

Ireland and Apple v. Commission: The General Court Annuls European Commission Judgment on Unlawful State Aid, Signaling Era of Scrupulous Fact Investigation in EU State Aid Cases

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I. OVERVIEW

The European Commission issued a decision in 2016 regarding two Irish Revenue tax rulings on January 29, 1991 and May 23, 2007, respectively.¹ The Irish Revenue rendered these rulings in response to ongoing communications with two Apple Group companies, Apple Sales International (ASI) and Apple Operations Europe (AOE).² These Irish tax rulings were favorable to Apple and endorsed the methods these Apple Group companies used to calculate their chargeable profits in Ireland from the trading activity of their Irish branches.³ In 2016, the European Commission (the Commission) held that these Irish tax rulings constituted illegal State aid to Apple in the form of unlawful tax benefits, and that Ireland unlawfully issued these tax rulings without notifying the Commission.⁴ The Commission reasoned that Ireland granted the Apple companies an unlawful tax advantage because they allocated to the companies, rather than to their taxable local branches, the majority of

1. Cases T-778/16 and T-892/16, *Ir. and Apple v. Comm’n*, ECLI:EU:T:2020:338, ¶ 11 (July 15, 2020).

2. *Id.* ¶¶ 11-21.

3. *Id.*

4. *Id.* ¶¶ 26-31.

profits for taxation purposes, including profits from Apple's intellectual property licenses.⁵

On appeal, the Seventh Chamber of the General Court of the European Union *held* that Ireland did not grant Apple unlawful State aid in the form of illegal tax benefits. *Cases T-778/16 and T-892/16, Ir. and Apple v. Comm'n*, ECLI:EU:T:2020:338, para. 11 (July 15, 2020).

II. BACKGROUND

The Treaty on the Functioning of the European Union (TFEU) is the continuation of one of the founding treaties of the EU that fosters cooperation among its Member States.⁶ Article 107 of the TFEU prohibits Member States from issuing State aid or granting aid through State resources that favor some undertakings and production of goods over others, absent exceptional circumstances.⁷ Aid of this kind distorts or threatens to distort competition.⁸ There are four criteria for determining the presence of State aid.⁹ State aid exists when: (1) the aid is granted through State resources or by the State; (2) one or more undertakings are favored, creating a selective advantage; (3) the aid has the potential to distort or does distort competition; and (4) the aid affects trade between Member States in the EU.¹⁰

Furthermore, Article 108(3) of the TFEU provides that the Commission shall be informed by Member States of any plans to grant aid.¹¹ A Member State shall not enact its proposed grant until the Commission has decided whether the aid is compatible with the internal market.¹²

A. *Direct Taxation Falls Within the Competence of the Member States*

As EU law currently stands, direct taxation falls within the competence of the Member States.¹³ However, Member States must

5. *Id.* ¶¶ 26-37.

6. Consolidated Version of the Treaty on the Functioning of the European Union pmb., Mar. 30, 2010, 2010 O.J. (C 83) [hereinafter TFEU].

7. *Id.* arts. 107(2)(a)-(c). Aid that is compatible with the internal market includes aid with a social character that is granted to individual consumers and aid to assist in relief from natural disaster or exceptional occurrences, among other kinds of aid.

8. *Id.* art. 107(1).

9. Commission Notice of July 19, 2016, The Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 1, ¶ 5.

10. *Id.*

11. TFEU art. 108(3).

12. *Id.*

13. Case C-269/09, *Comm'n v. Spain*, ECLI:EU:C:2012:439, ¶ 47 (July 12, 2012).

exercise this taxation power in a way that is consistent with EU law.¹⁴ The court relied on this determination of law in finding that Spain failed to fulfill its obligations under EU law where it adopted a law on income tax and amended its national laws on the taxation of corporations and on the income of non-residents.¹⁵ The court reasoned that Spain's personal income tax legislation was inconsistent with EU law, as it restricted freedom of movement for persons in the European Economic Area (EEA) Agreement through requiring taxpayers who transfer their residence abroad to include income not yet taxed in the tax base for the last year they were treated as resident taxpayers.¹⁶

