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Euro Tax Flash from KPMG's EU Tax Centre

CJEU overrules the judgement of the General Court in Irish State aid case

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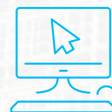
Key Summary:

On September 10, 2024, the Court of Justice of the European Union (CJEU) rendered its decision in case C-465/20 P. The case concerns two transfer pricing rulings issued by the Irish tax authorities in favor of two Irish incorporated, but non-Irish tax resident companies that had Irish trading branches.

In 2016, the European Commission determined that the two tax rulings constituted unlawful State aid, incompatible with the EU internal market, and ordered Ireland to recover the related amounts. Ireland and the companies benefiting from the rulings appealed and, in 2020, the General Court annulled the Commission's decision.

Upon appeal by the EC, the CJEU set aside the judgment of the General Court and gave final judgment in the matter, confirming the Commission's decision.



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Executive summary

In line with the Advocate General (AG)'s opinion, the CJEU concluded that the General Court committed a series of errors in law when it found that the European Commission (the Commission or the EC) had not shown to the requisite legal standard that the intellectual property (IP) held by the two Plaintiffs was attributable to their Irish branches. In particular, the CJEU held that the General Court erred when it ruled that the Commission's primary line of reasoning was based on erroneous assessments of normal taxation under Irish tax law, and when it upheld the complaints raised by the Plaintiffs regarding the Commission's factual assessments of the activities of the Irish branches and those of the head offices. Consequently, the CJEU decided to set aside the General Court's judgment.

Additionally, the CJEU concluded that it had sufficient information to rule on all the pleas raised by Ireland and the taxpayers, as these issues were fully debated before the General Court. In the CJEU's view, no further procedural steps or investigations were required, enabling it to issue a final judgment. After reviewing and rejecting the arguments presented by Ireland and the taxpayers in their initial appeal, the Court ultimately dismissed their claims.

Background

Background

The European Commission's Decision

On December 19, 2016, the Commission issued a decision concerning two transfer pricing rulings granted by Ireland in 1991 and 2007 in favor of two Irish incorporated, but non-Irish tax resident companies that were trading in Ireland through branches (the Decision). In short, the rulings endorsed the profit allocation methods related to the trading activity of the Irish branches of the two entities concerned. Among others, under the rulings, certain IP licenses should be allocated for tax purposes outside of Ireland, i.e., to the head-offices of the two Irish branches and not to the Irish branches.

Irish tax law as it stood at the time of the contested rulings provided that a non-resident company carrying on a trade in Ireland through a branch should be taxable in Ireland on "*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*".

In the EC's view, the two rulings constituted unlawful State aid, incompatible with the EU internal market. According to the Commission, the Irish tax authorities accepted a profit allocation which diminished the tax base in Ireland, thus leading to a selective advantage granted to the Plaintiffs. In a first line of reasoning, the Commission disagreed with the allocation of relevant IP outside of Ireland, which, in its view, led to those companies' annual taxable profits departing from a reliable approximation of a market-based outcome in line with the arm's length principle.

In a subsidiary line of reasoning, the EC explored a scenario where the Irish authorities were correct in their allocation of the IP outside of Ireland. In the Commission's view, the outcome was the same under this alternative scenario, as the functions exercised by the Irish branches would have required a greater attribution of profits to the Irish branches. In this respect, the EC identified three alleged erroneous methodological choices: the selection of the Irish branches as 'tested parties', the choice of the operating costs as profit level indicators and the levels of return accepted by the tax authorities.

Based on the above, the EC ordered Ireland to recover State aid amounting to approximately EUR 13 billion (plus interest). Both the taxpayers and Ireland appealed the EC's decision in front of the General Court of the EU (the General Court) – see **EuroTaxFlash Issue 307**.

The General Court's Decision

General Court Decision

On July 15, 2020, the General Court issued its judgment (joint cases T-778/16 and T-892/16) on the EC Decision.

