

Updated: DG Comp puts Apple on the hook for €13 billion

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Credit: iStock/PeskyMonkey

The European Commission today ordered Ireland to seek up to €13 billion in back taxes from technology company Apple, after finding that a pair of tax agreements that the US tech giant struck with the country's government breached EU state aid rules.

Competition commissioner Margrethe Vestager said in a press conference today that two sweetheart tax rulings endorsing the transfer of profits within Apple's group structure, which artificially lowered the tax that Apple paid in Ireland, amounted to illegal state aid.

These arrangements gave a selective advantage to the US-based tech company, which distorted competition and breached EU state aid rules, Vestager said, allowing Apple to pay substantially less tax than other businesses in the country.

The decision "sends a clear message" that the commission will not tolerate such illegal tax rulings, Vestager said.

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“Member states cannot give tax benefits to selected companies – this is illegal under EU state aid rules. The commission's investigation concluded that Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years,” she said.

“In fact, this selective treatment allowed Apple to pay an effective corporate tax rate of one per cent on its European profits in 2003 down to 0.005 per cent in 2014.”

Under the tax rulings, which were first agreed in 1991 and then updated in 2007, the profits accrued by two Apple entities in Ireland were attributed to both companies' head offices in order to avoid paying tax in Ireland. These head offices only existed on paper and were not subject to tax in any country under Ireland's tax laws.

These tax rulings endorsed the calculation and subsequent taxation of profits that did not reflect economic reality, the commission said in a statement. Apple avoided paying tax on almost all of the profits it accumulated in the EU, which were routed through its two Irish subsidiaries.

Both rulings were terminated in 2015 after Apple changed its group structure.

Ireland and Apple respond

In a statement responding to the decision, Irish finance minister Michael Noonan said Ireland's government would appeal against the decision within the next seventy days. He denied that state aid was provided, and said the full amount of tax was paid by Apple, which received no favourable treatment.

“I disagree profoundly with the commission's decision. Our tax system is founded on the strict application of the law, as enacted by the Oireachtas [Ireland's parliament], without exception,” he said.

“The decision leaves me with no choice but to seek cabinet approval to appeal the decision before the European courts. 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.”

Apple said in a statement that it planned to appeal the decision and it was confident it would be overturned.

“Apple follows the law and pays all of the taxes we owe wherever we operate,” the company said.

“The European Commission has launched an effort to rewrite Apple’s history in Europe, ignore Ireland’s tax laws and upend the international tax system in the process. The commission’s case is not about how much Apple pays in taxes, it’s about which government collects the money. It will have a profound and harmful effect on investment and job creation in Europe.”

The commission began investigating Apple in June 2014, the same day it launched similar probes into Fiat Chrysler and Starbucks; the enforcer [ordered](#) the Netherlands and Luxembourg to recover between €20 million and €30 million in unpaid tax from each company last year.

The Apple ruling concludes a long-running investigation, which fostered months of speculation about the size of any possible fine.

Today’s decision far exceeds the commission’s previous record state aid recovery order of €1.3 billion against EDF, and represents its largest-ever sanction across all areas of competition law. The Apple order is a suggested figure; it will be up to Ireland’s tax authority to calculate the exact level of back taxes that are to be collected.

Recovery

The commission said the total amount recoverable could be reduced if other member states investigate whether Apple should have paid more taxes in their jurisdictions during the time period covered by the decision.

“Other countries, in the EU or elsewhere, can look at our investigation,” Vestager said. “If they conclude that Apple should have recorded its sales in those countries instead of Ireland, they could require Apple to pay more tax locally. That would reduce the amount to be paid back to Ireland.”

Philipp Werner at Jones Day in Brussels said this aspect of the recovery methodology is novel and could be problematic in practice.

“I’ve not seen anything like this before,” he said, adding that there could be some practical problems in making the approach work. “According to the European Commission’s guidelines, a member state is obliged to recover state aid within four months. It is very difficult to see how Ireland could take into account taxes

levied by other countries in this time.”

The courts will eventually have to decide on this case, he said, but in the meantime the commission can be expected to follow the same line of argument in the upcoming Amazon and McDonald’s investigations, focusing on comparing multinational and domestic companies.

The decision comes a week after US Treasury secretary Jack Lew [criticised](#) the commission’s state aid tax investigations for unfairly targeting US companies. He described the commission’s tax probes as a “sweeping interpretation” of state aid doctrine, warning that it was wrong to seek retroactive tax recovery after departing from the status quo.

Responding to a question today about the US Treasury’s white paper, Vestager acknowledged that there may be issues where the US and the commission have a difference of opinion. However, she noted that ‘retroactivity’ suggests a changing of the rules – in this instance, no rules had been changed.

Baker Botts partner Georg Berrisch in Brussels said the ruling was expected, despite the US Treasury’s “very strong intervention”. The decision is unlikely to satisfy the US and will probably underline its impression that Brussels is disproportionately targeting US companies, he said.

“However, as regards state aid, this is not true as the commission [has] repeatedly ordered member states to recover large amounts of alleged illegal aid from European companies, including national champions,” he said.

“It raises several highly controversial issues that will be for the EU courts to decide. This litigation will take several years to resolve.”

The courts may examine whether the commission wrongly combined advantage and selectivity, which are separate under state aid case law, Berrisch said, and also consider whether the commission found that the tax ruling was selective only because it was available to international companies.

There is also a question as to whether the commission created legitimate expectations on the side of Apple by waiting more than 20 years before taking action, Berrisch said.

Jacques Derenne at Sheppard Mullin in Brussels said selectivity is something of a “weak point” for the commission.

“We have not seen, at least in the limited information in the press release, any reference to a detailed assessment of the selectivity criterion: how are other comparable companies treated in Ireland, and has Apple benefitted from a specific exception from the rules which could have been or are applicable to companies in a comparable legal and factual situation?” he said.

Without demonstrating a selective character, tax rulings cannot constitute state aid, even though it may have the effect of granting a clear advantage to the beneficiary, he said.






“The commission believes it can merely decide what the member state should have done in an ideal world to conclude the existence of a selective advantage, but does not outline the terms of comparison with other cases and does not try to show that the member state has departed from the applicable rules, which would be open to companies in a comparable legal and factual situation,” he said.

“For the test of selectivity to be met, the Commission should not compare what a Member State does with what it ideally should have done, but instead should compare what a Member State normally does with the specific situation of the company concerned.”

DG Comp continues to investigate similar deals agreed by Amazon and McDonald's in Luxembourg.

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