ORDER OF THE VICE-PRESIDENT OF THE COURT

17 May 2018 (*)

(Appeal — Intervention — Third country — State aid — Aid implemented by Ireland in favour of Apple — Advance tax agreement (tax ruling) — Selective tax advantages — Action for annulment — Interest in the result of the case)

In Case C-12/18 P(I),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, brought on 5 January 2018,

United States of America, represented by H. Viaene, advocaat, and J. Holmes QC,

appellant,

the other parties to the proceedings being:

Apple Sales International,

Apple Operations International,

established in Cork (Ireland), represented by D. Beard QC, A. Bates, J. Bourke and L. Osepciu, Barristers, A. von Bonin, Rechtsanwalt, and E. van der Stok, advocaat,

applicants at first instance,

European Commission, represented by R. Lyal and P.-J. Loewenthal, acting as Agents,

defendant at first instance,

Ireland,

EFTA Surveillance Authority,

interveners at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, M. Wathelet,

makes the following

Order

1 By its appeal, the United States of America asks the Court to set aside the order of the General Court of the European Union of 15 December 2017, *Apple Sales International and Apple Operations Europe* v *Commission* (T-892/16, not published, 'the order under appeal', EU:T:2017:925), by which the General Court rejected its application to intervene in support of the form of order sought by Apple Sales International ('ASI') and Apple Operations

Europe (‘AOE’), the applicants at first instance in Case T-892/16 concerning the action brought by ASI and AOE for the annulment of Commission Decision C(2016) 5605 final of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (‘the decision at issue’), by which the European Commission concluded that Ireland granted ASI and AOE unlawful State aid incompatible with the internal market and ordered its recovery by Ireland from ASI and AOE.

2 In addition, the United States of America asks the Court, in particular, to grant its application to intervene or, in the alternative, to refer the case back to the General Court.

3 ASI and AOE submitted their written observations on 2 February 2018, by which they contend that the order under appeal should be set aside and that the United States of America’s application to intervene should be upheld or, in the alternative, that the case should be referred back to the General Court, and that the Commission should be ordered to pay the costs.

4 The Commission submitted its written observations on 2 February 2018, seeking the dismissal of the appeal and an order that the United States of America pay the costs.

The order under appeal

5 After having recalled in paragraphs 10 to 14 of the order under appeal the settled case-law of the Court of Justice and of the General Court relating to the conditions under which a third party may intervene in a case brought before the General Court, pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, the General Court found as follows in paragraphs 15 to 26 of that order:

> ‘15 In support of its application for leave to intervene, the United States of America puts forward the following arguments.
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> 16 In the first place, the United States of America argues that its economic situation would be affected by the result of the present case to the extent that the recovery ordered by the [decision at issue] could result in an increase in the amount of tax credits or deductions which the [parent company of ASI and AOE] could claim from the tax authorities in that country, at the time where that company decides to repatriate profits obtained by its off-shore subsidiaries. Such repatriation could be chosen by [the parent company of ASI and AOE] or those profits could be regarded as having been repatriated following a possible tax reform in the United States of America.
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> 17 From the outset, as regards the subject matter of the case, concerning which the interest of the person who seeks leave to intervene must be defined, according to the case-law cited in paragraph 12 [of the order under appeal], it should be recalled that the present action seeks annulment of the [decision at issue], which found that unlawful and incompatible aid had been granted to [ASI and AOE] and ordered its recovery. Accordingly, the result of the present case cannot pre-determine the internal decisions of the group to which [ASI and AOE] belong, such as the distribution of profits or the repatriation of profits, still less so the internal decisions of the parent company of the group, in the context of its rights and obligations in relation to tax in the United States of America.
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> 18 Furthermore, as regards the criterion relating to the existence of a direct interest in the result of the case, it should be noted that, according to the case-law, the adverse effect, even if significant for the economic and financial interests of the applicant for leave to

intervene due to the economic consequences which the result of the case could have on the economic situation of the main party in support of which leave to intervene is sought, is not sufficient for that application to be granted (see, to that effect, order of the President of the Court of 6 October 2015, *Metalleftiki kai Metallourgiki Etairia Larymnis Larko* v *Commission*, C-362/15 P(I), EU:C:2015:682, paragraph 19). In the present case, it should be noted that the interest which the United States of America claims to have stems from the negative effect that the result of the case would have on its tax revenues resulting from the tax credits which could be claimed by the parent company of the group to which [ASI and AOE] belong. That tax credit would result from the amounts paid by [ASI and AOE] in Ireland following the recovery ordered by the [decision at issue] if the parent company decided to repatriate [ASI's and AOE's] profits.

