Ireland's Responsibility for the Impacts of Cross-border Tax Abuse on the Realisation of Economic, Social and Cultural Rights

Submission to the Committee on Economic, Social and Cultural Rights

Regarding paragraphs 4 and 6 of the list of issues, and paragraphs 16-17 of the replies of Ireland to the list of issues

Submitted on 12th January 2024 by:

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This submission is public

Introduction

Ireland is failing to meet its obligations under the International Covenant on Economic, Social and Cultural Rights due to its facilitation of cross-border tax abuse. Cross-border tax abuse refers to practices that aim to reduce or avoid tax payments, for example by shifting corporate-profits to low-tax jurisdictions. These practices siphon taxable revenues away from the countries in which they are generated, eroding those countries' taxes bases, undermining the capacity of their governments to fund essential public services and therefore to fulfil economic, social and cultural rights. The impact of cross-border tax abuse on the realisation of human rights has been highlighted by a number of UN experts, including the Special Rapporteur on extreme poverty and human rights.[1]

Profit-shifting is particularly harmful for developing countries, which are more dependent on corporate income tax than wealthier countries.[2] While it is difficult to disaggregate country-specific estimates of shifted profits, almost all global estimates find that a greater proportion of profits are shifted out of lower-middle- and low-income countries.[3]

Ireland continues to be one of the world's largest conduits or destinations for multinational profit-shifting, and its role has been recognised by the European Commission, bodies within the U.S. Congress, and esteemed academic research.[4] In 2020 and 2021, two estimates from highly-respected econometric studies found that Ireland is the destination annually of between $44bn and $100bn of shifted corporate profits, respectively the fifth- and first-largest destination.[5] More recent research published in 2023 by the EU Tax Observatory estimated that Ireland was the destination of approximately $120 to $140bn of shifted corporate profits annually from 2016-2020, jointly the first-largest destination.[6]

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[1] M. S. Carmona, Special Rapporteur on Extreme Poverty and Human Rights, 'Report of the Special Rapporteur on extreme poverty and human rights', UN Doc A/HRC/26/28 (22 May 2014) para 24; P. Alston, 'Tax Policy is Human Rights Policy: The Irish Debate', Keynote Address at Christian Aid Ireland Conference, (12 February 2015): https://www.ohchr.org/Documents/Issues/EPoverty/Alston-Tax_policy.docx; J. P. Bohoslavsky, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, 'Impact of economic reforms and austerity measures on women's human rights' UN Doc A/73/179 (18 July 2018) para 23, and 'Guiding principles on human rights impact assessments of economic reforms' UN Doc A/HRC/40/57 (19 December 2018) para 11.5; A-M. de Zayas, Independent Expert on the promotion of a democratic and equitable international order, Statement at the 71st session of the General Assembly (20 October 2016).

[2] International Monetary Fund, 'IMF Policy Paper: Spillovers in International Corporate Taxation' (9 May 2014) p. 7: https://www.imf.org/external/np/pp/eng/2014/050914.pdf; Corporate income tax (CIT) constitutes an average of 19.3% of all tax revenues in Africa, and 15.6% in Latin America and the Caribbean, while wealthy OECD states generate around 9% of their tax revenues from CIT. OECD Corporate Tax Statistics database: https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm;

[3] EU Tax Observatory, 'The scale of corporate tax avoidance': https://www.taxobservatory.eu/repository/the-scale-of-corporate-tax-avoidance/

[4] European Commission, *Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*: https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf; US Senate Permanent Subcommittee on Investigations, *Hearing on Offshore Profit Shifting and the US Tax Code* (20 September 2012), https://www.govinfo.gov/content/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf; See also Stephen C. Loomis, 'The Double Irish Sandwich: Reforming Overseas Tax Havens' 43 St. Mary's Law Journal (2012) 825; Shane Darcy, '"The Elephant in the Room": Corporate Tax Avoidance & Business and Human Rights' 2 Business and Human Rights Journal (2017) 1; Javier Garcia-Bernardo, Jan Fichtner, Frank W Takes and Eelke M Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network' 7 Scientific Reports (2017) 6246; Jannick Damgaard, Thomas Elkjaer and Niels Johannesen, 'Some $12 trillion worldwide is just phantom corporate investment' 55(2) Finance & Development (2018) 50; Alex Cobham, 'Procuring profit shifting: The State Role in Tax Avoidance' in Philip Alston and Nikki Reisch (eds) *Tax, Inequality and Human Rights* (OUP 2019) p. 156.

[5] T. .R Tørsløv, L. S Wier and G. Zucman, 'The Missing Profits of Nations' (National Bureau for Economic Research Working Paper No. 24701) (Revised April 2020), pp. 27-28: https://www.nber.org/papers/w24701.pdf; B. di Bratta, V. Santomartino and P. Acciari, Italian Ministry of Economy and Finance, 'Assessing profit shifting using Country-by-Country Reports: a non-linear response to tax rate differentials' (DF Working Paper No. 11, February 2021): https://www.finanze.it/export/sites/finanze/.galleries/Documenti/Varie/Assessing-profit-shifting-using-Country-by-Country-Reports-Bratta-Santomartino-Acciari-2021-19-02C.pdf. For more detail on the scale of global tax abuse and Ireland's role within it, see Tax Justice Network, 'The State of Tax Justice 2023': https://taxjustice.net/reports/the-state-of-tax-justice-2023/

[6] EU Tax Observatory, Global Tax Evasion Report 2024, October 2023, pp. 40: https://www.taxobservatory.eu//www-site/uploads/2023/10/global_tax_evasion_report_24.pdf