With respect the Commissions' primary line of reasoning, the General Court ruled that the EC, in its Decision, did not provide for sufficient proof for establishing a selective advantage under the State aid rules. According to the General Court, the EC incorrectly concluded that the Irish authorities granted an advantage to the Irish branches by a misallocation of the IP. In this respect, the EC should have demonstrated the value of income generated through the activities at the level of the Irish branches rather than concentrating on the functions being performed outside of

Ireland (the 'exclusion' approach). The General Court concluded that, materially, the Irish branches performed supportive activities, which would not justify the allocation of IP to them. Among others, the General Court supported this conclusion by conducting its own assessment of the facts, which included a comparison of the functions undertaken by the Irish Branches to those performed by the non-resident parent entity of the two Plaintiffs (the Parent). The General Court also held that the Commission did not provide sufficient evidence supporting the conclusion that the IP should have been allocated to the Irish branches – see E-news **Issue 120**.

With respect to the EC's subsidiary line of reasoning, the General Court took the view that the Commission did not succeed in demonstrating methodological errors in the tax rulings under dispute, which would have led to a reduction in the Plaintiffs' chargeable profits in Ireland. In this respect, the General Court held that the existing inconsistencies identified by the EC were not sufficient to constitute a selective advantage for the purposes of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).

However, the General Court endorsed the Commission's assessments of normal taxation under the relevant Irish tax law, having regard to the tools developed by the OECD, such as the arm's length principle.

The EC appealed the judgment of the General Court in front of the CJEU.

The European Commission's appeal

EC's appeal

The Commission's appeal was based on two lines of reasoning, each divided into three parts. The first ground of appeal concerned the General Court's criticism regarding the EC's primary line of reasoning, as follows:

- *Application of an exclusion approach*: in the first part of its first ground of appeal, the EC submitted that the General Court misinterpreted the Commission's initial Decision. Specifically, the Commission pleaded that the General Court incorrectly understood that the EC allocated the IP to the Irish branches solely based on the lack of employees and physical presence in the head offices (instead of conducting a functional analysis). The EC also submitted that the General Court's decision was vitiated by contradictions concerning whether the IP allocation was based on a functional analysis or not.
- *Relevance of functions carried out by the Parent:* in the second part of the first ground of appeal, the Commission submitted that, by using the functions performed by the Parent as the basis of comparison (rather than with those carried out by the head offices), the General Court violated the separate entity approach and the arm's length principle on which the relevant Irish legislation is based, therefore infringed Article 107(1) of the TFEU. In the alternative, the EC submitted that the infringement of the arm's length principle and of the separate entity approach constituted a manifest distortion of national law. The EC also asserted that the General Court committed a procedural irregularity by relying on inadmissible evidence.
- *Assessment of activities carried out by the head offices:* in the third part of the first ground of appeal, the EC challenged more specifically the General Court's assessment of activities carried out by the Plaintiffs' head office. Among its arguments, the Commission complained that the General Court imposed on it a burden of proof which was impossible to discharge.

The second ground of appeal was directed against the part of that judgment in which the General Court overturned the Commissions' subsidiary line of reasoning, as follows:

- *Standard of proof:* in the first part of the second ground of appeal, the EC submitted that the General Court erred in law when applying the rules on the standard of proof that the EC needs to comply with when examining the existence of a selective advantage under Article 107(1) TFEU.
- *Reliance on arguments not raised at first instance:* in the second part of the second ground of appeal, the EC submitted that the General Court committed a breach of procedure, by rejecting the EC's subsidiary line of reasoning based on arguments not raised by the Plaintiffs or by Ireland in their applications at first instance.
- *Methodological errors*: in the third part of the second ground of appeal, the EC submitted that the General Court misrepresented the Decision and infringed Article 107(1) TFEU and/or distorted the Irish law in concluding that the Decision had not established the existence of an advantage. Specifically, the Commission took the view that the General Court made three pricing methodological errors with respect to: i) the analysis related to the choice of the Irish branches as 'tested parties'; ii) the choice of the operating costs as the profit level indicator; and iii) the levels of return accepted by the transfer pricing rulings in place.

