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Apple Case: a milestone for Tax Ruling and European Union Law

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ANNO ACCADEMICO 2018/2019

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Introduction

The Apple case is unprecedented: a sanction of 14.4 billion euros announced by the European Commission over the tax ruling by Ireland on Apple's Irish incorporated branches: Apple Operation sale and Apple Operation Europe. This decision highlights the debate of tax legitimacy that raises more concerns by the public. Mundialization has meant more cross-border commercial exchanges, and a general principle says that tax has to be collected where the value is created, but components such as non-material goods, the complexity of the tax system, and the absence of linear taxation has rendered it more difficult for nations and institutions to ensure tax fairness on business created within the country. Despite this difficulty, international organisations such as the Organisation for Economic Co-operation and Development have tried to use a framework to harmonise the work of countries on taxes. The opposition between the European Commission and both Ireland and Apple, Inc. highlights the complexity of tax co-operation between countries and institutions.

The structure of the case is really interesting as it features the two branches of Apple that are incorporated in Ireland, Apple Operation sale and Apple Operation Europe. When opening their branches in October 1980, Apple proposed a deal to create employment in Europe and to serve their European customers. The cost sharing agreement between Apple, Inc and their Irish branches initially consisted of Apple sharing their intellectual properties with their branches in order to successfully

manage the retail aspect of Apple's product and to organise customer support.¹

The State Aid Action Plan is working with the European Commission to reduce state aid to encourage countries to create more targeted aid packages which will aim to encourage economic development by more innovative sectors as decided by the European Union.² The plan became more and more relevant in the European roadmap to a more inclusive and fair internal market.

In this thesis, I will highlight that the role of the European Commission as a law enforcer in this case is relevant in that they need to identify and show that there is effectively state aid and show that the behaviour of the member state towards the Apple subsidiaries deviates from what they generally offer to other companies. The European Union ensures this behaviour through a three-step method.³

After investigation, the Commission concluded that the contested tax ruling is unlawful in the sense of article 107 (1) (3) of the treaty on the functioning of the European Union.⁴ In view of the State Aid Action Plan, this is a good first step into a more inclusive and fair internal market. This action sends a clear message to member states, as highlighted by the European Union Commissioner, that no member state can conduct or provide tax benefits within the internal market.⁵ I will discuss the position of each stakeholder, Apple, Inc, Ireland and the European

¹ EUROPEAN COMMISSION (2017: 118 ss.).

² EUROPEAN COMMISSION (2005).

³ MASON, RUTH (2017).

⁴ EUROPEAN COMMISSION (2017: 145 ss.).

⁵ EUROPEAN COMMISSION (2016b).

Commission, by exploring each group's points of view, and I will aim to answer the question: Do European State Aid laws have to be written more clearly?

1. Tax ruling and European Commission overview

1.1 Context of the case

In the 1980's, in the middle of an economic crisis in Ireland, Apple, Inc. decided to open branches to serve their European customers. Steve Jobs, Apple's former CEO, chose to open these branches in Cork, a city with low economic activity and high levels of unemployment. Over the following ten years, the company saw continuous growth in sales, and by the end of the 1990's it had hired nearly 1500 employees to its Ireland-based branches.⁶ In response to their financial performance, Apple, Inc. decided to negotiate with the Irish Revenue for the authorization of the execution of a tax ruling to continue to bring more investment and resources into their Irish incorporated branches. Opening branches on a geographical basis is a general practice from multinational companies, as they need to deliver their customers worldwide, they need to implement a branch in order to be in line with the local laws especially when employing persons, delivering services or simply managed their local market in a more efficient way.

Apple's activities were great for the Irish economy: having brought around 1500 jobs to the country it had registered a net income of 270 million euros during a period of recession for the country. Successively, Ireland Revenue came up with their first tax ruling authorization in

⁶ COOK, TIM (2016).

1991.⁷ Specifically, Ireland offered Apple the permission of executing a tax ruling on a one-sided profit allocation method between the headquarter and the Irish branches. This agreement lasted until 2007 when a new agreement was signed by the two parties; both tax rulings are the subject of the opening decision of this thesis.⁸

The contested tax ruling involved Apple Operations Europe and Apple Sales International, the two branches established in Ireland. Under this new agreement, the company can implement a profit allocation method between the headquarter and his branches to share Intellectual properties, managements, resources and business risks. This has permit to Apple, Inc. to improve their income by taxing a few amounts of their profit in Ireland.⁹ These tax ruling has permit to Apple, Inc to considerably improved their performances for several years on a tax efficiency view's. The legal investigation from the European commission started from a request from the United State Senate.

In 2013, The US was beginning to grow suspicious of the low amount of taxes that Apple was paying to US tax collectors and began to investigate Apple's home incorporated companies.¹⁰ Due to the check the box policy: this act from United State of America imply that the country let companies acting with their out-countries branches regardless of the verification from American taxation entities.¹¹ As, they were unable to find any signs of Apple home tax avoidance, the United State Senate

⁷ COOK, JAMES (2016).

⁸ EUROPEAN COMMISSION (2017a: 149 ss.).

⁹ EUROPEAN COMMISSION (2016b).

¹⁰ MASON, RUTH (2017).

¹¹ GLECKMAN, HOWARD (2013).

ask to the European Commission to take a deeper look into the branches Apple had established in Ireland.

Following this, the European Commission notified Ireland on the 12th of June 2013, with a request to present documents in order to verify their status regarding their tax practices.¹² After, the study of the different documents provided by Ireland, the European Commission decided to investigate the practices of Ireland with their home-based companies on the basis that the tax ruling can constitute an illegal state aid.¹³

1.2 Background from the opening decision

To present the case, it is important to highlight both the actors who were involved in the opening decision and, how the tax system works in Ireland and the European approach to tax ruling. The actors involved in the case are six: Apple Inc., (located in the United States), Apple Operations Europe and Apple Sales International (AOE and ASI or Apple's Irish branches), their Irish incorporated branches, Ireland as a member state of the European Union, the European Commission (the Commission) as a law enforcer of the European Union and the Organization for Economic Co-operation and Development (OECD) as a third party observer.

¹² EUROPEAN COMMISSION (2017a: 1 ss.).

¹³ Ivi, 9 ss.

Apple, Inc., headquartered in the United States, created and developed mostly hardware, software, services and insurances linked to their products.¹⁴ In order to be efficient in their retail department and with their clients, Apple opened branches on a geographical basis: America, Europe and Asia are segmented. So, to deliver to their European customers, Apple chose Ireland to house its European branches: AOE and ASI and other ones which are not directly involved in the case. AOE is mostly focused on manufacturing expertise and retail management, on the other hand, ASI has the role of sales management.

The Commission's role is to ensure and protect the general interest of the European Union, it is composed by 28 commissioners, one per Member State and one Commission's President. It also introduces new laws to the European Parliament and allocate the European Union funding to the different members states or economic and social sectors.¹⁵ It provides the general roadmap to the policies that the European Union has to follow and plan the action plan that will be follow by Europe during the year. Importantly, it's initiates legislation and enforces, together with the European Court of Justice the European Union law. In the Apple case, their roles are to control and ensure that the Member state are acting regarding the European Union laws and treaties.¹⁶

Ireland as a member state has to respect the European policies and their treaties, especially, the two founding treaties: Treaty on European Union (Maastricht, 1992) and the Treaty on the Functioning of the European Union (originally firmed in Rome, 1957). The agreement on the

¹⁴ EUROPEAN COMMISSION (2017a: 41 ss.).