Periodic European Commission analysis published in 2022 reaffirmed Ireland's role as a conduit, noting that "*Ireland's legal structure regarding the withholding of taxes on outbound payments may encourage many companies to use Ireland's tax rules to engage in aggressive tax planning. Dividend, interest and royalty payment streams, relative to GDP, are therefore much higher than the EU average*", as well as inadequacies in its promised efforts to tackle such profit-shifting.[7]

In February 2023 the Committee on the Rights of the Child (CRC), in its concluding observations on the combined fifth and sixth periodic reports of Ireland submitted under the UN Convention on the Rights of the Child, recommended that Ireland "*ensure that tax policies do not contribute to tax abuse by companies registered in the State party but operating in other countries, leading to a negative impact on the availability of resources for the realization of children's rights in those countries*."[8]

In March 2022, in its list of issues in relation to the fourth periodic report of Ireland, the Committee on Economic, Social and Cultural Rights (CESCR) asked the Irish Government to provide **"*detailed information on specific legislative and policy measures taken to ensure that business entities respect the economic, social and cultural rights of all… [and] that they apply the principles of due diligence throughout their operations in the country or abroad*" (para 4) and to provide *"information on the evolution over the past 10 years of […] tax rates levied on corporate profits." (para 6)***

In its response, the State party (paras 16-17) notes the launch of its first National Plan (NAP) on Business and Human Rights (2017-2020), an independent baseline study of the existing legislative and regulatory frameworks applying to business and human rights in Ireland developed as part of this plan, and the development of related guidelines for businesses. The state response does not discuss taxation of corporate profits. While the independent baseline study referenced by the State party cited this Committee's previous recommendations regarding Ireland's tax regime, and civil society organisations also raised this as an area of concern during consultations during the development of the NAP, corporate taxation is not addressed in the NAP itself.[9] It is also not discussed directly in the related guidelines for business enterprises.[10]

The remainder of this submission addresses this gap. It looks at (1) Ireland's obligations under the Covenant; (2) Ireland's continued facilitation of profit-shifting; (3) Ireland's opposition to international cooperation on profit-shifting; and (4) efforts to assess the impact of Ireland's tax policies on developing countries.

1. Ireland's obligations under the Covenant

The Committee's *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* makes explicit reference to taxation in addressing both the 'Extraterritorial obligation to respect' and the 'Extraterritorial obligation to fulfil'. The General Comment states as follows under the former heading:

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[7] European Commission, *Commission Staff Working Document: 2022 Country Report – Ireland*, 9 June 2022: https://ec.europa.eu/info/sites/default/files/2022-european-semester-country-report-ireland_en.pdf

[8] Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Ireland, CRC/C/IRL/CO/5-6, para 13 (f)

[9] Regan Stein/Department of Foreign Affairs, 2019, National Action Plan on Business and Human Rights: Baseline Assessment of Legislative and Regulatory Framework https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Baseline-Study-Business-and-Human-Rights-v2.pdf; Christian Aid Ireland, 2015, Christian Aid Ireland submission: Government of Ireland consultation on a National Action Plan for Business and Human Rights: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/nationalplanonbizandhr/Christian-Aid-Ireland-1.pdf

[10] Department of Foreign Affairs, 2021, Implementation Group for the National Plan on Business and Human Rights 2017-2020, Business and Human Rights Guidance for Business Enterprises: https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Guidance_on_Business_and_Human_Rights.pdf

> 29. The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation.[11]

And under the latter heading, it states in relevant part:

> 36. Article 2 (1) of the Covenant sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.
>
> 37. Consistent with article 28 of the Universal Declaration of Human Rights, this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment. States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned. To combat abusive tax practices by transnational corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.[12]

Ireland's active facilitation of corporate profit-shifting, through the tax policies outlined in section 2 of this submission, is a clear violation of its obligations under the Covenant, as interpreted in the above paragraphs of the Committee's General Comment No. 24. Equally, Ireland's opposition to the establishment of a UN tax body and resistance of efforts at reform at OECD level, as outlined in section 3, amount to a systematic effort to undermine the creation of an international environment that enables the fulfilment of the Covenant rights. Finally, Ireland's outdated and incomplete external 'Spillover Analysis', as outlined in section 4, fails to properly account for the impact of its tax policies on developing countries. That analysis' conclusion that these policies are justified on the basis of the relatively limited contribution to developing countries' lost revenues made by Ireland's tax policies is untenable as a matter of general international law,[13] not to mention the Covenant.

[11] Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities E/C.12/GC/24 para 29.

[12] Ibid, paras 36-37.

[13] See, by analogy, the rejection by the International Court of Justice in the *Bosnian Genocide* case of a similar defence where the Court noted that 'the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result […] which the efforts of only one State were insufficient to produce.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 para 430.

2. Ireland's continued facilitation of profit-shifting

Though multinational profit-shifting structures are varied, they function primarily through entities located in higher-tax jurisdictions making payments – including service fees, interest payments and royalty fees for the use of intellectual property – to entities located in lower-tax jurisdictions, usually within the same corporate group. In this manner, profits can be shifted into Ireland, which is itself a low-tax jurisdiction, and also on to even lower tax jurisdictions like Bermuda or the Cayman Islands.