The Advocate General's opinion

On November 9, 2023, AG Giovanni Pitruzzella issued his opinion with regards to the EC's appeal.

The AG concluded that the General Court committed a series of errors in law when it found that the European Commission had not shown to the requisite legal standard that the intellectual property held by the two Plaintiffs was attributable to their Irish permanent establishments. The AG also took the view that the General Court erred in finding that the EC had not proven the methodological errors based on which the latter had concluded that the tax rulings were vitiated. Consequently, the AG recommended the CJEU to set aside the judgment and to refer the case back to the General Court for a new decision on the merits.

CJEU decision

Preliminary considerations

Before addressing the Commission's appeal, the CJEU outlined several key preliminary considerations. First, the Court quoted its settled case-law under which the provisions of the Treaty on the Functioning of the European Union ((TFEU) on monitoring State aid also cover areas where EU law is not harmonized, and that Member States must refrain from adopting measures that could represent State aid incompatible with the internal market. The Court then referred to its previous case-law in summarizing the steps required for a national measure to qualify as illegal 'State aid':

CJEU decision

1. There must be an intervention by the State or through State resources
2. The intervention must be liable to affect trade
3. The intervention must confer a selective advantage on the beneficiary
4. It must distort or threaten to distort competition.

As regards the third step, in particular – considering whether a selective advantage has been granted, the European Commission is tasked with (i) identifying the reference system, i.e. the ordinary tax system applicable in that Member State in a factually comparable situation (by reference to the objectives of that regime), and (ii) demonstrating that the disputed tax measure – in this case the tax rulings – is a derogation from that 'normal' system, and therefore represents a form of discrimination (either formally or in practice).

First ground of appeal - errors in the assessment of the existence of a selective advantage

First ground of appeal

In its first ground of appeal, consisting of three parts, the Commission argued that the General Court made several errors in challenging its primary line of reasoning regarding the existence of a selective advantage.

Part 1 - application of an exclusion approach

In line with the AG's conclusions, the CJEU upheld the Commission's plea that the General Court had misinterpreted the EC's Decision and its approach with respect to analyzing the allocation of IP and related profits.

Application of an exclusion approach

Specifically, the CJEU held that the General Court erred in law by concluding that the Commission applied an 'exclusion'[1] approach based on the absence of employees and physical presence at the level of the head offices, as part of its primary line of reasoning. In this context, the Court noted that the Commission had also conducted an analysis of the functions performed by the head offices and the Irish branches, respectively, with respect to the IP licenses. Based on this assessment, the Commission determined that the Irish branches had an active role, stemming from the assumption of various functions and risks associated with the management and use of those licenses. In the Court's view, the Commission's findings were based on two distinct conclusions: (i) the lack of functions and risks assumed by the head offices, and (ii) the multiplicity and centrality of the functions performed by the Irish branches.

Based on the above, the CJEU concluded that the first part of the first ground of appeal should be upheld.

Part 2 - relevance of functions carried out by the Parent

The second part of the first ground of appeal focused on the Commission's claim that the General Court erred in law by implicitly accepting the relevance of the functions performed by other entities in the group—particularly the Parent, for the purpose of determining the Plaintiffs' taxable profits in Ireland.

[1] The 'exclusion approach' presumed that the EC examined the overall profits derived by the non-resident companies and, to the extent that those profits could not be allocated to other parts of those entities, were allocated by default to the Irish branches.

The Commission's plea was essentially a request to review whether the General Court correctly defined the scope of the national tax law applicable and correctly applied this to the case at hand.

Inadmissible evidence

The CJEU then addressed the Commission's complaint that the General Court should not have considered certain evidence that was not presented during the administrative procedure, but was only submitted before the General Court, or not produced at all. This information included several email exchanges and powers of attorney presented as evidence of decisions made by the boards of directors of the head offices.

