Systems of Preferential Tax Treatment in the EU: A Case Study of Apple, Inc.

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Transfer pricing allows corporations to shift profits from high-tax jurisdictions to low-tax jurisdictions. When employed by multinational corporations, which produce up to 70% of the world’s trade, many can shelter billions of dollars in tax havens. This paper explores how this is possible by analyzing the use of Base Erosion and Profit Shifting Tools in Ireland.

I. Setting the Scene

On May 21, 2013, the CEO of Apple, Inc. (“Apple”), Tim Cook, found himself testifying before the Permanent Subcommittee on Investigations for the Committee on Homeland Security and Governmental Affairs of the United States Senate. This subcommittee has the authority to investigate investment fraud schemes, commodity and security fraud, computer fraud, and the use of offshore banking, etc. Cook was summoned to speak about the tax strategies used by Apple after members of Congress began to examine how “multinational corporations use[d] loopholes in the Tax Code to move...
profits to offshore tax havens to avoid paying U.S. taxes." Concluding the subcommittee’s investigation, legislators addressed some of the concerns cited in its report.5

Ireland was the primary offshore tax jurisdiction highlighted in Cook’s testimony to Senate; although Ireland is the primary focus here, note there were many other jurisdictions across the European Union (“EU”) which offered and continue to offer comparable treatment to U.S. based technology companies.6 When this investigation began the European Commission—the executive branch of the EU—decided to intervene to determine how these allegations, if confirmed, affected competition rules in the EU. Following a two-year investigation, on August 29, 2016, Margrethe Vestager, the European Commissioner for Competition concluded:

“Member States cannot give tax benefits to selected companies—this is illegal under EU state aid rules … Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years … this selective treatment allowed Apple to pay an effective corporate tax rate of 1% on its European profits in 2003 down to 0.005% in 2014.”7

In the Commission’s ruling, Apple was ordered to pay Ireland a total of 13 billion euros to make up for years of unlawful Irish subsidies.8 Unlike the EU Commission, the Internal Revenue Service (“IRS”) in the U.S. did not find Apple’s tax avoidance scheme to be illegal.9 A tax loophole called


5. Supra note 1.

6. “Seven EU countries (Belgium, Cyprus, Hungary, Ireland, Luxembourg, Malta and The Netherlands) display traits of a tax haven and facilitate aggressive tax planning.” See European Parliament Press Release; Tax crimes: special committee calls for a European financial police force (February 27, 2019).


“check-the-box” rule allowed Apple’s actions to be in compliance with tax filing requirements at the time. Despite careful investigation, Apple has only been subject to the legal reprimands of the EU Commission.\(^\text{10}\)

The purpose of this paper is to explore and examine the legal and corporate tax reasons why, and how, Ireland has employed state aid to provide preferential tax treatment to companies like Apple. Although, the main events analyzed in this case study occurred between 2014-2016, the underlying issues are still ongoing and represent major points of contention for the EU and the Trump administration.\(^\text{11}\) Following reactionary tax reforms by U.S. and EU legislators, it is unclear whether effective action has been taken by both hegemons to close loopholes long abused by savvy tax planners. By understanding the elements addressed in the Commission’s decision regarding Apple’s activity in Ireland, the reader will be better positioned to determine whether new measures of enforcement are equipped to limit the unparalleled ability of creative tax planning professionals behind systems of preferential tax treatment in the EU.

## II. Transfer Pricing

Part of the reason why Apple has billions of dollars abroad is due to a concept called transfer pricing.\(^\text{12}\) Fundamentally, a transfer price is the price one unit of a business charges another unit—of the same business—for a good or service (also, the “widget” or “widgets”).\(^\text{13}\) Normally the price of that widget should remain relative to its fair market value. Where a transfer price differs from the fair market value of the widget, the result is that one business unit will enjoy a capital advantage while the other business unit is disadvantaged and records a loss in profit from the sale.\(^\text{14}\) Sometimes, transfer prices can be disproportionate because of factors such as exchange

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rates or customs tax, however, absent these challenges, a transfer price can also be subject to manipulation so that the majority of a company’s profit is moved somewhere else—preferably to a place with a lower tax rate.\footnote{15} Multinational Enterprises (“MNE” or “MNEs”), especially those who manufacture tangible products, regularly employ intra-firm trading. Intra-firm trading occurs when the parent company trades with its domestic and foreign controlled subsidiaries, or vis-a-versa.\footnote{16} According to the OECD, in 2014 MNE’s made up half of the world’s exports.\footnote{17} That same year, United Nations Conference on Trade and Development (“UNCTAD”) estimated that MNE’s would dominate 80% of world trade by 2018.\footnote{18} An MNE with a global supply chain as big as Apple’s could benefit from employing artificial transfer pricing. Consider the example below. Refer to Figure 1 for a visual illustration. Note the values have been exaggerated to show the illegal use of transfer pricing.