¹⁵ EUROPEAN UNION (2018).

¹⁶ *Ibidem*.

tax ruling between the Irish government and the Apple's branches was focused on the profit allocation method used to calculate the transfer pricing and so, the amount of tax that the Irish branches are gone paid. To permit the deal, a cost sharing agreement was made between Apple, Inc. and its two Irish branches based on a one-sided profit allocation method. In details, Intellectual property is created and owned by Apple, Inc. which, thanks to the agreement, gives the AOE the ability to use their trademark and more generally all components that are useful to sell Apple products; ASI follows the same format in their sales operations.¹⁷

Regarding their taxation system, corporate tax in Ireland is calculated based on the profit of the company on a 12-month basis. There are three components in their tax system: tax related to trading income with a general 12,5% rate applied, non-trading income such as carrying business is taxed at 25% and the capital gains tax is 33% with some exceptions under Irish law and other tax treaties.¹⁸ Ireland is part of the OECD organization and present a reference of the arm's length principle in his domestic and use the EOOD transfer pricing guideline legislation under the article 42 of the Financial Act 2010.¹⁹ The OECD is an international organization created in 1961 that has the scope the help their members (mostly developed countries) managing their trades and giving a general framework to help them favouriting a democratize

¹⁷ EUROPEAN COMMISSION (2017a: 47 ss.).

¹⁸ BURNS, LIAM (2017).

¹⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2017).

trade collaboration.²⁰ There are present in the Apple case as a third part observer and refers legal practices to deal with international trade such as transfer pricing.²¹

The cost of product development is shared between the three entities which includes their research and development costs, marketing costs, risk management and distribution management. Due to the request from the United states senate, the Commission notified Ireland on the 12th of June 2013, with a request to present documents in order to verify their status regarding their tax ruling practices.²² After the study of the different documents provided by Ireland, the Commission started its investigation based on the fact that the tax ruling provided by Ireland is considered individual state aid in the sense of the article 107 (1) of the Treaty of the Functioning of the European Union (TFUE). Both the 1991 and 2007 issued tax ruling issued by the Irish government are presumably considered irregular regarding the State Aid law in Europe.

1.3 The contested tax ruling

Transfer pricing (TP) is used by companies to share their economic activities between the holding and the branches, subsidiaries or even a

²⁰ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2018).

²¹ EUROPEAN COMMISSION (2017: 174 ss.).

²² Ivi, 1 ss.

third-party enterprise. TP is a tool used generally by taxpayers to reinforce their outcome in the market. The advantage of operating with transfer pricing for companies is really important when acting internationally: it generally permits them to work without being influenced by regional market changes. To elaborate in more detail, when transfer pricing takes place, it permits an enterprise to reach an outcome regardless of market conditions because these expenses are transferred to another entity. These cross-border transactions can bring way more advantages for companies acting internationally by using transfer pricing to put off the risk of changing market demand.

As Apple Inc says, the transfer pricing has to respect the arm's length principle and so, to behave under Organization for Economic co-operation and development (EOCD) framework.²³ Especially the arms-length principle, it is commonly applied commercially and financially and is defined as a way of acting between two parties without the pressure of a third party.²⁴ This principle is used to determine if the selected transfer pricing is relevant considering a comparable situation on a uncontrollable situation upon price, profit or resale price.²⁵

The OECD offers a transfer pricing guideline that refers to 5 types of transfer pricing methods, which are divided into 2 categories: traditional transaction method and transitional profit method, which are recognized by the majority of tax authorities in the world. The OECD TP guidelines recommend that as a tax payer, you have to choose the most appropriate method to use. The first method is the CUP Method which

²³ EUROPEAN COMMISSION (2017a: 167 ss.).

²⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2007).

²⁵ *Ibidem*.

says that to determine the arms' length, we need to find the difference between the price in an uncontrollable transaction and the price of a controllable transaction in a similar situation. If there is a difference, we need to refer to the price in a controllable transaction instead of an uncontrollable one to respect the arm's length principle. The Resale Price Method is considering the price of the good that a company buys, then reducing it by the gross method minus all the operating costs to sell the final good to determine if the profit allocation is acting under the arm's length. The Cost Plus Method starts with the cost of the supplier in a controllable transaction, then a mark-up comparison is done with the same supplier or a similar external situation in an uncontrollable transaction. To determine the profit allocation method, then a comparison is made between the original mark-up and a mark-up on a similar situation (internal or external). The transactional profit split method is a way to determine the arm's length by splitting the profit or loss of the final product transaction between the 2 companies that has of actions for the realization of the product, the amount of the split is determined by the allocation of resources done by the companies. The transaction Net Margin Method (TNMM) is taking the profit indicator instead, and then comparing this factor with another enterprise in an uncontrollable transaction to determine the arm's length.²⁶

We can observe that Apple, Inc has used a one-sided profit allocation method similar to the TNMM method when dealing with AOE and ASI.²⁷ The 3 entities share development costs, intellectual property and

²⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2010).

²⁷ EUROPEAN COMMISSION (2017a: 265 ss.).

marketing costs. Then, the branches would do an annual money transfer to Apple, Inc. in order to finance their costs in development and research. For Ireland and Apple, its profit allocation method is regular under the arm's length principle.²⁸ Additionally, when looking at the domestic law in Ireland, the domestic legislation effectively referred to that principle: the 1997 taxes consolidated act, inserted later by Section 42 of the Financial Act 2010 implies that a tax ruling follows the OECD transfer guidelines.²⁹

The Commission argues that transfer pricing constitutes illegal state aid in the sense of the art. 107 (2) and (3) of the TFUE for several reasons: The Commission emits doubts on the fact that another operator would have accepted a similar profit allocation on a comparable basis.³⁰ Moreover, there is an absence of documents that show comparable situations provided by the Irish authorities to justify the arm's length of the transfer pricing.³¹ There is also an inconsistency in the cost sharing process: the increase in sales does not match with an increase of resources inside the Irish branches.³²

Due to the assumption previously highlighted, the European Commission decided to investigate the practices of Ireland with their home-based companies on the basis that the tax ruling constitutes illegal state aid regarding the art 107 (1) (3) of the TFUE.³³

²⁸ *Ibidem.*

²⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2017).

³⁰ EUROPEAN COMMISSION (2017: 146 ss.).

³¹ *ivi*, 148 ss.

³² *ivi*, 149 ss.

³³ *ivi*, 151 ss.

1.4 Comments from interested parts

Ireland and Apple, along with the international trade community, were surprised upon hearing the release of the European Union's decision. Ireland came out against the thesis of the European Union that the state aid granted by Ireland was given individually to the American company, Apple, Inc., and commented on the decision with several arguments.

First, Ireland argued that the arm's length principle is referred to in domestic legislation: Section 25 of the Tax Consolidation Act (TCA) of the 1997 in the domain of the Organization for Economic Co-operation is the only assumption that can be taken into account when considering the amount of taxes that a branch which is carrying out profit allocation with an external company has to pay in the country where they are established.³⁴ It was the only framework Ireland considered relevant to take on decision. Regarding the reference system used by the Commission in the opening decision, Ireland replied by commenting that it's different from the private contract with ASI and AOE in Ireland.³⁵

The comment from Apple, Inc. followed Ireland's position. They argued that they did not consider this state aid to be given individually, as Ireland and the company are working under the scope of the 25 TCA 97 and so, the arm's length principle. In an open letter to the European

³⁴ IRISH STATUTE BOOK (1997).

