THE IRISH APPLE TAX DISASTER

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On August 30, 2016, the European Commission (EC) concluded that Ireland and Apple, Inc. (Apple) had violated the European Union (EU) State Aid rules when Ireland granted tax advantages to Apple; therefore, the EC ordered the Irish government to collect up to €13 billion Euros ($15.3 billion USD) in tax underpayments from Apple for the 2003 to 2014 period (EC Press Release 2016). This was the largest sum in history that the EC had ever charged a company; the previous record was set by EDP Energy in 2015 when it was charged €1.4 billion ($1.7 billion USD) (Simon-Lewis 2017).

On October 4, 2017, the EC announced that it was taking Ireland to the European Court of Justice for its failure to collect the €13 billion Euros ($15.3 billion USD) of tax due from Apple as a result of the 2016 EC decision. The EC concluded that Ireland had missed the deadline of January 3, 2017 for collecting the tax, and until the tax was recovered, Apple continued to benefit from an unfair advantage. Ireland's Finance Ministry said that Ireland had never accepted the EC's decision, but was committed to collecting the tax due pending Ireland's own appeal of the ruling. Apple appealed the case (Blenkinsop 2017).

The EU had granted concessions to Ireland in exchange for Ireland accepting the Treaty of Lisbon. One of these concessions was allowing Ireland to retain competence over its own tax laws (Brugha 2009). This meant that Ireland was not required to obtain EC approval in order to grant State Aid to Apple or to any other company. It appeared that the EC was ignoring the protocol it had granted to Ireland in exchange for the latter's vote in favor of the Treaty of Lisbon.

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Apple was not the only U.S. company that the EC targeted with adverse tax decisions. The EC initiated or finalized decisions adverse to Amazon (State Aid - Luxembourg 2015), Google (EC Press Release Database 2018) and Starbucks (EC Decision 2017/1283) based on the specific pricing methodologies that these U.S. companies had used with the endorsement of tax authorities in several EU member states. In one case, the EC ordered Amazon to pay €250 million Euros in back taxes to Luxembourg (Horobin & White 2019).

On July 10, 2019, U.S. Trade Representative Robert Lighthizer launched an investigation to determine whether France's recent *"digital tax"* was *"discriminatory or unreasonable and burdens or restricts United States commerce."* The investigation was authorized under Section 301 of the U.S. Trade Act of 1974 - the same tool President Donald Trump had used to impose tariffs on Chinese goods due to the country's alleged theft of intellectual property (Horobin & White 2019).

The Court Decision

On July 15, 2020, the European Union General Court (Seventh Chamber, Extended Composition) annulled the European Commission's decision in Ireland and Others v. European Commission, holding that the European Commission had not proven that the Irish tax rulings gave rise to a selective advantage under the European Union State Aid rules. In light of this annulment of the European Commission decision by the European Union General Court, Ireland did not have to collect the €13 billion Euros of unpaid tax from Apple: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:T:2020:338

Background

Apple, the world's largest tech company, was the beneficiary of a deal that enabled it to avoid paying any tax on almost all profits in Europe for more than 20 years. The arrangement between Apple and Ireland dated to a 1991 tax ruling, which was replaced by a 2007 ruling. These rulings were generally *comfort letters* designed to provide clarity on tax issues for a business and were normally kept private; however, the EC found out about them while examining the work of a United States Senate subcommittee (Beesley & Barker 2018).

The issue of the EC case centered on the arrangement Apple had with Ireland. In 1991, Apple created the Irish subsidiary Apple Sales International (ASI), which recorded all of Apple's profits in Europe, Africa, the Middle East and India. If someone bought a phone in Spain, for example, the sale would be recorded by ASI in Ireland, not in Spain. ASI then paid the annual Irish tax rates that were in the range of .005 percent and 1 percent until 2014, according to the agreement between Ireland and Apple. Ireland had one of the lowest corporate tax rates in the European Union: 12.5 percent, while most EU member states had corporate tax rates of over 16 percent; the Belgian tax rate was as high as 33.9 percent. According to the EC, ASI paid much less than the already low Irish corporate tax rate (Bennedsen and Stabile 2017). According to the EC, Ireland allowed Apple to pay a tax rate of 1 percent of its European profits in 2003 - which dropped to 0.005 percent by 2014 (Cook 2016).

