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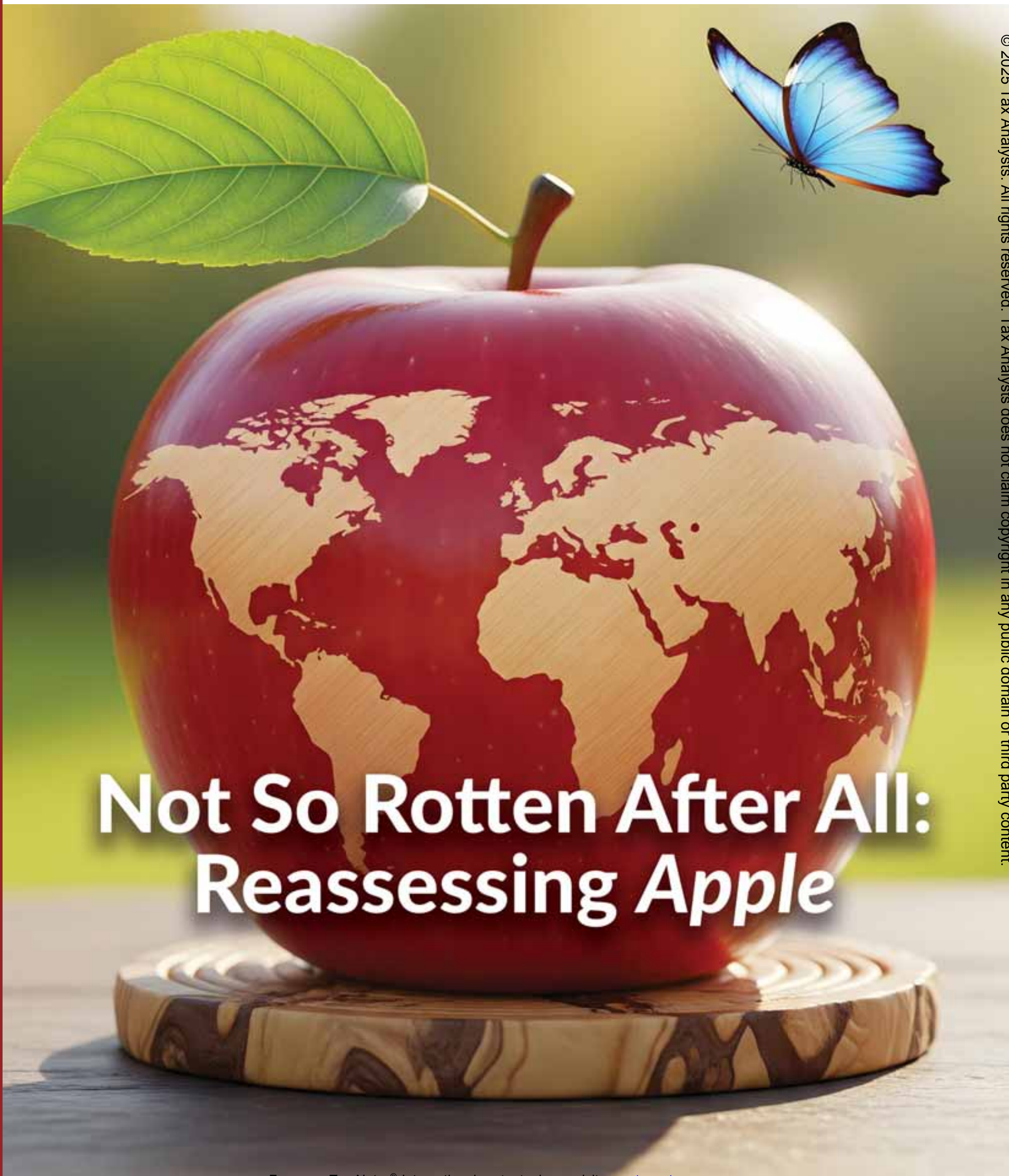

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In this article, Laroma Jezzi revisits the *Apple* state aid decision of the EU's Court of Justice and asks whether there is more to it than some critics have suggested.

The views expressed in this article are solely the author's and do not necessarily reflect those of any other person or institution.

Introductory Remarks

Against those academic commentaries depicting the decision of the EU's Court of Justice in *Apple*[1] as misguided, this article contends that the decision reflects legal coherence and judicial restraint. Rather than establishing a supranational tax standard, the Court sought to restore neutrality and prevent "stateless income," thereby reaffirming that EU state aid control operates as a guardian of internal legal coherence rather than a supranational tax policy. The judgment is thus not "rotten to the core"[2] but represents an act of coherence within EU state aid law and the broader framework of international tax coordination.

Apple has been discussed so extensively that revisiting it may seem unnecessary.[3] Yet the continuing fascination with the judgment arises from a paradox: The more it is condemned as erroneous, the more it reveals the evolving intersection between EU state aid control and international taxation. Much of the commentary has portrayed the decision as doctrinally confused, economically naive, or politically motivated. I beg to take a different view, not to rehearse the case, but to reconsider what its critics may have overlooked: its quiet, almost reluctant, coherence.

Apple stands out as a pinnacle in the esteemed sport of blasting the decisions of the Court. To find precedents, one must look back to cases such as *Saint-Gobain*,[4] *Cadbury Schweppes*,[5] or *Marks & Spencer*,[6] in which the Court incited outrage among staunch scholars and practitioners by attempting to reconcile, in an admittedly creative

[1] *European Commission v. Ireland and others*, C-465/20 P (2024).

