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After the European Commission Ordered Apple to Pay Back Taxes to Ireland: Ireland's Future in the New Global Tax Environment

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After the European Commission Ordered Apple to Pay Back Taxes to Ireland: Ireland's Future in the New Global Tax Environment

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ABSTRACT

On August 30, 2016, the European Commission ordered Ireland to collect $14.5 billion plus interest in unpaid taxes between 2003 and 2014 from Apple Inc. The European Union suggested that Ireland made "sweetheart deals" with Apple in exchange for bringing more jobs into the country and concluded that these deals constituted illegal tax benefits, contrary to the European Union's prohibitions against "state aid."

Profit shifting and transfer pricing manipulation dominate the analysis of the corporate tax structure in Ireland and its position in the context of global tax policy. This note explains the European Commission's Apple decision and analyzes how this decision will affect Ireland's international relations and its law reform, so that Ireland could comply with the European Union and international tax law.

The European Commission's Apple decision helped the United States, the European Union, and Ireland start a conversation on how to work together to regulate tax evasion on a global scale. I conclude that tax system reforms on an international scale will happen in the future to combat "illegal deals" between multinational companies and specific countries.

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INTRODUCTION

On August 30, 2016, the European Commission (EC) ordered Ireland to collect $14.5 billion plus interest in unpaid taxes between 2003 and 2014 from Apple Inc.[1] After massive media coverage of the European Commission's ruling, the public became aware of the corporate tax avoidance issue on a global scale.[2]

The European Commission's ruling focuses on Apple's structure in Ireland; the question at the heart of the dispute is whether Apple's tax agreements constitute "state aid." Apple based a major international division, Apple Sales International, in an office in Cork, Ireland. In 2011, this division generated more than €16 billion ($22 billion) in pretax profit but paid Ireland less than €10 million in income taxes, which represents an effective tax rate of 0.05 percent and is well below Ireland's 12.5 percent corporate tax rate.[3] How did Apple manage to pay such a low tax? Apple made two agreements with the Irish Revenue Commissioners in 1991, updated in 2007, concerning profits allocation among Apple's subsidiaries in Ireland.[4] According to these agreements, only €50 million of the €16 billion pretax profits in 2011 were considered taxable in Ireland. The European Commission concluded that these two tax agreements constituted illegal tax benefits, contrary to the European Union's prohibitions against "state aid."[5] The European Union suggested that Ireland made "sweetheart deals" with Apple in exchange for bringing more jobs into the country.[6]

This note explains the European Commission's Apple decision and analyzes how this decision will affect Ireland's international relations

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1. James Kanter & Mark Scott, *Apple Owes $14.5 Billion in Back Taxes to Ireland, E.U. Says*, N.Y. TIMES (Oct. 30, 2017), http://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html; Letter from European Commission to the Republic of Ireland, State Aid SA. 38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland Alleged Aid to Apple, 21–22 (June 11, 2014) (discussing unpaid taxes Ireland had not collected from Apple), http://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf [hereinafter Letter from EC to Ireland].

2. Kanter & Scott, *supra* note 1; Letter from European Commission to the Republic of Ireland, *supra* note 1.

3. Stu Woo & Sam Schechner, *At Issue in Apple-EU Tax Case: Did Ireland Take Enough?*, WALL ST. J. (Aug. 30, 2016, 1:09 PM), http://www.wsj.com/articles/at-issue-in-apple-eu-tax-case-did-ireland-take-enough-1472576989.

4. *Id.*; Letter from European Commission to the Republic of Ireland, *supra* note 1, at 2.

5. Woo & Schechner, *supra* note 3.

6. Natalia Drozdiak, Viktoria Dendrinou & Sam Schechner, *EU Set to Rule Apple Tax Deal with Ireland Illegal*, WALL ST. J. (Aug. 30, 2016, 12:39 AM), http://www.wsj.com/articles/eu-set-to-rule-as-soon-as-tuesday-apple-tax-deals-with-ireland-illegal-1472494231?mod=whatnext&cx_navSource=cx_picks&cx_tag=contextual&cx_artPos=3#cxrecs_s.

and its law reform, so that Ireland could comply with the European Union and international tax law.[7] Profit shifting and transfer pricing manipulation dominate the analysis of the corporate tax structure in Ireland and its position in the context of global tax policy.[8] Although bilateral and multilateral tax treaties address some issues of the sovereignty of tax policies in the context of an increasingly globalized and cross-jurisdictional economic system,[9] loopholes between the various systems provide corporations with abundant opportunities to minimize their tax liability.[10] Part II of this paper explains how tax evasion became a global issue due to technological developments that enhanced international mobility. The section lays out some of the benefits for choosing Ireland, instead of a corporation's home country, as the state of incorporation. Part III explains the "double Irish" structure used by some multinational corporations to lower their corporate tax liability, some basic tax rules, and Apple's structure in Ireland. Part IV introduces the European Commission's decision by explaining the basis of the European Commission's ruling and why the European Commission has the authority to regulate tax arrangements between Apple Inc. and the Irish Government. Specifically, the European

7. In the customary method of the study of international relations and international law, the stress is on the state or nation factor. PHILIP C. JESSUP, TRANSNATIONAL LAW 11 (1956).

8. *See E.U.'s Apple Ruling Is No Precedent for Future Tax Cases*, FORTUNE (Sept. 26, 2016), http://fortune.com/2016/09/26/apple-no-precedent-tax-cases/; *see also* Stephen C. Loomis, *The Double Irish Sandwich: Reforming Overseas Tax Havens*, 43 ST. MARY'S L.J. 825, 826 (2012); Tom Fairless, *EU Regulators to Require Starbucks, Fiat Pay Millions of Euros in Back Taxes*, WALL ST. J. (Oct. 21, 2015, 12:41 PM), http://www.wsj.com/articles/eu-rules-that-starbucks-fiat-benefited-from-illegal-tax-deals-1445419279; Simon Bowers, *Starbucks and Fiat Sweetheart Tax Deals with EU Nations Ruled Unlawful*, GUARDIAN (Oct. 21, 2015), https://www.theguardian.com/business/2015/oct/21/starbucks-and-fiat-tax-deals-with-eu-nations-ruled-unlawful.

9. United States and Ireland have bilateral treaties. *See, e.g.*, Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.S.-Ir. Sept. 24, 1997, 39 U.S.T. 112; *see also* Nelson D. Schwartz & Charles Duhigg, *Billions in Taxes Avoided by Apple, U.S. Inquiry Finds*, N.Y. TIMES, May 21, 2013, at A1 (discussing the Congressional hearings held to uncover the scope of the tax avoidance schemes employed by Apple, as well as numerous other multinational companies).

10. For example, Google has created four separate subsidiaries and has used conflicting tax codes, as well as bilateral tax agreements to avoid paying almost any U.S. taxes. Starbucks has for years made Amsterdam the heart of its European operations. *See* Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, WASH. POST (Oct. 21, 2010, 6:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203253.html; ERNST & YOUNG LLP, COMMON CONSOLIDATED CORPORATE TAX BASE: A STUDY ON THE IMPACT OF THE COMMON CONSOLIDATED CORPORATE TAX BASE PROPOSALS ON EUROPEAN BUSINESS TAXPAYERS, 7–12 (2011), http://taxinstitute.ie/Portals/0/EY%20CCTB.pdf.

Commission stated that its decision was not based on the general "double Irish" structure or the lower Irish corporate tax rate, but rather, it was about Apple's "illegal deals" with the Irish government, which allowed Apple to pay virtually nothing on its European business for years.[11] Part V analyzes the European Union's position in intervening in Apple's tax arrangements with Ireland and the ramifications of the European Commission's decision to Ireland. Ireland's governmental representatives expressed that they were going to support Apple and appeal the decision.[12] This position is not surprising since Ireland would like to maintain its reputation as being tax friendly and keep attracting significant foreign investment. However, with the global awareness of tax evasion problems, especially after the Apple decision, Ireland has to be more cautious when entering into private deals with multinational corporations because the private arrangements could be investigated by the European Commission, which might affect Ireland's reputation as being tax friendly.

I conclude that tax system reforms on an international scale will happen in the future to combat "illegal deals" between multinational companies and specific countries, like Ireland in Europe.[13] The European Commission's Apple decision helped the United States, the European Union, and Ireland start a conversation on how to work together to regulate tax evasion on a global scale. The Organization for Economic Cooperation and Development (OECD) also tried to implement projects to combat the global tax evasion problem. While Ireland will have to pay close attention to internationally agreed upon standards established by the OECD, Ireland will try to stay competitive and attractive in the global market by maintaining its lower tax rate and supporting foreign companies in establishing business in Ireland.

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11. Kanter & Scott, *supra* note 1.

