that advantage and selectivity can be analysed together.[16]

Therefore, the apparent overlapping between advantage and selectivity appears to be nothing but a mere formality, which does not affect the state aid analysis as a whole. For this purpose, this author agrees with Court that this issue is indeed irrelevant.[17]

B. Reference Framework and State Aid Law

i. Arm's Length Standard as an 'Allocation Benchmark'

One of the most striking outcomes of the General Court's decision in the Apple case refers to the Commission's use of an alleged arm's length standard to verify the correct allocation of profits.[18] The Commission's approach was supported by the General Court and found grounds in the CJEU's decision in *Forum 187*.[19] According to the Commission, and ratified by the General Court, the arm's length could be used as an *allocation benchmark* "to ensure that transactions between integrated group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been carried out by non-integrated stand-alone companies".[20] That is, the Commission would enjoy a new prerogative to use arm's length as a free-standing obligation to check member states' profit allocations, regardless of whether or not that particular member state recognised the arm's length into its national legal system.

There are various reasons why the General Court's confirmation of the Commission line of reasoning is arguable to say the least.

First, this approach violates the well-settled understanding under EU law that member states are sovereign to decide in direct taxation matters which events should be taxed, and how that taxation will occur within the limits of their territory. This is why a relevant benchmark for state aid purposes cannot be derived autonomously from EU law or alleged fiscal standards applied within or outside the European Union.[21] Some might argue that this is not what the

---

[16] Judgment of 30 June 2016, *Belgium* v *Commission*, C 270/15 P, EU:C:2016:489, para. 32. *See also*, e.g. H. López, *General Thought on Selectivity and Consequences of a Broad Concept of State Aid in Tax Matters*, 9 European State Aid Law Quarterly 4, 807 (2010).

[17] GC Decision in Apple, paras. 138-139.

[18] GC Decision in Apple, para. 34-35 and 192 et seq (analysis of the General Court).

[19] Judgement of 22 June 2006, *Belgium and Forum 187 v Commission,* C-182/03 and C-217/03, EU:C:2006:416, para 97 (confirming that member states should apply the arm's length standard as embedded in their domestic laws to resemble prices that would have been charged in conditions of "free competition"). *See also*, Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (Text with EEA relevance.) (notified under document number C (2003) 564, para. 95.

[20] GC Decision in Apple, para. 194.

[21] W. Schön, 'Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence', in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation*, 9 (Springer, 2016). In contrast, *see* the CJEU decisions in Judgment of 22 December 2008, *British Aggregates v Commission,* C-487/06, ECLI:EU:C:2008:757; Judgement of 17 November 2019, *Presidente del Consiglio dei Ministri v Regione Sardegna*, C-169/08, ECLI:EU:C:2009:709; and Judgment of 15 November 2011, *European Commission and*

Electronic copy available at: https://ssrn.com/abstract=3818119

General Court is doing because the Court is not confirming the arm's length standard as "a basis for imposing taxes that would otherwise not be due under the reference framework", but rather as a benchmark to verify that Ireland allocated Apple's profits without benefiting integrated companies in comparison to stand-alone companies. However, the practical effect is the same.[22] What would be the difference between formally recognising a free-standing obligation to apply the arm's length standard based on Article 107 TFEU and what the Court confirmed to be just an 'allocation benchmark'? [23] Probably none. The General Court just confirmed that the assumed sovereignty of member states in direct tax matters is not such, and that an "arm's length control" by the Commission is now possible, regardless of the fact that the questioned member states does not recognise such a standard.

Second, the approach confirmed by the General Court poses an obvious risk upon the use of advanced legal certainty in the form of tax rulings. Indeed, if one assumes for a moment that Ireland had its well-settled transfer pricing system, followed the OECD arm's length standard (i.e., the Transfer Pricing Guidelines), and that a transfer price was calculated according to those rules, too. Could an *ex-post* evaluation of the allocation of profits change that result? Would that necessarily amount to illegal state aid? A strict reading of *Forum 187* would suggest a positive answer. In fact, an *'EU arm's length standard'* applied as an allocation benchmark would demand profit levels very close to those profits reported by stand-alone companies. Therefore, the most likely result will be that a tax ruling will be considered *per se* selective, regardless of the question on whether that ruling is part or not of a more generally applicable system.[24] On the contrary, if one assumes that the ruling system can be part of the reference system, the fact of providing an advantageous ruling will not be enough to determine illegal state aid. That is, it will need to be tested against the system of issuing ruling as a whole. Therefore, only to the extent that the whole system is flawed favouring group companies would give rise to illegal aid.[25] This latter argument, nonetheless, was expressly rejected by the Court.[26]

Third, the General Court rejected the argument of Ireland and Apple regarding to what constituted the reference framework, raising issues of comparability.[27] However, and unlike other state aid cases, the *Apple case* does not raise comparability issues between integrated and

---

Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732.

