

Ireland's Case of Diminishing Returns: How Ireland's Corporate Tax Policy Fails to Serve the Irish People and Their Democracy

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*“[A]t the heart of the Irish economy has always been the philosophy of tax competitiveness. Tax competitiveness has taken [Ireland] out of poverty It has been a successful policy [It] is why Ireland has stayed afloat.”*¹

I. INTRODUCTION

Ireland is well known for many things that give the country an indelible place in the hearts of people around the world. Irish authors and poets like George Bernard Shaw, Oscar Wilde, Maeve Binchy, James Joyce, and Seamus Heaney are common focal points in western education and have greatly aided the progression of modern literature over the last 200 years. Musicians and bands from Sinéad O’Connor to U2, Hozier, and Thin Lizzy have brought a fusion of Irish culture to stages and music charts across the globe. Brands like Jameson, Guinness, Kerrygold, and Ryanair continue to be of use to consumers around the world. Irish pubs are open and popular watering holes for locals and expats alike in cities from San Diego to Kathmandu. Thanks to one of the largest and “most prominent significant dispersals of populations in European history,” Ireland’s indomitable spirit remains alive and thriving, despite having a population of less than 5 million people.²

However, the economic prosperity of Ireland has not ascended in unison with the worldliness of Irish culture and the global growth of positive Irish sentiment.³ Ireland’s economic fortunes have instead remained “an unfortunate embarrassment to be whispered about in dark corners”⁴ until the late 20th century when, after nearly 700 years of subjugation at the hands of Anglo-Norman Britons,⁵ the Republic of Ireland experienced its first major socio-economic turn around in the mid-1990s.⁶

1. Tim Adams, *Bono: ‘There’s a Difference Between Cosying up to Power and Being Close to Power’*, THE GUARDIAN (Sept. 21, 2013, 7:05 PM), <https://www.theguardian.com/music/2013/sep/22/bono-campaigner-u2-global-poverty> [<https://perma.cc/8MJP-NT4S>].

2. Énda Delaney, *The Irish Diaspora*, 33 IRISH ECON. & SOC. HIST. 35, 35–38 (2006).

3. The terms “Republic of Ireland” and “Ireland” will be used at length throughout this Comment and are meant to be interchangeable in the context of this Comment; both reference the sovereign state of the Republic of Ireland. Any reference to Northern Ireland will be referenced as “Northern Ireland” and not “United Kingdom.”

4. Delaney, *supra* note 2, at 38.

5. Gavin Stamp, *Neighbours Across the Sea: A Brief History of Anglo-Irish Relations*, BBC NEWS (Apr. 8, 2014), <https://www.bbc.com/news/uk-politics-26883211> [<https://perma.cc/8GF8-NMDL>].

6. Sean Dorgan, *How Ireland Became the Celtic Tiger*, THE HERITAGE FOUND. (June 23, 2006), <https://www.heritage.org/europe/report/how-ireland-became-the-celtic-tiger> [<https://perma.cc/ZU3N-HTKX>].

The booming Celtic Tiger economy of the mid-1990s through the mid-2000s provided a quick glimpse into the potential benefits of modern globalization and put Ireland on the world stage as a model of how a formerly-colonial society can transform itself into a high-tech, high-income society.⁷ Ireland's perceived role as a champion of harnessing globalization for the better of its people, however, remains speculative at best.⁸ Rapidly increasing social inequality is challenging Ireland's ability to maintain steady economic growth.⁹

Some scholars theorize that Ireland's economic boom is resulting in growing "social polarization between those who are benefiting from it and those being marginalized by it."¹⁰ After hundreds of years of societal stagnation at the hands of a colonial power, Ireland now faces societal stagnation thanks to its government's prioritization of inequitable economic growth over the need to congruently develop its internal economy to increase the citizens' quality of life and social equity.¹¹

Ireland's initial ascent from agrarian society to the Celtic Tiger and its subsequent descent into socioeconomic stagnation came about thanks in major part to Ireland's corporate tax structure. Ireland's highly agrarian economy of the early-to-mid 20th century was not allowed to take part in the international industrial revolution between 1820 and 1840 because of England's oppressive policies towards Irish economic growth.¹² However, once Ireland found its first opportunity to embark on an independent path of economic policy in the 1980s, it found a direct and attractive fast-cash outlet through the harnessing of foreign direct investment by way of tax incentives.¹³

Despite some limited ebbs and flows, the Republic of Ireland's overarching corporate tax policy since the 1950s has centered on attracting direct foreign

7. *Id.*

8. Colin Coulter et al., *Austerity's Model Pupil: The Ideological Uses of Ireland During the Eurozone Crisis*, 45 CRITICAL SOCIOLOGY 697, 697–98 (2017).

9. *Id.*

10. Paul Kirby, THE CELTIC TIGER IN DISTRESS: GROWTH WITH INEQUALITY IN IRELAND 4–5 (2016).

11. *Id.* at 5.

12. See Aidan Walsh & Chris Sanger, *The Historical Development and International Context of the Irish Corporate Tax System*, ERNST & YOUNG 3 (2014), <https://eyfinancialservicesthoughtgallery.ie/wp-content/uploads/2014/11/Historical-Development-and-International-Context-of-the-Irish-corporate-tax-system-2.pdf>.

13. *Id.* at 5.

investment.¹⁴ This policy, however, has affected highly unequal economic growth favoring business and corporate interests¹⁵ and, after two inelastic economic recessions, is still the reigning policy in use in Ireland. The changing landscape of tax competition and policy in the United States and Europe, along with an increase in anti-tax competition sentiment from the European Union, has shown that Ireland's stagnant corporate tax policy has reached a state of rapidly diminishing returns.¹⁶ Once a harbinger of the "good times"¹⁷ and a praised economic performer amongst capitalist societies in the western world,¹⁸ Ireland's current corporate tax scheme has morphed into an example of the gripping power tax manipulation holds over Irish revenue and financial policy.

The Republic of Ireland's current use of corporate tax policy will be discussed at further length below. While this Comment will include an explanation of the socioeconomic consequences created by the Republic of Ireland's continued use of a low corporate tax rate, it is not intended to vilify businesses, their practice, or the corporate search for the most efficient methods of tax avoidance; this is conduct universal to businesses and corporations.

Rather, this Comment argues that Ireland must break from its current corporate tax law to implement a modernized tax strategy that adequately provides for economic revenue beyond the historic pandering to corporate

14. See Frank Barry & Clare O'Mahony, *Regime Change in 1950s Ireland: The New Export-Oriented Foreign Investment Strategy*, 44 IRISH ECON. & SOC. HIST. 46, 47 (2017) ("The new foreign direct investment (FDI) regime was initiated by the inter-party governments of the era: the Industrial Development Authority (IDA) was established by the first Costello government in 1949, while the crucial financial incentives to support the new regime were introduced by the second inter-party government in 1956.").

15. See generally NAT O'CONNOR & CORMAC STAUNTON, *CHERISHING ALL EQUALLY: ECONOMIC INEQUALITY IN IRELAND* (John Baker et. al., eds., 2015), http://www.tasc.ie/assets/files/pdf/tasc_cherishing_all_equally_web.pdf [<https://perma.cc/35UM-VFYM>].

16. Walsh & Sanger, *supra* note 12, at 20.

17. The "good times" is an Irish colloquialism referring to the limited periods in independent Irish history when the economy has been good enough for families to not have to pinch their pocketbooks. ("Economists are coming on television now telling us Irish people that we fucked up the good times by spending all our money. That's what we were supposed to do, that's why they were called 'the good times'! You can't be saving your money during the good times. If you did then it would be called the 'in preparation for the bad times,' times."). TOMMY TIERNAN, *What Recession?*, on LIVE IN NEW YORK (Mabinog Ltd. 2011).

18. Antoin E. Murphy, *The 'Celtic Tiger' – An Analysis of Ireland's Economic Growth Performance*, 3 (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Studies, Working Paper No. 16, 2000), https://cadmus.eui.eu/bitstream/handle/1814/1656/00_16.pdf?sequence=1&isAllowed=y [<https://perma.cc/JPK2-A3VF>] ("Less than ten years later the Economist highlighted Ireland on its front cover with the title 'Europe's shining light'. In the lead editorial it remarked: 'Just yesterday, it seems, Ireland was one of Europe's poorest countries. Today it is about as prosperous as the European average, and getting richer all the time'.").

entities in a search for foreign direct investment. The Republic of Ireland should apply tax policy that balances internal and external business needs to decrease dependency on investment from American corporations seeking refuge from European tax schemes. A new tax regime, implemented with an eye on long-term sector growth and societal investment, has the potential to modernize Ireland's socioeconomic structure to capitalize on the already existing pool of Irish-borne tech, biotech, financial, and data-driven companies looking for an opportunity to become prominent fixtures of the Irish economy.

This Comment starts by providing a historical overview of Irish corporate tax policy and the significant role it played in bringing the country up to economic strength with other economies in Western Europe. Then, it explains the current state of Ireland's corporate tax code and explores influential legislation in the European Union and the United States governing their respective approaches to tax competition and tax harmonization. This is done to more clearly juxtapose the Irish government's outdated, yet continuing maintenance of the country's tax haven status with changes in international tax enforcement and corporate tax policy that further diminish the financial and political returns of maintaining an overtly low corporate tax rate.

Lastly, this Comment suggests remedies for the inadequacies of the current tax system to create financial returns that are at least more proportionate to the current amount of aid given to corporate investors and quell rising negative sentiment from the European Commission. Ireland should take steps towards corporate tax reform by either (a) closing profit-shifting loopholes and applying a uniform effective tax rate, or (b) working with the European Union to achieve effective and minimally damaging tax harmonization that would not dissuade major companies from foregoing the Irish business development market.

This Comment is not written as a call to action for the Republic of Ireland to reassert the protectionist measures implemented by Éamon de Valera in the 1950s.¹⁹ Nor is it a call for the destruction of the vast and sometimes beneficial bilateral tax treaty network Ireland has cultivated.²⁰ Proposals here-in, while critical of Fianna Fáil's and Fine Gael's 40-year adherence to the status quo, are not partisan motivated. Rather, they are intended to show Ireland has an opportunity to make a significant and

19. See Joe Durkin, *Seán Lemass and the Nadir of Protectionism*, 41.3 THE ECON. & SOC. REV. 269, 277 (2010), https://www.esr.ie/ESR_papers/vol41_3/03-durkan.pdf.

20. Gary Tobin & Keith Walsh, *What Makes a Country a Tax Haven? An Assessment of International Standards Shows Ireland is Not a Tax Haven*, 44.3 THE ECON. & SOC. REV. 401, 421 (2013).

historic step forward in its independence and growth as a relatively young nation. The time for adherence to a stagnant state of economic affairs is over; the potential for equitable Irish economic growth is palpable.

A. The Rise of Irish Tax Competition

The history of Ireland's economic growth strategy, and integrally its corporate tax strategy, to date, is necessary to understand the context of this Comment. To refrain from overanalyzing nearly 100 years of strategy since Ireland's independence, this Comment's historical analysis relies on scholarly and legal writings to provide a concise and accurate scope of how, and why, Ireland finds itself in its current socioeconomic state.

Ireland adopted the tax code of the United Kingdom in near-verbatim fashion after establishing independence in 1922,²¹ implementing a small, yet historically prominent income tax that became the foundation for the Irish corporation tax.²² In the late 1950s, Irish foreign policy shifted from an unsuccessful and overtly stagnant protectionist approach towards a more globally inclusive plan of national conduct.²³ This historic shift marked the first time Ireland was opened to influencing, and being influenced by, the global economy in a meaningful way.²⁴ In fact, the Irish government largely based their foreign policy objectives on goals similar to the many countries of Western Europe that were benefiting from the drastic, globalization-driven economic growth of the post-World War II Marshall plan era.²⁵

Although the income tax adopted in 1922 was liberalized in the late 1950s to cover business income, Ireland did not hesitate to provide tax relief to manufacturing and export-focused companies.²⁶ Beginning humbly in 1956 as relief for profits earned over companies' 1956 base profits, Ireland expanded the scope of this relief to allow manufacturing and export-focused companies to take advantage of export sales relief ("ESR").²⁷ In essence, ESR precluded all profits from exports manufactured in Ireland from income tax, including the tax returns received from refunds given to companies after tax filings.²⁸

21. Walsh & Sanger, *supra* note 12, at 4.

22. Walsh & Sanger, *supra* note 12, at 4–5.

23. Barry & O'Mahony, *supra* note 14, at 46.

24. Barry & O'Mahony, *supra* note 14, at 50–52.

25. Although "US foreign policy interests clearly played a significant part in shaping the agenda in Ireland—as elsewhere in Western Europe," Ireland did not fully agree with the US's idea of Ireland becoming a large food exporter and gradually moved Marshall Aid money into Irish industrial sectors rather than food production. Barry & O'Mahony, *supra* note 14, at 52–53.

