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The Apple Saga's Prova Generale: The Opinion of AG Pitruzzella

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On November 9th 2023, the Advocate General (“AG”) Pitruzzella published his [Opinion](#) on the Apple state aid case.

More specifically, in *Commission v Ireland & Apple* (Case C?465/20 P), the AG proposed to the European Court of Justice (“ECJ”) that it annul the General Court’s (“GC”) [ruling](#) in the Apple case, refer the cases back to the GC and reserve the costs.

The structure of this Op-Ed is as follows. First, we will briefly describe the factual background of the case. Second, the AG’s Opinion will be analysed in depth. Third, we will critically examine the AG’s arguments, while pondering on the broader ramifications of this judgment.

Factual Background

According to the ECJ’s own [summary](#), the facts of this case are as follows. In 1991 and 2007, Ireland issued two tax rulings in relation to two companies of the Apple Group (Apple Sales International – ASI and Apple Operations Europe – AOE), incorporated under Irish law but not tax resident in Ireland. The rulings approved the method by which ASI and AOE proposed to determine their chargeable profits in Ireland deriving from the activity of their Irish branches. In 2016, the European Commission considered that the tax rulings, by excluding from the tax base the profits deriving from the use of intellectual property licences held by ASI and AOE, granted those companies, between 1991 and 2014, State aid that was unlawful and incompatible with the internal market and from which the Apple Group as a whole had benefitted, and ordered Ireland to recover that aid. In 2020, on the application of Ireland and ASI and AOE, the General Court of

the European Union annulled the Commission’s decision, finding that the Commission had not shown that there was an advantage deriving from the adoption of the tax rulings. The Commission lodged an appeal with the Court of Justice, asking it to set aside the judgment of the General Court. The latter’s ruling will not be dissected, but I have commented on it [elsewhere](#).

The AG’s Assessment of the Commission’s Pleas

The first ground of appeal

The Commission's first ground of appeal was divided into three parts. More specifically, the Commission submitted that the General Court misinterpreted the decision at issue, committed a breach of procedure and used contradictory reasoning. Let us now briefly examine them in turn.

The first part of the first ground of appeal

Firstly, on the first complaint relating to the first part of the first ground of appeal, the AG concluded, in paras 29-30, that contrary to what the General Court stated in the judgment under appeal, it was not the finding, in itself, that the head offices had neither employees nor physical presence that led the Commission to conclude that the IP licences and related profits had to be allocated to the Irish branches of Apple. Rather, it was the linking of two separate findings carried out in the context of the application of the legal test set out in recital 272 of the Commission decision at issue, which specifically required a comparison between the functions performed, the assets used and the risks assumed by the various parties which made up ASI and AOE.. The first finding was the complete absence of functions and risks assumed by the head offices. The second finding was the multiplicity and centrality of those functions and risks assumed by the branches of Apple. Therefore, the AG found that the General Court erred in law when it concluded, by misinterpreting the decision at issue, that the Commission had adopted an 'exclusion' approach in its primary line of reasoning.

The Commission's second complaint related to an alleged procedural irregularity, i.e that the General Court committed a procedural irregularity by ignoring the analysis of the functions performed by the Irish branches of Apple set out in recitals 296 to 303 of the decision at issue and the observations which it submitted at first instance explaining those functions in more detail. The AG rejected this complaint, stating that it was for the General Court not only to interpret the Commission's decision but it was also entitled to depart from the interpretation supported in the course of the proceedings by the Commission, where that was justified.

By the third complaint in the first part of its first ground of appeal, the Commission asserted that the General Court failed to state reasons in two respects. Firstly, the GC judgment did not contain adequate reasoning in so far as it concludes that the primary reasoning is based on an 'exclusion' approach. Secondly, the Commission maintained that the reasoning in the GC judgment was vitiated by contradictions. As an example, it cited the fact that GC had asserted that the Commission had not attempted to show that the allocation of the IP licences to the Irish branches followed from the activities actually carried out by the latter while, on the other hand, the GC had allegedly considered that the Commission had identified the functions performed by those branches which, in its view, justified such an allocation. The AG, with terse reasoning, upheld this complaint (para 35). Therefore, the overall conclusion of the AG on the first part of the first ground of the Commission's appeal was that it should be upheld, and the GC judgment should be quashed (para 36).