³⁵ EUROPEAN COMMISSION (2017a: 146 ss.).

community, Apple highlighted the fact that Apple is a company that has been investing in Ireland on a continuous basis since 1980, when the country faced an economic crisis.³⁶

They argue that the State Aid granted by Ireland was legal due to the fact that they were acting in a situation of regional crisis and that the European Commission cannot behave like they were by asking for retroactive taxes.³⁷ In fact, Apple, Inc. is referring to its open letter to the comma 3 of the art. 107 of the TFUE which gives the framework to consider State Aid compatible with the internal market:

“Aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious underemployment, and of the regions referred to in Article 349, in views of their structural, economic and social situation.”³⁸

The installation of the European branches by Apple, Inc. is effectively corresponding to a period of weak economic performance and immigration that leads the country to a decline in population and Gross Domestic Product (GDP). By watching the economic situation of the late 1970's, there was a general recession worldwide due mostly to a switch to neo liberalism economic policies during a period of GDP growth.³⁹ The United States and Japan were able to get off this crisis, but it was not the case for every other country where the crisis has been going on for several years: this is the case of Ireland. In fact, Ireland during the 1980-1984 years had seen a clear slow-down in their economic growth, a high inflation rate and a high unemployment rate. Especially, the city

³⁶ COOK, TIM (2016).

³⁷ COOK, TIM (2016).

³⁸ EUR-LEX (2012).

³⁹ MOYNIHAN, MICHAEL (2018).

of Cork where Apple, Inc decided to open their branches faced a huge crisis where successively the companies Ford, Dunlop and Verolme decided to lay off thousands of employees in the city because of their economic situation.⁴⁰ As they began their economic activities in October 1980, Apple, Inc invoke the compatibility with the internal market.

Another point underlined by the American company is the retroactivity implied by the European Commission decision.⁴¹ In fact, Apple, Inc. argues that during the agreements with Ireland that were agreed upon in 1991 and 2007, they were not able to know that they were acting against the European treaty as they were acting under the scope of 25 TCA. Here the principle of legal certainty is invoked, which said that the law must provide tools to regulate their comportments upon a comportment judged deviant from a country or an organization.

As the third part of the decision, the community of international trade also agreed on the fact their entity is more appropriate to take action in this case.⁴² They argued that the tax agreement between Apple and Ireland follows the general trade agreement framework. From there, they insist on the fact that the OECD is better suited to take on law suit. As well, they insist on the fact that a potential recovery should be excluded as both Apple, Inc. and Ireland were not able to determine the exactitude of the transfer pricing in line with state aid policy.⁴³

Therefore, the European Commission is not considered by Ireland to be relevant in taking a lawsuit against the two entities for that case.⁴⁴ Other

⁴⁰ *Ibidem.*

⁴¹ COOK, TIM (2016).

⁴² EUROPEAN COMMISSION (2017: 174 ss.).

⁴³ *ivi*, 175 ss.

⁴⁴ *ivi*, 153 ss.

interested parties have also exchanged letters to defend the position of Apple and Ireland on the case.

2. Investigation from the European Commission

2.1 The existence of the state aid

State aid is a frequently used policy tool in Europe: after the second World War, due to a rapid increase in both population and economic growth in cities, there were huge regional disparities. To resolve these issues, governments used state aid in order to increase employment and economic growth in certain regions. State aid can consist of tax incentives, support for investments or even, providing goods and services on preferential terms.⁴⁵ Due to the Lisbon Agenda, the European Union started to keep an eye on state aid to prevent it from creating an unequal market. This policy is one part of the State Aid Action Plan (SAAP): it has the scope to keep selective state aid low in order to benefit the community's interests instead of unilateral economic policies.⁴⁶

The European treaties give a framework for member states on how they can and have to act on their social and economic policies. Regarding State Aid, there are tools used by countries to support regions or sectors in critical economic situation to permit them to grow again. They consist of tax incentives, support for investments, rewards for companies

⁴⁵ EUROPEAN COMMISSION (2016c).

⁴⁶ *Ibidem*.

in certain economic sectors and more.⁴⁷ The article 107 (1) of the TFUE gives the basis for countries to organize their state aid in order to avoid creating unbalanced market and to take unilateral economic policies that can distort the fairness of the internal market. The European Commission uses 4 steps to identify the existence of state aid: there is an effective intervention by the member state or through state resources, this intervention has an effect on the trade between member states, it confers a selective advantage and it effectively distorts the competition.⁴⁸

As any other investigation related to State Aid, the European Commission used this method to determine the unlawfulness of the state aid. First, we can input to Ireland the contested tax ruling as it was delivered by the Irish Revenue which is an institution from Ireland. Additionally, this state aid is constituting a favourable tax conduces to AOE and ASI with is, in the sense of the court of Justice, a state aid. Second, Apple, Inc. sells both hardware and software worldwide and distributed their products all over Europe. As the activity of AOE and ASI are focused on retail management and customer customers support. They clearly do business from Ireland to deliver to the European market, as the tax ruling confers a tax advantage to the company acting with concurrent inside the internal market, the second condition is satisfied. Third, as the contested tax ruling has permitted Apple's branches to pay fewer taxes (I will demonstrate it in the section 2.3), it confers a selective advantage that has permit to Apple group to pay less taxes and so, reinforce their incomes in the market. This implied s selective advantage to the American company when acting in Europe that could not have been existing

⁴⁷ EUROPEAN COMMISSION (2016c).

⁴⁸ EUR-LEX (2012).

without the intervention of the state. Finally, as the Irish revenue have authorized the profit allocation method used between Apple, Inc. and their Irish branches. This authorization is so a derogation from the reference system generally propose to other companies. As it has permitted to the Apple's group to conduce activities in a favourable way, it's constituted a distortion of the competition and a derogation from the reference based.⁴⁹

Now the existence of the State Aid has been highlighted by the Commission, the European Commission needs to determine a reference system to successively compare Irish tax behaviour with their incorporated companies.⁵⁰ Ireland, Apple, Inc and the OECD organization previously implied that the reference to determine the validity of the tax ruling should be the 25 TCA 97. Let's see the argument from the European Commission about this assumption.

2.2 Reference system

There are two categories of state aid: general and individual. General state aid consists of government policy designed to reinforce a determined sector by providing tax incentives on investments, providing goods or services to corporations.

⁴⁹ EUROPEAN COMMISSION (2017: 224 ss.).

⁵⁰ *ivi*, 226 ss.

On the other hand, individual state aid is an act between the country and the company.⁵¹ It's generally based on tax incentives that permit to the determined company to have a better income. The company generally guarantees the allocation of resources inside the country in exchange. State aid is considered selective regarding the references system chosen. It is considered unlawful when it is given in an individual way or accorded selectively.⁵² To determine the selectivity of the Aid, the Commission usually uses 3 steps to identify it: select the reference from the member state, show that the company has received state aid not in accordance with that trend and highlight that other companies have not benefitted from this aid.⁵³ This method is used by the Commission to analyse if the State Aid has been given selectively and confers an advantage from other companies.