26. Walsh & Sanger, *supra* note 12, at 4.

27. Walsh & Sanger, *supra* note 12, at 4–5.

28. Walsh & Sanger, *supra* note 12, at 4–5.

This relief ushered in a new era of unprecedented growth in Ireland.²⁹ In the 1960s, “foreign companies set up 350 new enterprises in Ireland: British, American, German and Dutch. Among the early arrivals—and still here today—were Denmark’s Leo Laboratories (1959), Warner-Lambert (1960), General Electric (1963) and Pfizer (1969).”³⁰ Foreign direct investment drove the overwhelming majority of this growth, fueling 70% of Ireland’s new employment as well as 90% of the country’s new export goods and materials.³¹

Ireland’s corporate sector growth through the 1960s allowed the government, specifically the Industrial Development Authority (“IDA”), to begin identifying and prioritizing Ireland’s top performing industrial sectors.³² Importantly, this early identification came before these companies, mainly focused in the electronics, pharmaceuticals, and biotech industries, became “more widely known and attractive to other development agencies” in other countries.³³ Furthermore, this early identification of key sectors started a trend in Irish policy towards pampering business interests:

Projects considered particularly worthy came from companies that were leaders in their field, were high-tech, highly skilled and offered long-term growth potential, used the country’s natural resources, presented spin-off prospects to existing firms, provided jobs quickly, located in less developed parts of the country and helped sell Ireland as an [foreign direct investment] location.³⁴

In 1976, the Irish government codified its focus on business attraction in the Corporation Tax Act. Not only did the act grandfather ESR until 1990,³⁵ but it also laid an “effective 10% corporate tax rate [beginning January 1, 1981] for trading manufacturing profits”³⁶ Plus, the government expanded the definition of ‘manufacturing’ to, importantly, include internet and

29. Paul Donnelly, *How Foreign Firms Transformed Ireland’s Domestic Economy*, IRISH TIMES (Nov. 13, 2013, 01:00 AM), <https://www.irishtimes.com/business/how-foreign-firms-transformed-ireland-s-domestic-economy-1.1593462> [<https://perma.cc/U64V-ZLNW>].

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Ireland joined the European Union by resounding national approval 1973. European Union, *EU member countries in brief*, europa.eu, https://europa.eu/european-union/about-eu/countries/member-countries/ireland_en [<https://perma.cc/H4TJ-4R47>]; ERS quickly ran afoul of the European Union’s rules governing preferential business treatment and was grandfathered until 1990. Walsh & Sanger, *supra* note 12, at 5.

36. Walsh & Sanger, *supra* note 12, at 5.

financial services and activities in Dublin's International Financial Services Centre.³⁷

Eventually, the ESR's complete exclusion of export profits was removed in compliance with European Union requirements and replaced with a base erosion profit sharing ("BEPS") system allowing for an actual tax rate below only half of³⁸ the advertised 12.5% effective rate.³⁹

This growth continued through the 2000s with the further attraction of high-tech companies and, eventually, a newly emergent financial services sector.⁴⁰ Ireland grew to be one of the most "prosperous" countries in Western Europe⁴¹ attributable to more than 40 years of effective business attraction; Ireland's GDP grew from less than \$50 billion U.S.D. in 1980 to over \$380 billion U.S.D. in 2019.⁴²

However, the economic growth and relative stability that once signified Ireland's rise from the depths of poverty,⁴³ now raises questions as to whether Ireland is truly prosperous, or has disillusioned the world through over-reliance on purposely inflated financial figures.⁴⁴ In reality, wages still are "sluggish," actual living conditions are not seeing proportional improvement, and housing is unaffordable and undersupplied.⁴⁵ As will be discussed below, Ireland's corporate tax system has stopped being a

37. Walsh & Sanger, *supra* note 12, at 5.

38. Frank Barry, *Aggressive Tax Planning Practices and Inward FDI Implications for Ireland of the New US Corporate Tax Regime*, 50 THE ECON. & SOC. REV. 325, 331 (2019); Tom Bergin, *Global tax deal leaves billion-dollar loopholes Reuters analysis finds*, REUTERS (Dec. 3, 2021), <https://www.reuters.com/business/global-tax-deal-leaves-billion-dollar-loopholes-reuters-analysis-finds-2021-12-03/> [<https://perma.cc/VZ73-ZYSL>].

39. Walsh & Sanger, *supra* note 12, at 5.

40. Donnelly, *supra* note 29.

41. Cliodhna Russell, *Most Prosperous Countries in the World Revealed: Ireland Ranked Above Germany, UK and US*, THEJOURNAL.IE (Nov. 2, 2015, 5:44 PM) <https://www.thejournal.ie/ireland-prosperous-global-index-2421951-Nov2015> [<https://perma.cc/BVG4-CRM2>].

42. *Ireland GDP*, TRADING ECON., <https://tradingeconomics.com/ireland/gdp> [<https://perma.cc/7RLE-7PLW>].

43. Murphy, *supra* note 18, at 4 ("Less than ten years later the Economist highlighted Ireland on its front cover with the title 'Europe's shining light'. In the lead editorial it remarked: 'Just yesterday, it seems, Ireland was one of Europe's poorest countries. Today it is about as prosperous as the European average, and getting richer all the time'.").

44. Eoin Burke-Kennedy, *Is Ireland's booming economy just an illusion?*, IRISH TIMES (Mar. 30, 2018 06:35 AM) <https://www.irishtimes.com/business/economy/is-ireland-s-booming-economy-just-an-illusion-1.3444645> [<https://perma.cc/B9C6-T7WC>]; Figures regarding ideas like "prosperity" are often measured objectively by economists and other types of numeric analysts, often times not taking into account the actual state of living within the country. See Maura Stephens, *Ireland's prosperity trap*, OPENDEMOCRACY (Mar. 22, 2006), https://www.opendemocracy.net/en/prosperity_trap_3379jsp/ [<https://perma.cc/PP9V-P9TH>].

45. Burke-Kennedy, *supra* note 44.

beneficial tool for Ireland's growth and has instead created an illusion that the country is operating an equitable system benefiting the country's coffers for the better of the Irish people. In actuality, the decades-long adherence to attracting foreign business is no longer helping the country achieve its potential.

II. APPLICABLE LAW

The law applicable to the content of this Comment is complex and spans three countries and a geopolitical union. The Irish corporate tax code itself contains nearly 40 years of amendments and is difficult to parse, at best. To effectively analyze the Irish tax code itself, this Comment relies on scholarly and legal writings outside of the written code that accurately and concisely explain the sheer volume of legislative text.

A. A Look at the Irish Tax Code

Understanding the current state of Ireland's corporate tax policy requires looking into the tax code itself. A look at the Irish tax code not only provides historical context into how tax policy turned into legal codification, but also shows how Ireland has changed its tax avoidance schemes to keep up with modern regulations and loophole closures.

In the late 1990s, the Oireachtas, Ireland's bicameral legislative body, signed into law the Taxes Consolidation Act of 1997 ("TCA")⁴⁶ and the Finance Act of 1999,⁴⁷ bringing together the country's bodies of legislation on income tax, corporation tax, and securities/investment tax into two cohesive vehicles of legislation. The TCA and Finance Act codified a decades-long strategy by the Irish government to attract foreign direct investment ("FDI") through the enticement of a low headline corporate tax rate.⁴⁸

46. Taxes Consolidation Act, 1997 (Act No. 37/1997) (Ir.), § 23(A)(1)a, <http://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/pdf>.

47. Finance Act, 1999 (Act No. 2/1999) (Ir.), <http://www.irishstatutebook.ie/eli/1999/act/2/enacted/en/pdf>.

48. Barry & O'Mahony, *supra* note 14, at 51 ("The IDA, the DEAC and Coras Trachtala would all support the department's proposals for export profits tax relief (or 'export sales relief')—the origin of Ireland's low corporation tax regime. The measure was eventually introduced by the second inter-party government, in the face of continuing opposition from the Department of Finance, in 1956.").

Specifically, Section 21 of the TCA set the general rate of corporation tax at 12.5% for all trading companies,⁴⁹ one of Europe's lowest.⁵⁰ In Ireland's case, trading refers to profits earned on the island of Ireland through business transactions and is not specifically related to investment trading.⁵¹ The TCA and Finance Acts were continuations of reductions in headline corporate profit taxation underway in Ireland since 1976.⁵² In the nearly twenty-five years between 1976 and the turn of the century, the tax levied on corporate profit dropped from a highly protectionist 50% to its current 12.5%,⁵³ largely due to expansion of the "manufacturing" definition in the tax code to cover financial services rather than traditionally manufactured goods.⁵⁴

In addition to formally lowering the headline tax rate, the acts also addressed special tax considerations for corporate profits from businesses in specialized sectors.⁵⁵ The broadly defined manufacturing sector enjoyed a new 10% rate on profits traded in Ireland, which was eventually phased out to 12.5% in 2003.⁵⁶ Most notably, the acts created a set of special circumstances for profits related to sales of intellectual property (including software, biotech, technological processing machines, app revenues, and information technology), all of which were specifically designated to use a smaller-than-headline rate of 2.5 to 4.5% based on a system of base erosion profit-shifting.⁵⁷

An understanding of the sheer importance of the base erosion profit shifting system to Ireland requires insight into how BEPS schemes operate and how they allow corporations to avoid paying corporate tax in states with higher headline rates. The following explanation is undoubtedly a simplified detailing of the mechanics of Ireland's BEPS tools, but it illustrates the process through which Ireland conducts its overt tax avoidance scheme. Additionally, it also shows how the Irish government has changed different

49. Irish Tax and Customs Revenue, SI 02-02-06, *Tax and Duty Manual*, § 2.2 (February 2021), <https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-02/02-02-06.pdf>.

50. *Corporate Tax Rate Table*, KPMG (2011-2021), <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html> [<https://perma.cc/3DD5-3QNN>].

51. Irish Tax and Customs Revenue, *supra* note 49, at § 2.2, <https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-02/02-02-06.pdf>.

52. Julia Blue, *The Celtic Tiger Roars Defiantly: Corporation Tax in Ireland and Competition Within the European Union*, DUKE J. COMP. & INT'L L. 443, 456–57 (1999).

53. *Id.* at 455.

54. Walsh & Sanger, *supra* note 12, at 5.

55. Blue, *supra* note 52, at 456.

56. Blue, *supra* note 52, at 456.

57. GOV'T OF IR., OFFICE OF THE COMPTROLLER AND AUDITOR GENERAL, REPORT ON THE ACCOUNTS OF THE PUBLIC SERVICE (2016).

aspects of its schemes over the last 30 years in order to stay away from regulatory trouble.

