

Notes

THE CELTIC TIGER ROARS DEFIANTLY: CORPORATION TAX IN IRELAND AND COMPETITION WITHIN THE EUROPEAN UNION

I. INTRODUCTION

As economic and political accord within the European Union (EU) becomes more and more of a reality, the whole that is the European Common Market struggles to maintain a unity that overrides almost inevitable tensions created by the strong cultural personalities of its parts. Ireland, since its incorporation into the EU, has fought economically and politically to assert the independent identity that accompanied the country's incredible economic growth and earned it the nickname "The Celtic Tiger."

One of the most commonly cited explanations for Ireland's economic growth from the early 1990s is its low rate of corporation tax, among the lowest in the European Union.¹ Direct national tax policy is generally outside the scope of the legal framework of Europe's economic and political union. However, because a state's rates of taxation may lure business operations from one country to another, the potential anti-competitive effects of a state's corporate taxation rates suggest the applicability of EU anti-competition treaty provisions and policies to assert EU jurisdiction over national taxation policies.

Part II of this note will address the EU's legal framework for national direct corporation tax policies within the European Common Market. Part III will examine the national legal framework for Ireland's corporation tax system. Part IV will assess the legal and political challenges to Ireland's low rate of corporation tax under EU law. This Note concludes that the EU's current legal framework for eliminating competition between Member States is an ineffective

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1. See Jessica Poyner, *Investment in Ireland: The Enticement of U.S. High-tech Industry to the Emerald Isle*, 10 *TRANSNAT'L LAW.* 195 (1997).

weapon against a state's domestic corporate tax policies; currently, harmonization of corporation tax rates in the Common Market is neither legally nor politically feasible.

II. LEGAL FRAMEWORK: CORPORATE TAXATION IN THE EUROPEAN UNION

A. Corporate Taxation and the EC Treaty

The Treaty Establishing the European Economic Community ("EC Treaty") was signed in Rome in 1957, and it established a Common Market by "[eliminating] the barriers which divide Europe."² Article 2 establishes a Common Market marked by "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."³ The drafters intended a lack of inter-Member State competition and free movement of capital, labor, and goods to promote the social goals of economic stability and an increased standard of living.⁴ The EC Treaty thus calls for "the establishment of a system ensuring that competition shall not be distorted" in the Common Market.⁵ The EC Treaty envisions two paths to integration: "positive integration" by legislative intervention aimed at harmonizing Member States' policies and national legislation and "negative integration" through the removal of pre-existing barriers to economic harmonization.⁶

In order to advance the Common Market and minimize distortion of competition between the Member States, Title V of the EC Treaty discourages economic subsidies or taxes that impact certain sectors or industries.⁷ Article 85 outlines specific practices that are considered "incompatible" with the Common Market, including price fixing, discrimination, and unfair trade practices.⁸ The

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, PmbL., 258 U.N.T.S. 11 (1958), *amended by* Single European Act, 1987 O.J. (L 169) 1 (effective July 1, 1987) [hereinafter EC Treaty].

3. GEORGE BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 8 (1993).

4. *See* EC Treaty, *supra* note 2, art. 8(a).

5. *Id.* art. 3(f).

6. *See* ADOLFO J. MARTIN JIMENEZ, TOWARDS CORPORATE TAX HARMONIZATION IN THE EUROPEAN COMMUNITY: AN INSTITUTIONAL AND PROCEDURAL ANALYSIS (1999).

7. *See generally* EC Treaty, *supra* note 2, tit. V.

8. *See id.*

Maastricht Treaty on European Union, which amended the pre-existing EC Treaty, added Article 103, which declares that Member States should “regard their economic policies as a matter of common concern.”⁹

Direct taxes, as distinguished from indirect taxes in Article 99 of the EC Treaty, provide revenue for a state through duties imposed upon its citizens or entities doing business within its borders.¹⁰ Title V, Chapter 2 of the EC Treaty links taxation to the free movement of goods.¹¹ Although the Treaty does not explicitly label direct taxation policies as a potential source of distortion of competition between Member States, the EC Treaty expressly prohibits discriminatory *indirect* taxation on transactions in goods.¹² Additionally, Members States’ tax laws, direct and indirect, are required to comply with the “fundamental freedoms” of the EC Treaty. Member States may restrict the free movement of capital only to the extent necessary to ensure the proper functioning of the internal market.¹³ They may not restrict the free movement of capital,¹⁴ nor may they restrict freedom of establishment within the Community.¹⁵ Article 220 of the EC Treaty, however, addresses *direct* taxation by urging Member States to negotiate double taxation treaties in order to eliminate double taxation within the Common Market.¹⁶

Article 100 of the EC Treaty represents a potential legal basis for a challenge to a Member State’s internal direct taxation policies.¹⁷ Article 100 provides that “the Council shall, acting unanimously on a proposal from the [European] Commission, issue directives for the approximation of such provisions . . . as directly affect the establishment or functioning of the Common Market.”¹⁸ The only condition for application of Article 100 is that a Member State’s

9. JIMENEZ, *supra* note 6, at 205.

10. See generally EC Treaty, *supra* note 2, art. 99; see also BEN TERRA & PETER WATTEL, EUROPEAN TAX LAW 69-71 (1993).

11. See generally EC Treaty, *supra* note 2, tit. V, ch. 2.

12. See *id.* arts. 95-97, 99. Indirect taxation includes turnover taxes, excise duties, or any other internal taxation of such a nature as to afford indirect protection to other products. See *id.*, arts. 95, 99. Transactions in goods are any transactions involving products of member states. See *id.*, art. 95.

13. See *id.* art. 67.

14. See *id.*

15. See *id.* art. 52.

16. See *id.* art. 220.

17. *Id.* art. 100.

18. *Id.*

internal legislation immediately impact the Common Market.¹⁹ Challenging a national tax policy under Article 100 would be a difficult task, however, due to the article's requirement of a unanimous Council vote.²⁰ Because each Member State may veto any Council directive, any Member State defending its direct taxation scheme would possess the power to strike down the challenge. Additionally, in accordance with Article 189 of the EC Treaty, any directives promulgated under Article 100 would have to be implemented into national law through legislative measures in each of the Member States.²¹

Member States may not provide any preferential economic subsidies or other aid if such aid is found to "distort" or "threaten to distort" competition between Member States.²² Exceptions to this rule and procedures to be followed in the event of a violation are delineated in Article 92(2) and (3).²³ Article 92(2)(a) deems compatible with the Common Market any aid that "has a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned."²⁴ Relief for natural disasters or relief related to the German reunification falls under Article 92(2)(b),²⁵ while aid to promote projects or development within economically depressed areas and programs related to culture or heritage conservation fall under Article 92(2)(b)(3).²⁶ Furthermore, Article 92(3) states that "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment" is "considered to be compatible with the Common Market."²⁷

B. Legislative and Community-Level Initiatives

The idea that Member States' direct taxation schemes may impede attainment of goals of economic integration represented by

19. *See id.*; *see also* Jan E. Brinkmann & Andreas O. Riecker, *European Company Taxation: The Ruding Committee Reports Gives Harmonization Efforts a New Impetus*, 27 INT'L LAW. 1061, 1063 (1993).