The Court recalled that, based on settled case-law, the legitimacy of a State aid decision should be assessed based on the information available to the Commission at the time when the decision was made and on what could have been obtained upon request during the administrative procedure. In the Court's view, the Commission cannot be criticized for not considering information that was not (but could have been) submitted during the administrative procedure, as it is not required to proactively examine or predict what information may be provided.

The CJEU therefore agreed with the plea that the General Court committed a procedural breach by taking the inadmissible evidence into account.

Legal test applicable under Irish law for determining the profits of a non-resident company

Legal test applicable

The CJEU upheld the Commission's plea that the functions performed by the Parent were incorrectly taken into account when determining the taxable profits of the Plaintiffs in Ireland. The Court noted that the General Court held that the legal test for attributing profits to the Irish branches should be based on a functional analysis, limited to the activities of the Irish branches and their respective head offices, without factoring in the role of separate legal entities, such as the Parent.

In line with the AG's comments, the CJEU noted that the General Court nevertheless deviated from this approach. Specifically, the General Court compared the functions and risks undertaken by the Irish Branches in relation to the IP licenses with the functions and risks undertaken by a separate legal entity (i.e., the companies' Parent) in relation to those assets in its role as the group's parent or under the cost-sharing agreement or under the marketing services agreement. This deviation meant that the General Court applied a different legal test than the one it had itself determined was appropriate.

The CJEU continued by rejecting the Applicants' plea, which argued that even if the General Court had considered the Parent's functions, the Commission's complaint was ineffective. The Applicants claimed that the General Court's conclusion was primarily based on its analysis of the activities of the Irish Branches and head offices, finding that the functions performed by the branches were 'routine' and insufficient to justify the allocation of the IP licenses. In this context, the CJEU analyzed the General Court's reasoning, as appearing from its initial judgement and concluded that the General Court had indeed largely based its decision on the assessment of the functions performed at the level of the Parent.

Part 3 - assessment of activities carried out by the head offices

In the third part of the first ground of appeal the Commission essentially claimed that the General Court had infringed upon the separate entity approach and the arm's length principle, and distorted national law by concluding that formal acts carried out by the directors of the Plaintiffs constituted functions performed by the head offices in relation to the IP.

Among others, the CJEU noted that the General Court imposed an excessive burden of proof on the Commission by finding that the fact that the minutes examined by the Commission do not give details of decisions concerning the management of the Apple Group's IP licenses, of the cost-sharing agreement and of important business decisions does not mean that those decisions were not taken. Furthermore, in line with the AG's opinion, the Court held that it is an unjustifiably excessive burden on the Commission to prove the existence of negative facts, which can only be presumed.

The CJEU therefore concluded that the third part of the first ground of appeal is for this part admissible and well founded and should be upheld.

CJEU's decision on the first ground of appeal

Decision on the first ground of appeal

In the overall assessment of the first ground of appeal, the CJEU concluded that the judgement under appeal must be set aside, with regard to the EC's primary line of reasoning relating to the existence of a selective advantage.

Actions brought in front of the CJEU

After setting aside the judgment under appeal[2], the CJEU considered whether the state of the proceedings was such that it may give final judgment in the actions. In this context, the CJEU noted that it had the information necessary to rule on all the pleas presented by the Applicants, as these were fully debated before the General Court. In the CJEU's view, no further procedural steps or investigations were needed, allowing the CJEU to issue a final judgment in the matter.

The CJEU proceeded to examine the pleas raised by the Applicants in the initial proceedings before the General Court. The summary below highlights some of the main pleas and key reasoning provided by the CJEU.

Pleas related to the assessment of the existence of a selective advantage

First, the CJEU addressed the Applicants' pleas challenging the Commission's assessment of a selective advantage, focusing on four key aspects: i) the Commission's approach of jointly examining the conditions of advantage and selectivity, ii) the identification of the appropriate reference framework, iii) the Commission's factual findings regarding activities within the Plaintiffs' corporate group, and iv) the selective nature of the disputed tax rulings.

