



## Apple – Time for Calm Reflection – Consider the Facts

As Ireland and taxpayers in many other jurisdictions come to grips with the Commission's decision on alleged State aid to Apple, a lot of misleading information and ill-informed opinion has informed the discourse - some commentators over the weekend totally lost the plot in terms of making exaggerated statements - and as a consequence this has heightened the issue politically.

I will try to give a somewhat different perspective that I hope will put the Commission's decision into a better context. As I have dealt with State aid issues for over 30 years (see chapter 6 of my book [Behind Closed Doors: the EU Negotiations that Shaped Modern Ireland](#)), I will set out facts and leave it to others to pass judgement.

While a definitive assessment, if any, cannot be made until the redacted text of the 150 page Commission's decision is to hand, I draw attention to a [letter dated 11 June 2014](#) sent by the Commission to the Irish Government that sets out the grounds for the investigation.

The first assertion is that the Commission has acted *ultra vires* i.e. its investigation has gone beyond its regulatory powers. Not so. The Commission has had core competence under the EU Treaties (since the 1951 European Coal and Steel Treaty) and EU Regulations to investigate alleged breaches of State aid that confer a competitive advantage on one or more undertakings. There have been [400 State aid cases involving Ireland](#) since 2000 and 225 cases involving tax advantages across the EU. Many of the Irish cases involved situations where a tax advantage was given to a particular sector (stallion fees, film industry, IFSC rates reliefs, tax reliefs for investment in renewable energy etc.), or to an undertaking (excise duty relief to Aughinish Alumina, R&D grants to Bell Laboratories and grant aid to Centocor). In many cases State aid was deemed compatible with the principles of the single market.

There is also a sense that Ireland has been singled out for attention. Not so. Since 2013, the Commission has been investigating the tax ruling practices of all Member States and has done so with the express approval of Ireland. For instance, in October 2015, the Commission concluded that [Luxembourg](#) and the [Netherlands](#) had granted selected tax advantages to Fiat and Starbucks, respectively. In January, 2016, the Commission concluded that selective tax advantages granted by [Belgium](#) to at least 35 multinationals, mainly from the EU, under its 'excess profit' tax scheme were illegal under State aid rules and that €700m in taxes should be recovered. The Commission is also investigating two Luxembourg cases involving Amazon and McDonalds.

There is also the argument that the Commission should not apply retrospective rules as this would affect multinationals' investment decisions. Not so. Article 15 of [EU Regulation No 659/1999](#) on the procedural rules involving State aid gives the Commission powers to seek the recovery of State aid over a period of ten years, which in this case begins ten years prior to 2013 i.e. when the Commission first requested information from the Irish Government. The collection of retrospective illegal State aid has been around for several decades. One could be forgiven for thinking it applies in the Apple case only.

The Government argues there is a concerted effort to force Ireland to increase the current rate of corporation tax. Not so; unless Ireland wants to make such a link. There is a huge difference between alleged corporate tax avoidance and the setting of Ireland's headline rate of corporation tax. These issues should be dealt with quite separately otherwise multinationals may get an impression that the two are somehow linked. To give assurance to inward investors the Government might be mindful to publish the letter - a ruling - it received from the Commission in December 1997 that clearly indicated that Ireland's single rate of corporate tax was a general measure under EU State aid rules and is therefore entirely legal and consistent with EU competition policy. When I showed this letter to the head of taxation of one of the world's largest corporations he described the Commission's approval as 'gold dust' in the hands of IDA Ireland. In reality, Ireland could reduce its standard rate of corporate taxation provided it applies to all sectors of the economy. It is deeply worrying that Ireland still feels insecure about the 'threat' to the 12.5% rate. If the Government had courage it should drop the rate forthwith to 10%. If the Germans and the French complain they might be asked when they intend to abolish the €53 billion in [subsidies](#) (including €18 billion in tax reliefs) they give to their indigenous companies every year. We have the comfort that changes in EU tax policy require unanimity.