While the specific structures used have evolved over time, since the 1990s Irish tax law and policy has continually protected the ability of multinational companies to shift profits out of developing countries and elsewhere. These structures have primarily relied on a two-step practice, whereby companies (1) book income from sales made around the world in an Irish entity that acts as a 'sales hub', and then (2) shift profits to a low- or no-tax jurisdiction through payments to an Irish-registered but overseas-resident company. Originally known as the '**Double Irish'**, this mechanism and its many variants have arguably been one of the world's most-used corporate tax avoidance structures. As an indication of its scale, in 2019 alone Google used this mechanism to shift over $75.4bn of profits from worldwide advertising income through Ireland to Bermuda, where the standard rate of tax is 0%.[14]

When asked about these structures, and in particular their impact on developing countries, the Irish Government regularly cites a 'Spillover Analysis' conducted in 2015 on behalf of the Irish Department of Finance. That analysis asserted that then-recent changes to Irish tax law "*will [by 2020] bring an end to the so-called Double Irish two-tier structure used in aggressive tax planning*", and thus that "*after the changes made to the residency rules in the Finance Bill 2014, it can be said that the current Irish tax system in general…does not facilitate [such] conduit structures*.".[15]

Eight years later, however, the Irish tax system clearly does still facilitate such 'conduit structures', as well as tax shelters for overseas income in Ireland itself. Three policies in particular demonstrate this clearly:

(a) Tax breaks for acquisitions of intellectual property

As the Irish Government began to phase out the tax residency rules that made the original 'Double Irish' structure possible, some multinationals were able to effectively replace them by relying instead on tax breaks introduced in relation to the transfer of intellectual property (IP) to Ireland. This allowed these companies to continue to book sales income in Ireland from around the world and ultimately incur very low tax on these sales in Ireland *itself*, rather than having to shift the profits on to a third country like Bermuda. This arrangement came to be known as the '**Green Jersey'**, [16] and was facilitated by a series of measures which significantly expanded the tax deductions available for the acquisition of IP by one company from another within the same multinational group.[17]

In 2014, in the same piece of legislation which it claimed ended the 'Double Irish', the Irish Government simultaneously increased to 100% the amount of related profits companies could shield

[14] C. Taylor, 'Google used 'double-Irish' to shift $75.4bn in profits out of Ireland', *Irish Times*, 17 April 2021, https://www.irishtimes.com/business/technology/google-used-double-irish-to-shift-75-4bn-in-profits-out-of-ireland-1.4540519. See also European Commission, *Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*, https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf ; US Senate Permament Subcommittee on Investigations, *Hearing on Offshore Profit Shifting and the US Tax Code* (20 September 2012), https://www.govinfo.gov/content/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf

[15] See section 4 below for further discussion of this analysis; Department of Finance, IBFD Spillover Analysis. Possible Effects of the Irish Tax System on Developing Economies (July 2015): https://assets.gov.ie/181168/10d97d7e-cf59-4b85-88ae-de377997d069.pdf, pp 8, 61

[16] E. Clancy and M. B. Christensen, *Exposed: Apple's Golden Delicious Tax Deals* (report for the GUE/NGL group in European Parliament), June 2018: https://left.eu/content/uploads/2018/06/Apple_report_final.pdf

[17] For example, Section 13 of the Finance Act 2009; s.43 Finance Act 2010; s.37 Finance Act 2011

in this way, thereby shrinking the effective tax rate on those profits from 2.5% to 0%.[18] After intense public criticism this was restored to 80% in September 2017, but the huge amounts of IP that multinationals had moved into Ireland prior to September 2017 were explicitly exempted.[19] Any companies that had on-shored IP during the three-year window could continue to use the 100% allowance.[20]

These changes have incentivised multinationals to book taxable income in Irish subsidiaries, derived from sales made all over the world, including in developing countries, and which could otherwise have been taxed in those countries. In the first quarter of 2015, Apple moved over US$240bn of intellectual property to Ireland from another low-tax jurisdiction, generating a tax deduction that could shield over €27 billion a year of profits derived from sales in all non-US countries, including developing countries.[21] Likewise Microsoft has long used such structures to shift taxable profits from European, Middle Eastern and African sales to and through Ireland. Since 2019, it has made Ireland the hub for its sales in the Asia-Pacific region too - previously booked in Singapore - worth some $10bn a year.[22] In this way Microsoft is booking taxable sales revenue in low-tax Ireland from a range of low- and middle-income countries.

(b) The 'Single Malt'

While some multinationals have relied on the above 'onshore' tax structure, others have instead turned to a new version of the original 'offshore' Double Irish. Dubbed the '**Single Malt**', this new structure allows multinationals to achieve the same effective result as under the Double Irish by shifting profits to low-tax jurisdictions with which Ireland has signed tax treaties, including Malta.[23]

After sustained criticism, in 2018 Ireland's then-Finance Minister Paschal Donohoe announced an agreement between Ireland and Malta to end the facilitation of what he acknowledged was "aggressive tax planning" using this arrangement.[24] However, due to the narrow drafting of this agreement, several multinationals – from Microsoft's subsidiary LinkedIn, to medical producers Allergan and Teleflex, and video game behemoth Tencent – have been able to continue to set up 'Single Malt' structures.[25] In 2021 research from Christian Aid Ireland showed in detail that the 'Single Malt' still operates, and that Abbott Laboratories, one of the world's largest pharmaceutical companies and amongst the world's largest Covid test producers, constructed a 'Single Malt' tax shelter just months after the Irish Government claimed to have shut such structures down.[26] Faced

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[18] S. 40 Finance Act 2014

[19] C. Taylor, 'Tax break on intellectual property changed to raise funds', *Irish Times,* 10 October 2017, https://www.irishtimes.com/business/economy/tax-break-on-intellectual-property-changed-to-raise-funds-1.3251422