12. *Ireland to Change Company Tax Laws, but 12.5% Corporation Tax Rate to Stay*, RTÉ NEWS (Oct. 15, 2013, 7:01 PM), http://www.rte.ie/news/business/2013/1015/480547-government-committed-to-12-5-corporation-tax-rate/; Andrew P. Kummer, *Pro-Business but Anti-Economy?: Why Ireland's Staunch Protection of its Corporate Tax Regime is Preventing a Celtic Phoenix From Rising From the Ashes of the Celtic Tiger*, 9 BROOK. J. CORP. FIN. & COM. L. 284, 301–02 (2014).

13. *See* Jerald David August, *Update on OECD Base Erosion and Profit Shifting Project*, KOSTELANETZ & FINK, LLP (Aug. 17, 2016), http://www.kflaw.com/update_on_oecd_base_erosion_and_profit_shifting_project.

I. BACKGROUND

A. Global Economy and Scale

According to one theory, "[t]he modern state is based on the assumption that law operates on a single scale, the scale of the state."[14] "[T]he fixed location of tangible property tend[s] to restrict corporate wealth and identity to fairly defined boundaries."[15] Thus, for a long time, corporations have primarily been linked to their home countries.[16] However, with increased mobility of capital, labor, and property, political barriers continued to decline and multinational corporations inevitably began to emerge.[17]

With the explosion of globalization, global companies tend to take advantages of different countries' political economies, laws, and governments to achieve wealth concentration.[18] From the tax perspective, multinational companies have a financial incentive to allocate as much profit as possible to low tax jurisdictions by taking advantages of the inconsistencies of the international taxation rules.[19] This problem is further emphasized in the "case of global technology companies," whose "primary asset and source of income is intellectual property that may be easily shifted to tax-friendly countries."[20]

B. Benefits for Multinational Corporations to Establish Business in Ireland

Historically, cities became places where people of different origins clustered together on a semi-permanent basis out of mutual interest.[21] Beginning in the 1980s, the Irish government played an active role in

14. Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y, 279, 287 (1987).

15. Steven A. Bank, *The Globalization of Corporate Tax Reform*, 40 PEPP. L. REV. 1307, 1307 (2013).

16. *Id.*

17. *Id.* at 1308.

18. *See* SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY 14–15 (2014).

19. *See* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TAX AND PROBLEMS 710 (4th ed. 2011) (describing the setting of prices on all types of transactions between related parties); *see also* Brian Mistler, *Taking Action Against Base Erosion Profit Shifting*, 32 ARIZ. J. INT'L & COMP. L. 903, 904 (2015).

20. Bank, *supra* note 15, at 1310.

21. GREG CLARK, GLOBAL CITIES 12 (2016).

promoting foreign direct investment (FDI) from large multinational corporations.[22] Ireland's economy developed tremendously ever since.

One of the reasons that foreign corporations chose to locate in Ireland is the 12.5 percent corporate tax rate,[23] which is one of the lowest corporate tax rate regimes in the world.[24] By comparison, the United States has a much higher corporate tax rate of 35 percent.[25] This means that when a company generates $10 million in profit, it needs to pay $3.5 million U.S. tax if the company were built in the United States, while it only pays $1.25 million if the factory were built in Ireland. In addition to the 12.5 percent tax rate, Ireland provides tax subsidies for research and development and other activities.[26] However, it is

22. Foreign direct investment has long been regarded as a key component in Ireland's economic development. Since the late 1950s, the government moved away from import substitution strategies, protectionism, and foreign ownership restriction to allow nearly unrestricted access to the Irish economy. Org. for Econ. Co-Operation and Dev. [OECD], OECD REVIEWS OF FOREIGN DIRECT INVESTMENT: IRELAND, at 7–10 (1994), https://www.oecd.org/ireland/34383945.pdf; *see also* Michael Mikiciuk, *Foreign Direct Investment Success in Ireland: Can Poland Duplicate Ireland's Economic Success Based on Foreign Direct Investment Policies?*, 14 U. MIAMI INT'L & COMP. L. REV. 65, 95 (2006); *Apple Tax Case: Why is Ireland Refusing Billions?*, BBC (Sept. 7, 2016), http://www.bbc.com/news/world-europe-37299430.

23. *See Ireland Corporate Tax Rate 1981-2016*, TRADING ECON., http://www.tradingeconomics.com/ireland/corporate-tax-rate (last updated Oct. 2017); CORPORATE TAX RATES TABLE, KPMG, https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html (last visited Oct. 30, 2017); Conor O'Brien, *Is Ireland's Corporation Tax Regime Fit for Purpose?*, IRISH TIMES (June 11, 2013, 1:00 AM), http://www.irishtimes.com/business/economy/is-ireland-s-corpbration-tax-regime-fit-for-purpose-1.1423602.

24. According to a corporate tax rate table published by KPMG, the tax rate of some other countries in Europe is as follows: Belgium: 33.99%; France: 33.3%; Germany: 29.72%; Iceland: 20%; Italy: 31.4%; Netherlands: 25%. *See* CORPORATE TAX RATES TABLE, *supra* note 23; Vincent Boland, *Dublin Ditches Double Irish to Save Low Tax Regime*, FIN. TIMES (Oct. 14, 2014), https://www.ft.com/content/1f740b46-539b-11e4-929b-00144feab7de.

25. I.R.C. § 11(b)(1) (2016); CORPORATE TAX RATE SCHEDULE 2014, TAX POLICY CENTER (Jan. 20, 2015), http://www.taxpolicycenter.org/sites/default/files/legacy/taxfacts/content/pdf/corporate_rates.pdf; Anton Aurenius, *How the U.S. Corporate Tax Rate Compares to the Rest of the World*, TAX FOUNDATION (Aug. 22, 2016), http://taxfoundation.org/blog/how-us-corporate-tax-rate-compares-rest-world. Effective as of December 21, 2017, the United States changed Section 11 of the Internal Revenue Code, and the new corporate tax rate is twenty-one percent. I.R.C. § 11 (2017). This note only discusses the effects and implications of the Apple decision in the context of previous tax structures in the United States and in Europe.

26. "Ireland has an R&D [Research and Development] Tax Credit scheme since 2004. Qualifying R&D expenditure generates a 25% tax credit for offset against corporation tax, in addition to the tax deduction . . . ." IDA IRELAND, TAXATION IN IRELAND 2016 (2016), http://www.idaireland.com/docs/publications/Taxation_2016.pdf; Kummer, *supra* note 12.

generally asserted that no preferential treatment exists under Ireland's corporate tax structure.[27]

Other factors that help a corporation decide whether to establish business in Ireland include the quality and flexibility of the English-speaking workforce, availability of a multilingual labor force, cooperative labor relations, political stability, pro-business government policies and regulators, a transparent judicial system, transportation links, proximity to the United States and Europe, and the drawing power of existing companies operating successfully in Ireland.[28]

II. THE DOUBLE IRISH PROBLEM AND APPLE'S STRUCTURE IN IRELAND

The setting of prices for the transfer of goods or services from one company to another is called "transfer pricing" and is used to reduce tax liabilities in relatively high-tax countries.[29] The problem of transfer pricing is that it gives an advantage to a company if it can artificially allocate profits between associate companies in different jurisdictions.[30] Lenient U.S. transfer pricing rules allow Irish factories to generate excessive profits that should have been taxed in the United States. For example, if a company generates $30 million profits, when it shifts $20 million of the $30 million profit from the United States to Ireland, it reduces its U.S. tax by $7 million.[31]

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27. Rashid Raiyan, *What the Apple Tax Dispute Means for the EU-US Relationship*, MKT. MOGUL (Sept. 6, 2016), http://themarketmogul.com/what-the-apple-tax-dispute-means-for-the-eu-us-relationship/. But there are special deals for certain companies on an individualized basis. O'Brien, *supra* note 23.

28. A survey released by Ernst & Young in 2010 stated that the best way for states to stimulate future European attractiveness is: (1) whether they support small and medium-sized enterprises; (2) whether they support high-tech industries and innovation; and (3) whether they can reduce taxation and increase flexibility. *See* Jim Stewart, *Low Corporate Tax Rates and Economic Development*, *in* ENACTING GLOBALIZATION: MULTIDISCIPLINARY PERSPECTIVES ON INTERNATIONAL INTEGRATION 6–7 (Louis Brennan ed., 2014); BUREAU OF ECON. & BUS. AFF., U.S. DEP'T OF ST., 2016 INVESTMENT CLIMATE STATEMENTS: IRELAND (2016), http://www.state.gov/e/eb/rls/othr/ics/2016/eur/254375.htm; Landon Thomas Jr. & Eric Pfanner, *Even Before Apple Tax Breaks, Ireland's Policy Had Its Critics*, CNBC (May 22, 2013, 4:59 AM), http://www.cnbc.com/id/100756298.

29. DENNIS CAPLAN, MANAGEMENT ACCOUNTING CONCEPTS AND TECHNIQUES, ch. 23 (2010).

30. *See E.U.'s Apple Ruling Is No Precedent for Future Tax Cases*, *supra* note 8.