[2] Ruth Mason and Stephen Daly, "Rotten to the Core: The EU's Court of Justice Decision in *Apple*," *Tax Notes Int'l*, Nov. 11, 2024, p. 987.

[3] A flood of academic commentary and journalistic analysis has addressed *Apple*. Likewise, it has drawn the attention of political actors. *See also* Reuven S. Avi-Yonah and Gianluca Mazzoni, "The Apple State Aid Decision: A Wrong Way to Enforce the Benefits Principle?" *Tax Notes Int'l*, Nov. 28, 2016, p. 837; Joseph P. Brothers, "From the Double Irish to the Bermuda Triangle," *Tax Notes Int'l*, Nov. 24, 2014, p. 687; Emma Clancy and Martin Brehm Christensen, "Apple's Golden Delicious Tax Deals: Is Ireland Helping Apple Pay Less Than 1 Percent Tax in the EU?" European United Left/Nordic Green Left (June 21, 2018). On the Irish public accounting impact of Apple "migration" to Ireland, see Seamus Coffey, "What Apple Did Next," Economic Incentives Blog, Jan. 24, 2018; Stephen L. Curtis and David G. Chamberlain, "Apple's Cost-Sharing Arrangement: Frankenstein's Monster," *Tax Notes Int'l*, Aug. 16, 2021, p. 815, and Part 2, *Tax Notes Int'l*, Aug. 23, 2021, p. 975.

[4] *Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt*, C-307/97 (1999).

[5] *Cadbury Schweppes PLC and Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue*, C-196/04 (2006).

[6] *Marks & Spencer v. Halsey*, C-446/03 (2005).

manner, EU fundamental freedoms with the cornerstone principles of international taxation.[7]

While some authoritative commentators have assessed the judgment with a balanced tone, describing it as "poorly reasoned (and) wrongly decided,"[8] "deeply flawed," "erratic and misguided,"[9] and "unsatisfactory from a strictly legal perspective,"[10] others have adopted a more vociferous approach, closer to political punditry. They have unapologetically labeled it "rotten to the core"[11] and accused the Court of playing "directly into the stereotype of EU regulators as prejudiced against U.S. companies and willing to go to any length to inhibit their competitiveness in Europe," thereby lending "credence to Tim Cook's (*très chic*) claim that the original investigation was 'total political crap.'"[12]

Beneath such indignation, there often lies a subtle hint of admiration, a grudging respect, perhaps, for the sheer elegance of Apple's tax engineering and, notably, for the audacity with which legal form was elevated into a masterpiece of fiscal choreography.

Such harsh comments about the decision of the highest European court are surprising, particularly considering that other public authorities involved in this saga, the U.S. and Irish governments, along with their powerful tax authorities, were entirely comfortable with the "fantastical but ultimately economically impossible outcome [of] purported stateless income seemingly falling from the sky into tax-haven shell companies with no employees or activities."[13]

The result was not accidental tolerance but institutional complicity, a system whose distortions were visible yet left uncorrected.[14] And it is somewhat ironic that, despite the evident involvement of transatlantic selective state complicity in the tax issues surrounding *Apple* and others, what appears to worry most commentators is not the role played by governments but the alleged distortion of state aid rules by the commission and the Court, rules that, they seem to suggest, EU officials and judges never fully understood, all in the service of an anti-tax-avoidance crusade.

Indeed, as much as the functions and responsibilities of executive branches and judiciaries differ, one cannot help but notice the double standard to which the two are held accountable in this case. Like many corporate giants, Apple did not simply avoid tax, as the Court's critics somewhat low-key suggest; it operated within a broader framework of permissive rules that gave administrative practices room to grow to the point of effectively enabling stateless income. This remains true even though, in contrast with the approach adopted elsewhere,[15] the commission and the judges[16] in *Apple* confined themselves to assessing the selective misapplication of Irish law by the relevant administration. Suggesting that it had permitted, in this case, an outcome that cannot be considered in line with a bona fide coherent interpretation of the Irish tax provision on profit attribution to permanent establishments, rather than condemning Ireland's system as such.

That said, are these criticisms truly justified?

[7] As Tom O'Shea demonstrated in *EU Tax Law and Double Tax Conventions* (2008), apparent inconsistency in EU tax jurisprudence often conceals an underlying logic, an effort to reconcile national sovereignty with the coherence of the internal market.

[8] Ryan Finley, "The Meaning of State Aid Is Anyone's Guess After *Apple*," *Tax Notes Int'l*, Sept. 23, 2024, p. 1961.

[9] *Id.*

[10] Leopoldo Parada, "Breaking Down the CJEU's Decision in *Apple*: An Unsatisfactory Outcome," 1 *Highlights and Insights on European Taxation* (2025).

[11] Mason and Daly, *supra* note 2.

[12] *Id.*

[13] Curtis, "Is the United States Giving State Aid to Apple?" *Tax Notes Int'l*, Jan. 20, 2025, p. 437.

[14] For instance, some U.S. politicians accused Ireland of acting as a tax haven through which vast amounts of profits were shifted (also referred to as a "conduit offshore financial center," see Javier Garcia-Bernardo et al., "Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network," 7(1) *Sci. Rep.* 6245-10 (2017)). *See also* Jesse Drucker, "Controversial Tax Strategies Brainchild of O'Rourke's Son," *Irish Independent*, Nov. 2, 2013; the architect of the "Double Irish" scheme, Feargal O'Rourke, cynically — yet not inaccurately — pointed out that directing blame at Ireland distracts from the real issue: namely, that politicians around the world who protest against tax avoidance should, first and foremost, hold themselves accountable. "Why should Ireland be the policeman for the U.S.? They can change the law like that!" he said, snapping his fingers. "I could draft a bill for them in an hour."

