

Beyond \$15B: What's At Stake In The Apple Irish Tax Appeal

By **Joyce Beebe** (September 13, 2019, 1:43 PM EDT)

On Sept. 17 and 18, the European Union's General Court[1] will hear Ireland's appeal[2] to a 2016 European Commission decision,[3] which concluded that Ireland unlawfully issued two favorable tax rulings for Apple Inc. in 1991 and 2007. The EC argues that because the rulings gave Apple selective tax advantages using state resources, they distorted competition and therefore constituted illegal state aid.



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This has been a high-profile case since the moment the EC released its decision, in which Ireland was ordered to recover a whopping €14.3 billion (\$15.7 billion)[4] in taxes and interest from Apple, the highest assessment in history. To put the size in perspective, Ireland's 2017 corporate income tax revenue[5] was €8.1 billion, so this back tax would be almost double the country's annual corporate income tax revenue. Considering that Ireland was bailed out[6] by a €67.5 billion E.U.-International Monetary Fund loan package during its financial crisis in 2010 and still owes €44.5 billion of the bailout loans, the €14.3 billion will constitute a significant amount of repayment.

It is predictable that Apple will strongly dispute the decision; however, the seemingly counterintuitive fact is that Ireland claimed Apple does not owe the country any money, so it does not want the back taxes that the EC ordered Apple to pay. As a result, both Ireland and Apple immediately vowed to appeal the case, claiming unfair and biased treatment by the EC; the formal complaint was filed with EU's General Court within three months of the original decision.

Both the Obama[7] and Trump[8] administrations strongly disagreed with the EC's decision. After Ireland appealed to the EU's General Court, the U.S. government filed an application to assist Apple in defending its case in court. However, the General Court denied the petition[9] on the basis that the U.S. has no direct interest in the state aid case and therefore does not need to participate. This decision further infuriated the U.S. government and increased tension between the U.S. and the EU.

In Ireland's appeal document, the government reiterated its position that its rulings did not depart from domestic laws, and the EC overreached its authority by using its own tax interpretations instead of those of the Irish tax authority and legislature. Specifically, the EC invoked the arm's length principle, a general principle in the Organization for Economic Cooperation and Development's guidelines about allocating profits to a branch of a nonresident company, to conclude that Ireland provided illegal state aid to Apple in the form of tax incentives.

However, the arm's length principle was not part of Irish law at the time of the tax rulings. Furthermore, the OECD guidelines that the EC referenced were not formally published until 2010, and the Irish government could not have foreseen these rules in 1991 and 2007.

Although predicting the results of this case is impossible, Ireland is not alone in the EC's recent focus on state aid. Last summer, the General Court heard[10] tax incentive cases for Luxembourg and Netherlands, in which the countries allegedly provided favorable tax rulings to Fiat Chrysler Automobiles NV and Starbucks Corp., respectively. The decisions are expected before the end of this year. The EC also assessed tax underpayment of €350 million and €120 million for Luxembourg's unlawful tax incentives to Amazon Inc. and Engie, and the appeals are in line for General Court

hearings.

Some observers note it has been rare for the EU General Court to overturn the EC's decisions; however, this pattern is changing. In February, Belgium^[11] won the appeal to overturn a 2016 EC decision that requested the country recover €700 million from 35 companies. The EC claimed the Belgian tax authority simply adopted a technical application approach in granting rulings without performing a qualitative and quantitative assessment on a case-by-case basis. These rulings therefore collectively constitute a systematic state aid scheme.

The General Court disagreed and indicated that the Belgian government exercised its discretion over the essential elements of the 35 cases in determining the amount of profit that was subject to the preferential tax treatment; the court therefore did not consider the tax incentives to be a systemic scheme. In June 2019, the General Court also overturned the EC's decision against Hungary,^[12] stating that the EC failed to show the Hungarian tax was discriminatory against other competitors.

Although the technical merits of each case are different, several appeal documents raise two concerns: the EC is intervening on an aspect of taxation that is typically within the power of member countries under EU treaties, and the EC is imposing certain value judgements that are not inherent in local country laws. The most important implications of the Apple case, as well as the forthcoming rulings involving Amazon and Starbucks, are how much discretion^[13] a member country has in granting tax incentives, and how far can a country go to attract nonresident companies without violating competition agreements.

In all ongoing state aid investigations, the EC will need to strike a delicate balance. On the one hand, it is critical to maintain fair competition and avoid providing large companies with unfair advantages over smaller rivals. On the other hand, as seen in recent situations such as Brexit^[14] and the U.S. trade dispute with China,^[15] businesses do migrate in the face of tax and regulatory uncertainty. If the pendulum shifts too far away from letting countries decide what tax rulings are acceptable within their own territories, it may also harm their competitiveness.

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