[20] S. 25 Finance Act 2017; S. Coffey, *Review of Ireland's Corporation Tax Code*, 30 June 2017: https://assets.gov.ie/7255/b275ad7f0874433b9d6d0c54c8f84764.pdf

[21] For the derivation of this figure from Ireland's national accounts, see S. Coffey, 'What Apple Did Next', 24 January 2018, http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html; For a discussion on how long it will take this capital allowance to be exhausted, see S. Coffey, 'The last insight into Apple's use of capital allowances?', 18 April 2023, https://economic-incentives.blogspot.com/2023/04/the-last-insight-into-apples-use-of.html; For its structure of booking foreign sales in Ireland and relocating IP post-2014, see E. Clancy and M. B. Christensen (n 15)

[22] Microsoft Operations Ireland Ltd, annual accounts 2019, p.4; M. Paul, 'Microsoft moves $52.8bn of assets and its Asian trading operation to Ireland', Irish Times, 25 May 2019: https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630

[23] Christian Aid Ireland, '*Impossible structures: tax outcomes overlooked by the 2015 Spillover Analysis*', November 2017: https://www.christianaid.ie/resources/campaigns/impossible-structures-2017-tax-report

[24] Statement from Minister P. Donohoe, December 2018: https://www.gov.ie/en/press-release/723aff-minister-donohoe-welcomes-agreement-between-revenue-commissioners-ma/; Competent Authority Agreement under the Ireland-Malta Double Taxation Convention 2008 (November 2018), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35/35-01-10.pdf ; Barry O'Halloran, 'Revenue to close 'single malt' tax loophole', *Irish Times*, 27 November 2018, https://www.irishtimes.com/business/economy/revenue-to-close-single-malt-tax-loophole-1.3712238

[25] Minister of Finance, written answer (Question to Finance), Dáil Éireann, 21 September 2021, https://www.oireachtas.ie/en/debates/question/2021-09-21/63/#pq-answers-63_185_186_187_188_189_190_195_196

[26] Christian Aid Ireland, *Abbott Laboratories Single Malt Tax Structure*, September 2021, https://www.christianaid.ie/resources/campaigns/abbott-laboratories-single-malt-tax-shelter-christian-aid-ireland

with this evidence, the Irish government insists that the Ireland-Malta agreement is operating as intended, indicating its support for its narrow and partial impact.[27]

The impact is significant: the 'Single Malt' structure enables Abbott Laboratories to legally avoid paying millions of dollars in tax on pandemic super-profits generated through several billion dollars in annual sales of rapid 'point of care' tests for infectious diseases including Covid-19, HIV and malaria, including to countries in the Global South. In this manner, sales income is shifted from some of the poorest countries in the world, such as Ethiopia and Nepal, into Ireland and on to Malta.[28] It enabled the company's testing division to achieve an effective tax rate of just 4% on €459m profits in 2020, while diminishing its tax liabilities in developing countries.[29]

(c) An extensive network of tax treaties

Double tax treaties seek to resolve tax dilemmas for companies and citizens living and working between two countries, or investing in one country's economy from another, by allocating taxing rights between income 'source' (e.g. a developing country where the sale takes place) and 'residence' (Ireland). However, double tax treaties can deprive developing countries of tax revenue that is vital for realising economic, social and cultural rights. They can also create new loopholes for profit-shifting and other forms of cross-border tax abuse. In 2014, the IMF advised that 'developing countries… would be well advised to sign treaties *only with considerable caution*.'[30] An IMF policy paper suggests that African countries may lose between 15% and 25% of their entire corporate income tax revenues when they sign tax treaties with 'investment hubs' like Ireland.[31]

From Ireland's perspective, double tax treaties can reduce tax burdens on Irish outward investment and make Ireland a more attractive location for multinationals to base their investments and assets. From the perspective of a developing country, however, Ireland is a particularly risky trade partner: its large network of seventy-four tax treaties,[32] its low corporate tax rate, and its generous tax regime mean that tax treaties with Ireland can act as a global 'leaky bathtub', allowing taxpayers to shift income and gains both to a low-tax environment in Ireland, and on to other low-tax jurisdictions.[33]

One of Ireland's most recently signed tax treaties was agreed with Ghana in 2018, as part of an explicit 'Africa Strategy' targeting four emerging African economies for new tax treaties.[34] Ireland approached

[27] Minister P. Donohue, written answer to parliamentary question, 21 September 2021, https://www.oireachtas.ie/en/debates/question/2021-09-21/187/

[28] P. Leahy, 'Pharma giant Abbott using Irish 'single-malt' scheme to avoid tax on profits', *Irish Times*, 15 September 2021, https://www.irishtimes.com/news/health/pharma-giant-abbott-using-irish-single-malt-scheme-to-avoid-tax-on-profits-1.4674126; Christian Aid Ireland (n 28)

[29] See calculations in T. Hubert, 'The double malt – part one: How a pandemic boost to a multinational's Irish sales left a half-billion profit taxed at 4%', *The Currency*, 28 March 2022: https://thecurrency.news/articles/78037/distilling-the-double-malt-part-one-how-a-pandemic-boost-to-a-pharma-multinationals-irish-sales-left-a-half-billion-profit-taxed-at-4/

[30] International Monetary Fund (n **Error! Bookmark not defined.**) p. 24. Emphasis added.

[31] S. Beer and J. Loeprick, 'The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa', IMF Working Paper WP/18/227 (24 October 2018). The paper classifies investment hubs as those economies where the sum of FDI in-stocks and out-stocks is more than double its GDP.