[15] *European Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, joined cases C-106/09 P and C-107/09 P (2011).

[16] Grand Chamber Court Apple Judgment, at paras. 201-204.

The Very Well-Known Facts of the Case

During the reference period (from 1991 to 2014), Apple Inc., the U.S. parent company of the group, managed its non-U.S. operations through three vertically integrated Irish subsidiaries: Apple Operations International (AOI), Apple Operations Europe (AOE), and Apple Sales International (ASI). All these companies were tax stateless because of a mismatch between U.S. and Irish corporate tax residence rules: The former required incorporation, whereas the latter required management. Unsurprisingly, the companies in question were neither incorporated in the United States nor managed in Ireland; hence, they benefited from statelessness, a contradiction, since companies, as creations of law, cannot meaningfully be stateless for tax purposes. Nevertheless, both the United States and Ireland appeared entirely comfortable with this arrangement.

AOE and (since 1999) ASI were also parties to a cost-sharing agreement (CSA) with Apple Inc., under which the parent company granted the two subsidiaries certain multibillion-dollar rights to exploit its intellectual property (IP licenses).

In return, the subsidiaries made financial contributions to the related development costs, determined annually based on Apple's global turnover outside the Americas. The gist of this arrangement was that AOE and ASI, by simply paying a fraction of the research and development costs incurred by Apple Inc. in the United States (which also gave rise, there, to an R&D tax credit), were entitled to claim all the non-U.S. profits of the Apple group.

From a U.S. perspective, the CSA would have been laughable, were it not for the fact that the very rule designed to prevent such abuses, the commensurate with income (CWI) standard,[17] had been effectively neutralized. A series of "Treasury and IRS mistakes,"[18] rooted in the flawed assumption that companies would not use CSAs to shift IP-driven profits offshore for fear of losing the R&D deduction, ultimately undermined the rule's effectiveness.

A less seasoned reader might shrug and say, so what? Sure, the company effortlessly shifted its IP out of the United States without incurring any tax hit by navigating the CWI standard, but wouldn't the passive income from that very IP eventually fall back into the U.S. tax net through a reasonably efficient controlled foreign corporation provision, such as subpart F?[19]

Not quite. Through the check-the-box regulations, "the Treasury Department unwittingly opened a massive loophole in Subpart F,"[20] thus allowing Apple and many other multinational enterprises to treat their foreign subsidiaries as disregarded entities. As a result, passive income from IP and dividends disappeared for U.S. tax purposes, leaving only — at this stage — the operating income earned by AOI under the CSA. That income flowed through a global hub that purchased goods from Chinese manufacturers such as Foxconn and resold them to distributors, generating profits that easily escaped CFC rules.

[17] Introduced by section 1231(e) (1 and 2) of the Tax Reform Act 1986. The CWI provision was extended to CSAs only in 2009 with the introduction of the "Periodic Adjustment Rule" under 26 CFR 1.482-7(i)(6). This rule applies exclusively to the only valuation element arising from this type of agreement — the buy-in payment. It empowers the IRS to adjust all buy-in payment amounts whenever the actual overall profit subsequently realized falls outside a predefined profitability range established by the regulation itself. Through the application of CWI, hundreds of billions of dollars in unpaid taxes could potentially have been recovered. For instance, it has been observed that applying the periodic adjustment rule to only six taxpayers — Facebook, Apple, Google, eBay, Cisco, and Microsoft — could (in 2023) still yield recoverable tax revenues amounting to $500 billion. Nevertheless, U.S. tax authorities have neglected to enforce the periodic adjustment rule. *See* Curtis, Avi-Yonah, Jeffrey M. Kadet, and Chamberlain, "Commensurate With Income: IRS Nonenforcement Has Cost $1 Trillion," *Tax Notes Int'l*, May 22, 2023, p. 1017.

[18] Hearing on Profit Shifting U.S. Senate Permanent Subcommittee on Investigations, "Law Professor Recommends Changes to Reduce Offshore Tax Haven Use," *Tax Notes Today Federal*, Sept. 20, 2012.

[19] Which the Kennedy administration introduced in the early 1960s precisely to address these sorts of issues.

[20] Permanent Subcommittee on Investigation of the Committee on Homeland Security and Governmental Affairs — United States Senate (2013), Offshore Profit Shifting and the U.S. Tax Code — Part 2 (Apple Inc.), opening statement of Sen. Carl Levin, offshore profit shifting and the U.S. Tax Code — Part 2 (Apple Inc.), at 6 (May 21, 2013).

What began as a feat of U.S. legislative gymnastics soon demanded European choreography. Thus, it was merely a matter of carefully choosing where they would conveniently reappear.[21] It is at this point that Ireland takes its role in the fiscal ballet.

To undertake the routine yet essential tasks of procuring, manufacturing, selling, and distributing Apple products across various market jurisdictions, Apple required a workforce and operational presence somewhere. Both ASI and AOE were therefore incorporated under Irish company law and filed their statutory accounts in Ireland.[22] Nonetheless, under Irish tax law, they were regarded as nonresident companies, deemed instead to have Irish PEs corresponding to their local operations. This peculiar interaction between company law and tax-residence rules produced a structural mismatch between accounting profit and taxable profit. To achieve the intended outcome, Apple had to ensure that the profits generated by ASI's and AOE's activities were carefully allocated between their stateless head offices and Irish branches, thereby preventing them from being taxed more than Apple intended: Indeed, the more profits were allocated to the branches, and thus taxed at Ireland's 12.5 percent corporate rate, the larger the tax bill would have been.

