



**BRUSSELS | 14 NOVEMBER 2023**

## **European Commission's Assessment in Apple Case Upheld in Opinion of ECJ's Advocate General**

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Advocate General (AG) Giovanni Pitruzzella in the [Opinion](#) delivered on 9 November 2023 in Case *C-465/20 P European Commission v Ireland, Apple Sales International and Apple Operations International*, found that the General Court in its first instance judgment erred in law by overruling the Commission's assessment in the Apple case. The AG opinion, relevant for the EU law assessment of "tax rulings" cases, serves to advise the Court of Justice in its deliberations.

The AG found that the judgment of the General Court puts an "unjustifiably excessive burden of proof on the Commission" and that the General Court erred in the definition of the standard of proof incumbent on the Commission. The AG considers the threshold set for the Commission "impossible" given the requirement to *"prove the existence of negative facts which, by their nature, cannot be demonstrated, but only deduced from presumptions based on established positive facts or by evidence of a positive fact to the contrary, paragraph 304 of the judgment under appeal imposes an unjustifiably excessive burden of proof on the Commission"*, the AG argues.

The AG considers that the General Court erred in law when it concluded that the Commission had adopted an 'exclusion' approach in its primary line of reasoning, an error which vitiates the conclusions reached by the General Court with regard

to application of Irish law (Section 25 of the TCA 97), the findings in relation to the taxation of profits under Irish tax law, the findings concerning the Arm's Length Principle (ALP) and the authorised OECD approach. On the basis of the same error of interpretation, the AG believes the General Court wrongly dismissed the methodology applied by the Commission. Given the relevance of the functions performed by Apple Inc. in the context of the Commission's primary line of reasoning which led the General Court to uphold the actions brought by ASI and AOE and Ireland, the AG considers that the General Court failed to state reasons which in effect prevents the ECJ from knowing the basis for rejecting the Commission's analysis.

As the AG contends, fundamental errors in the determination of the methodology applicable to the profit allocation for the purposes of calculating the tax base of a non-resident company operating through a branch may necessarily lead to an undervaluation of those profits compared to an arm's length result, and are therefore inherently or manifestly capable of reducing the tax burden of that company compared with normal taxation. In such cases, the Commission, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, may rely on proof of the existence of such an error and on the fact that the Member State concerned has failed to demonstrate that it has no effect on whether the level of profits thus calculated corresponds to an arm's length value. The General Court therefore incorrectly assessed where the standard of proof lies, in the case of decisions such as that at issue, the AG contends.

The AG also accepts Commission's submission that the General Court's conclusions are based on an incorrect classification of ASI's Irish branch as a routine logistical risk-free service provider. In so far as that classification depends on the correct application of the principles laid down in the OECD Transfer Pricing Guidelines on which Apple and Ireland relied to justify *ex post* the advance decisions as well as the appropriateness of the operating costs as the profit level indicator of the ASI branch, the arguments raised by the Commission do not fall outside the limits of the Court's review of the facts at the appeal stage, the AG argues. With relation to the applicability of the recent *Fiat* case, where the Court

stated that without harmonisation the methods and criteria for determining an arm's length outcome rest with Member states, the AG stressed that the *Apple* case differs from *Fiat Chrysler*, therefore rejecting that paragraph 95 of the *Fiat* judgment applies to the *Apple* case. On the basis of the above analysis, the AG's opinion contends the Commission's appeal is well founded thus advising the ECJ to set aside the General Court judgment.

## **EU Introduces Accounting Standard Changes Related to Pillar 2**

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The European Commission has adopted a Regulation to introduce a temporary exception for deferred taxes arising from the implementation of the OECD's Pillar Two Model Rules, as well as certain disclosures for affected entities. As a result, MNE groups established in the Union will not have to recognise Pillar 2 increases as deferred taxes in their interim consolidated financial statements.

The temporary exception is to be applied immediately upon the issue of those amendments by the IASB and retrospectively in accordance with International Accounting Standard 8: Accounting Policies, Changes in Accounting Estimates and Errors ('IAS 8'). The disclosure requirements are to be applied to annual reporting periods beginning on or after 1 January 2023. A company is not required to apply the disclosure requirements in interim financial reports for interim periods ending on or before 31 December 2023.

Commission Regulation (EU) 2023/2468 of 8 November 2023 amending Regulation (EU) 2023/1803 as regards International Accounting Standard 12 is available [here](#).

## **EU Reaffirms Commitment to Pillar 2**

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The ECOFIN Council meeting of EU's finance ministers held on 9 November saw the adoption of [two statements](#) (by the Council and by the Commission) concerning their commitment to Pillar 2.

On Pillar Two, the European Commission called on all EU Member States to *"proceed swiftly with the transposition of the Pillar Two Directive and will continue to support the efforts of Member States in this regard."* The Commission also expressed the view that the OECD administrative guidance of December 2022, February 2023 and July 2023 is compatible with the EU Directive on Minimum Tax (Council Directive (EU) 2022/2523 of 14 December 2022).

On Pillar One, the Commission welcomed the release of the text of the Multilateral Convention and the technical agreement reached on key points of Amount A, which paves the way for implementing a partial reallocation of taxing rights. The Commission also underlined the importance of Amount B as a key component of the ongoing reform of international taxation, simplifying transfer pricing and enhancing legal certainty. The Commission called on Member States to swiftly sign and ratify the Multilateral Convention.

## **Next Meeting of the FISC European Parliament Subcommittee**

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The next meeting of the FISC Subcommittee will take place on 30 November 2023. The Subcommittee will host an exchange of views with the Chair of the Code of Conduct Group on Business Taxation. The meeting will be livestreamed [here](#).

The Subcommittee also published a [calendar of meetings](#) for 2024, currently containing dates for Q1 meetings in 2024. Further information on the topics will be made available in due course.

## **Cross-Atlantic Tax Symposium on 16 November in London**

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The Chartered Institute of Taxation (CIOT) and the International Fiscal Association (IFA) UK Branch will host the 24th Cross-Atlantic Symposium and European Conference on 16 November at the Deloitte Auditorium, 2 New Street Square, London. Topics include:

- Recent US Developments: Pillars 1 and 2, Corporate Minimum Tax;
- UK - Pillar 2 Implementation Update;
- Recent EU Developments – BEFIT, Unshell, SAFE and FASTER Directives update;
- Dealing with tax authorities post-Covid – what has changed in working with IRS, HMRC and other tax authorities around Europe.

The Symposium will be chaired by Professor Philip Baker KC and Clive Gawthorpe (Chair, CIOT European Branch). Speakers include Benjamin Angel (Director, European Commission), Gary Ashford (President, Chartered Institute of Taxation), Aleksandar Ivanovski (Director of Tax Policy, CFE), Raluca Enache (Head of EU Tax Centre, KPMG), Jefferson VanderWolk (Partner, Squire Patton Boggs) and other speakers from practice and academia.

Registration is available on the following [link](#).

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