1. Double Irish, Single Malt, and the Green Jersey: Base Erosion and Profit Sharing Under Irish Law

Since the early 1990's, Ireland's tax system has utilized some variation of a BEPS tool to attract FDI from multinational corporations.⁵⁸ Base erosion refers to the practice of reducing the taxable base of a company's taxable profits⁵⁹ by decreasing the amount of profits a company claims to have earned in one country.⁶⁰ This reduction of a company's taxable profit base is accomplished through profit-shifting, a practice of shifting taxable profits from high-tax countries to low-tax countries.⁶¹

This is possible because of a "a fundamental design flaw of the international tax regime: the 'arm's length standard', which states that [multinational corporations] should value the intra-firm transactions between different subsidiaries as if they were being handled with a third independent party at market prices."⁶² In other words, shifting profits between a company's own subsidiaries is legal under an international presumption that subsidiaries, even wholly-owned subsidiaries, are to be interacted with as separate third-party companies whose transactions with the parent company are conducted at reasonable market prices.⁶³

58. While there is not an exact date provided for the beginning of Ireland's BEPS tool, Apple is known to have used it as early as 1991 thanks to a report from the Irish Revenue Commissioner clarifying Apple's use of the tool under Irish law. Rogerio M Fernandes Ferreira, *INSIGHT: The Apple Case Decision in Perspective*, BLOOMBERG TAX (Aug. 26, 2020), <https://news.bloombergtax.com/daily-tax-report-international/insight-the-apple-case-decision-in-perspective> [<https://perma.cc/KG3X-G3CS>]. Google has also used the BEPS tool within the last three years without despite Ireland's supposed closure of the original BEPS mechanics. Peter Bodkin, *Two years after the 'double Irish' was shelved, Google used it to shift billions to Bermuda*, THE JOURNAL.IE (Dec. 1, 2018), <https://www.thejournal.ie/google-ireland-tax-3-3-4367701-Dec2018/> [<https://perma.cc/B2XY-RQRY>].

59. *What is BEPS*, TRANSFER PRICING ASIA (Jan. 29, 2017), <https://transferpricingasia.com/2017/01/29/what-is-beps/> [<https://perma.cc/6UGC-P6JP>].

60. *Id.*

61. *Id.*

62. Wouter Lips, *Great Powers in Global Tax Governance: A Comparison of the US Role in the CRS and BEPS*, GLOBALIZATIONS, 4 (2018), <https://files.osf.io/v1/resources/ewd3j/providers/osfstorage/5d9c9b73fcf91f00121a3068?action=download&direct&version=1> [<https://perma.cc/9EV8-HC5C>].

63. *See id.*

In Ireland's case, this profit-shifting is not the end of the proverbial road for a company's profit. Once a multinational company's profit is shifted to Ireland, the corporation then uses Ireland's renowned and extensive set of bilateral tax treaties⁶⁴ to further shift that profit to a third country with a low-to-zero percent corporate tax. This last tax haven is where the corporation's profit is *finally* reported as income and subjected to a headline tax rate.⁶⁵

Take, for example, the following hypothetical. Say that Google uses Ireland's BEPS tool to avoid paying corporation tax on profit generated in another EU country with a relatively high corporation tax rate. Google's American headquarters creates a web services program and subsequently sells the IP rights for that program to its Bermudian subsidiary, Google Bermuda. Google Bermuda then licenses its Irish based subsidiary, Google Ireland, to sell the program in Ireland. Then, Google Ireland licenses Google Germany to sell in the program in Germany.

A customer buys Google's program in Germany for €100. Selling IP-related products requires minimal overhead, so Google Germany earns €95 per sale of an individual program. Using the arm's length standard, Google shifts this German-derived profit to Google Ireland as a royalty payment for Google Germany's licensing agreement. Because it is IP-related profit, Google Ireland only incurs a 2.5% to 4.5% tax in accordance with the TCA and Finance Act on any profits held in Ireland.⁶⁶ Once in Ireland, Google Ireland then uses Ireland's complete tax treaty with Bermuda to shift the remaining profit to Google Bermuda. Most of the €95 profit originally made in Germany at the beginning of the transaction will finish its journey as reportable Bermudan income subject to Bermuda's zero-tax jurisdiction.⁶⁷

This legal abuse of the Irish tax code and international norms of corporate tax policy provides Ireland with some revenue from corporate tax, but the scheme(s) shielded huge volumes of taxable profits being shifted through the country.⁶⁸

64. PricewaterhouseCoopers, *Ireland's Foreign tax relief and tax treaties*, WORLDWIDE TAX SUMMARIES (last reviewed Aug. 12, 2020), <https://taxsummaries.pwc.com/ireland/individual/foreign-tax-relief-and-tax-treaties> [<https://perma.cc/MN3D-TJK6>].

65. *Id.*

66. *What is BEPS*, *supra* note 59.

67. See Joseph Brothers, *From the Double Irish to the Bermuda Triangle*, TAX ANALYSTS 687-95 (Nov. 24, 2014), <https://sven-giegold.de/wp-content/uploads/2015/03/From-Double-Irish-to-Bermuda-Triangle-2014.pdf>. Both Bermuda and the Cayman Islands were/are popular final zero-tax destinations for profit originally generated in the European Union. See *id.* at 692.

68. Jannick Damgaard, Thomas Elkjaer & Niels Johannesen, *The Rise of Phantom Investments*, 56.3 FIN. & DEV. 11, 12 (Sept. 2019), <https://www.imf.org/external/pubs/ft/fandd/2019/09/pdf/the-rise-of-phantom-FDI-in-tax-havens-damgaard.pdf>. Stephen Holland, *How Ireland became one of the World's biggest tax havens*, INDEPENDENT.IE (Dec. 4,

Ireland's 'double Irish' BEPS tool, however, has been discontinued in its original form in compliance with European Union ("EU") regulation. "Over the past years Ireland has implemented significant changes in domestic legislation and adopted and implemented recommendations from the Organization for Economic Co-operation and Development ("OECD") which have closed or significantly restricted the ability of companies to use tax planning structures similar to [BEPS]."⁶⁹

Rather than acquiesce to EU regulation, Ireland's corporate tax hydra has brought two successors into the void left by the closure of the 'double Irish' tool: the aptly named 'Single Malt'⁷⁰ and 'Green Jersey' systems.⁷¹ The 'Single Malt' mimics the structure of the 'double Irish' system but changes the end destination of the transaction to a tax haven whose bilateral treaty with Ireland states that the money being shifted is for "managerial and control" purposes.⁷² The immediacy with which 'Single Malt' arose dashed hopes of complete abolition of the 'double Irish' tool.⁷³ Regardless of its technical legality, Ireland closed one of its two 'Single Malt' loopholes in a joint announcement with Maltese Financial authorities; Ireland's bilateral tax treaty with the United Arab Emirates still allows for this system.⁷⁴

2021), <https://www.independent.ie/regionals/sligochampion/business/how-ireland-became-one-of-the-worlds-biggest-tax-havens-41117761.html> [<https://perma.cc/UZ8U-MEQ8>] ("The Double Irish tax tool first used in the late 1980s was the largest tax avoidance tool in history and by 2010 it was shielding \$100 billion annually in US multinational foreign profits from taxation.").

69. Cormac Doyle, *INSIGHT: The Apple Case—Where Are We Now?*, BLOOMBERG TAX (Aug. 3, 2020), <https://news.bloombergtax.com/daily-tax-report-international/insight-the-apple-case-where-are-we-now> [<https://perma.cc/VK9C-2GRE>].

70. Dominic Coyle, *Multinationals turn from 'Double Irish' to 'Single Malt' to avoid tax in Ireland*, THE IRISH TIMES (Nov. 14, 2017), <https://www.irishtimes.com/business/economy/multinationals-turn-from-double-irish-to-single-malt-to-avoid-tax-in-ireland-1.3290649> [<https://perma.cc/5YUS-T2WW>].

71. Emma Clancy, *Apple, Ireland and The New Green Jersey Tax Avoidance Technique*, SOC. EUR. (July 4, 2018), <https://www.socialeurope.eu/apple-ireland-and-the-new-green-jersey-tax-avoidance-technique> [<https://perma.cc/FSL5-WS6K>].

72. Sarah McCabe, *New Loophole to Replace the 'Double Irish' Tax Strategy*, INDEPENDENT.IE (Nov. 8, 2014), <https://www.independent.ie/business/irish/new-loophole-to-replace-the-double-irish-tax-strategy-30728951.html> [<https://perma.cc/5UZN-K578>].

73. *Id.* ("The findings, reported in the National Tax Journal, pour cold water on hopes that the abolition of the Double Irish in Budget 2015 will clamp down on multinational tax avoidance and restore the reputational damage repeated corporate tax scandals have caused Ireland.").

74. Billy O'Halloran, *Revenue to Close 'Single Malt' Loophole*, IRISH TIMES (Nov. 27, 2018), <https://www.irishtimes.com/business/economy/revenue-to-close-single-malt-tax-loophole-1.3712238> [<https://perma.cc/5F2J-VKWW>].

The better favored successor to ‘double Irish’ has been the Capital Allotments for Intangible Assets (“CAIA”) system. Already used by Apple, CAIA introduces a system from the traditional BEPS tools that have drawn fire from the European Union.⁷⁵ Under CAIA, an Irish subsidiary still buys intangible assets (these are the same IP assets used in both other tax avoidance tools) from its foreign headquarters.⁷⁶

But, whereas previous systems used tax treaties to shift profits, CAIA allows companies to use intangible assets, purchased in multi-billion dollar chunks, as a giant, multi-year tax deductions against revenues generated in the European Union and moved to Ireland.⁷⁷ In essence, CAIA allows an Irish subsidiary to buy, for example, \$100 billion worth of intangible assets from its American parent company and subsequently use that \$100 billion purchase as a monstrous deduction against \$100 billion worth of profit earned in the European Union, creating a net-zero tax obligation in Ireland.

Through CAIA, a multinational company operating under the system can use the deduction’s now 80% coverage⁷⁸ of international profits to reach an effective tax rate of 2.5%.⁷⁹ To date, Microsoft⁸⁰ and Apple⁸¹ have most notably taken advantage of the CAIA BEPS tool, and more companies will undoubtedly structure their business models to fit the CAIA system until the profit shifting loopholes are closed and tax crediting schemes end.

75. Patrick Smyth, *Explainer: Apple’s €13bn tax appeal has huge implications*, IRISH TIMES (Sept. 13, 2019), <https://www.irishtimes.com/business/economy/explainer-apple-s-13bn-tax-appeal-has-huge-implications-1.4017044> [<https://perma.cc/7LKE-96G2>].

76. Clancy, *supra*, note 71.

77. Clancy, *supra*, note 71.

78. *Tax break for Irish IP transfers is cut to 80pc*, INDEPENDENT.IE (Oct. 11, 2017), <https://www.independent.ie/business/budget/tax-break-for-ip-transfers-is-cut-to-80pc-36215540.html> [<https://perma.cc/XRP2-UEE6>].

79. *Ireland As A European Gateway Jurisdiction For China—Outbound and Inbound Investments*, MATHESON (2013), https://web.archive.org/web/20180712182634if/http://www.matheson.com:80/images/uploads/documents/China_Article_-_March_2013.pdf (“The tax deduction can be used to achieve an effective tax rate of 2.5% on profits from exploitation of the IP purchased. Provided the IP is held for five years, a subsequent disposal of the IP will not result in a clawback.”).

80. Mark Paul, *Microsoft moves \$52.8bn of assets and its Asian trading operation to Ireland*, IRISH TIMES (May 25, 2019), <https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fbusiness%2Ftechnology%2Fmicrosoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630> [<https://perma.cc/5ELK-W2MK>].

81. Brad Setser, *Ireland’s Statistical Cry for Help*, COUNCIL ON FOREIGN AFFS. (Nov. 21, 2019), <https://www.cfr.org/blog/irelands-statistical-cry-help> [<https://perma.cc/2PTY-LTNZ>] (“Apple pioneered this structure when Apple Ireland borrowed funds from Apple Jersey to, more or less, buy the IP rights that had been assigned to Apple Jersey (hat tip to the reporters who worked through the Paradise Papers).”).

B. EU Fair Competition Laws

It seems reasonable to believe that Ireland will not stop manipulating its corporate tax policy on its own volition. This means that extra-governmental pressure and action from the European Union is likely necessary to change Ireland's tax-avoiding nature. However, in order to address any of Ireland's corporate tax issues, the EU, acting in its role as Europe's supra-governmental authority, must find a basis for action grounded in the treaties forming the constitutional basis of the Union.