31. *See* Martin Sullivan, *If Ireland Is Not a Tax Haven, What Is It?*, FORBES (Nov. 6, 2013, 9:57 AM), http://www.forbes.com/sites/taxanalysts/2013/11/06/if-ireland-is-not-a-tax-haven-what-is-it/; Michael Hennigan, *How Apple Found a Bigger Tax Loophole than the Double Irish*, FINFACTS (Aug. 17, 2016), http://www.finfacts.ie/Irish_finance_news/articleDetail.php?How-Apple-found-a-bigger-tax-loophole-than-the-Double-Irish-681.

A. The Double Irish Structure

The common arrangement in Ireland is a structure called "Double Irish."[32] It is developed by using a twist in Irish law by sending royalty payments for intellectual property from one Irish-registered subsidiary to another that resides in a "tax haven."[33] Apple Inc. used the legal loophole created by the difference between the U.S. and Irish tax laws to determine the basis of taxation, and developed a unique structure that is similar to the double Irish scheme to lower its tax.[34]

The purpose of the structure is to trigger the deferral provisions of the U.S. tax code for profits earned outside the United States.[35] The earnings of foreign corporations will not be taxed in the United States until the foreign corporation repatriates its earnings through the distribution of dividends.[36] This deferral is maintained as long as the profits are retained in the non-U.S. incorporated affiliates and not repatriated to the U.S. parent.[37]

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32. *See* Loomis, *supra* note 8, at 828; Vanessa Houlder, *Q&A: What is The Double Irish? European Commission Has Threatened to Launch a Formal Investigation*, FIN. TIMES (Oct. 9, 2014), https://www.ft.com/content/f7a2b958-4fc8-11e4-908e-00144feab7de.

33. *See* Scott DeAngelis, *If You Can't Beat Them, Join Them: The U.S. Solution to the Issue of Corporate Inversions*, 48 VAND. J. TRANSNAT'L L. 1353, 1369 (2015); *see also* Sam Schechner, *Ireland to Close "Double Irish" Tax Loophole: Change to Come Slowly, Particularly Affecting U.S. Tech Firms Like Google and Facebook*, N.Y. TIMES (Oct. 14, 2014, 4:48 PM), http://www.wsj.com/articles/ireland-to-close-double-irish-tax-loophole-1413295755.

34. *See EU Releases World Tax Havens Blacklist*, EUBUSINESS (June 18, 2015, 9:53 CET), http://www.eubusiness.com/news-eu/economy-politics.120n; *see also* Enzo Miraslov et al., *Apple Inc's Dubious Tax Evasion Strategy: Double Irish with a Dutch Sandwich*, YONSEI UNDERWOOD GÉNIES L. REV. (May 15, 2016), https://yonseiuiclawreview.wordpress.com/2016/05/15/apple-incs-ingenious-tax-evasion-strategy-double-irish-with-a-dutch-sandwich/.

35. Seamus Coffey, *Exaggerating the Irish-US Economic Relationship*, ECON. INCENTIVES (Mar. 5, 2015), http://economic-incentives.blogspot.com/2015/03/exaggerating-irish-us-economic.html.

36. Andrew Mitchel & Ryan E. Dunn, *Subpart F Income*, INT'L TAX BLOG (Nov. 14, 2011), http://intltax.typepad.com/intltax_blog/2011/11/subpart-f-income.html.

37. Coffey, *supra* note 35. From the U.S. perspective, the operating subsidiary is disregarded under the check-the-box regime so that the cash flowing into the holding company does not trigger subpart F inclusions to the U.S. parent. Joseph P. Brothers, *Featured Perspectives: From the Double Irish to the Bermuda Triangle*, TAX ANALYSTS 2014, at 687 (Nov. 24, 2014), http://www.sven-giegold.de/wp-content/uploads/2015/03/From-Double-Irish-to-Bermuda-Triangle-2014.pdf. The subpart F rules attempt to prevent deflection of income, either from the United States or from the foreign country in which earned, into another jurisdiction which is a tax haven or which has a preferential tax regime for certain types of income. OFF. OF TAX POL'Y, DEP'T OF THE TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A

The "double Irish" structure needs at least three companies to work.[38] The first company is a U.S. company (U.S. Co.), which licenses its intellectual property (IP) to a subsidiary based in Ireland (Irish Co. 1).[39] Irish Co. 1 then licenses the patent rights to a second Irish company (Irish Co. 2), which receives income from Irish Co. 1, but has to pay royalties and fees to Irish Co. 1.[40] Thus, Irish Co. 2's taxes are lower because the royalties and fees paid to Irish Co.1. are deductible expenses. The U.S. company doesn't pay any federal taxes on the income from the Irish companies because the earnings were not made in the United States.[41] The combined company's global profits are reported in Ireland, regardless of where they are earned.[42]

B. Inconsistence of Taxation System in Ireland and in the United States

There are two major types of taxation systems for taxing international income: the territorial system and the worldwide system.[43] Under a territorial tax system, only income derived within the country would be taxed,[44] and most or all foreign income would be exempted.[45]

POLICY STUDY, at xii (2000), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-SubpartF-2000.pdf.

38. Daniel Wesley, *Double Irish Deception: How Google—Apple—Facebook Avoid Paying Taxes*, CREDITLOAN (Mar. 15, 2017), https://visualeconomics.creditloan.com/double-irish-deception-how-google-apple-facebook-avoid-paying-taxes/.

39. Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (April 28, 2012), http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html; Jeffrey L. Rubinger & Summer Ayers Lepree, *Death of the "Double Irish Dutch Sandwich"? Not so Fast*, BILZIN SUMBERG'S TAXES WITHOUT BORDERS (Oct. 23, 2014), http://www.taxeswithoutbordersblog.com/2014/10/death-of-the-double-irish-dutch-sandwich-not-so-fast/.

40. Wesley, *supra* note 38.

41. *Id.*; *see also* Harriet Taylor, *How Apple Managed to Pay a 0.005 Percent Tax Rate in 2014*, CNBC (Aug. 30, 2016, 7:24 PM), http://www.cnbc.com/2016/08/30/how-apples-irish-subsidiaries-paid-a-0005-percent-tax-rate-in-2014.html.

42. David Jolly, *Ireland, Home to U.S. 'Inversions,' Sees Huge Growth in G.D.P.*, N.Y. TIMES (July 12, 2016), http://www.nytimes.com/2016/07/13/business/dealbook/ireland-us-tax-inversion.html?action=click&contentCollection=Technology&module=RelatedCoverage&region=Marginalia&pgtype=article.

43. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 411 (1987) (explaining the main ways that people and corporations are subject to tax in the United States).

44. John T. VanDenburgh, *Closing International Loopholes: Changing the Corporate Tax Base to Effectively Combat Tax Avoidance*, 47 VAL. U.L. REV. 313, 321 (2012); *see also* HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 347–49 (2d ed. 2004) (discussing how various jurisdictions determine residency status for taxing).

45. *See* I.R.C. § 861(a) (2016); I.R.C. § 862(a) (2016). To prevent erosion of the tax base, a territorial system could cover income from financial assets held by a foreign

Under a worldwide system, a corporation is taxed on its worldwide income, regardless of the source of their income.[46] The United States employs a system that combines both the territorial and the worldwide tax system.[47] When operations are carried out through a foreign subsidiary, the income generally will not be subject to the U.S. taxation (except when distributed through dividends or other financial alternatives).[48] Ireland also employs a mix system: Corporations in Ireland are taxed on their income wherever it derives from, like a worldwide tax system;[49] Ireland will not tax the earnings of a nonresident corporation (except on its Irish source earnings), like a territorial tax system.[50]

The concept of "resident" is very important under the worldwide system because a corporation will only be taxed when it is a "resident" of that particular country.[51] While the United States uses the place of incorporation and the principle place of business as the test for corporate residence,[52] Ireland uses "manage and control" for

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subsidiary that could easily be held by the U.S. company. *Territorial vs. Worldwide Taxation*, SENATE REPUBLICAN POLICY COMM. (Sept. 19, 2012), http://www.rpc.senate.gov/policy-papers/territorial-vs-worldwide-taxation.

46. Hugh J. Ault & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 3056, 1989), http://www.nber.org/papers/w3056.pdf.

47. MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 157–62 (2003) (explaining that the United States tax system is referred to by most as a worldwide system, because the United States taxes foreign source income even though it is not quite a pure system).

48. *See* Ault & Bradford, *supra* note 46, at 1–2.

49. AIDAN WALSH & CHRIS SANGER, THE HISTORICAL DEVELOPMENT AND INTERNATIONAL CONTEXT OF THE IRISH CORPORATE TAX SYSTEM 3 (2014), http://www.budget.gov.ie/Budgets/2015/Documents/EY_Historical_Dev_International_Context_Irish_%20Corporation_Tax.pdf.

