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Case Notes

European Commission v Ireland: eating the Apple without gaining knowledge

"Pride and Prejudice" would be a good title for a court-room saga. The well-known "truth universally acknowledged" with which Jane Austen opened that novel, instead of referring to the need of a wife by a single man in possession of a good fortune, may then more usefully have warned us all that "anything may happen in a court-room". The warning has come instead, with less literary style, in the judgment in *European Commission v Ireland (Commission v Ireland)*.[1]

As is well-known, the General Court (GC) had annulled the decision of the Commission[2] that Ireland had granted state aid to companies in the Apple group by means of tax rulings.[3] In *Commission v Ireland*, the Grand Chamber of the Court of Justice of the European Union (CJEU) overturned the ruling of the GC so that Ireland was found indeed to have granted state aid.

Some basic facts are shortly stated below, though it would be unwise to be too sure as to what they are. As the Advocate General (AG) pointed out "the dispute between the parties raises the delicate issue of the boundary between findings of facts and their legal classification …".[4] That observation is particularly significant because, as the CJEU said, in the field of state aid the GC's findings on national law, in this case Irish tax law, are in principle findings of fact.[5] The AG recommended that the Court remit the case to the GC because it did not have before it "the elements", i.e. the facts, enabling a final judgment to be made.[6] So he was not too sure of the facts of the case. The recommendation was not followed.

There has been significant comment already on the judgment of the CJEU.[7] Interest in the case is not confined to the EU. Interestingly, it seems the US may take the view that the EU was debating the taxation of profits which it was for the US to tax or not.[8] In all the circumstances, this note cannot aspire to anything approaching a comprehensive review of the decision of the

[1] *European Commission v Ireland (Commission v Ireland)* (C-465/20 P) EU:C:2024:724; [2024] B.T.C. 26.
[2] Commission Decision 2017/1283 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple [2017] OJ L187/1.
[3] *Ireland v European Commission (Ireland v Commission (GCEU))* (T-778/16 and T-892/16) EU:T:2020:338; 22 I.T.L. Rep. 815.
[4] Opinion of Pitruzella AG in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [44].
[5] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [174].
[6] The Opinion at [138] and *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [168].
[7] See, e.g. Ruth Mason and Stephen Daly, "Rotten to the Core: The EU's Court of Justice Decision in Apple" (2024) 116 *Tax Notes International* 987; Richard Collier, "A Bad Apple Ruling" (*Oxford University Centre for Business Taxation blog*, 13 September 2024), *https://oxfordtax.sbs.ox.ac.uk/article/bad-apple-ruling*; Emer Hunt and Geraldine Doyle, "Observing systemic values in a tax avoidance environment: Using systems theory to examine the Ireland-Apple tax relationship" [2024] *Systems Research and Behavioral Science* 1, *https://doi.org/10.1002/sres.3057*. Note too the comparison between the Apple judgment and the CJEU's decision in *United Kingdom v European Commission* (C-555/22 P, C-556/22 P and C-564/22 P) EU:C:2024:763; [2024] S.T.C.1756 in this review: Stephen Daly "United Kingdom and ITV Plc v European Commission: comparing apples with apples?" [2024] B.T.R. 725.
[8] Mason and Daly, "Rotten to the Core: The EU's Court of Justice Decision in Apple" (2024) 116 *Tax Notes International* 987, 1007: "If any country granted Apple massive state aid here, it was the United States, not Ireland." One may assume that President Trump would have some views on this matter.

CJEU. In 404 paragraphs, the Court addresses many issues and comments on the same issues in different ways. What follows are a few observations which it is hoped may provide the basis for further reflection.