Completing the picture required more than just a remarkable talent to handle the rules: It also needed a willing platform to validate the allocation.

The Irish tax authorities issued tax rulings in 1991 and 2007 regarding the calculation of ASI's and AOE's taxable profits in Ireland, simply aligning with Apple's requests.

Apple's operations in Europe eventually attracted the attention of the U.S. Senate, prompting an investigation into alarming reports of substantial untaxed profits.[23] The Senate Subcommittee on Investigations scrutinized Apple's "double Irish" tax scheme, concentrating on its use of stateless entities to transfer profits out of the reach of U.S. tax authorities. While this high-profile inquiry resulted in little more than a slap on the wrist and some red faces among Apple's top executives, who were grilled during the Senate hearings, it ironically caught the attention of the European commission. Suspecting potential violations of EU state aid regulations, the commission launched its own investigation in 2013, escalating the matter into a transatlantic showdown over Apple's tax practices.

Following a three-year investigation, the commission adopted a decision requiring Ireland to recover approximately €13 billion from Apple because of alleged illegal state aid granted through the tax rulings.

The commission's claim was mainly based on an argument that essentially challenged the Irish tax authorities' rulings as a departure from the standard taxation applicable under the relevant framework and the OECD-developed arm's-length principle, which was deemed inherent to Irish law before its express adoption in 2010. According to the commission, properly applying the arm's-length principle, as construed in the OECD 2010 report on the attribution of profits to permanent establishments of July 22, 2010 (authorized-OECD approach, AOA), would have prevented the issuance of the tax rulings that afforded Apple preferential treatment.

In its argument, the commission asserted that the acceptance by the Irish tax authorities of the proposition that Apple's IP licenses should be allocated for tax purposes to the head offices, and thus outside of Ireland, resulted in AOE's and ASI's annual chargeable profits in Ireland diverging from a reliable approximation of a market-based outcome under the arm's-length principle. The commission argued that this principle implied that those head offices possessed the necessary assets and carried out the relevant functions, while bearing the associated risks, and that, in contrast to the PEs, ASI and AOE had no physical presence or employees outside of Ireland, meaning they could not fulfil the functions related to the IP licenses.

[21] Mason, "State Aid Enforcement After *Apple*," *Tax Notes Int'l*, Oct. 6, 2025, p. 113; with regard to the blatant avoidance of U.S. taxes Mason also concurs, "now, in my view, if there was any tax avoidance by Apple here, it was principally U.S. tax avoidance, not Irish tax avoidance."

[22] Recital 98 of the commission's decision.

[23] Permanent Subcommittee on Investigation of the Committee on Homeland Security and Governmental Affairs — United States Senate (2013), Offshore Profit Shifting and the U.S. Tax Code — Part 2 (Apple Inc.) (May 21, 2013).

The EU's general court agreed with the commission's reference to the arm's-length principle as a benchmark for allocating profits between Apple's subsidiaries and their PEs, further contending that the internal and external reference frameworks essentially overlapped.[24] However, the court specifically noted that to assert that the portion of the total profits of AOE and ASI attributable to intellectual property should have been allocated to their Irish PEs, the commission needed to demonstrate that the branches exercised control over the IP and, consequently, that they (and not others) were making strategic decisions regarding it.[25]

According to the court, the commission had failed to provide this evidence because it had wrongly relied on a process of exclusion, merely pointing out that because the "empty" companies did not make these strategic decisions, it must be assumed that the PEs played a role in this context.[26]

In any case, the court concluded that the discussion surrounding this dichotomy was ultimately futile, because the decisions in question had not been made at the level of PEs or head offices but, rather, by Apple Inc. in Cupertino, California, on behalf of the entire Apple group.[27]

The commission's defeat was made even more stinging by the thinly veiled irony with which the judges commented on its argument:

The commission argues, in essence, that ASI's Irish branch performed all of those functions and assumed all of those risks relating to the Apple Group's activities outside North and South America without providing evidence of the actual performance of those functions or assumption of those risks by the branch in question. Given the extent of the Apple Group's activities outside North and South America, which represent approximately 60 percent of the group's turnover, the commission's assertion in that regard is not reasonable.[28]

While the European Commission's appeal against the court's decision was pending, the prevailing sentiment suggested that it would likely be dismissed overwhelmingly. This expectation was particularly strong because, in the interim, the Court of Justice had delivered three major judgments (in *Fiat*,[29] *Amazon*,[30] and *Engie*,[31]) that appeared to confine the commission's powers within much narrower interpretive limits. In those cases, the Court emphasized that the "reference framework" for assessing selective advantage must derive from the member state's own domestic tax system and that the commission is not entitled to substitute its own assessment of national law for that of the competent authorities, unless the latter's interpretation is manifestly inconsistent.