[22] In this opinion, *see also* R. Mason and S. Daly, *State Aid: The General Court Decision in* Apple, 99 Tax Notes Int'l 1317, 1323 (2020).

[23] The GC concluded that an arm's length standard very similar to that applied in the OECD TP Guidelines was expressly endorsed in Irish case law. Particularly, the GC referred to the outcomes in *Belville Holdings v. Cronin* [1985], I.R.465, and in *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd*. [1988], I.R.10. GC Decision in Apple, paras. 184 and 219. See also the analysis at *infra* Section 3.B.ii.

[24] R. Luja, 'State Aid Benchmarking and Tax Rulings: Can We Keep It Simple?', in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation*, 119 (Springer, 2016).

[25] The Commission would not need to assess every ruling individually. *See* Judgement of 14 October 1987, *Germany v Commission*, C-248/84, ECLI:EU:C:1987:437, para 18.

[26] GC Decision in Apple, para. 155 (arguing that the tax rulings form part of the general Irish corporate tax system).

[27] GC Decision in Apple, paras. 140-165. For an analysis of comparability, *see also* W. Haslehner and A. Ancora, *The Apple State Aid Case*, in M. Lang et al (eds), *CJEU - Recent Developments in Direct Taxation 2019,* 233-234 (Linde, 2020).

Electronic copy available at: https://ssrn.com/abstract=3818119

stand-alone companies, but rather between branches of non-resident companies and resident companies. These issues will be analysed in separate section of this contribution.[28]

ii. The OECD Transfer Pricing Guidelines and the AOA

The use of the OECD Transfer Pricing Guidelines to approximate transaction to an alleged arm's length standard, and therefore, to determine the existence of a selective advantage deserves special attention, too.[29]

The core question relies —again— on whether the guidelines have been incorporated or acknowledged within the domestic law, shaping therefore the general tax system. If the answer is positive, there are no doubts that the OECD TP guidelines could themselves serve as a benchmark as part of the reference system, regardless of whether the arm's length standard as such is part of the reference system. On the contrary, the justification to refer to the OECD TP Guidelines is more arguable if there is no such a reference either in domestic law or administrative practice. [30]

In the case under analysis, the General Court did not only accept the use of arm's length as an *allocation benchmark*, but also confirmed the argument of the Commission that as the application of Irish domestic law (section 25 of the TCA 97) resembles the Authorised OECD Approach (AOA) —contained in the OECD TP guidelines—, its application is allowed. In particular, the Court concluded that as section 25 of the TCA 97 looks at the circumstances and facts of the branches in Ireland (including functions, assets and risk), there was "essentially some overlap" with the AOA approach.[31] In the view of the Court, therefore, such an alleged overlap would be enough to conclude that Ireland if not formally, at least informally or implicitly, incorporated or acknowledged the use of the AOA approach contained in the OECD TP guidelines, confirming the Commission's retroactive application of this modern guidance.[32]

The Court's conclusion is arguable as it suggests that a mere resemblance in the domestic law of an alleged international standard may be considered enough to justify the use of benchmarks beyond the domestic systems, and regardless of its formal legal recognition within domestic law.[33] This is particularly important when only a few countries around the world have formally

[28] See *infra* Section 3.C.
[29] GC Decision in Apple, para. 239.
[30] W. Haslehner, *Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law*, in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation* (Springer, 2016) (arguing that accepting the OECD TP Guidelines as a benchmark just because they are "internationally accepted standards" is unconvincing).
[31] GC Decision in Apple, paras. 238-239. See also the Irish case law at supra note 23 that the GC accepted as an endorsement to the OECD arm's length standard since they "involved adjustments equivalent to those proposed on the basis of the arm's length principle, in particular in the OECD Transfer Pricing Guidelines". GC Decision in Apple, para. 219 (in reference to the Irish case law *Belville Holdings v. Cronin* [1985]).
[32] R. Mason, *Identifying Illegal Subsidies*, 69 Am. U. L. Rev. 479, 516 (2020).
[33] For the role of the role of the OECD TP Guidelines with regard to the interpretative process of transfer pricing rules, *see* A. Navarro, *Transactional Adjustments in Transfer Pricing*, sec. 2.3.1.2 (IBFD, 2018).

