

Apple received €13bn in illegal Irish state aid

- US tech giant Apple was granted illegal state aid by Ireland, the EC ruled on Tuesday, and must now pay up to €13bn (£11bn) in back taxes, plus interest.
- Apple and Ireland to appeal decision, and US Treasury argues that the EC has conflated the previously distinct concepts of 'advantage' and 'selectivity'.
- Suggestions that the ruling may impact the stability of Ireland's minority government, and the EC's 'more solid' argument means no guarantee of success for Apple's appeal.

The European Commission has concluded that tax rulings issued by the Irish tax authorities in favour of two Apple subsidiaries, which operated in Ireland until 2015, constituted illegal state aid under EU law. The Commission has calculated that these rulings allowed Apple to allocate profits in a way that reduced the taxes payable in Ireland by up to €13bn over ten years. Ireland must now recover this amount, plus interest, from Apple. Both the Irish government and Apple have said they will appeal the decision to the European Court.

The Commission launched its state aid investigation in June 2014 into two tax rulings, the first of which was issued in 1991. These rulings allowed two companies, Apple Sales International and Apple Operations Europe, both incorporated in Ireland, to attribute profits from their Irish branches to a head office. However, the investigation concluded that this arrangement 'did not have any factual or economic justification', as the 'head office' existed only on paper and was not subject to tax in any country under the Irish tax law which, until 2013, allowed for 'stateless companies'. The Commission notes that Apple paid an effective corporate tax rate of 1% on its European profits in 2003, and that in 2014 this rate had further reduced to 0.005%. The Commission can order recovery of illegal state aid for a ten-year period preceding its first request for information in 2013.

The EU competition commissioner, Margrethe Vestager, said the decision 'sends a clear message [that] member states cannot give unfair tax benefits to selected companies'. This approach 'has been long confirmed by the EU courts and the Commission's case practice. EU state aid rules have been in force since 1958 and apply to all companies that choose to operate in the EU single market.'

The decision was inevitably met with an angry reaction. US senator Charles E. Schumer called it a 'cheap money

grab', while the US Treasury said it was 'disappointed' the EC was 'acting unilaterally'. Apple CEO Tim Cook called the move an 'obvious targeting of Apple' that was 'harmful [to] investment and job creation in Europe.'

The US has previously expressed strong criticism of EU state aid policy, most recently in a Treasury white paper. This highlighted three main issues with the Commission's approach, which according to the US Treasury:

- is new and departs from previous EU case law and Commission decisions;
- should not seek retroactive recoveries; and
- is inconsistent with international norms and undermines the international tax system, including OECD transfer pricing guidelines and the BEPS project.

The US Treasury argued that the Commission has conflated the previously distinct concepts of 'advantage' and 'selectivity'. The white paper stated: 'The Commission's position that individual transfer pricing rulings are selective when given to a particular multinational company, even when other multinational companies could have obtained them, constitutes a new approach that has not previously been applied.'

Meanwhile, Michael Noonan, Ireland's finance minister, 'disagreed profoundly' with the EC's ruling, saying he had no choice but to seek Cabinet approval to appeal the decision. 'This is necessary to defend the integrity of our tax system; to provide tax certainty to business; and to challenge the encroachment of EU state aid rules into the sovereign member state competence of taxation.'

Niall Cody, chairman of the Irish Revenue Commissioners, insisted the tax authority had cooperated fully with the EC investigation, adding: 'While I cannot otherwise comment on the specific facts of this case, I can confirm that: there was no departure from the applicable Irish tax law by Revenue; there was no preference shown in applying that law; and the full tax due was paid in accordance with the law.'

Wider implications

The EC said the amount of unpaid taxes to be recovered by the Irish authorities would be reduced 'if other countries were to require Apple to pay more taxes on the profits recorded ... the taxable profits of ASI in Ireland would be reduced if profits were recorded and taxed in other countries instead of being recorded in Ireland ... The amount of unpaid taxes to be recovered by the Irish authorities would also be reduced if the US authorities were to require Apple to pay larger amounts of money to their US parent

company for this period to finance R&D efforts.' Dentons tax partner Jeremy Cape observed that it 'sounds like an invitation for other countries to challenge the ruling to recover their own share.'

Timothy Lyons QC, barrister at 39 Essex Chambers, noted that the €13bn sum was not a precise figure. 'The press release says "up to" that amount. The Commission cannot provide a precise figure. It is arguing for determination of Irish branch profits on an arm's length basis and says "profits must be allocated between companies in a corporate group, and between different parts of the same company, in a way that reflects economic reality".' That is not an accurate statement of Irish law but, even if it is accepted as such, there remains room for argument about the figure because the standard being applied can only result in the determination of a range of values not a single figure. It should also be noted that the Commission agrees that the figure could be varied by the position adopted by other countries. That is an inevitable but potentially significant acknowledgment.'

George Peretz QC, barrister at Monckton Chambers, observed that interest also needed to be included in any tax recovered. 'Under EU state aid rules, when member states recover unlawful state aid, they are required to include interest on a compound basis, and at interest rates set out in EC notices.'

Aisling Donohue, tax partner at Irish-based mgpartners, said one of the biggest surprises was that the EC changed its argument from the one based on transfer pricing it made in 2014, when it wrote to Ireland to open the investigation, to a 'more solid' one now. 'Under Irish law at the time, there were no requirements over transfer pricing documentation so the EC couldn't make the argument on selectivity,' she said. 'The argument made now is the issue of what profits are being allocated to Irish branches. Under TCA 1997 (Tax Consolidation Act 1997), s 25 says non-residents are subject to Irish corporation tax if they are trading through a branch or agency. Unless Apple can successfully argue the sales made belong somewhere else, the profits belong in the Irish branch. There is no basis in law to impute royalties to the head office.'

The fallout, she says, could even collapse Ireland's unstable minority government, which is keen to appeal the decision to defend Ireland's reputation as a business-friendly environment, while others argue that Ireland should seek to recover the €13bn in light of austerity there. Any appeal Apple makes, she adds, could take years with no guarantee of success. ■

Reported by Santhie Goundar, with additional reporting by Andrew Wotton.