Regarding the identification of the reference framework, the CJEU held that, since the Applicants' complaints were already rejected in the judgment under appeal and there was no cross-appeal, the General Court's judgment stands as *res judicata* (final judgement based on merits). As a result, the CJEU did not need to address those complaints further.

On the matter of normal taxation of profits under Irish law, the CJEU reiterated its previous findings that the Commission did not rely solely on an "exclusion" approach, which would have conflicted with Irish tax rules.

Final judgement

The CJEU also noted that it could not reasonably be argued that the EC did not attempt to show that the Irish branches were actively involved in managing the IP license when justifying the allocation of the IP licenses to the branches. Consequently, under the Irish rules, all trading income was to be regarded as arising from the activities undertaken by the branches.

Plea on whether the tax rulings constituted an intervention by the State or through State resources

The CJEU dismissed Ireland's plea that the Commission had erroneously determined that the tax rulings under dispute constituted State intervention or the use of State resources.

Ireland had argued that the rulings issued by its tax authorities merely applied national tax laws to the specific circumstances of the two Plaintiffs and that it had not refrained from taxing their profits, as only the Irish branches of the Plaintiffs were subject to tax in Ireland.

The CJEU recalled its settled case-law, which classifies a measure as State intervention or aid granted through State resources if, first, the measure is granted directly or indirectly through those resources, and secondly, the measure is imputable to a Member State. Regarding the first requirement, the CJEU found that the rulings effectively reduced the taxable profits in Ireland of the two Plaintiffs, as compared to other companies taxed in Ireland whose chargeable profits reflect prices determined under normal market conditions, and therefore represented a use of State resources. The CJEU also highlighted that the Irish Revenue, which issued the tax rulings, is an organ of the Irish State, and therefore the second requirement was satisfied.

[2] Under Article 61 of the Statute of the CJEU, if the CJEU sets aside a decision issued by the General Court, it can either issue a final judgment or refer the case back to the General Court.

Pleas alleging infringement of essential procedural requirements, and in particular of the right to be heard

The CJEU continued by rejecting Ireland's plea that, in the process of adopting the Decision, the Commission infringed essential procedural requirements, and in particular the right to be heard. Ireland had also claimed that the Commission had not provided a real opportunity for adversarial debate.

Instead, the CJEU took the view that there is no basis for the claim that the Plaintiffs' procedural rights were disregarded and that the Commission breached the principle of good administration, in so far as it correctly performed, with the means it had at its disposal, its task of putting the interested parties in a position of being able to submit their comments effectively during the formal aid investigation procedure.

Pleas in law alleging breach of the principles of legal certainty and protection of legitimate expectations

The CJEU rejected the pleas that the Commission had breached the principles of legal certainty, non-retroactivity, and legitimate expectations by ordering Ireland to recover alleged State aid. The Applicants had argued that the Commission's interpretation, including its use of the arm's length principle, was unforeseeable at the time the tax rulings under dispute were issued.

The CJEU recalled that, under EU law, when the Commission determines that certain measures constitute unlawful aid, it is required to order the Member State to recover the aid from the beneficiary, unless this would breach a general principle of EU law. With regards to legal certainty, the CJEU quoted its settled case-law, stating that the principle can not be invoked unless the Commission clearly failed in its duty of diligence or in exercising its supervisory powers. In cases where aid was not notified, the mere delay in ordering recovery does not, by itself, render the recovery decision unlawful.

The CJEU also noted that the Commission was not notified about the tax rulings and only became aware of their existence in 2013, based on publicly available information in 2013. A formal request for information was sent to Ireland within one month of this finding. Furthermore, whilst the Commission's reasoning did apply to tax rulings, this approach was not novel or a departure from its established decision-making practices, nor was it unforeseeable in light of CJEU case-law on State aid in fiscal matters.

