



# Euro Tax Flash from KPMG's EU Tax Centre



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## **EU Commission: Final decision on Irish State aid to Apple published**

### **State aid — Tax rulings — Ireland**

On December 19, 2016, the European Commission published its final decision on its State aid investigations into transfer pricing rulings granted by Ireland to the Apple group. Although the decision was announced on August 30, 2016 (see the Commission's [Press Release](#)), publication was deferred (as is normal in such proceedings), in order to allow any confidentiality issues to be resolved.

The decision ([C\(2016\) 5605 final](#)) confirms the outcome of the Commission's opening decision of June 11, 2014, that the rulings in question constituted illegal State aid (see [ETF 233](#)). The State aid which was estimated by the Commission in its August announcement at up to €13 billion must be recovered (with interest) by the Irish authorities from the Apple group. The decision is understood to have been appealed both by Apple and Ireland.

### **Background**

The decision follows a two year investigation, further to the announcement by the Commission of its decision to open the State aid procedure in June 2014. Similar investigations have been launched in respect of possible State aid granted by the Netherlands and Luxembourg to other multinational companies. In December 2014, the Commission had ordered all Member States to list all the tax rulings issued since January 1, 2010, and in June 2015 requested 15 Member States to provide detailed information on some of their rulings. The investigations into tax rulings (primarily APAs) is one of several EU initiatives in the areas of tax transparency and tackling harmful tax competition between Member States and tax avoidance.

The Commission is required by EU law to review State aid granted by

Member States and, if it finds that the aid is incompatible with the internal market, to order the Member State concerned not to put it into effect, or to abolish or alter it, and order the beneficiary to repay such aid within a prescribed timeframe. Broadly speaking, aid is in principle incompatible with EU law if it distorts competition by, for example, providing an 'advantage', such as a tax reduction that would not normally have been available, favoring certain undertakings, i.e. is 'selective', thus affecting trade between Member States. Such aid must be recovered by the Member State in question from its beneficiary.

The case itself concerns two companies belonging to the Apple group that were considered by the Irish tax authorities as not resident in Ireland but carried on business through their respective branches in Ireland. The Commission challenged rulings granted by the Irish tax authorities to the two companies that endorsed a way of determining the profits of the two branches for Irish tax purposes.

### **The Decision**

The Commission concluded that the tax rulings resulted in a 'selective advantage' being granted to the companies involved. This conclusion was based on their opinion that the rulings endorsed methods for allocating profits to the Irish branches that 'depart from a market-based outcome in line with the arm's length principle' and result in a lowering of the companies' tax base when compared either with other companies that do not belong to a group, or, alternatively, with other non-resident companies operating through an Irish branch. The Commission argues that this resulted in a reduction of taxable profits in Ireland that constituted a 'selective advantage'. On the basis of this and its other findings, the Commission concluded that the rulings constituted State aid that is incompatible with EU law.

In its decision the Commission addressed, but dismissed, claims that it had infringed the right of Apple and Ireland to be heard since the focus of the investigation had allegedly changed since the opening decision. The Commission also addressed allegations that the decision violated EU principles of legal certainty and legitimate expectations so that the aid should not be recovered. These claims were also not founded, according to the Commission.

### **Comments from interested parties**

The final decision includes comments from interested parties, including Apple and Ireland. The comments refer both to the opening decision as well as the final decision. These include challenges to the Commission's legal and technical analysis, such as the interpretation of the State aid concepts of 'advantage' and 'selectivity'.

### **Next steps**

The Commission's decision requires Ireland to recover from Apple the aid granted in the 10 years before the start of its investigation in June 2013. While the Commission had estimated the total amount to be up to €13 billion (plus interest) when it announced the decision in August, in its published decision it confined itself to declaring that there was an obligation to repay, and left it to the Irish authorities to calculate the exact amount. The Commission does indicate that the starting point should be that all the profits of the two companies should be allocated to the Irish branches, but that certain deductions may be made, including where these result from restatements of financial accounts or tax returns as allowed under the applicable Irish rules.

Both Apple and the Commission are understood to have filed appeals before the General Court of the CJEU seeking annulment of the Commission's decision. Such appeals do not however suspend the recovery payment. Whether the rulings will ultimately be considered to constitute State aid will now depend on the outcome of the current appeals, and possibly subsequent appeals before the CJEU itself. How long that will take remains to be seen, but it is likely to be a question of years rather than months.

## **EU Tax Centre comment**

### **State aid is just part of a bigger picture**

This decision should be seen in the light of the comprehensive State aid investigation process the Commission intensified in December 2014 as well as its efforts to improve transparency and combat aggressive tax

planning. However, there has been significant criticism of the Commission's use of the State aid rules in this area, as opposed to relying on the EU political and legislative process to regulate such matters.

#### **This case could have implications for other State aid cases**

One aspect of the decision that is of general relevance for State aid cases is the question whether the key State aid concepts of 'advantage' and 'selectivity' should always be separately demonstrated. The Commission takes the position in its decision, based on case law of the CJEU, that where a case involves aid granted to individual taxpayers (as opposed to aid constituted by a 'scheme') the identification of an economic advantage is in principle sufficient to support the presumption that it is selective. Whether this position is correct will ultimately be decided under the appeals.

#### **What should companies be doing now?**

The recovery of State aid is a politically sensitive issue and this has been more than demonstrated by the level of public and media attention that this case has given rise to as well as the negative reactions from the United States. This reflects the potentially significant commercial and financial impact a successful challenge can have on companies carrying on business in the EU. This calls for careful monitoring going forward of corporate tax arrangements, such as those covered by cross-border tax rulings, but action may also be required for existing arrangements. A typical approach involves the following three steps:

- Assessing potential exposure to State aid claims
- Taking remedial action to mitigate the impact of such claims
- Considering grounds for defending such claims

At a practical level, we are seeing a particular focus on issues such as the following:

- Reviewing and renewing transfer pricing rulings
- Reviewing arrangements covered by tax incentive regimes
- Assessing implications for financial statements
- Analyzing implications of successful claims, such as deductibility or creditability of recovered aid

In light of this and the other State aid cases initiated by the Commission in this area, the main message is that State aid will continue to be a major issue until some of the key issues are resolved in the courts: doing nothing in the meantime does not seem a viable option.

Should you have any questions, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.

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