Electronic copy available at: https://ssrn.com/abstract=3818119

accepted to implement the OECD TP Guidelines, first;[34] and secondly, because there is no doubt that it goes against legal certainty, granting the Court extensive powers to interpret the domestic laws of Member States and their potential resemblance with standards apparently accepted by a worldwide majority.[35] Moreover, if alleged overlaps are sufficient proof of the recognition of certain "international standards", there are no doubts that many state aid cases can be decided beforehand.

Let me take the example of double non-taxation and the apparent international standard of ensuring single taxation to exemplify the above.[36] Consider two countries having a tax treaty that imposes the residence state to relieve double taxation using for this purpose the exemption method. Let's also assume also that by application of the same treaty the residence state considers that that certain item of income (e.g., royalties) are attributed to branch in the source state, which is considered to be a permanent (PE) establishment by both the residence and the source state. However, as per domestic tax law in the source state that income is not taxable. The outcome is therefore double non-taxation. Consider also that all this has been interpreted by a specific tax ruling granted to a specific undertaking in the residence state.[37]

If this situation was part of a state aid assessment, we would need to find the derogation from the general system that causes an unequal treatment. By a matter of logic, that general system is given by the tax treaty itself (i.e., the treaty is the reference framework), unless we agree that a superior principle is embodied in the nature of tax treaties in the form of single taxation. If the Court assumes that single taxation is indeed a principle followed by all countries and embodied also into tax treaties, there is no doubt that a new benchmark is born, regardless any formal legal recognition.[38]

[34] CFE ECJ Task Force, Opinion Statement ECJ-TF 3/2020 on the General Court judgments of 15 July 2020 in the Cases T-778/16 and T- 892/16, Ireland v. Commission and Apple v. Commission, on State aid granted by tax rulings fixing the attribution of profits to permanent establishments in Ireland, p 11 para 40 (2 December 2020) (criticising the idea that the AOA —embedded in the TP Guidelines— represents an international consensus). *See also,* Haslehner and Ancora, supra note 26, at 234-235. In contrast, *see* Mason, supra note 31, at 514 (arguing that most countries, including non-OECD countries, follow the OECD TP guidelines).

[35] For example, the Preliminary Decision SA 38944 (Amazon) stated in paragraph 11: "The internationally agreed standard for setting such commercial conditions between companies of the same corporate group or a branch thereof and its parent company and thereby for the allocation of profit is the 'arm's length principle' as set in Article 9 of the OECD Model Tax Convention".

[36] In brief, single taxation endorses the idea that income in cross-border transactions should be taxed once, but no more than once, reinforcing the prevention of both double taxation and double non-taxation. See R. Avi-Yonah, *International Tax as International Law: An analysis of the International Tax Regime*, Cambridge University Press, New York (2007), at 8-13. This "principle" of international tax law has been defended and criticised in the tax literature in the past. More recently, it has evolved into the so-called concept of "full taxation". See, R. Mason, *The Transformation of International Tax*, Am. J. Int'l Law 114:3, 353 (2020) (who originally proposed the concept of "full taxation"); N. Noked, *Defense of Primary Taxing Rights* (forthcoming) (arguing for a 'defensive primary taxing right tax' which would follow the full taxation approach); S. Moyal, *Back to Basics: Rethinking Normative Principles in International Tax,*73 Tax Lawyer 1(2019) (arguing for a broader interpretation of single taxation very similar to full taxation). For a normative criticism of the concept of full taxation, see L. Parada, *Full Taxation: The Single Tax Emperor's New Clothes*, Fl. Tax Rev 24 (2021-forthcoming).

[37] The facts of this example resemble those in the open investigation to Luxembourg's tax treatment of McDonald's. See European Commission, Press Release State aid: Commission opens formal investigation into Luxembourg's tax treatment of McDonald's, IP/15/6221, 3 December 2015.