Imagine MNE X produces cars and is incorporated in the Unites States. It plans to sell its cars in all continental Europe. MNE X has two subsidiaries abroad. Sub1 builds the engines and Sub2 builds the frames and assembles the car to its final stage. Disregarding other transaction costs, imagine Sub1 sells its engines to Sub2 for half the price. Naturally, Sub1 loses money because it is selling its product at half the fair market value. As a result, Sub2 can now sell the finished product at a discounted price because its overall cost of goods sold (“COGS”) is much lower than anticipated. Sub2 will be able to sell more cars at a lower price mark and gain a larger profit. Sub2’s overall profit will make up for any lost profit by Sub1, and because they are

\begin{enumerate}
\item Id.
\end{enumerate}
both affiliates to MNE X, there has only been an artificial shift of profit from Sub1 to Sub2.

Like individuals, companies must pay tax on their income; this is known as the Corporate Tax. MNE X will have to pay taxes in the U.S. and everywhere else it has an affiliate. Now imagine Sub1 resides in Brazil where the corporate tax rate is 34% and imagine Sub2 resides in Ireland where the corporate tax rate is 12.5%. Say the overall sale of the cars sold by Sub2 amounted to $2 million USD. Because the final sale of the cars occurred in Sub2—the Irish subsidiary—the $2 million profit is income to Sub2.


therefore it will be taxed at a corporate tax rate of 12.5%, which comes out to a tax liability of $250,000.

Imagine if this transaction had happened the other way around. The $2 million profit would have been taxed at 34% in Brazil and would have incurred a tax liability of $680,000; that is more than twice the amount in Ireland. Additionally, recall that at the beginning of this exercise, Sub1 in Brazil also recorded a loss on their balance sheet when it sold its engines to Sub2 for half the price. Not only did the profits from the car sales been recorded in Ireland, but the income that remained in Brazil is much lower than it should have been; because, the transfer pricing mirrors what would have been the Brazilian subsidiary’s profits as a decrease on the Irish subsidiary’s COGS. Refer to Figure 2 for a visual illustration. This is a good outcome for Sub1, because it will have less income taxed at the 34% Brazilian corporate tax rate. By manipulating the transfer price at the onset, MNE X and its affiliates sheltered more than $250,000 from being taxed which is now a net profit for the entire company. This is how transfer pricing can be manipulated.

III. IRISH BASE EROSION AND PROFIT SHIFTING (BEPS) TOOLS

Now imagine, instead of cars, MNE X sold an intangible product such as an idea, or a math formula. Unlike a car with wheels and an engine, it is more difficult to determine the value of an intangible asset. One way to measure its value would be to determine the costs required to protect it, such as a patent or trademark. However, what happens in the scenario where a huge MNE is conducting intra-firm trading and needs to sell only a piece of that idea to another unit; or, instead, imagine the object it wants to sell has no way to be formally patented (i.e., skill and knowledge of the workforce,

Figure 2

![Figure 2](https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html)
training systems and methods, customer lists, distribution networks, etc.)? While this issue can be difficult to settle internally, it becomes an even trickier dilemma when tax authorities are required to determine if a transfer price has been made at “arm’s length” by one unit of the business to another.

The “arm’s-length principle” as applied in transfer pricing states the amount charged by one related party to another for a given product must be the same as if the parties were not related. An arm’s-length price for a transaction is therefore what the price of that transaction would be on the open market. For commodities, like a car or bananas, determining the arm’s-length price can be as easy as referring to the price a non-related party assigned to the same item elsewhere, but when dealing with intangibles, such as intellectual property, arriving at an arm’s length price can be a more complicated task. Consequently, since valuation for these products can be difficult to determine, it is easy to both intentionally and unintentionally participate in abusive transfer pricing behavior. Here lies the paramount issue the EU Commission found during its two year investigation of Apple’s transactions in Ireland.