50. ERNST & YOUNG, WORLDWIDE CORPORATE TAX GUIDE 2013, at 589 (2013), http://www.ey.com/Publication/vwLUAssets/EY-worldwide-corporate-tax-guide-2013/$FILE/EY-worldwide-corporate-tax-guide-2013.pdf (noting that only "[a] company *resident* in Ireland is subject to corporation tax on its worldwide profits" while "[a] company not resident in Ireland is subject to corporation tax if it carries on a trade in Ireland through a branch or agency" and, in that case, tax is assessed only on "trading profits of the branch or agency") (emphasis added).

51. Daniel Shaviro, *The Rising Tax-Electivity of U.S. Corporate Residence*, 64 TAX L. REV. 377, 383 (2011) ("A corporation is a U.S. resident if and only if it is 'created or organized in the United States or under the law of the United States or of any State.'").

52. 28 U.S.C. § 1332(c)(1) (2017). In *Hertz*, the Supreme Court developed the nerve center test to determine the citizenship for diversity jurisdiction, which is the place where the corporation has an "office from which its business was directed and controlled," usually the headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77, 89–90 (2010).

determination of residency.[53] This inconsistency gives rise to the "nowhere residence" problem,[54] which arises when companies do not need to pay U.S. taxes because a subsidiary in Ireland earned the profits, while this same subsidiary claims that it is not managed or controlled in Ireland, so the corporation doesn't need to pay the Irish tax either.[55]

C. Apple's Structure in Ireland

Beginning in the late 1980s, Apple started to create subsidiaries in Ireland.[56] Apple's companies incorporated in Ireland are represented in the chart below.

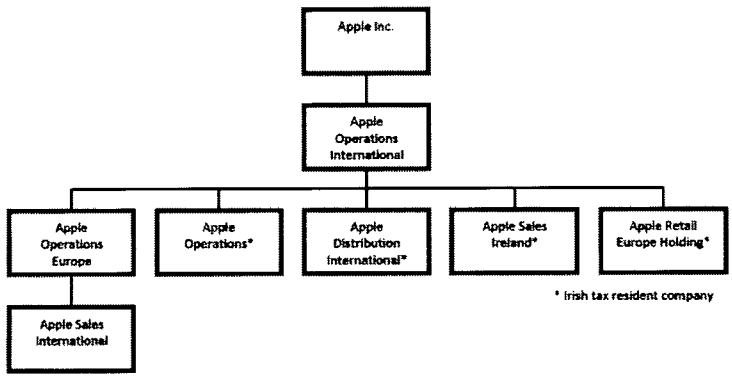

Chart from European Commission Decision of State Aid SA. 38373 (2014/C) (ex 2014/NN) (ex 2014/CP) Ireland: Alleged Aid to Apple, C (2014) 3606 final of June 11, 2014.

Among the companies on the chart, Apple Inc. is incorporated in the United States and all other companies are incorporated in Ireland. In compliance with the U.S. transfer pricing rules, Apple Inc. entered into a Research and Development Cost Sharing Agreement[57] with its

53. *See Corporation Tax (CT): Company Residency Rules*, REVENUE: IRISH TAX AND CUSTOMS (June 22, 2017) http://www.revenue.ie/en/companies-and-charities/corporation-tax-for-companies/corporation-tax/company-residency-rules.aspx.

54. *See* DeAngelis, *supra* note 33.

55. *See* Wesley, *supra* note 38.

56. Schwartz & Duhigg, *supra* note 9.

57. A cost sharing agreement is an agreement between companies of one group to share costs and benefits of developing intangible assets; it is a form of a cost contribution arrangement described in Chapter VIII of the OECD Guidelines. Letter from European Commission to the Republic of Ireland, *supra* note 1, at 8 n.13; *Cost Sharing Agreements: An Effective Tax Planning Tool*, VALUATION RES. CORP. (Sept. 2008),

subsidiaries, Apple Operations Europe (AOE) and Apple Sales International (ASI), who are also parties to this agreement. According to the agreement, Apple, AOE, and ASI share research and development costs and risks for developing certain Apple products[58] as well as the ownership of the IP rights to Apple goods sold offshore.[59] Thus, the Irish subsidiaries were allowed to receive all of the profits from exploiting Apple Inc.'s IP rights abroad without paying U.S. taxes.[60]

For sales of Apple products, ASI signs a contract with an independent third-party manufacturer in China to assemble the Apple products and then resells the products to Apple Distribution International for sales in Europe, the Middle East, Africa, and India (and to Apple Singapore for sales in Asia and the Pacific region).[61] In the end, about 90 percent of Apple's foreign profits are earned by Irish subsidiaries.[62]

Apple levied a big part of the profits earned elsewhere in Europe to account for IP and used it to reduce the Irish tax on its earnings from Europe.[63] Unlike most other multinational corporations that use the double Irish structure, Apple did not put its IP used in Europe and other non-U.S. markets in separate companies.[64] Instead, ASI was split

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http://www.valuationresearch.com/sites/default /files/kb/4_CostSharing.pdf. The bigger advantage was that the arrangement allowed Apple to send royalties on patents developed in California to Ireland. The transfer was internal, and simply moved funds from one part of the company to a subsidiary overseas. Duhigg & Kocieniewski, *supra* note 39.

58. Letter from European Commission to the Republic of Ireland, *supra* note 1, at 8 n.13.

59. Walter Hickey, *Apple Avoids Paying $17 Million in Taxes Every Day Through a Ballsy but Genius Tax Avoidance Scheme*, BUS. INSIDER (May 21, 2013, 4:16 PM), http://www.businessinsider.com/how-apple-reduces-what-it-pays-in-taxes-2013-5.

60. Miraslov, *supra* note 34. Joseph Stiglitz, an economist from Columbia University, made the following comments: "The [U.S.] tax law right now says we can keep that in Ireland or we can bring it back . . . we're not going to bring it back until there's a fair rate. There's no debate about it. Is that legal to do or not legal to do? It is legal to do. It is the current tax law. It's not a matter of being patriotic or not patriotic. It doesn't go that the more you pay, the more patriotic you are." Hennigan, *supra* note 31.

61. *Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.): Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Governmental Affairs U.S. Senate*, 113th Cong. 3 (2013) (statement of Sen. Carl Levin, Chair, S. Armed Serv.'s Comm.), https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf [hereinafter Statement of Sen. Carl Levin].

62. Vanessa Houlder, Alex Barker, & Arthur Beesley, *Apple's EU Tax Dispute Explained*, FIN. TIMES (Aug. 30, 2016), https://www.ft.com/content/3e0172a0-6e1b-11e6-9ac1-1055824ca907.

63. Cliff Taylor, *Apple's Irish Company Structure Key to EU Tax Finding*, IRISH TIMES (Sept. 2, 2016), http://www.irishtimes.com/business/economy/apple-s-irish-company-structure-key-to-eu-tax-finding-1.2775684.

64. *Id.*

into an Irish branch and an offshore head office.[65] All strategic decisions taken by ASI, including in relation to the IP, are taken outside Ireland.[66] This allows for the profits derived on the IP rights held by the Irish subsidiaries to be transferred to the offshore head office. Thus, the profits are subject to virtually no tax burden pursuant to the offshore island's tax laws.[67] ASI is able to claim that it is managed and controlled outside of Ireland and thus, was not a tax resident in Ireland.[68] At the same time, the United States will not treat the holding companies established under the laws of Ireland as their residents because for U.S. tax purposes, residency is determined by the "place of incorporation" doctrine.[69] This results in a nowhere resident entity, and earnings of the Irish holding companies that are a non-Irish source will be untaxed.

D. Apple's "Special Arrangements" With Ireland

Apple entered into two agreements with the Revenue Commissioners that allowed Apple to allocate profits between the Irish branch and the headquarters of ASI. These arrangements were the center of the European Commission's decision.

One of the advance transfer pricing arrangements between Apple and Ireland is for Apple Operations Europe (AOE). In 1991, Apple and the Irish Revenue agreed that the basis for determining its net profit would be calculated as 65 percent of operating expenses up to an annual amount of sixty to seventy million dollars and 20 percent of operating expenses in excess of sixty to seventy million dollars.[70] Operating expenses included in the formula were all operating expenses incurred by AOE's Irish branch, including depreciation, but excluding materials for resale and cost-share for intangibles charged from Apple-affiliated companies.[71] In 2007, a revised approach for remunerating the Irish branch of AOE was agreed which was based on a 10 to 20 percent

65. *See id.*; *see also* Doron Narotzki, *Corporate Social Responsibility and Taxation: The Next Step of the Evolution*, 16 HOUS. BUS. & TAX L.J. 167, 189 (2016).

66. *See generally* Statement of Sen. Carl Levin, *supra* note 61 (discussing strategic decisions to evade tax liability).