Furthermore, in the absence of EU law governing the matter, designating the bases of assessment and spreading a tax burden across the different economic sectors is within the competence of the Member States.¹⁷ However, the Grand Chamber of the Court of Justice of the European Union held that the General Court erred in finding that a proposed tax reform did not confer selective advantages to offshore companies as per Article 87(1) of the EC Treaty.¹⁸ The court reasoned that offshore companies were not taxed because the bases of assessment were designed so that offshore companies that have no employees and occupy no business premises have no tax bases under the proposed reform.¹⁹ Although tax measures open to all economic agents are not State aid, here, the tax advantages that offshore companies benefitted from were not open to all economic agents and that offshore companies enjoy selective advantages because they have no employees and occupy no business premises.²⁰ The court reasoned further that the General Court failed to assess the regime as a whole, which provided a combination of a payroll tax and BPOT as the basis of assessment and the absence of a general basis of assessment providing for the taxation of all companies covered by the regime.²¹ This combination of bases proposed resulted in taxation according to the number of employees and the size of the business premises occupied, which inevitably granted offshore companies a

14. *Id.*

15. *Id.* ¶ 1.

16. *Id.* ¶ 48.

17. Cases C-106/09 P and C-107/09 P, *Comm'n and Spain v. Gov't of Gibraltar and U.K.*, ECLI:EU:C:2011:732, ¶¶ 97-98 (Nov. 15, 2011).

18. *Id.* ¶ 108.

19. *Id.* ¶¶ 106-07.

20. *Id.* ¶ 130.

21. *Id.* ¶¶ 98-100.

selective advantage, as they lack these two components by nature.²² The court held that here, the tax system conferred selective advantages because the proposed regime favored certain undertakings by virtue of their specific characteristics under Article 87(1) of the EC Treaty.²³

B. The Authorized OECD Approach: Using the Arm's Length Principle to Determine the Existence of a Selective Advantage

For the Commission to classify a tax measure as State aid, the aid must meet the conditions set out in Article 87(1) of the EC Treaty.²⁴ On the basis of a June 2006 judgment on a Belgian tax ruling, the Commission established that the arm's length principle is the benchmark for determining whether a company has received a selective advantage.²⁵ Specifically, EU courts consider whether a certain undertaking is favored, whether the measure is selective, whether the aid is granted through State resources and imputable to the state, and whether the aid affects trade between Member States and threatens to distort competition.²⁶ In *Belg. and Forum 187 ASBL*, taxable profits were set at a flat-rate amount that represented a percentage of operating costs and expenses.²⁷ Staff costs and financial charges were not included within these operating costs and expenses.²⁸ The court compared this tax regime to the ordinary tax system in conditions of free competition.²⁹ In an ordinary tax system, staff costs and financial costs make large contributions to allowing coordination centers to earn revenue, so the exclusion of these costs under the regime in question from taxable income of the coordination centers created transfer prices different from those in conditions of free competition.³⁰ Therefore, the exclusion of these costs granted an economic advantage to the coordination centers.³¹ The court further held that this aid was selective, as the proposed tax regime's exemptions from property and withholding tax, capital duty, and notional withholding tax were

22. *Id.* ¶ 102.

23. *Id.* ¶ 104.

24. Cases C-182/03 and C-217/03, *Belg. and Forum 187 ASBL v. Comm'n of the European Communities*, ECLI:EU:C:2006:416, ¶ 84 (June 22, 2006); *see* EC Treaty art. 87(1) (as in effect 1958) (now TFEU art. 107).

25. Cases C-182/03 and C-217/03, *Belg. and Forum 187 ASBL v. Comm'n of the European Communities*, ECLI:EU:C:2006:416, ¶¶ 5-15, 102 (June 22, 2006).

26. *Id.* ¶¶ 85-135.

27. *Id.* ¶ 91.

28. *Id.*

29. *Id.* ¶ 95.

30. *Id.* ¶ 96.

