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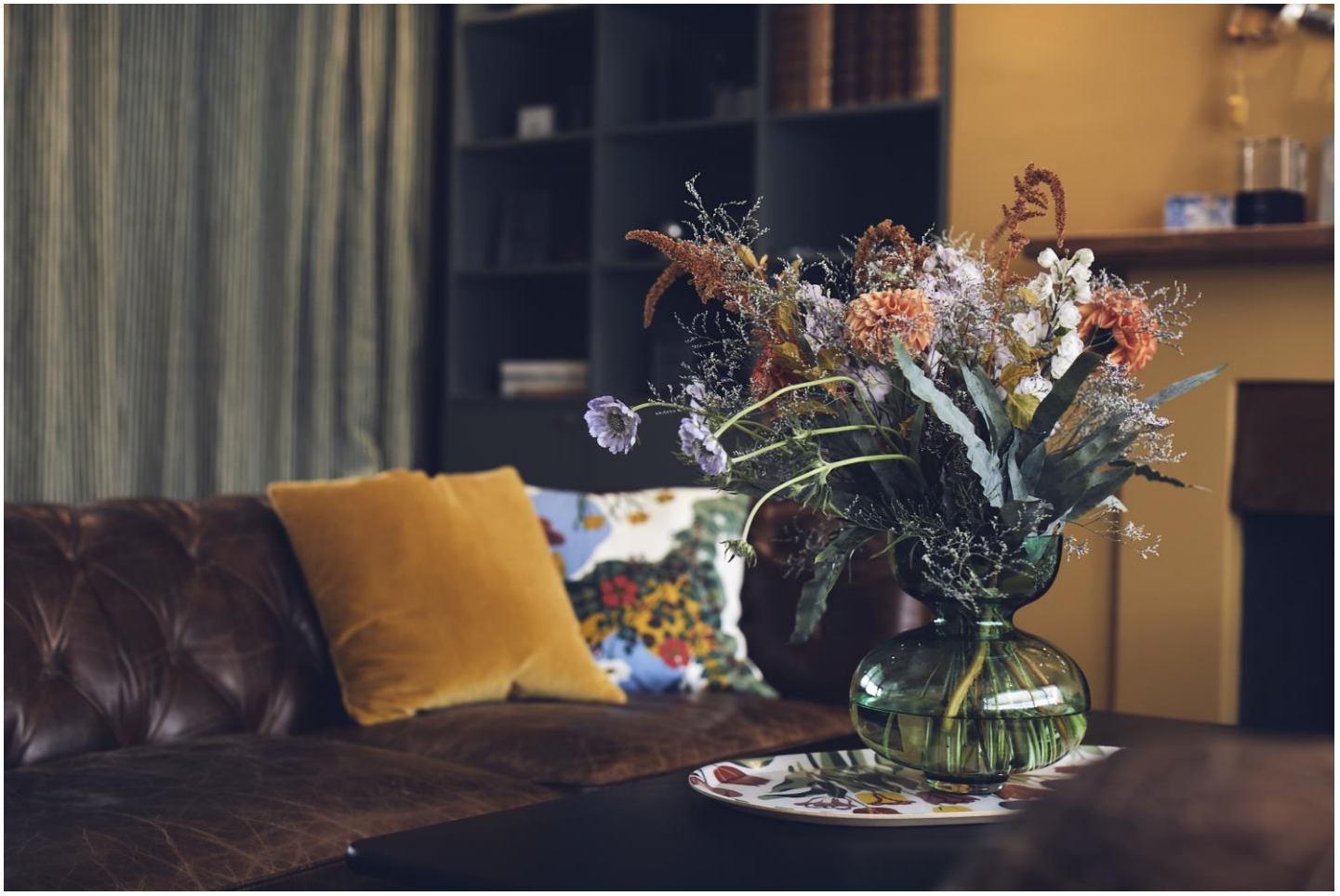

THE APPLE CASE: ADVOCATE GENERAL PITRUZZELLA SUGGESTS BRINGING LIFE TO THE COMMISSION'S EURbn 13 CLAWBACK CLAIM AGAINST APPLE

10 November 2023

Introduction

On 9 November 2023, Advocate General Pitruzella has issued his opinion in the historic Apple case[1]. In doing so, the Advocate General sides partially with the European Commission's ("the Commission") appeal to Court of Justice ("the CJEU") of the judgment of the

[1] Case C-465/20 P.

General Court[2] whereby the General Court annulled the Commission's decision to order Ireland to claw back (recover) EURbn 13 for the Apple companies concerned due to certain Irish tax rulings constituting unlawful and incompatible State Aid according to the Commission.

The Advocate General finds that the General Court committed several errors of law in its judgment, for which reason the Advocate General advises the CJEU to set that judgment aside and refer it back to the General Court for the purposes of allowing the General Court to rule on the remaining legal issues.

If the CJEU were to follow the Advocate General when passing its judgment in the appeal case, this could have significant implications for the legal state of play as to when tax rulings may constitute unlawful "State Aid" for the purposes of Articles 107 and 108 TFEU.

