

EU Commission: Ireland gave illegal State aid to Apple of up to €13 billion

September 2016

On August 30, 2016 the European Commission announced its final decision (see the Commission's [Press Release](#)) on its state aid investigations into transfer pricing rulings granted by Ireland to the Apple group. This decision confirms the Commission's opening decision that the rulings in question constituted illegal state aid. The state aid which is estimated by the Commission at up to €13 billion has now been determined to be incompatible with the internal market, and must be recovered (with interest) by the Irish authorities from the Apple group. It is expected that the decision will be appealed.

Background

The decision follows a two year investigation, further to the announcement by the Commission of its preliminary conclusions in June 2014. Similar investigations have been launched in respect of possible state aid granted by the Netherlands and Luxembourg to other multinational companies. In December 2014, the Commission had ordered all Member States to list all the tax rulings issued since January 1, 2010, and in June 2015 requested 15 Member States to provide detailed information on some of their rulings. The investigations of tax rulings (primarily APAs) is one of several EU initiatives in the areas of tax transparency and tackling harmful tax competition between Member States and tax avoidance.

The Commission is required by EU law to review state aid granted by Member States and, if it finds that the aid is incompatible with the internal market, to order the Member State concerned not to put it into effect, or to abolish or alter it, and order the beneficiary to repay such aid within a prescribed timeframe. Broadly speaking, aid is incompatible with EU law if it distorts competition by, for example, favoring certain undertakings thus affecting trade between Member States, provided that it does not meet the conditions for Commission approval under the EU Treaty. Such aid is illegal and must be recovered by the Member State in question from its beneficiary.

The Decision

The Commission concluded that two tax rulings issued by Ireland to Apple have "substantially and artificially lowered the tax paid by Apple in Ireland since 1991". In the view of the Commission, the rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which according to the Commission did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to the companies' head offices and not to their respective Irish branches. The profits allocated to the head offices were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force.

As a consequence, the Commission confirms their opening decision that both rulings constitute state aid that is incompatible with EU law, although the earlier opening decision focused on the (transfer pricing) methods used to determine the profits of the two companies in question. The decision requires Ireland to recover the aid from Apple, and provides a specific methodology for calculating this. The Commission estimates the total amount to be up to €13 billion.

Reaction from the Irish government

In a press release issued by the Irish government, Minister of Finance Michael Noonan said "I disagree profoundly with the Commission's decision. Our tax system is founded on the strict application of the law, as enacted by the Irish Parliament, without exception. The decision leaves me with no choice but to seek Cabinet approval to appeal the decision before the European Courts."

Next steps

This decision forms part of the standard state aid investigation procedure. The non-confidential version of the decision is expected to be published in the next few months. Both Ireland's Finance Minister and the Apple group are understood to have indicated that they will appeal the decision before the General Court (and possibly later the Court of Justice of the European Union). Any such appeal does not suspend the recovery payment.

According to the Commission's press release, 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 by Apple Sales International and Apple Operations Europe for this period.

EU Tax Centre Comment

This decision should be seen in the light of the comprehensive state aid investigation process the Commission intensified in December 2014 and is a significant step in their efforts to improve transparency and combat aggressive tax planning. Whether the rulings will ultimately be considered to constitute state aid will now depend on whether the decision is appealed. One of the key issues is the allocation of the profits generated through the sales in Europe between the Irish branches and their respective head offices. In the Commission's opinion, since neither head office had the operating capacity to handle and manage the distribution business, the sales profits should have been recorded with the Irish branches. On the contrary, the allocation foreseen by the rulings attributed most of the profits to the respective head offices, where they were not taxed. Interestingly, the Commission does leave the option open that the amount to be recovered can be reduced in case other jurisdictions were to require Apple to pay more taxes on the profits recorded by the two respective entities. This may cause lengthy transfer pricing discussions with other jurisdictions.

The recovery of state aid is a politically sensitive issue and this decision is likely to become yet another bone of contention in the already tense relations between the Commission and the US Department of the Treasury, especially following the publication, last week of a [white paper](#) on "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings", which strongly criticizes the approach adopted by the Commission in its earlier state aid decisions. This is especially the case as this decision constitutes the largest recovery claim in a direct taxation state aid case.

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