31. *Id.* ¶ 97.

deviations from the ordinary tax regime in Belgium.³² Further, the court found that these advantages were granted through State resources and were imputable to the State.³³ Finally, the court notes that the tax scheme affects trade between Member States and distorts competition.³⁴ Multinational companies established in multiple states erect coordination centers, and the advantages conferred on these centers distort competition between the centers and service provider sectors.³⁵ These advantages encourage group companies to utilize services provided by the coordination centers.³⁶ This case illustrates that integrated companies and standalone companies are treated the same in that the value of the activities each carries out is determined by the value of those types of activities on the market.³⁷

As per Section 25 of the Taxes Consolidation Act (TCA), a company that is not a State resident is only within the charge of corporation tax if “it carries on a trade in the State through a branch or agency.”³⁸ These chargeable profits include income arising from the branch and income from property rights used by, or held by or for, the branch.³⁹ If a non-resident company engages in trade in the State through a branch or agency, it will be chargeable to corporation tax on all its chargeable profits, wherever they may arise.⁴⁰

Although at the time the contested Irish tax rulings were issued the arm’s length approach had not yet been incorporated into Irish law, Ireland confirmed that the value of activities the Irish branches carried out should be determined by market value for the purposes of complying with Section 25 of the TCA.⁴¹ The OECD 2010 Report on the Attribution of Profits to Permanent Establishments (the Authorized OECD Approach) details the arm’s length principle application for determining the profit allocation of permanent establishments (PE).⁴² To combat issues of double taxation and

32. *Id.* ¶ 120.

33. *Id.* ¶ 127.

34. *Id.* ¶¶ 132, 134.

35. *Id.* ¶ 132.

36. *Id.* ¶¶ 130-35.

37. Cases T-778/16 and T-892/16, *Ir. and Apple v. Comm’n*, ECLI:EU:T:2020:338, ¶ 213 (July 15, 2020).

38. Taxes Consolidation Act, 1997 (Act No. 39/1997 § 25(1)) (Ir.), <https://www.irishstatutebook.ie/eli/1997/act/39/section/25/enacted/en/html>.

39. *Id.* § 25(2)(a).

40. *See* Taxes Consolidation Act, 1997, *supra* note 38.

41. *Ir. and Apple v. Comm’n*, ECLI:EU:T:2020:338, ¶ 210.

42. Organization for Economic Cooperation and Development [OECD], 2010 Report on the Attribution of Profits to Permanent Establishments (July 22, 2010) at 12-3, § B, ¶¶ 8-10,

non-taxation, the Authorized OECD Approach attributes profits to a PE that are profits the PE would have earned at arm's length in its dealings with other groups in the enterprise if the PE were a separate and independent enterprise that engaged in the same activities.⁴³ The Authorized OECD Approach examines the functions the PE performs, the assets it uses, and the risks the enterprise assumes through the PE and other areas of the enterprise.⁴⁴ It sets a limit on the amount of attributable profit that can be taxed in the host country of a PE.⁴⁵ The Authorized OECD Approach entails a two-step analysis.⁴⁶ First, a functional and factual analysis of the PE is undertaken to determine whether the PE is assumed to have a sufficient amount of capital to support its functions, assets, and risks.⁴⁷ In this step, the responsibilities and activities of the PE are identified.⁴⁸ Ownership of assets is attributed on the basis of where significant human functions essential to the determination of economic ownership are performed, and risks are attributed in this way as well.⁴⁹ Secondly, the Authorized OECD Approach requires us to determine how much of the corporation's capital is required to cover assets and support risks to accurately attribute an arm's length amount of profits to the PE.⁵⁰ This allows for the calculation of the profits or losses of the PE from its activities.⁵¹

Profits derived from property that is controlled by a non-resident company cannot be attributable to the Irish branch of that company, even if that branch could utilize or had access to that property.⁵² In 1988, the High Court of Ireland held that income from a fund was not chargeable to the Irish corporation tax where a sum of money earned by the Irish branch of a company resident in the Netherlands was transferred to Switzerland

available at <https://www.oecd.org/ctp/transfer-pricing/45689524.pdf> [hereinafter the Authorized OECD Approach].

43. *Id.* at 12, § B-2, ¶ 8.

44. *Id.*

45. *Id.* at 12, § B-2, ¶¶ 8-9.

46. *Id.* at 21, § B-5, para 44.

47. *Id.* at 35, ¶ 107.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 13, § B-2, ¶ 10; *see also* OECD, Review of Comparability and of Profit Methods: Revision of Chapters I-III of the Transfer Pricing Guidelines (July 22, 2010) ¶¶ 3.1, 3.18 (explaining that to determine whether a transaction is consistent with the arm's length principle, one can examine comparable controlled and uncontrolled transactions. To be effective, this transactional net margin method (TNMM) must have a tested party that a net profit indicator is tested against. The tested party should be a reliable party with the least complex functionality.).