20. *See* BERMANN et. al, *supra* note 3.

21. *See* JEAN-MARC TIRARD, *CORPORATE TAXATION IN EU COUNTRIES* (1994).

22. *Id.*

23. EC Treaty, *supra* note 2, arts. 92(2)-(3).

24. *Id.* art. 92(2)(a).

25. *Id.* art. 92(2)(b); *see id.* art. 92(2)(c).

26. *Id.* art. 92(2)(b).

27. *Id.* art. 92(3).

the establishment of a European Common Market is not a new concern. Both the 1963 Neumark Report²⁸ and the Van Den Tempel Report,²⁹ distributed in 1971, discussed the need for a harmonized corporation tax scheme throughout the European Economic Community.

The Neumark Report was the product of a committee chaired by Professor F. Neumark of Germany and charged by the European Commission (“Commission”) with researching the effects of disparities among Member States’ financial systems upon the establishment of the Common Market.³⁰ The Neumark Report addressed general principles governing tax harmonization and made recommendations regarding all taxes that could hamper the Common Market.³¹ It noted the independent development of the various European fiscal systems, and acknowledged that these differences should thus be considered in devising a common taxation method.³² The committee ultimately believed that any unification of tax systems would fail due to political considerations and would not eliminate distortions of competition between Member States.³³ Nonetheless, the Neumark Report concluded by recommending a single corporate tax rate within the EEC and a multilateral tax convention establishing the details and financial suprastructure of a community-wide tax scheme.³⁴

The Commission responded to the Neumark Report with a program entitled “Program for the Harmonization of Direct Taxes,” which proposed (1) harmonization of the withholding taxes on payment dividends and interest; (2) elimination of discrimination against non-residents, financial intermediaries, and holding companies to facilitate cross border mergers and acquisitions; and (3)

28. See *Rapporto del Comitato Fiscale e Finanziario*, Commissione: Bruxelles (1962) [Report of Fiscal and Financial Committee], 2 Common Mkt Rep. § 3211.03 (1975) [hereinafter Neumark Report].

29. See *Impôt Sur les Sociétés et Impôt Sur le Revenu dans les Communautés Européennes*, in *COLLECTION ETUDES, SÉRIE CONCURRENCE, RAPPROCHEMENT DES LEGISLATIONS*, No. 15 (1970), discussed in JIMINEZ, *supra* note 6, at 110 [hereinafter Van Den Tempel Report].

30. See generally Neumark Report, *supra* note 28.

31. See *id.* For a general discussion of the Neumark Report, see JIMINEZ, *supra* note 6, at 107; see also L.G.M. Stevens, *Introduction and Summary*, in A.L. BOVENBERG ET AL., *HARMONIZATION OF COMPANY TAXATION IN THE EUROPEAN COMMUNITY: SOME COMMENTS ON THE RUDING COMMITTEE REPORT 5* (1992).

32. See JIMINEZ, *supra* note 6, at 108.

33. See Neumark Report, *supra* note 28 (the text of the report makes this statement but does not provide support for it).

34. See *id.*

harmonization of amortization systems.³⁵ Thus, the Commission did not respond to the Neumark Report's call to devise a single rate of direct company taxation across the Community.

In 1970, the Commission appointed A.J. Van Den Tempel, a Dutch financier, to head a committee to report on corporate taxation and its effect on the internal market.³⁶ The Van Den Tempel Report suggested that the EEC follow the Dutch model of corporate taxation, which would result in double taxation on the income of corporations residing in one Member State but deriving income from operations in another Member State.³⁷ The Van Den Tempel Report suggested that the Dutch model's simplicity and neutrality offered a potential starting point from which the EC could develop a harmonized corporate tax system.³⁸

The European Parliament opposed a 1975 "Action Program" to implement a single corporate tax rate and structure.³⁹ The delegates felt that a "full and real harmonization could not be achieved without harmonizing the tax base," and the proposal contained only an imputation system through which Member States would apply a tax rate ranging from 45 to 55 percent.⁴⁰ The Commission planned to supplement the 1975 proposal with this missing layer of detail, but no new proposals materialized.⁴¹ The European Commission withdrew this proposal on April 20, 1990. It then shifted its focus from tax harmonization to the elimination of corporate double taxation and issues pertaining to indirect taxes.⁴²

The Commission charged a committee in 1990 with exploring Member States' corporation tax policies and elucidating any potential anti-competitive effects the national tax mechanisms had upon the Common Market. The committee, chaired by Onno Ruding, a former Dutch finance minister, was charged with answering the following questions:

- (1) Do differences in taxation among Member States cause major distortions in the internal market, particularly with respect to

35. See *Programme d'Harmonization des Impôts Directs*, Communication de la Commission au Conseil de 26 Juin 1967, Supplement to Bulletin No. 8, Commission of CEE, Brussels, cited in JIMINEZ, *supra* note 6, at 108.

36. See Van Den Tempel Report, *supra* note 29.

37. See *id.*

38. See JIMINEZ, *supra* note 6, at 117.

39. See *id.*

40. *Id.*

41. See Brinkman & Riecker, *supra* note 19, at 1065.

42. See *id.*

investment decisions and competition? (2) In so far as such distortions arise, are they likely to be eliminated simply through the interplay of market forces and tax competition between Member States, or is action at the Community level required? (3) What specific measures are required at the Community level to mitigate these distortions?⁴³

The Ruding Committee issued its report on March 10, 1992. It proposed a directive to eliminate withholding taxes on cross-border payments of interest and royalties between companies,⁴⁴ proposed a directive on cross-border loss compensation,⁴⁵ and recommended that a pre-existing Parent-Subsidiary and Merger Directive be extended in scope.⁴⁶ Because of the unanimity requirement for corporate taxation measures, none of these proposals was passed by the Council.⁴⁷