When selecting the references system, these elements have to be taken into account for this case: the reference taxation system, so what Ireland generally practices in term of taxation, and their rules of taxation for corporate profits. Successively, the determination on the restriction to the art 25 of the TCA 1997, so the arm's length principle as it's included in the domestic jurisdiction and the profit allocation method authorize by the Irish revenue.⁵⁴ First, the Commission considered that the reference system is composed by the ordinary rules of taxation of corporate

⁵¹ EUROPEAN COMMISSION (2016c).

⁵² *Ibidem*.

⁵³ MASON, RUTH (2017).

⁵⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2017).

profit under the Irish corporate tax system.⁵⁵ In the Irish taxation system, corporate profits are taxable from 12,5% for profit derived from trading and 25% for non-trading incomes. This rule applied for companies or branches that produce income and are incorporated in Ireland, there are no exceptions inside the Irish tax system for resident or non-resident companies, integrated companies or branches.⁵⁶

As ASI and AOE are both incorporated non-tax resident in Ireland, they should follow this scheme. The Commission considered that both non-residents and residents in Ireland are taxed on different sources of income, but the same tax treatment has to be applied for both, as a result, the Commission considered that both have to be taxable as corporate profits in Ireland.⁵⁷ The Commission rejected the thesis presented by Apple and Ireland that non-residents and residents should be treated on a different basis.⁵⁸ So, the ordinary rules of taxation of corporate profit in Ireland is the appropriate tax reference system for the Apple case.

Furthermore, the Commission accepts the distinction introduced by Apple and Ireland between non-resident and resident companies: they are not in the same factual and legal situation because their tax subjectivity is different.⁵⁹ The tax ruling accorded by Ireland is the result of an integrated group transaction (Apple headquarters and its branches in Ireland) but argues that it cannot be limited to the rule applied to non-resident taxable profit as both are taxable on the same type of income.

⁵⁵ EUROPEAN COMMISSION (2017: 228 ss.).

⁵⁶ *ivi*, 224 ss.

⁵⁷ *ivi*, 224 ss.

⁵⁸ *ivi*, 236 ss.

⁵⁹ EUROPEAN COMMISSION (2017: 237 ss.).

So, the Commission considered both tax-resident and non-tax residents on a similar basis in this case.⁶⁰

Now, the decision cannot be restricted to the applicability of the arm's length principle only as any tax application from a member state has to respect the state aid policy.⁶¹ In fact, the Commission considered the arm's length principle as a benchmark when determining if a non-resident integrated company is favourite over a non-integrated company but not as the only basis such as implied by Ireland.⁶²

Regarding the profit allocation method, the Commission strongly disagrees with the thesis that only the activities that take place inside Ireland have to be taken into consideration by Ireland.⁶³

Then, to determine the taxable base, the Commission has done an audit on Irish based companies to highlight the deviance from the arm's length principle. The study was done by PWC on 52 Irish tax-incorporated companies as a reference.⁶⁴ These companies were selected on the basis that they are comparable with the economic activities of Apple, Inc and his branches. The companies selected were those that had benefitted from an authorization of executing a tax ruling from the Irish revenues. The reference chosen by the PWC group was focused on Irish incorporated tax companies that carry out a viable business allow them to fairly compare the activities of ASI and AOE. In this analysis, they

⁶⁰ *ivi*, 241 ss.

⁶¹ *ivi*, 248 ss.

⁶² *ivi*, 256 ss.

⁶³ *ivi*, 243 ss.

⁶⁴ *ivi*, 354 ss.

pointed out that no other companies are using a profit allocation method comparable to the one offered to the Apple company.⁶⁵

Apple, Inc. argues that the references framework is different from what they are doing because ASI and AOE are not Irish tax-incorporated companies and differ from the reference chosen by the Commission.⁶⁶ In fact, AOE and ASI are both Irish incorporated non-tax-resident companies and subsidiaries of Apple, Inc. From the reference baseline done by PWC, we can observe from the 52 companies, they are all tax residents in Ireland because it has been considered by the Commission that it was needed to determine the reference based to use companies that carry out trade activities, but they do not necessarily need to be tax residents as the allocation method show that both non-resident and tax resident companies have to follow the same regime.

Considering that IP creation is the creation of the value of Apple's product, it is implied that the core activity of the company is the IP creation, and so, the sector that has to be taxed. The assumption from Ireland that Intellectual Property should not be considered for tax purposes in Ireland as no IP management is hosted inside the Irish branches is rejected by the European Commission. In the allocation of assets, management of the risks and functions distribution, it has been shown that Apple, Inc.'s holder of the IP of the group is a tax resident in the United States of America but ASI and AOE were not declared in any country for tax purposes by Apple. On the other hand, Ireland considered them managed by Apple, Inc. but the Commission considered that both ASI and

⁶⁵ EUROPEAN COMMISSION (2017: 355 ss.).

⁶⁶ *ivi*, 382 ss.

AOE had to be threatened as tax residents in Ireland. Furthermore, they reject the position from Apple that the IP is managed in Ireland as no board members carrying out functions of management of IP creation were referred to in these branches.

Additionally, it is important to underline the allocation method used by Apple, Inc. to transfer resources between the headquarter and the branches used: they used a method similar to the TNMN method provided by the OECD TP guideline: in few words they used a one-sided allocation method where only the activities of ASI and AOE are taken into account. The Commission evaluate the authorization of this method from the Irish Revenue as state aid because no crucial or complex activities are related to the Irish branches from the documents provided to the Commission. Additionally, the choice of profit level indicator is not considered to have involved business risks as the main activities are related to procurements, sales and distributions activities.⁶⁷ So, this choice is rejected by the Commission to determine the arm's length principle.

Consequently, the Commission has judged that the reference system for this case is not limited to the arm's length principle and has treated both resident and non-resident Irish companies under the same regime: the general Irish rules of taxation.⁶⁸

2.3 Deviance from the reference based

⁶⁷ EUROPEAN COMMISSION (2017: 336 ss.).

⁶⁸ *ivi*, 337 ss.

Now that the reference base chosen by the European Commission has been highlighted, we can highlight the differences between the tax ruling provided by Ireland and the usual tax ruling granted to other companies. The reference system study done by PWC highlighted that other companies are paying taxes following the ordinary rules of taxation in Ireland. The study shows that no equal regime was given to comparable companies using transfer pricing for their activities through Ireland business entities. So, the taxation rate enjoyed by ASI and AOE is far from the reference scheme provided by the Irish revenue.

Additionally, the arm's length principle cannot be considered as the only reference, the Commission is respecting the fact that the headquarter and their two branches are effectively acting under the arm's length principle scope but argues again that the framework highlighted in this case is the Irish Revenue practices.⁶⁹ In that sense, the use of the arm's length principle is effective in the cost-sharing agreement between Apple, Inc and their branches by the European Commission as a benchmark.⁷⁰ But the principal argument from the decision of the Commission is that the contested tax ruling is unlawful regarding Article. 107 of the European Treaty and not restricted only to the valuation of the arm's length. In other words, the Commission valuation implies that the tax ruling issued by the Irish revenue differs from what they offer to

⁶⁹ EUROPEAN COMMISSION (2017: 255 ss.).

⁷⁰ *ivi*, 256 ss.

other companies in Ireland: this is the subject of the investigation for illegal state aid.