The second part of the first ground of appeal

However, the AG did not stop there. He examined the second part of the first ground of appeal, by

which the Commission challenged the GC's implicit acceptance of the relevance of the functions performed by Apple Inc. for the purpose of determining ASI's and AOE's chargeable profits in Ireland. More specifically, the Commission raised two separate complaints. The first alleged a procedural irregularity as a result of the taking into account of inadmissible evidence and inadequate and contradictory reasoning; the second alleged an infringement of Article 107(1) TFEU, a distortion of Irish law and a procedural irregularity.

The AG began by examining the second complaint, in paras 38 onwards of his Opinion. Finding it to be admissible, the AG moved to the substance of the complaint. The Commission claimed that certain pieces of evidence referred to by the GC were inadmissible. According to the Commission (para 49), said evidence, consisted, first, of several email exchanges between Apple Inc. directors concerning contacts with OEMs and telecommunications operators and, secondly, of four powers of attorney issued by ASI to Apple Inc. directors, which could not be taken into account by the General Court, since they had not been produced during the administrative procedure and, for three of those powers of attorney, also because they had been produced late before the General Court, only at the stage of the reply. The AG concluded that the Commission's arguments alleging a procedural irregularity resulting from the taking into account of inadmissible evidence must be upheld (para 51).

Coming to the alleged distortion of Irish law, the Commission submitted that the legal test applicable under Irish law for the purposes of determining the chargeable profits of a non-resident company in Ireland was correctly identified by the General Court in paragraph 248 of the judgment under appeal and must take into account the 'allocation of assets, functions and risks between the branch and the other parts of that company'.

The AG took a step back and focused on the "undisputed premiss of that judgment". Said premiss was, in his view, that in order to determine the chargeable profits in Ireland of a non-resident company, it is necessary to carry out a 'functional ... analysis' to determine the activities performed, the assets used and the risks assumed by its branch in Ireland. That analysis is required by Section 25 of the TCA 97, the arm's length principle and the authorised OECD approach, in his view. Moreover, a "coherent reading of the judgment under appeal does not permit the inference that the General Court considered that a criterion which was focused exclusively on the activities of the Irish branches of the non-resident companies was applicable under Irish law" (para 55). In his view (para 58), the Commission's interpretation of the judgment under appeal is correct where it states that the criterion for determining the profits of a non-resident company held by the General Court to be applicable under Section 25 of the TCA 97 requires account to be taken of the allocation of assets, functions and risks between the branch and the other parts of that company and excludes the taking into account of the role played by separate entities.

The next assertion that the AG needed to deal with (para 60) was to check whether, as the Commission maintained, the GC actually relied on the functions performed by Apple Inc. in relation to the IP of the Apple Group or whether the Commission's reasoning distorted the grounds of the judgment under appeal on that point. From paragraphs 61 to 67 of his Opinion, the AG assessed the claims of all parties. His conclusion, in para 67, was that, in all the paragraphs of the judgment under appeal criticised by the Commission, the General Court relied, more or less implicitly and in any event clearly, on the functions performed by Apple Inc. in relation to the Apple Group's IP under the cost-sharing agreement or the marketing services agreement or in its role as parent company, comparing those functions with those performed by the Irish branches in relation to the IP licences. Thus, contrary to the assertions of Ireland and Apple, the second

complaint was not based on a misreading of the judgment under appeal, let alone a distortion of that judgment.

The next section (paras 68-73) concerns the impact of taking into account Apple Inc.'s activities on the legal classification of the facts. Ireland and Apple submitted that the second Commission complaint was, in any event, ineffective since, even assuming that the GC took into consideration the functions of Apple Inc., the conclusions which it reached at the end of its examination of the facts are based on an analysis of the activities of the Irish branches and the head offices and on the finding that the functions performed by those branches were 'routine', which, according to the GC, were insufficient to justify the allocation to the latter of the IP licences and related profits.