The Ruding Committee Report studied the economic distortions resulting from Member States' divergent tax systems and concluded that tax rates and the formulation of the basis upon which income taxes would be imposed do in fact have enormous effects on business decisions.⁴⁸ The Committee divided the issue into two subparts: the objective question of whether differences in tax burdens are relevant to the profitability of an investment project, and the subjective question of whether business people perceive tax differentials as an important factor.⁴⁹

Regarding the objective question, the Ruding Committee Report found that interest rates and inflation rates are as important as national taxation policies in a business' decision to locate in one jurisdiction over another.⁵⁰ However, if interest and inflation rates are excluded, differences in tax regulations still have a substantial effect.⁵¹ The committee found that: "(a) there are clear differences in tax burdens on domestic corporations in various Member States, (b) that there is overall discrimination against foreign investors, and (c)

43. F.J.G.M. Vanistendael, *A Personal View*, in BOVENBERG ET AL., *supra* note 31, at 13-15 (addressing the author's views and experiences as a member of the Ruding Committee). The economic aspects of the Ruding Report's findings are examined more closely *infra* Part III.

44. *See id.* at 13.

45. *See id.* at 23-28.

46. *See id.*

47. *See* European Commission, *Company Taxation: Current Position and Outlook* (visited Apr. 17, 2000) <<http://europa.eu.int/scadplus/leg/en/lvb/l26036.htm>>.

48. *See* Vanistendael, *supra* note 43, at 19.

49. *See id.*

50. *See* TERRA & WATTEL, *supra* note 10, at 88.

51. *See* Vanistendael, *supra* note 43, at 19.

that a foreign investor is faced with very different tax burdens on his investments in each individual Member State.”⁵²

As to the subjective impact of tax differentials on business decisions, the committee found that

for all elements of the business organization, tax considerations were always or usually relevant in 57.9 percent (sales outlets) to 85.1 percent (financial service centers) of the cases. For financial service centers, tax considerations were always a major factor in 52.6 percent of the cases, confirming the empirical evidence that financial services activities are sensitive to variations in tax burdens.⁵³

Of particular importance to the Irish taxation system was the Ruding Committee’s finding that tax rates and tax incentives are the instruments with the greatest impact on business decisions.⁵⁴ The report surveyed Community businesses to determine whether these entities would prefer that the Community tackle competitive distortion caused by tax discrepancies between Member States, or whether they believed that free market forces would bring about convergence.⁵⁵ The Ruding Committee reported that 74 percent of businesses were in favor of Community action toward tax harmonization, and 26 percent were in favor of leaving convergence to market forces.⁵⁶

At the Verona meeting of ECOFIN members in April 1996, the Commission addressed concerns about the potential anti-competitive effects of Member States’ corporate tax policies.⁵⁷ In response, the Commission established the High Level Group, which was later replaced by the Taxation Policy Group.⁵⁸ These groups consisted of personal representatives of the Member States’ Finance Ministries. They were chaired by the Commission and were charged with addressing the proposals of the Ruding Committee.⁵⁹ On December 1, 1997, under the direction of the Taxation Policy Group, the Ministers of Finance agreed on a tax package to reduce harmful tax competition, including a draft of the Code of Conduct on Direct

52. *Id.* at 20.

53. *Id.*

54. *See* TERRA & WATTEL, *supra* note 10, at 88.

55. *See* Vanistendael, *supra* note 43, at 22.

56. *See id.*

57. *See* JIMINEZ, *supra* note 6, at 142-43.

58. *See id.*

59. *See id.*

Business Taxation (“Code of Conduct”).⁶⁰ On March 9, 1998, the ECOFIN Council created the Code of Conduct Group to address the implementation of the provisions outlined in the Code of Conduct. Each Member State and the Commission appointed a high-level representative and a deputy to represent it in the drafting of the Code of Conduct. The Group currently meets at least twice a year “to facilitate the political orientation of its work,”⁶¹ and the group’s goal is the elimination of harmful national taxation measures by December 31, 2002.⁶²

The Code of Conduct was approved on December 1, 1997 as a political commitment by Member States to refrain from adopting markedly low corporate taxation rates that would be harmful to competition and to phase out rates that currently violate the commitment within five years.⁶³ The Code of Conduct applies Article 92 and 93 of the EC Treaty to measures relating to direct business taxation and calls for “the strict application of the aid rules concerned.”⁶⁴ The Code of Conduct outlines five criteria for determining whether a tax measure “affects, or may affect, in a significant way the location of business activity in the Community.”⁶⁵ These are:

- (1) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or (2) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or (3) whether advantages are granted without any real economic activity, or substantial economic presence within the Member State offering such tax advantages, or (4) whether the basis of profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably those agreed upon within the OECD, or (5) whether the tax measures lack transparency, including where statutory rules are relaxed at administrative level [*sic*] in a non-transparent way.⁶⁶

60. EUR. COMM., Code of Good Conduct in the Field of Direct Company Taxation, Official Document No. 2061, Dec. 3, 1997, at 2.2.1 [hereinafter Code of Conduct].

61. Vanistendael, *supra* note 43, at 22.

62. *See id.*

63. *See* EUR. COMM., Commission Notice on the Application of State Aid Rules to Measures Relating to Direct Business Taxation (Dec. 10, 1998), Commission Notice 384/03, 1998 J.O. (C 384/3) 1 [hereinafter Commission Notice on Business Taxation].

64. *Id.*

65. Code of Conduct, *supra* note 60, at 2.2.1, Annex 1.

66. *Id.*

These provisions quelled any question as to whether the State Aid provisions of the EC Treaty applied to direct business taxation and, as will be discussed below at length, led the European Commission to reassess the nature of Ireland's ten percent corporation tax in light of the anti-competition provisions Title V.⁶⁷

The European Commission released another notice in December 1998, which clarified the application of the State Aid provisions of Articles 92 and 93 of the EC Treaty to direct business taxation.⁶⁸ The Commission stated that the goal of the Code of Conduct was to "improve transparency in the tax area through a system of information exchanges between Member States and of assessment of any tax measures that may be covered by [the Code of Conduct]."⁶⁹ The notice provided for an analysis of the tax provisions currently in force in Member States and established the European Union's stronger position on the regulation of national tax matters. Two days later, the Commission published an assessment of Ireland's corporation tax, which will be discussed at length below.⁷⁰

C. Judicial Initiatives: Corporate Taxation and the European Court of Justice

The European Court of Justice (ECJ) has endorsed the application of the doctrine of direct effect, which presumes that Community legal norms are the "law of the land in the sphere of application of Community law."⁷¹ Likewise, the supremacy doctrine ensures that in a conflict between Community law and the law of a Member State, Community law will apply.⁷² The ECJ's application of these doctrines to questions of competition and State Aid has had a profound impact on the interpretation of the EC Treaty provisions that relate to direct taxation, even though the EC Treaty itself is silent on the issue.⁷³ Most of the case law in this area centers on the four

67. See Proposal For Appropriate Measures Under Article 93(1) of the EC Treaty Concerning Irish Corporation Tax (Dec. 12, 1998), Commission Regulation 395/09, 1998 J.O. (C 395/19) 1 [hereinafter Irish Tax Proposal].

