Ireland Will Not Bite The Apple

by Michael Curtis

Rarely in history has an offer of 13 billion euros been refused by a state or organization. One would think this was an offer that couldn't be refused. The Government of Ireland entered the book of records on September 2, 2016 by not taking the offered gift. Instead, it decided to appeal against the ruling of the European Commission that it had granted Apple undue and illegal tax benefits that allowed it to pay substantially less tax than other businesses, and that Ireland should recover the illegal aid.

The European Commission had no specific concern about the Irish tax system, nor is it anxious to harmonize corporate tax rates in Europe. Nevertheless, its decision on Apple and on other firms is part of two problems, issues that should be important for discussion in the U.S. presidential campaign. One is the specific problem of whether large business corporations, especially American firms, are paying a fair share of taxation. The other, that should be particularly pertinent in the U.S. election is whether the European Union can attempt to decide tax laws, or whether all sovereign states, like Ireland in the case of Apple, have the sovereign right to determine their own tax laws.

The European Commission (EC) has been actively investigating tax deals in the European countries since 2014. Its surprising departure has been to use a device, in a sense a ploy, that favorable tax exemptions or "sweetheart" tax deals are in reality state aid bestowed on the firm. State aid is defined as in place when a company receives government support thus gaining an advantage over its competitors. This is held to be incompatible with the single market, the central principle, of the EU. State aid is prohibited by Article 107 of the EU Founding Law, that has been amended several times, unless it is justified by reason of general economic development.

The central figure involved in the current controversy on the issue is Margrethe Vestager, Danish politician and former minister, who since November 2014 has been European Commissioner for Competition. As a minister in Denmark she believed in a free trading economy. As Commissioner, a powerful position that affects global as well as European companies, she was instructed to enforce rules and policy on competition to contribute to jobs and economic growth. To do this she has focused with intensity on cases concerning tax benefits and state aid to large firms, many American though she claims she is not anti-American. Her views on this, however, are implied in her comment that the American market gives consumers very little choice and higher prices than in Europe in general.

Within a few months of her appointment as Commissioner, Margrethe Vestager, brought antitrust charges against Google. She initiated investigations into tax affairs of a number of prominent companies, including Starbucks, Amazon, Fiat, Gazprom, and now Engie in France, as well as Apple.

In 2015 Vestager ordered Cyprus Airways to pay back to the Cyprus government more than 65 million euros in what she considered "illegal" state aid it received in 2012 and 2013 as part of a "restructuring program." As a result, the Airways, 93 % of which was owned by the state, suspended operations resulting in the loss of 550 jobs, and, ironically reducing competition. Vestager explained her decision by saying the Airways had no chance of becoming viable without continuing state subsidies, and that the restructuring plan was based on unrealistic assumptions.

On addition, Vestager has dealt with other agreements involving selective tax advantages, ordering Luxembourg to get 30 million euros from Fiat, the Netherlands to get 30 million euro from Starbucks, and Belgium to get 700 million euros from Anheuser Busch and 35 multinational companies. In these cases a tax ruling lowered the tax paid by the various companies.

In the Irish case, Vestager acted because she claimed Apple had paid only 0.005% corporation tax on its European profits in 2014. She held that Ireland had granted illegal tax benefits to Apple that enabled it to pay substantially less tax than other businesses. Benefits of this kind were equivalent to a bundle of cash. Money had flowed through Apple subsidiaries in Ireland.

This selective tax treatment, Vestager held, was illegal, and also gave Apple a significant advantage. Apple was able to void taxation on almost all profits made in the whole European Union, because Apple had recorded all its sales in Ireland rather than in the countries where the products were sold.

In its defense, Apple agreed it had shifted income to Ireland and its Irish subsidiaries because of the growth of its sales overseas. It said it paid 30.5% on profits made on its U.S. sales, and that it paid standard Irish tax, 12.5% corporate tax, in respect to its Irish branch, and employed 6,000 in Ireland, many in the town of Cork.

For its part, Ireland had prospered from the entrance of large corporations, Apple, Microsoft, Intel, the internet social networks, and chemical and pharmaceutical companies. Ireland argued that jobs had been created by Apple, especially in the city of Cork, and the flow of international investment might slow or stop if there was a retroactive tax demand. These international companies had transformed Ireland’s regional economy.

The problem for Apple started with an inquiry by the U.S. Senate Subcommittee on Investigations chaired by Democratic

Senator Carl Levin who thought Apple's corporative arrangements were unorthodox because it did not have to file publicly for its Irish subsidiaries. It was that investigation that found Apple paid "essentially no tax" in on its income in Ireland that tipped off what led to the EC investigation.

The tax problem goes beyond Apple. In November 2014 the LuxLeaks scandal, tax avoidance schemes, revealed that large companies in Luxembourg were able to exploit legal loopholes and get tax rates as low as 1%. In the UK, Amazon paid only £11.9 million by routing much of its British sales through its Luxembourg subsidiary. The essential problem is that global corporations use mechanisms to reduce or avoid corporate tax by shifting profits to tax havens. There is universal agreement that international tax rules must be changed so the corporations will pay tax based on economic activity in a country.

The issue for the U.S. and European countries is the isolated nature of decision making by the EC on tax and other issues, virtually acting without consultation of the US or other countries. The US Presidential candidates should note that Commissioner Vestager plans to look into tax affairs concerning the companies linked to Business Roundtable. This group with 185 CEOs and a collective revenue of $7 trillion has already argued that such an inquiry would increase business uncertainty with an adverse effect on foreign investment in Europe because the tax uncertainty will disrupt trade and investment.

It is essential that at least one of the U.S. Presidential candidates will take a firm stand on the issue and make clear that tax policies, whether they need to be changed or not, must remain in the hands of sovereign states, including the U.S.