First, the Treaty Establishing the European Economic Community ("EC Treaty") was signed in 1957, establishing a common European market by "[eliminating] the barriers which divide Europe."⁸² Article 2 of the EC Treaty established the common market to facilitate "the harmonious development of economic activities, a continuous and balanced expansion, increased economic stability, a rise in the standard of living in Europe and closer relations among Member States."⁸³

Notably, the EC Treaty prescribes that the European Commission, an executive body composed of an individual representative from each member state,⁸⁴ retains both the power to remove obstacles to the economic harmonization of member states and the power to introduce legislation aimed to promote member state economic harmonization from the top down.⁸⁵ Chapter 3 of the EC Treaty codifies the Commission's empowerment to take legal steps maintaining the fair functioning parity of the Union's economic affairs, including the ability to review and act on the legality of a member state's conduct within the common market.⁸⁶ This empowerment, however, requires unanimous approval from the European Commission, meaning that Ireland's representative could veto any action that could negatively impact Ireland's economy.⁸⁷ Without unanimity, the Commission cannot issue legally binding directives, regulations, or administrative actions to

82. *Treaty Establishing the European Economic Community*, at art. 1, 258 U.N.T.S. 11 (1958), *amended by* Single European Act, O.J. L 169 1, (effective July 1, 1987), [hereinafter EC Treaty], https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf [hereinafter EC Treaty].

83. *Id.* art. 2.

84. *European Commission [EC]*, DEVEX, <https://www.devex.com/organizations/european-commission-ec-52542>. [https://perma.cc/2WL7-UQ5X].

85. Blue, *supra* note 52, at 456–57.

86. EC Treaty, *supra* note 82, art. 100.

87. EC Treaty, *supra* note 82, art. 101.

curtail a member state's actions if that conduct "directly affect[s] the establishment or functioning of the common market."⁸⁸

Second, the European Union's Treaty of Lisbon in 2007 modernized the Union's governing apparatus.⁸⁹ The treaty, which updated both the EC Treaty and the Treaty on the Functioning of the European Union, centralized the union's regulations, foreign policy, and centralized leadership.⁹⁰ It also streamlined new methods through which the EU could act against the economic practices of non-compliant member states.⁹¹ Specifically, Section 2 of the treaty addresses economic aids granted by states and provides for the intervention of the European Commission in actions by member states that are not "compatible with the internal market."⁹² Specifically, article 107 defines illegal state aid as:

Save otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.⁹³

Most importantly in Ireland's case, article 108 of the Treaty of Lisbon sheds the EC Treaty's requirement of unanimous commissioner approval before the European Commission can act against states distorting the market.⁹⁴ This regulatory loosening increases the supervisory ability of the Commission, allowing it to combat the actions of member states trying to create an economic advantage at the expense of other member states.

The Treaty of Lisbon strengthens the EU's ability to involve itself in the economic affairs of member states. In fact, the Treaty adds language applicable to Ireland's current situation: how the European Commission approaches incongruent or illegally competitive taxation.⁹⁵ The Commission can "issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market."⁹⁶ In fact, most EU

88. EC Treaty, *supra* note 82, art. 115.

89. *Fact Sheets on the European Union: The Treaty of Lisbon*, European Parliament, 2 (last updated 2020). https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.5.pdf.

90. *Id.*

91. *Id.* at 5.

92. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, Oct. 26, 2012, 2012 O.J. (C 326) 47, (effective Dec. 1, 2009) [hereinafter Treaty of Lisbon].

93. *Id.*

94. *Id.* art. 108.

95. EC Treaty, *supra* note 82, arts. 95–100.

96. Treaty of Lisbon, *supra* note 92, art. 115.

competition infringement actions in the realm of tax management originates from these directives.⁹⁷

Overall, the power given to the European Commission in the EC Treaty and Treaty of Lisbon directly effects Ireland's tax and economic policy. Although the European Commission might not be able to directly block Irish legislation because of the Treaty's unanimous approval requirement, the empowerment enshrined in the later Treaty of Lisbon allows the Commission to directly act against Ireland's tax policy by utilizing the European justice system.

C. European Case Law

Two important pieces of modern, post-Eurozone crisis, post-Treaty of Lisbon case law speak to the European Union's growing ability to take direct action against member states it alleges to have distorted competition in the common market. They also illustrate the European Commission's wariness of Ireland's commitment to the ideological underpinnings of the European Union while simultaneously remaining a tax haven.

First, the European Commission's 2016 investigation on illegal state aid accused the Republic of Ireland of giving the Apple Group, operating in Europe as Apple Sales International ("ASI") and Apple Operations Europe ("AOE"), over \$13 billion U.S.D. in illegal state aid in the form of a BEPS-fueled near-zero tax rate between January 1991 and May 2007.⁹⁸ Although the ruling did not specifically cite Article 107 of the Treaty of Lisbon, the European Commission's wording directly draws upon the Article's mandate to combat potential and real distortions in the common market.⁹⁹ Specifically, the Commission stated:

97. *Fact Sheets on the European Union: Direct Taxation: Personal And Company Taxation*, EUROPEAN PARLIAMENT (last updated 2020), <https://www.europarl.europa.eu/factsheets/en/sheet/80/direct-taxation-personal-and-company-taxation> [<https://perma.cc/PB2B-F49V>].

98. European Commission Press Release IP/16/2923, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion (Aug. 30, 2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923 [<https://perma.cc/YP2J-K92A>] [hereinafter Apple Tax Decision].

99. *See id.*

As a matter of principle, EU state aid rules require that incompatible state aid is recovered in order to remove the distortion of competition created by the aid. There are no fines under EU State aid rules and recovery does not penalise the company in question. It simply restores equal treatment with other companies.¹⁰⁰

The European Commission's action marked the first time that Irish corporate tax policy ran afoul of the EU's principles of the common market to the point where direct action was needed to correct the state of affairs.¹⁰¹ The specific BEPS-fueled tax rate provided by the Irish government to the Apple Group subsidiaries was based on the original 'double Irish' BEPS tool, cutting the headline corporate tax rate well below the headline 12.5%.¹⁰² Although the EU's legal challenge focused on a secret deal between the Irish executive and Apple's controlling members to provide specific aid to Apple's profit stream,¹⁰³ the action nonetheless illustrated the resolve of the European Commission to start acting against tax avoiders and the state-sponsored schemes aiding their avoidance. Furthermore, the retroactivity of the Commission's decision—attributing their €13 billion back tax judgment to a BEPS tool that was phased out two to three years before the Commission's 2016 decision—displayed the EC Treaty's and the Treaty on the Functioning of the European Union's ("TFEU") temporal reach.¹⁰⁴ The Commission's decision undoubtedly sent a resounding message that it was willing to challenge the autonomy of any tax system it perceives as harmful to internal competition.¹⁰⁵

The second piece of case law is the consequent reversal of the European Commission's decision on Ireland's illegal state aid by the European General Court in early 2020. In *Ireland v. Commission*, the Republic of Ireland directly challenged the European Commission's ruling that the Irish authorities subverted Article 107 of the Treaty of Lisbon.¹⁰⁶ Ireland, along with the Apple subsidiaries implicated in the European Commission's original ruling, argued the Commission could only make a showing that the tax set up provided to Apple was selective in nature and not that it was created to purposely distort the common market or provide the Apple subsidiaries

100. *Id.*

101. *Id.*

102. The infographics provided by the European Commission details a system of profit shifting that all but describes the Double Irish, and later Single Malt, corporate tax avoidance schemes to create an actual tax rate of 1% for Apple and its subsidiaries by 2003. *See id.* This actual rate falls well below the state-advertised 12.5% headline corporate tax rate. *See also* Walsh & Sanger, *supra* note 12, at 5.

103. Apple Tax Decision, *supra* note 98.

104. Apple Tax Decision, *supra* note 98.

105. Rita Barrera & Jessica Bustamante, *The Rotten Apple: Tax Avoidance in Ireland*, 32:1 THE INT'L TRADE J., 150, 158–59 (2018).

106. Case T-778/16, *Ireland v. Comm'n*, 2020 E.C.R.

with a competitive advantage within the European technologies market.¹⁰⁷ More specifically, Ireland based its plea before the court on the grounds that Article 107's safeguards against market distortion and Article 108's protections against illegal state aid jointly created a burden of proof requiring the Commission to prove any state aid provided in the form of tax benefits was to provide a specific advantage to an entity rather than a selective benefit;¹⁰⁸ the former being a violation of the Treaty of Lisbon, but not the latter.¹⁰⁹

Ultimately, the European General Court annulled the European Commission's €13 billion fine against Apple because the Commission could not satisfy the court's burden of proof for violations of Article 107/108 of the Treaty of Lisbon.¹¹⁰ The decision did not come without caveats. Most importantly, the court's explanation that the Commission was correct in its conclusion that any similar violation committed by Ireland of Article 107 would originate from the ordinary rules of the Irish corporate tax code under the TCA.¹¹¹ This assertion by the court effectively rubber-stamped the Commission's suspicion that the TCA might have been, and could continue to be, a source of potential violations of the Treaty of Lisbon's protections on fair competition.¹¹²

D. *The United States' 2017 Tax Cuts and Jobs Act*

The last piece of applicable law underscores the diminishing longevity of Ireland's current corporate taxation scheme. While an American law may seem slightly out of place, the 2017 *Tax Cuts and Jobs Act* ("TCJA") creates specific predicaments for Ireland because around 80% of all Irish corporation and business taxes are paid by American companies,¹¹³ a percentage dominated by American companies that contribute to the majority of Ireland's

107. *Id.* ¶¶ 133–37.

108. *Id.* ¶¶ 133–34.

109. *Id.* ¶¶ 134.

110. European Commission Press Release, IP/90/20, The General Court of the European Union annuls the decision taken by the Commission regarding the Irish tax rulings in favor of Apple (July 15, 2020).

111. Case T-778/16, *Ireland v. Comm'n*, 2020 E.C.R., ¶ 163.

112. *See id.*

113. Irish Tax & Customs, *Corporation Tax 2017 Payments and 2016 Returns*, IR. GOV'T. & EVALUATION SERV. 1, 2 (Apr. 2018), <https://www.revenue.ie/en/corporate/documents/research/ct-analysis-2018.pdf> [hereinafter Irish Tax & Customs].

GDP.¹¹⁴ In fact, these companies employ over 180,000 Irish workers¹¹⁵ and twenty-five of the top fifty Irish companies in 2017 were American companies that directly contributed to wages, capital spending,¹¹⁶ and 80% of the corporate tax revenue injected into the Irish economy.¹¹⁷

This economic contribution, however, artificially inflated the power and strength of the Irish economy.¹¹⁸ For example, a double-digit rise in Ireland's GDP in 2015 was not a sign of a booming Irish economy,¹¹⁹ but was instead attributable to a rise in corporate inversions during the Obama era.¹²⁰ The TCJA does not make profit shifting or corporate inversion an illegal practice for American companies; rather, it changes the incentives surrounding each practice.¹²¹

The TCJA changes many features of the US tax code once utilized by multinational corporations to avoid paying American taxes on a majority of their profits. First, the act reduces the headline federal tax rate from 35% to 21% as part of a broader effort by Congress to attract corporate capital back to American shores.¹²² This reduction in the headline rate is coupled with a broader shift from a worldwide tax system to a hybrid territorial tax system, which is a dramatic change from American tax policy since the 1960s.¹²³ Under this new system, foreign prophets incur a “one time

114. Dan MacGuill, *FactCheck: How Much Do Multinationals Actually Contribute in Taxes?*, THEJOURNAL.IE (Sept. 9, 2016, 7:07 PM), <https://www.thejournal.ie/multinationals-tax-contribution-ireland-facts-2972139-Sep2016/> [https://perma.cc/9NR8-LFHN].

115. *Facts & Figures*, AM. CHAMBER OF COM. IR., <https://www.amcham.ie/about-us/us-ireland-business/stats-facts.aspx> [https://perma.cc/48E4-LYQN].

116. *Ireland's Economic and Competitiveness Update Q1 2018*, IDA IR. (2018), https://www.idaireland.com/IDAireland/media/docs/resources/infographics/IDA_Update_Q1-18_1.pdf?ext=.pdf.