68. See Commission Notice on Business Taxation, *supra* note 63.

69. *Id.* at 1.

70. See generally Irish Tax Proposal, *supra* note 67.

71. JIMINEZ, *supra* note 6, at 206.

72. See *id.*

73. See *supra* Part I.

freedoms: the free movement of goods,⁷⁴ free movement of persons,⁷⁵ freedom of establishment,⁷⁶ and free movement of capital.⁷⁷ These decisions do not address a Member State's national tax policy or corporation tax rate because they usually involve an individual taxpayer and enforcement of non-discrimination principles. However, the provisions of the EC Treaty on State Aid at issue in the case of Ireland's corporation tax have also been addressed by the ECJ and are the focus of this discussion.

The ECJ has defined State Aid in an extremely broad manner and opened the door to Commission review of Member States' legislation on state intervention in the Common Market.⁷⁸ In *De Steenkolenmijnen v. High Authority*, the ECJ effectively equated the definition of State Aid to the definition of a subsidy and clarified the potential discriminatory and anti-competitive effects that such aid may have.⁷⁹ In another case, the ECJ held that national courts possess jurisdiction to review challenges to a potentially anti-competitive State Aid regime that falls under the prohibitions in Articles 92 and 93 of the EC Treaty.⁸⁰ In *Italian Government v. Commission*, the Court defined the scope of Article 92's prohibition on illegal State Aid:

The aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects. Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92.⁸¹

74. See Case 18/84, *Commission v. France*, 1985 E.C.R. 1339; see also Case C-69/88, *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Staat der Nederlanden* 1990 E.C.R. I-583.

75. See Case 44/72, *Marsman v. Roskamp*, 1972 E.C.R. 1243.

76. See, e.g., Case 14/76, *Bloos, S.P.R.L. v. Société en Commandite par Actions de Bouyer*, 1976 E.C.R. 1497.

77. See, e.g., Case 267/86, *Van Eycke v. ASPA NV*, 1988 E.C.R. 4769.

78. See Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the European Coal and Steel Community*, 1961 E.C.R. 1.

79. See *id.* at 3.

80. See Case 173/73, *Italian Govt. v. Commission*, 1974 E.C.R. 709.

81. *Id.* at 718-19.

This case provided the Commission with the language to challenge Ireland's corporation tax rates in 1997. In *Lorenz v. Germany*,⁸² the Court gave the Commission the power to compel a Member State to modify or repeal a State Aid scheme that the Commission unilaterally decides is contrary to Article 92.⁸³

Although the ECJ's April 1998 opinion in *Safir v. Skattemyndigheten I Dalarnas Län*⁸⁴ addressed national tax rates in relation to the freedom to provide services, *Safir* could be interpreted as the Court's willingness to assess Member States' policies of direct taxation in the context of the anti-competition provisions of the EC Treaty. In *Safir*, the ECJ declared a national tax policy to be contrary to the spirit of the European Common Market.⁸⁵ *Safir* purchased a life insurance policy from a company outside Sweden and challenged Sweden's tax on the premium paid to the foreign corporation by a Swedish national.⁸⁶ Sweden placed the burden of filing forms containing information on the location and identity of the foreign insurance company on the Swedish taxpayer.⁸⁷ The Court agreed with *Safir*, who claimed a violation of Article 60 of the EC Treaty, which ensures that businesses in the service sector will enjoy equal treatment in their dealings with or in any Member State.⁸⁸ The Court held that Sweden hindered foreign companies by forcing their potential customers to endure additional burdens when purchasing insurance policies, burdens that did not apply to customers of Swedish insurers.⁸⁹ However, the Court did not address the compatibility of Sweden's policy with Article 73(d), which acknowledges the right of a Member State to legislate its own national tax policy. Although this case is of limited application to a general tax rate applied consistently by a Member State, it may provide a stepping stone whereby the Court will assert its authority to rule in the name of the Common Market.

82. See Case 120/73, *Lorenz GmbH v. Germany and the Land Rheinland/Pfalz*, 1973 E.C.R. 1471.

83. See *id.* at 1480.

84. See Case C-118/96, *Safir v. Skattemyndigheten I Dalarnas Län*, 1998 E.C.R. I-1897.

85. See *Safir*, 1998 E.C.R. at I-1898.

86. See *id.* at I-1898.

87. See *id.* at I-1898.

88. See EC Treaty, *supra* note 2, art. 60. The text of Article 60 reads in relevant part: "Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals." *Id.*

89. See *Safir*, 1998 E.C.R. at I-1928.

Though the Court did not address whether the Common Market policy of Article 100 supersedes national sovereignty, as represented by Article 73(d), *Safir* may indicate an increased willingness on the part of the EU to call national tax schemes into question in the name of the Common Market. As the Court stated in *Safir*, “It must be observed first of all that, although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law.”⁹⁰

III. IRISH LEGAL FRAMEWORK: CORPORATION TAX LAW AND POLICY IN IRELAND

In order to combat such economic woes as inflation and unemployment, Ireland established a corporation tax structure that boasts the lowest rates in the EU.⁹¹ In the 1950s, Ireland opened its markets and placed a zero rate of taxation on corporations in export industries.⁹² This policy eventually gave way to the need for additional revenue, but since 1976, Ireland’s rate of taxation on corporate profits has generally decreased from a high of fifty percent.⁹³ Prior to the Finance Act of 1999,⁹⁴ the maximum rate of tax on corporations in Ireland was 32 percent, with a reduced rate of 28 percent on the first £50,000 of a corporation’s profit.⁹⁵

The most significant provisions of Ireland’s taxation scheme at issue with the European Commission were introduced in Ireland’s Finance Act of 1980.⁹⁶ The Act provides for a 10 percent tax rate on corporations operating in “manufacturing” and “manufacturing related services,”⁹⁷ with a liberal definition of the term “manufacturing.”⁹⁸ In addition to maintaining the reduced tax rate,

90. *Id.* at I-1925.