19 Therefore, although the [decision at issue] could be viewed as directly harming [ASI's and AOE's] economic and financial interests, so that the result of the present case is liable to have direct economic consequences for their economic situation, it is necessary to find that those economic consequences could only indirectly affect the economic situation of the United States of America. Those economic consequences could arise only by means of an application for a tax credit, which must moreover be lodged not by [ASI and AOE] but by their parent company, the economic situation of which would also, but less immediately, be affected by the result of the present case.

20 It follows that the United States of America has failed to establish the existence of a direct interest in the result of the case.

21 As regards the criterion relating to whether the interest of the applicant for leave to intervene in the result of the case is actually established, according to the case-law cited in paragraph 12 [of the order under appeal], it is sufficient to note that, according to the arguments made by the United States of America itself, the alleged negative effects on its economic situation would be dependent on many factors, the occurrence of any of which is far from certain, namely, the repatriation of the profits of the off-shore subsidiaries of the parent company of the group to which [ASI and AOE] belong and the tax credit which that company might claim from the tax authorities of the United States of America.

22 The United States of America submits that its economic situation would be affected only if the [parent company of ASI and AOE] decided to repatriate the profits of its off-shore subsidiaries.

23 First, it must be stated that the United States of America has not produced evidence establishing that the repatriation of profits from off-shore subsidiaries of the [parent company of ASI and AOE] is established. Accordingly, that decision cannot be viewed as being automatic, the [parent company of ASI and AOE] being free to make its own decisions in that regard.

24 Moreover, assuming that such repatriation were to take place, it would also be necessary for the parent company of the group to which [ASI and AOE] belong to claim, from the tax authorities of the United States of America, tax credits relating to the repayment ordered by the [decision at issue] and for those authorities to uphold that claim. The United States of America has not provided any further clarification or other evidence which establishes that the repayment of aid ordered by the Commission would automatically give rise to a federal tax credit due in the United States of America. For example, no information was provided on the issue as to whether the

grant of such a tax credit is subject to authorisation on the part of the tax authorities in the United States of America or to any other preconditions.

25 Second, it should be noted that the United States of America has not provided any further clarification as regards the scope and entry into force of the tax reform to which it made reference, nor did it explain how that reform would bring about the repatriation of the profits of the off-shore subsidiaries of [ASI's and AOE's] parent company. In support of its arguments, the United States of America refers to the document entitled "White Paper", issued by the United States of America Treasury Department on 24 August 2016, according to which "there is the possibility that any repayments ordered by the Commission will be considered foreign income taxes that are creditable against U.S. taxes owed by the companies in the United States of America. If so, the companies' U.S. tax liability would be reduced dollar for dollar by these recoveries when their offshore earnings are repatriated or treated as repatriated as part of possible U.S. tax reform". That quotation itself highlights the hypothetical nature of such a tax credit, in particular the uncertainty of the repatriation of off-shore profits in the context of a possible tax reform in the United States of America.

26 It follows from the foregoing that the United States of America has not established an interest in the result of the case that would give rise to the alleged negative effect that the repayment ordered by the [decision at issue] would have on its tax revenues.'

The appeal

Preliminary considerations

6 Pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, any person may intervene before the Courts of the European Union if that person can establish an interest in the result of a case submitted to one of those Courts.

