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The European Union has long sought to maintain economic competitive balance in Europe. As the European Union's enforcement arm, the European Commission ("EC") is tasked with regulating member-states' aid regimes and maintaining the competitive balance of the single market.[1] A recent decision in the European General Court, against the EC and in favor of Apple and Ireland, threatens the EC's ability to maintain that balance through litigation and respond to distorted competition.[2] If the EC loses its appeal, it is unclear if the EC can effectively regulate the single market.

The Republic of Ireland is one of the most preferred corporate tax havens in all of Europe.[3] United States multinational corporations such as Apple, seeking to escape the United States' more aggressive tax regime, flocked to Ireland to take advantage of tax loopholes and hide profits in Irish subsidiaries.[4] Ireland's 12.5% base corporate tax rate is already substantially lower than the United States' previous 35% marginal rate and its current 21% rate.[5] However, companies more effectively avoided taxation by using a structure known as the "Double Irish With a Dutch Sandwich" to erode their corporate tax base and shift profits.[6] This tax loophole used Irish and Dutch subsidiaries to offshore profits in low-tax jurisdictions such as Bermuda.[7] The technique allowed American companies to pay little to no corporate taxes.[8] It is estimated that American companies had sequestered more than $1 trillion in profits in Ireland by 2017, with Apple representing the largest market share.[9]

In August of 2016, the EC announced that Ireland had granted Apple over €13 billion in undue tax benefits from 2003-2014.[10] The landmark decision followed a two-year investigation into Ireland's corporate tax practices, allowance of the Double Irish system, and use of private tax rulings.[11] The EC argued that Ireland's 1991 and 2007 private tax rulings legitimized Apple's unique tax structure in Europe and allowed Apple's income tax rate in Ireland to drop from 1% in 2003 to .005% in 2014.[12] The investigation stated that, "Member States cannot give tax benefits to selected companies – this is illegal under EU state aid rules."[13] The private tax rulings were seen as the result of an exclusive negotiation between Ireland and Apple, which allowed Apple to use a corporate structure nearly identical to the Double Irish strategy, but with one Irish company instead of the standard two.[14] The rulings were not available to other European and US multinationals.[15] In general, Ireland's corporate tax regime was seen as so generous to corporations, Apple in particular, that it was akin to illegal state aid. Thus, it served to uproot the European Union's competitive balance.

The decision was in line with the EC's typical regulation of the single market. Ireland, fearing a $20 billion dollar fine, more than half of its GDP at the time, appealed the decision.[16] In 2020, the European General Court annulled the EC's decision and sided with Ireland and Apple, ruling that the EC failed to meet its burden of proof in arguing that contested tax rulings were the result of a deal between Ireland and Apple.[17] The decision dealt a massive blow to the European Union's ability to regulate tax anticompetitive behavior through litigation.[18] The European Union has since appealed the decision with the European Court of Justice ("ECJ").[19]

The 2020 General Court ruling is a landmark decision that could have substantial implications for how the EC is able to effectively regulate state aid policies among the member-states. The EC is expected to ensure that each member-state, despite its own tax laws and individual interests, adheres to European Union treaties and interests.[20] By raising the evidentiary standard, courts have at least ensured that litigating state aid programs becomes a lengthy and complicated task.[21] Years of continued litigation has the potential to cloud the EC's regulatory authority. Member-states, taxpayers, investors, and multinational companies all now have good reason to proceed cautiously until a final outcome is decided.[22] An adverse decision would force the European Union to reshape how it maintains the competitive balance among the member-states. "'What is at stake is . . . the ability of the Commission to use state aid to rebalance tax regimes across Europe and also on its current plans to pursue low-tax member states which have advantageous corporate tax regimes.'"[23]

The decision and subsequent appeal also served to breed uncertainty during a time when the European Union and the United States made progress towards closing some of Europe's larger tax loopholes. In 2014, during the EC's initial investigation, and under pressure from the United States and the European Union, Ireland began to crack down on the Double Irish tax system.[24] Ireland's 2015 budget closed the loophole and gave corporations already benefiting from the Double Irish tax structure until 2020 to adjust their corporate structures accordingly.[25] The announcement, along with concerns over impending tax reform in the United States, led United States multinationals such as Google to abandon the Double Irish structure early, and repatriate some of their earnings back to the United States.[26]

It remains unclear how effective closing the Double Irish loophole has been in effectuating the end of tax avoidance in Europe and reinstituting a measure of competitive balance. Even as Ireland closed the Double Irish, new Irish low-tax structures aimed at attracting companies to onshore their intellectual property have taken its place.[27] The leak of the Panama Papers and the Paradise Papers identified, among other concerns, that Europe and its citizens and businesses continue to use European offshore accounts and corporate tax loopholes to shelter profits.[28] Nor is it clear what else the European Union can do to effectuate competitive balance and regulate balanced tax regimes in the European Union. If the EC's attempt to regulate tax regimes through litigation fails, potential alternative measures include litigating from the perspective of violations of the single market, or even an attempt to aggressively restructure the European Union with a uniform tax system.[29] Neither option is likely to attract much support among the member-states.

Thus, the ECJ's eventual decision will serve either to boldly reinforce the EC's ability to regulate state aid and punish member-states whose needlessly generous tax regimes distort competition, or accentuate these problems by limiting the EC's ability to effectively maintain competitive balance among the several states and in the global market. The European Union can only hope for a favorable result.

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[28]*See generally Offshore Trove Exposes Trump-Russia Links and Piggy Banks of the Wealthiest 1 Percent*, Int'l Consortium of Investigative Journalists(Nov. 5, 2017), https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/.

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