91. See Anthony Garvey, *Irish Tax Pledge to Protect Multinationals*, ELECTRONICS TIMES, Dec. 7, 1998, at 4, available in 1998 WL 13433700. For detailed information on the Irish corporation tax rate structure, see generally FRANK BRENNAN & PAUL MOORE, CORPORATION TAX (9th ed. 1997).

92. See Therese Raphael, *Ireland’s European Rivals Are Green With Envy*, WALL ST. J. EUR., Dec. 17, 1998, available in 1998 WL-WSJE 21156751.

93. See Institute of Taxation in Ireland, *Rates of Corporation Tax* (visited April 1, 2000) <<http://www.taxireland.ie/irishtax/index.htm>>.

94. Finance Act, No. 2 (1999).

95. See BRENNAN & MOORE, *supra* note 91, at 8.

96. Finance Act, No. 14 (1980); see Poyner, *supra* note 1, at 210.

97. See Finance Act, No. 14 § 39 (1980).

98. For a comprehensive listing of industries that qualify for the reduced corporation tax rate and those that are excluded, see Institute of Taxation in Ireland, *Manufacturing Relief and*

the Finance Act of 1984 introduced “Relief for Investment in Corporate Trades,” which grants individual taxpayers a deduction for investments made in companies that qualify for the 10 percent rate.⁹⁹ The percent rate was originally scheduled to remain in effect through December 31, 2000, but in 1990, the Irish government extended its application through December 31, 2010.¹⁰⁰

Gradually, Irish tax policymakers increased the scope of sectors entitled to the lower rate of taxation. For instance, the Finance Act of 1981 added fish farms, engineering services, and shipbuilding to the list of industries qualifying for the reduced tax rate.¹⁰¹ In 1984, to encourage Ireland’s emerging high-technology sector, data processing, computer software companies, and “software development services”¹⁰² were added to the list. This sector was also included in a list of industries for which individuals could deduct private capital investments.¹⁰³ The 1986 Finance Act included research and development companies in the list of qualifying industries, though individual investors in these companies were not permitted to deduct their investments.¹⁰⁴ Later Finance Acts added even more industries to the list of industries qualifying for both the 10 percent tax rate and investment deductions: shipping activities,¹⁰⁵ export sales from “trading houses,”¹⁰⁶ plant cultivation by way of “micro-propagation and plant cloning,”¹⁰⁷ meat and fish processing,¹⁰⁸ remanufacture or repair of computer equipment,¹⁰⁹ and repair or maintenance of aircraft¹¹⁰ and aircraft components.¹¹¹ Other industries were afforded the reduced tax rate but were denied deductions for individual investors, such as newspaper advertising companies¹¹² and

Investment in Corporate Trades (visited April 1, 2000) <<http://www.taxireland.ie/irishtax/index.htm>>.

99. See Finance Act, No. 9 §§ 11-27 (1984), as amended by Finance Act, No. 10 §§ 8-12 (1987) and Finance Act, No. 13 § 9 (1989).

100. See Irish Tax Proposal, *supra* note 64.

101. Finance Act, No. 16 § 17 (1981).

102. Finance Act, No. 9 §45 (1984).

103. See *id.*

104. See Finance Act, No. 13 §24 (1986).

105. See Finance Act, No. 10 §§ 11, 28 (1987).

106. *Id.* §§ 22, 29.

107. *Id.* § 31; see also Finance Act, No. 12 §7 (1988).

108. See Finance Act, No. 10 § 41 (1990).

109. See *id.*

110. See *id.*

111. See *id.*

112. See Finance Act, No. 13 §44 (1993).

service activities for ships or off-shore platforms.¹¹³ It is thus apparent that Ireland's preferential tax rate was aimed at a vast range of economic enterprises.

The goal of such low corporation tax rates was to decrease inflation and unemployment, and the statistical data suggest that the program was successful. Economic growth boomed after the tax reforms; since 1993, GDP growth has averaged 8 percent annually.¹¹⁴ Unemployment has fallen from 16 percent to 7.8 percent (compared with over 10 percent in Germany and France) and is expected to fall to below 5 percent over the next few years.¹¹⁵ Revenues from corporate taxes in 1999 were 3.5 percent of GDP, double the amount in 1990.¹¹⁶ The tax rates have stimulated Ireland's economy dramatically and have brought multinational corporations such as Dell, Intel, and Pfizer within the country's borders.¹¹⁷

As previously noted, Irish corporation taxes are among the lowest in the European Union. The 10 percent rate on profits generated by the aforementioned categories of corporations contrasts starkly with the 45 percent rate in Germany¹¹⁸ and France's rate of 33.33 percent.¹¹⁹ Not surprisingly, Germany and France have led the attack on Ireland's corporate tax rates. Objecting that the rates distort competition between EU Member States, they have advocated the need to "harmonize" taxes within the EU.¹²⁰ Germany, for one, is not rushing to decrease its corporate tax rates, which are among the highest in the Europe. Germans have pointed out that their 11.46 billion ecu annual contribution constitutes 60 percent of the EU's budget,¹²¹ while Ireland is a net beneficiary, receiving 2.8 billion ecu of aid annually.¹²² This cash flow makes it increasingly difficult for

113. See Finance Act, No. 10 §42 (1990).

114. See Raphael, *supra* note 92, at 12.

115. See *id.*

116. See *id.*

117. See *id.*

118. See Ernst & Young, *Doing Business in Germany*, Corporate Tax Guide (visited Apr. 17, 2000) <<http://www.doingbusinessin.com/start/index.cfm>>.

119. See Ernst & Young, *Doing Business in France*, Corporate Tax Guide (visited Apr. 17, 2000) <<http://www.doingbusinessin.com/start/index.cfm>>.

120. See Raphael, *supra* note 92, at 13.

121. See Dennis Staunton, *Hoping to Impress Europe's Paymaster—the Strong Links Between Ireland and Germany Will Be Confirmed When the Taoiseach Meets the German Chancellor, Mr Schroeder, In Bonn Today, But All Is Not Sweetness and Light*, IR. TIMES, Dec. 15, 1998, at 17, available in LEXIS, News Library, Itimes File.

122. See *id.*

Germans to watch their corporate taxpayers flee for tax havens like Luxembourg and Ireland.