At first glance, this line of reasoning seemed to strike at the heart of the *Apple* decision, which had been portrayed as relying on an external and arguably ex post benchmark inspired by the OECD arm's-length standard as well as the AOA rather than on Irish law as construed and applied by the Irish Revenue. Yet the Court's reasoning in *Apple* reveals a more nuanced equilibrium: While confirming that the commission must assess selectivity solely in light of national law, the Court acknowledged, at least in principle, that international standards such as the OECD guidelines may serve as interpretive aids where those standards have been absorbed into the domestic interpretative framework, whether through statutory reference, settled administrative practice, or consistent case law. In this sense, national law encompasses not only the legislative provisions themselves but also the interpretative context developed by domestic authorities in their application.

As clarified in paragraphs 120 and 121 of the *Engie* judgment, the commission must, in

[24] *Apple Sales International and Apple Operations Europe v. Commission* T-892/16 (2020), at para. 239.

[25] *Id.* at paras. 251-252.

[26] *Id.* at paras. 243, 244, 259, 361, and 362.

[27] *Id.* at paras. 298-309.

[28] *Id.* at para. 267.

[29] *Fiat Chrysler Finance Europe v. European Commission*, joined cases C-885/19 P and C-898/19 P (2022).

[30] *European Commission v. Grand Duchy of Luxembourg, Amazon.com Inc., and Amazon EU Sarl*, C-457/21 P (2023).

[31] *Luxembourg and Others v. European Commission*, joined cases C-451/21 P and C-454/21 P (2023).

principle, accept the interpretation of national law advanced by the member state during the exchange of arguments, except if that interpretation is incompatible with the wording of the law, or reliable and consistent evidence demonstrating that another interpretation prevails in the member state's own judicial or administrative practice. This principle, subsequently restated and applied in *Apple*, demonstrates that while *Fiat*, *Amazon*, and *Engie* reaffirmed the primacy of domestic law, *Apple* refined that principle by insisting that national autonomy cannot be invoked to justify internal incoherence.

Accordingly, and somewhat against expectations, the Court, largely following the reasoning of its Advocate General, set aside the general court's judgment and upheld the commission's decision.

First, the Court considered the issue of the reference framework and, specifically, whether the commission was entitled to rely on the OECD's arm's-length benchmark to assess whether the Irish tax rulings deviated from "normal taxation." The Court observed that the complaints raised by Ireland, ASI, and AOE on this point had already been dismissed by the court and, in the absence of a cross-appeal, that finding had the force of res judicata. Yet the Court's reasoning went further than a mere procedural acknowledgement. In substance, the Court implicitly endorsed the arm's-length principle as the appropriate standard for evaluating profit allocation under Irish law. It confirmed that section 25 of the Taxes Consolidation Act 1997 (TCA 97), which governs the attribution of profits to branches of nonresident companies, must be applied consistently with the same functional and factual analysis as the one underlying the AOA.

The general court, indeed, had highlighted that:

> It should be borne in mind, as Ireland itself acknowledged in paragraph 123 of its application without being challenged in that regard by the commission, that, when applying section 25 of the TCA 97 it is necessary to look at the facts and circumstances of the branches in Ireland, including the functions performed, the assets used and the risks assumed by the branches [and that] when questioned specifically on that point in a written question put by the Court and orally at the hearing, Ireland confirmed that, to determine the profits to be allocated to branches for the purposes of section 25 of the TCA 97, it was necessary to carry out an objective analysis of the facts that included, first, identifying the 'activities' performed by the branch, the assets it uses for its activities, including intangibles such as IP, and the related risks that it assumes and, second, determining the value of that type of activity on the market.[32]

There is therefore good reason to conclude that the Court implicitly recognized the merit of the general court's reasoning insofar as the latter reckoned the arm's-length logic not an external construct imported by the commission but an integral element of Ireland's own legal framework for determining branch profits.[33]

Second, the Court maintained that the commission did not support allocating the IP to the branches based on an exclusion approach but rather by analyzing the functions performed, the assets used, and the risks undertaken by those branches.[34]

Third, the Court concluded that although the general court correctly identified the reference framework, it misinterpreted it by attributing the IP to Apple Inc. rather than to its subsidiaries or subsidiaries' branches.[35]

Before turning to the details of the Court's reasoning, and aware that what follows will gently contradict many of the leading academic voices on the matter, I should admit that I approach this discussion with due humility. Yet it seems worth reconsidering whether the prevailing academic narrative truly captures the

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[32] *Apple Sales International and Apple Operations Europe v. Commission*, T-892/16 (2020), at para. 238.

[33] *But see* Mason and Daly, "What Went Wrong in the Apple State Aid Case and How to Fix It: Part 2 — Suggested Reforms," 44(3) *Va. Tax Rev.* 351: "The Commission repeatedly misled the EU Courts about the vintage of OECD Guidance that it used in the state-aid cases. Retroactive use of external guidance is unfair to the Member State and impedes the EU Courts in making reliable and accurate decisions."

[34] Grand Chamber Judgment at paras. 129-131.

[35] *Id.* at para. 137.

coherence of the judgment, or whether, beneath the surface, the Court's approach is not quite as rotten as it has been portrayed.

Not So Rotten After All

The Court's reasoning has often been misunderstood, and critics have portrayed it as blind to economic reality, as if the judges had simply ignored the fact that Apple's IP was developed and exploited in Cupertino rather than in the essentially routine operational activities carried out by its Irish branches.

Yet both the advocate general and the Court were perfectly aware of that reality; they merely considered it juridically irrelevant. Once Apple itself had elected to transfer the economic ownership of the IP to Ireland through the CSA, that choice could not be selectively disregarded when convenient.