A. Research and Development

Apple used transfer pricing to reduce its overall profit in high tax jurisdictions by giving the economic rights of its intellectual property to its Irish subsidiary. In his article, Nobel laureate economist, Joseph Stiglitz, brilliantly describes the issue:

“The real source of blame is the transfer pricing system—established and maintained by the advanced countries. This system allows corporations

22. Id.
to artificially segment their activities into infinite numbers of subsidiaries which are taxed as separate businesses and gives corporations wide latitude to move profits into low-tax jurisdictions like Ireland, using *mythical internal prices*. In this case Ireland went one step further by allowing the shifting of profits to subsidiaries that exist in cyberspace and have no employees” (emphasis added).  

Here, the underlying economic issue is, Apple like most tech manufacturers earns most of its profits by selling intellectual property not by selling the physical hardware of a phone or an iPad. In the history of iPhone production, the costs to produce the physical hardware has been as little as $183 (Apple iPhone 5C), and as much as $490.50 (Apple iPhone 11 Pro Max). Meanwhile these phones have had a retail price of $549 and $1,449, respectively. That means Apple enjoyed profit margins well within 60-70%. The difference between the production costs and retail value reflects the profit earned on Apple’s intellectual property. Here, the intellectual property being transferred is referred to as “research and development.” Research and development (“R&D”) is the designation given to the activities companies conduct to innovate and introduce new products and services— for Apple, that could be software development, engineering, etc. The economic purpose of R&D is to create new or improved technology that can provide a competitive advantage for the business. R&D became the item used to transfer large amounts of capital from high tax jurisdictions to lower tax jurisdictions. This was especially true in 2004 when Ireland introduced an R&D credit which allowed companies to reduce their overall taxable corporate income. Over time, Ireland made various amendments to this tax


30. Id.

31. Id.

32. Id.


credit which now allows companies to take up to 25% of their R&D expenditures for both revenue and capital in a tax credit. This credit still remains as the tool used to directly offset a company’s overall corporate income tax. Interestingly, this amendment was made in 2014, the same year Apple restructured its Irish subsidiaries for the second time. When Apple found a tax structure described as the “holy grail of tax avoidance,” Senate investigators learned that billions of dollars were being transferred to subsidiaries that on paper stated being in Ireland, but in reality had no buildings, no employees and no physical location.

**B. “Ghost Companies”**

Apple managed to find the “holy grail,” or rather a loophole in the tax code by utilizing a very specific type of base erosion profit shifting tool (“BEPS), called the “Double Irish” arrangement—later implemented as the “single Irish.” BEPS are corporate tax planning strategies employed by multinationals to purposefully shift profits from higher tax jurisdictions to lower tax jurisdictions, thus “eroding” the “tax–base” or total taxable income of the higher tax jurisdictions. Query what the difference is between transfer pricing and BEPS. Recall transfer pricing is a normal sales transaction that occurs between business entities which may or may not be subject to abuse depending on whether products are priced to the fair market value. Here, BEPS refers specifically, to all the creative ways a tax advisor may structure a company’s tax plan to transfer as much money out of a high tax jurisdiction to drastically reduce the corporation’s taxable income.

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36. Id. “revenue and capital” (emphasis added to highlight rents, royalties and other general payments for the exchange for R&D, is sufficient to comply with the standards of the tax credit).

37. Id.


39. Statement of Carl Levin, supra note 4, at 1. “Apple has sought the Holy Grail of tax avoidance, offshore corporations that it argues are not, for tax purposes, residents anywhere in any nation.”


42. Id.

While not always illegal, sometimes it is; and in Apple’s case, the EU Commission found that Apple’s modified use of the “Double Irish” arrangement was illegal and disproportionately affecting competition.44

C. EU State Aid Rules

Apple, therefore, from 1991 to 2014 managed to perfect the process to avoid taxes in two primary ways: first, it effectively gave most of the economic rights of the company’s R&D to its subsidiaries in Ireland. Put simply, this allowed Apple (U.S.) to shift profits from its U.S. market to Ireland by way of “royalties” for the use of the company’s intellectual property. In other words, the Irish entity controlled which of Apple’s subsidiaries were granted a license to utilize Apple’s intellectual property.45

So, for example, if an iPhone was sold in China, the Chinese subsidiary then paid the Irish subsidiary for the use of the intellectual property. Second, it structured its Irish subsidiaries so that all revenue on sales coming from Asia, Europe, the Middle East and Africa were all reported as earnings in Ireland—exclusively.46 None of this would have been possible for Apple without the endorsement of a unique “cost sharing agreement” carried out by the Irish Revenue’s two rulings, first in 1991 and later reaffirmed in 2007.47 This piece was also central to the Commission’s investigation.

