Kluwer Competition Law Blog

A Policy-Oriented Appeal: The Commission Takes the Apple Judgment to the Court of Justice

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Background

On July 15, 2020, the General Court annulled the 2016 Commission Decision ordering Ireland to recover EUR 13 billion of illegal State aid from Apple,[1] chiefly, because the Commission had not demonstrated to the requisite legal standard that an advantage had been granted.[2] On the same day, the Commission's Executive Vice-President M. Vestager released a statement noting that the Commission would "*carefully study the judgment and reflect on possible next steps*".[3] Two months later, on September 25, 2020, M. Vestager announced the Commission's decision to appeal the General Court's Judgment because, in the Commission's view, it contains "*a number of errors of law*" and "*raises important legal issues that are of relevance to the Commission in its application of State aid rules to tax planning cases*".[4]

A policy-oriented appeal

To those familiar with the details of the General Court's Judgment, however, the Commission's decision to appeal arises as a seemingly futile effort of exclusive political inspiration. This is due to the nature of the General Court's findings:

- First, the General Court began by reiterating its settled case law, according to which, even if direct taxation falls within the exclusive competence of the Member States (*e.*, principle of fiscal autonomy), the exercise thereof must be consistent with EU law, including State aid provisions.[5] The Commission was thus competent to assess the compatibility of the 1991 and 2007 tax rulings with Article 107(1) TFEU.[6]
- Second, the General Court saw no objection to the Commission's joint analysis of the existence of an advantage of the measure and its selectivity.[7] In fact, as the Court recalled, it is common for the two steps to overlap in cases of a fiscal nature.[8]
- Third, the General Court confirmed that the Commission had correctly identified the reference framework as being the ordinary rules of taxation of corporate profits in Ireland.[9]
- Fourth, in line with the *Fiat* and *Starbucks* Judgments,[10] the General Court held that the Commission could use the arm's length principle as a tool to determine whether the profits allocated to the Irish branches, as endorsed by the contested tax rulings, corresponded to those that would have been obtained under normal market conditions.[11] Relatedly, the Court held

that the Commission was entitled to use the Authorised OECD Approach to allocate the profits to the Irish branches.[12]

- Fifth, with regards to the finding of an advantage, the General Court decisively found that:
  - it is not sufficient to state that the head offices of Apple Sales International and Apples Operations Europe had no actual activities and employees in order to impute by exclusion all income to the Irish branches (the so-called 'exclusionary attribution method'), but it is necessary for the Commission to prove *positively* that the relevant income corresponds to the activities and functions of the Irish branches;[13]
  - despite the fact that the contested tax rulings revealed a series of methodological mistakes in the attribution of income to the Irish branches, these mistakes did not suffice to prove the existence of aid;[14]
  - the mere existence of discretion is not sufficient to establish that an advantage has been granted and the Commission needs to put forward evidence that such discretion resulted in a lower taxation.[15]

All in all, the General Court concluded that the Commission was right as a matter of principle (*i.e.*, the Commission soundly interpreted the legal framework), but that the burden lies upon the Commission to sufficiently prove an alleged infringement, without undue shortcuts (*i.e.*, the Commission misapplied the legal framework in light of the particular facts of the case). Now, as is already well-known, "[a]*n appeal to the Court of Justice shall be limited to points of law*".[16] This is why the Commission's effort to appeal appears a particularly demanding exercise, if not of dubious credibility and grounding, especially when contrasted with its decision not to appeal the comparable *Starbucks* Judgment.[17] Indeed, the only factors which differentiate the *Apple* Judgment from the *Starbucks'* are the former's sheer size, unprecedented media coverage and symbolic character.[18] In the same vein, the two statements released by M. Vestager are nothing but policy-charged mantras to obtain political momentum and broader legislative change.[19]

In any event, any possible appeal envisaged by the Commission will have to be grounded on the fifth finding (*supra*), for self-evident reasons.[20] Admittedly, it is not infrequent for applicants (and the Court of Justice itself) to reformulate purely factual matters as questions of legal interpretation. Under those circumstances, the crux of the case will be determining who needs to prove what and to what extent. In other words, whether the Commission is entitled to rely on a seemingly arbitrary process surrounding the adoption of the contested tax rulings to presume that a selective advantage has been granted, thus placing the burden of disproof on Ireland and Apple.

