The OECD Global Corporate Tax Deal: What it is, What it will do, and Why it's good

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Introduction & Background to Ireland's Corporate Tax Framework

For the past two summers, corporate tax (the tax corporations pay on their profits) has featured heavily in the news cycle. On the 15th of July, 2020, the General Court of the European Union (one below the Court of Justice) annulled the European Commission's ruling that found that Ireland had given illegal state aid to Apple in the form of tax benefits. The General Court's decision brought Ireland's corporate tax rate back into focus[1] and led the European Commission (Commission) to redouble its efforts to introduce a so-called 'common consolidated corporate tax base' (CCCTB) across the EU[2] even though the average corporate tax rate across the EU of 20.5% (down from 28.8% average in the early Noughties[3]) is lower than the average global corporate tax rate of 24%.[4]

There was even talk of changing how votes on tax matters are taken by the Council of Ministers (Council) as a way of pushing through the CCCTB.[5] Currently, there are only two policy areas which require the unanimous approval of the Council – foreign policy and tax. The Commission's thinking was that if the approval of a qualified majority or at least 55% of the Council was required on tax matters, then reforms such as the CCCTB might be passed as member states with low corporate tax rates like Ireland, Hungary, Cyprus, Bulgaria and Estonia[6] could not singlehandedly strike down the reform. However, chances of this happening are arguably slim given that the condition of unanimity in tax matters is supposed to complement/support member states' exclusive legislative competence in relation to domestic tax affairs (i.e. tax on income, wealth or capital).[7] This means that if the proposed changes to how votes are taken were to be implemented, member states could rightly argue that it represents an encroachment on their exclusive power in the area of direct taxation (an argument that Irish political parties have made in response to previous efforts to re-launch the CCCTB proposal[8]).

In the summer of 2021, nearly a year to the day that the General Court's ruling had refuelled the corporate tax debate; the OECD announced that 130 out of 140 countries had agreed to global corporate tax reform[9] (six more countries have since signed-up).[10] The Two-Pillared deal would see all signatory countries implement an effective minimum corporate tax rate of 15% and would also require multinationals to pay tax in countries where sales were recorded or, put differently, where the economic activity that generated the value took place. It is estimated that this Pillar of the deal will cost Ireland nearly €2 billion a year.[11] The significance of this particular change is that part of the controversy surrounding Apple's tax arrangement in Ireland was not just that its effective corporate tax rate in 2014 was as little as 0.005%, but that it avoided paying tax across all EU member states by

recording all European sales of its products in Ireland rather than in the countries where the products were sold. The majority of the profits from these sales were allocated to a 'head office' that "existed only on paper" meaning that it was stateless and could not have generated these profits itself. Significantly, it also meant that these profits went largely untaxed.[12]

Déjà Vu

This is just the latest in a long running debate about Ireland's corporate tax that began even before the 12.5% rate was introduced. From around 1990 until 2000, Ireland applied a tax rate of 10% in respect of manufacturing companies and companies located in Dublin's financial district, the IFSC.[13] Just like today, Ireland was under pressure to raise its rate to a more "European level"[14] which ultimately led to the 12.5% rate which was not exactly a 'European level' but was nevertheless accepted by the Commission following negotiations with the Irish Government of the day (Fianna Fáil/Progressive Democrats coalition 1997-2002).[15]

Just as it is today, the Commission was concerned in the late 90s that member states' application of low rates of corporation tax along with other "harmful"[16] measures would distort competition across the Single Market by attracting foreign direct investment (FDI) to low tax member states to the detriment of high tax member states.[17] Member states like France and Germany were particularly concerned about this.[18]

Another parallel between then and now is that the Commission during the late 90s was concerned about 'forum shopping' whereby policies targeted towards the creation of a "regulatory and tax friendly environment"[19] for multinationals would become the "standout factor driving location decisions"[20] and thus precipitate a 'race to the bottom'.[21] Professor Irene Lynch Fannon calls this the "Delaware effect"[22] as corporate friendly policies in the US State of Delaware have made it the locus of incorporation in the US.[23]

OECD Deal

Large multinationals based in Ireland like big tech, pharmaceutical and medical device firms that record over €750 million in turnover a year will be taxed at the new rate of 15%, whereas every other company will be taxed at the existing rate of 12.5%. Interestingly, it was reported that Ireland won this concession from the OECD on foot of Finance Minister, Paschal Donohoe's political clout as President of the Eurogroup (the Eurogroup comprises of finance ministers from each of the 19 Eurozone countries).[24] The effect of this arrangement will be that the 12.5% rate will continue to apply to an estimated 160,000 companies in Ireland employing up to 1.8 million people. Meanwhile, the new effective global minimum rate of 15% will be levied on the profits of a little more than 1,500 companies in Ireland with a comparatively much smaller workforce of 500,000.[25]