Consequently, in 2016, Commissioner Margrethe Vestager announced that under the auspices of the EU’s competition policies, the Commission found that Apple’s unique Irish subsidiary structure and the two tax rulings issued by the Irish government permitting this structure resulted in favorable treatment to Apple and was therefore, illegal under EU state aid rules.48

Under Article 107(1), of the Treaty on the Functioning of the European Union—Part Three: Union Policies and Internal Actions—Title VII: Common Rules on Competition, Taxation and Approximation of Laws—Chapter 1: Rules on competition - Section 2: Aids granted by States (“TFEU”), State aid is prohibited if:

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\text{\ldots any 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 shall, in so far as it affects trade}\n\]

44. Id.
45. Id.
46. Id.
48. Id.
between Member States, be *incompatible* with the internal market”(emphasis added).49

Here, the Commission believed the Irish government “distorted competition by favoring certain undertakings . . . .” According to the Commission’s decision, the undertakings at issue were two tax rulings issued by the Irish Revenue on January 29, 1991 and May 23, 2007.50 These rulings gave preferential treatment to two entities in Ireland called, Apple Sales International (“ASI”) and Apple Operations Europe (“AOE”).51 Competition authorities in the EU took issue with these rulings because it claimed the Irish endorsed a special cost sharing agreement which allowed Apple to use a modified version of the “Double Irish” so that it’s Irish subsidiaries could “substantially and artificially lower the tax paid by Apple in Ireland since 1991.”52 The amounts these subsidiaries reported as income and the amount of tax they were actually paying did not correspond to economic reality. Essentially, Apple created a system to shift most of its worldwide, sales’ profit back to one of these entities in Ireland.53 Unlike, a traditional “Double Irish” arrangement, where a company sets up two Irish, incorporated companies, managed by a group located in a lower tax jurisdiction—usually somewhere in the Caribbean—here, the Irish government allowed Apple to set up “branch” offices under one company.54 Each subsidiary has a “head office” and an “Irish Branch.”55 This arrangement allowed for profits on worldwide sales and R&D royalties to be shifted internally to a “head office.” Meanwhile, the Irish branch only earned income on “operations.”56 In other words, the structure looked like this, ASI is a fully owned subsidiary of AOE, which in turn is a fully owned subsidiary of AOI, which in turn is a fully owned subsidiary of Apple, Inc. (parent company), which is incorporated in the United States. ASI and AOE were both split into two branches—the “head office” and the “Irish branch.” If Apple had followed the standard “Double Irish” arrangement, ASI and AOE would have been

51. *Id.*
53. *Id.*
54. *Id.*
their own companies. Refer to FIGURE 3 & 4 for a visual illustration of these arrangements.

**Figure 3**
Constanza Ortiz, Systems of Preferential Tax Treatments in the EU, (2019).
During its thorough assessment, the Commission learned that these “head offices” existed only on paper and could not have possibly generated the profit it reported, on its own.57 Additionally, it was uncovered that profits which were rerouted to these “head offices” were not subject to tax in any country under the specific provisions of the Irish tax law—this means the Irish government not only knew, but endorsed the utilization of shell companies incorporated in its own jurisdiction to bypass being taxed on more than half of Apple’s worldwide income.58 Meanwhile it did permit for the “Irish branches” to be taxed exclusively on operational costs which were a fraction of the amount seen by the “head offices.”59 Further, the Irish revenue allowed Apple to negotiate an even lower tax rate for the income held by the “Irish branches.”60 Because of this allocation method endorsed in the Irish tax rulings, Apple only paid corporate tax rate at 1% in 2003 and later had it decreased to **0.005% in 2014** for the profits allocated to Apple Sales International’s “Irish branch.”61 Meanwhile, the Senate’s investigation highlighted that Apple’s “ghost company” with a mailing address in Cork, Ireland received $29.9 billion in dividends from lower-tiered offshore affiliates from 2009 to 2012.62 It declared this comprised 30% of Apple’s global net profit—but all of it went untaxed. Without a shadow of a doubt, the Commission determined this qualified as selective tax treatment of Apple in Ireland. Essentially, it was illegal under EU state aid rules because it gave

57. Statement of Timothy Cook, supra, note 2.
58. Statement of Timothy Cook, supra, note 2.
60. Id.
61. Id.
Apple a significant advantage over other businesses that were subject to the same national tax rules.

