

State aid lessons for Australia from the Apple EU tax case

Written by Pamela Finckenberg-Broman, PhD Candidate Griffith Law school, Griffith University

State aid is [not necessarily the right forum](#) to tackle tax avoidance by multinationals, but it is effective.

The [European Commission's case against Apple](#) for receiving undue tax benefits from Ireland demonstrates the EU has had it with multinational corporations transferring profits between entities to avoid paying taxes inside the Union.

The aim for a ["closer Union"](#) is not compatible with fellow states eroding each other's tax bases. At the same time, the EU individually and as part of OECD is calling for transparency in tax matters for both [corporations](#) and [individuals](#)

. The EU might have sped up these processes with its action, and the Australian Tax Office could surf on the same wave.

But there are also broader implications for Australian companies.

The EU is Australia's second largest trading partner and several Australian controlled companies operate in the EU. If these companies receive any kind of nonobjective VIP treatment channelled from public revenues they might want to turn to the relevant local authorities or a lawyer to get clarity in the matter of their status.

State aid can take many forms. For example, one form of state aid could be an EU member state granting compensation for parallel broadcasting to an Australian television operator for conversion from analogue to digital broadcasting. This would be considered illegal state aid because it favours one type of platform over another.

A municipality enabling a transport company to provide transport for consumers at a cheaper price than its competitors by compensating the company in different forms (like contractual rebates and marketing deals) may qualify as aid. State aid may be present when companies are allowed to charge higher than market prices due to a national law favouring certain types of energy providers. State aid can also be tax benefits.

The Apple tax ruling serves to emphasise to foreign direct investors active in the EU that they are not beyond the reach of EU state aid rules.

State aid regulation is designed to tackle a wide range of subsidies potentially distorting competition in the EU's internal market. Unlike under the World Trade Organisation, subsidies are not restricted to goods. WTO rules apply to businesses outside of the EU and recognise a failure to collect tax as a [subsidy](#).

How the state aid rules work

State aid law is part of the EU competition rules. It gives the Commission extraordinary powers to investigate, make decisions, and enforce those decisions. These rules are intrusive and regulate how member states of the EU can spend their revenue.

State aid is viewed as a selective advantage conferred by national public authorities to entities engaged in economic activities. Under [Article 107 TFEU](#) state aid is prohibited, unless it can be justified by reasons of general economic development or genuine policy objectives. Tax relief creating potential revenue constitutes illegal state aid if:

- it is a form of state intervention
- on a selective basis the recipient receives an advantage
- it distorts or may distort competition
- it is likely to affect trade between EU member states.

Due to Ireland's selectivity and Apple's alleged competitive advantage, the Commission found the tax treatment tailored for Apple to be selective compared to other businesses with a similar legal and factual situation.

For the advantage to Apple, it assessed whether the Irish tax arrangements with Apple followed the "[arm's length principle](#)". The findings were that it was not so because the taxable basis in the 1991 ruling was negotiated rather than substantiated by reference to comparable transactions. Ireland accepted the calculation suggested by Apple, without attempting to reason the method and asking for supporting evidence. The arrangement was artificial and not subject to revision, so Apple was deemed the beneficiary of a state-provided economic advantage.

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Since 2013, the Commission's investigations of tax ruling practices of member states has produced several rulings on breach of state aid rules. Luxembourg, the Netherlands and Belgium have all been found guilty of granting large multinationals (such as Fiat and Starbucks) similar tax advantages as Ireland did to Apple.

Now the process of recovery will begin, unless it is totally impossible. The standard procedure is for retroactive recovery to be applied. The amount subject to recovery, including a commercial rate of interest, is counted from the date the beneficiary had access to the aid until the actual recovery date.

As state aid rules do not cover business conducted outside of the EU, the EU invites other nations, including Australia, to their share of the €13 billion pie. Australia would just need to prove that part of the recovered tax claim falls under its jurisdiction.

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