[38] For example, I would not argue that a tax treaty may under certain circumstances pursue the avoidance of double non-taxation such as in the case of a treaty that specifically includes a subject-to-tax clause. If that were the case,

Electronic copy available at: https://ssrn.com/abstract=3818119

Although the example above is not directly relevant to the case under analysis, it serves to illustrate that if a door is open for the Commission to attend to so-called "international recognised standards or principles" —whatever that means— the seek for benchmarks can arrive at the absurd of arguing, for example, that any state action not curbing base erosion and profit shifting (BEPS) can almost automatically be considered state aid. This does not only contradict the traditional benchmarking used in state aid cases, but the purpose of state aid law itself.[39]

iii. The use of the TNMM method

As part of its subsidiary line of reasoning, the Commission also argued that even if one accepts that profits should be allocated to the branches of ASI and AOE (as argued by Ireland), the method applied for allocation of profits —and endorsed in the tax rulings— departed from arm's length and granted an advantage to ASI and AOE.[40] For this purpose, and curiously to say the least, the Commission considered that the method for allocation of profits endorsed in the rulings resembled the transaction net margin method (TNMM), which is laid down in the OECD TP Guidelines. Thus, it decided to use it as reference to determine whether or not ASI and AOE received an advantage.[41] The question is, therefore, whether the Commission was entitled to do that.

The Court was very pragmatic here and relied on two actions from Ireland and Apple Inc to confirm the use of the TNMM method. First, the existence of ad hoc reports from tax advisors relying on the TNMM to demonstrate that the ASI and AEO's allocated profits in Ireland were arm's length.[42] Secondly, the fact that neither Apple Inc. nor Ireland criticised the decision of the Commission to use the TNMM in relation to its line of reasoning.[43]

Although the Court ultimately considered that the Commission did not satisfactorily proved that choosing ASI and AOE's branches as tested parties led to a reduction in the allocation of profits, the Court's line of reasoning is arguable for various reasons.

First, domestic Irish Law does not seem to provide any specific (not even preferable) transfer pricing method for the allocation of profits. Indeed, section 25(1) of the TCA 97 simply states: "A company not resident in the State shall not be within the charge to corporation tax unless it carries on a trade in the State through a branch or agency, but if it does so it shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on

I would dare to say that the avoidance of double non-taxation is part of the reference system for state aid purposes. *See also* in this opinion: R. Szudoczky, 'Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law: Comments', in in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation*, 172 (Springer, 2016).

[39] See more at *infra* Section 4.A (state aid and tackling tax avoidance).

[40] GC Decision in Apple, para. 315.

[41] GC Decision in Apple, para 316.

[42] GC Decision in Apple, para. 324.

[43] GC Decision in Apple, para. 323.

Electronic copy available at: https://ssrn.com/abstract=3818119

all its chargeable profits wherever arising".[44] Accordingly, subsections 2 and 3 of section 25 of the TCA 97 do not specify the method for the allocation of profits either. It seems, therefore, that the Court did not only agree with the application of a *sui generis* arm's length standard, but also made an approximation of what is the *most suitable* allocation method for this purpose.[45]

Second, it is questionable that the Court relied exclusively on the uncontested Commission's election of the TNMM, as well as the existence of 'ad hoc reports' from tax advisors, to confirm the suitability of the TNMM. This is not only against legal certainty —any resemblance to any method of allocation of profits can be interpreted now by a Court as a confirmation or acknowledgement— but the whole act of doing so presents transfer pricing as a sort of exact science where only one outcome is possible.[46] This is far from reality and demonstrates again the Commission's ambition of not only recognising an inexistent "EU law principle of arm's length" among member states, but also to apply a certain method in a certain manner, even though neither domestic law nor the OECD TP Guidelines (soft law) prescribe a priority of methods.[47] Indeed, a "wrong application" of an allocation method in transfer pricing should not amount to anything else than a mistake, whose correction should not become a new prerogative of the Commission. Therefore, it is debatable that the Commission attempts now to exercise a sort of "best-method control" as if the sovereignty of member states in direct tax matter was not relevant anymore. Moreover, this may create a permanent sensation of uncertainty for taxpayers who must now turn not only to national tax authorities in the seek for legal certainty (tax rulings), but also to the Commission which must now confirm both the allocation method and its proper application following unrealistic standard of sophistication as regards profits' attribution.[48]

Ultimately, it is perhaps important to note here the contradiction that in a European single market where other methods for the allocation of profits has been expressly acknowledged, the Commission —supported by the General Court in this case— insists in the arm's length standard as the only formula to ensure equal treatment.[49] Indeed, one should not forget that formulary apportionment is indeed the core of the European Common Consolidated Corporate Tax Base (CCCTB) project, and that allocation of profits based on formulas is exactly the