52. *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd.* [1988] I. R. 10 (Ir.) at 11.

and invested by the company under the U.S. parent company's direction.⁵³ The court reasoned that the investment fund was used by and held by the company, rather than the Irish branch, which had no power to make decisions regarding the Swiss bank account.⁵⁴ Decision-making power rested only with the company resident in the Netherlands.⁵⁵ The court reasoned further that these funds were not held for the Dublin branch, as the funds were available for any purpose the company might announce.⁵⁶ Thus, income derived from these funds cannot be subject to the Irish corporation tax.⁵⁷

When examining national tax measures, the existence of a tax advantage can only be established when compared with normal taxation measures.⁵⁸ The Grand Chamber has held that a selective advantage exists where Portugal adapted its tax system to reduce the rates of income and corporation tax for the Autonomous Region of the Azores.⁵⁹ To determine whether a tax scheme is selective, the court noted that it is necessary to examine whether the tax scheme confers an advantage on certain undertakings when compared to others in similar legal and factual situations.⁶⁰

C. *Recent Developments in EU State Aid*

There have been approximately eleven State aid investigations and decisions since 2013.⁶¹ Recently, the court in *Luxembourg and Fiat v. Commission* held that a 2012 Luxembourg tax ruling in favor of Fiat Chrysler Finance Europe (FFT) was unlawful State aid where the ruling enabled FFT to determine its taxable profits annually for Luxembourg corporate income tax.⁶² The court reasoned that where national tax law failed to distinguish between integrated and standalone undertakings for

53. *Id.*

54. *Id.* at 13.

55. *Id.*

56. *Id.* at 13-14.

57. *Id.* at 14.

58. Case C-88/03, *Port. v. Comm'n of the European Communities*, ECLI:EU:C:2006:511, ¶ 56 (Sept. 6, 2006).

59. *Id.* ¶¶ 13-14.

60. *Id.* ¶ 56.

61. *EU General Court Strikes Down Commission's €14 Billion State Aid Decision Against Apple and Ireland*, CLEARY GOTTlieb (July 24, 2020), <https://www.clearygottlieb.com/news-and-insights/publication-listing/eu-general-court-strikes-down-commissions-14-billion-state-aid-decision>.

62. Press Release No. 118/19, General Court of the European Union, The General Court Confirms the Commission's Decision on the Aid Measure Granted by Luxembourg to Fiat Chrysler Finance Europe, 2 (Sept. 24, 2019) [hereinafter Fiat Press Release].

corporate income tax liability, the Commission may utilize the arm's length principle to compare the fiscal burdens arising from the tax measure versus the normal tax regime to determine the existence of an advantage.⁶³ The Commission rightfully utilized the arm's length principle within its power under Article 107 of the TFEU to make this determination.⁶⁴ The court held the Commission correctly determined that the contested tax ruling lowered FFT's tax liability as compared to the normal tax it would have paid under Luxembourg law.⁶⁵ The court also held that the ruling was selective, as it fulfilled the three-pronged analysis.⁶⁶

D. Procedural Background

The Commission found the Irish Revenue's tax rulings of January 29, 1991 and May 23, 2007 favoring two Apple companies, ASI and AOE, which enabled these companies to determine their tax liability in Ireland on a yearly basis, violative of the TFEU State aid prohibition in 2016 absent special justifying circumstances.⁶⁷ The Commission reasoned that these contested Irish Revenue tax rulings conferred a selective advantage on ASI and AOE that distorted or threatened to distort competition, that could affect trade between Member States, and that was imputable to the State and financed through State resources.⁶⁸ As the tax rulings caused a reduction in the charges that ASI and AOE would normally bear in their business operations, the tax rulings were held to grant aid to both ASI and

63. *Id.*; Cases T-755/15 and T-759/15, *Lux. and Fiat Chrysler Finance Eur. v. Comm'n*, ECLI:EU:T:2019:670, ¶ 141 (Sept. 24, 2019).