The AG claimed (para 71) that, in paragraphs 298-310 of its judgment, the GC had found, first, that ASI and AOE had provided evidence of the centralised nature of those decisions and, as regards, in particular, decisions in the field of R&D, evidence showing that decisions relating to the development of the products and concerning the R&D strategy had been taken and implemented by executives of the group based in Cupertino and that strategies relating to new product launches and the organisation of distribution on the European markets, were managed at the Apple Group level. Secondly (para 72), he noted that the GC took into consideration the decision-making role played by the head offices. The GC noted, first, with regard to ASI and AOE's ability to take decisions concerning their essential functions through their management bodies, that the Commission itself accepted that those companies had boards of directors which held regular meetings during the relevant period, and reproduced extracts from the minutes of those meetings in tables included in the decision at issue. The GC also noted that it was apparent from certain submitted minutes that 'individual directors [had been] granted very wide managerial powers' and concluded that the Commission had erred when it considered that ASI and AOE, through their management bodies, in particular their boards of directors, did not have the ability to perform the essential functions of those companies by, where appropriate, delegating their powers to individual executives who were not members of the Irish branches' staff.

The AG begged to differ. He pointed out (para 72) that neither that conclusion nor the evidence drawn from the minutes examined by the Commission provided any indication as to the actual involvement of the boards of directors of the head offices in the taking of decisions relating to the management of the IP licences. In that regard, in paragraph 304 of the judgment under appeal, the GC had merely stated that the fact that those minutes 'do not give details of the decisions concerning the management of the ... IP licences, of the cost-sharing agreement and of important business decisions does not mean that those decisions were not taken'.

His conclusion on the ineffectiveness argument was that the GC did not find that the head offices had participated in the taking of the strategic decisions taken by Apple Inc., or that they were actually involved in the implementation of those decisions or in the active management of the IP licences. It followed, in his view, that the objection raised by ASI and AOI and by Ireland, which alleges that the present complaint is ineffective, had to be rejected.

Coming to the first complaint of the second part of the first ground of appeal, which was (spoiler alert!) also endorsed by the AG, the Commission had argued that the GC judgment was vitiated by an inadequate statement of reasons. The main reason was that the GC had relied on several important functions performed by Apple Inc. directors or employees with regard to Apple IP, but did not take a position on certain key paras of the Commission's decisions, where the latter had set out the reasons why it considered that those functions were irrelevant for the purposes of assessing

the advance decisions in the light of Article 107(1) TFEU. In the same vein, the GC failed to consider the arguments put forward by the Commission at first instance concerning the irrelevance of the functions performed by Apple Inc. ‘for the benefit’ of ASI and AOE or ‘on behalf’ of the head offices. The judgment was therefore, according to the Commission, vitiated by an inadequate statement of reasons. The AG agreed with this assertion, for the reasons put forward in paras 76-77 of his Opinion.

The third part of the first ground of appeal

Let us now shift our focus on the third part of the first ground of appeal, which was directed against paragraphs 301 and 303 to 309 of the judgment under appeal. Here, the Commission disputed the GC’s assessments relating to the activities carried out by the head offices. More specifically, the Commission first submitted (para 82) that the GC did not respond to its argument put forward in defence that the minutes examined by the Commission were the only item of evidence produced by Apple and Ireland during the administrative procedure in order to demonstrate the existence of functions performed by the head offices.

The AG pointed out that, according to settled case-law, first, in the context of an appeal, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence that the General Court accepted in support of those facts and, secondly, the duty of the General Court to state the reasons for its judgments does not require it to provide an account that follows exhaustively and one by one all the arguments put forward by the parties to the dispute. An assessment – which enables the Commission to understand the reasons for the importance that the General Court attached to certain pieces of evidence, even if they were the only item of evidence provided during the administrative procedure relating to the functions of the head offices – is not open to criticism before the Court of Justice, except in cases of distortion, which was not relied on by the Commission. Therefore, the AG here disagreed with the Commission.