117. Irish Tax & Customs, *supra* note 113, at 1.

118. David Jolly, *Ireland, Home to U.S. 'Inversions,' Sees Huge Growth in G.D.P.*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/business/dealbook/ireland-us-tax-inversion.html> [https://perma.cc/YW9R-YZCE] (“And Ireland’s economy, while still growing, is hardly the robust economic engine the double-digit rate of last year would imply. The country’s G.D.P. expanded at an annual rate of 2.3 percent in the first quarter of 2016.”).

119. *Id.*

120. Cliff Taylor, *Ireland's GDP figures: Why 26% Economic Growth is a Problem*, IRISH TIMES (July 15, 2016, 9:30 AM), <https://www.irishtimes.com/business/economy/ireland-s-gdp-figures-why-26-economic-growth-is-a-problem-1.2722170> [https://perma.cc/U9Z9-URZ8].

121. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

122. *See id.* Before 2017, the United States had a corporate tax rate of 35%. PricewaterhouseCoopers, *United States – Corporate - Taxes on corporate income*, WORLDWIDE TAX SUMMARIES (Feb. 1, 2022), <https://taxsummaries.pwc.com/united-states/corporate/taxes-on-corporate-income> [https://perma.cc/9LAV-3TFM].

123. Barry, *supra* note 38, at 327–28.

toll charge . . . whether or not the funds are repatriated to the US.”¹²⁴ Under the former worldwide tax system, a company would be taxed at the US corporate tax rate no matter where it earned its income.¹²⁵ If a company earned that income in a foreign country with a lower tax rate, the company would be subject to paying the difference between the foreign country's tax rate and the US corporate tax rate on all income returned to the United States.¹²⁶

Furthermore, the TCJA creates what scholars call the “participation exemption” which exempts corporations from domestic American taxation when their foreign profits are paid back to their American parent companies.¹²⁷ Nearly 80% of the foreign-taxed income paid back to American parent companies can be eligible for double taxation relief, with the ineligible repatriated profits subject to a lower-than-headline corporate tax rate of 13.1%.¹²⁸ The TCJA's incentives regarding the repatriation of foreign capital have the potential to start a stream of tangible asset movement back to the United States, away from the coffers of subsidiaries in foreign states.¹²⁹ If this comes to fruition, foreign states whose gross domestic product (“GDP”) figures have so far benefited from the artificial increase created by non-repatriated foreign revenues may see their purported economic success fall to more realistic terms.¹³⁰

The TCJA rounds out its major changes by incentivizing US-parented corporations to hold their intangible assets, including IP holdings, in the United States, thus making them eligible for tax deductions on sales and services to foreign parties.¹³¹ Overall, the TCJA's writers aimed to create a new-age system of corporate taxation and encourage repatriation of American corporate holdings and assets.¹³²

124. Barry, *supra* note 38, at 332; see Sedona L. Clothier, Relationships between Corporate Inversions and the Tax Cuts & Jobs Act (Spring 2019) (Honors Thesis, University of New Hampshire).

125. Clothier, *supra* note 124, at 3.

126. Clothier, *supra* note 124, at 3.

127. Clothier, *supra* note 124, at 10.

128. Barry, *supra* note 38, at 333.

129. Barry, *supra* note 38, at 322–33.

130. Barry, *supra* note 38, at 337.

131. Barry, *supra* note 38, at 333.

132. See David Perdue, IMPACTS OF THE US ECONOMY ON IRELAND: A QUANTITATIVE AND QUALITATIVE ANALYSIS 13 (2015) (“However now that the parent/intangible asset is here, there is no royalty import and Ireland's exports and GDP are artificially inflated . . . While it is not known which exact companies caused the distortions, it is clear US

The TCJA's consequences for the Republic of Ireland are apparent. The repatriation of tangible assets to the United States could negatively affect Ireland's GDP, a measure which is, in large part, artificially inflated by holdings kept in Ireland by American corporations.¹³³ Losing the artificial inflation of Ireland's current GDP numbers could make companies more worried that they are investing in a weaker economy.

However, this repatriation of corporate capital may not result in a detrimental repatriation of IP rights that are so vital to Irish subsidiaries under Ireland's BEPS tools. In regards of IP location,

[E]ven if the US export subsidy for IP-intensive goods and services is deemed compatible with WTO rules, the margin associated with locating IP assets in Ireland will not disappear. Irish-located IP, furthermore, can be used to blend away the tax disadvantages of choosing to locate some IP or global intangible income close to where R&D is undertaken in higher-tax European economies.¹³⁴

This means that even if there is a repatriation of corporate capital to American shores, American corporations are not being highly incentivized to remove Irish-located IP.

Whether the TCJA will remain in force under the Biden administration or deliver the desired long-term benefits envisioned by the Trump administration is yet to be seen. Nevertheless, the TCJA does not seem to create substantial barriers that would affect the Irish government's corporate pandering. In fact, the TCJA likely gives the Irish government a new opportunity to modernize its FDI attraction techniques to better fit the tax needs of American companies rather than the needs of Irish people and social services.

E. A Note on Brexit

One important issue that this Comment has not addressed is the issue of Brexit. Ireland and the United Kingdom share a deeply complicated history and have become vastly economically intertwined in the 30 years since the Irish economy began truly growing in the beginning of the 1990s. Ireland and the United Kingdom are part of a joint common travel area, similar to the Schengen Area, and traditionally enjoyed beneficial trade agreements.¹³⁵ Companies from the United Kingdom make up the second

multinationals have played a role. One reason for the reclassification of multinational companies as being resident in Ireland is the use by some US firms of tax inversions.”).

133. *Irish GDP makes a strong start to 2019; 2018 growth revised up to 8.2%*, REUTERS (July 11, 2019, 3:05 AM), <https://www.reuters.com/article/ireland-economy-gdp/irish-gdp-makes-strong-start-to-2019-2018-growth-revised-up-to-8-2-idUSS8N22500X> [<https://perma.cc/37LY-5JGE>]; OECD, IRISH GDP UP BY 26.3% IN 2015? 1 (2016).

134. Barry, *supra* note 38, at 336–37.

135. *What is the common travel area?*, UK IN A CHANGING EUR., <https://ukandeu.ac.uk/the-facts/what-is-the-common-travel-area/> [<https://perma.cc/H9V6-9G7L>].

largest group of economic contributors in the Republic of Ireland behind American corporations.¹³⁶ It is reasonable to believe that these companies, like their American counterparts, will need their Irish offices to act as their connection to the European Union now more than ever. The situation for these UK-borne companies is similar to that of American companies in that Ireland is their best option for a culturally synchronistic, English-speaking, willing and able workforce. In other words, the opportunity cost for these companies, should they move from Ireland after the proposed tax reform, would be high enough to dissuade them from closing down their Irish operations in favor of a different jurisdiction. Overall, however, the uncertainty surrounding Brexit makes Ireland's situation with the UK very fluid and difficult to discern in the short term and long term.

III. LEGAL ANALYSIS

A. The Irish Tax Code Fails to Benefit the Irish People

The Republic of Ireland economically trudged its way through a large part of the 20th century.¹³⁷ The booming economy of the Celtic Tiger from the mid-1990s to the mid-2000s finally gave hope to the Irish people that there was potential for a stronger economy than the abject mediocrity they had been subjected to in previous decades.¹³⁸ However, this idea of “the good times” created a dangerous precedent that effectively justified the Irish government's low corporate tax policy on a micro-socioeconomic level.

Globalization consistently drives increasing levels of financial wealth into the hands of a concentrated percentage of individuals.¹³⁹ At the national level, globalization has graduated formerly low-income countries with less

136. *Top 1000 Irish Businesses*, IRISH TIMES, <http://www.top1000.ie/companies>.

137. John Fitz Gerald, *Understanding Ireland's Economic Success* 2 (Econ. Soc. Research Inst., Working Paper No. 111, 1999), <https://www.esri.ie/system/files?file=media/file-uploads/2015-07/WP111.pdf> (“When a major history of Ireland in the 20th century was first published a decade ago (Lee, 1989) one of the many interesting questions addressed was why Ireland was an economic failure.”).

138. Angelique Chrisafis, *Celtic Tiger roars again - but not for the poor*, THE GUARDIAN (Oct. 6, 2004), <https://www.theguardian.com/world/2004/oct/07/ireland> [<https://perma.cc/J2UN-HUFG>] (“Ireland, once one of the poorest countries in Europe, could become one of the richest in the EU, according to Dan McLaughlin, the N/A. chief economist at the Bank of Ireland. He said employment would rise by 50,000 a year and Ireland would have to lure workers from the EU's latest members in eastern Europe.”).

139. Ricardo Fuentes-Nieva & Nicolas Galasso, *WORKING FOR THE FEW: POLITICAL CAPTURE AND ECONOMIC INEQUALITY* 5 (2014).

overall inequality, like Ireland, into middle-income status with increasing levels of overall inequality, driving a “wedge between the haves and have nots.”¹⁴⁰ The Celtic Tiger, for example, helped drive Ireland to becoming one of the richest countries in Europe on paper, but in the process pushed Ireland’s capital, Dublin, into becoming the most expensive city in Europe.¹⁴¹ The gap between rich and poor grew so much that the UN reported that Ireland had the highest levels of inequality of all western countries except the US.¹⁴² The boom’s on-paper benefit never really trickled down to the common Irishperson:

In spite of its new-found prosperity, Ireland has the highest proportion of people at risk of poverty in the EU. Some single parent families survive on less than €150 a week. Many say they can’t pay for their children to go to the doctor when they are sick. The elderly, disabled and young are particularly at risk, while immigrants who arrived with the boom often live in appalling conditions. A European report released last week said one in five Irish people was classed as poor: taking home less than 60% of the average wage. The OECD puts the poverty level at about 15%.¹⁴³

This resounding inequality was not confined to the early 2000s. From 1980 to 2012, the share of national income going to the richest one percent of the Irish economy nearly doubled from around 5% to around 11%.¹⁴⁴ “American multinationals made more profits in Ireland in 2017 than in six of the world’s largest economies combined,” according to official data from Caín agus Custaim Ba hÉirann (Ireland’s Office of Custom and Tax).¹⁴⁵ Economic analysis conducted by the Irish government in 2019 further showed that American multinationals reported \$83 billion U.S.D. *in profits* in Ireland alone, constituting over 30% of the profit made by American multinationals in the European Union.¹⁴⁶ From 1995 to 2015, Ireland “benefited from \$277 [billion U.S.D.] (£182bn) of US direct foreign investment in the past two decades,”¹⁴⁷ creating a seemingly obvious depiction of economic prosperity within the country.

Despite the outstanding volume of capital running through Ireland, there are still social and fiscal crises that “centre on those who have little

140. *Id.* at 6–7.

141. Chrisafis, *supra* note 138.

142. Chrisafis, *supra* note 138.

143. Chrisafis, *supra* note 138.

144. Fuentes-Nieva & Galasso, *supra* note 139, at 6.

145. David Chance, *US firms make \$83bn profits in Ireland*, INDEPENDENT.IE (Aug. 27, 2019), <https://www.independent.ie/business/irish/us-firms-make-83bn-profits-in-ireland-38439416.html> [<https://perma.cc/6A7J-4CL8>].

146. *Id.*

147. Henry McDonald, *700 US companies now located in Ireland as direct investment soars*, THE GUARDIAN (Mar. 5, 2015), <https://www.theguardian.com/world/2015/mar/05/ireland-attracts-soaring-level-of-us-investment> [<https://perma.cc/DBX7-EG9N>].

or no connections to multinationals [sic] firms.”¹⁴⁸ The Republic of Ireland remains one of the most socioeconomically unequal countries in Europe.¹⁴⁹ One in six people in Ireland live on an income below the poverty line.¹⁵⁰ 23% of children in Ireland, roughly one in four, lives in a household deprived of two or more basic necessities and 8.8% of children are living in consistent poverty.¹⁵¹ Travellers, a nomadic indigenous ethnic minority in Ireland, were left out of the Celtic Tiger financial boom of the mid-2000s and still suffer from a drastically shorter life expectancy and higher infancy mortality rate than the general Irish population.¹⁵² In fact, evidence from 2007, the height of Ireland's Financial prosperity before the global financial crisis showed that “some 50 per cent of Travellers die before their 39th birthday and some 70 per cent fail to live past the age of 59.”¹⁵³ Unfortunately, this health inequality continues to affect the Traveller community.¹⁵⁴ The empirical socioeconomic evidence begs the question whether the phenomenal amount of foreign direct investment provided by multinational corporations should be taxed more heavily to effectively contribute to improving the health, viability, and socioeconomic solvency of the people of the Republic of Ireland. Even the European Union's economics commissioner, Pierre Moscovici, raised similar sentiment after Ireland's decision to appeal the

148. See, e.g., Sheila Killian, *Where's the harm in tax competition? Lessons from US multinationals in Ireland*, CRITICAL PERSPECTIVES ON ACCOUNTING 13 (2005), https://ulir.ul.ie/bitstream/handle/10344/3090/Killian_2006_tax.pdf?sequence=2 [<https://perma.cc/23YE-TWAR>].

