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Apple and Cartels: The European Commission Tightens the Reins

by **Marco Hickey**

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The European Commission on Tuesday issued a negative decision in the Apple State aid case, ordering it pay €13 billion to the Irish State.

Margrethe Vestager, the Commissioner for Competition, said Ireland's selective treatment of Apple for instance allowed the company to pay an effective tax rate of 0.005% on its European profits in 2014, and allocate profits within its operations for tax purposes in ways that did not reflect the economic reality and that the above breached EU laws on State aid. Both Ireland and Apple's position is that no State aid was provided and that the full amount of tax to Ireland was paid. Following discussion with the Taoiseach, Cabinet approval is being sought to appeal the Commission decision. Apple has indicated that it too intends to appeal.

Although Ms Vestager assured that the decision was not political, it appears that the Commission is increasingly flexing its muscles in the area of competition policy. This fervour includes the pursuit and sanctioning of cartels. Only recently, it imposed a record fine of €2.93 billion on several of the EU's biggest truck manufacturers for participating in a cartel for fourteen years. The Commission found that that MAN, Volvo/Renault, Daimler, Iveco, and DAF colluded on truck pricing and on passing on the costs of compliance with stricter emission rules. The total amount of fine was twice the previous record, €1.4 billion levied in respect of a TV and computer monitor tubes cartel in 2012, which included Chunghwa, LG Electronics, Philips and Samsung SDI, Panasonic, Toshiba, MTPD (currently a Panasonic subsidiary) and Technicolor (formerly Thomson). Ms Vestager stated that the fines were justified on the grounds that the cartel involved entities holding a very large market and that it continued for a long time. Daimler received the largest fine of €1.1 billion, while DAF, Volvo/Renault and Iveco were fined €752.7 million, €670.4 million and €494.6 million, respectively.

The trucks cartel case has been received as reflecting the strong stance of the Vestager Commission to competition enforcement. The basis for the fines was the EU prohibition on agreements which have as their object or effect the distortion of competition in the EU internal market.

Cartels, virtually by definition, are not efficiency enhancing and do not benefit consumers. At a local level, businesses and individuals found guilty of so-called hard-core cartel offences can face criminal penalties, including fines and imprisonment.

Regarding State aid, the Commission has been investigating the tax ruling practices of Member States since June 2013. In October 2015, the Commission concluded that Luxembourg and the Netherlands had granted selective tax advantages to Fiat and Starbucks, respectively. In January 2016, the Commission concluded that selective tax advantages granted by Belgium to least 35 multinationals, mainly from the EU, under its "excess profit" tax scheme are illegal under EU State aid rules. The Commission is also carrying out two in-depth investigations into concerns that tax rulings in Luxembourg may have given rise to the provision of illegal State aid to Amazon and McDonald's.

While Ireland acknowledges and accepts that the European Commission has a legitimate role, under the Treaties, in enforcing competition rules, the Department of Finance has stated that it is "not appropriate that EU State aid competition rules are being used in this new and unprecedented way in the area of taxation, which is a Member State competence and a fundamental matter of sovereignty."

There are concerns surrounding the approach of the Commission, which some believe is undermining the international consensus, impeding reform and creating uncertainty for business and investment in Europe. To bolster this point, the US Treasury has raised very significant concerns in its recent White Paper on the European Commission's State aid investigations. The US Treasury has stated that: "The Commission's new approach is inconsistent with international norms and undermines the International tax system".

Minister of Finance, Michael Noonan, TD has "disagreed profoundly" with the Commission's decision in the Apple case, stating that "[the Irish] Our tax system is founded on the strict application of the law, as enacted by the Oireachtas, without exception." In relation to the appeal, he said: "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."

Going forward, the future Commission decision regarding Amazon and McDonalds in Luxembourg are still pending. However, the Starbucks Netherlands, Fiat Luxembourg and Belgium tax scheme cases, as well as the record-making truck cartel cases against MAN, Volvo/Renault, Daimler, Iveco, and DAF, reveal a hard-edged approach on the part of the Commission's which has resulted in divided opinions.

In terms of compliance, Irish businesses must be aware of competition rules in their dealings with national tax and grant aid authorities but also when interacting with competing businesses. The proactive approach of the European Commission is likely to be replicated at the domestic level, so businesses seeking special treatment from State authorities or cooperating rather than competing with their rivals do so at their peril.

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