However, he agreed with the Commission on a second point, i.e. on the fact that the GC, in paragraph 304 of its judgment, imposed on the Commission a burden of proof which was impossible to discharge. The next part of the GC ruling that the Commission challenged was where the GC stated that it was apparent from the the minutes that it examined ‘that individual directors [had been] granted very wide managerial powers’. The Commission argued that, although the minutes in question occasionally recorded the grant of delegation of powers by the board of directors, the fact remains that only one of those powers of attorney concerned the conclusion of contracts with OEMs and telecommunications operators. The AG did not welcome this line of argumentation. More specifically, he asserted (para 87) that, in so far as the Commission sought, by that line of argument, to call into question the assessment of the probative value of the entry in the minutes of the abovementioned power of attorney, such an assessment falls, in principle, within the exclusive jurisdiction of the General Court. Moreover, there is no rule or principle of EU law which prohibits, in principle, the General Court from relying on a single piece of evidence to establish the relevant facts. The complaint had to therefore, in his view, be rejected.

The next part of the GC ruling that the Commission challenged (para 88) was quite important. In particular, the Commission challenged the GC’s conclusion that ‘formal acts’ such as issuing a power of attorney for the purposes of negotiating an agreement or signing it (in the Apple case, the various amendments to the cost-sharing agreement made during the relevant period) constitute

functions actually performed by the head offices in relation to IP licences. The Commission accepted that, in particular, the carrying out of negotiations for the conclusion of commercial contracts, such as those with OEMs and telecommunications operators, is capable of constituting ‘significant people functions’ for the purposes of the functional and factual analysis to be carried out on the basis of Section 25 of the TCA 97. However, those functions were allegedly performed by employees of Apple Inc., on behalf of the entire Apple Group or for the benefit of ASI and AOE, not by the head offices.

After analysing the overall rationale of the GC (para 89), the AG stated (para 90) that he was not convinced that it was correct to interpret paragraphs 301, 306 and 307 of the judgment under appeal in the manner suggested by the Commission. Given the above, the AG rejected the Commission’s argument, in so far as it was based on a misreading of the judgment under appeal (para 91).

The AG’s overall conclusions on the first ground of appeal can be found in para 96. As the reader can tell by now, in his view, the Commission’s first ground of appeal was well founded. For that reason alone, the AG would consider the GC judgment defective and annulable, but he still went on to discuss the second ground of appeal as well.

The second ground of appeal

The Commission’s second ground of appeal centered around the fact that the GC upheld the complaints raised by Ireland and ASI and AOE against the Commission’s subsidiary line of reasoning (para 97). By said line of reasoning, the Commission had maintained that, even if it were accepted that the IP licences had to be allocated outside Ireland, the profit allocation methods endorsed in the advance decisions had nonetheless led to undervaluing the annual chargeable profits of ASI and AOE in Ireland in so far as they were based on inappropriate choices, which had produced a result departing from a reliable approximation of a market-based outcome in line with the arm’s length principle.

The second ground of the Commission’s appeal was divided into three parts. The first part related to an error in the determination of the standard of proof to be applied in order to establish the existence of an advantage in the case of advance decisions relating to the allocation of profits, the second related to a procedural irregularity, while the third related to an infringement of Article 107(1) TFEU and/or a distortion of national law. These were examined in turn by the AG.

The first part of the second ground of appeal

On the first part of the second ground of appeal, the Commission accused (para 99) the GC of adopting an incorrect standard of proof in considering that it was for the Commission to demonstrate that the profit allocation set out in the advance decisions had led to a reduction in ASI’s and AOE’s tax liability as compared with that which those companies would have borne under the normal rules of taxation and that the finding of methodological errors was not sufficient. The Commission, in fact, made quite an interesting claim here, parallelizing the standard of proof with that under the market economy operator test. More specifically, it asserted that it is for the Commission only to prove the ‘plausibility’ of an advantage, while it is for the Member State

concerned to demonstrate that such an advantage is justified.

The AG went on to defend the Commission's line of reasoning. More specifically, the AG noted (para 104) that the finding of an advantage within the meaning of Article 107(1) TFEU, which the Commission reached at the end of its subsidiary line of reasoning, was not based on 'a mere hypothesis, which was neither confirmed nor rebutted by the information at [its] disposal', or on mere 'plausible assertions', but on the finding of specific errors. These errors vitiated, according to the Commission, the profit allocation method accepted in the advance decisions, which affected the various elements of the calculation that led to the determination of ASI's and AOE's chargeable profits. In the AG's view, it could not be ruled out that, as the Commission maintained, fundamental errors in the determination of the methodology applicable to the profit allocation operation 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. If this were the case, they would be inherently or manifestly capable of reducing the tax burden of that company compared with taxation regarded as normal.

