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Apple, state aid and 'illegal' tax breaks

Edward Fennell

"You're everywhere and nowhere baby, that's where you're at," as Jeff Beck sang in his 1967 hit *Hi Ho Silver Lining*. Those lyrics could now be applied to Apple, whose sales outlets are everywhere but whose head office is apparently nowhere. No wonder that this has brought down the wrath of the European Commission on the Irish government, which is seen to be giving Apple an "illegal" tax break.

Should the Irish government reverse its decision to appeal and, instead, enforce on Apple that €13 billion (£11 billion) penalty (or unpaid tax bill as the commission would prefer to describe it)? Not so fast, say a cross-section of lawyers in London and Dublin; there is more to this than meets the eye.

Although much of the media coverage — and indeed the commission's glossing of the case — has put the focus on Apple's track record of avoiding paying taxes (although Bruce Sewell, general counsel of the company, strongly denies any tax avoidance), it is not what the case is about, says Suzanne Rab, a barrister of Serle Court. The heart of the matter is state aid, she says, or as John Cassels, of Fieldfisher, puts it: "The key question with state aid is whether a 'selective advantage' was given to a company."

So did Apple gain a "selective advantage"? "Given the complexity of law in this area, this is not a slam-dunk case for the commission," says Dominic Stuttaford, the head of tax at Norton Rose Fulbright. The problem with the commission's argument, Rab says, is that although the application of state aid rules to tax cases is not new, the application of the concept of selectivity creates very complex issues when the alleged state aid involves a fiscal element.

"The European courts will eventually have to decide whether the commission has blurred the distinction between the 'advantage' and the 'selectivity' assessment in determining that the arrangements amount to state aid," Rab says. "These are two concepts that should not be confused. First, is there an advantage? This involves a comparison between the beneficiary's position with or without the contested measure. Second, if there is an advantage, is it selective? This involves a comparison between the beneficiary's position with the contested measure and that of other taxpayers in a comparable legal and factual position. The test is: does the measure treat certain companies differently by comparison to others, who in view of the objective of the measure are in a comparable legal and factual position?"

It all becomes very technical. Who exactly would Apple's arrangements in Ireland be compared against? What evidence is there that any other company has been disadvantaged by these arrangements? These are difficult questions and, as Philip Andrews, of the Dublin firm McCann FitzGerald, says, "It's hard to understand what the selectivity angle is here. It doesn't appear that the normal procedures were not followed by the Irish authorities."

Niall Collins, of Mason Hayes & Curran in Dublin, says: "It was predictable, but disappointing, to see the commission using the state aid rules to drive policy objectives outside their remit (tax harmonisation). The commission has invited the US Internal Revenue Service and other countries to consider taxing Apple's historic profits. This is a clear challenge to the respected OECD international framework of taxation. Set against such comment, claims of commission overreach and a politically driven attempt to bolster dialogue around an EU common consolidated tax base are understandable."

In this context, no wonder that Apple's chief executive Tim Cook claimed that the commission's judgment had "no basis in fact or law". A charitable interpretation of the commission's position was offered by Philip Andrews; that there might have been a misunderstanding by the commissioner Margrethe Verstager about the difference between the common law as followed in Ireland and civil law as practised across mainland Europe.

Meanwhile, Stuttaford has expressed concern about the commission's innovatory reference in its statements to "economic reality" as being the test of legal validity. "The difficulty is what does 'economic reality' mean? How do you judge it?" asks Stuttaford. "Is it right for the commission to suddenly invent a new standard?"

Starkly behind this is the controversial size of the quantum to be paid to the Irish government by Apple, further muddled by the suggestion that it could be reduced if other countries were to require Apple to pay more taxes. "The game has changed dramatically and these figures are ridiculous," says León Fernando, a barrister at Del Canto Chambers. "The way that they've calculated these figures is far beyond their powers in a supposed state's aid case. We must remind the EU that, despite social and media interest in taxing multinationals, there are no legal arguments to portray it as a tax case. Direct tax is and will be a sovereign responsibility of individual EU states."

For this reason Fernando, along with others, thinks the Irish will win on appeal.

PAUL FAITH/AFP/GETTY; ANDREW BURTON/THE WASHINGTON POST/GETTY

Apple's European headquarters in Ireland, top; its chief executive Tim Cook, outside the Californian office, above, rejects the European Commission's tax judgment

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