It is true that, like any other intercompany arrangement, the CSA could, in principle, be questioned as not having been concluded at arm's length. This possibility was expressly acknowledged by the commission in the final recitals of its decision.[36] However, all the parties involved, including Apple and the Irish authorities, treated the CSA as an arm's-length arrangement. The commission accepted this premise, not because it deemed the CSA immune from scrutiny, but because examining its conformity with U.S. transfer pricing rules would have exceeded its mandate and encroached upon U.S. taxing powers.

The issue before the commission was therefore not whether the CSA was arm's length per se, but whether Ireland's application of its own profit-attribution rules was consistent and nonselective once the CSA's effects had been accepted. Apple could not, in other words, have it both ways: It could not rely on the CSA to justify the exclusion of those same profits from U.S. taxation while simultaneously invoking the factual centralization of its R&D activities in Cupertino to shield them from Irish taxation.

The CSA, a legal fiction bordering on the absurd, was nonetheless a creature of Apple's own making, and the Court merely took the company at its word. If the IP was transferred to Ireland, the profits attributable to its exploitation had to find a home within the Irish tax base.

The commission's approach was not as aggressive or unilateral as many of its critics have suggested: Far from asserting an exclusive claim over the entirety of Apple's non-U.S. profits, the commission repeatedly emphasized that any recovery would have to be adjusted downward to reflect taxation levied elsewhere, particularly in the United States.

Paragraph 449 and following of the decision recognizes that to the extent that any other jurisdiction were to require Apple to pay tax on those profits, the amount of aid to be recovered would be reduced accordingly. This reservation reveals the commission's genuine concern with avoiding double taxation, not with expanding its own fiscal reach.

Nor did the commission presume to decide whether, or how, the United States should tax Apple's income. Its task was confined to determining whether Ireland, under its own law, had granted a selective advantage by allowing profits generated within its jurisdiction to escape taxation altogether. The issue was not the allocation of taxing rights between sovereign states but the internal coherence of Ireland's application of its own rules.

In this sense, the commission did not challenge Ireland's residence rules or its power to define the tax status of Irish-incorporated entities. It accepted those rules as given and assessed whether, within that framework, Ireland had applied section 25 TCA 1997 consistently. Because the so-called head offices had no employees, premises, or decision-making capacity, there was no factual or legal basis, under Ireland's own framework, for attributing profits to them.

The commission's conclusion that the residual profits belonged to the Irish branches did not elevate their routine functions; it merely removed an internal inconsistency. Once Ireland chose to recognize and tax those entities, it could not simultaneously disregard the income arising from them.

In other words, under the AOA, the allocation of residual profits must follow the location of significant people functions, assets, and

[36] Commission Decision (EU) 2017/1283 of Aug. 30, 2016, on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP), at paras. 450-451.

economically significant risks. If those elements are neither in Ireland nor in the stateless head offices, the residual profits cannot be attributed to those head offices through a notional or fictitious internal royalty. No such internal dealing can be recognized under the AOA. Consequently, the profits recorded in Ireland by ASI and AOE could only be reduced through an upward adjustment of Apple Inc.'s profits in the United States, not through a downward adjustment in Ireland.

Seen in that light, the judgment does not represent an intrusion of state aid law into the domain of tax sovereignty but a reaffirmation of the limits of national discretion in administering that sovereignty. By refusing to treat the head office fiction as sacrosanct, the Court was not legislating tax policy; it was enforcing a basic logic of consistency. Once both Ireland and the United States had accepted — taking the CSA at face value — that the income was hosted in Ireland, they could not subsequently pretend that it no longer existed.

This also explains the advocate general's emphasis on the internal coherence of Ireland's own reference framework.[37] The issue was not whether Cupertino's engineers made the strategic decisions all parties agreed they did, but whether the Irish tax rulings had correctly applied Irish law in allowing Apple to allocate the IP, and hence the profits, outside any taxing jurisdiction. The Commission's conclusion that such rulings amounted to selective aid was thus a judgment about administrative favoritism, not about the international location of value creation.

In retrospect, what appears to be rotten to some commentators is perhaps less the Court's reasoning than the political discomfort it provokes. The Court did not claim that Apple's profits should be taxed in the EU; it merely refused to legitimize their disappearance while being in the single market. By upholding the commission's power to require Ireland to apply its own law coherently, the Court recognized that the structure endorsed by the Irish rulings amounted to a policy choice inconsistent with the internal logic of the Irish tax system itself.[38] In that sense, what the Court rejected was not policymaking as such, but a form of policy incoherence whereby income accepted as arising under Irish company law was simultaneously treated as stateless for tax purposes. Stateless income, the Court reminded, cannot persist as a lawful policy outcome within a coherent legal order.

In this respect, the decision is not the symbol of European overreach that its detractors imagine. It is, rather, a quiet acknowledgement of a broader systemic failure, one jointly engineered by governments on both sides of the Atlantic, and a reminder that, in a union founded on the rule of law, even the most sophisticated tax architecture cannot rest on deliberate incoherence.

In *Apple*, it cannot be maintained that the Court erred merely because it relied, at least implicitly, on the arm's-length principle. Several commentators have argued that such reliance would be illegitimate, because Irish domestic law does not expressly incorporate this principle as a statutory benchmark for profit allocation. This objection, however, appears excessively formalistic. As some commentators observe,[39] Irish law has long required that profits attributable to a branch be determined "commensurate with the actual activities performed," even though the statutory text of section 25 TCA 1997 predates the codification of transfer pricing rules.