The CJEU also emphasized that, under settled case-law, companies benefiting from aid can not, in principle, hold a legitimate expectation that the aid is lawful unless it was granted in compliance with State aid procedures.

Moreover, the Court also rejected the argument that the Commission violated the principle of non-retroactivity by basing its decision on an OECD approach that was established after the contested tax rulings. The Court took the view that the EC's Decision was based on Article 107(1) TFEU, which has been part of Ireland's legal framework since 1973, not on the OECD guidelines. In the Court's view, the OECD framework was only referenced as guidance for the purposes of determining whether a method for determining taxable profits was in line the arm's length principle.

The Court also dismissed the claim that the tax rulings should be classified as 'existing aid' under EU law, emphasizing that the contested tax rulings, not the general Irish tax rules, were the relevant measures deemed to be classified as unlawful State aid.

Pleas in law alleging that the Commission breached the principle of fiscal autonomy

The Court then rejected the Applicants' plea that the Commission's Decision breached fundamental constitutional principles of the EU legal order, particularly concerning the division of competences between the EU and Member States. Specifically, the Applicants asserted that direct taxation falls exclusively within the competence of Member States and claimed that the Commission exceeded its authority by relying on a unilateral and incorrect interpretation of Irish law and by imposing procedural rules not found in Irish law.

In this context, the Court recalled its settled case-law (in particular, its decision in the joint cases C-885/19 P and C-898/19 P) according to which, Member States' actions in areas not harmonized by EU law, such as direct taxation, are not excluded from the scope of the TFEU provisions on monitoring State aid. Moreover, whilst Member States retain competence in direct taxation, they must comply with EU law and avoid measures that could constitute unlawful State aid. The Court also recalled that tax rulings granted by Member States can qualify as State aid if the conditions of Article 107(1) TFEU are met.

ETC Comment:

The CJEU decision in the case at hand is the latest in a string of cases related to EC's State aid investigations concerning tax rulings granted by Member States, and it is the final judgement in the case at hand.

This judgement has been received as a major (unexpected) win by the Commission, following a series of cases in which the CJEU ruled in favor of the taxpayer and dismissed the EC's decisions. In particular, in its judgement in the joined cases C-885/19 P and C-898/19 P, the Court (on appeal), concluded that the General Court was wrong to confirm the Commission's approach to apply a version of the arm's length principle not codified in Luxembourg domestic law and annulled the EC's decision (kindly refer to EuroTaxFlash Issue 492 for more information on this case).

In a **press conference** organized in relation to the CJEU's decision of 10 September, EU Commissioner for Competition, Margrethe Vestager (Vice-President of the Commission) remarked that there are two main take-aways from the judgement. Firstly, that although Member States have the exclusive authority to determine their tax system, tax rulings are nevertheless subject to EU State aid rules. Secondly, that – to prevent certain companies from receiving unfair tax advantages through tax rulings that differentiate from the relevant domestic tax laws, the Commission may exercise control. Finally, Commissioner Vestager stated that the State aid investigations have contributed to a different attitude of Member States and to regulatory and legislative changes, also in Ireland.

The Irish Department of Finance published a **statement** that the position of Ireland has always been that no favorable tax treatment to any companies or taxpayers was provided by Ireland. The corporate tax policy of Ireland focused on attracting real substantial investments, while creating employment. Moreover, Ireland is involved in the OECD work addressing Base Erosion and Profit Shifting, and Ireland has implemented the measures from the two EU Anti-Tax Avoidance Directives and has transposed the Minimum Tax Directive. Ireland is of the opinion that the issue of tax avoidance and profit shifting can only be solved through global agreement on how and where companies should pay their taxes. In that respect, Ireland continues to support the Pillar Two solution, while it works with the international community on a global solution for fair and transparent global taxation. In the statement it is also noted that the judgement is now of historical relevance only as the two tax rulings at stake are no longer in force and Ireland meanwhile introduced changes to the relevant corporate tax laws involved.

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