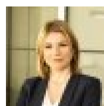
Why is Apple liable to repay EUR 13 billion to Ireland? Can this happen to companies in Latvia? 2/45/24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In September 2024 the Court of Justice of the European Union (CJEU) definitively ruled on the case involving the European Commission (EC) against Ireland and Apple.[1] The CJEU confirmed that Ireland's two tax measures allowed Apple to use transfer prices in its intragroup transactions that were not arm's length, constituting illegal state aid under Article 107(1) of the Treaty on the Functioning of the European Union (TFEU). Apple enjoyed tax advantages over the period from 1991 to 2014 and must now repay EUR 13 billion in unpaid taxes to the Irish state. This is the largest amount of illegal aid in history to date.

Background

The case involves tax rulings the Irish government issued to two Apple subsidiaries – Apple Sales International Ltd and Apple Operations Europe Ltd. Both are incorporated but are not tax resident in Ireland. The tax rulings allowed Apple to redirect a large portion of its profits to 'head offices' outside Ireland, which had neither a physical presence nor employees. In fact, these only existed on paper and the profits were not taxed anywhere.

In 2011, for example, one of Apple's Irish subsidiaries reported a profit of about EUR 16 billion. Thanks to the tax rulings, only about EUR 50 million of this amount was taxed in Ireland, resulting in tax payments equal to just about 0.05% of the total annual profit.

Key insights

State aid and tax policy are closely linked

While the member states enjoy fiscal sovereignty, any tax measure adopted by a member state must comply with the rules of EU law on state aid. This means the member states are competent to determine their national system of corporate taxation, but they have to carefully evaluate it from a state aid control perspective and seek approval from the EC where necessary. It's crucial that the reference framework or the 'normal' tax regime should be identified correctly. The case demonstrated that an error of assessment at this stage can lead to an incorrect assessment for the entire state aid.

The consequences of illegal state aid can be severe

Recovering illegal state aid is not merely a theoretical issue. While the goal of recovery is not to penalise companies but rather to restore the situation that existed in the internal market before the aid was granted, no recipient wants to find themselves in such a situation. The statute of limitations for recovering

illegal state aid is ten years from the date of granting, and interest is charged for this period.

Decisions by national authorities do not provide legal certainty

In practice there is often a perception that state aid recipients have legal certainty. However, protected legal certainty can only arise where the EC has approved state aid in accordance with the procedure set out in TFEU Article 108. It follows that in all other cases where the EC has not created legitimate expectations that state aid is legal, including where national authorities provide information or make decisions, the recipients do not have protected legal certainty that the aid will not be recovered.

Conclusion

The ruling highlights several key aspects: the link between state aid and tax policy, the consequences of illegal state aid, the significance of transfer pricing rules, and the need to comply with EU state aid rules. The ruling not only marks a critical precedent in EU tax law enforcement but also sends a clear message about the scrutiny applied to multinational corporations' tax practices in the EU. The careful analysis and interpretation by the CJEU reaffirm the importance of transparency, fairness and compliance in corporate taxation.

The ruling serves as a warning to other member states and multinational corporations about the need to adhere to principles of fair competition and state aid conditions.

Can this be repeated in Latvia?

While Latvia is not as large an international business hub as Ireland, similar situations may arise here. Latvia must comply with the same EU rules on state aid and tax policy. If Latvia were to grant similar tax advantages to a company without EC approval, there is a risk that such actions would be considered illegal state aid. It's therefore important to carefully evaluate any tax measure in the light of EU law and consult with the relevant EU institutions where necessary. PwC Latvia has teams of experienced professionals standing by to help you if you need in-depth advice on tax treatment or state aid.

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[1] CJEU ruling No. C-465/20 P, Commission/Ireland (*Apple*) dated 10 September 2024, ECLI:EU:C:2024:724