In such cases, the Commission may be entitled to rely, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, on proof of the existence of such an error and on the fact that the Member State concerned had failed to demonstrate that it had no effect on whether the level of profits thus calculated corresponds to an arm's length value. In the AG's view, this would not amount to an inappropriate reversal of the burden of proof. Thus, he concluded that the GC had incorrectly assessed the standard of proof (para 104).

Still, the AG proceeded to assess the impact of his conclusion on the validity of the GC's judgment. He noted that the GC, following a detailed analysis, which was challenged by the Commission both as to the substance and from the perspective of compliance with the limits of judicial review, held that the methodological errors identified in the Commission decision at issue had not been demonstrated and merely found, in essence, that there was no contemporaneous data justifying the choices relating to the calculation method accepted in the advance decisions. Therefore, the AG asserted that the error with regard to the standard of proof would have no real impact on the correctness of the conclusions reached by the General Court if the complaints put forward by the Commission in the second and third parts of its plea were shown to be unfounded (first and second complaint of the third part of the second ground of appeal). Thus, he went on to examine said complaints.

The second and third parts of the second ground of appeal

By the first complaint (analysed in paras 109-116 of the AG's Opinion) the Commission challenged, first, the classification of the functions performed by the Irish branches as 'less complex' for the purposes of choosing the tested party. Overall, the AG concluded that the grounds put forward by the GC did not by themselves make it possible, in so far as they take into account only the situation of the Irish branches, to invalidate the premiss on which the Commission relied in its subsidiary line of reasoning, that is to say, that the head offices, as parties to the transaction which performed the less complex functions, should have been tested (para 112).

After quickly dismissing an argument by the Commission that the GC had found of its own motion that there had been an error of interpretation of the OECD Transfer Pricing guidelines which had

not been raised by the applicants at first instance, the AG addressed the Commission's point that the choice of the party to be tested is a fundamental step in the application of the TNMM. He agreed (para 115) with the Commission as to the importance which, in the context of those OECD guidelines, is attributed to the choice of the party to be tested in the event of the application of the TNMM. He considered that the first complaint in the third part of the second ground of appeal was well founded (para 116).

By the second complaint (analysed in paras 117-129 of the AG's Opinion) the Commission challenged the paras of the GC judgment in which the GC had set aside the conclusions of the Commission's Apple Decision on an important issue. More specifically, the Commission had concluded that, even assuming that the choice of the Irish branches as tested parties was correct, the choice of taking ASI's and AOE's operating costs as the profit level indicator had led to chargeable profits of those companies in Ireland which did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle. The Commission was right, in the view of AG Pitruzzella.

Secondly, the Commission challenged paragraphs 366 to 372 of the GC judgment, in which the GC criticised the rejection, in recital 340 of the decision at issue, of the Berry ratio as a suitable financial ratio for estimating the arm's length remuneration in the present case. The Commission, in the AG's view, did not err in stating that the GC's examination of the Berry ratio was largely unconnected with the arguments raised by the applicants and discussed at first instance.

Thirdly, the Commission put forward a series of arguments to show that the GC had erred in law in the assessment made in paragraphs 366 to 372 of its judgment. It maintained that the GC's conclusion was based on an incorrect classification of ASI's Irish branch as a routine logistical service provider without assuming any risk. ASI and AOI as well as Ireland asserted that such a classification cannot be called into question at the appeal stage. Such an objection had to be rejected, in the AG's view. Therefore, the point raised by the Commission was deemed admissible.