It is of course good news that the 12.5% rate will be retained for the vast majority of companies in Ireland employing the most people. However, it is the MNCs taxed at the higher level that account for the majority of Irish exports which may prove consequential.[26]

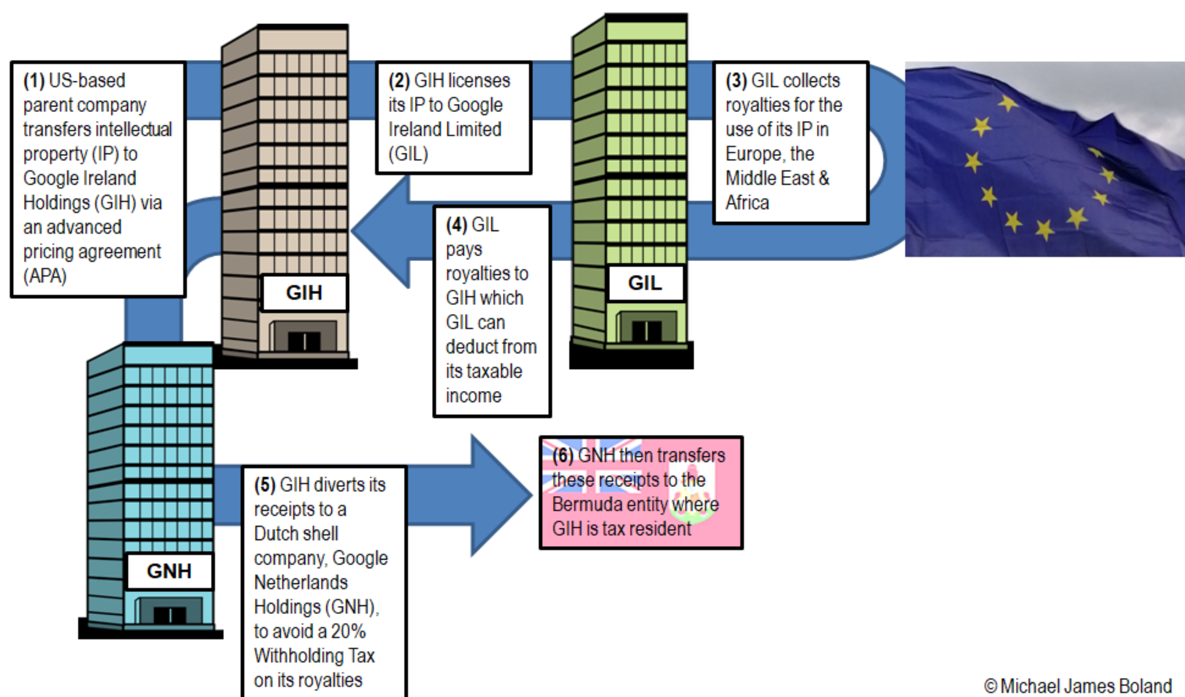
Taxing Rights

The OECD deal also proposes changes to where corporations pay tax. This will inevitably benefit larger economies like France who have long been vocal critics of Ireland's "corporate friendly"[27] tax rate. It has been suggested that one reason for this is that larger countries have much larger populations to Ireland.[28] This necessarily means that multinationals will record more sales in these countries than they will in Ireland which, in turn, means that they will pay more tax in those countries than they will in Ireland.

However, this is not the only reason why France would approve of the OECD deal. As stated, France has consistently been critical of Ireland's corporate tax policy and has been a long-time supporter of the CCCTB as well as previous OECD efforts to address aggressive tax-planning strategies and so-called 'Hybrid Mismatch' arrangements.[29] The French argument has been that Ireland's corporate tax regime distorted the market for FDI[30] (an argument that is challenged in the notes below) and facilitated tax avoidance through the operation of the so-called 'Double Irish' which became a "slur"[31] attached to Ireland's international reputation. The 'Double Irish' practice which no longer exists as of the 1st January, 2021, having been phased out over several years allowed companies incorporated in Ireland to hold non tax residency status in Ireland and thus shift profits through Ireland to recognised tax havens in Bermuda, the Cayman Islands and elsewhere.[32]

Figure 1 below is an infographic of Google's operations in Ireland. Using the example of Google, it illustrates how the 'Double Irish' system worked and how Google used it to transfer profit worth more than €11 billion (US $13.7 billion) in 2019[33] to Bermuda where it was taxed at a rate of 0%.