67. *See id.*

68. The Apple Operations International (AOI) has no physical presence and has not had any employees for thirty-three years. It has two directors and one officer. Most of the AOI board meetings were held in Cupertino rather than Cork. Hickey, *supra* note 59; *see also* Statement of Sen. Carl Levin, *supra* note 61; Narotzki, *supra* note 65, at 189.

69. ERNST & YOUNG, *supra* note 50, at 1421.

70. This was subject to the provision that if the overall profit from the Irish operations was less than the figure resulting from this formula, that lower figure would be used for determining net profits.

71. Letter from European Commission to the Republic of Ireland, *supra* note 1, at 29.

margin on branch operating costs, excluding costs not attributable to the Irish branch, and an IP return of 1 to 9 percent of branch turnover with respect to the accumulated manufacturing process technology of the Irish branch.

As for ASI, Apple and the Irish government agreed in 1991 that the net profit attributable to the ASI branch would be calculated as 12.5 percent of all branch operating costs, excluding material for resale. A modified basis was agreed in 2007 with an eight to eighteen percent margin on branch operating costs, excluding costs not attributable to the Irish branch.[72]

III. THE EUROPEAN COMMISSION'S DECISION

Tax agreements between governments and companies are certainly not unique to Ireland and Apple.[73] For many years, Competition Commissioner Margrethe Vestager[74] analyzed and criticized "sweetheart deals" between specific European Union (EU) countries and multinational corporations.[75] On June 11, 2014, EU regulators opened a formal investigation into corporate tax regimes in Ireland, Luxembourg, and the Netherlands. This investigation was prompted by concerns that several major multinational corporations—Apple, Amazon, Google, and Starbucks—were receiving beneficial tax deals greater than what is allowed under EU law.[76] Vestager argued that it is a competition issue because smaller companies suffer when corporations like Apple get special treatment.[77]

A. Why Agreements Between Apple and the Irish Government are Problematic and Why the European Union has the Authority to Regulate Ireland's Tax Decisions

Given the multinational nature of the corporate income tax problem, it is not surprising that the search for a solution has taken place on a multinational level. Although no treaty specifically provides the EU

72. *Id.*

73. *See* Taylor, *supra* note 41.

74. Margrethe Vestager is a member of Denmark's social liberal party. *See* Dan Bobkoff, *What Just Happened to Apple, Explained*, BUS. INSIDER (Aug. 30, 2016, 5:28 PM), http://www.businessinsider.com/what-just-happened-to-apple-explained-2016-8.

75. *See* David Meyer, *Here's What You Need to Know About Apple's $14.5 Billion EU Tax Bill*, FORTUNE (Aug. 30, 2016), http://fortune.com/2016/08/30/apple-tax-ireland-ruling/; *see also* Loomis, *supra* note 8; Drucker, *supra* note 10; Fairless, *supra* note 8; Bowers, *supra* note 8.

76. *See* DeAngelis, *supra* note 33, at 1377.

77. *See* Meyer, *supra* note 75.

with the authority to interfere with individual member states' domestic corporate tax schemes, a variety of directives have been advanced "to minimi[z]e corporate tax factors as an obstacle to doing business in the Single Market."[78] The goals and tasks of the European Commission (EC) are aimed at the dynamic integration of member states. Since "the dynamics [were] built into the integration process, the EC has [had] potentially comprehensive jurisdiction over all areas of economic, social, and cultural activities within the EC territory."[79] Specifically, article 107(1) of the Treaty on the Functioning of the European Union (TFEU) forbids "aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods."[80] According to the TFEU, the European Court of Justice (ECJ) prohibits providing domestic individuals and products with more favorable tax treatment than foreign individuals and taxpayers,[81] and the EC[82] may at any time, following a complaint or on its own initiative, examine possible unlawful aid.[83]

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78. ALISTAIR CRAIG, EU LAW AND BRITISH TAX: WHICH COMES FIRST? 11 (2013); *see also* STEVEN A. BANK, ANGLO-AMERICAN CORPORATE TAXATION 241 (2011).

79. Jost Delbruck, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 25 (1993); *see also* Consolidated Versions of the Treaty on European Union and Treaty on the Functioning of the European Union, art. 26(2), Sept. 05, 2008, 2008 O.J. (C 115) 59 [hereinafter TFEU]; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 6; William J. Davey, *European Integration: Reflections on Its Limits and Effects*, 1 IND. J. GLOBAL LEGAL STUD. 185, 187–95 (1993) (analyzing major characteristics of EC).

80. TFEU, *supra* note 79, art. 107(1); *see also* Richard Lyal, *Transfer Pricing Rules and State Aid*, 38 FORDHAM INT'L L.J. 1017, 1027 (2015). If France taxed companies in the north less than those in the south, that is generally state aid in the EU's view. It is the same with trying to get a German company to move to Denmark by abating property taxes for a new headquarters. Bobkoff, *supra* note 74.

81. This same principle was applied in the EU's so-called "Parent/Subsidiary Directive," which focused on outlawing the double taxation of dividends paid by a subsidiary of one-member state to its parent company located in another member state. *See* Kummer, *supra* note 12.

82. The European Commission is EU's executive arm and not a tax authority. *See* Bobkoff, *supra* note 74. The European Commission's job is to maintain fairness between the EU member states. *Id.*; *see also* Directorate-General for International Cooperation and Development: Main Missions of DEVCO Directorates & Units, Dec. 22, 2015, http://ec.europa.eu/europeaid/sites/devco/files/mission-statement-december-2015_en.pdf.

83. TFEU, *supra* note 79, art. 108(3) (requiring Member States to notify non-exempted State aid measures, including in the form of tax measures, to the Commission before their implementation, and to await the Commission's approval before implementing such measures. If either of those obligations is not fulfilled, the State aid measure is considered to be unlawful.); *see also* Jay Modrall & Dominic Stuttaford, *Tax Rulings on Transfer*

B. The Essence of the European Commission's Decision

The EC said its Apple decision was not about Ireland's tax rate,[84] but about Apple's special deal with Ireland under which it paid far less than Ireland's statutory rate on EU sales income.[85] The two advanced pricing agreements between Apple and the Irish Revenue Commissioners were obtained in 1991 and 2007.[86] These agreements allowed Apple to allocate profits between the Irish branch and its headquarters all within one company. However, to avoid the advantage brought by the "transfer pricing," an "arm's length principle was internationally agreed upon, setting commercial conditions for the allocation of profit.[87] The arm's length principle applies not only to

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Pricing May Violate EU State Aid Rules, LEXOLOGY (Oct. 10, 2014), http://www.lexology.com/library/detail.aspx?g=8e1c8105-6020-4268-843e-e60f1b0825ec. The ECJ had "decided more than a hundred cases involving Member States' income tax systems" as of 2007. Michael J. Graetz & Alvin C. Warren, Jr., *Dividend Taxation in Europe: When the ECJ Makes Tax Policy* (Yale Law Sch. Pub. Law Working Paper No. 143, 2007); *see also* Bank, *supra* note 15, at 1313–14.

84. EC lacks the legal authority to challenge Ireland's corporate rate, and the national governments are responsible for raising taxes and setting tax rates. *Taxation*, EUROPEAN UNION, https://europa.eu/european-union/topics/taxation_en (last visited Nov. 1, 2017).

85. *See* Thomas Jr. & Pfanner, *supra* note 28 ("[A] special corporate tax rate of only 2 percent that Senate investigators say Apple worked out with Irish tax authorities"); *see also* Jenni Ryall, *A Deep Dive into Apple's 'Sweetheart Deal' with Ireland*, MASHABLE (Aug. 30, 2016), http://mashable.com/2016/08/30/apple-sweetheart-deal-ireland/#i8HbxA5XDEqm.

86. *See* Statement of Sen. Carl Levin, *supra* note 61. *See generally* George Pagano, *The United States Went to War to Avoid the Red Coats' Taxes—Now Corporations are Sprinting to the United Kingdom's Tax Rate*, 39 SUFFOLK TRANSNAT'L L. REV. 427 (2016) (discussing how captive insurance companies and offshore tax shelters give U.S. companies the ability to shift taxable income); Katie Benner, *Fact-Checking Apple's Claims on E.U. Tax Ruling*, N.Y. TIMES (Aug. 30, 2016), http://www.nytimes.com/2016/08/31/technology/tax-experts-check-out-arguments-from-apple-over-ruling.html?action=click&contentCollection=Technology&module=RelatedCoverage&region=EndOfArticle&pgtype=article; Duhigg & Kocieniewski, *supra* note 39. *See also* Kanter & Scott, *supra* note 1; Angelo Young, *Welcome to Tax Haven, U.S.A.: Apple, Ireland and the American Corporate Tax Giveaway*, SALON (Sept. 6, 2016, 5:59 AM), http://www.salon.com/2016/09/06/welcome-to-tax-haven-usa-apple-ireland-and-the-american-corporate-tax-giveaway/; Taylor, *supra* note 41 ("Apple makes an assumption, for accounting purposes, that it will repatriate all the taxes recorded in Ireland to the United States. The company reports a very high tax rate of around 26 percent, but in reality pays around just 2 or 3 percent."). The Office of the Revenue Commissioners was established by Government Order in 1923. The Mission Statement of Revenue is: "To serve the community by fairly and efficiently collecting taxes and duties and implementing Customs controls." *Role of Revenue*, REVENUE: IRISH TAX AND CUSTOMS, http://www.revenue.ie/en/about/index.html (last visited Nov. 1, 2017).