Regarding the allocation method, the growth that the Apple company experienced does not match an increase in resources from their Irish branch. As their Irish subsidiaries are creating more incomes, the Commission considered that it should follow with the same increase in resources inside their branches.⁷¹ Moreover, no critical functions are referred to the Apple branches such as intellectual property creation or design of product which are considered the creation of value for Apple's product. During the study of the different documents provided by Apple, no critical functions are referred to AOE or ASI.

Furthermore, when comparing the profit level indicator revealed by the documents provided by Irish revenues and the study done by PWC, a clear disparity is shown.

In the comparison to what Ireland generally practices to home incorporated companies, they found a lower tax rate for AOE and ASI. The quartile applied to the 52 companies from the study is on average applied to 3% of the profit mark-up, taxed at 12,5% from the Irish revenue.⁷² ASI is taxed less than 0,5% by the Irish revenue

It's about 6 times fewer. For the case of AOE, they failed in the lower quartile, but the data stays consistent from what the Irish revenue taxed to other entities in the same situation.⁷³

⁷¹ *ivi*, 341 ss.

⁷² EUROPEAN COMMISSION (2017: 355 ss.).

⁷³ *ivi*, 357 ss.

The European Commission revealed that the transfer pricing, and especially the profit allocation method endorsed by Apple has permitted the company to declare only a small amount of their profits to the Irish revenue. Thanks to their profit allocation method authorized by the Irish government, the company from Cupertino was able to avoid paying the taxes that should have been paid to the Irish revenue.⁷⁴

This difference from the percentage of profit declared (between 0-0,5%) and the median applied to Irish entities (3%) will be used to estimate to the amount that has to be recovered from Apple group. We can add that this tax avoidance has been possible for several years in part thanks to the United States' "check the box" policy. This policy allowed to US-based companies to act with their subsidiaries regardless of the involvement of the United States for tax purposes. In that way, the transfer pricing realized by Apple, Inc. is free of any home control in the United States.⁷⁵

2.4 Unlawfulness of the state aid

In the claiming of the unlawfulness of state aid, the European Commission after demonstrating that the state aid exists, determined the reference base and highlighted that the state aid deviate from the last one, the European Commission needed to ensure whether or not the state aid

⁷⁴ *ivi*, 412 ss.

⁷⁵ GLECKMAN, HOWARD (2013).

was compatible with the internal market. The definition of compatibility with the internal market is present under the Art. 107 (3) of the TFUE. The state aid granted by Ireland applied to Irish subsidiaries located in the city of Cork, which is not defined as an economical a region of underemployment, neither Ireland is considered to have been in a period of economic recession. Moreover, this aid was not part of aid targeted to develop a range of activities that needed to be developed under the Commission's schedule and either if the state aid was made to develop the economy of the region, it has been previously shown that it altered the fairness of the internal market. As Ireland did not notify the Commission on any kind of compatibility with the section of Art. 107 (3), the state aid is considered incompatible with the internal market.⁷⁶

The contested tax ruling accorded by the Irish government is considered unlawful state aid because they have permitted the American company to get a better tax system regarding their concurrent.⁷⁷ As defined in Article 108 (3), a member state has the duty to inform the Commission of any state aid, so their entity is able to conduct an evaluation to control that it is relevant and in line with the scope of the European treaties.⁷⁸ In fact, when notifying the Commission of the implementation of a state aid plan or legal actions that will benefit an individual enterprise, they can start their research to evaluate if this plan is compatible with the internal market.

⁷⁶ EUROPEAN COMMISSION (2017a: 424 ss.).

⁷⁷ *ivi*, 412 ss.

⁷⁸ *ivi*, 423 ss.

The Commission considers that this contested tax ruling accorded by Ireland has created an unbalanced market and has given a competitive advantage to Apple by having allocated the Apple Intellectual Properties license to the Irish incorporated branches, that successively use it to sell Apple's product and so profit to the one sided allocation method granted by Ireland to declare a minimum amount of profit inside their Irish branches. As a result, this has led to a lowering of the tax payment from ASI and AOE. The Commission considers that the state aid granted by Ireland to Apple's branches constitutes unlawful state aid through the contested tax ruling.⁷⁹ The Commission published a decision with the accusation that Ireland has granted State Aid to Apple in the amount of 13,4 billion euros plus interest on the 30th of August 2016.⁸⁰

⁷⁹ EUROPEAN COMMISSION (2017a: 412 ss.).

⁸⁰ *ivi*, 452 ss.

3. Final decision and future involvements.

3.1 recovery process

The Commission has the obligation to order the recovery of the amount of money that has profited the company from the state aid. To calculate the amount to be recovered, the Commission based its calculation on the amount that should have been paid minus the amount already paid to the Irish Revenue through the two issued taxes rulings.⁸¹ According to the Article 17 of Regulation (EU) 2015/1589, the recovery cannot be longer than 10 years.⁸²

Both Apple, Inc. and Ireland argue that they were not able to be informed by the unlawfulness of their act during the two contested tax rulings. They argue with the principle of legal certainty: it's implied that the law has to be consistent and predictable in order to avoid decisions taken under an arbitrary way. In fact, the two entities are arguing that the European Commission is retroactively acting and violating this principle.⁸³

The Commission is replying that they could not be aware of the two tax rulings because the US Senate started notifying the Commission on the 21st of May 2014. Due to the check the box policy, no entities were able

⁸¹ *ivi*, 444 ss.

⁸² *ivi*, 434 ss.

⁸³ EUROPEAN COMMISSION (2017a: 439 ss.).

to be aware of the allocation method done by Apple, Inc. as the US Treasury was not able to verify the practices of Apple, Inc, only the European Commission could have done an audit on the situation but could not have been aware of that last one. As the Commission followed with a request for information only 3 weeks after, this principle cannot be invoked as the Commission does not show a lack of action for a long period of time.⁸⁴

Moreover, Ireland brings up that the amount to be recovered is too complex to be defined.⁸⁵ They argue that they were not able to know that they were acting unlawfully when granting Apple's branches, the contested tax ruling authorization. This exception should imply that the State Aid is lawful from their position. As Apple did not raise this point to defend their position and the Commission claimed that they are able to evaluate the amount to be recovered for the Irish tax system. Furthermore, the Commission showed their ability to recover the amount of money by showing the amount of money that has to be recovered. To calculate the amount that has to be recovered, the Commission considered what the Irish revenue practices to companies, so on a basis of 3% of the profit to what the Irish revenue has taxed ASI, so between 0% and 0,5%. As a result, the amount to be recovered is about 2,75% on the 10 years profit of ASI which resulted to the Commission as the amount of 13,4 billion plus interest.⁸⁶

To recover this amount of money, it is Ireland's role to recover it from Apple. This amount of money can be deposited on a security account in

⁸⁴ *ivi*, 440 ss.

⁸⁵ *ivi*, 444 ss.

⁸⁶ EUROPEAN COMMISSION (2017a: 447 ss.).

case another entity of the European Union or a member state decided to act for this case.⁸⁷ Additionally, the amount of money included interest from the publication of the decision from the Commission to the notification of Ireland of their plan to recover the amount from the branches.⁸⁸ Ireland also has the obligation to regulate the situation from the one prior to the payment. Ireland has to recover the claimed amount of money from both ASI and AOE. In the procedure system from the European Union, Ireland has to recover the money based on the amount calculated by the Commission, it has to be done within four months from the notification of the decision and keep getting informed by the Commission about the legal measures implemented by the Member State to recover the money.