[32] Additional treaties with Ghana (2018) and Kenya (2021) are still awaiting ratification in those countries.

[33] The analogy is from Michael Keen of the IMF's Fiscal Affairs Division: 'Tax treaties are like a bathtub; a single leaky one is a drain on a country's revenues.' Jim Brumby and Michael Keen, 'Tax Treaties: Boost or Bane for Development?' IMF Blog (16 November 2016) <https://blogs.imf.org/2016/11/16/tax-treaties-boost-or-bane-for-development/> (last accessed 30 June 2020).

[34] Convention Between Ireland and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains (7 February 2018): https://www.revenue.ie/en/tax-professionals/documents/double-taxation-treaties/g/ghana.pdf; Department for Foreign Affairs and Trade, ''Report on Africa Strategy Trade Consultations 21-23 March 2012', 5 April 2012, internal document released to researchers, reproduced in Mike Lewis, *A Negotiating History of Ireland's New Tax Treaty with Ghana*, 10 February 2019, pp. 17-18, https://www.mikelewisresearch.com/GH-IE.pdf; D. Coyle, 'Irish officials disregarded Dept of Foreign Affairs concerns over Ghana trade deal', *Irish Times,* 27 September 2019: https://www.irishtimes.com/business/economy/irish-officials-disregarded-dept-of-foreign-affairs-concerns-over-ghana-trade-deal-1.4031852

Ghana in 2012 with a view to negotiating a tax treaty.[35] A Government Minister subsequently told Dáil Éireann (the lower house of the Irish parliament) that Ghana had approached Ireland.[36] He later apologised when campaigners released documents showing that the opposite was true.[37]

Ireland has been one of Ghana's largest sources of foreign direct investment (FDI) since 2012 and provided one-third of its FDI in 2016.[38] In this context, Ireland sought to agree a favourable tax treaty. A Government Minister told Dáil Éireann that '[t]he Ghanaian negotiating team was led by a member of the UN Committee of Experts on International Co-operation in Tax Matters… and was well placed to determine what was or was not in their interests'.[39] However, documents released through a freedom of information request show that agreement on the treaty was actually only reached after the Irish ambassador to Ghana went over the heads of the Ghanaian Revenue Authority and Finance Ministry experts negotiating the treaty to lobby the Ghanaian Deputy Minister of Finance directly.[40]

A Government Minister told a parliamentary committee examining the Ghana treaty in 2018 that the benefits of double taxation agreements for developing countries are 'well known'.[41] This directly contradicted a ministerial briefing note issued by officials in the Department of Foreign Affairs and Trade at the start of the Ghana negotiations, which noted that 'the effect of many double taxation agreements is that capital flows from developing to developed nations'.[42] The latter point was made again at an Africa Strategy Committee meeting in relation to Ghana.[43] The Irish government carried out no impact analysis on the tax treaty or its potential impact on rights in Ghana. [44]

Ireland's treaty with Ghana will have a detrimental effect on Ghana's ability to raise tax revenues. The treaty provisions run contrary to the recommendations of both the IMF and the UN Tax Committee,[45] and the treaty lacks any of the protections which the OECD member states agreed in 2015 were necessary to provide 'the minimum level of protection against treaty abuse'.[46] The DFAT ministerial briefing had highlighted that seeking to minimise withholding tax 'would clearly not be encouraged in relation to developing nations',[47] but the Irish government nonetheless explicitly negotiated to halve Ghanaian withholding taxes on royalties and technical services fees.[48]

In June 2022, the Irish Government published a new policy on tax treaties, which recognises the specific risks they pose for developing countries. It includes welcome commitments not to target certain countries for tax treaties, to conduct impact assessments, to "*consider the preferences of the*

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[35] Mike Lewis, 'Irish double tax agreement threatens revenue losses in Ghana' in *Trapped in Illicit Finance: How abusive tax and trade practices harm human rights* (Christian Aid et al., September 2019) p. 24 <https://www.christianaid.ie/sites/default/files/2019-09/trapped-in-illicit-finance-report-sep2019.pdfl Dáil Éireann debate - 7 Nov 2018, Vol. 974 No. 5 (Personal Explanation by Minister of State) <https://www.oireachtas.ie/en/debates/debate/dail/2018-11-07/28/?highlight%5B0%5D.

[36] Select Committee on Finance, Public Expenditure and Reform, and Taoiseach Debate - 20 Sep 2018 (Taxation Agreement: Motions) <https://www.oireachtas.ie/ga/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/>): 'In 2012, officials from the Ministry of Foreign Affairs of the Republic of Ghana raised with the Department of Foreign Affairs and Trade the possibility of negotiating a double tax agreement with Ireland.'; Dáil Éireann debate - 3 Oct 2018, Vol. 972 No. 8 (Taxation Orders 2018: Motion) <https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/> 'In 2012, officials from the Republic of Ghana raised with the Department of Foreign Affairs and Trade the possibility of negotiating a double tax agreement with Ireland.'

[37] Dáil Éireann debate Vol. 974 No. 5 (n 35).

[38] Mike Lewis (n 35) p. 24.

[39] Dáil Éireann debate Vol. 972 No. 8 (n 36).

[40] Mike Lewis (n 35) p. 26.

[41] Select Committee on Finance et al. (n 36).

[42] Prepared by the Africa Section of Ireland's Department of Foreign Affairs and Trade in November 2012 for the implementation committee of the Africa Strategy mentioned above (obtained by Christian Aid Ireland).

