

The release this week by the European Commission (EC) of its decision in the high-profile European Union (EU) State aid case against Apple has shocked many around the world, especially those outside the EU, despite indications for months that this ruling would involve a significant tax assessment. The magnitude of the judgment – an astonishingly high US\$14.5 billion (EUR 13B), plus interest – has created a seismic wave of uncertainty for taxpayers investing into the EU who have, for years, felt they knew what their tax outcomes would be.

EC Decision

The EC has made targeted efforts in connection with State aid cases since 2013, which is the year in which Apple was first notified of the EC's investigations. On August 30, the EC released a detailed press release describing its decision that Apple had received an unfair advantage over other businesses by the terms of its Irish tax rulings. As the EC is only permitted to order recovery of illegal State aid for the 10 years preceding the date of first inquiry, the EC found that, from 2003 to 2013, Apple had been given preferential State aid in the form of its tax rulings from Ireland.

The press release highlights the facts contributing to what the EC perceives to be a lack of economic substance, but is largely silent regarding how preferential treatment was provided to Apple over other companies. The EC's mandate is to ensure equal treatment of taxpayers by EU members such that no preferential treatment is provided and competition remains fair. Because the press release emphasizes substantive tax issues, like "economic substance" rather than elements of preferential treatment, there is concern the EC might be substituting its tax policy judgment for that of a member state. This could threaten EU members' ability to use tax policy as an instrument to grow their local economies by attracting investment.

We will have to wait until the full 130-page report detailing the decision in the Apple case is released by the EC in order to better understand the analysis. In the meantime, we can only assume that the EC considered the size of the judgment in light of Apple's strong financial position.

Reactions by Ireland and the US

Ireland

Operating in Ireland since the 1980s, Apple has hired a significant number of employees over the years. At current count, Apple reportedly has approximately 6,000 employees who are contributing to the Irish economy, and they have recently made a commitment to hire even more employees in Ireland. Apple is just one of many companies that have established substantive operations in Ireland and helped to build a thriving local economy.

Ireland offers a 12.5% corporate tax rate for any company generating trading profits in Ireland. Previously, Ireland also offered the ability to further reduce this 12.5% rate by structuring involving a non-Irish resident entity, perhaps to less than 1%. As noted above, the EC's press release did not provide support for its position that Apple was treated differently than other similarly-situated companies. Accordingly, Ireland's government is adamant that it has not treated Apple differently than other companies establishing operations in Ireland. Michael Noonan, Ireland's Minister of Finance, has said that he will seek the Irish government's approval to appeal this ruling. The Irish government feels that defending itself as a stable choice for substantive investment is crucial to its continued economic success. The matter is far from certain, however, as there is already talk of using this unexpected tax revenue to fill some of Ireland's financial holes.

The US

The US continues to maintain its position that the EU State aid cases are unfairly targeting US multinationals. This complaint stems from the fact that a large number of the multinationals under investigation by the EC are US companies and, not surprisingly, the companies are all household names. One interpretation of events is that the EC may believe that painting these well-known companies as not paying their fair share of tax will convince the general public that tax reform is needed in many jurisdictions in order to get back to a level playing field where profits are taxed at similar rates and no country has an economic advantage simply because it is offering a low tax rate.

In advance of the EC's decision, the US Treasury, in an unprecedented move, released a 26-page [whitepaper](#) outlining its concerns about the potential impact of the ruling. It is not surprising that US policymakers were swift to react to the EC's finding that Apple had received State aid in the form of its Irish tax ruling. According to the US Treasury, "[w]e believe that retroactive tax assessments by the Commission are unfair, contrary to well-established legal principles, and call into question the tax rules of individual Member States... The Commission's actions could threaten to undermine foreign investment, the business climate in Europe, and the important spirit of economic partnership between the U.S. and the EU."

Despite being away from Washington, DC for summer recess, US lawmakers from both parties and both Chambers of Congress were also critical of the EC in the wake of its most-recent decision. On the Senate side, current Senate Finance Committee Chairman Orrin Hatch (R-UT) criticized the ruling as "unfair," while Senator Chuck Schumer (D-NY), who is expected to lead the Democratic caucus next Congress, expressed frustration that the EC was

making a “cheap money grab” of “tax revenues that should go toward investment [] in the United States.” In fact, prior to the EC’s decision, and in a rare showing of bipartisan unity, Senators Hatch, Schumer, Ron Wyden (D-OR), and Rob Portman (R-OH) sent multiple letters to US Treasury Secretary Jack Lew urging the US to respond appropriately to the EU State aid cases.

On the House side of the US Congress, House Ways and Means Committee Chairman Kevin Brady (R-TX) called the EC’s decision a “predatory and naked tax grab,” and used the ruling as another opportunity to call for reforms to the US tax Code, which he said is driving businesses to keep profits offshore. Chairman Brady specifically called for action on the House Republicans’ tax reform “Blueprint,” which sets out the GOP’s vision for tax reform.

To be sure, the EC’s decision in the Apple case will serve as yet another reminder to US policymakers that tax reform is needed. Until now, US tax policymakers have assumed those offshore profits would eventually be taxed in the US. This State aid ruling is the latest reminder that such an assumption might not be reasonable. While comprehensive tax reform is clearly the most effective way to achieve this, such reform still faces many obstacles. As such, the US government is examining various responses – including the potential to use section 891 of the US tax Code, which allows the President to double US taxes on individuals and corporations from countries that are deemed to have subjected US citizens and companies to “discriminatory or extraterritorial taxes.” Taking this route, however, also presents potential complications, including a tax war with the EU – something the US clearly wants to avoid. From a legislative perspective, it is rumored that one leading Congressional tax-writer may actually soon release legislation aimed at combatting EU State aid cases.

Though exactly what policy solution the US will turn to in the short term remains unclear, it is certain that the EC’s decision in the Apple case – and others that may follow – will not go unanswered.

Process of Collection and Appeal

Now that the EC has determined that Apple was the recipient of unlawful State aid, Ireland has an obligation to begin recovery efforts of the US\$14.5 billion assessment, plus interest, even if Ireland decides to appeal the decision. During the appeal, any amounts recovered would be held in escrow pending the outcome of the appeal process.

Conclusion

In addition to triggering a potential US\$14.5 billion tax bill for Apple, this latest EU State aid ruling may further erode confidence in the robustness and stability of each EU member state’s system of tax administration, including specifically well-established tax rulings and clearances. Reversing established tax rulings on which a taxpayer has relied for all of its global tax filings, and presumably also its financial statements, might not only give pause to those seeking such rulings, but may also affect how multinational enterprises view the EU as a whole when planning for global expansion. Squire Patton Boggs can assist companies as they begin to think about how this decision will impact their own operations and planning in light of the current and anticipated regulatory and legislative responses of policymakers worldwide.

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