Some facts

Apple Operations Europe (AOE), formerly known as Apple Computer Ltd, and Apple Sales International (ASI) were part of the Apple group of companies headed up by Apple Inc. Neither of these Irish companies were tax resident in Ireland but both had branches there. A significant number of the directors of AOE and ASI were employees of Apple Inc and were based in Cupertino, California, US, from where Apple's business was directed. The head offices of AOE and ASI were said to lack any physical presence or employees and not to be located in any jurisdiction. The branch of ASI in Ireland had no employees until 2012.[9]

The Irish branch of AOE was responsible for the manufacture and assembly of a specialised range of computer products in Ireland such as iMac desktops, MacBook laptops and other computer accessories. It supplied these to related parties in Europe, the Middle East, India and Africa (EMEIA). The Irish branch of ASI was concerned with procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in EMEIA and the Asia-Pacific region.

AOE and ASI had a cost-sharing agreement with Apple Inc. The agreement concerned, among other things, the research and development of technology in the products of the Apple group. Both AOE and ASI held licences (the IP licences) for the procurement, manufacture, sale, and distribution of the Apple group's products outside North and South America. The Irish branches had no rights to them.

The two advance rulings of the Irish tax authorities which the Commission alleged gave rise to state aid were given, initially, in 1991 and revised in 2007. They concerned the basis for the calculation of the profits of the branches and methods for the allocation of profit to them. The revised rulings of 2007 came into effect from 1 October 2007 for both branches and applied for five years so long as circumstances remained unchanged. They could be renewed annually and were effective until the 2014 tax year.[10]

The decision of the Commission

The arguments in the Commission's decision have been fairly described as "dense".[11] In no small measure that is due to the number of alternative approaches the decision contains. It is what one would expect to see in a decision drafted by a cautious bureaucracy and intended, above all else, to withstand judicial scrutiny. To some extent, the approach is justifiable, particularly as the decision was drafted as long ago as 2016. Nevertheless, in the contemporary political climate,

[9] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [265]; 22 I.T.L. Rep. 815 and Commission Decision 2017/1283 recital 109.
[10] Commission Decision 2017/1283 recitals 39, 59–62 and *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [11]–[21].
[11] Hunt and Doyle, "Observing systemic values in a tax avoidance environment: Using systems theory to examine the Ireland-Apple tax relationship" [2024] *Systems Research and Behavioral Science* 1, 7.

clouded with suspicion and conspiracy theories and in which truthfulness is not a virtue, all decision-makers should ensure that their drafting style as well as their language elevates clarity and transparency while maintaining appropriate conceptual sophistication.

The decision addresses, of course, the four elements of state aid contained in art.107 TFEU. The most significant part of the Commission's state aid analysis is in s.8.2 of the Decision entitled "Existence of a Selective Advantage", recitals 225 to 413. This encompassed a three-step analysis. First, the reference framework was identified. Secondly, there was consideration of a derogation from that reference framework. Thirdly, the question of justification for the derogation was addressed. Ireland did not consider that a justification was needed and did not advance one.

As to the first of the three steps, the Commission considered that the reference framework consisted of the ordinary rules of taxation of corporate profit in Ireland which sought to tax the profits of all companies subject to tax in Ireland. Part of that framework was s.25 of the Taxes Consolidation Act (TCA) 1997 (IR) taxing branches.[12] Alternatively, it said the framework was to be confined to s.25. Either way, the reference framework was said to contain an arm's length principle. If both of those propositions were incorrect then it was said that the tax rulings would be "the result of discretion exercised by Irish Revenue in the absence of objective criteria related to the tax system".[13]

As to the second step, concerning derogation from the framework, the Commission had primary and secondary lines of reasoning.[14] In its primary approach, the Commission considered that the IP licences contributed significantly to the income of AOE and ASI. It criticised the Irish tax authorities for endorsing a profit allocation to the branches which was based on the allocation of the IP licences outside Ireland when the head offices of AOE and ASI outside Ireland had no physical presence or employees.[15] The branches had physical presence and employees. AOE, for example, was involved in IP development and some form of management and control of the IP licences.[16] ASI was responsible, for example, for gathering and analysing data which was indispensable for the exploitation of Apple IP in the EMEIA region.[17] Consequently, profits should have been allocated to the Irish branches of AOE and ASI.