87. *See* Org. for Econ. Co-Operation and Dev. [OECD], REVIEW OF COMPARABILITY AND OF PROFIT METHODS: REVISION OF CHAPTERS I-III OF THE TRANSFER PRICING GUIDELINES, at 4–20 (July 22, 2010), http://www.oecd.org/ctp/transfer-pricing/45763692.pdf [hereinafter

transactions between separate companies within the same corporate group, but also to transactions between a company and its permanent establishments.[88] The EU is worried that if the method of taxation for intra-group transfers does not comply with the arm's length principle, it could provide a selective advantage to the company concerned.[89]

In Apple's case, the EC's view is that Apple's arrangement with Ireland was artificial and conferred a selective benefit to Apple,[90] and the advanced price fixing agreements (APAs) constitute "state aid" that is incompatible with Article 107(1) of the TFEU.[91] The EC argued that Apple's head office in Ireland exists only on paper and was created for the sole purpose of allowing Apple to pay low taxes in Ireland in exchange for Apple's agreement to invest in the country and to employ a

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OECD]. The authoritative statement of the arm's length principle is found in paragraph 1 of Article 9 of the OECD Model Tax Convention:

> (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
>
> (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT [OECD], MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 9(1) (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#.Wfoo71tSxpg#page1.

88. *See* Statement of Sen. Carl Levin, *supra* note 61, at 6–10.

89. *See* Philip Andrews & McCann FitzGerald, *Uncle Sam Is Right: The EU Probe into Ireland's Tax Treatment of Apple Is Overreach*, KLUWER COMPETITION L. BLOG (June 30, 2016), http://kluwercompetitionlawblog.com/2016/06/30/uncle-sam-is-right-the-eu-probe-into-irelands-tax-treatment-of-apple-is-overreach/.

90. *See* Taylor, *supra* note 63. The Government of Ireland has calculated Apple's taxable income in such a way as to produce an effective rate in the low single digits. The rate has varied from year to year, but an estimation revealed tax rate ranging between 1% in 2003 to 0.005% in 2014. *See* Lee Sheppard, *The EU Case Against Apple's Irish Tax Deal*, FORBES (Sep. 5, 2016, 7:02 PM), http://www.forbes.com/sites/leesheppard/2016/09/05/the-eu-case-against-apples-irish-tax-deal/4/#1cc7c2f355a0; European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 billion (Aug. 30, 2016), http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

91. *See* TFEU, *supra* note 79, art. 107(1); *Negative Decision for Apple and for Ireland to be Appealed*, DELOITTE, http://www2.deloitte.com/ie/en/pages/tax/articles/negative-decision-for-apple.html (last visited Nov. 1, 2017).

certain number of people there.[92] Moreover, the EC noted that the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations set certain requirements for the choice of the appropriate transfer pricing method to comply with the arm's length principle.[93] The fact that the methods used in APAs resulted from negotiation rather than a transfer pricing methodology reinforces the idea that the outcome price of the agreed method was not negotiated at arm's length.[94]

The Irish government, however, has repeatedly insisted that tax benefits available to Apple were not exclusive, and the law was "applied fully."[95] Irish Finance Minister Michael Noonan said at the European Parliament, "The government fundamentally disagrees with the European Commission's analysis and the decision left the government no choice but to take an appeal to the European courts."[96]

IV. AFTER THE DECISION

Greg Clark, a Professor of Economics, identified five key features that manifest over time in cities that develop roles beyond domestic markets. The key features are: (1) cross-border trade through connectivity; (2) diverse and entrepreneurial populations; (3) innovation and influence over systems of exchange; (4) the discovery of new markets, products, and practices; and (5) geopolitical opportunity.[97] After the European Commission's decision, Apple announced its desire to appeal the decision, and Ireland expressed its intention to join

92. *See* Press Association, *What Were Apple's Tax Arrangements in Ireland?*, EVENING TELEGRAPH (Aug. 31, 2016, 7:13 AM), https://www.eveningtelegraph.co.uk/fp/apples-tax-arrangements-ireland/.

93. The OECD Transfer Pricing Guidelines provides five such methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method; (ii) the cost-plus method; (iii) the resale minus method; (iv) the transactional net margin method; and (v) the transactional profit split method. Multinational corporations retain the freedom to apply methods not described in those guidelines to establish transfer prices provided those prices satisfy the arm's length principle. OECD, *supra* note 87, at 21–53; *see also* Letter from European Commission to the Republic of Ireland, *supra* note 1.

94. *EU Commission Concludes Ireland Granted State Aid to Apple*, SIMMONS & SIMMONS LLP, http://www.elexica.com/en/legal-topics/tax/27-eu-commission-concludes-ireland-granted-state-aid-to-apple (last visited Nov. 1, 2017).

95. *Apple Tax Case: Why is Ireland Refusing Billions?*, *supra* note 22.

96. Stephanie Bodoni, *Ireland Set to Take Fight Over Apple Tax Bill to EU Court*, BLOOMBERG (Nov. 8, 2016, 12:03 PM), https://www.bloomberg.com/news/articles/2016-11-08/ireland-set-to-take-fight-over-apple-tax-bill-to-eu-court.

97. GREG CLARK, GLOBAL CITIES 2 (2016).

Apple.[98] However, the appeal might take years. At the same time, the decision has already started changing the global tax environment, and Ireland will have to make changes in order to comply with international tax standards and maintain its tax-friendly position to attract foreign investors.

A. History Background: Ireland and European Union's Relationship

Since Ireland joined the then European Economic Community in 1973, Ireland has enjoyed the benefit of being a member of the European Union (EU) in many aspects.[99] After joining the European Monetary System, Ireland received European funding that has been incorporated into Ireland's economy. This funding financed infrastructure projects and training, research, industrial, social, and community development programs.[100] Ireland gradually transformed into one of the world's most open trading partners and became an attractive investment destination.[101]

In late 2010, with the banking and fiscal crises, Ireland agreed to an €85 billion multilateral support package from its European partners.[102] The interest rate on the bailout loan was determined to be 5.8 percent per annum baseline and thereafter variable depending both upon the timing of the withdrawals from the bailout fund as well as upon the prevailing market conditions.[103] To comply with a required condition of the bailout program, Ireland needs to take domestic measures to manage Ireland's budget deficit.[104] Irish policy makers set forth a plan to cut public expenditures by €10 billion and increase tax receipts by €5 billion over a four-year period.[105]

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98. Vincent Boland, *Ireland to Appeal Against EU's Apple Ruling*, FIN. TIMES (Sept. 2, 2016), https://www.ft.com/content/2b8adff6-711f-11e6-a0c9-1365ce54b926.

99. *Ireland in the EU*, PERMANENT REPRESENTATION OF IR., DEP'T OF FOREIGN AFFAIRS & TRADE, https://www.dfa.ie/prep/brussels/the-perm-rep/ireland-in-the-eu/ (last visited Nov. 1, 2017).

100. Brian Bolger, *Ireland and the EU: Forty Years of Change*, EUROPEAN MOVEMENT IR. (Mar. 2013), http://www.europeanmovement.ie/wp-content/uploads/2013/03/Ireland-and-the-EU-Brian-Bolger.pdf.

101. *Ireland in the EU*, *supra* note 99.

102. Lisa O'Carroll, *Ireland Bailout: Full Irish Government Statement*, GUARDIAN (Nov. 28, 2010, 4:07 PM), https://www.theguardian.com/business/ireland-business-blog-with-lisa-ocarroll/2010/nov/28/ireland-bailout-full-government-statement.

103. *Eurozone Agrees €85bn Deal for Ireland*, RTÉ NEWS (Nov. 29, 2010, 7:21 AM), www.rte.ie/news/2010/1128/294894-economy/.

104. *Id.*

105. Neil Shah, *Ireland Outlines Austerity Measures*, WALL ST. J. (Nov. 25, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703572404575634452116491286.