[44] Section 25(1) of the Taxes Consolidated Act 1997.
[45] The qualification of "sui generis" is justified by the fact that the Court agrees with the Commission on an arm's length standard equivalent to the OECE TP Guidelines based on its own interpretation of Irish domestic and case law. See also for the use of the term *sui generis* arm's length, Mason and Daly, *supra note* 23 at 1319.
[46] P. Wattel, 'The Cats and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions', in I. Richelle, W. Schön and E. Traversa (eds), *State Aid Law and Business Taxation,* 186 (Springer, 2016). *See also*, GC Decision in Apple, para. 455 (confirming, however, that in transfer pricing not only one outcome is possible).
[47] Curiously, however, the Commission challenged the application of the TNMM method to Starbucks's coffee roasting facility, considering it inappropriate. This demonstrate again that transfer pricing is far for providing a unique standard solution.
[48] See also in this opinion, Haslehner and Ancora, supra note 26, at 235.
[49] In this opinion, *see also* T. Fausta, *The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules*, Eur. St. Aid L.Q. 249, 262 (2019).

Electronic copy available at: https://ssrn.com/abstract=3818119

opposite than an allocation based on 'arm's length'.[50] This proves again that the idea of an autonomous arm's length is nothing more than an ideal and very fragile construction.

C. Comparability

As already noted, the General Court rejected the argument raised by Ireland and Apple in the contested decision in 2017, who claimed that it was section 25(1) of the TCA 97 and not the entire corporate tax system in Ireland the correct reference framework in the case. Instead, the General Court supported the position of the Commission who argued that section 25(1) of the TCA 97 was part of the ordinary rules of corporate taxation in Ireland. [51] Therefore, and even though residents and non-residents are taxed on different source of income, they both would be in comparable factual and legal situation in light of the "intrinsic objective" of the rules, [52] which was identified as "to tax the chargeable profits of companies carrying on activities in Ireland, be they resident or non-resident, integrated or stand-alone".[53]

There are two remarkable issues to highlight here. First, although the General Court follows a traditional "derogation approach" in order to identify the existence of illegal state aid, it acknowledges the approach confirmed in previous case law, which states that for a measure to be considered selective, it is enough to demonstrate that the measure benefits a particular group of operators that are in an objectively comparable situation.[54] Second, if this assertion is correct, it would mean that similar allocation rules should be applied to both types of entities, and that Article 107(1) TFEU would grant the Commission a sort of right to control that.[55]

There is no much analysis of the issue of comparability in the General Court's decision. However, if we recall the contested decision in 2017, the Commission supports the alleged comparability with two CJEU cases on fundamental freedoms that, although related, refer to entirely different questions.[56]

The first one is *Royal Bank of Scotland v Elliniko Dimosio (Greek State),* which referred to the application of a tax rate of 40% in Greece on a branch of the Royal Bank of Scotland whose seat was in the United Kingdom.[57] This tax rate was different from that applicable to Greek

---

[50] European Commission, Proposal for a Council Directive on a Corporate Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4

[51] GC Decision in Apple, para. 224 ("…the fact remains that, if those national rules provide that the branches of non-resident companies, as concerns the profits derived from those branches' trading activity in Ireland, and resident companies are to be subject to the same conditions of taxation…")

[52] GC Decision in Apple, para. 142.

[53] GC Decision in Apple, para. 155. *See also*, Id., para. 200.

[54] Judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C 20/15 P and C 21/15 P, EU:C:2016:981, paras. 76 and 77.

[55] GC Decision in Apple, para. 224 ("…Article 107(1) TFEU gives the Commission the right 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").

[56] Commission Contested Decision 2017, para. 239. *See also*, Haslehner and Ancora, supra note 26, at 233.

[57] Judgement of 29 April 1999, *Royal Bank of Scotland plc v Elliniko Dimosio (Greek State),* C-311/97, ECLI:EU:C:1999:216 (hereinafter, "Royal Bank of Scotland")

Electronic copy available at: https://ssrn.com/abstract=3818119

banks with a seat in Greece, which amounted to a 35%. Therefore, the main issue concerned the comparability between non-resident companies' branches and resident companies, and the potential discrimination of the formers under fundamental freedoms.[58] Similarly, the Commission uses *CLT-UFA SA* to support its argumentation.[59] In this case, the main issue referred to the application of a tax rate of 42% to profits of a non-resident Luxembourgish company with a German branch in comparison to a German subsidiary of a non-resident company, which would have been generally subject to a tax rate of 30% if all profits were distributed at the end of the year.[60] Thus, a differential treatment existed only because the seat and management of the parent company was in Luxembourg and not in Germany, infringing therefore the freedom of establishment. The CJEU agreed that the differential rate was discriminatory, emphasising that the freedom to choose a legal form through which a business in another member state will be carried out allows companies to open a branch and be treated equally in comparison to subsidiaries in that member state.[61] In other words, member states would be prevented to set up a differential tax treatment between subsidiaries and branches of non-resident companies since both are in a comparable situation.[62] Therefore, and once again, *CLT-UFA SA* answers a different question regarding comparability and fundamental freedoms than that posed in the *Apple case*.