The secondary line of reasoning operated if the Irish authorities were correct to allocate the IP licences outside Ireland and the Commission was wrong to say that management and control of the IP licences should be allocated to the Irish branches.[18] In such circumstances, AOE and ASI still obtained a selective advantage. It was said to arise from the choice of the Irish branches

[12] "(1) A company not resident in the State shall not be within the charge to corporation tax unless it carries on a trade in the State through a branch or agency, but if it does so it shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on all its chargeable profits wherever arising.

(2) For the purposes of corporation tax, the chargeable profits of a company not resident in the State but carrying on a trade in the State through a branch or agency shall be—

(a) any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency, but this paragraph shall not include distributions received from companies resident in the State…

…"

[13] Commission Decision 2017/1283 recital 379.

[14] Commission Decision 2017/1283 recitals 260, 261 and ss.8.2.2.2 and 8.2.3.

[15] Commission Decision 2017/1283 recital 280.

[16] Commission Decision 2017/1283 recital 304.

[17] Commission Decision 2017/1283 recital 298.

[18] Commission Decision 2017/1283 recitals 325–360.

of ASI and AOE as the focus of the one-sided profit allocation methods, the choice of operating expense as a profit level indicator and the levels of accepted returns.[19] The one-sided profit allocation methods resembled the transactional net margin method (TNMM) as described in the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. The Commission referred to the edition of 2010. The TNMM had also been used by the Netherlands in relation to Starbucks[20] and by Luxembourg in relation to Fiat Chrysler.[21]

The judgment of the GC

The GC's judgment is only briefly commented on here. A more detailed outline of it has already appeared in this *Review*.[22] It is clear, however, that the Court considered the case very carefully. It put written questions both to the Commission, about its submissions, and to Ireland about the nature of the Irish tax system.[23]

Early on in its judgment, the GC outlined the functions of AOE and ASI.[24] It noted the submissions of the Commission to the effect that the IP licences had contributed significantly to their income.[25] The Commission confirmed in answer to the Court's written question that what it was concerned with was "profits resulting from the allocation of the economic ownership of the Apple Group's IP licences to the Irish branches".[26]

The Court concluded in relation to the primary line of reasoning, that:

> "… the Commission did not attempt to show that the Irish branches of ASI and AOE had in fact controlled the Apple Group's IP licences when it concluded that the Irish tax authorities should have allocated the Apple Group's IP licences to those branches …"[27]

It considered that was important because according to Irish law and the Irish decision of *Dataproducts*:[28]

> "… the property held by [a] company cannot be allocated to the Irish branch if it has not been established that that property is actually controlled by that branch."[29]

[19] Commission Decision 2017/1283 recital 327.
[20] Commission Decision 2017/502 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (notified under document C(2015) 7143) [2017] OJ L 83/38.
[21] Commission Decision 2016/2326 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (notified under document C(2015) 7152) [2016] OJ L351/1.
[22] Timothy Lyons, "Ireland and Apple v European Commission: the competent exercise of competences" [2020] B.T.R. 609.
[23] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [81], [126], [210], [219], [238] and [438].
[24] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [8]–[10].
[25] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [38].
[26] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [126].
[27] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [186].
[28] *S Murphy (Inspector of Taxes) v Dataproducts (Dublin) Ltd (Dataproducts)* [1988] I.R. 10. *Dataproducts* was incorporated and carried on manufacturing in Ireland but was resident in the Netherlands. The Irish branch transferred some funds to Switzerland. Carroll J held, on the basis of pre-consolidation legislation, that, save for certain re-transferred sums, the fund was held for and used by the company and not the Irish branch. Consequently, Irish corporation tax was not chargeable on the income arising from it.
[29] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [184].