By implication and analogy, this could likely also have a similar significant impact on when a tax ruling from a non-EU member state authority could constitute a "Foreign Financial Contribution" or – even – a distortive "Foreign Subsidy" for the purposes of the EU Foreign Subsidies Regulation.

This would imply that undertakings would have to consider and account for such foreign tax rulings in particular when being involved in FSR[3] in-scope M&A transactions and/or EU public procurement procedures.

The Background to the Apple Case

Tax rulings are a common instrument in EU member states.

Tax rulings enable undertakings to seek advance decisions from the competent national tax authorities concerned regarding the undertaking's prospective tax treatment under certain applicable assumptions set out in the tax ruling.

In 1991 and 2007, Ireland issued two tax rulings (the "Tax Rulings") pertaining to the Apple Group companies (Apple Sales International ("ASI") and Apple Operations Europe ("AOE")), which are incorporated, but not tax-residents, in Ireland.

The Tax Rulings approved a specific methodology invented to calculate the chargeable profits of ASI and AOE in Ireland resulting from their activities in Ireland for the purposes of determining the (possible) Irish income taxation of ASI and AOE.

[2] Cases T-778/16 & T-892/16, 15 July 2020.
[3] EU Foreign Subsidies Regulation (Regulation 2022/2560).

This methodology implied exempting the profits from the tax base which would be attributable to certain intellectual property rights, stemming from research and development, and which were subject to a cost-share arrangement with other Apple Group companies.
In 2016, the European Commission found that the Tax Rulings implied the grant of unlawful and incompatible State Aid in favor of Apple Inc. This State Aid would be granted on an on-going basis during the period 1991 to 2014. The aggregate unlawful and incompatible State Aid amount constituted according to the Commission EUR 13 billion not including interest.

In support of this finding, the Commission held that the effective exclusion or exemption of the profits generated from aforesaid intellectual property rights from the applicable Irish tax base, conferred a selective economic advantage to Apple Inc. through ASI and AOE and thus constituted unlawful State Aid for the purposes of Articles 107 and 108 TFEU.

The Commission also based its decision on the finding that the Tax Rulings and the ASI and AOE's profit allocation did not comply with the arm's length principle.

Against this background, the Commission decided to order Ireland to recover the aggregate amount equivalent to the exempt tax benefit amount, which constitutes EURbn 13, as this would constitute incompatible operating aid in support of the concerned Apple beneficiary entities.

Ireland and Apple, respectively, subsequently launched annulment actions before the General Court against the Commission's State Aid decision.

In 2020, the General Court decided to annul the Commission's decision when passing its judgment.

The General Court found that the Commission had not established - to the requisite legal extent - that the Tax Rulings had conferred a selective economic advantage on to the Apple beneficiary entities concerned. As a result, the Commission had not, according to the General Court, established the presence of any unlawful State Aid in its decision, for which reason the decision had to be annulled.

Following this, the Commission appealed the General Court's judgment to the CJEU.

The Advocate General´s opinion in the appeal case
Advocate General Giovanni Pitruzzella recommends in his Opinion that the CJEU should set aside the judgment of the General Court and refer the case to the General Court for a new adjudication on its merits.

The Advocate General holds that the General Court erred in law in its legal interpretation of the evidential requirements resulting from Articles 1017 and 108 TFEU when concluding that the Commission did not meet the required legal standard applicable to establishing that the profits attributable to the intellectual property licenses and the associated profits generated from global Apple product sales outside the USA should - contrary to what is assumed in the Tax Rulings – form part of the Irish Apple branches' tax base and hence constitute taxable profits in Ireland.

In addition, the Advocate General finds that the General Court assessed the substance inadequately. Consequently, the Advocate General deems it imperative that the case is referred back to the General Court for a new comprehensive reassessment of the merits and allegations in the case.

It should be noted that while the CJEU is not bound by the opinions rendered by the Advocate Generals, the CJEU often follows the recommendations of the Advocate Generals in practice when passing judgement.

Our Comments

While the Advocate General does state in his Opinion that the EU State Aid rules cannot be used to harmonize the national tax rules of the EU Member States, the Opinion nonetheless fuels the legal basis for national tax rulings being, in principle, able to constitute unlawful State Aid when the presence of a selective economic advantage is established to the requisite evidential extent.

If followed by the CJEU, this legal state of play would first of all imply that undertakings would be well-advised to consider and assess the potential State Aid risk when obtaining and receiving a tax ruling from an EU Member state authority.

Moreover, the same legal state of play with respect to tax rulings would likely also be transferred to apply to the same extent under the sphere of the EU Foreign Subsidies Regulation.

Consequently, undertakings would be equally well-advised to consider, assess, store, and calculate the financial implications resulting from any tax rulings passed by a non-EU member state authority in favor of the undertaking concerned (any legal entity under the relevant group) for the purposes of assessing the undertaking's compliance with the obligations resulting from the EU Foreign Subsidies Regulation and its risk exposure under this regulation, specifically in the context of M&A transactions and EU public procurement procedures.

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