\textit{a. Why did Apple use the “Single Irish” Arrangement in Ireland?}

What is frustrating about this case is the lack of consistent information provided by reputable news sources on the topic of the altered “Double Irish” arrangement used by Apple. When reviewing this case, the Commission places so much importance on the contested tax rulings which allowed Apple to have “branches” instead of separate companies in Ireland. Naturally, this leaves one wondering why Apple made this decision. It is clear why the Irish government would permit this structure to exist seeing as Apple has helped turn this small nation into an economic powerhouse following its tumultuous past—however, this leaves the original inquiry unanswered. The few spectators which accurately detected the variance in structures hypothesized
that perhaps Apple was interested in keeping the same management structures it had implemented when it first came to Ireland in the 1980s.\(^{63}\) While this is certainly a possible explanation, it is not a satisfying one. This is especially true, after some economists predicted had Apple kept the traditional “Double Irish” arrangement, not only would there have been similar if not identical tax savings for Apple, but also, the Irish Revenue would not have needed to intervene to give special permission to set up separate companies incorporated in Ireland.\(^{64}\) Put simply these economist believed, if for example, Apple had incorporated ASI and AOE as two separate companies incorporated in Ireland but “managed” in Cayman Islands, which has no corporate tax, no income tax, no property taxes, no capital gains taxes, no payroll taxes, and no withholding tax, then it would have saved the same amount of money and have remained in a completely legal tax jurisdiction per the laws of the EU.\(^{65}\) But this was not the case, and Apple did in fact have a very good reason for their use of the altered “Double Irish,” and it has nothing to do with management.

Only one source provides the most feasible explanation for this question, and it is not in any of the Commission’s related documents, not even in its one-hundred-and-thirty-page decision for this case. The answer to this question can be found on the sixth page of the memorandum drafted by those members of the U.S. Senate which conducted this investigation in 2013.\(^{66}\) The sixth page of this memo contains the findings and recommendations of the Subcommittee’s investigation into Apple’s Irish subsidiaries. The fourth recommendation made to Senate is to “Properly Enforce Same Country Exception.”\(^{67}\) It was this provision of the U.S. tax code on which Apple structured it entire “Single Irish” arrangement.

Before the Trump administration issued the Tax Cuts and Jobs Act in 2017, which implemented various new regulations promulgated by the IRS, large corporations in the U.S. realized there were major tax advantages to using a foreign corporation to conduct foreign operations. This is because the company could defer tax on that income. The rule was, the U.S. would not tax on the income of a foreign corporation, instead it would be deferred until the income was re-distributed as a dividend or otherwise repatriated by


\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) *Statement of Carl Levin*, supra note 4.

\(^{67}\) *Id.* at 6.
the foreign corporation back to its U.S. shareholders. However, Congress determined that this type of deferral was inappropriate and had been taken advantage of, so it decided to implement the “Subpart F” provisions. The Subpart F provisions eliminate deferral of U.S. tax on some categories of foreign income by taxing certain U.S. persons on their “pro rata share” of such income earned by their controlled foreign corporations (“CFCs”). Before, many U.S. taxpayers achieved deferral of U.S. tax on certain kinds of passive income, such as dividends, interest, rents and royalties. They did this by earning such income through foreign corporations; but, after Subpart F provisions were implemented, all of these transactions were required to be reported and taxed by U.S. tax regulators. However, to every rule there is an exception, and Apple was quick to capitalize on this exception. Pursuant to the Internal Revenue Code (“IRC”) §954(c)(3)(A)(ii) the “same country exception,” refers to interest and dividends that are excluded from Subpart F inclusions if they are “received from a related entity incorporated in the same country as the recipient CFC and substantially engaged in business in such country.” Additionally, rents and royalties are excluded from Subpart F inclusions if they are “received from a related entity for the use of, or the privilege of using, property within the CFC’s country of incorporation.”