Consequently, the Court considered it impossible, consistently with Irish law, to attribute the IP licences and profits derived from them to ASI and AOE. The Court's fundamental criticism of the Commission decision is that:

> "… the Commission erred, in its primary line of reasoning, in its assessment of the provisions of Irish tax law relating to the taxation of the profits of companies that are not resident in Ireland but which carry on a trade there through a branch."[30]

The Court also rejected the attribution of the profits of ASI and AOE to the Irish branches to the extent that those profits could not be allocated to other parts of the companies. This was referred to as an "exclusion approach" which it was said the Commission had followed.[31] The rejection of the exclusion approach, was the subject of factual assessment but it was, in any event, an inevitable result of the Court's findings on Irish law. If control of the IP licences had not been established, no allocation of profit was possible. In making their tax rulings, as a matter of Irish tax law, the Irish tax authorities could not have allocated profit derived from the IP licences to the Irish branches of ASI and AOE. As the Court considered that those authorities acted consistently with the reference framework, it is not surprising that they ultimately concluded that there had been no provision of a selective advantage.

The GC went on to find that the Commission was entitled to use the arm's length principle to determine the profits of the branches,[32] and could not be criticised for having relied on the Authorised OECD Approach.[33] In the view of the Court, however, the Commission had failed to show that the allocation of profit which it made followed from the activities actually carried on by the Irish branches and did not show that the income was representative of the value of the branches' activities.[34]

The Court also had concerns over what it considered the lack of evidence of the activities of the branches[35] and over the consistency of the Commission's approach with the evidence. It was accepted in the Commission's decision itself that ASI employed no staff until 2012 to carry out the functions it alleged that ASI's branch fulfilled.[36] Yet the rulings took effect from 1 October 2007.

In the light of what it considered errors as to Irish tax law and on the evidence briefly noted above, the Court rejected the Commission's primary line of reasoning. It did not explore other objections to that line of reasoning but went on to consider the others. They were also found wanting largely on evidential grounds. It is not necessary for the purposes of this note to consider them in detail.

[30] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [186].
[31] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [178]–[188].
[32] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [224]–[225].
[33] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [240].
[34] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [228].
[35] The Court said "the Commission provided no evidence": *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [263] and [293]. See to similar effect [271], [292], [333], [350], [380], [416], [440] and [479]. Note also [331] where the Court says: "[T]he Commission merely asserted."
[36] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [265] and Commission Decision 2017/1283 recital 109.

The AG's Opinion

The AG commented that it was "necessary, in so far as is possible, to seek a coherent reading of the judgment under appeal".[37] Later he mentioned "the difficulty of attributing an unequivocal meaning" to certain parts of it.[38] We may assume he was unimpressed with what he read.

One of his many criticisms of the GC was that it imposed on the Commission a burden of proof it was impossible to discharge.[39] The Commission wished to infer from the silence of minutes of board meetings of AEO and ASI and the absence of evidence to the contrary that the boards did not take decisions in relation to the management of the IP licences. The AG considered that appropriate.[40] The GC considered a lack of details about decisions in board minutes did not mean that no decisions were taken.[41] It was surely correct to be cautious about making findings where "a lack of indications, and … the *absence of evidence to the contrary*"[42] are heavily relied upon. It is worth noting too that when the AG referred to the burden of proof he was probably referring to the standard of proof which the Commission must meet in discharging its burden.[43]

One element of the judgment of the GC which the AG considered vital was the "exclusion" approach taken by the Commission and noted above.[44] The Commission itself agreed this would have been incompatible with Irish tax law and the OECD authorised approach but said it did not adopt it.[45] The AG concluded that the Commission's approach to allocation had been based on an absence of evidence in relation to the head office of the Irish companies and the evidence of activity by the branches.[46] Consequently, the Commission had not allocated profit to the branches by default and had not used the "exclusion" approach.

