Funding the Future

The EU v Apple and Ireland

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The EU's provisional decision in the case it is making against Ireland for providing illegal state aid to Apple is here.

The basis of the decision is summarised in para 69, where it is said that:

Based on the above, the Commission is of the opinion that the contested rulings do not comply with the arm's length principle. Accordingly, the Commission is of the opinion that through those rulings the Irish authorities confer an advantage on Apple. That advantage is obtained every year and on-going, when the annual tax liability is agreed upon by the tax authorities in view of that ruling.

The decision hangs entirely on whether or not OECD guidelines on transfer pricing were followed in this case, or whether instead an arbitrary allocation of profit was permitted. After some very good discussion of the OECD's principles (whether or not you agree with them) the decision reached is just about unavoidable, and is as noted above.

The question then was whether there was a loss to Ireland that represented state aid. The EU is emphatic (para 50):

As regards the measure's financing through State resources, provided it can be shown that the contested rulings resulted in a lowering of Apple's tax liability in Ireland, it can also be concluded that those rulings give rise to a loss of State resources. That is because any reduction of tax for Apple results in a loss of tax revenue that otherwise would have been available to Ireland.

How much is involved? That the ruling does not yet say. It is not yet clear if the ruling will be applied to underpayment of tax on all the activities of Apple Sales International, which makes half of all Apple's sales (or $4 billion), or just the Irish branch with sales of about â‚¬400 million, on which tax of between â‚¬1 and â‚¬10 million was paid in 2012. This obviously has massive implications for the outcome.

What is clear right now is that the EU is very confident indeed that based on 1991 documentation, published in the report, no attempt was made to follow proper transfer pricing guidelines when the extent of Apple's profits to be taxed in Ireland were decided upon and a sum acceptable to the company was instead substituted in its place. This arbitrary amount was well below anything that any transfer pricing based ruling would have allocated in the opinion of the EU and it is hard to see Apple successfully contesting that.

If this ruling has value it is for precisely that reason. What the EU is saying is that the law should be upheld and it is not for states to show favour with regard to it or for companies to demand such favour. It is saying Apple sought such favour and Ireland granted it. Now it looks like the price will be paid. For the sake of the rest of the world's businesses that is good news. Granting privileges has no place in a modern economy because it fundamentally distorts markets and rigs competition, but I am sure this is just the tip of an iceberg.

And yes, I did write this on a Mac. But would I and could I have done without this tax advantage having been given? That is the question.