[43] *ibid*.

[44] Dáil Éireann debate Vol. 972 No. 8 (n 36)

[45] Mike Lewis (n35) p. 25. See International Monetary Fund (n Error! Bookmark not defined.); United Nations Department of Economic & Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries (2017 Update)* ST/ESA/PAD/SER.E/213.

[46] Mike Lewis (n35) p. 25.

[47] Prepared by the Africa Section of Ireland's Department of Foreign Affairs and Trade in November 2012 (n 42).

[48] Mike Lewis (n35) p. 24.

partner country regarding source taxation", and to incorporate agreed OECD anti-abuse measures.[49] However, these commitments apply only to Least Developed Countries (LDCs), which are very rarely prospective tax treaty partners compared to low- and middle-income countries with larger and faster-growing economies. Only two of Ireland's 74 existing tax treaties are with LDCs, Ethiopia and Zambia, whereas three of the six new tax treaties Ireland has signed since 2018 have been with developing economies which would be excluded from this new policy: Ghana (2018), Kenya (2021) and Kosovo (2021).[50] This policy is therefore extremely narrow and will likely be of limited practical significance in the foreseeable future.

3. Ireland's opposition to international cooperation on profit-shifting

A UN mandated body to address cross-border tax abuse and establish a more equitable global taxation system, similar to other multilateral approaches set up tackle global challenges such as climate change, is an important institutional requirement for addressing this issue. While civil society organisations and the Group of 77 have long called on the UN to create such a body, developed countries, including Ireland, have insisted that global tax reform negotiations take place at the OECD, where full membership is limited to developed countries.[51] Despite the establishment of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS), the agenda, priorities and outcomes of OECD instruments have reflected the priorities of its developed country membership, while developing countries' concerns have either been side-lined or delayed.[52] A collective submission from the Civil Society Financing for Development Group (CSFDD) to the High Level Panel on International Financial Accountability, Transparency and Integrity (FACTI Panel) recently noted:

> *Developing countries and civil society organisations have expressed the need for the creation of a transparent and inclusive intergovernmental tax commission under the auspices of the UN… corporate tax abuse is a form of corruption that hits the poorest hardest. This must be central to the work of the FACTI panel, and not left to an unrepresentative process at the OECD in which challenging poverty is not an objective.*[53]

The CSFDD submission further notes, however, that 'some OECD member states are very reluctant to move forward the work on tax avoidance within the UN.'[54] Ireland, which is among these countries,

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[49] Department of Finance, *Ireland's Tax Treaty Policy Statement* (June 2022), pp. 13, https://www.gov.ie/en/publication/6ee4f-irelands-tax-treaty-policy-statement/

[50] Revenue Commissioners, 'Double Taxation Treaties' (n.d.), https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx

[51] See, for example, Statement on Behalf of the Group of 77 and China by Mr. Eliesa Tuiloma, (New York, 29 May 2013) <https://www.g77.org/statement/getstatement.php?id=130529; Statement on Behalf of the Group of 77 and China by Carola Iñguez (New York, 2 April 2017) <http://www.g77.org/statement/getstatement.php?id=170407b; Statement on Behalf of the Group of 77 and China by H.E. Minister Dr. Riyad Mansour (New York, 15 April 2019: https://www.g77.org/statement/getstatement.php?id=190415c; See also the Statement of Mr. Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council 30th Session (Geneva, 16 September 2015) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16461&

[52] In 2015, as part of the BEPS' Project, over 60 predominantly developed countries agreed a series of actions designed to tackle corporate profit-shifting. The Inclusive Framework on BEPS was only established in 2016, to allow other countries, including developing countries, to participate in this process. Many have chosen not to do so, however, as it would require them to sign up to the package of actions agreed in 2015 which they had no meaningful part in negotiating. *See* Report of the Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2020* (New York: United Nations, 2020) pp. 43-44; and Joint response to OECD public consultation document on the review of Country-by-Country Reporting (BEPS Action 13) (March 2020) <https://financialtransparency.org/wp-content/uploads/2020/03/Submission-letter-OECD-consultation-on-CBCR.pdf. 3-6.

[53] Civil Society Financing for Development (CS FFD) Group, 'Statement at Launch of the FACTI Panel for Achieving the 2030 Agenda' (3 March 2020) <https://csoforffd.org/2020/03/03/statement-at-launch-of-the-high-level-panel-on-international-financial-accountability-transparency-and-integrity-for-achieving-the-2030-agenda-facti-panel/> (last accessed 26 June 2020). See also Civil Society Financing for Development (CS FFD) Group, 'Civil Society FfD Group Statement at FACTI Panel global townhall' (28 April 2020) <https://csoforffd.org/2020/04/28/civil-society-ffd-group-statement-at-facti-panel-global-townhall/> (last accessed 26 June 2020).