Taking this consideration into account required Apple to setup a “Single Irish” arrangement. Since Apple was looking to transfer most of its U.S. income to one of the Irish subsidiaries by way of the R&D royalties, under Subpart F provisions, this transaction constitutes a quasi-sale. For purposes of the IRS, this then would also constitute income. However, because Apple structured its subsidiaries under one company, incorporated under the same jurisdiction, it was able to apply the “Same Country Exception.” Had it applied the traditional “Double Irish” arrangement and opened the second company offshore in the Cayman Islands, it would not have qualified for the “Same Country Exception.” This is because the U.S. vests its tax jurisdiction on a company dependent on where they are located—Ireland on the other hand vests their jurisdiction dependent on where the management of the company is located. Therefore, Apple would have needed to report the second company as being incorporated in the Cayman Islands, which would

68. Id.
70. Id.
71. Id.
72. Id.
73. Statement of Timothy Cook, supra note 2.
have excluded them from applying the “same country exception.” Meanwhile, by reporting both ASI and AOE as having a location in Cork, Ireland, but with management in Cupertino, California, not only was it able to avoid U.S. and Irish Corporate tax liability, but it also managed to exclude the passive income transactions it would have otherwise been obligated to report if it had not told the U.S. regulators that both ASI and AOE were both in Ireland.

The importance of noting this fact has to do with international tax enforcement. It was surprising to find no explanation of this issue in any of the materials related to the case drafted by the Commission, let alone an accurate account of events from news outlets reporting on the investigation. The absence of this information sheds light on a bigger issue which is, tax regulators perhaps do not conduct enough transnational due diligence to see where one tax regime may create a loophole for another. Surely, Apple’s tax planners and those of many other large corporations are conducting this due diligence—and they are very good at it. It seems in order to stop a behavior from happening it would be efficient to understand why the behavior occurs in the first place. But without getting enough information to map out the playing field, it would be impossible to see where the opponent has an advantage. This case highlights a need to avoid silos of information between two domestic regulatory bodies looking to supervise the intricate transactions of companies who conduct business internationally.

IV. Unlawful State Aid in The EU

In 2016, when the Commissioner announced the final decision to require Apple to repay Ireland 13 billion euros in recovery of state aid, the commission received backlash from different members of the community. First, the Irish government declared it was not interested in receiving the payment. Second, Apple and others alike argued this matter was not under the jurisdiction of the EU seeing as the arrangements were made in consultation with the Irish government and only concerned Irish tax law—which is not, de facto, an issue subject to EU law. However, the Commission clarified it had taken an interest in investigating this case because the state aid granted by Ireland through the contested tax rulings was incompatible with the internal market. This, therefore, posed issues which


affected competition for the entire European Union. Since the EU does not have a unified taxing authority, this matter fell under the jurisdiction of the Commissioner of Competition. Recall that the Commission’s objective is to uphold the treaties of the European Union promulgated by the Council. Issues affecting not one, but all member states, such as anti-competitive behavior, is a problem for the Commission to resolve. Therefore, pursuant to Article 108(2) of TFEU the Commissioner declared it had authority to investigate this matter in consideration of this rule:

If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. . . .

Recall, under Article 107(1) TFEU, the Commission must find the following elements in order to meet the definition of aid contained in this rule. It must show: (i) the measure was imputable to the State and financed through State resources; (ii) the aid provided an advantage on its recipient; (iii) the advantage provided was selective; and (iv) the measure distorted or threatened to distort competition and had the potential to affect trade between Member States. Once this is met, the Commission can order recovery of illegal state aid for a ten-year period preceding the Commission’s first request for information—following the investigation held by the U.S. Senate, the Commission sent a request for information to Ireland on June 12, 2013.

Here, concerning the first and second element, recall the contested tax rulings in 1991 and 2007 allowed Apple to setup the unique “Single Irish” structure, where its subsidiaries each had two “branches,” one which was called the “head office” and the other, the “Irish branch.” Recall the head office had no tax jurisdiction but received capital from most of the U.S. and EMEA’s sale’s income by way of intellectual property licensing and the use

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76. “It further recalls that, while the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with the Union State aid rules, which bind the Member States and enjoy primacy over their domestic legislation” Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1), Oct. 26, 2012, 2008 O.J. (C 326) [hereinafter TFEU].


