
Oireachtas Joint Committee on Finance, Public
Expenditure and Reform and Taoiseach

*“EU State Aid Rules – investigation into preferential tax
rulings involving Apple Inc in Ireland published by the
European Commission on 30 August”*

2 February 2017

Opening Statement by the Minister for Finance, Michael
Noonan, TD

Introduction and parameters

I would like to thank the committee for inviting me to attend today to discuss this important issue.

The topic of today’s discussion is the subject of on-going litigation before the European Courts involving the State, Apple and the European Commission. As a result, I am required to fully respect the constraints placed on me by both Irish and EU law as regards public discussions on open legal proceedings.

This means that I will not be able to engage in a substantive discussion on material that relates to either the investigation or the legal appeal. This includes, though is not restricted, to:

- The State’s annulment application;
- The Opening Decision;
- The Final Decision;

- Any documents and exchanges with the Commission during the investigation; and
- Any underlying facts with which the investigation was concerned.

The committee will also be aware that these matters also refer to the private and commercially sensitive business operations of an identified taxpayer, namely Apple. It is important to give due account to this today also.

That said, I am conscious of the importance of the work of the committee and trust that the members will take full account of the legal parameters that underpin my ability to speak today.

Investigation Recap

Over the past number of years, the Competition Directorate of the European Commission has been gathering information from all Member States on tax rulings. So far, it has examined over 1,000 rulings across Europe.

Ireland has always complied with such requests – which are issued on an ongoing basis to all Member States – and we will continue to do so as we believe we have nothing to hide.

Aside from Apple, no other State aid cases have been opened against Ireland and the Commission has not indicated that any further State aid investigations will be initiated in respect of Ireland.

The European Commission's Final Decision in the Apple case marked the end of a three year process.

The Commission first wrote to Ireland in June 2013 asking for information on the practice of tax rulings in Ireland and in particular, they requested information on any rulings granted in favour of Apple.

The process was later formalised as a full investigation into the dealings between the State and Apple in June 2014.

Ireland co-operated fully with the Commission's inquiries. Over the course of those three years, detailed and comprehensive responses were provided to the Commission demonstrating Ireland's view that:

- the appropriate amount of Irish tax was charged;
- no selective advantage was given; and
- there was no State Aid.

Commission's Decision

In August 2016, the Commission announced that the Apple investigation was concluded and that they had reached a negative Decision.

At the same time, the Commission privately sent a detailed and technical legal document to the State, setting out the analysis that underpinned their conclusion.

This was later published in December 2016 and the committee will have seen that the Commission has three distinct and indeed contradictory baseis for the negative conclusion:

1. Their “primary” line of reasoning is that Ireland should have taxed all the world-wide profits of the two non-resident companies. This is the heart of the Final Decision and the basis for the enormous recovery amount estimated publically by the Commission.
2. The second and “subsidiary” line of reasoning is that the Irish branches of the companies should have paid more Irish tax than they did on the basis of a different transfer pricing methodology.
This is only referred to in outline in the Final Decision and the Commission have not specified a basis for calculating the recovery amount on this basis, although it would likely be significantly smaller than under the primary line of reasoning.
3. The third “alternative” line of reasoning is that the Irish legislation allowed the Revenue Commissioners to exercise discretion which conferred a selective advantage on Apple.
This is also only referred to in the Final Decision and the Commission have not specified a basis for calculating the recovery amount on this basis.

Appeal

In September the Government decided to appeal the Commission Decision to the European Courts.

This is necessary:

- to defend the integrity of our tax system;
- to provide tax certainty to business; and

- to challenge the encroachment of EU state aid rules into the sovereign Member State competence of taxation.

As I have already explained, I am mindful of the need to avoid cutting across Ireland's legal case in my contribution here today. In the interest of being as transparent as possible, in December my Department published a summary of the legal pleas we have lodged in this case which also explains what each plea means. I therefore do not propose to repeat those here today or expand upon these points and will leave them to be debated before the courts.

That said, I feel it is important that I outline, in high-level terms, what I believe are the key persuasive arguments for taking an appeal.

First, it is simply untrue that Ireland provided favourable treatment to Apple.

The Chairman of the Revenue Commissioners has stated emphatically that:

- there was no departure from the applicable Irish tax law by Revenue;
- there was no preference shown in applying that law; and
- the full tax due was paid in accordance with the law.

It is important to take this seriously as it is very damaging for our reputation to be called into question in this way. This affects how Ireland could be treated by other jurisdictions, damages Ireland's credibility in the international tax debate and inhibits Ireland in pressing arguments that serve our national interest.

A further concern is that the Commission is undermining the fundamental principle of international tax: that tax should be paid where the value is created.