64. *Id.* ¶ 107-08; *see also* Cases T-760/15 and T-636/16, *Neth. and Starbucks v. Comm'n*, ECLI:EU:T:2019:669, ¶¶ 371, 563 (Sept. 24, 2019) (annulling the Commission's 2015 decision and holding that although the Commission did not err in identifying the arm's length principle to assess the existence of State aid, the Commission did fail to demonstrate the existence of an economic advantage under Article 107 of the TFEU where Netherlands tax authorities executed an advance pricing arrangement (APA) with Starbucks Manufacturing EMEA BV (SMBV), which is part of the Starbucks group.); *see* Press Release No. 119/19, General Court of the European Union, *The General Court Annuls the Commission's Decision on the Aid Measure Implemented by the Netherlands in Favour of Starbucks*, 1 (Sept. 24, 2019) [hereinafter Starbucks Press Release].

65. *Lux. and Fiat Chrysler Finance Eur.*, ECLI:EU:T:2019:670, ¶ 299; *see* Fiat Press Release, *supra* note 62.

66. *Lux. and Fiat Chrysler Finance Eur.*, ECLI:EU:T:2019:670, ¶ 22 (noting that the three-pronged analysis to determine the selectiveness of a measure includes identifying the normal tax regime in that Member State; (2) determining whether the tax regime derogates from the normal regime; and (3) if the system does derogate, the State must establish whether the system is justified by its nature); *see* Fiat Press Release, *supra* note 62.

67. Commission Decision (EU) 2017/1283 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (Aug. 30, 2016), ¶ 39, *available at* <https://eur-lex.europa.eu/eli/dec/2017/1283/oj>.

68. *Id.* ¶¶ 414-15.

AOE.⁶⁹ The Commission found that these tax rulings constituted State aid that was incompatible with the internal market, as it did not facilitate the development of certain economic areas and the incentives were not limited in time or proportionate to an amount required to remedy an economic deficiency in the areas concerned.⁷⁰ Furthermore, the Commission held the rulings violative of the Article 108(3) obligation of Member States to notify the Commission of plans to grant State aid.⁷¹ The Commission found that Ireland failed to give notice of its plan to issue the contested ruling, and thus, the tax rulings were unlawful aid.⁷² The Commission ordered Ireland to recover this aid, plus interest, from ASI and AOE.⁷³ Ireland and Apple appealed these decisions, and the case was joined.⁷⁴ The General Court of the Seventh Chamber heard the appeal in 2020.⁷⁵

III. THE COURT'S DECISION

In the noted case, the General Court of the European Union annuls the European Commission's 2016 decision, issuing judgment in favor of the Apple Group companies and Ireland.⁷⁶ The Court holds that the Commission failed to use the requisite legal standard in determining the existence of a selective advantage to the Apple companies and that a factual analysis of ASI and AOE branch activities is necessary to determine profit allocation.⁷⁷ Additionally, the court held that the value of the Irish branches' activities should be determined according to the value of the same activity on the market, despite the fact that the arm's length principal had not yet been incorporated into Irish law on determining profit allocations for non-resident companies.⁷⁸ The court further held that Member States are not obligated to apply an arm's length principle to their own respective tax laws.⁷⁹ The court determined that Member States have the responsibility of allocating tax burdens across different production areas and economic sectors.⁸⁰ Additionally, the court determined that "normal" taxation should be determined by utilizing Ireland's national tax

69. *Id.* ¶ 222.

70. *Id.* ¶ 421.

71. *Id.* ¶ 423.

72. *Id.* ¶ 424.

73. *Id.* ¶ 452.

74. Cases T-778/16 and T-892/16, *Ir. and Apple v. Comm'n*, ECLI:EU:T:2020:338, ¶ 78 (July 15, 2020).

75. *Id.*

76. *Id.* ¶ 507.

77. *Id.* ¶ 186.

78. *Id.* ¶¶ 210, 217.

79. *Id.* ¶ 221.