National legal systems frequently refrain from reproducing, within their domestic statutes, the detailed framework of transfer pricing principles. Instead, they typically articulate a general

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[37]In paragraph 59 of his opinion, the advocate general notes that "the need to limit the analysis to relations between the head offices and the Irish branches arises, however, from the choice made by Apple Inc., in its commercial autonomy, to transfer, under the cost-sharing agreement, part of its profits to ASI and AOE. It is therefore a matter of distributing such profits to the various subdivisions of those companies, from which Apple Inc. remains separate. The consequence of applying a different criterion, as highlighted correctly by the commission, is to fail to take into account the reality of that agreement and of the tax structure of the Apple group, which are factors that the Irish tax authorities could not disregard in a comprehensive assessment of the method for determining the chargeable profit of ASI and AOE proposed by the group. Otherwise, this would therefore lead to the paradoxical outcome that the assets legitimately transferred by Apple Inc. outside the United States and the related profits, when determining the tax due in Ireland, would return — only virtually — to the United States, further reducing the tax liability of the group."

[38]Grand Chamber Judgment at para. 201.

[39]Isabel Verlinden and Stefaan De Baets, "The ECJ Apple Judgment: A Sour Tarte Tatin," 32(1) *Int'l Transfer Pricing J.* (2025).

requirement that profits between a PE and its head office be allocated according to the economic reality of the functions performed, assets used, and risks assumed, to reach an outcome consistent with transactions between independent parties and reflective of market values. Were this not the implicit purpose of such provisions, they would be rendered largely devoid of normative content.

It would be unreasonable to expect EU member states to incorporate, in positive law, the full corpus of the OECD transfer pricing guidelines for the commission or the EU courts to invoke the arm's-length principle as a standard of review. A mere cross-reference to those guidelines, or even their absence from domestic legislation, cannot preclude the application of the underlying arm's-length logic when assessing whether profits have been allocated consistently with economic substance.[40]

If one were to adopt the excessively orthodox approach suggested by certain commentators, the law would demand an unattainable degree of textual precision, effectively conditioning the commission's supervisory powers on the formal transposition of every OECD methodological refinement.

Admittedly, the analogy often drawn with the Danish cases[41] may seem imperfect, because those judgments concerned EU law (the interpretation of the parent-subsidiary and interest-royalties directives) rather than the domestic tax rules of a member state. Yet they remain instructive insofar as they reiterate an immanent principle of coherence within the EU legal order: The benefits of EU legislation cannot be invoked for "wholly artificial arrangements which do not reflect economic reality." The Court emphasized that the prohibition of abuse "constitutes an expression of the general EU law principle that no one may fraudulently or abusively rely on Union law."

That same logic of coherence, transposed in *Apple*, into a context governed by national law, underpins the Court's reasoning. The Court's acceptance of the arm's-length principle as a heuristic standard did not create a supranational tax benchmark but rather confirmed that once a member state defines a rule for profit allocation, it must apply it consistently and without selective deviation.

This interpretive tension becomes clearer when viewed alongside *Engie*. There, following the general court's confirmation of the commission's decision,[42] it was annulled on appeal by the Grand Chamber[43] on the ground that the commission had substituted its own interpretation of Luxembourg tax law for that of the domestic authorities, holding that "it is not for the commission to substitute its own assessment of national law for that of the competent authorities, unless that assessment is manifestly inconsistent,"[44] and that the commission did not demonstrate to the requisite legal standard that the tax rulings at issue were contrary to the reference framework constituted by Luxembourg law itself.[45] *Engie* thus exposes the impossible balance demanded of the commission: condemned for overreach when it interprets national law autonomously, yet criticized for passivity when it confines itself within that same law. *Apple* and *Engie*, viewed together, illuminate this double bind. In *Apple*, the commission was faulted not for disregarding national law but for taking Ireland's framework at face value and insisting that it be applied coherently. Both judgments reflect a common discipline: The commission's task is not to rewrite national law, but to ensure that its application does not devolve into selective advantage.

One may legitimately question, then, what the critics of the *Apple* judgment would consider to be the alternative. Are we to accept that profits may be allocated on artificial bases, even when the

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[40] Fausta Todhe, "The Rise of an (Autonomous) Arm's Length Principle in EU State Aid Rules?" 18(3) *Eur. State Aid L. Q.* 249-263 (2019); the commission's and the Court's reliance on the arm's-length principle reflects the emergence of a "functional, autonomous benchmark of economic rationality inherent in article 107(1) [Treaty on the Functioning of the European Union]," rather than a mechanical transposition of OECD standards.

[41] *Denmark v. T Danmark*, joined cases C-116/16 and C-117/16 (2019); and *N Luxembourg 1 v. Denmark*, joined cases C-115/16, C-118/16, C-119/16, and C-299/16 (2016).

[42] *Luxembourg v. European Commission* and *Engie Global LNG Holding and Others v. European Commission*, joined cases T-516/18 and T-525/18 (2021).

[43] *Luxembourg v. Commission*, joined cases C-451/21 P and C-454/21 P (2023).

[44] *Id.* at para. 138.

[45] *Id.* at para 128.

allocation leads to outcomes that defy both logic and fiscal coherence, namely, that substantial profits, though effectively realized and duly recorded, are not attributable to any identifiable jurisdiction?[46]

Excessive formalism in this context risks becoming not a safeguard of legality but an instrument of incoherence. The insistence on textual orthodoxy, while ostensibly protective of national autonomy, may thus end up legitimizing precisely those results that EU law, through its emphasis on substance over form and its concern with the prevention of competitive distortions, seeks to avoid.