In a letter written on the 4th of October 2017, Ireland has been assigned to the European Court of Justice to not have yet taken yet the resources to recover the money.⁸⁹ As a process between the Commission and the European Court of Justice, when an adopted decision is published, it needs to be solved by the term implied by the European rules: here, the amount of money needs to be recovered by Ireland to Apple branches. Additionally, the situation has to be regulated and a communication from the Irish relevant authorities has to be given to the Commission under two months in order to inform the Commission on the way that the money will be recovered and when it will happen.⁹⁰

⁸⁷ *ivi*, 445 ss.

⁸⁸ *ivi*, 452 ss.

⁸⁹ EUROPEAN COMMISSION (2016b).

⁹⁰ EUROPEAN COMMISSION (2017a: 452 ss.).

3.2 State aid action plan

The state aid action plan (SAAP) launched in 2005 in line with the Lisbon strategy has the tagline to reduce state aid and make it more targeted. The European state aid policies have always been an important part of the European general policy. In fact, it has allowed European citizens a more competitive internal market, and, without these actions, it would have meant higher prices and lower-quality goods for customers.⁹¹ As well, creating a competitive environment is essential to pursue an innovative environment and a fair system where the entrance barriers are as low as possible. In particular, tax ruling practices of member states have been part of a large investigation.

Since June 2013, the Commission has been investigating the tax ruling practices of several members states.⁹² The investigation was mostly focused on these countries: Belgium, Luxembourg, Netherland and Ireland. Several sanctions have been taken on companies such as Starbucks and Fiat where the member state has respectively recovered between 20 and 30 million euros from these companies.⁹³ The Apple case is by far the most important in terms of the amount to recover: 13, 4 billion euros plus interest.⁹⁴ As of the 5th of January, the European Commission has recovered a total 14.4 billion euros from Apple in an escrow account to recover the illegal state aid from Ireland. This amount of

⁹¹ EUROPEAN COMMISSION (2005).

⁹² EUROPEAN COMMISSION (2017c).

⁹³ EUROPEAN COMMISSION (2015).

⁹⁴ EUROPEAN COMMISSION (2016b).

money will be used to continue to improve the fairness of the internal market and develop more targeted state aid.

When facing the new challenge of building a fair environment for Europe that can benefit their citizens, the European Commission underline an important point: the co-operation between member states and the Commission:

“A shared responsibility between the Commission and Member states: The Commission cannot improve state aid rules and practices without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly”.⁹⁵

It's a relevant point in the Apple case and shows the conflict of interest between member states and European Union: as a country, Ireland needs to provide the best environment for companies to attract them. It mostly implied a low tax rate for companies that are always looking to maximize their incomes. On the other hand, the European Union has to ensure that the rules between member states are made in a way that permits competitiveness and fairness inside the internal market. It's a pain point to the European Commission to be able to be aware of state aid practices inside Europe with the complexity of international tax law.

When looking at the case, the structure introduced by Apple makes it difficult to identify state aid: the tax ruling granted by Irish Revenue

⁹⁵ EUROPEAN COMMISSION (2005).

was accepted by the OECD organization because the one-side profit allocation used by the Apple group was in line with the arm's length principle. As the check the box policy from the United States doesn't permit us to be aware of the amount of taxes paid by Apple, Inc., a request from the US senate was needed that successively bring up to an investigation by the European Commission. This case highlighted clearly the problem of coordination between countries for multinational corporations' taxes. Adding the conflict of interest that can persist between member states when protecting their own economic development, the actual state aid rules of the treaty seems to be insufficient due to a lack of clarity when dealing in the international tax context.

3.3 Conclusion

The adoption of the decision is the first of this size; as of the 5th of January, the second most important state aid judged was of 700 million euros against State Aid provided by the Belgium government where a total of 35 companies were involved.⁹⁶ 14,4 billion is, in fact, an unprecedented sanction inside Europe. This unprecedented sanction clearly shows the policy of the European Union: maintain an internal market where the competition between companies remains fair thanks to the action taken by the European Commission. The fight against individual and selective state aid is important to maintain the European Union creation tagline: building a union where the internal market is free and fair.⁹⁷ In fact, by combatting unfair tax practices, it allows to Europe to guarantee equal exchange of capital between member states.

This is possible thanks to the action of the European Commission, in line with the Lisbon strategy. Since the first investigation in 2013 on tax ruling, there have been more than 5 countries sanctioned for more than 50 companies involved, mostly due to tax ruling practices.⁹⁸ The adoption of the decision for the Apple case brings the interest of every member state in several points. It permits them to send a clear message

⁹⁶ EUROPEAN COMMISSION (2016a).

⁹⁷ EUROPEAN COMMISSION (2005).

⁹⁸ EUROPEAN COMMISSION (2016a).

that State Aid cannot be given on a selective basis inside Europe to prevent the internal economy from becoming an unbalanced and unfair market.⁹⁹

From the first European treaty in 1957, which had the scope to create a federal union where citizens and capital are free to move from one country to another and evolve into a fair environment. Building a fair and strong European economy is one of the strongest goals achieved by the European Union, as it created an economy able to find responses to the new global economy without leaving the unilateral policy to fragilize the union. The fight against individual state aid is essential for the protection of the internal market.

As shown in this thesis, the position of the stakeholders was really contrasting. On one hand, the European Commission was strong in their position that the state aid has been done selectively by showing that the tax ruling has given an advantage to Apple, Inc regarding their competitors, where no other companies have received an advantage like the one offered to Apple's branches. On the other, Apple, Inc., Ireland and also the OECD argued on the fact that the European Commission was not the right entity to resolve these controversies, and that the rules on tax ruling were not clear so that Ireland could have been able to advise the European Union from their tax ruling practices.

This has also been possible because of the check the box policy from the United States: no country was able to be aware of that situation plus the fact that complexity of fiscal law from one country to another makes

⁹⁹ EUROPEAN COMMISSION (2005).

this type of practice possible and obliges the European Commission to take action and take a deeper look at the practices of each member state. To resolve and maintain a fair internal market, we can imagine that the Commission has to take on large investigations to stay aware from the practices of each member states, as well as a fiscal law becoming more complex and an innovation sector making it hard to define a reference country to tax their profits, the task of the Commission will be harder also in the future with the evolution of unmaterial goods combined with the complexity of fiscal practices making it hard to define a reference country.

A solution could be a larger codification of the State Aid which includes a stronger obligation to member states to advise the European Union on their home's taxation. For example, the implementation of a register where the fiscal entities from members states have the obligation to communicate each of their tax incentives, tax rulings, subventions in goods or services and also deals with external companies in the internal market. This can be a solution to make the European Union internal market, a fairness environment and preserve the European project from news technologies and complexity in international tax law and more generally the ambitious European project.

Abstract:

Il caso di Apple non ha precedenti: la Commissione Europea ha emesso una sanzione di 14,4 miliardi di euro contro il *tax ruling* concesso dall'Irlanda alle succursali *Apple Operation Sales* e *Apple Operation Europe*. La vicenda qui in analisi è molto significativa e diversi sono gli attori che rivestono un ruolo importante.