80. *Id.* ¶ 222.

rules, so here, the arm's length principle.⁸¹ In its incorrect application of the arm's length principle, the Commission undertook an erroneous factual analysis of the activities of the Irish branches and failed to demonstrate to the requisite legal standard that a selective advantage existed or that the tax rulings led to a reduction in tax burden.⁸²

First, the court held that a factual analysis of the Irish branch activities of ASI and AOE was necessary, and that the Commission erred in its allocation of profits using an exclusion approach.⁸³ The court reasoned that the Commission failed to prove that Apple profits from intellectual property licenses should have been allocated to Apple's Irish branches and that under Section 25 of the TCA, the income of ASI and AOE from trade was a result of the activities of the Irish branches.⁸⁴ If the Apple Group IP licenses held by ASI and AOE were not controlled by the Irish branches, it would be incorrect to allocate all of the income generated by the companies arising from those licenses to those branches under Section 25 of the TCA.⁸⁵ *Murphy v. Dataproducts* demonstrates that the profits derived from property controlled by a non-resident company cannot be attributable to the Irish branches of a company, even if the property or licenses have been made available to the Irish branches.⁸⁶ The Commission failed to demonstrate that ASI and AOE controlled the Apple Group's IP licenses and erred in assessing the taxation of profits of non-resident companies in Ireland that carry on trade in the State through company branches.⁸⁷

Second, the court held that the value of the activities carried out by the Irish branches should be determined according to the value of the same activity on the market, although the arm's length principal had not yet been incorporated by Irish law to determine profit allocations for non-resident companies.⁸⁸ Under Irish law, profits resulting from the trading activity of the Apple branches in Ireland are taxed as if the value of the activities is determined by market value and conditions under Section 25 of the TCA.⁸⁹ Furthermore, the arm's length principle was incorporated in double taxation treaties with the United States, Great Britain, and Northern

81. *Id.* ¶¶ 223-35.

82. *Id.* ¶¶ 228-29, 243-45, 507.

83. *Id.* ¶ 186.

84. *Id.*

85. *Id.* ¶ 180.

86. *Id.* ¶ 184.

87. *Id.* ¶ 187.

88. *Id.* ¶ 217.

89. *Id.* ¶¶ 211, 218.

Ireland to resolve these issues, therefore Ireland did agree to apply this principle in its bilateral relations with these States.⁹⁰ However, there is no obligation arising from Article 107 of the TFEU for all Member States to incorporate the arm's length principle in their own respective tax law regimes.⁹¹

Third, the court determined that Member States have the responsibility of allocating tax burdens across different factors of production and economic sectors in the absence of EU rules governing otherwise.⁹² Thus, under current developments of EU law, the Commission cannot independently determine the "normal" taxation of an undertaking.⁹³ Rather, "normal" taxation should be determined utilizing Ireland's national tax rules.⁹⁴ However, national rules may provide that non-resident branches' profits from trading in the State and resident companies should fall under the same taxation conditions.⁹⁵ In that case, Article 107(1) of the TFEU allows the Commission to determine whether the amount of profit allocated to the branches corresponds to the profit that would have been obtained under market conditions.⁹⁶ Here, the Commission's application of the arm's length principle was erroneous, as it failed to consider the structure and characteristics of the Apple Group companies.⁹⁷ In 2016, the Commission concluded that the profits of ASI and AOE arising from the Apple Group's intellectual property licenses should be allocated to the Irish branches due to a lack of staff who could manage the intellectual property outside of these branches.⁹⁸ However, the Commission failed to show that this allocation was proper because it failed to produce evidence establishing that the Irish branches had ever performed these management functions.⁹⁹ Thus, the Commission's application of the arm's length principle was inconsistent with the Authorized OECD Approach.¹⁰⁰ Ultimately, the Commission failed to prove that the contested tax rulings conferred a selective advantage on

90. *Id.* ¶ 220.

91. *Id.* ¶ 221.

92. *Id.* ¶ 222; *see* Case C-269/09, *Comm'n v. Spain*, ECLI:EU:C:2012:439, ¶ 97 (July 12, 2012).

93. *Ir. and Apple v. Comm'n*, ECLI:EU:T:2020:338, ¶ 223.

94. *Id.* ¶ 224.

95. *Id.*

96. *Id.* ¶ 225.

97. *Id.* ¶ 226.

98. *Id.* ¶ 224.

99. *Id.* ¶ 243.

100. *Id.* ¶ 244.