Figure 1



Moreover, a deal which seeks to align taxing rights with markets where the economic activity generating the value took place and which sets an effective minimum corporate tax rate that may this time reflect a 'European level' would chime with countries like France where the idea that corporations would be taxed at a much lower level than individuals[34] is politically unconscionable.[35]

Tax Avoidance

Notwithstanding the potential loss of tax revenue, the deal's reallocation of taxing rights goes some way towards curbing tax avoidance such as that engaged in by Apple. It has already been noted that Apple recorded all European sales of its products in Ireland. Most of the profits from these sales were attributed to a stateless 'head office' with the effect that Apple paid next to no tax on its profits across the entire European Single Market. Meanwhile, Apple's workforce in Cork of some 5,500 people was paying between 20% and 45% tax on their incomes[36] and making PRSI contributions.

It has already been noted that the changes to where corporations pay tax is expected to cost Ireland €2 billion a year. However, the famous economist, Professor Joseph Stiglitz, notes that the kinds of practices that enabled Apple and other multinationals to avoid tax which Pillar One of the OECD deal now seeks to address "does not give rise to real economic activity".[37]

So, maybe we could argue that this €2 billion loss is "more apparent than real"[38] and that we and the EU as a whole which loses an estimated €35 billion[39] in revenue each year on account of tax

avoidance will actually gain much more than we will lose. A deal which seeks to curtail opportunities for tax avoidance and so-called 'forum shopping' and, in turn, contributes towards investment in social services, health care, education, infrastructure, climate change mitigation policies amongst others can only be a good deal in the long-run.

Conclusion

This blog post considered the reforms in the OECD global corporate tax deal that all but four countries have signed up to. These reforms remain proposals, however. They need the consent of national parliaments which as far as EU member states are concerned should be straight forward now that all member states have signed up to the deal. It will be recalled that Ireland, Hungary & Estonia were the only hold outs among the EU 27 when the deal was first agreed in July, 2021. However, there is no certainty that it will get through the US Congress despite the Biden Administration being very much in favour of global corporate tax reform.

Given Ireland's efforts over many years to resist changes to its corporate tax policy, it is understandable that the proposed minimum effective corporate tax rate of 15% is the most talked about of the two Pillars of this deal. However, Pillar One is just as consequential. This is the Pillar that proposes to align taxing rights to where sales were recorded and thus close a loophole that multinationals like Apple Inc. used to essentially avoid tax on profits from all its European sales. The Government forecasts that Ireland will lose billions every year as a result of Pillar One and estimates that it will precipitate a 20% fall in revenue.[40] However, in focusing on the potential losses, we lose sight of the many gains. In particular, the significant investment in public services and infrastructure that Pillar One will enable from revenue that heretofore may have been lost through tax avoidance.

For those who believe in corporate citizenship,[41] the OECD deal should be viewed not as a threat but as an opportunity to balance the scales and ensure that every citizen pays their fair share.[42]

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[1] Cliff Taylor, 'EU court decision settles €13bn question: Apple's money was never ours to tax' *The Irish Times* (Dublin, 15 July 2020) <https://www.irishtimes.com/business/economy/eu-court-decision-settles-13bn-question-apple-s-money-was-never-ours-to-tax-1.4305104> accessed 16 July 2020.

[2] Published on the same day as the General Court's decision, Commission Communication, 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy', COM (2020) 312 final <https://ec.europa.eu/taxation_customs/package-fair-and-simple-taxation_en> accessed 20 July 2020.

[3] Irene Lynch Fannon, 'The Luck of the Irish or Just Plain Old Tax and Regulatory Planning? The Success of Venture Capitalism in Ireland' (2006) 1 Entrepreneurial Bus. L.J. 231, 246 (Lynch Fannon, 'The Luck of the Irish').

[4] Irene Lynch Fannon, 'Apple Tax: The Core Issues' in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment and Finance* (Elgar 2019) 341 (Lynch Fannon, 'Apple Tax').

[5] Commission Communication, 'Towards a More Efficient and Democratic Decision-Making in EU Tax Policy', COM (2019) 8 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52019DC0008> accessed 17 July 2020.