[54] CSFFD, Statement at Launch of the FACTI Panel, *ibid.*

has refused to support the establishment of a UN tax treaty body and voted against a successful UN General Assembly resolution in support of a UN Tax Convention in October 2023.[55]

At OECD level, Ireland has actively and publicly sought to narrow the scope of certain reforms designed to deter corporate profit-shifting and, relatedly, to establish a global minimum corporate tax rate. During negotiations regarding the latter, the federation of African revenue authorities recommended that developing countries needed a global minimum corporate tax rate of at least 20% to protect their tax bases against a new 'race to the bottom', which they feared would be precipitated by a rate being set at too low a level.[56] The global average statutory corporate tax rate is approximately 20%, while the average rate in Africa is 26.7%.[57] The G-24 group of lower-income countries similarly advocated a higher minimum rate.[58] A number of experts argued that a 25% rate was necessary to properly address profit-shifting and protect developing country economies.[59]

By mid-2021, however, ambition had been significantly watered down and 140 member states in the OECD's 'Inclusive Framework' had settled on a target rate of "at least 15 percent".[60] Ireland was a prominent advocate for a lower rate and later became one of only nine countries to refuse to support even this compromise language.[61] Ultimately, despite the repeated concerns of many low- and middle-income countries, Ireland successfully insisted on a further concession: to delete "at least" from the agreement, in an effort to ensure that not only would the proposed rate be set low at 15%, but that it should not be increased in future. Then-Finance Minister Paschal Donohoe noted that "*importantly we have secured the removal of 'at least' in the OECD text as we had sought. Some countries wanted higher minimum tax rates and I believe our position moderated those ambitions*."[62]

As a number of esteemed experts and academics, including Nobel Prize-winning economists Thomas Piketty and Joseph Stiglitz, and former UN Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda Carmona, put it: *"This process has been watered down in such a way that it will overwhelmingly benefit rich countries. Proposals for a global effective minimum tax have been rejected in the pursuit of the lowest common denominator of 15%, a success for Ireland, a loss for the rest of the world."*[63]

The Irish Government's negotiating position, which well-informed news reports and U.S. bilateral lobbying efforts indicate substantially drove this global outcome, involved no direct consideration of its impact on developing countries.[64] A review of 35 of the 39 internal briefing notes prepared for the

[55] See, for example, Dáil Éireann debate – Wednesday, 7 Oct 2015 Vol. 892 No. 1 (Corporate Tax Policy: Motion) <https://www.oireachtas.ie/en/debates/debate/dail/2015-10-07/28/; Dáil Éireann debate – Tuesday, 20 Jan 2018 Vol. 964 No. 4 (Tax Agreements) <https://www.oireachtas.ie/en/debates/debate/dail/2018-01-30/17/#s18; Eurodad, 'Historic tax vote paves way for a UN tax convention', November 2023, https://www.eurodad.org/historic_tax_vote_paves_the_way_for_a_un_tax_convention

[56] ATAF, *A new era of international taxation rules – What does this mean for Africa?*, 8 October 2021, https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa

[57] OECD, *Corporate Tax Statistics,* 29 July 2021, pp. 9-12, https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-third-edition.pdf

[58] *Comments of the G-24 on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy agreed by 134 jurisdictions of the Inclusive Framework on the 1st of July 2021*, 19 September 2021: https://www.g24.org/wp-content/uploads/2021/09/Comments-of-the-G24-on-the-IF-July-Statement.pdf

[59] Independent Commission for the Reform of International Corporate Taxation (ICRICT), open letter to G20 Leaders, October 2021: https://www.icrict.com/press-release/2021/10/12/icrict-open-letter-to-g20-leaders-a-global-tax-deal-for-the-rich

[60] OECD Inclusive Framework, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy*, 1 July 2021, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf

[61] C. Taylor and E. O'Riordan, 'Ireland one of 9 countries to hold out on signing OECD global tax deal', *Irish Times*, 1 July 2021, https://www.irishtimes.com/business/economy/ireland-one-of-9-countries-to-hold-out-on-signing-oecd-global-tax-deal-1.4609129

[62] Minister P. Donohoe, Statement October 2021:https://www.gov.ie/en/speech/615f7-statement-by-minister-donohoe-on-decision-for-ireland-join-oecd-international-tax-agreement/

[63] ICRICT (n59) (emphasis added)

[64] Hanna Ziady and Mark Thompson, '136 countries agree to minimum corporate tax rate after Ireland drops its opposition', *CNN Business*, 8 October 2021, https://edition.cnn.com/2021/10/08/business/ireland-global-tax-deal-oecd/index.html ; David Lawder, 'U.S. Treasury's Yellen urges Irish finance minister to take global tax deal', *Reuters*, 23 September 2021, https://www.reuters.com/business/us-treasurys-yellen-tells-irish-finance-minister-tax-deal-is-generational-2021-09-22/ ;

relevant Government Ministers during the negotiating period in September and October 2021 found no mention of development, international impact or spillover.[65] As Ireland's Taoiseach Leo Varadkar told the Irish Parliament: "*these negotiations have been about larger countries trying to get a bigger share of the pie… it has not been about ensuring that countries in the developing world get a fairer share of the taxation*."[66]

Ireland has also opted out of a key provision (Article 12) of an OECD agreement (Multilateral Instrument, MLI), which is designed to address tax avoidance and would have made it harder for multinationals to avoid taxes on sales made in developing countries by booking them in Ireland.[67] The Irish Government stated in 2017 that it was waiting for further work to be completed at the OECD before signing the Article.[68] This OECD work was completed in early 2018, but Ireland maintained its opt-out when it ratified the MLI in early 2019: thereby denying its tax treaty partners, including developing countries, a key tool to claim taxable profits in arrangements like the 'Double Irish' or 'Single Malt'.[69]

Finally, the Irish Government has regularly argued that it supports capacity-building efforts through the 2017 Addis Tax Initiative and a 2019 Domestic Resource Mobilisation (DRM) project.[70] We do not doubt the importance of these efforts, which focus on strengthening developing countries' tax governance and administrative capacity. However, assisting developing countries to collect tax more effectively will have relatively little impact if those authorities are simultaneously faced with a shrinking tax base as a result of tax avoidance structures like those facilitated by Ireland.