B. EU's Desire to Reset the Balance of Power on Tax Policy in Europe

Transnational financial managers and entrepreneurs have learned to make the most of "both the revolution in information technology and the new rules instituted in response to neoliberal ideology;" thus, financial flows have expanded even faster than the expansion of global production and trade.[106] The weakness of global governance is usually considered most dangerous in the realm of finance, and the capacity of the global regulatory apparatus continues to fall behind.[107]

European leaders have criticized the current system, saying it amounts to a "beggar thy neighbor" policy that fosters a harmfully competitive environment in Europe and would affect the world's corporate tax system.[108] The EU is estimated to have lost around €1 trillion every year due to tax evasion and avoidance.[109] Under Apple's special deal with Ireland, Apple paid far less than Ireland's statutory rate on EU sales income; therefore, it did not generate much income tax in the EU countries where its products were sold.[110] The European Commission's Apple decision is "an indicator of [the EC's] desire to contribute, through the application of the State aid rules, to fair tax competition and to the fight against tax base erosion."[111]

Although it might take years to resolve the appeal, the final decision will reset the balance of power on tax policy in Europe if the European Commission (EC) ultimately prevails.[112] While independent countries "will still be able to set their own tax rates, the Commission will have established itself as a watchful referee of how national rules are

106. Peter Evans, *Is an Alternative Globalization Possible?*, 36 POL. & SOC'Y 271, 280 (2008).

107. *Id.*

108. This claim is supported by a 2011 report conducted by PricewaterhouseCoopers, which found that the "effective rate of tax on corporate profits in Ireland was 11.9 [percent]," a number almost identical to the statutory rate of 12.5 percent. Jim Stewart, *Corporation Tax: How Important is the 12.5% Corporate Tax Rate in Ireland* 3 (Inst. for Int'l Integration Studies, Working Paper No. 375, Sept. 2011).

109. RICHARD MURPHY, CLOSING THE EUROPEAN TAX GAP 2 (2012), http://www.socialistsanddemocrats.eu/sites/default/files/120229_richard_murphy_eu_tax_gap_en.pdf; DEBT & DEV. COAL. IR., CORPORATE TAX SECRECY AND THE STATE: THE APPLE CASE IN IRELAND 2 (2015), https://www.debtireland.org/download/pdf/20151023141734.pdf.

110. *See* Thomas Jr. & Pfanner, *supra* note 28. The first tax ruling by Ireland occurred in 1991 and then was followed by an update in 2007. The deals related to two subsidiaries of Apple that were set up in Ireland: Apple Sales International (ASI) and its parent company Apple Operations Europe (AOE). *See* Ryall, *supra* note 85.

111. Lyal, *supra* note 80, at 1043.

112. Houlder, Barker, & Beesley, *supra* note 62.

implemented."[113] "The example of Apple will be a warning to big global companies to put their affairs in order, at least in Europe."[114]

C. Ireland's Position in Remaining Tax-Friendly to Attract Foreign Investment

Ireland uses its 12.5 percent low corporate tax rate, together with its well-educated, English-speaking, European workforce, to attract foreign multinational corporations and to help Ireland become the single largest location outside the United States for the declared pretax profits of U.S. firms.[115] Irish Finance Minister Michael Noonan has acknowledged that "aggressive tax planning by multinational companies has been criticized by governments across the world and has damaged the reputation of many countries," including Ireland.[116] Therefore, Michael Noonan believes that it is time for Ireland to take action.[117]

1. Why Ireland Would Like to Support Apple Instead of Collecting Tax

The Irish government and the Irish Revenue have strongly defended that Apple has paid the correct amount of Irish tax and that Ireland applied its taxing rights for Apple "no differently than it has applied them to other taxpayers with branch operations in Ireland."[118] This position seems odd in light of Ireland's recent history of economic trouble.[119] "The rise of government deficits has also been fed by the increase in tax evasion, partly facilitated by the development of complex accounting, financial, and legal instruments."[120]

However, Apple has brought massive benefits for Ireland and helped develop the infrastructure in the north side of the city of Cork in Ireland. "A primary role of domestic law . . . is to provide the infrastructure necessary for the exercise of participatory rights by

113. *Id.*

114. *Id.*

115. *See* Nick Shaxson, *How Ireland Became an Offshore Financial Centre*, TAX JUSTICE NETWORK (Nov. 11, 2015), http://www.taxjustice.net/2015/11/11/how-ireland-became-an-offshore-financial-centre/; *Apple Tax Case: Why is Ireland Refusing Billions?*, *supra* note 22.

116. Jim Puzzanghera & Paresh Dave, *Ireland to Close Corporate Tax Loophole Used by Google and Others*, L.A. TIMES (Oct. 14, 2014, 7:41 PM), http://www.latimes.com/business/la-fi-ireland-tax-haven-20141015-story.html.

117. *See id.*

118. *Negative Decision for Apple and for Ireland to be Appealed*, *supra* note 91.

119. *Apple Tax Case: Why is Ireland Refusing Billions?*, *supra* note 22.

120. SASKIA SASSEN, EXPULSIONS 21 (2014).

citizens."[121] Apple started to set up factories in Ireland in 1980[122] and now employs nearly 6,000 people across the country.[123] The workers' presence also resulted in the building of new road links and even a regular bus service.[124]

Michael Noonan stated that the country's corporate tax strategy contains three key elements: "rate, reputation and regime."[125] In Noonan's view, "increasing tax reputation is a key factor in winning mobile foreign direct investment."[126] Any increase to the baseline corporation tax would cause potentially harmful consequences, including discouraging multinational companies from doing business in Ireland.[127] Thus, Ireland would like to protect its reputation for being a tax-friendly country,[128] so that it does not lose companies to other tax-friendly jurisdictions.[129]

2. Future Limitations and Obstacles for Ireland to Maintain Status Quo

An unfortunate combination of international and domestic economic factors has led to significant financial deficit issues for Ireland, forcing increased borrowings at sometimes very expensive interest rates.[130] It has placed increasing pressure and international attention on the fiscal

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121. ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 14 (2004).

122. Duhigg & Kocieniewski, *supra* note 39; *see also Apple's Tax in Ireland*, WALL ST. J. (Aug. 30, 2016, 9:39 AM), http://blogs.wsj.com/briefly/2016/08/30/apples-irish-tax-bill-at-a-glance/#.

123. *Apple's Tax in Ireland*, *supra* note 122.

124. Henry McDonald, *Irish Finance Minister Stands Firm on Apple Tax Deal in Budget Speech*, GUARDIAN (Oct. 11, 2016, 7:07 PM), https://www.theguardian.com/technology/2016/oct/11/apple-ireland-corporate-tax-finance-minister-michael-noonan-european-commission.

125. *Ireland to Change Company Tax Laws, but 12.5% Corporation Tax Rate to Stay*, *supra* note 12.

126. *Id.*

127. *See* Liz Alderman, *Much Fiscal Pain in Ireland, but Low Corporate Taxes Go Untouched*, N.Y. TIMES, Nov. 26, 2010, at B1; Matt Carthy, *After Apple: Ireland's Taxation Regime Has Become a Source of Embarrassment to Our People*, THEJOURNAL.IE (Sept. 12, 2016, 8:30 PM), http://www.thejournal.ie/readme/matt-carthy-apple-tax-panama-papers-2976321-Sep2016/?utm_source=shortlink.

128. Cianan Brennan, *"The Government Needs Its Head Examined"—Should Ireland Really Throw €13 Billion Back in the EU's face?*, THEJOURNAL.IE (Aug. 31, 2016, 6:05 AM), http://www.thejournal.ie/apple-appeal-e13-billion-2955381-Aug2016/.

129. *See id.*; *see also* Kummer, *supra* note 12, at 293–94.

130. Andrew Cullen, *Corporate Tax Remains Central to Ireland's Strategy*, 21 INT'L TAX REV. 7, 7 (2010).

decisions that are now being made in Ireland.[131] Irish citizens are aware that €13 billion ($14.5 billion) plus interest is enough to cover the costs of the Irish health service for a year.[132] People have started wondering why their government refuses the money.[133] Although the EC has said that Ireland would not be obligated to use back taxes from Apple to pay down its national debt, Ireland could have taken this chance to use the money to pay its national debt.[134] In the absence of government actions against abusive and unfair business practices, ordinary citizens will feel increasingly disempowered and doubtful about continuing on toward globalization.

Success on appeal for Apple and Ireland might relieve some of the pressure and give national governments more leeway. However, it is very difficult to predict which way a decision would go. The panel of judges comes from all over the EU, so judges are not necessarily inclined to support Ireland. Moreover, because direct taxation is the responsibility of EU member governments, some judges may bristle at the EC's interference with this sovereign function. Apple and other companies have also faced criticism for keeping large reserves of cash overseas. The money is not taxed at home until it is brought back to the parent company in the United States.[135] Paul Ryan, the Speaker of the U.S. House of Representatives, has urged the United States to reform the tax system so that U.S.-based companies invest in their own country.[136] But until the appeal is resolved, it threatens to upset U.S.-EU relations, potentially further hampering already difficult talks on a trade deal.[137]

Apple's tax issue will be an example for any country operating in the "Eurozone."[138] Although Apple is not going to abandon Ireland regardless of the outcome, the EC decision would make companies think

131. *Id.*; *see also* Press Association, *supra* note 92.