In July 1987, Ireland applied to the European Commission to have its special 10 percent corporation tax rate extended to certain income derived from trading operations in areas of Dublin known as the Shannon Customs-Free Airport Zone (SCAZ) and the International Financial Service Centre (IFSC).¹²³ The Commission determined that singling out these areas for special tax treatment constituted “an operating aid to their beneficiaries, as they are not linked to the realization of any investment or other specific activities which would not be performed by beneficiaries in the ordinary course of their business in Ireland.”¹²⁴ Ordinarily, operating aid can only be granted under Article 92(3)(a) if it is justified in terms of its contribution to regional development and if its level is in proportion to the handicaps it seeks to alleviate.¹²⁵ Additionally, the aid must be limited in time and progressively reduced.¹²⁶ These provisions notwithstanding, the Commission cleared the extension of the 10 percent rate under an exception that State Aid given to underdeveloped areas or areas suffering from an unusually low standard of living will not be considered harmful to the Common Market.¹²⁷

Inbound investors operating in Ireland are eligible for grants from the Industrial Development Agency (IDA).¹²⁸ IDA grants provide subsidies for the acquisition of plant sites, utilities, and labor for foreign corporations that agree to use local labor and Irish management.¹²⁹ A corporation qualifying for an IDA grant automatically qualifies for the 10 percent preferential corporation tax rate. Under the Finance Act of 1999, these corporations will be allowed to continue to receive the governmental subsidies and low tax rate for existing activities and any expansion projects approved by the IDA before July 1998. However, the preferential treatment of foreign corporations within the designated zones will be phased out by 2005.¹³⁰

123. *See id.*

124. *Id.*

125. *See id.*

126. *See id.*

127. *See EC Treaty, supra note 2, art. 92(3)(a).*

128. For a discussion of the IDA, see Poyner, *supra note 1*, at 201.

129. *See EU Rules to Cap IDA Aid*, IRISH INDEPENDENT, Dec. 16, 1998, available in 1998 WL 8234621.

130. *See Irish Tax Proposal, supra note 67.*

Thus, although the Irish corporate taxation rates will be raised from their previous low rates for companies operating in the manufacturing industry, Ireland still boasts the lowest rate of corporate taxation in the European Union. These rates are actually more generally applicable than they once were because all operations producing “trading income” will be eligible to receive a low 12.5 percent rate of tax.

IV. ANALYSIS

A. Challenges of the Irish Corporation Tax System Under EU Law

Although a Member State’s direct taxation rate remains under national control,¹³¹ the Member States did agree in the Code of Conduct that the European Commission on Finance must approve any policy of taxation that may have an adverse effect on competition in the Common Market. Since this is a political commitment and does not have the force of law, the Commission turned to the State Aid provisions in Article 100 as the legal basis to force Ireland to reformulate its corporation tax and IDA grant policies. However, these provisions are subject to a rule of unanimity.¹³² Any directive to unify national tax systems would be met with considerable opposition, and therefore, the issue has given way to a political push for greater harmonization of rates of national corporate taxes.¹³³

In 1987, the European Commission on Finance first approved Ireland’s rate of taxation in the IFSC and SCAZ regimes, and in 1990, it allowed for the extension of these rates through December 31, 2000.¹³⁴ When the Commission considered the issue again in 1991, it approved the further continuation of the rate in the IFSC to December 31, 2005 for operations that began in the area before January 1995.¹³⁵ In 1994, the deadline for revoking preferential status

131. See EC Treaty, *supra* note 2, art. 73d.

132. See EC Treaty, *supra* note 2, art. 100.

133. See Kevin Brown & Jim Kelly, *Tax Harmony? No Thanks: Attempts to Reform Taxation Across the EU Will Meet Huge Resistance*, Comment & Analysis, FIN. TIMES, Mar. 1, 1999, at 17. The article surveyed European business organizations, and found “virtually no support for the ambitious tax reform agenda set out by the German and French finance ministers.” *Id.*

134. See EUR. COMM., Proposal for Appropriate Measures Under Article 93(1) of the EC Treaty Concerning the International Financial Service Centre and Shannon Customs-Free Airport Zone (December 18, 1998), Commission Notice 395/14, 1998 J.O. (C 395/14) [hereinafter Proposal for Appropriate Measures].

135. See *id.*

to corporations that had pre-existing operations in both preferred zones was extended to December 31, 2000; the 10 percent rate for these industries would remain in place through December 2005.¹³⁶

However, from 1997 to 1999, Ireland felt considerable political pressure from the EU to raise its corporation tax rate and to phase out its preferential treatment of businesses within the SCAZ and the IFSC.¹³⁷ For example, although British Prime Minister Tony Blair and German Chancellor Gerhard Schröder were firmly opposed to a single corporate taxation system, they issued a joint statement in December 1998 that supported “tough action to combat unfair tax competition in line with the Code of Conduct Group” and stated that “discriminatory tax rules and practices should generally be removed to prevent the distortion of competition within the EU.”¹³⁸ Furthermore, following the passage of the Code of Conduct in 1997, the Commission exercised its newly-articulated power to assess taxation in Member States.

The Commission issued a notice in December 1998 that declared the tax schemes for the IFSC and the SCAZ to be “operating aid” because the aid was linked to activities that would ordinarily be associated with the businesses’ normal operations.¹³⁹ In order for this operating aid to be authorized, it must be justified as a contribution to regional development and must be proportional to the degree of underdevelopment in that region.¹⁴⁰ However, the Commission found that Ireland’s preferential tax schemes had accomplished their intended purposes because unemployment rates had decreased to an acceptable level and the GDP had been increasing at a steady and rapid rate.¹⁴¹ Since the IFSC and SCAZ could “no longer be considered compatible with the Common Market,” the Commission revoked the approval for the IFSC and SCAZ as regions in need of State Aid.¹⁴²

The Commission, deriving its jurisdiction from the Code of Conduct, then addressed the status of the Irish Republic as an

136. See European Commission Press Release IP/98/691/B, *Commission Addresses Recommendations to Ireland Regarding Corporate Tax*, July 1998.

137. See *id.*

138. Brown & Kelly, *supra* note 133, at 19.

139. See Irish Tax Proposal, *supra* note 67, at 1; see also Proposal for Appropriate Measures Under Article 93(1) of the EC Treaty Concerning the International Financial Service Centre and Shannon Customs-Free Airport Zone, *supra* note 134.