Si discute del ruolo avuto da ciascuno di essi, dalla Commissione Europea, dal gruppo Apple, e dall'Irlanda, e se ne evidenziano i punti di vista e i passi che hanno condotto alla sentenza finale. Infine, si cercherà di proporre soluzioni possibili che possano rispondere al quesito principale: le leggi europee sugli aiuti di stato dovrebbero essere più chiare?

Si può far risalire l'inizio della vicenda agli anni ottanta del secolo scorso, quando nel mezzo della crisi economica irlandese *Apple Inc.* decide di aprire due sue filiali nella città di Cork per implementare il servizio ai clienti europei. Nei successivi dieci anni le vendite della compagnia sono in continua crescita e *Apple Inc.* negozia con il governo irlandese un accordo fiscale che gli consenta di continuare a portare ulteriori investimenti e risorse nel paese.

Nel 1991 l'Irlanda concede alla compagnia americana il permesso di usufruire di un *ruling* fiscale tra la sede centrale e le due succursali irlandesi, *Apple Operations Europe (AOE)* e *Apple Sales International (ASI)*. Grazie a questo accordo la compagnia può sviluppare un metodo di ripartizione degli utili che gli consente di condividere le proprietà intellettuali, la gestione, le risorse e i rischi. Questo permette ad *Apple Inc.* di aumentare i proventi e migliorare le sue performance per diversi anni, ripartendo i suoi profitti tra Stati Uniti e Irlanda.

L'indagine giudiziaria della Commissione Europea prende il via grazie ad una richiesta formulata dal Senato degli Stati Uniti. Nel 2013 gli Stati Uniti cominciano ad investigare sulla quantità sorprendentemente bassa

di tasse che *Apple Inc.* paga allo stato americano e si interessa alle società che fanno capo alla sede centrale.

Il Senato degli Stati Uniti non è però in grado di verificare se ci sia effettivamente una evasione di tasse da parte di *Apple Inc.*, questo a causa del *check the box policy*, una legge che consente alle compagnie di operare con le loro succursali estere senza la verifica delle autorità fiscali statunitensi.

Dopo la verifica dei documenti prodotti dal paese europeo, la Commissione decide di procedere ad un'indagine sulle pratiche messe in campo dall'Irlanda nei confronti delle compagnie che operano sul suo territorio, contestando il fatto che il *ruling fiscale* costituisca una forma illegale di aiuti di stato.

Si analizza il ruolo avuto da ciascuna delle parti, il sistema delle tasse in Irlanda e la posizione della Commissione Europea nei confronti del *ruling fiscale*.

Apple Inc., è una compagnia con sede negli Stati Uniti, principalmente si occupa di creare e sviluppare software, servizi e assicurazioni correlati ai suoi prodotti.

Apple Operations Europe (AOE) e Apple Sales International (ASI) sono le sue filiali irlandesi, nate per servire i clienti europei, sono i rami della compagnia direttamente coinvolti nel caso in discussione.

Il ruolo della Commissione è quello di controllare e assicurare che lo stato coinvolto agisca nel rispetto delle leggi e dei trattati dell'Unione Europea.

L'Irlanda, come stato membro dell'Unione Europea, ha il dovere di rispettarne le politiche e i trattati. L'autorizzazione del metodo usato per il *ruling fiscale* tra il governo irlandese e Apple è considerata sotto lo scopo della Organizzazione per la cooperazione e lo sviluppo economico (OECD) in primo tempo.

L'accordo si basa sul metodo di ripartizione dei profitti usato per calcolare il transfer pricing e quindi l'ammontare delle tasse che le succursali irlandesi devono pagare. Per fare questo è stato stipulato un accordo di ripartizione dei costi tra Apple Inc e le sue due filiali irlandesi.

Il sistema di tassazione in Irlanda prevede che le tasse per le imprese siano calcolate sulla base del profitto della compagnia in 12 mesi: tasse relative ai profitti commerciali con un'aliquota generale del 12,5%, tasse relative a proventi non commerciali con un'aliquota del 25% e le tasse sui guadagni da capitale con un'aliquota al 33%.

L'Irlanda è inoltre membro della OECD, un'organizzazione internazionale che ha lo scopo di aiutare i propri membri a gestire il commercio dando loro un quadro generale di riferimento che favorisca una democratica collaborazione negli scambi commerciali.

L'OECD è parte in causa nel caso *Apple* sia come osservatore terzo che come riferimento nella applicazione di pratiche legali.

La Commissione Europea ha avviato le sue indagini partendo dal fatto che il *tax ruling* concesso dall'Irlanda può essere considerato un aiuto di stato individuale in base all'articolo 107 (1) del TFUE. Entrambe le concessioni di *tax ruling* concesse dal governo irlandese, nel 1991 e nel 2007, sono considerate illegali secondo la legge sugli aiuti di stato in Europa.

Le compagnie usano uno strumento detto *Transfer Pricing* (TP) per ripartire le attività economiche tra la sede e le sue filiali ma anche verso aziende terze, ed è usato per migliorare la performance sui mercati.

Il vantaggio di questo strumento è che permette alle compagnie di operare a livello internazionale senza essere influenzate dai cambiamenti del mercato locale, ovvero di operare indipendentemente dalle condizioni del mercato minimizzandone i rischi perché questi costi sono trasferiti ad un'altra entità.

Una regola generale delle leggi internazionali in materia di tassazione dice che il *transfer pricing* è di competenza dell'OECD e deve seguire il principio di *arm's length*.

Questo principio stabilisce che due parti debbano interagire tra loro senza che una terza parte possa fare pressioni.

Si osserva in questa discussione, come *Apple Inc.* abbia usato un metodo simile al *Transaction Net Margin Method* (TNMM) nei suoi rapporti con AOE e ASI. Le tre entità condividono i costi di sviluppo, la proprietà intellettuale e i costi di marketing, le filiali annualmente dovrebbero trasferire fondi ad *Apple Inc.* per finanziare i costi di sviluppo e ricerca.

Secondo Irlanda e Apple il metodo di ripartizione dei profitti è regolare in base al principio di *arm's length* e secondo la legge nazionale irlandese.

La Commissione Europea contesta il *transfer pricing* perché costituirebbe un illegale aiuto di stato per diverse ragioni. Innanzitutto, contesta il fatto che nessun altro operatore avrebbe potuto accettare una simile ripartizione degli utili sulle stesse basi, ma contesta anche la mancata produzione di documenti da parte delle autorità irlandesi che mostrino situazioni analoghe di applicazione del principio. Sottolinea una contraddizione nel processo di distribuzione dei costi: all'aumento delle vendite non corrisponde un aumento delle risorse nelle filiali irlandesi.

La risposta dell'Irlanda alle tesi dell'Unione Europea è che gli aiuti di stato dati ad *Apple Inc.* sono da considerarsi come un aiuto verso una singola compagnia americana e argomenta che, in base alle regole dell'OECD, le filiali di una compagnia che operano all'estero devono pagare le tasse nel paese in cui hanno sede, mentre il principio di libera concorrenza è sancito dalle stesse leggi locali irlandesi.

Inoltre, sottolinea come il sistema di riferimento preso in considerazione dall'Unione Europea non corrisponde alla struttura a cui appartengono ASI e AOE in Irlanda, che sono da considerarsi filiali irlandesi e non società soggette alla tassazione irlandese.