132. If you are an "ordinarily resident" in Ireland, you can access a range of public health services that are free of charge or subsidized by the Irish government. People without medical cards can still access a wide range of community and hospital health services, either free of charge or at reduced cost. *See Health: Introduction to Irish Healthcare System*, LIVING IN IRELAND, http://www.livinginireland.ie/en/health (last visited Nov. 2, 2017); *Who Can Access Health Services in Ireland?*, HEALTH SERVICE EXECUTIVE, http://www.hse.ie/eng/services/Find_a_Service/eligibility.html (last visited Nov. 1, 2017).

133. *See* Sheppard, *supra* note 90.

134. Rónán Duffy, *EC: Ireland Could Spend Apple Tax Money on Anything It Wants*, THEJOURNAL.IE (Aug. 31, 2016, 4:12 PM), http://www.thejournal.ie/commission-apple-money-2957501-Aug2016/.

135. Kanter & Scott, *supra* note 1.

136. Raiyan, *supra* note 27.

137. Houlder, Barker, & Beesley, *supra* note 62.

138. *See id.*

twice before using Ireland.[139] Potentially any company that is deemed to have received a special deal from a European government could end up being targeted in the future.[140] Although not all companies doing business in Europe are bound by the EC's Apple decision, the EC could conduct separate investigations and address each specific company or country.[141] This might result in more investment in other tax friendly countries like Switzerland or Singapore as opposed to Ireland.[142]

The Organization for Economic Cooperation and Development (the OECD) could set international standards on taxation and develop mandatory codes of conduct for multinationals based in OECD countries, including Ireland.[143] Similar to problems as the environment, security, or some areas of public health, taxation on a global scale cannot be resolved effectively by the way of individual nation-state action alone.[144] State-scale or global-scale rights are often resistant to pressures from higher levels.[145] Research on international economic exchanges has revealed the emergence of a new *lex mercatoria*, an international legal space in which different types of economic agents operate, whose behavior is regulated by new international rules and contractual relations established by dominant multinational corporations, international banks, or international associations dominated by both.[146] The OECD aims to promote policies that will improve the economic and social well-being of people around the world.[147] Mr. Saint-Amans, the director of the OECD's Center for Tax Policy and Administration, has expressed concern over the EC's Apple

139. *See* Young, *supra* note 86.

140. *See id.*

141. A decision may have one or more addressees. For example, when the Commission's decision imposed a fine on Microsoft for abuse of its dominant market position, the only company directly concerned was Microsoft. *European Union Decisions*, EUR-LEX (Sept. 16, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0036; Paul Blake, *Amazon, McDonald's Face EU Tax Audit Similar to Apple's*, ABC NEWS (Aug. 30, 2016), http://abcnews.go.com/International/amazon-mcdonalds-face-eu-tax-audit-similar-apples/story?id=41741475.

142. *See* Young, *supra* note 86.

143. ARCHON FUNG, DARA O'ROURKE, & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS? 67 (Joshua Cohen & Joel Rogers eds., 2001).

144. Alfred C. Aman, Jr., *Globalization: Legal Aspects*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (James D. Wright ed., 2d ed. 2015); *see also* Eoin Burke-Kennedy, *Bulk of Apple's Profits Belong in US, Says OECD Tax Chief*, IRISH TIMES (Sept. 26, 2016), http://www.irishtimes.com/business/economy/bulk-of-apple-s-profits-belong-in-us-says-oecd-tax-chief-1.2806379.

145. Mariana Valverde, *Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory*, 18 SOC. & LEGAL STUD. 139, 141–42 (2009).

146. Boaventura de Sousa Santos, *supra* note 14, at 287.

147. Org. for Econ. Co-operation and Dev. [OECD], *OECD Work on Taxation*, at 2 (2017), http://www.oecd.org/ctp/beps/centre-for-tax-policy-and-administration-brochure.pdf.

decision: "Are we moving to a tax war between two blocs, Americans and Europeans, or are we still in an environment in which we can still build something?"[148] His view is that "we must ensure we have co-operation among all the countries."[149] In fact, the OECD has taken steps to combat perceived tax avoidance and is trying to restore global unanimity in an effort to discourage profit shifting.[150] The OECD has enumerated a fifteen point action plan on Base Erosion and Profit Shifting (BEPS) which includes proposals to develop and implement model treaty provisions to combat tax avoidance schemes and to create rules to limit corporations' ability to transfer intangible property rights to more favorable jurisdictions.[151] Apple's decision may be seen in a broader context encompassing the BEPS project currently under way in the OECD and the Commission's initiatives aimed at greater tax transparency, including information on tax rulings.[152] Ireland and the United States already started tax negotiations after the OECD made the BEPS reports to update existing tax agreements between Ireland and the United States.[153]

CONCLUSION

The European Commission's decision will certainly escalate tensions between the EU and the United States, adding further fuel to the U.S. Treasury's concerns of losing domestic tax revenue. It will also cause all European Union member states to take notice of the EC approach, and encourage them to reconsider their domestic tax regimes, over which the EU retains sovereignty, in order to comply with the global economy scale.[154]

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148. *See* Burke-Kennedy, *supra* note 144.

149. *Id.*

150. *See* Mistler, *supra* note 19, at 903; *see also* Lynnley Browning, *Profit Shifting*, BLOOMBERG (Apr. 27, 2017, 12:38 PM), http://www.bloombergview.com/quicktake/profit-shifting.

151. *See* August, *supra* note 13.

152. *See id.*

153. The existing treaty between Ireland and the United States was signed in 1997, with a protocol to the treaty signed in 1999. *New Tax Discussions Begin Between Ireland and US*, RTÉ NEWS (Aug. 25, 2016, 4:25 PM), http://www.rte.ie/news/business/2016/0825/811925-ireland-us-tax-talks/.

154. *Negative Decision for Apple and for Ireland to be Appealed*, *supra* note 91. On October 4, 2017, the European Commission took Ireland to the European Court of Justice for failure to collect the back taxes from Apple. *See State Aid: Commission Refers Ireland to Court for Failure to Recover Illegal Tax Benefits from Apple Worth up to €13 Billion*, EUR. COMM'N (Oct. 4, 2017), http://europa.eu/rapid/press-release_IP-17-3702_en.htm. On October 4, 2017, the European Commission ordered Luxemburg to recover €250 million ($294 million) in corporate income taxes from Amazon and stated that Luxemburg granted

Given the open nature of the Irish economy, the long-established emphasis by the Irish government's encouragement of foreign direct investment, and the importance that is placed on Ireland's international competitiveness, Ireland will try to provide a solution that can maintain Ireland as an attractive location for international investment.[155] The low corporate tax rate has been key to Ireland's strengthening recovery from the recession,[156] and it is unlikely that Ireland will change this lower corporate tax rate in the future.

Irish Minister for Finance Michael Noonan has stated that the international rules for taxing multinational companies have captured Ireland's focus. He added that "Ireland wants to be part of the solution to this global tax challenge, not part of the problem."[157] After Apple's case, one of the main policy changes in Ireland might be to fix the mismatch between the U.S. tax regime and Ireland's, so that companies incorporated in Ireland would not be "stateless" by operating outside of Ireland.[158]

A case involving such a wealthy multinational corporation like Apple is unlikely to come up again, but there are other multinational corporations at risk.[159] With the new OECD project in force, Ireland will have to pay close attention to internationally agreed standards to keep itself competitive and attractive in the global market.

Amazon anti-competitive State aid in 2003. *See* David Meyer, *Amazon Was Just Hit with a $294 Million Bill for Back Taxes*, FORTUNE (Oct. 4, 2017), http://fortune.com/2017/10/04/amazon-luxembourg-tax-eu-vestager/. These decisions are beyond the scope of this note. These decisions, however, indicate the European Commission's determination in regulating the tax evasion problems in Europe.

155. Cullen, *supra* note 130, at 7.

156. Tom Sykes, *Why Ireland Doesn't Want Apple's $14 Million in Unpaid Taxes*, DAILY BEAST (Aug. 30, 2016, 7:02 AM), http://www.thedailybeast.com/articles/2016/08/30/apple-must-pay-ireland-13-billion-in-unpaid-taxes.html.

157. *Ireland to Change Company Tax Laws, but 12.5% Corporation Tax Rate to Stay*, *supra* note 12.

158. *See id.*; *see also* Kummer, *supra* note 12, at 293–94; Michael V. Sala, *Breaking Down BEPS: Strategies, Reforms, and Planning Responses*, 47 CONN. L. REV. 573, 596 (2014).

159. EU authorities are currently investigating Amazon and McDonald's for similar tax deals it deems illegal. Press Association, *supra* note 92.