The AG, like the CJEU subsequently, appears not to have considered important what may be thought a central element of the GC's reasoning in relation to the exclusion approach outlined above. The GC assessed the exclusion approach in the context of a discussion of Irish law and the need for evidence of control of the IP licences. As we have already seen, in the GC's judgment the relevant question, considering Irish law, was whether the Irish branch had control of property.[47] For allocation to occur, it had to be shown that the branches had control of the IP licences. It was not enough to show that they were "made available" to the branches.[48] It bears repeating that the GC found that "the Commission did not attempt to show that the Irish branches of ASI and AOE in fact controlled the Apple Group's IP licences".[49]

In the AG's view, because he had concluded in [23] to [30] of his Opinion that it was incorrect to say that the Commission had allocated profits to the branches by default and used the exclusion

[37] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [54].
[38] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [92].
[39] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [84], and also [85].
[40] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [85].
[41] *Ireland v European Commission* (T-778/16) EU:T:2020:338 at [304].
[42] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [85]. Emphasis is in the original.
[43] The Advocate General referred to the standard of proof in the context of other criticisms of the General Court, see in particular Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [137].
[44] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [178].
[45] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [23].
[46] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [28].
[47] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [182] and [184].
[48] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [181].
[49] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [186].

approach, the conclusions of the GC in relation to the primary line of reasoning were undermined. If the GC could reply, it may well say it took the view that in the absence of evidence of control, allocation on any basis was inconsistent with Irish law.

A second ground of appeal against the subsidiary reasoning also found favour with the AG, though for present purposes it is not necessary to consider it. The complaints of Ireland, ASI and AOE regarding the "exclusion" approach were to be definitively rejected and the reasoning of the GC was found to be flawed. Nevertheless, he concluded that the case should not be decided by the Court because it "did not have before it the elements enabling it to give final judgment".[50] Accordingly, in the AG's view the matter should have been remitted to the GC.

The CJEU's judgment

The Court was faced with an Opinion which heavily criticised the GC, but which was not itself beyond criticism. Nevertheless, in a judgment that ran to 404 paragraphs, the Court was able to deal with the substance of the appeal very shortly in [117] to [132]. In these paragraphs, it dealt with the criticism of the GC's judgment in relation to the exclusion approach. Like the AG, the CJEU found that the Commission had not adopted such an approach. It had instead linked two separate findings that there was, first, an absence of active or critical functions performed and risks assumed by the head offices of ASI and AEO and, second, there were functions and risks assumed by the branches.

It followed, said the CJEU, that the first ground of appeal alleging errors in the assessment of the Commission's primary line of reasoning should be upheld. There was no need to examine the other complaints because they "are directed against the same finding of the General Court".[51] It went on, nevertheless, to consider the other complaints and they succeeded. The complaints included that the GC took into account inadmissible evidence,[52] failed to concentrate on the activities of ASI and AOE and looked at the activities of Apple Inc[53] and imposed an excessive burden of proof on the Commission (as the AG also believed).[54]

It may be noted that the CJEU paid apparently little if any attention to the finding of the GC that the Commission did not attempt to show that the Irish branches of ASI and AOE had in fact controlled the Apple Group's IP licences.[55] This would appear to be because the Commission had succeeded in persuading the CJEU that the criticism it faced was related to its approach to allocation. As has already been noted, the more fundamental criticism that the GC made was that no allocation was possible at all because there was no evidence of the control of property. The Court found that the GC distorted the content of the Commission's decision.[56] Perhaps, in its submissions to the CJEU, the Commission distorted the GC's judgment.

Like the AG noted above, the Court could not be convinced that the absence of reference to matters in minutes of board meetings of the Irish companies could be relied upon to show that

[50] Opinion of AG Pitruzella in *Commission v Ireland* (C-465/20 P) EU:C:2023:840 at [138].
[51] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [133].
[52] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [255].
[53] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [256].
[54] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [257].
[55] See *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [186].
[56] See *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [130].

certain matters had not been considered by the companies.[57] It also took the view that the Commission could not be criticised for not taking into account, during the administrative procedure, commercial contracts and powers of attorney relevant to ASI and AEO. The Court said that:

> "It was, on the contrary, incumbent on ASI and AOE to submit that evidence during the administrative procedure, if they were of the view that it would establish the reality and relevance of the centralised nature of strategic decisions within the Apple Group taken by directors of that group in Cupertino."[58]

Even if these evidential matters could not be said to be determinative, they were important. No doubt it is correct that evidence should be made available during the administrative procedure. Courts generally strive, nevertheless, to ensure that rules as to production of evidence and burden of proof do not operate so as to divorce the case on which they rule from the real world. The CJEU's treatment of board minutes and other material relevant to the operation of the Apple Group makes it almost impossible to avoid asking whether the Apple Group in relation to which the CJEU gave judgment was the Apple Group that existed in reality. Remission to the GC would have addressed that concern.