4. Ireland's 2015 Spillover Analysis: incomplete and outdated

In 2014, to its credit, the Irish government commissioned an initial 'Spillover Analysis' of its tax regime on developing economies. In almost every case, however, the analysis dismissed any significant negative impact on the ground that the flow of trade and investment between Ireland and developing countries is insignificant, both in absolute terms and in proportion to overall foreign investment into those countries. It concluded that "*the Irish tax system on its own can hardly lead to significant loss of tax revenue in developing countries. It is a combination of elements involved*."[71]

However, as outlined in detail in a report by Christian Aid Ireland, the 2015 Spillover Analysis was limited and insufficient in several crucial respects, which grossly under-represented the scale of relevant transactions between Ireland and developing economies.[72] In summary, it:

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[65] Documents released by Department of Finance under Freedom of Information, 8 December 2021. The Government partially redacted some of these documents prior to release, and entirely withheld the remaining four, so we cannot determine whether development or spillover effects were discussed in the redacted parts, but have seen no indication of this.

[66] Dáil Éireann debate, 7 Oct 2021: https://www.oireachtas.ie/en/debates/debate/dail/2021-10-07/32/#spk_171

[67] Article 12 expands the definition of a taxable 'permanent establishment' in bilateral tax treaties to give greater rights to the sales country to claim some of the taxable sales profits of the overseas selling company.

[68] Department of Finance, *Technical Briefing Note: Ireland's Approach to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (June 2017), pp. 4-5, https://assets.gov.ie/7714/153a244d2ab641e091c6d9446e8a1b9e.pdf

[69] Government of Ireland, *Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (29 January 2019), p.31, http://www.oecd.org/tax/treaties/beps-mli-position-ireland-instrument-deposit.pdf . Article 12 is not a panacea: there is debate about the definition of 'commissionaire arrangements' in common-law jurisdictions; it would only apply to countries with which Ireland has a tax treaty; and Article 12 does not apply where the selling company has absolutely no presence in the country concerned, as with online sales (though this does not appear to be the situation with Abbott's testing sales). Nonetheless it is one of a wider armoury of transfer pricing tools permitting lower-income countries to claw back taxable profits from arrangements like the one described here.

[70] Combined fifth and sixth periodic reports submitted by Ireland under article 44 of the Convention, September 2022, CRC/C/IRL/5-6, paras 82-86

[71] Department of Finance, IBFD Spillover Analysis. Possible Effects of the Irish Tax System on Developing Economies (July 2015): https://assets.gov.ie/181168/10d97d7e-cf59-4b85-88ae-de377997d069.pdf

[72] Christian Aid Ireland, *Global Linkages: re-examining the empirical basis of the 2015 Spillover Analysis* (November 2017): https://www.christianaid.ie/sites/default/files/2018-02/global-linkages-tax-report.pdf

- examined financial flows between Ireland and **just thirteen developing countries**. Twelve of these countries were among the lowest developing-country recipients of Irish foreign direct investment (FDI) compared to the size of their economies during the period it analysed. By contrast, at least thirteen other low- or middle-income countries which (proportionally) receive far greater FDI from Ireland were omitted from the analysis entirely.

- examined investment data for these thirteen countries for **just two years** (2009 and 2012), only 4% of the available data on Irish overseas investment into developing countries during this four-year period (2009-2012).

- **ignored indirect investment** between Ireland and developing countries via other developed 'investment hubs', as well as types of financial flows often used for profit-shifting but not reflected in international investment figures, such as commissions/service fees.

- failed to consider or quantify **sales income booked in Irish 'sales hubs'** from customers in other countries, despite this being a key mechanism in many of the most significant Irish tax avoidance structures.

As a result, the 2015 Spillover Analysis paints a fundamentally incomplete picture of the economic links between Ireland and developing economies and downplays the serious impact of corporate profit shifting on the tax bases of developing countries. Furthermore, it is now significantly outdated, with available data for the period 2016-2020 showing that of the top 40 recipients of Irish FDI, fourteen were eligible for official development assistance (ODA).[73] The Irish Government has not updated or repeated this analysis, though it continues to cite it eight years later, despite significant changes in national and international tax law and the global economy since it was carried out.[74]

Conclusion

In sum, Ireland has knowingly taken actions which undermine the capacity of developing countries to secure Covenant rights. For the above reasons, these actions constitute a failure to comply with the Covenant. On this basis, the submitting organisations respectfully request that the Committee makes the following recommendations in its concluding observations:

(a) Conduct independent, participatory, comprehensive and periodic impact assessments of its tax and financial policies to ensure that they do not contribute to tax abuse by national companies operating outside the State party that lead to a negative impact on the availability of resources for the realisation of economic, social and cultural rights in the countries in which they are operating;

(b) Amend those taxation measures which undermine the realisation of economic, social and cultural rights in other countries to ensure that they cease to have this effect.

(c) Cooperate internationally to promote the establishment of a UN-led international corporate taxation system which supports the realisation of economic, social and cultural rights globally.

[73] Calculations from IMF Coordinated Direct Investment Survey (CDIS). These countries have significant economic linkages to Ireland but are omitted from the 2015 analysis.

[74] These changes include: the global implementation of the OECD's Base Erosion and Profit Shifting (BEPS) programme; reform of the taxation of U.S. multinationals via the US' 2017 Tax Cuts and Jobs Act; EU-wide reforms implemented through the first two Anti Tax Avoidance Directives (ATAD); and significant unilateral changes to Irish tax rules governing the tax treatment of intellectual property and capital allowances for its acquisition.