

The Apple Case

BRIEFING

What is State aid law?

State aid law prohibits countries in Europe from giving businesses selective advantages that distort competition in the EU Single Market.

All of the criteria of Article 107 TFEU must be proven in order for there to be State aid: being a measure (i) “granted by a Member State or through State resources”; (ii) giving an advantage (or “aid”) that is selective (ie, that favours “certain undertakings or the production of certain goods”); (iii) which “distorts or threatens to distort competition”; and (iv) “affects trade between Member States”.¹

How does it apply to tax measures?

Direct taxation remains within the competence of the EU Member States.² Member States retain the right to set the manner (eg, taxes on profits, property taxes etc.) by which, and extent to which (eg, taxable proportion of profits), direct taxation applies to corporations, so long as the national methods comply with State aid laws. This limitation on the Member States’ competence to set direct taxation rules has been upheld by the CJEU.³

While the Apple case certainly raises novel issues, fiscal State aid has been recognised by the European Courts since the 1970s,

when the ECJ determined that tax measures designed to prop up specific industries in a country breached State aid law.⁴ The European Commission issued a notice in 1998 on the application of State aid law to direct business taxation. However, since then the principles established in case law and the Commission’s practice on fiscal State aid have developed considerably in their complexity.

As outlined above, the European Courts have identified several criteria necessary to prove the existence of State aid. In fiscal State aid cases most of the criteria of State aid can be reasonably swiftly proven by the European Commission: Foregoing tax is easily attributed to the relevant Member State; underpayment of tax provides a windfall which gives an advantage; this advantage threatens to distort competition; and, if reasonably significant in size, can be said to have an effect on trade between Member States.

The final criterion, “selectivity”, is the most contentious criterion and the likely battleground for an appeal by Ireland or Apple. A key issue will be whether Apple’s subsidiaries’ tax arrangements were selective – ie, whether they would have been available to others in a comparable situation.

THE LAWYER
European Awards 2016

Law firm of the year
- Republic of Ireland

★★★★★

Winner

1 C-280/00 *Altmark Trans*, paragraph 74. Article 107 Treaty on the Functioning of the European Union.
2 Article 115 TFEU and T-211/04 and T-215/04 *Gibraltar v Commission*, paragraph 146.
3 C-106/09 *Commission v Gibraltar*, paragraph 104 and C-524/04 *Thin Cap Group Litigation*, paragraph 25
4 173/73 *Italy v Commission* [1974] ECR 709, para 13

The Apple Case

(continued)

What is “selectivity”?

Any derogation from the normal tax rules that “does not apply generally to all relevant undertakings in a Member State” may be selective.⁵ The “relevant undertakings” are those in a “legal and factual situation that is comparable in the light of the objective pursued by the measure in question”.⁶

In all of its preliminary decisions (and all publicly available final decisions) in the current contentious fiscal aid investigations (Fiat, Starbucks, Amazon, McDonalds, Belgian Excess Profits Scheme and Apple), the Commission has relied heavily on two leading European Court judgments relevant to State aid and tax planning matters, C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* and C-106/09 *Commission v Gibraltar* (particularly the former), to validate that its current approach is not novel. However, very few other cases are referred to and these two cases are analogous rather than directly comparable to the matters under consideration in the recent investigations. This in part explains the US Treasury’s claim that “the Commission’s approach is a new approach and departs from prior EU case law.”

Important recent decisions on fiscal selectivity are the decisions of the General Court (under appeal by the European Commission) in the *World Duty Free Group* and *Banco Santander* cases. In those cases, the General Court determined that where a measure is *a priori* available to all relevant undertakings meeting relevant criteria, it will not be selective. It remains to be seen whether the ECJ, to which the Commission has appealed the General Court’s verdict, will agree. An advisor to the Court, Advocate General Wathelet has delivered an opinion which supports the Commission’s view of selectivity.

What will happen now?

For businesses in Ireland, other than Apple, this does not change anything. As the European Commission has stated, the “decision does not call into question Ireland’s general tax system or its corporate tax rate.”⁷

The “up to €13 billion” which the European Commission has ordered Ireland to recover from Apple must be recovered now, even where Ireland and/or Apple appeal the decision. It appears that Ireland will put the money in an escrow account pending outcome of the lengthy appeals process, as Commissioner Vestager has suggested. However, even before this is paid, the exact amount will have to be calculated, with input from the Revenue Commissioners and the European Commission, with a final determination likely to take several months.

Even then, other countries (including the United States) have been invited by Commissioner Vestager to claim some of the billions for themselves, saying “if [other countries] conclude that Apple should have recorded those 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.”⁸

Appeal against the Commission’s decision is almost certain. Apple’s Tim Cook’s response is clear – the decision is legally indefensible. Apple (as a legal person to whom the decision is of direct and individual concern) has the right to appeal the decision and has indicated it will do so. Ireland’s minority government has decided Ireland will also appeal and a motion supporting the decision to appeal was passed by the majority of the Irish parliament’s lower house (93 in favour, 36 against). The Irish Department of Finance

5 Conor Quigley, *European State Aid Law*, page 41, citing Case C-143/99, *Adria-Wien Pipeline*, [2001] ECR, I-8365, para 35.

6 Case C-143/99, *Adria-Wien Pipeline*, [2001] ECR, I-8365, para 41.

7 European Commission Press Release, 30 August 2016.

8 *Ibid*

The Apple Case (continued)

provided an explanatory memorandum to the representatives before the vote, setting out relevant facts and the government's position on the Commission's decision ([available here](#)).

Appeals must be lodged within 2 months and 10 days of publication of the decision or of its notification to the parties.⁹ The decision will probably not be published for four to eight months (based on recent fiscal State aid cases).

Based on recent experience, an initial appeal to the EU's General Court is likely to take two to three years to be decided. If this appeal is successful, the European Commission will almost certainly appeal to the Court of Justice of the European Union, which would likely take a further two years to make a final ruling on the matter.

⁹ Article 263 TFEU and Article 101 of the Rules of Procedure of the General Court of the European Union.

Further information is available from:



Philip Andrews

*Partner, Head of Competition,
Regulated Markets & EU Law*

DDI: +353 1 611 9143

EMAIL: philip.andrews@mccannfitzgerald.com



Michael Ryan

Head of Tax

DDI: +353 1 611 9130

EMAIL: michael.ryan@mccannfitzgerald.com

Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.

Principal Office Riverside One, Sir John Rogerson's Quay, Dublin 2, D02 X576
Tel: +353-1-829 0000

London Tower 42, Level 38C, 25 Old Broad Street, London EC2N 1HQ
Tel: +44-20-7621 1000

New York Tower 45, 120 West 45th Street, 19th Floor, New York, NY 10036
Tel: +1-646-952 6001

Brussels 40 Square de Meeûs, 1000 Brussels
Tel: +32-2-740 0370