There is also a degree of surprise that the Commission chose to issue the Apple decision in a rushed and ill-considered manner. Not so. Ireland and other Member States agreed in October 2015 to exchange information on tax rulings and to deter from using tax rulings as an instrument of tax abuse. It is reported that some 1,000 rulings from 23 Member States have been identified. In addition, on the basis of [proposals](#) from the Commission, Ireland has signed up to a series of EU measures to tackle the most prevalent loopholes in national laws that allow corporate tax avoidance to take place and to the principle that all companies must pay tax where they make their profits. [ECOFIN Ministers' conclusions](#) on 25 May 2016 on aggressive tax planning are a clear statement of policy intent. All this builds on the 1997 Code of Conduct for business taxation promoted by the Irish Presidency of the day. How come nobody in Government has highlighted these political commitments on tax avoidance that Ireland is party to?

Several politicians have spoken in alarmist terms about the Commission's decision being a serious encroachment of Ireland's sovereignty. Sovereign Ireland gave the Commission the legal powers it is using. The people voted for the Treaties the Commission relies upon for its actions. Sovereign Ireland should rebut the economic and legal arguments made on the basis of evidence and not rhetoric. Shooting the messenger displays an acute lack of understanding of the Commission's role.

So Ireland intends to challenge the Commission's decision before the European Court of Justice. It will be interesting to see the grounds of the appeal. Appeals to the ECJ should be considered and detailed and they take time to prepare. The Belgian Government's appeal was not made until nearly two months after the Commission's decision was published. Ireland has had an opportunity to submit observations on the Belgian and other appeals and it would be useful in the context of the current furore over Apple to have sight of these documents.

In its June 2014 communication to the Irish Government, the Commission made some critical evidenced-based statements that should be the focus of what has now become a high profile appeal. For example, it is contested by the Commission that Revenue's two rulings (of 1991 and 2007) were selective i.e. only Apple got rulings that had the effect of reducing its Irish and global tax liability. The Government will have to swear evidence before the ECJ that only Apple got a ruling about the treatment of its profits. Imagine the (additional) reputational damage to Ireland if further instances of Revenue rulings conferring tax advantages came to light. In addition, Ireland will have to prove that the two rulings were derived from specific provisions of the Finance Acts. The sections concerned have yet to be identified by Government.

The Commission makes the point that Revenue negotiated its rulings based on proposals submitted by Apple and did not base them on a pre-determined economic methodology and, in fact, an arbitrary mark-up attributable to manufacturing activity only was covered. Furthermore the Commission is firmly of the opinion that the rulings run counter to the (non-binding) OECD's (2010) Transfer Pricing Guidelines that deal with the arm's length pricing of transactions and profit allocation between companies of the same corporate group. This is a critical legal issue as the ECJ has already ruled that intra-group transfers not complying with the arm's length principle can provide a selective advantage to the company concerned.

The Government will also have to prove and demonstrate that the rulings did not give Apple's competitors an advantage and that the Commission failed to satisfy the rules required to determine when a State aid is present. What would happen if one of Apple's competitors gave evidence to the contrary? Is it not strange that we still do not know who complained to the Commission about Apple's tax arrangements?

What next? Under EU State aid rules (Article 14 of EU Regulation No 659/1999) Ireland has no option and must recover the aid from Apple plus interest. As the Commission made clear in its decision it is a matter for Ireland to find out from the tax authorities in other jurisdictions if they have a claim to part of the €13 billion. In addition, Ireland needs to calculate how much of this pre-2014 quantum represents tax due to the Irish Exchequer, not least because the Commission has confirmed that such a windfall gain can be spent on productive investment. Finally, as Ireland proceeds with an appeal (as it should do), the precedent cases involving Belgium, Luxembourg and the Netherlands should be assessed. In fact, the ECJ is likely to decide on these cases before it rules on Ireland's appeal. A clear cut ruling is important for the credibility of Ireland's FDI effort.

Apple set aside a significant provision in its [accounts](#) in anticipation of the Commission's decision. This suggests that the company (but not the Irish Government) anticipated a negative ruling on State aid and had planned for this eventuality.

Another apple dilemma happened in 1307 when William Tell shot an apple placed on his son's head with a cross-bow bolt and in so doing saved their lives. What sort of instrument will be needed to save the Government's political life if the ECJ appeal fails (or is not fully upheld) and Irish taxpayers are deprived of windfall tax payments for many years as a consequence.

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