7 It is settled case-law of the Court of Justice that the concept of 'an interest in the result of the case', within the meaning of that provision, must be defined in the light of the precise subject matter of the case and be understood as meaning a direct and existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law or arguments put forward. The term 'the result of the case' refers to the final decision sought, as set out in the operative part of the future judgment (orders of the Vice-President of the Court of 6 October 2015, *Metalleftiki kai Metallourgiki Etairia Larymnis Larko* v *Commission*, C-385/15 P(I), not published, EU:C:2015:681, paragraph 6, and of 1 March 2016, *Cousins Material House* v *Commission*, C-635/15 P(I), not published, EU:C:2016:166, paragraph 5).

8 In that regard, it should be ascertained, in particular, whether the applicant for leave to intervene is directly affected by the contested measure and whether his interest in the result of the case is established. In principle, an interest in the result of the case can be considered to be sufficiently direct only in so far as that result is capable of altering the legal position of the applicant to intervene (orders of the Vice-President of the Court of 6 October 2015, *Metalleftiki kai Metallourgiki Etairia Larymnis Larko* v *Commission*, C-385/15 P(I), not published, EU:C:2015:681, paragraph 7, and of 1 March 2016, *Cousins Material House* v *Commission*, C-635/15 P(I), not published, EU:C:2016:166, paragraph 6).

9 Furthermore, it follows from the case-law of the Court that, where a third country seeks leave to intervene in a dispute before the Courts of the European Union, it is regarded, for the purposes of that application, like any person, distinct from the Member States, who,

pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, must establish an interest in the result of the case (order of 23 February 1983, *Chris International Foods* v *Commission*, 91/82 and 200/82, EU:C:1983:45).

10 It is in the light of those considerations that the United States of America's appeal must be examined.

11 The United States of America relies on four pleas, alleging four errors of law said to vitiate the order under appeal. First, the General Court wrongly concluded that the position of the United States of America would be affected only if Apple Inc., the parent company of the group to which ASI and AOE belong, decided to apply for a tax credit, without also taking into account the possibility for that company to deduct from the tax due in the United States the amounts paid by way of foreign taxes. Second, the General Court should not have held that the interest of the United States of America in the result of the case was uncertain in view of the fact that it was not established that Apple would have claimed tax credits, to which it would have been entitled, in relation to any taxes recovered by Ireland from ASI and AOE in implementation of the decision at issue. Third, the General Court wrongly held that the interest of the United States of America was indirect on account of the uncertainty as to repatriation of ASI's and AOE's earnings. In particular, the General Court should not have held that the tax reform which the United States of America had referred to in its application to intervene, and which would have introduced in the tax law of that third country a presumption of repatriation of earnings such as those at issue, was hypothetical. Fourth, the General Court misapplied the case-law of the Court of Justice in holding that the position of the United States of America was similar to that of a creditor who, to establish an interest in the case, refers to the consequences of its result on his economic situation.

The third plea in law

12 As regards the third plea, which it is appropriate to deal with first, the United States of America claims that the General Court, in paragraphs 22, 23 and 25 of the order under appeal, wrongly considered that the interest of the United States of America in the result of the case was indirect, due to the uncertainty as to Apple's repatriation to the United States of America of the profits generated by ASI and AOE. In its submission, first, when and how such repatriation occurs is not relevant, given that, as soon as Ireland has recovered the tax payable on the basis of the decision at issue, the United States of America no longer has any valid basis for opposing a claim by the parent company of ASI and AOE for a tax credit or, at the very least, for opposing a tax deduction by that parent company in respect of the sum recovered by that Member State. Second, contrary to what the General Court held in support of its decision, the tax reform mentioned in the United States of America's application to intervene, and under which, in essence, repatriation of the profits of ASI and AOE could have been presumed, is not hypothetical.

13 In order to rule on this plea, it must be noted that, in paragraph 16 of the order under appeal, the General Court observed that, in essence, the United States of America argued, in support of its application to intervene, that its economic situation could be affected 'at the time where [the parent company of ASI and AOE] decides to repatriate profits obtained by its off-shore subsidiaries' because the parent company could then claim from the United States tax authorities tax credits and tax allowances corresponding to the amounts recovered by Ireland in implementation of the decision at issue.

14 Thus, the Court, in that paragraph, which has not been challenged in this appeal, relied on the fact that, as long as a company established in the United States has not decided to

repatriate the foreign profits of its subsidiaries established abroad, those profits are not subject to tax in the United States.