149. Carl O'Brien, *Ireland at risk of reaching US levels of income inequality, says study*, IRISH TIMES (Feb. 16, 2015, 11:33 AM), <https://www.irishtimes.com/news/social-affairs/ireland-at-risk-of-reaching-us-levels-of-income-inequality-says-study-1.2105125> [<https://perma.cc/A5YW-FKGK>] (“It is one of a series of findings by the think-tank Tasc, which warns that income inequality will edge closer to US levels unless there are changes in economic and social policy. The research says Ireland is now the most unequal country in the EU when it comes to how the economy distributes income, before taxes and social welfare payments are included.”).

150. Sean Healy, *760,000 people in Ireland are poor. That's one in six of us*, IRISH EXAMINER (Apr. 15, 2019, 01:00 AM), www.irishexaminer.com/opinion/commentanalysis/arid-30917661.html [<https://perma.cc/9FX2-CJQU>].

151. *Id.*

152. Killian, *supra* note 148, at 13.

153. *50% of Travellers die before 39 - study*, IRISH TIMES (June 25, 2007, 01:00 AM), <https://www.irishtimes.com/news/50-of-travellers-die-before-39-study-1.808703> [<https://perma.cc/A385-NRDN>].

154. Safa Abdalla et al., *Social inequalities in health expectancy in the contribution of mortality and morbidity: the case of Irish Travellers*, 35.4 J. PUB. HEALTH 533, 537–39 (2013), <https://academic.oup.com/jpubhealth/article/35/4/533/1685437> [<https://perma.cc/X6VB-JQPZ>].

European Commission's Apple tax case decision, saying: "It is a strange decision, in a way, to say 'I don't want your €13 billion' when you could have some social programmes or economic programmes [funded] in a country that has been damaged by a crisis, but that's their own will."¹⁵⁵

While it may seem counterintuitive to tax competition enthusiasts, the Organization for Economic Cooperation and Development ("OECD") warned as early as 1998 that low tax rate policies used to attract foreign capital has the potential to erode national tax bases, alter the structure of taxation itself, and hamper the application of taxes and their redistributive goals.¹⁵⁶ Between 2014 and 2021, Ireland's annual corporate tax revenue increased from €4 billion annually to €12 billion annually.¹⁵⁷ However, this revenue barely touches the €61 billion in public spending the Irish government stated would be necessary to fund necessary social and economic programs within the country in 2018.¹⁵⁸ Such short-changing hugely affects the long-term viability of publicly funded institutions such as the Irish Health Service Executive ("HSE"),¹⁵⁹ funding for homelessness protection, rural farming and agrarian subsidies, and more.¹⁶⁰ In fact, the €13 billion fine levied by the European Commission against Apple is itself equivalent to the average annual amount allotted in the Irish budget to the HSE.¹⁶¹

This is not to say that the respective internal allocation of tax funds in Ireland is properly appropriated. It is, however, proof aiding the rational accusation that the amount of tax revenue generated from the annual profits earned by multinational corporations in Ireland does not come close to

155. Suzanne Lynch, *Irish appeal of Apple ruling a 'strange decision', says Moscovici*, IRISH TIMES (Sept. 9, 2016, 08:57 AM), <https://www.irishtimes.com/business/economy/irish-appeal-of-apple-ruling-a-strange-decision-says-moscovici-1.2785431> [<https://perma.cc/4LF5-89H3>].

156. ORG. FOR ECON. COOP. AND DEV. [OECD], HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 14 (1998).

157. Liz Alderman, *Ireland's Days as a Tax Haven May Be Ending, but Not Without a Fight*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/business/ireland-minimum-corporate-tax.html> [<https://perma.cc/AJ37-V844>].

158. GOV'T OF IR., DEP'T OF FIN., BUDGET 2018: ECONOMIC AND FISCAL OUTLOOK (2017), http://budget.gov.ie/Budgets/2018/Documents/Budget_2018_Economic_and_Fiscal_Outlook.pdf.

159. Barrera & Bustamante, *supra* note 105, at 7 ("The €13 billion that Apple owes is 'the equivalent of the annual budget for Ireland's health service'").

160. Brian O'Boyle, *How tax haven Ireland has undermined our democracy and public services*, IRISH INDEPENDENT (Dec. 8, 2021), <https://www.irishexaminer.com/opinion/commentanalysis/arid-40761102.html> [<https://perma.cc/5AJM-74F2>].

161. Sean Farrell & Henry McDonald, *Apple ordered to pay €13bn after EU rules Ireland broke state aid laws*, THE GUARDIAN (Aug. 30, 2016), <https://www.theguardian.com/business/2016/aug/30/apple-pay-back-taxes-eu-ruling-ireland-state-aid> [<https://perma.cc/7RTV-EN5M>].

proportionately contributing to the annual fiscal figure needed to balance the Irish budget.

*B. The Irish Tax Code Holds Ireland Captive to the
Wants of Corporations*

Ireland, under its current corporate tax regime, meets international standards for a financially captured tax haven state.¹⁶² Captured states are flexibly defined as tax havens or lower-tax jurisdictions where the national government's prioritization of maintaining the state's tax haven status allows multinational corporations to influence the affairs of state so as to dissuade or destroy any policies that may negatively affect the financial status quo.¹⁶³ In Ireland's context, its focus on maintaining inflows of FDI gives opportunities to the FDI contributors to improperly influence how the government acts, or does not act, on financial matters.

Ireland's captured state status is dangerous to the Irish people because the Irish government has shown a consistent pattern of bowing to corporate interests for the sake of maintaining the corporate/financial status quo. The Apple tax case highlights a perfect example of the captured Irish state, as well as how the government's acquiescence to private interest put Ireland in financial hot water with the European Union. At the heart of the Apple tax case were two secret dealings between Apple Systems Ireland ("ASI") and the Irish government¹⁶⁴ regarding how Apple could take advantage of Ireland's BEPS system without shifting profits to a subsidiary off Irish soil.¹⁶⁵ Apple, its subsidiaries, and the Irish tax commissioners and revenue board, ASI received two confidential rulings from the Irish Revenue Commissioners allowing them to use a single Irish company, split into two branches, to shift profits for the sake of tax avoidance.¹⁶⁶ The first branch would be subject to the headline 12.5% corporate tax rate in accordance

162. RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 120 (2009).

163. TRANSPARENCY INTERNATIONAL, ANTI-CORRUPTION HELP DESK: STARE CAPTURE 2 (Mar. 11, 2004), https://www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf.

164. Apple Tax Decision, *supra* note 98.

165. Apple Tax Decision, *supra* note 98.

166. Cliff Taylor, *Apple's Irish company structure key to EU tax finding*, IRISH TIMES (Sept. 2, 2016), <https://www.irishtimes.com/business/economy/apple-s-irish-company-structure-key-to-eu-tax-finding-1.2775684> [<https://perma.cc/55ZL-5DEZ>].

with Irish and EU law.¹⁶⁷ Apple successfully lobbied that the second, however, was treated by the Revenue Commissioners as a non-domiciled Apple subsidiary whose revenues were not to be considered Irish-borne capital and, thus, would only be subject to an ultra-low 0.005% tax rate.¹⁶⁸ From 2004 to 2014, Apple used their special status to shield tens of billions of euros of non-US profits from being taxed.¹⁶⁹ When the European Commission issued its 2016 decision ordering Apple to repay €13 billion in illegal tax incentives, the Irish government and Apple joined forces to appeal the decision in the European General Court,¹⁷⁰ which surprised scholars that Ireland would reject this windfall in back-taxes.¹⁷¹

Apple is not the only multinational corporation to capitalize on Ireland's captured state status.

Global legal firm Baker McKenzie, representing a coalition of 24 multinational U.S. software firms, including Microsoft, lobbied Michael Noonan, as [Irish] minister for finance, to resist the [Office for Economic Cooperation and Development's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting] proposals in January 2017. In a letter to [Noonan] the group recommended Ireland not adopt [a provision barring companies from using contracting agents to do business without tax liability], as the changes "will have effects lasting decades" and could "hamper global investment and growth due to uncertainty around taxation". The letter said that "keeping the current standard will make Ireland a more attractive location for regional headquarters . . .".¹⁷²

Not surprisingly, Ireland did not sign up for the OECD's tax reform convention.¹⁷³

The revelations around Baker McKenzie's active lobbying, however, are not the end of the story. In early 2019, a massive leak of internal documents and communications showed that Facebook targeted politicians around the world, including Ireland, promising further injections of FDI into countries

167. Commission Decision 2014/C of 30 August on State Aid SA (ex 2014/CP), https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf [<https://perma.cc/TNY7-FYFM>].

168. Apple Tax Decision, *supra* note 98.

169. Barrera & Bustamante, *supra* note 105, at 4–5.

170. Paul Hannon, *Irish Lawmakers Back Appeal on Apple Ruling*, WALL ST. J. (Nov. 14, 2016), <https://www.wsj.com/articles/irish-lawmakers-expected-to-approve-appeal-on-apple-ruling-1473256462> [<https://perma.cc/9M2Z-V5DV>]; John Campbell, *Apple Irish tax case appeal heard by EU court*, BBC NEWS (Sept. 17, 2019), <https://www.bbc.com/news/world-europe-49724786> [<https://perma.cc/66BV-5KRA>].

171. Lynch, *supra* note 155.

172. Jack Power, *Ireland resists closing corporation tax 'loophole'*, IRISH TIMES (Nov. 10, 2017), <https://www.irishtimes.com/news/ireland/irish-news/ireland-resists-closing-corporation-tax-loophole-1.3286199> [<https://perma.cc/YU6A-2FLC>].

173. *Id.*

who “head off ‘overly restrictive’ GDPR [privacy] legislation.”¹⁷⁴ Most importantly, the communications revealed that Facebook and former Irish prime minister Enda Kenny shared a “cozy” relationship and that Mr. Kenny was very appreciative of Facebook’s selection of Dublin as the company’s European headquarters.¹⁷⁵ The leak further explained that Ireland, whose internal data protection commissioner acted for all twenty-eight EU member states, was prepared to use his office to achieve a favorable outcome for Facebook.¹⁷⁶ It was later revealed that Ireland’s influence on European privacy policy was extended to protect Google’s interests as well.¹⁷⁷

Ireland’s pandering efforts all relate back to the country’s efforts to attract and maintain huge inflows of FDI and corporate revenue. This strategy, however, fails to protect the Irish people from the eternally business-oriented focus of corporations whose lobbying efforts are solely intended to protect/buffer their bottom line, not to protect the financial viability of the Irish state and/or the individual privacy, safety, or sovereignty of the Irish people. So long as Ireland is willing to continue its “vassalage” to corporate interests¹⁷⁸ for the sake of maintaining the status quo, it will add to its history of “catering to the very companies it is supposed to oversee”¹⁷⁹ at the expense of its obligations to its own people and to the European Union. As definitively stated by German political scientist Friedrich Ebert:

As a country grows more and more dependent on one source of revenue, be it mining or aid, the government becomes less and less dependent on, and so accountable to the people of the country. Instead, it focuses on meeting the needs of the sector or group which is essentially supporting its ability to remain in power. If this logic can also be applied to a relentless single-minded policy of using tax to attract FDI, the implications for Ireland are obvious and worrying.¹⁸⁰

174. Carole Cadwalladr & Duncan Campbell, *Revealed: Facebook’s global lobbying against data privacy laws*, THE GUARDIAN (Mar. 2, 2019), <https://www.theguardian.com/technology/2019/mar/02/facebook-global-lobbying-campaign-against-data-privacy-laws-investment> [https://perma.cc/J78V-QM7X].