According to the EC, the special deal between Ireland and Apple constituted illegal State Aid. See Exhibits 1, 2, and 3.

Exhibit 1. Why State Aid is Considered to be Wrong

Source: European Commission Competition Policy

A company receiving government support may gain a distortive advantage over its competitors. Therefore, ***Article 107 TFEU*** *generally prohibits State Aid unless exceptionally justified.*

Exhibit 2. Definition of State Aid

Source: European Commission Competition Policy

State Aid is defined as an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State Aid (examples include general taxation measures or employment legislation).

Exhibit 3. Features of State Aid

Source: European Commission Competition Policy

- *There has been an intervention by the State or through State resources, which can take a variety of forms (e.g., grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.):*
- *The intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions:*
- *As a result, competition has been or may be distorted;*
- *The intervention is likely to affect trade between Member States.*

The argument could be made that Ireland decided to enter into an agreement with Apple based on Irish values and needs. To the Irish, employment opportunities were more important than were massive taxes. If the Irish felt that the only way to lure a large, global company such as Apple to its borders was by reducing the tax burden, then why would the EC override the Irish belief regarding taxes? Did the EC provide job opportunities to Irish citizens? If not, then who was the EC to decide what Irish agreements should be upheld? What Irish agreements should be overruled? See Exhibit 4.

Exhibit 4. When State Aid is Necessary

Source: European Commission Competition Policy

*Despite the general prohibition of State Aid, in some circumstances government interventions are necessary for a well-functioning and equitable economy. Therefore, the Treaty leaves room for a number of policy objectives for which State Aid can be considered compatible. These exemptions can be found in **legislation** relevant to State Aid.*

The Irish people were not comfortable with the European Union overseeing their national affairs. Following the Irish ***"No"*** vote in the referendum of June 2008 on the Lisbon Treaty, the European Union member states began talks to investigate whether it was possible to reach a compromise that would respect both the Irish vote and the choices of other member states in ratifying the Treaty. The European Union granted Ireland a number of guarantees, and one of those guarantees was on taxation. Nonetheless, there was the argument that even if Ireland did not violate the State Aid rules, it had violated the global tax justice principles by granting special tax concessions to Apple. See Exhibit 5 and 6.

Exhibit 5. Guarantee on Taxation

`Source: Institute of European Affairs

TAXATION - *Nothing in the Treaty of Lisbon makes any change of any kind, for any member state, to the extent or operation of the competence of the European Union in relation to taxation.*

This guarantee is clear in stating that nothing in the Lisbon Treaty makes any change to the EU's competence with respect to taxation and in particular the right of Member States to set their own corporation tax rates. Retention of unanimity in voting on taxation policy matters was a key Irish aim during negotiations on the Treaty. That aim was fully achieved, and unanimity in voting on tax matters remains unchanged.

Exhibit 6. Basic Principles of Global Tax Justice
Source: Dietsch 2015

The Membership Principle	Natural and legal persons must pay tax in the state of which they are a member.
The Transparency Corollary	The payment of tax requires transparency between taxpayers and their tax authorities, as well as between tax authorities.
The Fiscal Policy Constraint	A state's fiscal policy is unjust and should be prohibited if is both strategically motivated and has a negative impact on the aggregate fiscal self-determination of other states.

Conclusion and Decision

Based on the factual and legal analyses, it was clear that the EU General Court decision was a justified decision. The EC did not claim that Apple broke any specific laws of Ireland or the EU; rather, it claimed that Apple's *"sweet"* deal with Ireland was illegal because the arrangement meant unfair competition and was therefore *"State Aid."*

The ***legal*** question was whether or not the EU had the right to override an agreement that a sovereign nation made with a corporate entity in order to improve the economy of that nation. There was also the ***ethical*** question as to whether the generous deal between Apple and Ireland harmed the economies of other nations, and whether Apple and Ireland had benefitted from a deal at the expense of the global community.

What ***legal*** and ***ethical*** arguments justified the European Union General Court's annulment of the European Commission's decision, in which the European Commission stated that Ireland gave Apple a selective advantage under the European Union's State Aid rules?

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