A broader context of closer judicial scrutiny

Moreover, the appeal seems unlikely to succeed because the General Court's findings are in line with a recent (and mostly-welcomed) trend of closer judicial review of the Commission's activities in competition and State aid cases.[21] These constitute a by-product of the EU Court's broader case law regarding judicial review in matters of scientific, technical and complex economic nature, which shows a decreasing deference towards the Commission's wide discretion.[22] The bottom line of all of these cases is, simply put, that the Commission must substantiate its conclusions without making faulty assumptions and taking into account reliable, consistent and complete evidence.

On the upside, the Commission can always overcome the problems identified in the *Apple*

Judgment, taking inspiration from the *Fiat* case, by engaging in a more in-depth investigation, in which it actually demonstrates and quantifies the advantage conferred by the methodological errors identified in the contested tax rulings.

The views presented in this post are those of the author. The author has not acted on behalf of any of the parties.

[1] *Aid to Apple* (Case COMP/SA.38373) – Commission decision of August 30, 2016.

[2] *Ireland and Apple v. Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338 (the "*Apple* Judgment"). See the corresponding Kluwer Competition Law Blog posts here and here.

[3] Statement by Executive Vice-President Margrethe Vestager following today's Court judgment on the Apple tax State aid case in Ireland – July 15, 2020.

[4] 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 – September 25, 2020.

[5] *Apple* Judgment, paras. 105-106.

[6] *Apple* Judgment, para. 109.

[7] *Apple* Judgment, paras. 138-139.

[8] *Apple* Judgment, para. 136.

[9] *Apple* Judgment, para. 163.

[10] *Fiat* (Case T-755/15) EU:T:2019:670; *Starbucks* (Case T-760/15) EU:T:2019:669.

[11] *Apple* Judgment, para. 224.

[12] *Apple* Judgment, paras. 237 and 240.

[13] *Apple* Judgment, paras. 259-272 and 288.

[14] *Apple* Judgment, paras. 350 et seq.

[15] *Apple* Judgment, para. 493.

[16] Article 256(1) TFEU and Article 58 of the Statute of the Court of Justice.

[17] D. Kyriazis, Why the EU Commission won't appeal the Starbucks judgment, *Multinational Group Tax & Transfer Pricing News* – December 10, 2019.

[18] D. Kyriazis, Apple: One Case to Rule Them All, *Kluwer Competition Law Blog* – July 16,

2020.

[19] "*The Commission stands fully behind the objective that all companies should pay their fair share of tax.* […] *The Commission will continue to look at aggressive tax planning measures under EU State aid rules to assess whether they result in illegal State aid. At the same time, State aid enforcement needs to go hand in hand with a change in corporate philosophies and the right legislation to address loopholes and ensure transparency*"; "*We need to continue our efforts to put in place the right legislation to address loopholes and ensure transparency. So, there's more work ahead – including to make sure that all businesses, including digital ones, pay their fair share of tax where it is rightfully due"*.

[20] Being the other findings favourable for the Commission.

[21] A. Lamadrid, EU Judicial Review: Major Antitrust Implications of Recent State Aid Cases, Part 1 and Part 2, *Chillin' Competition* – March 18 and May 28, 2019. See, for instance, *Frucona Košice* (C?300/16 P) EU:C:2017:706; *Fútbol Club Barcelona* (T-865/16) EU:T:2019:113; *Real Madrid* (T-791/16) EU:T:2019:346; *Valencia Club de Fútbol* (T-732/16) EU:T:2020:98; *Elche Club de Fútbol* (T-901/16) EU:T:2020:97; *Naviera Armas* (T-108/16) EU:T:2018:145; and *Starbucks* (*ibid*), as opposed to *Fiat* (*ibid*), regarding State aid; and the widely-acclaimed *CK Telecoms UK Investments v Commission* (T-399/16) EU:T:2020:217 in merger control.

[22] Notably, in the field of risk regulation, as illustrated by *Bilbaína de Alquitranes and Others* (T-689/13) EU:T:2015:767, upheld by the Court of Justice (C-691/15 P) EU:C:2017:882: "*the EU judicature must verify whether that institution has examined, carefully and impartially, all the relevant facts of the individual case on which that assessment was based* […]. *That duty to act diligently is inherent in the principle of sound administration and applies generally to the actions of the EU administration*" (para. 35). Along these lines, see also *Commission v. Poland* (C-441/17) EU:C:2018:255, "[t]*he assessment* […] *may not, therefore, have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt"* (para. 114); *Gowan Comércio Internacional e Serviços* (C?77/09) EU:C:2010:803, para. 75; and the extensive case law cited therein.

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