Some observations on the Apple case

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The General Court's award ruling in the Apple case contains some surprising parts, and it is not easily reconciled with some from the Court of Justice of the EU. As in the AT&T [11] and Blockbuster [12] cases, it means an impressive effort to analyse the issues at depth.

The facts are described in the decision of the European Commission and the ruling of the General Court. Very shortly, tax companies, Apple and its subsidiaries, were engaged in a tax-driven scheme that did not meet the standards of the arm's length principle. The tax authorities had investigated the scheme, concluding that it did not provide any advantage to the subjects. The tax system was otherwise found to be reliable and the evidence against the purpose of the tax was strong enough to conclude that the calculated profit was not a reliable approximation of a market-based outcome.

The General Court ruled, firstly, on the right of the Commission to examine cases in the light of the relevant tax aid rules. This calls for two observations. On the one hand, if the selectivity assessment is made in the light of the traditional method of analysis, no such conclusion should be reached. More that a fact, this would generally allow to reach similar results and non-equivalent differences, in view this finding is in fact, [13]. On the other hand, the General Court did not find that the Commission's ruling should be considered as the objective of a tax law, without being dependent on the regulatory method used to the taxation. The absence of a legal difficulty, to the contrary, enables the adoption of the target of the tax system, which is so inherent relevant to the tax law in question.

A second, more critical legal ruling, the case stems from the arm's length principle, the objective of which is to have a reliable approximation of profits for purposes of revenue, without or reduced basis for the amount.

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supports the efforts to meet the challenges arising from digitalization. At the same time, the State aid cases might continue to differ in so far as the law requires depending on the level of digitalization of different enterprises. The initiative to reallocate the residual profits of certain multinational enterprises would be restricted to the taxable jurisdictions (i.e. the country of residence) of the non-profitable enterprise. However, each is a move far from affecting an multinational enterprise in a similar manner: As I emphasised in an earlier blog contribution, a relief from tax in the country of origin would per definition not apply to independent enterprises or to domestic groups, and it would not affect all multinational enterprises in the same way. Therefore, it can be wondered if the envisaged changes do not amount to a substantial change in the country of origin to the benefit of certain multinational enterprises, especially those that export goods or services, or have some offices abroad. Such a tax relief would hardly be reconcilable with the logic of the tax system of the country of origin, as it is a principle that, being the first and primary delimitation of the tax base by the destination, the new nexus rules would only target certain business entities or certain multinational enterprises. This may result in a selective advantage to the benefit of undertakings that do not have a broader presence, or for which which (tax) revenue will be allocated to the entity created in broader presence. There may also be a conflict with the fundamental freedoms, especially in the market jurisdiction where the tax base would increase, since the amendments to the arm’s length principle would not apply in domestic situations, and might not be justified by the need to prevent tax avoidance or safeguard a balanced allocation of the power to impose tax. Consequently, the initiative is aimed transfer pricing rules is in order to moderate part of the impact of the 2018 reforms on the cross-border activities of the single multinationals and the so-called “Amount A”). However, such a move is far from affecting all multinational enterprises in a similar manner. As I emphasised in an earlier blog contribution, a relief from tax in the country of origin would per definition not apply to independent enterprises or to domestic groups, and it would not affect all multinational enterprises in the same way. 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