Apple.¹⁰¹ The court held that Ireland need not recover back taxes from Apple and that Ireland did not grant Apple illegal State aid in the form of tax benefits.¹⁰²

IV. ANALYSIS

This judgment aligns with other Commission State aid investigations such as the *Fiat* and *Starbucks* cases in its confirmation of the arm's length principle as an instrument of determining whether a selective advantage has been granted to an undertaking.¹⁰³ In each of these cases, the court determined that the Commission could use the arm's length principle to determine what constitutes a normal taxation regime in the absence of contradictory national law on the issue.¹⁰⁴

This judgment is a reflection of early principles set forth in Europe 2020, Europe's broad growth strategy for the decade, as the judgment foreshadows future in-depth Commission investigation of tax rulings under State aid rules.¹⁰⁵ In 2012, the Commission issued the State Aid Modernization Initiative (the Initiative) in a Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions.¹⁰⁶ The Initiative seeks to strengthen the quality of the Commission's scrutiny and toolset to investigate State aid cases that impact the internal market.¹⁰⁷ To further strengthen the economies of the EU and Member States, the Commission hopes to foster an effective internal market through regulation, competition policy, and State aid control.¹⁰⁸ The overarching goals of the Initiative include the creation of one integrated market with no national market borders and the regulation of competition policy and State aid to prevent anticompetitive behavior.¹⁰⁹ State aid control allows the Commission to ensure that anticompetitive behavior, such as Member States favoring some market actors over others, does not interrupt market

101. *Id.* ¶ 504.

102. *Id.*

103. Eric Barbier De La Serre, et al., *EU Overturns Commission Decision in Landmark Apple Tax Case*, JONES DAY (July 2020), <https://www.jonesday.com/en/insights/2020/07/eu-court-overturns-commission-decision-in-landmark-apple-tax-case>.

104. *Id.*

105. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernization (SAM)*, ¶ 1, COM (2012) 209.

106. *Id.*

107. *Id.* ¶ 8.

108. *Id.* ¶ 2.

109. *Id.*

functions.¹¹⁰ The modernization of State aid control has three major objectives.¹¹¹ These objectives are to foster sustainable growth in a competitive internal market, to focus Commission scrutiny on cases that heavily impact the internal market and strengthen Member State cooperation in enforcing State aid controls, and to streamline rules to enable faster decisions in the cases.¹¹² The Initiative highlights the ineffectiveness of State aid that does not target market failure and has no incentive effect.¹¹³ Aid of this kind “acts as a brake to growth by worsening competitive conditions in the internal market.”¹¹⁴ The Initiative highlights the importance of quality, efficient public support, and the need to embed State aid control into the EU Semester.¹¹⁵

The Initiative details several different mechanisms of State aid modernization.¹¹⁶ These mechanisms include the identification of horizontal principles applicable to the assessment of compatibility of the aid measures carried out by the Commission that would allow the Commission to standardize treatment of State aid across all networks.¹¹⁷ This might include consideration of the overall impact of the aid.¹¹⁸ State guidelines must be revised to be consistent with these principles.¹¹⁹ In focusing on the enforcement of cases with the biggest impacts on the internal market, the Initiative suggests conducting possible reviews of the *de minimis* Regulation based on impact assessments.¹²⁰ In these assessments, the Commission would consider the regulation situation in both Member States and in the internal market as a whole.¹²¹ Then, the Commission would assess the threshold of the impact and its relationship to current market conditions.¹²² Additionally, the Initiative advocates for regulatory changes allowing the Commission to declare certain categories

110. *Id.*

111. *Id.* ¶ 8.

112. *Id.*

113. *Id.* ¶ 12.

114. *Id.*

115. *Id.* ¶ 14; see also European Council, *European Semester* (May 12, 2021) <https://www.consilium.europa.eu/en/policies/european-semester/#>. The European Semester is a cycle of policy coordination during which Member States align economic policies with EU rules agreed upon.

116. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernization (SAM)*, ¶ 18(a), COM (2012) 209.

117. *Id.*

118. *Id.*

119. *Id.* ¶ 18(b).

120. *Id.* ¶ 20(a).