As noted by other commentators, too, the alleged comparability raises questions, because residents and non-resident companies in the source state are generally comparable only to the extent they earn income in that state, and under the limit of territoriality, which allows the exclusion of some items of income in the case of non-residents.[63] Therefore, a branch of a non-resident company is not in the same situation than a resident subsidiary as regards the foreign income earned by the non-resident company's branch.[64] However, the General Court agreed with the Commission that resident and non-resident companies are comparable if non-resident companies carry out a business in Ireland through a branch,[65] because the general objective of the Irish corporate tax regime was to tax all chargeable profits of companies carrying on activities in Ireland.[66] It would be recommendable that the CJEU addresses this issue in further detail during the appeal.[67]

---

[58] Royal Bank of Scotland, para. 26 and 29.

[59] Judgement of 23 February 2006, *CLT-UFA SA v Finanzamt Köln-West*, C-253/03, ECLI:EU:C:2006:129 (hereinafter, "CLT-UFA").

[60] CLT-UFA, paras. 3 to 9.

[61] CLT-UFA para. 15.

[62] CLT-UFA para 16 and 30. The CJEU concluded that the only difference between a subsidiary and a branch of a non-resident company relies on the formalities involving the distribution of profits. Whilst this is done through a formal decision in the case of a subsidiary, the absence of a formal decision is what characterises the situation of branches. However, both are in a comparable position. Id., para. 23.

[63] Haslehner and Ancora, supra note 26, at 234.

[64] Judgement of 2 October 1997, *Futura Participations and Singer*, C-259/95, ECLI:EU:C:1997:239, para. 22.

[65] GC Decision in Apple, para. 161.

[66] GC Decision in Apple, para. 155. *See also*, Id., para. 200.

[67] European Commission, Statement by the Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgement on the Apple tax State aid case in Ireland (25 September 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1746

Electronic copy available at: https://ssrn.com/abstract=3818119

D. Burden of Proof

Another important issue in relation to the General Court's decision in *Apple* refers to the burden of proof. Has Ireland the burden to prove that its profit allocation's decisions based on *ex-ante* Irish law were correct? Is that the Commission's role?

The question is more complicated and has more implications than it appears at first sight. Indeed, if the Commission proves that the decisions taken by Ireland were entirely discretionary, there would be grounds to shift the burden of proof onto Ireland.[68] This is because the CJEU has stated in the past that "if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which a financial assistance is provided…", such discretion can be considered selective. [69] However, such a discretion should not be general in nature.[70] In other words, a degree of discretion would still be acceptable to the extent that it is exercised within the objective limits of the tax system.[71]

In the case under analysis (*Apple*), the General Court appears to follow the logic already settled in *Starbucks* and *Fiat,* establishing that the burden of proof is upon the Commission. This is confirmed in several passages of the Court's decision, confirming that it is not enough for the Commission to state that there is a "methodological error" in the profit allocation to the Irish branches, but the Commission must prove that this error has led to a reduction in the chargeable profits of these entities, which "would have not obtained had the rulings not been issued".[72] That is, the causation between the methodological error and the reduction in the tax burden is crucial to determine the existence of an advantage.

The conclusion of the General Court has total logic. First, transfer pricing is not an exact science, and the Court expressly recognised it.[73] Second, and even agreeing on the application of an arm's length as an allocation benchmark, informed by the OECD TP Guidelines, the possible results can be varied. Therefore, the Commission is called to not only demonstrate that a "proper allocation" was not carried out, but that improper profit allocation results in an advantageous treatment. This causation link between the error and the reduction in the chargeable profits is precisely what the General Court considered unsatisfactorily proved, and ruled therefore against the Commission.[74]

