



HIGHLIGHT

ILLEGAL STATE AIDS AND MULTINATIONAL COMPANIES: THE EUROPEAN COMMISSION DECISION ON THE *APPLE – IRELAND* TAX RULING

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In its decision of 30 August 2016 the European Commission found that Ireland granted undue tax benefits to Apple and that, as a consequence, that Member State is under the obligation to recover the illegal aids from the beneficiary, under Art. 108 TFEU. The notice has had immediately a resounding impact on mass media: not only because of the constant interest generated by the bitten Apple brand, but also because the Commission decision seems to have taken a substantial bite out of Apple's financial solidity.¹ In fact, the investigations show that the multinational company has benefited of illegal tax aids worth up to 13 billion euros. What emerges from the press release of the Commission is that the tax rulings issued by Ireland endorsed an artificial internal allocation of profits within Apple Sales International and Apple Operations Europe so that

“most sales profits of Apple Sales International were allocated to its ‘head office’ when this ‘head office’ had no operating capacity to handle and manage the distribution business, or any other substantive business for that matter. Only the Irish branch of Apple Sales International had the capacity to generate any income from trading [...]”²

The decision should be connected to a recent major activity of the Commission directed at investigating the tax ruling practices of Member States.³ In fact, in the second

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¹ See Tim Cook's Press release on Apple's website, *A Message to the Apple Community in Europe* of 30 August 2016.

² Reference can be made only to the Press release IP/16/2923 of the European Commission of 30 August 2016, since the public version of the decision is not yet available.

³ See the Background section of the Press release IP/16/2923, cit.

half of 2014 the European Commission started a deep activity of investigation towards different Member States (i.e. Ireland, Luxembourg and the Netherlands) in order to verify whether advance tax rulings in relation to the transfer pricing practices of certain corporate groups constituted illegal selective measures under Art. 107, para. 1, TFEU. In particular, the inquiry regarded some famous multinational companies: Apple,⁴ Starbucks,⁵ Fiat,⁶ and Amazon.⁷ In each of the three cases already decided (the Amazon case is still pending) the Commission concluded that there had been illegal State aids and that the tax avoidance schemes of the underlying undertakings concluded by the Member States and the multinational corporations did not correspond to the arm's length principle.

In all the three recent State aids proceedings, the European Commission has heavily relied on the OECD guidelines on transfer pricing⁸ in order to assess whether the arm's length principle had been respected. The Commission, although recognizing that the guidelines are not legally binding,⁹ analysed the cases at hands on the basis of the benchmarks identified in that instrument. This seems to be fully consistent with the recent Commission Notice on the notion of State aid as referred to in Art. 107, para.1, TFEU,¹⁰ and the reason of this choice seems to be found in the circumstance that the Guidelines "capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions".¹¹

The impression, though, is that the Commission finds it difficult to elaborate a fully "European" notion of fiscal State aid. This seems to be due to the fact that Member States retain exclusive power over direct taxation and that therefore they are politically

⁴ European Commission, Case no. SA.38373, *Alleged aid to Apple*.

⁵ European Commission, Case no. SA.38374, *State aid implemented by the Netherlands to Starbucks*.

⁶ European Commission, Case no. SA.38375, *State aid which Luxembourg granted to Fiat*.

⁷ European Commission, Case no. SA.38944, *Alleged aid to Amazon – Luxembourg*.

⁸ Organization for Economic Cooperation and Development, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* of 16 August 2010.

⁹ See para. 59 of the Invitation 2014/C 369/04 of the European Commission to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union in the State aid SA.38373 (2014/C) (ex 2014/NN) — *Alleged aid to Apple* proceeding.

¹⁰ See Notice 2016/C 262/01 of the European Commission on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union of 19 May 2016, para. 173, stating that: "When examining whether a transfer pricing ruling complies with the arm's length principle inherent in Article 107(1) of the Treaty, the Commission may have regard to the guidance provided by the Organisation for Economic Cooperation and Development ('OECD'), in particular the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. [...] Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid".

¹¹ *Ibidem*.

unwilling to create a common ground on tax matters since, from a purely economic point of view, a more favourable tax regulation can attract investments. Member States benefit of the absence of harmonisation over this sector, and so the Commission needs to find outside the European legal system the notion of tax State aid, by giving great authority to an international instrument, even if it is a soft law one.

The new course embarked upon by the European Commission, thus, will likely open a long confrontation between the European Commission and the multinational companies, probably supported by the Member States concerned. If the elaboration of uniform and predetermined criteria on the identification of selective tax measures could contribute to secure the effectiveness of the internal market regulations, in a moment of deep Member States' scepticism towards EU institutions, the attitude of the European Commission might be perceived as excessively intrusive towards Member States' sovereignty over tax matters. The announced actions for annulment against the decision of the Commission may thus give to the CJUE the opportunity to determine the balance to be struck between conflicting interests and, possibly, also conflicting views about the process of European integration.¹²

¹² The Netherlands, Luxembourg, and Fiat Chrysler Finance Europe (Fiat) have separately brought actions in the Court of Justice for the European Union seeking to annul Commission decisions reached October 21, 2015: see case T-760/15, *Netherlands v. Commission*; case T-755/15, *Luxembourg v. Commission*; case T-759/15, *Fiat Chrysler Finance Europe v. Commission*. See also the notice of 2 September 2016 that the Irish Government will join Apple in the appeal against the Commission decision, published on *Reuters*.