140. See *id.*

141. See *id.*

142. *Id.*

approved region for State Aid.¹⁴³ According to Article 92(1) of the EC Treaty, aid “represents a benefit to an undertaking by enabling it to retain a greater proportion of its profits either for distribution to its members or its shareholders or for reinvestment and therefore confers an advantage on eligible undertakings.”¹⁴⁴ The Commission first decided that tax systems could be considered aid “granted by a Member State or through State resources in any form whatsoever” because reduced tax receipts for a Member State are “equivalent to the consumption of state resources.”¹⁴⁵ Second, in order for a state action to be considered State Aid, it must “favor certain undertakings or the production of certain goods.”¹⁴⁶ The Commission ruled that this condition was met through the Irish corporation tax scheme’s preferential treatment of the manufacturing and service sectors and that a justification for a lower rate of tax on certain sectors of the economy no longer exists.¹⁴⁷ Furthermore, according to the Commission, an assessment of the validity of a State Aid system hinges on its potential effect on trade between states rather than on the purpose behind the State Aid program.¹⁴⁸ Since the lower tax rate improves a corporation’s competitive position due to higher profit retention, the Commission determined that competition between Member States is distorted.¹⁴⁹ Thus, the Commission concluded that “the measure constitutes a State Aid and [the Commission] has registered the [Irish corporation tax] scheme as an existing aid.”¹⁵⁰

In response to this, Ireland and the European Commission negotiated the Finance Act of 1999, which the European Commission officially sanctioned in a notice dated December 18, 1998.¹⁵¹ Ireland promises to set corporation taxes on trading income to 12.5 percent and rates on non-trading income to 25 percent, effective January 2003 through 2025.¹⁵² This agreement was announced on July 22, 1998 in a press release issued by the Minister for Finance and the Minister for Enterprise, Trade, and Employment. The goal of the agreement was

143. See Irish Tax Proposal, *supra* note 67.

144. EC Treaty, *supra* note 2, art. 92(1).

145. Irish Tax Proposal, *supra* note 67.

146. EC Treaty, *supra* note 2, art. 92(1).

147. See Irish Tax Proposal, *supra* note 67.

148. See *id.*

149. See *id.*

150. *Id.*

151. See Finance Act, No. 2 (1999).

152. See Mary Walsh, *Ireland, EU Agree to Major Changes in Irish Tax Regime*, WORLDWIDE TAX DAILY, July 27, 1998.

to “address a series of measures to the Irish Government which it needs to take in order to put its corporate tax system in conformity with European Union State Aid rules.”¹⁵³

In order to preserve the legitimate expectations of investors, the European Union’s settlement with Ireland provides for a transition period to allow companies to remain subject to the current tax regime. According to the press release issued by the Commission on July 22, 1998, “the arrangements for phasing out the preferential rate under the [Irish corporation tax] system are spread over a longer period, reflecting in particular the legitimate expectations acquired by companies given that the system was, since 1980, regarded as a general measure and not subject to the State Aid rules.”¹⁵⁴ The length of the transition period depends on the industry and when a company received eligibility for IDA grants or preferential treatment by operating within the IFSC or SCAZ regimes.¹⁵⁵ The EU has approved the extension of a 10 percent taxation rate through 2010 for inbound investment projects approved by the IDA before May 31, 1998.¹⁵⁶ Companies operating under the preferential IFSC and SCAZ regimes will continue to receive the 10 percent rate through 2005.¹⁵⁷

The EU affirmed the measures that Ireland and other Member States had planned for eliminating the incompatibility with the Common Market. In order to eliminate the requirement for “discrimination” within the Commission’s analysis of Article 92(1), the new 12.5 percent rate for all corporate trading income profits attempts to “favor certain undertakings or the production of certain goods.”¹⁵⁸ Ireland’s previous distinction between “manufacturing” and “non-manufacturing” industries raised questions of discriminatory corporate tax schedules, and the dichotomy between the newly defined term “trading income” and other types of corporate income could serve as ammunition for a future dispute by the EU. If, however, the national tax scheme is applied generally to all corporate operating income in a nondiscriminatory fashion, it could escape such a challenge.

153. European Commission Press Release No. IP/98/691/B, *supra* note 136.

154. *Id.*

155. *See* Finance Act, No. 2 (1999).

156. *See* European Commission Press Release No. IP/98/691/B, *supra* note 136.

157. *See id.*

158. EC Treaty, *supra* note 2, art. 92(1).

Furthermore, Ireland may benefit from the procedural safety net created by the Article 100 unanimity requirement.¹⁵⁹ Article 100 states that “[t]he Council shall, acting *unanimously* on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, 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 Common Market.”¹⁶⁰ Only the Commission can challenge a Member State’s potentially anti-competitive policies, and Ireland has the power to veto any challenge that should arise.¹⁶¹ Finally, a claim based on the 12.5 percent rate itself would face Article 73(d), which implicitly grants Member States the right to set their own national tax policies.¹⁶²

B. Potential Movement of State Aid Provisions and Tax Rates

The European Commission will no longer be able to characterize Ireland’s corporation tax rate as “illegal” State Aid. The Commission has defined “operating aid” as “aid aimed at reducing a firm’s operating expenses.”¹⁶³ Under Article 92(3)(a) of the EC Treaty, such aid can only be authorized in regions qualifying as areas where the standard of living is abnormally low or where there is serious underemployment.¹⁶⁴ Ireland, however, no longer qualifies for either of these exemptions; the Organisation for Economic Co-operation and Development (OECD) reported in its 1999 annual economic survey that “the Irish economy has notched up five straight years of stunning economic performance.”¹⁶⁵ Although the Commission’s definition of “operating aid” would render Ireland guilty of violating Article 92, the line must be drawn somewhere. Any Member State’s rate of taxation that leaves a corporation with comparatively more remaining operating income than it would have in another jurisdiction could theoretically be considered operating aid because it is “aimed at reducing a firm’s operating expenses.”¹⁶⁶ An evenly

159. See EC Treaty, *supra* note 2, art. 100.

160. *Id.* (emphasis added).

161. See *id.*

162. See EC Treaty, *supra* note 2, art. 73(d).

163. European Commission Press Release No. IP/98/691/B, *supra* note 136.

164. See *id.*

165. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD ECONOMIC SURVEYS 1998-1999—IRELAND 9 (May 1999).

166. European Commission Press Release No. IP/98/691/B, *supra* note 136.

applied rate of taxation would avert a challenge under the EC Treaty's State Aid provisions and would be a legally sound method. The Commission, in its application of the Treaty's provisions on State Aid to corporate taxation, found the following:

The main criterion in applying Article 92(1) to a tax measure is therefore that the measure provides in favor of certain undertakings an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within the system are justified "by the nature or general scheme" of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State. If this is not the case, then State Aid is involved.¹⁶⁷

Therefore, a Member State's rate of corporation tax should not be considered "operating aid" if that rate of tax is evenly applied to corporations operating within the Member State's borders.