The substance of the matter, as analysed in paras 122-124 of the AG's Opinion, was much more complicated. In summary, the Commission submitted that the GC had applied an incorrect legal test contrary to the arm's length principle in classifying the Irish branch of ASI as a low-risk distributor by comparing the risks assumed by that branch with the risk policies of Apple Inc. In the AG's view, the Commission, in its decision, while not denying that policies relating to centralised risk management had been put in place by Apple Inc., had demonstrated, without being overruled on the point by the GC, and without limiting itself to an exclusion approach, that, in relation to the head offices, the Irish branch of ASI had assumed a certain level of risk. Therefore, the Commission's point was well argued, in the AG's view.

Moving on, the Commission challenged the GC for deciding that the Commission had not succeeded in demonstrating that the profit level indicator based on total costs was more appropriate for the purposes of determining the arm's length profits for AOE's Irish branch. In those circumstances, the GC, in the AG's view, exceeded the limits of its power of review by raising of its own motion and upholding complaints which had not been put forward by the applicants and which related to points of the decision at issue which the latter had, at least implicitly, approved.

The AG then went on to make some interesting remarks, remarks which are more broadly applicable and concern the relationship between the Commission and the GC. The GC in its judgment had noted that the OECD Transfer Pricing Guidelines on which the Commission relied

‘do not recommend the use of [a] particular profit level indicator, such as the total costs, and do not preclude the use of operating costs ...’. This is, in my view, uncontroversial. However, the AG, in para 126 of his Opinion, stated that, regardless of whether the GC is correct in this respect, the mere fact that, as the GC stated, ‘it is not inconceivable, in principle, that operating costs may constitute an appropriate profit level indicator’ (para 410 of GC ruling) does not in itself constitute a factor on which the GC could rely, without substituting its own discretion for that of the Commission and its own arguments for those of the parties.

This cannot be correct. How can stating the obvious amount to an illegality on the part of the GC? The GC merely repeated that the OECD Guidelines do not preclude the use of operating costs as a profit level indicator; thus, it logically follows that it is, indeed (!), not inconceivable, in principle, that operating costs may constitute an appropriate profit level indicator. If we render such dicta “worthy” of an annulment by the ECJ, I am afraid that no GC judgment will survive unquashed in the future...

The AG did not budge, despite recalling that in para 95 of the judgment in *Fiat*, the ECJ had stated that, without harmonisation in that regard, any fixing of the methods and criteria for determining an ‘arm’s length’ outcome falls within the discretion of the Member States. Why? Because the *Engie* case, in his view, differs from that *Fiat* one, as he claimed to have substantiated in para 21 of his Opinion. Firstly, I do not think para 21 offers something relevant in this regard and seems largely unconnected to the Apple case. Secondly, even if the two cases were as different as claimed by the AG, this would still not affect matters of EU law principle, such as those included in the dictum above in relation to fiscal autonomy in case of lack of EU harmonization. Therefore, the AG’s remark is both non-compelling and out of place. In any event, the AG found the second complaint of the third part of the second ground of appeal to also be well founded (para 129).

Finally, by the last complaint in the third part of the second ground of appeal, the Commission challenged paragraphs 418 to 478 of the GC judgment under appeal, in which the GC had set aside the reasoning which had led it to reject the levels of return of the Irish branches of ASI and AOE accepted in the advance decisions. The Commission took issue with the GC’s approach and contended that the GC erred in law by confusing the condition relating to the existence of an advantage within the meaning of that provision and the quantification of the sums to be repaid which may even be zero. It referred in support of its argument to the ECJ judgment of 13 February 2014 in *Mediaset*. Still, the AG, correctly in my view, rejected this “analogy”, noting that the *Mediaset* case differed from the Apple case. In the Apple case, it is indeed necessary to determine whether the provision, in an advance decision, of an individualised method of calculation which was never actually applied can give rise to an advantage within the meaning of Article 107(1) TFEU. Therefore, the AG rejected the Commission’s argument.

As regards the levels of return accepted in the 2007 advance decision, the Commission had first of all called into question the reliability of the comparability studies on which the ad hoc reports had been based, since the companies selected by those studies were not, in its view, comparable to ASI and AOE. The GC had concluded that the Commission had not succeeded in demonstrating the alleged errors. The Commission had then carried out a corrected comparability analysis, using the companies selected in the abovementioned ad hoc reports, and adopting as the profit level indicator, for ASI, sales and, for AOE, total costs. The GC, while acknowledging that such an analysis would have enabled the Commission to demonstrate the existence of a selective advantage, nevertheless rejected its validity on three grounds, all of which were challenged by the Commission on appeal. The AG sided with the Commission.