A Gentle Reply to the Orthodoxy

Certain commentators argue that the Court's decision in *Apple* "resurrected" an autonomous EU arm's-length standard, undermining *Fiat*, *Amazon*, and *Engie*. But that reading misrepresents both the Court's method and the commission's conduct. The Court did not endorse a new EU-law arm's-length principle; it simply accepted Ireland's own interpretative stance, that profits must be allocated between a company's head office and its Irish branch according to their respective functions, risks, and assets. Paragraph 203 of the judgment makes this explicit: The allocation is to be made "without requiring any account to be taken of the role played by separate entities."[47]

The commission's inquiry thus remained internal to Irish law, asking whether Irish Revenue had consistently applied its own section 25 TCA 1997. In doing so, the commission adopted OECD guidance not as binding law but as a heuristic benchmark for the "functions-assets-risks" logic already implicit in Ireland's practice. This distinction, between substitution of domestic law and interpretive alignment, is often elided in criticism.

Some contend that *Apple* contradicts *Fiat*. Yet *Fiat* concerned an advance pricing agreement grounded in explicit Luxembourg legislation adopting the OECD principle; the commission erred there by replacing Luxembourg's method with its own. In *Apple*, by contrast, Ireland itself had conceded that an arm's-length test applied to branch taxation. The Court merely held Ireland to that concession. Far from overturning *Fiat*, *Apple* applied its logic consistently: The commission could not disregard the member state's chosen framework, but it could verify whether that framework was applied coherently and nonselectively.

Critics also accuse the court of ignoring U.S. taxing rights. Yet, as already noted, paragraph 449 of the commission decision expressly state that any recovery would be reduced if another jurisdiction, including the United States, taxed the same profits. This safeguard proves that the commission's goal was not to appropriate income globally but to restore Ireland's own tax neutrality. Once Apple had placed its IP within Irish-incorporated entities, the only question was whether Ireland could, consistently with its law, treat those profits as untaxed anywhere. The commission's answer, that it could not, was a juridical one, not an assertion of extraterritorial competence.[48]

Some insist that economic reality, Cupertino's engineers, and U.S. control should have prevailed. Yet once Apple elected to transfer IP ownership to Ireland under the CSA, Ireland became the legal situs where that income is recorded. The economic reality does not justify that IP profits were to be allocated to stateless head offices deprived of any economic substance. Conversely, economic reality may prevail only by the means of an upward adjustment in the U.S., either voluntary or because of a tax assessment. No other downward adjustment of ASI and AOE

[46] Charles Garavan, "The Apple Case — The Right Decision for the Wrong Reasons?" 64(12) *Eur. Tax'n* (2024); denying any role to the arm's-length principle in such scenarios would "reduce the control of State aid to a purely formal exercise, blind to the economic distortions it purports to remedy."

[47] That is, Apple Inc.

[48] Elizabeth J. Stevens and H. David Rosenbloom, "Original Sin: Cost Sharing in the United States," *Tax Notes Int'l*, Nov. 11, 2024, p. 917; "the U.S. decision to cede residence-based taxing authority over profits from intangibles developed in the United States was a significant driver of these state aid cases. The commission almost surely would not have sought to correct plainly undesirable tax policy outcomes by asserting that European jurisdictions' transfer pricing rulings conferred unlawful state aid if the United States had fully asserted its taxing jurisdiction over the U.S. participants in the cost-sharing arrangements. Had Apple's resident-nowhere subsidiaries been required to pay royalties to the U.S. parent that were commensurate with the profit they generated from non-U.S. sales of Apple products, those subsidiaries would never have accumulated such towering piles of untaxed profit. The commission sought to tax what the United States had left on the table."

recorded profits would be "legal" under Irish tax law. MNEs cannot invoke economic reality selectively, embracing form when convenient (to avoid U.S. tax) and substance when cornered (to avoid EU scrutiny). The Court's discipline was not formalism but consistency.

Other analyses have rightly noted that in *UK CFC*,[49] the Court reaffirmed national sovereignty and the need to respect member states' interpretation of their own law unless manifestly unreasonable.[50] *Apple* fits this pattern. The commission did not invent an alternative reference framework; it identified an internal inconsistency within Ireland's own application of section 25. By restoring that coherence, the Court preserved rather than eroded fiscal autonomy.

[49] *UK and ITV v. Commission*, joined cases C-555/22 P, C-556/22 P, and C-564/22 P (2024).

[50] Daly, "United Kingdom and ITV PLC v European Commission: Comparing Apples with Apples?" SSRN (Jan. 6, 2025).

Broader Implications

Far from rotten, *Apple* exemplifies judicial restraint in a politically charged environment. The Court confined itself to the member state's law, recognized the commission's pragmatic deference to other jurisdictions' taxing rights, and reaffirmed that state aid control concerns discrimination, not double taxation. The lesson is not that the EU has entered the realm of global profit allocation but that selective administrative leniency, allowing profits to vanish into a stateless limbo, is incompatible with the internal logic of any national tax system.

What the judgment ultimately restores is a principle of internal coherence: Once a member state accepts jurisdiction over a taxpayer's income, it cannot deploy administrative artifices to deny its own law's reach. In that sense, the decision is not revolutionary; it is reparative. Unlike what some have called rotten, it may well prove to be the soundest fruit in the European orchard, a quiet reminder that, when law is bent too far, it eventually snaps back. ■