[6] Ireland (12.5%), Hungary (9%), Cyprus (12.5%), Bulgaria (10%) & Estonia (ranges from 14%-20% and is only levied on distributable profits such as dividends which means that companies that do not issue dividends are not subject to corporation tax) <https://home.kpmg/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html> accessed 2 July 2020.
It will be recalled that Ireland, Hungary & Estonia were the only EU member states that did not sign up to the OECD deal initially. Ireland's particular association with a euro-sceptic country like Hungary that has a reputation for pursuing policies that are at variance with the 'European vision' was potentially deleterious to Ireland's reputation (Cf E-mail from Professor Irene Lynch Fannon to author (12 October 2021) (copy on file with author)).

[7] Claire Hill, 'The Notorious and the Admired: The Effectiveness of EU Competition Laws to reign in the Irish Corporate Tax Regime and the Market Power of Google' (2016) 3(6) J.B.E.I.T. 4, 5 (Hill, 'The Notorious and the Admired').

[8] ibid 15.

[9] OECD, '130 countries and jurisdictions join bold new framework for international tax reform' (Paris, 1 July 2021) <https://www.oecd.org/tax/beps/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm> accessed 1 July 2021.

[10] OECD, 'International community strikes a ground-breaking tax deal for the digital age' (Paris, 8 October 2021) <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> accessed 27 October 2021.

[11] Cliff Taylor, 'What will the OECD corporate tax deal mean for the Republic?' *The Irish Times – Business This Week* (Dublin, 8 October 2021) 5.

[12] European Commission, 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion' (Brussels, 30 August 2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> accessed 1 July 2020); cf. Lynch Fannon, 'Apple Tax' (n 4) 333-335.

[13] Lynch Fannon, 'The Luck of the Irish' (n 3) 243.

[14] ibid.

[15] Former Tánaiste, Minister, and leader of the Progressive Democrats, Mary Harney, recalls somewhat heated negotiations with the Commission on the introduction of the 12.5% corporate tax rate. See, Harry McGee, 'Rate would become bedrock of industrial policy for nearly a quarter of a century' *The Irish Times* (Dublin, 8 October 2021) 3.

[16] infra (n 15).

[17] In light of these concerns, the Council agreed to a non-binding code of conduct in 1997 which aimed to discourage member states from engaging in "harmful tax competition" such as taking measures intended to give tax advantages or incentives to one sector and not to others. See, Resolution of the Council and the Representatives of the Governments of the Member States of 1 December 1997 on a Code of Conduct for Business Taxation [1998] OJ C2/01.

[18] Hill, 'The Notorious and the Admired' (n 7) 13.

[19] Lynch Fannon, 'The Luck of the Irish' (n 3) 250.

[20] Hill, 'The Notorious and the Admired' (n 7) 6.

[21] In an interview with *The Irish Times* (Eoin Burke-Kennedy, 'Economist warns of race to the bottom' *The Irish Times – Business This Week* (Dublin, 8 October 2021) 4 (Burke-Kennedy)), Professor Joseph Stiglitz appealed for Ireland and other countries "to compete on the basis of a race to the top" i.e. compete to have the highest quality workforce, infrastructure, and rule of law. The implication here is that the alternative, a race to the bottom, would produce opposite results i.e. low quality workforce, regulatory landscape, etc. Ireland is an excellent example that this does not necessarily follow!

[22] Lynch Fannon, 'The Luck of the Irish' (n 3) 247.

[23] ibid 250-52.

[24] Feargal O'Rourke, 'If orange was the new black, then 15% is the new 12.5%' *The Irish Times* (Dublin, 8 October 2021) 12.

[25] This figure was cited in 2021 however, six years prior, employment by MNCs in Ireland was reported to be 187, 056 which at that time was its highest level ever. See, Hill, 'The Notorious and the Admired' (n 7) 11.

[26] ibid.

[27] Lynch Fannon, 'Apple Tax' (n 4) 338.

[28] Tánaiste & Minister for Enterprise, Trade and Employment, Dr. Leo Varadkar T.D. in 'What will be the effects of raising our corporate tax rate?' *RTÉ – Prime Time* (Dublin, 7 October 2021) <https://www.rte.ie/news/primetime/2021/1008/1252517-what-will-be-the-effects-of-raising-our-corporate-tax-rate/> accessed 13 October 2021 (Varadkar).

[29] See generally, OECD Taxation Policy Group, *OECD/G20 Base Erosion and Profit Shifting Project* (2015).