15 In such a situation, the General Court was correct in requiring, in essence, in paragraph 23 of the order under appeal, that the United States of America, in order to demonstrate its established interest in the result of the case, submit evidence proving that the repatriation of those profits was established.

16 Admittedly, it cannot be ruled out that, as argued by both the United States of America and ASI and AOE, the time of the repatriation of the profits concerned is not relevant in order to assess the consequences of the decision at issue on the legal situation of the United States of America.

17 However, there must be such repatriation in order for any tax claim of the United States to arise and, consequently, for any right of Apple to arise enabling it to assert, in respect of that claim, any tax credits or tax deductions, in accordance with United States law.

18 The General Court found that the United States of America did not provide any concrete evidence to prove that Apple had repatriated amounts resulting from the profits generated by the activity of ASI and AOE. Indeed, in its application to intervene before the General Court, it confined itself to asserting that 'it is reasonable to expect [Apple] to bring its European profits back to the United States'. Such an assertion, which is not corroborated by any evidence, such as annual accounts of that company proving that, at least for the periods in question, Apple had repatriated the profits of ASI and AOE, does not establish to the requisite legal standard the existence of such repatriation or at least a sufficient likelihood of any forthcoming repatriation. That is all the more so because, as the Commission submits in its response, according to a recent statement of the President of Apple, which is contested neither by the United States of America nor by ASI and AOE, Apple does not intend to repatriate the profits in question because the tax rate is too high in the United States.

19 As regards the argument of the United States of America that, contrary to what the General Court held in support of its decision, the tax reform mentioned in its application to intervene was not hypothetical, it is sufficient to observe that, as the United States of America itself acknowledges in its appeal, at the time of the adoption of the order under appeal that reform had not yet entered into force.

20 In any event, the General Court, in paragraph 25 of the order under appeal, examined the document produced by the United States of America on that tax reform and inferred therefrom that the document did not make it possible to understand how that reform would necessarily have resulted in the repatriation by Apple of the amounts resulting from the profits generated by the activity of ASI and AOE. In its appeal, the United States of America puts forward nothing capable of calling into question the conclusion which the Court reached following that examination.

21 It is true that the United States of America criticises the General Court for not having exercised its powers of inquiry in order to hear it on this issue.

22 However, according to the Court's settled case-law, the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it (judgment of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 319, and order of 10 June 2010, *Thomson Sales Europe* v *Commission*, C-498/09 P, EU:C:2010:338, paragraph 138).

23 It follows from all the foregoing considerations that the General Court did not err in law in deciding, in paragraph 26 of the order under appeal, that the United States of America had not established an interest in the result of the case that would follow from the alleged negative effect that the repayment ordered by the decision at issue would have on its tax revenues.

24 Consequently, the third plea must be dismissed as unfounded.

The first, second and fourth pleas

25 The lack of certainty as to repatriation by Apple of the amounts resulting from the profits generated by the activity of ASI and AOE is, in itself, a sufficient ground to justify, in law, the General Court's decision that the interest of the United States of America in the result of the case was not established. Since that ground has been unsuccessfully challenged by the United States of America in the context of the third plea, the grounds of the order under appeal relating to the possibility for Apple to claim tax credits or to assert a right to deduct are superfluous. It follows that the other three pleas in the appeal, directed against those grounds, must be declared ineffective.

26 In light of all of the foregoing, the appeal must be dismissed.

Costs

27 Under Article 138 of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United States of America has been unsuccessful, it must be ordered to pay the costs of these proceedings, in accordance with the form of order sought by the Commission. ASI and AOE, which submitted observations in support of the United States of America, are to bear their own costs.

On those grounds, the Vice-President of the Court hereby orders:

1. **The appeal is dismissed.**

2. **The United States of America shall bear, in addition to its own costs, those incurred by the European Commission.**

3. **Apple Sales International and Apple Operations Europe shall bear their own costs.**

Luxembourg, 17 May 2018.

A. Calot Escobar A. Tizzano

Registrar Vice-President

* Language of the case: English.