

CLIENT MEMORANDUM

Tax rulings under EU State aid rules after Apple: What is targeted and what can be done?

August 31, 2016

AUTHORS

Adrien Giraud | Jacques-Philippe Gunther | David Tayar

On August 30, 2016, the European Commission (“EC”) ordered Ireland to recover €13 billion (plus interests) of illegal State aid granted to Apple through two tax rulings. The magnitude of this recovery order shows the EC is determined to enforce State aid rules wherever it believes a fiscal advantage is being granted. It is therefore crucial to understand what is being targeted by the EC and what can be done to identify and mitigate exposure.

Since 2013, the EC has been investigating the tax ruling practices of Member States of the European Union (“EU”), following up on public allegations voiced in the media of favorable tax treatment of certain companies.

Three years into its investigation, the EC has concluded four cases (concerning Fiat, Starbucks, the Belgian excess profit exemption and most recently Apple), opened two formal investigations that are still ongoing (concerning Amazon and McDonald’s) and will probably open several others in the near future.

The EC also published on July 19th a “Notice on the notion of State aid” (“the Notice”) in which it explains further its position with respect to tax rulings.

Against this background, one can now understand more clearly what the EC is targeting in its investigations and may therefore anticipate and assess the risk.

Tax rulings under EU State aid rules after Apple: What is targeted and what can be done?

Continued

1. What is the EC targeting?

The EC has now articulated clearly its position in the Notice: “a tax ruling which endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm's length principle confers a selective advantage upon its recipient” will in substance constitute illegal State aid ([link to the Notice](#); see para. 171).

The Notice does not itself explain what this “arm’s length” test actually entails, but rather refers to another document published by the Organisation for Economic Cooperation and Development (“OECD”): “When examining whether a transfer pricing ruling complies with the arm's length principle [... the EC] may have regard to the guidance provided by [...] the ‘OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations’. [...] if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid” (para. 173 of the Notice).

The OECD Transfer Pricing Guidelines (“OECD Guidelines”) contain several alternative methodologies to ensure that a transfer price approximates a market-based outcome ([link here](#), see in particular from p. 61). The EC will interpret any deviation from a methodology provided by these OECD Guidelines as an indication of the existence of illegal State aid (and will do so despite the OECD Guidelines’ non-binding nature and irrespective of whether the “arm’s length” principle is at all recognized under the concerned Member States’ national tax laws).

If the EC finds that a ruling amounts to illegal State aid, it will issue a decision ordering the Member State to recover from the taxpayer the amount of taxes that were avoided thanks to the ruling, with compound interest. Under the current statute of limitation, tax rulings implemented up to 10 years ago can be targeted by the EC.

2. What can be done to anticipate and assess the risk?

As noted above, the EC is targeting rulings issued by tax authorities of Member States of the European Union in the past 10 years (note that it can investigate tax rulings regarding EU as well as foreign corporations); the EC is focusing its efforts on transfer pricing tax rulings (but other types of rulings are also included in the investigation).

A first measure would therefore consist of (i) identifying any tax rulings falling within the scope of the EC’s investigation and (ii) analyzing them under the “arm’s length” principle and the methodologies outlined in the OECD Guidelines.

Note that the reasoning used by the EC may apply to any Member State’s decision to tolerate that non OECD-compliant transfer prices impact a given tax return; this decision does not have to be formalized in a ruling for the measure to be qualified as State aid. The EC may therefore still extend considerably the reach of its investigation.

.....

Tax rulings under EU State aid rules after Apple: What is targeted and what can be done?

Continued

EXECUTIVE SUMMARY	
Who is concerned?	Any taxpayer who benefitted from a ruling from the tax authority of a Member State of the European Union in the past 10 years.
What is targeted?	Mainly (but not only) transfer pricing rulings implemented in the past 10 years.
What is the risk?	Potential reimbursement by the taxpayer – with compound interest – of the taxes avoided due to the ruling.
What can be done?	A first step consists of identifying the rulings falling within the scope of the EC's investigation and ensuring that these rulings comply with the "arm's length" principle under one of the methodologies prescribed by OECD's Guidelines.

If you have any questions regarding this memorandum, please contact Adrien Giraud (+32 2 290 18 20; agiraud@willkie.com), Jacques-Philippe Gunther (+33 1 53 43 4538; jgunther@willkie.com), David Tayar (+33 1 53 43 4690; dtayar@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

August 31, 2016

Copyright © 2016 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.

.....

WILLKIE FARR & GALLAGHER_{LLP}