Dal canto suo, *Apple Inc.* si allinea alla posizione dell'Irlanda, dichiarando che entrambe le parti rispettano i principi del 25 TCA 97 e quindi il principio di *arm's length*. Apple inoltre evidenzia che la compagnia ha investito nel paese europeo in un momento di forte crisi e che quindi gli aiuti offerti dal governo irlandese sono da considerarsi aiuti di stato legali perché erogati per far fronte alla difficile situazione economica del paese.

Apple contesta inoltre alla Commissione Europea il fatto che la sua decisione agisca in maniera retroattiva. In particolare, durante gli accordi del 1991 e del 2007, le parti non potevano sapere di andare contro i trattati europei, ed invoca inoltre il principio di certezza del diritto.

La comunità internazionale del commercio, come terza parte in causa, considera la propria organizzazione l'entità più appropriata a prendere una decisione in questo particolare caso. Sostiene infatti, che l'accordo sulla tassazione tra Irlanda e Apple segue i principi generali da essa propugnati e insiste sul fatto che il principio di libera concorrenza sia stato rispettato.

Nel caso in discussione la Commissione Europea identifica i seguenti punti: il contestato *tax ruling* è stato concesso dall'*Irish Revenue* una istituzione irlandese; *Apple, Inc.* vende i suoi prodotti in tutto il mondo e ai suoi clienti in tutta Europa, *AOE* e *ASI* svolgono attività di supporto alla sede americana, quindi esse svolgono attività dall'Irlanda verso il mercato europeo; il *tax ruling* permette alle filiali di Apple di pagare meno tasse conferendole un chiaro vantaggio che non avrebbe potuto avere senza l'intervento dello stato; l'autorizzazione da parte dell'*Irish Revenue* costituisce una palese distorsione della concorrenza.

La Commissione Europea considera che gli aiuti di stato siano stati elargiti in maniera selettiva in base al sistema di riferimento scelto ed è considerato illegale quando concesso in modo individuale o in maniera selettiva.

Per determinare la selettività degli aiuti la Commissione Europea si avvale di tre parametri: seleziona il riferimento dello stato membro, dimostra che la compagnia ha ricevuto un aiuto in disaccordo con quella tendenza ed evidenzia come altre compagnie non abbiano beneficiato dello stesso aiuto.

Nel caso in questione, la Commissione Europea ha preso in considerazione come sistema di riferimento il sistema di tassazione irlandese delle imprese che applica una aliquota del 12,5% sui profitti derivanti da attività commerciali e il 25% sui profitti non commerciali, ed è valido sia per le imprese e che per le filiali che svolgono attività in Irlanda, sia residenti che non residenti nel paese.

ASI e AOE rientrano in questo schema, quindi la Commissione ha rigettato la tesi sostenuta da Apple e dall'Irlanda secondo la quale le compagnie residenti e non residenti debbano essere trattate in modi differenti.

La Commissione Europea, d'altro canto, considera come valido il principio di *arm's length* e accetta che il *tax ruling* concesso dall'Irlanda sia il risultato di una transazione tra compagnie di uno stesso gruppo (Apple e le sue filiali irlandesi) ma afferma che questo non può dare come risultato un palese vantaggio all'impresa che se ne avvale.

Riguardo il metodo di ripartizione del profitto, la Commissione Europea è fortemente in disaccordo con il principio che le attività svolte in Irlanda debbano essere di esclusiva pertinenza dell'Irlanda. Considerando che la principale attività di Apple è creare valore grazie alle sue Proprietà Intelletuali allora queste sono il settore che deve essere tassato. Si rifiuta quindi di prendere in considerazione l'assunto sostenuto dall'Irlanda che se le Proprietà intelletuali sono create fuori dal paese allora non debbano essere tassate.

Nel determinare la base di tassazione, la Commissione Europea ha svolto una verifica sulle altre compagnie con sede nel paese evidenziando l'esistenza di una devianza. Nell'analisi si puntualizza che nessun'altra compagnia sta usando un sistema di ripartizione dei profitti comparabile a quello offerto ad Apple.

Apple Inc. contesta i risultati affermando che il quadro di riferimento usato per l'analisi è diverso da quello attuato realmente da *ASI* e *AOE*, che non sono compagnie sottoposte al regime fiscale irlandese, a differenza di quelle prese in esame, e sottolinea che il sistema di ripartizione usato da *Apple Inc.* è molto vicino al metodo TNMN fornito dalle linee guida dell'OECD.

Lo studio dimostra la differenza di trattamento concesso ad *Apple* rispetto alle altre compagnie messe a confronto: il *transfer pricing* concesso ad *AOE* e *ASI*, ha generato un livello di tassazione molto lontano dallo schema di riferimento.

Il problema evidenziato dalla Commissione Europea è che nel *transfer pricing* tra *ASI* e *Apple Inc.*, la maggior parte dei profitti non fa riferimento a nessuna nazione e quindi a nessun sistema di tassazione, neanche a quello degli Stati Uniti che non può intervenire sulle compagnie al di fuori dei suoi confini.

Il *ruling fiscale* accordato dal governo irlandese è considerato dalla Commissione un illegale aiuto di stato perché ha permesso alla compagnia americana di usufruire di un miglior trattamento fiscale rispetto ai concorrenti e ha comportato uno squilibrio del mercato interno dando un vantaggio competitivo ad Apple ai sensi dell'articolo 107 (1) TFUE. Di più, quest'ultimo viene anche considerato illegale ai sensi dell'articolo 108 (3) che obbliga lo stato membro a comunicare le sue pratiche in materia di aiuti di stato.

La Commissione Europea nel 2016 ha quindi calcolato che l'Irlanda stanziò aiuti di stato ad Apple per un ammontare di 13,4 miliardi di euro più interessi.

Gli attori coinvolti nel caso in discussione hanno dimostrato di avere posizioni forti e contrapposte.

Da un lato la Commissione Europea che ha dimostrato che gli aiuti di stato concessi ad Apple per mezzo del ruling fiscale hanno avvantaggiato la compagnia rispetto ai suoi concorrenti. Di contro, *Apple Inc.*, l'Irlanda e l'OECD hanno sostenuto che la Commissione Europea non può essere l'organismo più adatto a gestire questo tipo di controversie e che le regole sul *tax ruling* avrebbero dovuto essere più chiare in modo da permettere ad un suo stato membro di adempiere ai suoi doveri e poter agire con trasparenza e legittimità.

In conclusione, si propone che, per mantenere l'equità del mercato interno, la Commissione Europea debba farsi promotrice di una indagine su vasta scala per essere sempre al corrente delle pratiche messe in campo dagli stati membri, via via che le leggi fiscali diventano più complesse e che nuovi settori tecnologici si sviluppano, il compito della Commissione diventerà sempre più difficile nel futuro.

Una soluzione potrebbe essere una codifica più vasta degli aiuti di stato, che includa obblighi più forti degli stati membri e, per esempio, la realizzazione di un registro su cui le varie entità fiscali degli stati membri abbiano l'obbligo di comunicare gli incentivi fiscali erogati, i *tax ruling*, le sovvenzioni e gli accordi presi con le compagnie esterne al mercato interno, al fine di perseguire la creazione di condizioni eque e preservare il progetto europeo delle nuove complesse sfide.

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