175. *Id.*

176. *Id.*

177. Nicholas Vincour, *How one country blocks the world on data privacy*, POLITICO (Apr. 24, 2019), <https://www.politico.com/story/2019/04/24/ireland-data-privacy-1270123> [https://perma.cc/5C6Y-9MVU].

178. Cadwalladr & Campbell, *supra* note 174.

179. Vincour, *supra* note 177.

180. FRIEDRICH EBERT STIFTUNG, THE FUTURE WE THE PEOPLE NEED 83 (Werner Puschra & Sara Burke eds., Feb. 2013), <https://library.fes.de/pdf-files/iez/global/09610-20130215.pdf>.

C. The Irish Tax Code Hurts Ireland's Relationship with the EU

The European Union has been engaged in a decade-long battle against tax avoidance.¹⁸¹ In doing so, the EU has pushed member states towards more complete compliance with information exchanges, tax transparency, and regulations deterring unfair competition.¹⁸² The EU's more recent efforts have transformed from democratic attempts to harmonize data exchanges and national tax plans to judicial proceedings against member states whose reluctance to work through democratic channels has forced the extra-national body to take action in the courts. Ireland has shown a consistent pattern of resisting these harmonization attempts; behavior that has pitted the country against its European allies.¹⁸³

The EU's plan for fighting tax evasion and avoidance is three-pronged.¹⁸⁴ First, new legislation was adopted to strengthen the regulation of the European banking sector, most notably through the implementation of public disclosure requirements for key financial information.¹⁸⁵ The European Parliament intended this public disclosure requirement to aid the European Commission in ascertaining whether taxes had been paid at a reasonable economic value in the jurisdiction where the revenue is generated.¹⁸⁶ Second, EU directives steadily standardized the automatic exchange of tax information between national tax authorities, largely to combat tax dodgers and individuals hiding behind shell corporations to evade being subject to high-tax jurisdictions.¹⁸⁷ In essence, these first two prongs are supposed to work hand-in-hand to create a more seamless adjudication of where individuals and/or corporations have, or haven't, been taxed and whether individuals and/or corporations are purposefully evading certain tax regimes. Lastly, as of 2015, the European Commission has aggressively brought to court states who, in its eyes, are affecting unfair competition within the EU internal market by using unfair or illegal tax systems to aid multinational corporations.¹⁸⁸ The quick growth from legislating tax transparency to litigating against member states illustrates the European Commission's and, by extension, European Union's profound focus on leveling the tax playing field amongst member states.

181. Oxfam International, *Pulling the Plug: How to Stop Corporate Tax Dodging in Europe and Beyond*, 1 (Mar. 2015), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bn-pulling-plug-corporate-tax-eu-190315-en.pdf.

182. *See id.* at 1.

183. *Id.* at 2.

184. *Id.*

185. *Id.* at 3.

186. *Id.*

187. *Id.* at 2.

188. *Id.* at 3.

Ireland has managed to contrast with the EU on these three points. First, Ireland's internal regulations keep banking, financial, and tax information confidential.¹⁸⁹ Furthermore, the Irish Revenue Commissioners are required by law to maintain the confidentiality of all of their tax rulings regardless of whether the individual, company, or corporation involved wants or cares about confidentiality.¹⁹⁰ In fact, the Central Bank Act of 1942 prevents the Central Bank of Ireland from sending data intended to help the state comply with EU information exchanges to the Revenue Commissioners, the government officials who are supposed to report that data to the European Commission.¹⁹¹ Ireland's confidentiality provisions, however, were used by the European Commission in the Apple tax case to spin the idea that Ireland was an active and deliberate actor attempting to affront transparency, democratic governance, and public accountability.¹⁹² In fact, the Irish Revenue Commission cites the 1993 Central Statistics Act and the 1997 TCA to protect the secrecy of its internal dealings with Apple from the European Commission's investigation.¹⁹³ This shows the Irish government's, and Apple's, clear knowledge and use of Ireland's data secrecy to circumvent the EU's tax transparency regulations.

It is not as though the Irish government hasn't had the opportunity to provide for adequate transparency by law either. The Central Bank (Amendment) Act 2015 was passed so that certain members of the Oireachtas, Ireland's bicameral legislature, could gain access to confidential banking information held by the Central Bank,¹⁹⁴ yet the act was notably missing any provisions amending the Central Bank Act of 1942 to give the government

189. *Corporate Tax Secrecy and the State: the Apple Case in Ireland*, DEBT AND DEVELOPMENT COALITION IRELAND (Oct. 2015), <https://www.financialjustice.ie/assets/files/pdf/20151023141734.pdf> [hereinafter Debt and Development Coalition Ireland].

190. *Id.*

191. Harry McGee, *Central Bank Secrecy Law to Limit Public Disclosure; Banking Inquiry Bill Designed to Address Major Legal Obstacle to Investigation*, THE IRISH TIMES (Jan. 26, 2015, 1:05 AM), <https://www.irishtimes.com/news/politics/central-bank-secrecy-law-will-limit-public-disclosure-of-key-documents-1.2079188?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fpolitics%2Fcentral-bank-secrecy-law-will-limit-public-disclosure-of-key-documents-1.2079188> [https://perma.cc/7GUX-W3MF].

192. Debt and Development Coalition Ireland, *supra* note 189.

193. MacGuill, *supra* note 114.

194. See Central Bank (Amendment) Act, 2015 (Act No. 1/2015) (Ir.), <https://www.oireachtas.ie/en/bills/bill/2014/108/>.

the discretion to provide the EU and OECD with at least some tax information.¹⁹⁵

Second, Ireland's opposition to the European Commission's several illegal tax aid proceedings against the Netherlands (for aiding Starbucks) and Luxembourg (for aiding Fiat),¹⁹⁶ has drawn pointed responses from European state officials and political members of the European Union. Then-EU Commissioner, Margrethe Vestager, noted with frankness the position of the European Commission when it handed down its illegal state aid decision in 2016, saying, "Member states cannot give tax benefits to selected companies—this is illegal under EU state aid rules."¹⁹⁷ The EU's economics commissioner, Pierre Moscovici, issued similar sentiment, explaining, "We will defend our point of view We know that we are right. It's not arbitrary We are not a politicized commission we are a political commission with a political will, and this political will is clearly to fight tax evasion, tax fraud and aggressive tax planning"¹⁹⁸ Moscovici also expounded that he would not be surprised if Luxembourg and Holland, each embroiled in similar BEPS-tool tax avoidance cases with the EC, associated themselves with Ireland's apple tax appeal in the same way that Ireland had already legally associated themselves with the European Commission's proceedings against Luxembourg and the Netherlands.¹⁹⁹

After the European General Court annulled the European Commission's Apple tax ruling in early 2020, Vestager reiterated the Commission's dedication to stopping tax advantages for multinational companies.²⁰⁰ In her announcement of the Commission's submission of an appeal to the European Court of Justice, she stated:

Making sure that all companies, big and small, pay their fair share of tax remains a top priority for the Commission the General Court has repeatedly confirmed the principle that, while Member States have competence in determining their taxation laws taxation (sic), they must do so in respect of EU law, including State aid rules We have to continue to use all tools at our disposal to ensure

195. *See id.*

196. *See* European Commission Press Release IP/15/5880, Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal under EU State Aid Rules (Oct. 21, 2015), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_5880/IP_15_5880_EN.pdf [hereinafter European Commission].

197. Apple Tax Decision, *supra* note 98.

198. Lynch, *supra* note 155.

199. Lynch, *supra* note 155.

200. European Commission Press Release IP/20/1746, Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland (Sept. 25, 2020), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_20_1746/STATEMENT_20_1746_EN.pdf.

companies pay their fair share of tax We need to continue our efforts to put in place the right legislation to address loopholes and ensure transparency.²⁰¹

Europe's rhetoric is clear: states providing aid to multinational companies in a manner contrary to the EU's goal of ensuring fair and accurate taxation will find themselves subject to EU action. Ireland's consistent support of private business tax interests will likely continue to push the EU towards legal action, action that the Irish government will have to defend with a disproportionate amount of individual Irish taxpayer euros considering the already noted shortfall of corporate tax revenue compared to Ireland's social expenditures. Under the circumstances, it is reasonable to conclude that the European Union will not stop once the European Court of Justice decides the Apple tax case; it will continue its efforts until Ireland fixes the tax loopholes detrimental to the fairness of the EU internal market.

IV. PROPOSED SOLUTIONS

A. Close the Current Loopholes, Apply a Uniform Effective Tax Rate, and Use the TCJA to Capitalize on New European Investment

American corporations make up the bulk of the artificially inflated Irish economy.²⁰² Whether or not one agrees with this lack of corporate diversity, the entrenchment of these corporations in Ireland's business structure could prove very useful should Ireland heed international advice and close its corporate tax loopholes and/or uniformly apply corporate tax regardless of the sector. The historically massive amount of foreign direct investment board into Ireland by these corporations²⁰³ aids the reasonable belief that these companies would have a difficult time finding a new headquarter location. Not only have these corporations built business parks and headquarters campuses in Dublin (i.e. Facebook, Google), Cork (i.e. Dell), and around Ireland, but they have also committed themselves to massive financial investments in one of the most highly-skilled, English-speaking, culturally

201. *Id.*

202. MacGuill, *supra* note 114.

203. See Stephen Smith, *FDI-Ireland's 50 Year Overnight Success Story*, IRISH CENTRAL (May 16, 2014), <https://www.irishcentral.com/business/technology/fdi-irelands-50-year-overnight-success-story> [<https://perma.cc/3UG3-YWAC>].

synonymous job markets Europe has to offer.²⁰⁴ The opportunity cost of uprooting this highly beneficial socioeconomic structure would be high and would immediately present a problem finding a new host country whose workforce and national culture are able and ready to work with the complicated machination American multinational companies. Furthermore, Ireland arguably offers the best gateway into the European market for companies seeking a financially beneficial back to Europe.

With the recognition that the opportunity cost for corporations to move out of Ireland is quite high, the Irish government should close the tax loopholes of TCA and Finance Act to eliminate the availability of the current 2.5% to 4.5% effective tax rate on IP-related revenues and uniformly apply an across-the-board corporate tax rate between 9% to 12.5% of revenue, more realistically towards the lower end of that scale; 9% matching Hungary's headline rate²⁰⁵ and 12.5% being the current, yet underutilized Irish headline rate.²⁰⁶ Applying this uniformity would finally provide the country with reasonably proportional tax revenues that could adequately fund Ireland's social, health, and fiscal programs without burdening multinational corporations to a point where Ireland is no longer a competitively attractive option.

Furthermore, applying a uniform, non-looploled tax rate could be truly realizable thanks to loopholes in the TCJA. Although the ethereal effect of the TCJA was to directly combat Irish conversions and stop the offshoring of corporate revenues,²⁰⁷ quirks in the law's language and the hybrid-territorial system incentivizes American corporations to turn American IP into Irish IP and invest in Irish infrastructure. In fact, practical application of the TCJA allows multinational companies to avoid American taxes by being taxed in a foreign state, barring the IRS from affecting a double

204. *Ireland & US Investment*, IDA IR. (May 2011), <https://merriestreet.ie/en/wp-content/uploads/2011/05/ida-ireland-and-us-investment.pdf> ("US Investment is crucial to Ireland's economic success. Collectively US companies have a US\$165bn foreign direct investment (FDI) in Ireland. This represents 8% of all US investment in the EU and 4.6% worldwide. This equates to more than the total invested in the BRIC economies (Brazil, Russia, India and China). The US accounted for 74% of Ireland's inward investment in 2010. Irish companies directly employ 82,000 people within 227 companies in all 50 states across the USA. The cumulative stock of Irish foreign direct investment (FDI) in the US stood at \$35bn in 2009 (American Chamber of Commerce).").