The recommendation of the AG was that the GC judgment be set aside and the case referred back to the GC, since the ECJ did not have before it the elements enabling it to give final judgment on the actions at first instance.

Assessment and Broader Ramifications

Overall, the AG's Opinion appears to be rather one-sided. Moreover, his overall "direction" seems to be misguided and at odds with the spirit of both the *Fiat ruling of November 2022* and the *Engie ruling of December 2023* (both by the ECJ's Grand Chamber). In a nutshell, the reason why the AG is wrong is as follows.

Starting with the Fiat ruling, the ECJ had therein (para 73) stressed that, 'outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment and the taxable event'. In other words, the normal tax regime (or reference system) needs to stem from national law, not from a hypothetical, notional and artificial amalgamation of soft law or from creative interpretations of primary EU law. For these reasons, the Court had found (para 74) that it followed 'that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature.' This was, indeed, the nub of the case, and is the nub of the Apple case too, even if AG Pitruzzella does not place the same emphasis.

Please note the emphasis that the ECJ placed not only on the selectivity condition, but on the advantage condition as well. National law is crucial in the context of the first step of the selectivity test, but it is also crucial as the appropriate benchmark for the counterfactual analysis in the context of the advantage condition. Thus, without harmonisation in that regard, any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States.

Moving now to the equally important, and more recent, Engie ruling, the ECJ articulated, in paragraph 177 of its judgment, a rule which helps clarify and solidify the proper "exercise" for identifying the reference framework in fiscal state aid cases. More specifically, the ECJ stressed that '*the reference system or the 'normal' tax regime, on the basis of which the condition relating to selectivity must be analysed, must include the provisions laying down the exemptions which the national tax authorities considered to be applicable to the present case, where those provisions do not, in themselves, confer a selective advantage for the purposes of Article 107(1) TFEU*'. It went on to add that in '*such a situation, in the light of the Member States' own competence in the matter of direct taxation and the regard to be had for their fiscal autonomy [...] the Commission cannot establish a derogation from a reference framework merely by finding that a measure departs from a general objective of taxing all companies resident in the Member State concerned, without taking account of provisions of national law specifying the manner in which that objective is to be implemented*'. This way, the Grand Chamber underscored the crucial role played by Member States' fiscal autonomy, while also guarding against creative interpretations of EU state aid law

tackling issues which should only be addressed legislatively and not judicially.

So, following the two above rulings, the AG cannot be said to have argued convincingly in his Apple Opinion. He disregards the due respect paid by the ECJ to national fiscal autonomy and continues to insist on using the arm's length principle and its variations as a reference point for establishing the existence of a state aid advantage. The "Authorized OECD- approach" (AOA) should not have been used in the first place to assess Apple's tax arrangements in Ireland. Only Irish tax law is relevant! The AG became so involved in the intricacies of the AOA that he did not see the forest for the trees; therefore, it is unclear why a remand to the GC is needed. In my view, the ECJ will not follow the AG's Opinion, but will most probably side with Ireland and Apple, this way sticking to the principles it elaborated in its *Fiat* and *Engie* rulings.

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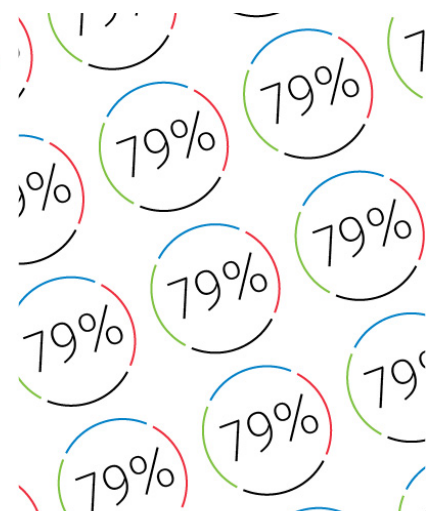
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