Ireland's settlement-induced corporate tax structure may yet be subject to another round of scrutiny under Article 92. The impact of a tax policy that is 20 percent lower than the average direct business taxation rate in the rest of the EU's Common Market will become more difficult to downplay with the institution of a common currency. However, such a challenge must hinge on a differentiation between different types of undertakings, which will become more difficult to prove with increased awareness of the ability to escape "discrimination" through carefully worded tax policies. Member States can evade the EC Treaty's proscriptions on illegal State Aid by defining all taxable corporations in the same manner and taxing them at the same rate. This is evident through Ireland's settlement program with the EU. Since Ireland's legislature and courts had defined "manufacturing" very liberally in the past, replacing it with "trading" (which nonetheless maintains an effectively dual tax rate) may be enough to evade another round of scrutiny under Article 92's anti-competition provisions. These same tools could render the same effect in a renewed attack on Ireland's corporate tax scheme; such an interpretation would require little extension of Article 92 beyond where the Commission has already proven it is willing to proceed.

167. EUR. COMM., Irish Tax Proposal, *supra* note 67, at 3.

C. Is Tax Harmonization Feasible?

Under the current regime established by the EC Treaty, tax harmonization is not legally feasible. Because Member States' taxation policies are consciously omitted from the Treaty's provisions for economic harmonization, they are insulated from EU directives via the unanimity requirement of Article 100.¹⁶⁸ Furthermore, Member States may evade EU challenges of "discrimination" by following Ireland's lead and defining taxable businesses in a manner that spreads the preferential tax rates more evenly.

Although it is indisputable that corporation tax rates lure investment activity and foreign business operations from one state into another, those rates interact with the state's labor policies and regulatory framework to create an environment for businesses.¹⁶⁹ The pool of labor, the availability of resources, and the extent of environmental regulation are just some of the factors that influence a region's attractiveness to outside businesses.¹⁷⁰ Furthermore, as discussed by the Ruding Committee, other internal factors, such as interest rates and inflation, also play a role.¹⁷¹ According to Frances Ruane, an economics professor at Trinity College in Dublin, most of the foreign direct investment into Ireland has originated in the United States, and accordingly a cultural affinity between the two nations may be responsible to some degree for the willingness of American businesses to locate on the island.¹⁷² Since factors other than Ireland's corporation tax rate may be responsible for its incredible growth in foreign direct investment and capital flows, eliminating economic competition between Member States is a broad goal that cannot be achieved simply by harmonizing their taxation rates.

Moreover, the EU may actually benefit from Ireland's tax policies. According to Paul Seabright, a senior research fellow at Churchill College, Cambridge, "some investment has probably gone to Ireland that might have gone elsewhere [on the basis of its corporation tax policies], but some has probably come to the EU that would not otherwise have come to Europe at all."¹⁷³ Therefore,

168. See EC Treaty, *supra* note 2, art. 100.

169. See Brinkman & Reicker, *supra* note 19, at 1067; see also data from the Ruding Committee, discussed *supra* Section I.

170. See Brown & Kelly, *supra* note 133, at 19.

171. See Stevens, *supra* note 31, at 19.

172. See *id.*

173. *Id.*

Ireland's rapid growth has probably had some "modest spillover effects through trade with other member states."¹⁷⁴

Yet another problem has been the EU's concentration on corporation tax *rates* rather than the tax *base*. Since tax systems formulate the basis upon which businesses are taxed differently, an attack that concentrates solely on the tax rate is likely to be superficial because it is the tax base that determines the amount of income upon which the rate is levied. For example, according to Nicholas Dee of the Confederation of British Industry's tax committee, "[t]he UK taxes companies at a low rate. France and Germany have high corporate tax *rates* but companies there pay much less in corporate taxes."¹⁷⁵

As a result of the difficulty—if not impossibility—of harmonizing Member States' corporate tax bases, the Ruding Committee abandoned its call for tax harmonization.¹⁷⁶ The Committee had stated that the introduction of a community-wide formula for computing a tax base might be "reconsidered when a much higher level of integration between Member States is achieved, in particular, when group treatment is introduced for enterprises located in different Member States."¹⁷⁷

The harmonization of corporation tax rates between Member States is neither legally nor politically feasible. The Commission must rely on the EC Treaty provisions on State Aid to challenge such an internal fiscal policy, and any Member State can escape this by applying definitions more broadly and eliminating potential claims of discrimination. The legal basis for a challenge will also encounter Article 100's veto provision. Politically, Ireland has fought pressure to raise its general rate of corporation tax because to some extent, this low rate has correlated to its incredible growth in GDP and employment. Even if the EU achieved harmonized corporation tax rates, the differences in Member States' formulations of corporate tax bases would still leave wide discrepancies in Member States' effective tax rates.

174. *Id.*

175. Brown & Kelly, *supra* note 133, at 19.

176. See Brinkman & Reicker, *supra* note 19, at 1067.

177. *Id.* (quoting The Ruding Committee Report, *supra* note 43).

V. CONCLUSION

The Celtic Tiger has roared its way from unemployment and stagnation to one of the highest rates of economic growth in the European Union. This is due in part to its corporation tax rate and its preferential treatment of foreign corporations doing business within its borders, particularly those within its designated industrial zones. Such growth has attracted critical attention from other EU Member States and tested the issues of tax harmonization in the Common Market, which have been debated for nearly three decades.

Ireland's case has proven that the current EU legal framework leaves no room to challenge individual Member States' national direct taxation policies. Thus, harmonization of direct corporation taxes within the EU is a legal impossibility without either amending the EC Treaty to explicitly allow it or revoking the requirement of unanimity for legislation promulgated under Article 100.

Political directives are also too weak to require Members to alter their internal direct taxation schemes. The Code of Conduct has provided a political framework for Member States to work to achieve greater harmonization of corporation taxes within their borders. However, this Code derives its teeth from the EC Treaty provisions on State Aid and therefore is powerless to challenge corporation tax rates applied evenly to all corporations within a Member State. Therefore, without the assistance of Member States' local initiatives and a politically palatable formula of calculating tax bases in addition to a single tax rate, the political arena cannot bring about harmonized corporate tax rates within the European Union.

Ireland has once again asserted its cultural and political independence from the Continent. Although the corporation tax rates have been altered to some extent, they still defiantly remain among the lowest in the EU. Businesses will continue to flock to the Emerald Isle, and the corporation tax rates will welcome them, as it is unlikely that Europe can unite on the issue of domestic direct taxation.

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