The central aspect of this case is that the economic activity that created the value in Apple's business operations was not conducted in Ireland. Everyone knows that the iPhone and other well-known Apple products were developed in the US, not Ireland. Our tax legislation, which reflects international norms, only allows us to tax non-resident companies on the profits that they make in Ireland. As a result, the bulk of Apple's profits were not subject to Irish tax.

And thirdly, in the Decision, the Commission are attempting to re-write Irish Corporation Tax legislation. Taxation is a core Member State competence, which is enshrined in the EU Treaties. This Decision encroaches on Member State sovereignty in the area of tax, by extending competition rules into the tax area to an unprecedented and unjustified extent. By doing this the Commission creates uncertainty for business and investment in the European economy, both in its novel interpretation of longstanding rules and their unfair retroactive application.

[Ireland's Track Record on International Tax](#)

It is important to emphasise that the bringing of appeal proceedings is not in any way an endorsement of aggressive tax planning arrangements, nor is it a defence of the extremely low effective tax rates that can be achieved under the broken international tax system.

It is a mismatch between the applications of the law in at least two tax jurisdictions that allow certain multi-national companies to pay such low levels globally.

The reaction to the Apple Decision has, at times, painted an outdated and unfair caricature of Ireland's position on tax that is at odds with the evidence and overlooks our proven track record in recent years. The facts show our constructive engagement at the international table, with early implementation of reforms ahead of many of our partner countries. This has been confirmed by the head of the OECD, Angel Guerria and more recently, the Tax Commissioner, Pierre Moscovici to this very committee.

Despite the Decision, Ireland remains committed to international efforts to reform international tax rules to ensure the correct tax is paid by multinationals in the correct place. Our view remains that it is important that this is done in the appropriate way – moving forward in tandem with other countries on the basis of a global consensus.

Recovery

On foot of the Commission's decision, and notwithstanding the appeal, Ireland is legally required to recover the alleged state aid from Apple.

In the press release for the announcement, the Commission said that they expect that the amount of aid totals up to €13 billion plus EU interest.

However, as the members will have seen, there is no such figure in the Final Decision and instead Ireland is required to calculate the sums on the basis of the methodology set out in the Decision.

This looks back over a ten year period for two companies and involves over 20 separate computations, taking into account any relevant tax paid in other jurisdictions.

The EU interest provisions are then applied to the amounts applying a methodology that is set out in an EU Directive

It is too early to speculate on what the final figure will be, as it requires complex calculations but this work has been on-going since September 2016 in co-operation with the Commission and Apple. .

Some of the public debate on the case has said that Ireland should take the money and spend it.

The Government disagrees with that position and instead is exploring how to place the sums in a ring-fenced escrow fund pending the outcome of legal proceedings.

It would be irresponsible and extremely short-sighted to consider the Decision as a windfall for the State.

An appeal has now been lodged that questions the validity of the Commission's Decision under EU law.

As a result, there is a genuine question of who is entitled to these sums. If the appeal is successful then we will have to repay Apple.

Based on the Commission's view that the recovery sums may be reduced if other countries were to require Apple to pay more taxes, the ultimate entitlement of Ireland to this money in the face of competing claims from other jurisdictions is highly uncertain. We simply cannot spend money that we are not confident we are entitled to.

Irish officials are currently negotiating the terms of such an escrow fund which may be established by a commercial contract with Apple, subject to the views of the Commission. Obviously, the terms of such an escrow fund are subject to confidential and commercially sensitive considerations and as a result I will not

be able to discuss them at this time. I will provide an update on both the contract and the figures involved when the process has been concluded in the coming months.

The formal deadline set out in the Decision for recovery is 3 January 2017, which has now passed.

It is not unusual and not at all uncommon for Member States to require more time for recovery – for example, the Starbucks case related to an estimated 20 to 30 million Euros and took much longer than four months to be recovered.

We therefore requested an extension, noting the complexities involved in the Apple Decision, and the fact that the four month deadline imposed is the usual State Aid deadline without any recognition to the magnitude of the recovery in our case.

While the Commission have not formally granted an extension, they did confirm that they are satisfied with Ireland's progress on this issue to date. This committee heard Commissioner Vestager attest to that fact herself this week.

Work has long been on-going to ensure that the State complies with the recovery obligations and this will continue in regular contact with the Commission to ensure that they remain satisfied with Ireland's progress.

Conclusion

In conclusion, the Government is of the view that there was no breach of State Aid rules in this case and that the legislative provisions were correctly applied.

By appealing the Decision the Government is taking the necessary course of action to vigorously defend the Irish position.

Ireland has done nothing wrong here. We have a proven track record in international tax reform and a strong commitment to meeting the best international standards.

As I said earlier, I am mindful not to damage the important appeal that is now before the European courts, but will engage with the Committee to the fullest extent that I can this morning.