The need to deal with reality is also relevant to the nature of the relevant reference framework, namely the tax law of Ireland. The *Dataproducts* decision was important in the GC's analysis of Irish tax law because it was that decision which established the need for control of property.[59] It may be noted though that the CJEU dealt with Irish law without mentioning the name *Dataproducts*. Ireland may take the view that the tax system which the CJEU used as its reference system was not the tax system which existed in reality.

The final issue which may be dealt with here in relation to the CJEU's judgment is its decision to decide the case itself rather than remit it to the GC. It considered that it had sufficient information available to rule on all the pleas which had been advanced.[60] In those circumstances it concluded that:

> "Those pleas were in fact the subject of an exchange of arguments before the General Court and their examination does not require any further measure of organisation of procedure or inquiry to be taken in the case, having regard to the issues which must be resolved in order to bring the dispute to an end."[61]

One can understand that the CJEU considered it was important to bring finality to the litigation but not everyone will be convinced that no further measures of inquiry were needed in this case. One may ask what was it that led the CJEU to be so much more certain than the AG. It may be that pragmatism was preferred to principle.

[57] See *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [245]
[58] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [186].
[59] *Ireland v Commission (GCEU)* (T-778/16) EU:T:2020:338 at [179]–[184].
[60] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [260]–[267].
[61] *Commission v Ireland* (C-465/20 P) EU:C:2024:724 at [266].

Concluding comments

The Commission requested Ireland to provide information on its tax rulings in a letter of 12 June 2013.[62] Its decision was dated 30 August 2016. The hearing before the GC took two days on 17 and 18 September 2019. The hearing before the CJEU took place on 23 May 2023. While the time taken for the entire Apple saga was undoubtedly long, the hearings before the courts were not themselves inordinately long. Certainly, a hearing in Ireland in respect of the transfer-pricing values applied in relation to group companies may give rise to a much longer hearing and a more detailed judicial examination of the facts.[63]

Of course, the EU courts have a different jurisdiction from national tax courts, that must be borne in mind, but it is worth considering whether a procedure which required more judicial time would have been appropriate in a case involving a group as large as Apple, tax law governed by statute and case law and €13 billion.

So far as concerns the future of EU law in relation to state aid and tax rulings, it may be that the concerns over the judgment in the CJEU which are being raised, here and elsewhere, will not matter as much as some may be tempted to think. The fundamental legal principles relevant to tax rulings and state aid have not been developed in any startling way. Furthermore, any reference to the judgment in *Commission v Ireland* in future litigation may be avoided by the parties as likely to lead only to extensive and confused debate.

Nevertheless, such considerations cannot nullify all the questions to which the judgment gives rise. Can we be sure that the CJEU's judgment discloses the real facts of the case? Was sufficient account taken of the fact that ASI had no staff until 2012? Do we really know the true content of the relevant Irish tax law? No doubt, remission to the GC may have addressed these and other issues. If, however, remission is to be considered an unattractive course of action, then perhaps the GC will find that its extensive powers in relation to measures of inquiry become a focus of attention in future cases.

Timothy Lyons KC[*]

[62] See Commission Decision 2017/1283 recital 1.

[63] See, e.g. the seven day hearing in which transfer pricing legislation was relevant in respect of the appeal to the Tax Appeals Commission under publication reference 59TACD2024 (the appellant is anonymised). The determination was made on 21 February 2024, *https://www.taxappeals.ie/en/determinations/59tacd2024-corporation-tax.*

[*] Barrister, 39 Essex Chambers.