205. *Hungary Corporate – Taxes on Corporate Income*, PWC (Jan. 7, 2022), <https://taxsummaries.pwc.com/hungary/corporate/taxes-on-corporate-income> [<https://perma.cc/E3XA-PV4P>].

206. Walsh & Sanger, *supra* note 12, at 5.

207. William G. Gale & Claire Haldeman, *The Tax Cuts and Job Acts: Searching for supply-side effects*, ECON. STUD. AT BROOKINGS (July 2021), https://www.brookings.edu/wp-content/uploads/2021/07/20210628_TPC_GaleHaldeman_TCJASupplySideEffects_Report_FINAL.pdf.

tax.²⁰⁸ Even though the TCJA supports the repatriation of capital to the United States, this offshoring would do little more than remove the artificial inflation of Ireland's GDP. In reality, this repatriated capital would first be taxed in Ireland at the 9% to 12.5% rate before returning to America, giving the Irish a fair share of tax revenue and allowing American multinational companies to completely, or near-completely, avoid American taxes.

For example, American corporations under the TCJA do not pay any American taxes outside of a one-time low-flat repatriation rate on revenues earned in foreign countries.²⁰⁹ This means that a company like Google or Facebook can utilize Ireland as a gateway to the European Union, use the arm's length principle and the European Union's freedom of capital movement principles to have all European-based revenues taxed in Ireland and not be subsequently subject to the American tax system. Overall, this would allow American corporations to build bigger foundations in Europe, creating more jobs and market potential for Irish workers without fear that establishing a large worker base in Ireland would create tax liabilities with the IRS from consequential profit increases and market growth down the line.

Lastly, multinational corporations, whether American or not, should also be reluctant to move their operations from Ireland because of the superior access to policy making that companies already enjoy under Ireland's captured state status. Facebook's influence over Ireland's position as a European "leader" on data privacy policy is a clear example of such access; without such access Facebook would likely have been subject to more stringent GDPR privacy restrictions created by Germany or France.²¹⁰ Raising the corporate tax liability for Ireland's largest economic contributors would arguably require political dealing, and the ethical efficacy of this political dealing should hold some importance. But, without a certain amount of acquiescence to the existing corporate interests with an Ireland, the influence multinational companies already enjoy would undoubtedly work to block any such shifting policy. Even so, the Irish government owes greatly

208. Kyle Pomerleau, *A Hybrid Approach: The Treatment of Foreign Profits Under the Tax Cuts and Jobs Act*, TAX FOUND (May 3, 2018), <https://taxfoundation.org/treatment-foreign-profits-tax-cuts-jobs-act/> [https://perma.cc/HKH6-5XW6].

209. *Key Elements of the U.S. Tax System*, TAX POL'Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/key-elements-us-tax-system> [https://perma.cc/WA8F-7W3L].

210. Naomi O'Leary, *Ireland has conflict of interest in regulating tech, says Facebook whistleblower*, THE IRISH TIMES, (Nov. 9, 2021, 11:34), <https://www.irishtimes.com/business/technology/ireland-has-conflict-of-interest-in-regulating-tech-says-facebook-whistleblower-1.4723559> [https://perma.cc/M3PB-WJ8V].

outstanding duties to both its people and the European Union. Closing the existing loopholes and applying a uniform corporate tax rate may not be easy or popular, but it is a necessary step if Ireland is to grow into more than a perpetual tax haven.

*B. A Novelty with Potential: Ireland Could Harmonize
with Benelux States*

Ireland is not the only country that the European Union has taken action against forgiving unfair tax advantages to corporations. In October 2015, the European Commission released a directive that Luxembourg and the Netherlands were to each recover between €20 million and €30 million in back taxes because of illegal corporate tax benefits provided to Fiat and Starbucks, respectively.²¹¹ In 2016, the European Commission extended this line of illegal state aid rulings to Belgium, ruling that the Belgian government had provided over €35 million in illegal tax incentives to multinational corporations.²¹² The Commission's reports, documents similar to that issued after the Commission's investigation of Ireland's illegal use of state aid for Apple, detailed a set of government-led schemes mimicking or closely related to the Irish Revenue Service's Tax rulings for Apple and the subsequently created Irish BEPS tools used over the past 20 years.²¹³

If Ireland wants to bring itself in line with the EU's harmonization efforts without losing some or all of its beneficial tax appeal, it might consider working with the governments of Belgium, Luxembourg, and the Netherlands to provide a streamlined, multi-state platform of corporate tax policy. Although Ireland has taken the brunt of the Commission's tax rulings (the Apple tax case covered several billion euros), each of the four countries have experience with the EU's modern enforcement of a legal state aid.²¹⁴ Ireland already sided with Luxembourg in opposition to the Commission's respective investigations,²¹⁵ creating a point of commonality that, at the very least, could act as a starting point for a unified, multi-state negotiating platform. With this in mind, collaboration between Ireland and Benelux (Belgium, the Netherlands, and Luxembourg) could provide

211. European Commission, *supra* note 196.

212. See European Commission Press Release, IP/16/42, State aid: Commission concludes Belgian "Excess Profit" tax scheme illegal; around €700 million to be recovered from 35 multinational companies (Jan. 11, 2016), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_16_42/IP_16_42_EN.pdf.

213. See *id.*

214. See Apple Tax Decision, *supra* note 98.

215. Colm Ó Mongáin, *Ireland appeals ECJ state aid ruling against Luxembourg*, RAIDÍÓ TEILIFÍS ÉIREANN (Feb. 20, 2020, 6:01 PM), <https://www.rte.ie/news/business/2020/0219/1116376-ireland-appeals-ecj-state-aid-ruling-against-luxembourg/> [<https://perma.cc/2LZH-4VWY>].

each country the bargaining power to approach the European Union to find an effective, modern, and favorable solution on corporate tax policy.

The economies of the four countries have their own unique quirks, but each economy is driven in large part by financial services and/or high-skilled technologies work.²¹⁶ Each Benelux country has high English literacy²¹⁷ and their trade is conducted mainly with Europe and North America.²¹⁸ These similarities between the demographic and economic structures of Ireland and the Benelux countries could lay the foundation for the potential harmonization of economic interests. Specifically, and Irish – Benelux coalition could align their respective interests in working with the EU to find a solution to the European Commission's continued corporate tax investigations and regulatory actions.

Collaboration between these countries is also not a foreign prospect. In 2018, Ireland joined with Beneluxa (Benelux and Austria) to create a collaborative platform on pharmaceutical policy.²¹⁹ Belgian Minister of Social Policy and Public Health, Maggie de Block, stated upon certification of the collaborative union that, "Today, we are five countries joining forces, our objective being to offer the best care possible, as soon as possible and in a sustainable way to all our patients."²²⁰ This pharmaceutical policy collaboration could serve as president that Belgium, Ireland, Luxembourg, and the Netherlands could work in collaboration towards achieving other policy goals as well.

This is not to suggest that all four countries should completely harmonize policy. Ireland's reliance on American corporations gives it continued incentive to retain a corporate tax rate lower than the roughly 22.65% average rate

216. See *Economy of the Netherlands*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Netherlands/Economy> [<https://perma.cc/UJ3T-TNF6>]; *Economy of Belgium*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Belgium/Economy> [<https://perma.cc/23BG-W9VA>]; *Economy of Luxembourg*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Luxembourg/Demographic-trends#ref23430> [<https://perma.cc/9J3F-2X2W>].

217. *The world's largest ranking of countries and regions by English skills*, EDUC. FIRST, <https://www.ef.edu/epi/regions/europe/> [<https://perma.cc/GAL7-YL37>].

218. See *Economy of the Netherlands*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Netherlands/Economy> [<https://perma.cc/UJ3T-TNF6>]; *Economy of Belgium*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Belgium/Economy> [<https://perma.cc/23BG-W9VA>]; *Economy of Luxembourg*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Luxembourg/Demographic-trends#ref23430> [<https://perma.cc/9J3F-2X2W>].

219. *Ireland joins Beneluxa initiative*, Press Release, GOV'T OF NETH., (June 6, 2018, 4:00 PM), <https://www.government.nl/latest/news/2018/06/22/ireland-joins-beneluxa-initiative> [<https://perma.cc/9C3V-U42B>].

220. *Id.*

currently used by the Benelux states.²²¹ The heightened reliance of Belgium, the Netherlands, and Luxenberg on the European market allows them to retain higher corporate tax rates considering their major trading partners (e.g. Germany, France, Italy) retain rates around 30%.²²²

Rather, this is an opportunity to utilize the collective bargaining power of four major EU member states. Together, Ireland and Benelux could work to create a corporate tax scheme providing companies with continued specific relief from corporate tax without giving those companies the opportunity to finesse the system to the detriment of social programs and the democratic process. The Benelux Union already has “the objective of bringing about total economic integration . . . by following a coordinated policy in the economic, financial, and social fields”²²³ This means that Ireland could potentially benefit from the power of the tri-national union’s policy coordination.

Even though the European Commission cannot directly block the tax policies of any of these four countries without great difficulty,²²⁴ the persistence of the Commission in investigating and punishing instances of illegal state aid²²⁵ gives both the EU and the four member states impetus to work towards a mutually agreeable solution. Ireland’s, and Benelux’s, interests in remaining attractive FDI destinations would be in better shape with unified negotiating power by their side. Furthermore, the vacuum created by the United Kingdom after Brexit could allow a unified Ireland-Benelux block to assume more of a role in influencing EU policy. This could lead to an overall negotiating power strong enough to balance, at least in part, the EU’s overriding interest in maintaining competition in the common market with the states’ interests in remaining attractive financial destinations.

V. CONCLUSION

Ireland’s corporate tax avoidance is no longer a tenable position at home or abroad. The Irish government’s lowering of the corporate tax rate in the mid-to-late 20th century undoubtedly played its part in modernizing

221. As of 2020, Belgium used a nominal corporate tax rate of 18% while the Netherlands used a 25% rate and Luxembourg a 24.94% rate. The average of these is about 22.65%. Elke Asen, *Corporate Tax Rates around the World 2020*, TAX FOUND. (Dec. 9, 2020), <https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/#Regional> [https://perma.cc/DQU4-CKSR].

222. *Id.*

223. *Benelux*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Benelux> [https://perma.cc/KQ5Q-F5L5].

224. *Decision Making on EU Tax Policy*, EUR. COMM’N, https://ec.europa.eu/taxation_customs/taxation-1/decision-making-eu-tax-policy_en [https://perma.cc/J5MJ-EEAT].

225. See Apple Tax Decision, *supra* note 98.

the Irish economy and has turned Ireland into one of the largest multinational corporate hubs in the Western world. However, the stagnation of the government's corporate tax policy and the effective lobbying of corporate interests has put Ireland in legal jeopardy with the European Union, has stymied needed financial aid required for social programs and infrastructure, and more recently has forced action from a group of nations, led under the banner of the OECD, trying to cut Ireland's ability to act as a tax haven.²²⁶ In the face of these pressures, Ireland has an opportunity to create a long-lasting, financially beneficial solution that provides ethical, equitable corporate tax revenues without dissuading multinational corporations from remaining in the Irish market. Ireland's educated, flexible, culturally similar, English-speaking workforce is vital for effective access to the European market, and the Irish government should use these points to negotiate a better tax settlement for its constituents. The foundations for tangible change are present. If this change will occur depends on whether the Irish government will build on these foundations or remain in the immovable confines of its current captive state outlook.

226. The current push from OECD nations to create a flat 15% corporate tax rate minimum solutions is presented in this comment. However, the 15% tax rate presented does not seem to bar the special intangible asset rates Ireland has utilized to date. *See* Silvia Amaro, *Global tax deal inches closer as hold out Ireland agrees to sign up*, CNBC (Oct. 7, 2021), <https://www.cnbc.com/2021/10/07/ireland-corporate-tax-rate.html> [<https://perma.cc/CXG7-7DNB>]. Until these special intangible asset rates are closed or amended, the Irish government will likely continue to use them to subvert any headline corporate tax rate.