121. *Id.*

122. *Id.*

of aid compatible with the internal market and exempt from ex-ante notification requirements, such as aid granted for natural disaster damage.¹²³ Responsibilities of Member States in ensuring enforcement and compliance with State aid rules would increase as well.¹²⁴ The Initiative calls for a better explanation of the notion of State aid and the consolidation of State aid rules.¹²⁵

Presently, the judgment in the noted case marks a significant setback for Margrethe Vestager, the European Competition Commissioner.¹²⁶ Vestager's priority is to ensure that companies pay their fair share of taxes through utilizing EU State aid rules to target tax arrangements that are perceived to be illegal.¹²⁷ In May of 2021, the Commission released a Communication on Business Taxation for the 21st Century, which addresses the current shortcomings of the international tax system and acknowledges the tax avoidance measures that have been adopted in recent years.¹²⁸ In its short-term tax agenda, the EU has announced a legislative proposal for the publication of the effective corporate tax rates of large companies that operate in the EU.¹²⁹ This proposal will be actionable by 2022, according to the Communication.¹³⁰ The Communication also seeks to limit the misuse of shell companies that exist to avoid tax obligations.¹³¹ This action will require companies to report information to tax authorities on shell entities regarding substantial presence and economic activity at the entity for tax purposes, and tax benefits could be denied where the misuse of shell companies exists.¹³² Furthermore, the Communication introduces a proposal titled "Business in Europe: Framework for Income Taxation (BEFIT)," which will resemble a corporate tax rulebook for the EU and aim to provide a more fair allocation of taxing rights between Member States and remove tax

123. *Id.* ¶ 20(b).

124. *Id.* ¶ 21.

125. *Id.* ¶¶ 22, 23(a).

126. European Commission, STATEMENT/20/1746 Statement by Executive Vice-President Margrethe Vestager on the Commission's Decision to Appeal the General Court's Judgment on the Apple Tax State Aid Case in Ireland (Sept. 25, 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1746.

127. *Id.*

128. European Commission, *Communication From the Commission to the European Parliament and Council, Business Taxation for the 21st Century*, at 1, COM (2021) 251 (May 18, 2021).

129. *Id.* at 9.

130. *Id.* at 10.

131. *Id.* at 9-10.

132. *Id.*

barriers that limit competition.¹³³ Given these recent policy developments, State aid investigations, and State aid judgments, it is likely that in future cases, the Commission will engage in a more thorough factual assessment of State aid investigations.¹³⁴

V. CONCLUSION

To date, the annulment of the 2016 decision ordering Ireland to recover a total of 14.3 billion euros in back-taxes and interest from Apple remains the largest annulled Commission State aid recovery order on record.¹³⁵ Vestager plans to appeal the July 2020 judgment of the General Court before the European Court of Justice, although it may be difficult to succeed on appeal, as any appeal will be limited to points of law and this judgment focusses primarily on factual assessments in its critique of the Commission's applied legal standard.¹³⁶ The current trend in State aid investigations signals heightened Commission scrutiny in its investigation and factual analysis of State aid cases.¹³⁷ Although the Commission can apply the arm's length principle to determine the existence of a selective advantage in the absence of national legislation to the contrary, it must do so with the evidence necessary to demonstrate the advantage.¹³⁸ It remains to be seen where the case will go on appeal, but the outcome could have a negative effect on the European Competition Commissioner's strategy to combat unlawful tax deals between corporations and EU Member States.¹³⁹ This decision will likely heighten the legal standard necessary to demonstrate the existence of unlawful State aid.¹⁴⁰

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133. *Id.* at 11-13.

134. *EU General Court Strikes Down Commission's €14 Billion State Aid Decision Against Apple and Ireland*, CLEARY GOTTLEIB 1 (July 24, 2020), <https://www.clearygottlieb.com/news-and-insights/publication-listing/eu-general-court-strikes-down-commissions-14-billion-state-aid-decision>.

135. *Id.*

136. *Id.*; European Commission, STATEMENT/20/1746 Statement by Executive Vice-President Margrethe Vestager on the Commission's Decision to Appeal the General Court's Judgment on the Apple Tax State Aid Case in Ireland (Sept. 25, 2020), available at https://ec.europa.eu/commission/presscorner/detail/fr/statement_20_1746.

137. *Id.*

138. Cases T-778/16 and T-892/16, *Ir. and Apple v. Comm'n*, ECLI:EU:T:2020:338, ¶ 243 (July 15, 2020).

139. Eric Barbier De La Serre, et al., *supra* note 103.

140. *Id.*

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