[30] Criticism such as this incorrectly presupposes that Ireland's success in attracting FDI particularly in the software and technology sectors from the 1970s, through the 1980s and 90s and up to the present day was due solely to corporate tax. It also inaccurately presupposes that successive Irish Governments and international tech and financial firms share a close relationship such that they can lobby and obtain favourable results from the Government of the day.
In respect of the latter presupposition, it is the Industrial Development Agency (IDA) rather than the Irish Government that negotiates with such firms and takes charge of Ireland's FDI strategy. While the IDA is a statutory body established under the Industrial Development Act and is State-sponsored, it is autonomous of the State and operates outside the civil service. The IDA formulates FDI related policy and it has discretion to award grants and make concessions of various kinds including tax concessions. When Apple located in Ireland in 1980, its then vice-president for manufacturing, Del Yocam, said that "there were tax concessions for us to go there". Yocam's honest recollection is so unlike that of Apple's current CEO, Tim Cook, who said much more recently that it was a "joyous romance" with Ireland that drew the tech giant to locate here (Cf Lynch Fannon, 'Apple Tax' (n 4) 350 for an appraisal of Cook's remarks). Nevertheless, it was the IDA that gave these concessions to Apple not strictly speaking the Irish Government.
In respect of the former presupposition, factors like education & technological innovation, labour supply and the regulatory landscape have contributed to Ireland's attractiveness for FDI. The point is that Ireland's attractiveness for FDI is not solely contingent on the maintenance of low corporate tax rates. As stated, other factors which standout as drivers of FDI include:

- Ireland's quick and relatively inexpensive system of incorporation.
- Ireland's common law legal system which would undoubtedly be attractive to multinationals based in the US where a similar common law legal system applies.
- Ireland's corporate rescue process known as examinership which provides a means of rescuing insolvent or nearly insolvent companies that have a 'reasonable prospect of survival'.

- Ireland's robust system of corporate enforcement which takes a graduated approach whereby Ireland's dedicated corporate enforcement authority (known as the Office of the Director of Corporate Enforcement from 2001 to 2021) will first engage with companies that are found to be non-compliant with their statutory obligations and encourage compliance going forward. Should this fail, many other corporate enforcement tools ranging from administrative sanctions to civil remedies or even summary criminal proceedings can be deployed (Cf Paul Appleby, 'Compliance and Enforcement – The ODCE Perspective' in Shane Kilcommins and Ursula Kilkelly (eds), *Regulatory Crime in Ireland* (Lonsdale, 2010)).

[31] Michael Noonan, Minister for Finance (2011-2017), quoted in 'Ireland to phase out tax loophole' *EURACTIV* (15 October 2014) <https://www.euractiv.com/section/euro-finance/news/ireland-to-phase-out-tax-loophole/> accessed 31 October 2021.

[32] cf Lynch Fannon, 'Apple Tax' (n 4) 337.

[33] Similarly, in 2014, more than €10 billion in Google profits were moved to Bermuda using the 'Double Irish' structure. See, Hill, 'The Notorious and the Admired' (n 7) 10.

[34] It is noteworthy that the effective minimum corporate tax rate of 15% that 136 countries agreed to at an OECD meeting on the 8th of October, 2021, and subsequently consented to by the G20 leaders at their Summit in Rome on the 29th & 30th of October, 2021, is still much lower than the average rate of individual income tax across Europe of 45%. See, Lynch Fannon, 'The Luck of the Irish' (n 3) 243.

[35] E-mail from Professor Irene Lynch Fannon to author (12 October 2021) (copy on file with author).

[36] Lynch Fannon, 'Apple Tax' (n 4) 338.

[37] Burke-Kennedy (n 20).

[38] Coined by Clark J (as he was then) in *In the Matter of Swanpool Ltd (in voluntary liquidation)* [2006] 2 ILRM 217, 223.

[39] Paolo Gentiloni, 'A New Package of Measures to Contribute to Europe's Recovery and Growth' (Brussels, 15 July 2020) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1360> accessed 20 July 2020.

[40] Varadkar (n 28).

[41] See generally, E. Merrick Dodd Jr, 'For whom are corporate managers trustees?' (1932) 45 Harv. L. Rev. 1145.

[42] Commenting on global corporate tax reform which, as stated, is a priority for the Biden Administration, the US Secretary of the Treasury, Dr. Janet L. Yellen said that reform would ensure that "... *all citizens* fairly share the burden of financing government" (emphasis added). See, "Remarks by Secretary of the Treasury Janet L. Yellen on International Priorities to The Chicago Council on Global Affairs" (5 April 2021) <https://home.treasury.gov/news/press-releases/jy0101> accessed 27 July 2021.