78. TFEU, supra note 76 at art. 108(2).

of other R&D expenses. Additionally, this ruling allowed Apple to negotiate a lower corporate tax rate for the little money that was funneled back to the Irish Branch for “operational costs.” Recall that in 2014, ASI paid 0.005% in corporate income tax. Regarding the third element, state resources were used because, effectively, the Irish Revenue agreed to the deprivation of billions of dollars in tax which then resulted in a loss of tax revenue that would have otherwise been available to Ireland. After the Commission’s thorough investigation, it appeared this arrangement had only been provided to Apple. This is not surprising seeing as Apple’s presence in Ireland, even considering these tax cuts, had brought the country thousands of jobs and billions of euros in profit. Lastly, the Commission declared that any aid provided to a multinational giant the size of Apple, would create a distortion to the market, not so much because of the significance of the aid, but because of the size of the company and its relation to the global market. It was after the Commission successfully met this standard, Apple was required to repay Ireland, not the European Union, a total of 13 billion euros in back taxes.

V. Leprechaun Economics

Following the Commission’s opening of the investigation, Apple declared it had closed its “Single Irish” arrangement in Ireland. As a result, in 2015 the Irish revenue agency had to amend its reported GDP increase from 26.3% to 34.4%. The Central Statistics office declared it could not disclose the cause for the increase, but in 2018 economists were able to confirm and attribute this increase to Apple’s restructuring—exclusively. Because of Apple’s restructuring, the Tax Justice Network estimated that profits of $660 billion were shifted making this the largest individual IP-BEPS transaction in history. Nobel Prize-winning economist, Paul

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Krugman famously coined this event as *Leprechaun Economics.*

While economists and regulators in the EU believed the closure of the “Single Irish” was a sign of positive reform for tax compliance in Ireland, it was not. Apple quickly replaced the “Single Irish” with the “Green Jersey” arrangement in 2016. This arrangement was another type of IP-BEPS which utilized Capital Allowances for Intangible Assets (“CAIA”). Since the Irish corporate tax system has a capital allowance for intangible asset schemes, this allowed Apple to expense its intangible assets against its Irish pre-tax income.

Seeing as the use of BEPS did not subside in Ireland and other neighboring tax havens, the Commission instead proposed to re-launch the implementation of the Common Consolidated Corporate Tax Base (“CCCTB”) in 2016. The CCCTB, first proposed in 2011, was created to provide a single set of rules for companies conducting business in EU member states to compute their taxable income, rather than use many different national rulebooks. In addition, companies would only have to file one tax return for all of their EU activities and could use that filing to offset losses in one member state against profit in another. In the case of a company like Apple, where it conducts business all throughout the EU, the CCCTB would make it so the consolidated taxable profits would be shared between the member states in which the group is active in by using an “apportionment formula.” Each member state would then tax its share of the profits at its own national tax rate.

Naturally countries like Ireland, Luxemburg and Malta were major opponents to this proposal in 2011 and the Commission had to stall its implementation of these rules. In 2016, when the European Commission re-launched its proposals for an amended CCCTB it was received with renewed opposition from several countries concerned about the implications of CCCTB for their tax sovereignty and for their corporate tax revenues. Currently, the Commission has added two amendments to the CCCTB with hopes to assuage some of the backlash it had received from member states.


85. *Id.*

86. *Id.*


88. *Id.*

89. *Id.*

90. *Id.*
First, it made it mandatory for corporations to adhere to the CCCTB provisions, and second, it agreed to postpone the “consolidation part” which would require corporations to incur more tax planning expenses as they would need to account for their subsidiaries in the EU as well. While concessions have been made by the Commission, it is unclear whether the CCCTB will be enough to put an end to preferential tax systems in the EU.

VI. Conclusion

What is the difference between tax avoidance and tax evasion? Should global corporations like Apple take the grunt from legislators annoyed with its expert use of loopholes found in a poorly managed tax code? In today’s globalized economy, MNEs conduct business in all parts of the world and are constantly pioneering new ways to legally avoid paying taxes. Base Erosion Profit Shifting tools are just a few of the many techniques used by large corporations to structure tax plans which allow them to bypass billions of dollars in tax liability. Low tax jurisdictions like Ireland, Luxemburg and Malta leverage these tools to attract companies such as Apple, Amazon and Google to take residency in their countries to conduct their sales activities to the rest of Europe. New regulations such as the CCCTB have been proposed to standardize the allocation of tax liabilities, however, given the resistance it has encountered because of its implications on state’s sovereignty, it is unclear whether the Commission can rely on these measures to solve the issue of abusive transfer pricing. This case study inadvertently highlights a lack of cohesion between the EU and U.S. tax authority systems. Without taking measures to create a unified front before MNEs transacting in their respective regions, it is unclear whether billions of dollars will be kept out of systems of preferential tax treatment in the EU.

91. CCCTB, supra note 87.