---

[68] Haslehner and Ancora, supra note 26, at 238.
[69] Judgement of 18 July 2013, C-6/12, *P*, ECLI:EU:C:2013:325, para 27.
[70] Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27
[71] Judgement of 18 July 2013, C-6/12, *P*, ECLI:EU:C:2013:325, para 25 and 26.
[72] GC Decision in Apple, para. 333. *See also*, GC Decision in Apple, paras. 216 and 319.
[73] GC Decision in Apple, para. 455. Yet, once may still consider questionable that the Court relied exclusively on the uncontested Commission's election of the TNMM, as well as the existence of 'ad hoc reports' from tax advisors, to confirm the suitability of the TNMM. In other words, despite of accepting that transfer pricing is not an exact science, such an approach raises doubts. More about this argument at *supra* Section 3.B.iii.
[74] GC Decision in Apple, para. 333.

Electronic copy available at: https://ssrn.com/abstract=3818119

4. Other implications from the EU General Court's decision

In addition to the strict legal analysis provided in this contribution, the General Court's decision leaves us some other important consequences that go beyond this particular case. Most notably, the arguable use of state aid rules as a regulatory tool to tackle tax avoidance both within and outside the internal market, as well as the general approach on stateless income.

A. State aid rules and tackling tax avoidance

State aid rules have always responded to the rational of preventing illegal subsidies that may affect competition within the internal market. This also applies to subsidies granted in the form of taxes not properly charged or exempt, which may selectively benefit some specific undertakings or a group of them. However, and for many years, we have witnessed the underlying Commission's intention to extend the use of state aid rules beyond this purpose.

The *Apple case*, as well as the majority of the state aid investigations involving tax rulings in the last years, appear to be motivated by the frustration of tackling what seems to be flagrant cases of tax avoidance in the form of under taxation or non-taxation, mostly derived from disparities among countries.[75] However, state aid rules were not designed for this purpose.[76] This does not mean that the Commission should avoid all state aid investigations related to the improper application of tax rules.[77] Yet, such investigations should strictly respond to the fact that those actions have granted a selective advantage to an undertaking, affecting the general functioning of the internal market, and they should not affect the sovereignty that member states have in direct tax matters.[78] That is a simple recognition that the essence of state aid law is not to prevent or combat profit shifting or base erosion, but to ensure free and fair competition within the EU internal market, preventing member state to grant particular tax benefits (subsidies) to a specific sector, a singular undertaking or a group of them.[79] This is why the strategy of the Commission to utilise an autonomous arm's length standard —even as an "allocation benchmark" as in the *Apple case*— seems not only to exceed the EU mandate regarding state aid law, but creates also a shadow of uncertainty, which should certainly be avoided.

---

[75] Commentators have argued in the past that State Aid rules might play a role on this. *See,* e.g. P. Rossi-Maccanico, *Fiscal Aid, tax competition, and BEPS,* Tax Notes Int'l 857 (2014) (justifying the use of state aid law for the purpose of combating base erosion and profit shifting, as well as against harmful tax competition). However, this argument assumes a sort of general principle under European Law to combat abusive practices, an issue that has been clearly rejected by the CJEU in the past. *See* Judgment of 29 March 2012, *3M Italia*, C-417/10, ECLI:EU:C:2012:184, para. 32 ("…it is clear that no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation…").
[76] In this opinion, see also R. Luja, *State Aid Rules and Their Limits*, Tax Notes Int'l 353 (2014).
[77] Mason and Daly, supra note 23, at 1329.
[78] Luja, supra note 73.
[79] Id.

Electronic copy available at: https://ssrn.com/abstract=3818119

B. The approach on 'stateless income'

Interestingly, neither the Commission nor the Court paid much attention to the fact that ASI and AOE were considered stateless entities in Ireland due to the disparities between the rules determining corporate residence in this country and those applied in the United States.[80] Some authors have criticised this approach as 'mild', arguing that the Commission should have paid more attention on this fact, particularly considering that the Irish rules of corporate residence seemed to be devised in such a way to achieve that stateless result.[81] This approach would be supported in previous case law —in particular, *Gibraltar*— where the CJEU found plausible that an apparently neutral tax system could be devised to give advantage to a specific group of undertakings, amounting therefore to illegal state aid (*de facto* state aid).[82] Although the argument is attractive, one must carefully consider it.

