# Ruling of European Commission in Apple investigation

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**Summary**

Following an in-depth state aid investigation launched in June 2014, the European Commission (the “Commission”) has concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991.

The Commission has held that the rulings were a way to establish the taxable profits for two Irish incorporated companies of the Apple Group (Apple Sales International and Apple Operations Europe) in a way, which did not, in the Commission’s view, correspond to economic reality.

In the Commission’s view, this selective tax treatment of Apple in Ireland was illegal under EU state aid rules, because it gave Apple a significant advantage over other businesses falling within the charge to Irish tax. As the Commission can order recovery of illegal state aid for a ten-year period preceding the Commission's first request for information in 2013, Ireland has been informed it must now recover the unpaid taxes in Ireland from Apple for the years 2003 to 2014 of up to €13 billion, plus interest.

**What the decision of the Commission means**

The decision will have direct impacts for both Apple and Ireland. In the latter case, the Minister for Finance Mr Michael Noonan has already announced that he is seeking cabinet approval to lodge an appeal with the European Courts. The appeal must be made within 2 months and 10 days. He stated, in relation to the rationale for such an appeal,

“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”.

The Department of Finance, Ireland, is therefore highlighting that the decision of the Commission involves the Commission stepping outside the role appointed in the European Treaties to enforce competition rules and into an area (taxation policy) within Member State competence. This is a bedrock of the European Treaties and one which requires unanimous approval of Member States to change.

What is of particular note is that the Commission based its finding of selectivity (a key criterion in the determining the existence of State aid) on two tax rulings as opposed to a specific fiscal or legislative measure for the benefit of Apple.Tax rulings are, in essence, Revenue's non-binding opinion on the tax code, which it itself a measure of general application.The Commission's decision, if upheld, could undermine the Revenue practice of issuing tax rulings to companies.

The Commission decision has also, in the view of the Department of Finance, undermined the international consensus and is creating uncertainty for business and investment in Europe. The Apple CEO, Tim Cook, has echoed this latter comment by pointing to the retroactive nature of the Commission decision.

In relation to any appeal against the decision of the Commission, Ireland will be required to levy the alleged outstanding taxes (alleged illegal state aid) and hold the funds in escrow pending the decision of the European Courts.

The Department of Finance and Apple have both indicated confidence in their respective statements that the decision will be overturned on appeal. This would appear to be a sustainable view in light of the basis for the decision of the Commission.

What the Decision of the Commission does not mean

In relation to the reporting of the decision in media, much has been made of the low Irish corporation tax rate and the impact of the decision on Irish tax policy.

Whilst this might be viewed as the upshot of the decision, it is incorrect. The Commission confirms in its statement,

'This decision does not call into question Ireland's general tax system or its corporate tax rate.'

This is an acknowledgement of the legal position in that taxation policy is and remains a Member State competence.

Unusually, given that the investigation concerned alleged state aid by Ireland to Apple, the Commission felt the need in its press release to highlight the fact that the arrangements put in place by Apple ‘enabled Apple to avoid taxation on almost all profits generated by sales of Apple products in the entire EU Single Market.’ It also included a background section to its press release making reference to the Commission pursuing a ‘far-reaching strategy towards fair taxation and greater transparency’. This of course is not a relevant concern in a state aid investigation and (inadvertently or otherwise) highlights the real issue underpinning the investigation. State aid investigations should address issues of unfair competition that arises from state support and not issues concerning matters of taxation policy.

Indeed, this point is made by the Commission in its own statement where it states,

‘Furthermore, Apple's tax structure in Europe as such, and whether profits could have been recorded in the countries where the sales effectively took place, are not issues covered by EU state aid rules.’

The decision should not therefore be viewed as impacting on Irish taxation policy or the corporation tax regime in force in Ireland.

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