First, the rules on corporate residence in Ireland were part of the corporate tax regime that existed even before the issuance of the tax rulings investigated. It is true that a modification of the rules was made in 1999 introducing place of incorporation as a factor, allowing also the use of the place of management and control under certain circumstances. However, to assert that such alternative use represents the Irish intention to devise opportunities for stateless income seems to go too far, and would require a sufficient proof which goes beyond of saying that the United States was one of the seven tax treaty partners of Ireland applying place or incorporation at that time, and therefore, purposively allowing the mismatch.[83] Moreover, it was the Commission itself who confirmed in 2009 that advantages from tax disparities between jurisdictions are not within the scope of state aid law to the extent that the national tax systems are themselves coherent.[84] That is, the fact that Ireland uses a particular factor to determine the corporate residence, which in interaction with another tax jurisdiction creates a mismatch and statelessness, is not within the scope of the state aid rules, regardless of the non-taxation outcome. This makes sense with the nature of state aid law, which focuses on the tax system of a singular member state in isolation.[85]

Second, the facts in *Gibraltar* and in Apple are rather different. In Gibraltar, the whole corporate tax system was replaced in order to avoid state aid law. That is why the CJEU found that illegal state aid existed 'as applied'. In *Apple*, however, there is a modification of the rules on corporate residence leaving the two factors for determining corporate residence alive. Whether that determination attends to the specific intention of allowing Irish companies, controlled by US entities, to be stateless is still a matter of proof.

---

[80] Supra Section 2 (explaining the Apple's structure and the reasons for statelessness).
[81] Mason and Daly, supra note 22, at 1328.
[82] Judgement of 15 November 2011, *Commission v. Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732.
[83] Mason and Daly, supra note 22, at 1328.
[84] The Commission already confirmed in 2009 that advantages from tax disparities between jurisdictions are not within the scope of state aid to the extent they the national tax systems are coherent. *See* Commission Decision C (2009) 4511 final (*Dutch group interest box*), OJ L 288/26 of 4 November 2009.
[85] Luja, supra note 73.

Electronic copy available at: https://ssrn.com/abstract=3818119

Third, and even though the argument of *de facto* selectivity could hypothetically succeed, it is important to note that the whole issue at stake is not about statelessness, stateless income or the non-taxation of economic behaviours as such. Indeed, this is not (and has never been) an issue under EU law.[86] Instead, the whole issue remains still on the existence of some domestic tax rules that can generate a selective advantage to some particular undertakings, constituting a derogation of the normal tax system. Some may argue that facilitating tax arbitrage is indeed a derogation of the normal system of taxation, contrary to the principle of abuse of law.[87] Yet, this affirmation assumes —erroneously in my view, and confirmed by case law— that the prevention of abuse of law is either a fundamental principle of EU law or part of the international tax regime followed by all countries.[88] Moreover, and as argued already, the task of counteracting abusive practices seems still to be within the scope of anti-avoidance legislation and not of that of state aid law. Indeed, state aid rules aim only at preventing illegal subsidies that may affect competition within the internal market. Therefore, these rules assess anti-avoidance legislation as a matter of selectivity, but in any case, they should aim to replace the lack of anti-abuse rules in a particular member state.

5. Final Remarks

There are no doubts that the General Court's decision in the *Apple case* is overly complicated and for moment very unsatisfactory, too. However, there are at least two positive lessons from it, which we should not forget in light of other state aid decisions in relation to tax rulings, too. First, state aid cases should always rely on proper legal grounds, avoiding the artificial construction of reference frameworks, as well as the application of *sui generis* international standards. Second, a proper understanding of the state aid law should never deviate from the fact that state aid rules are, in essence, anti-subsidy rules and not anti-tax avoidance rules, even when the absence of proper anti-abuse provisions in a member state or the particular outcome of a transaction may invite us to extend their use beyond their original scope. If we attend to these two basic lessons, perhaps we stop expecting that a European Court fixes what seems to be an incomplete or deficient work from national legislators. As apples are not the same as oranges, state aid legislation is definitely not the same as anti-avoidance legislation. It is perhaps time to draw that distinction more firmly.

***

A modified draft of this article has been published as Leopoldo Parada, *Between Apples and Oranges: The EU General Court's Decision in the 'Apple Case',* EC Tax Rev 2 (2021), pp. 55-63.

[86] Schön, supra note 21, at 5.
[87] P. Rossi-Maccanico, *Fiscal Aid, tax competition, and BEPS,* Tax Notes Int'l 857, 867 (2014).
[88] Judgment of 29 March 2012, *3M Italia*, C-417/10, ECLI:EU:C:2012:184.

Electronic copy available at: https://ssrn.com/abstract=3818119