

## The Notorious and the Admired: The effectiveness of EU Competition Laws to reign in the Irish Corporate Tax Regime and the Market Power of Google

Claire Hill<sup>a</sup>

<sup>a</sup> *The George Washington University, USA, Elliott School of International Affairs, October 21, 2016*

### ARTICLE INFO

#### *Article history:*

Received: November 18, 2016

Received in revised form: December 27, 2016

Accepted: December 10, 2016

Available online: December 20, 2016

**KEYWORDS:** Competition policy, European Union, corporate tax, Multinational Corporation, tax avoidance

### ABSTRACT

This paper analyzes the effectiveness of the European Commission's implementation of the European Union's (EU) competition policies as an opposing mechanism towards the tax avoidance schemes of Multinational Corporations (MNCs). The analysis focuses on the Commission's efforts to curb the market power of Google – the United States (US)-based MNC that is both admired in the public eye for its dominant position as a provider of innovative technology across the globe, and notorious for its ability to earn billions in profits, yet pay little or no corporate tax in the countries in which it does business. This paper will examine the political-economic environments that have permitted Google's international tax avoidance at the state level in the context of Ireland's favorable corporate tax regime, and at the supranational level in the context of the EU competition policies and anti-tax avoidance initiatives.

### Introduction

In the 1980s, Ireland began attracting a growing number of top US-based Multinational Corporations (MNCs) largely because of Foreign Direct Investment (FDI)-driven policies that leveraged favorable corporate tax rates in hopes of boosting economic development. Due to the strategy's success, the lenient tax policies remained, and to this day, Ireland boasts one of the lowest corporate income tax rates in the European Union (EU): 12.5%. Notably, Google established its European headquarters, Google Ireland Holdings (GIH), in Dublin, in 2003, along with a subsidiary, Google Ireland Limited (GIL). Since initiating its European operations, the Google has become both admired in the public eye for its dominant position as a provider of innovative technology across the globe and notorious for its ability to pay little or no corporate tax in the countries it does business, despite earning billions in profits. A number of countries and multinational legislative and economic bodies criticize Google for using corporate tax loopholes in Ireland to shift profits to an off-shore tax haven in Bermuda, arguing that the tax avoidance schemes of Google and similar MNCs with Irish entities erode tax bases across the globe, including in the EU.

The European Commission (the Commission), one of the five bureaucratic bodies of the EU and responsible for introducing and administering EU law, utilizes the EU's competition policies to proactively combat the tax avoidance strategies of MNCs. This paper analyzes the

effectiveness of the Commission's implementation of competition policies as a tool to curb the tax avoidance schemes and overall market power of Google in the context of Ireland's competitive corporate tax rates. First, Google will be examined at the state level, in the context of Ireland's corporate tax regime, and then, at the supranational level, in the context of EU competition policies and anti-tax avoidance initiatives. Since Ireland became a member of the European Economic Community, now the EU, in 1973, national and domestic factors, including Irish policies and the positions of major political parties, produced a permissive application of EU competition policy and related tax laws, thereby benefitting Google's operations in the EU and boosting FDI-driven economic growth in Ireland.

## **Background: Competition Policy and Corporate Taxation in the EU**

Since its establishment, the EU has required the adoption of laws and practices to remove barriers to trade in order to uphold fair and effective competition. As defined by EU authorities, "Competition encourages companies to offer consumer goods and services at the most favorable terms," and, "To be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by others."<sup>1</sup> Title VII, "Common Rules on Competition, Taxation and Approximation of Laws," of the Treaty on the Functioning of the European Union (TFEU), stipulates restrictions on distortionary practices, including fixed prices and production quotas (Article 101); the abuse or threat of abuse by a dominant position (Article 102); monopolies (Article 106); and state aid, "which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods" (Article 107).<sup>2</sup> Title VII of the TFEU also concerns taxation, providing for the harmonization of indirect taxes, such as value-added tax, excise duties, and import levies, which can distort the market by inhibiting the free movement of capital, labor, goods and services, which the EU was founded upon (Articles 110-113)<sup>3</sup>. However, the EU reserves the power of direct taxation—taxes imposed on income, wealth, or capital, accrued within a country's borders—for the individual member states. Direct forms of taxation are tied to state sovereignty throughout the history of the EU, and are therefore protected by a condition of unanimity in regards to the adoption of any additional law to the TFEU. Even so, the EU "recognizes that income tax rates may divert business, skewing production in the common market," signaling a dilemma between states' autonomy in levying direct taxes and the competition objectives of the internal market.<sup>4</sup>

Article 88 of the TFEU grants the Commission the responsibility of enforcing member-state compliance with competition law at the discretion of the Commissioner for Competition, a position currently held by Margrethe Vestager of Denmark. The Commission's online educational "Overview: making markets work better," emphasizes that the EU laws and policies developed to preserve fair, free-market competition are a critical tool to maintain "enterprise and efficiency" and "a wider choice for consumers," as it "helps reduce prices and improve quality."<sup>5</sup>

Due to these ongoing concerns, beginning in 1963, the Commission has assigned several committees comprised of academics and policy experts with the task of exploring solutions to the discrepancies between member state corporate tax regimes and the function of the common market. In this ongoing effort, the "Code of Conduct," adopted by the EU in 1997, garnered a legally non-binding commitment from Member States to "roll back existing laws that constitute harmful tax competition" and to "refrain from introducing such measures in the

---

<sup>1</sup> European Commission "Antitrust: Overview" last modified November 21, 2014.

[http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

<sup>2</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html> accessed 16 March 2016

<sup>3</sup> Ibid.

<sup>4</sup> Joshua D. Moore, "The Economic Importance of Tax Competition for Foreign Direct Investment: An Analysis of International Corporate Tax Harmonization Proposals and Lessons from the Winning Corporate Tax Strategy in Ireland." *University of the Pacific, McGeorge Global Business & Development Law Journal* (2007), 345.

<sup>5</sup> European Commission "Overview: making markets work better" last modified September 28, 2015  
[http://ec.europa.eu/competition/general/overview\\_en.html](http://ec.europa.eu/competition/general/overview_en.html)

future.”<sup>6</sup> The classification of tax competition as “harmful” is the driver of these commitments, as it is evident that “fair” free-market competition of any kind is encouraged. The EU authorities explicitly reinforce acknowledgement of “the positive effects of competition, which can indeed be beneficial.”<sup>7</sup> Rather, harmful tax competition is constituted by countries that offer tax rates to specific market participants that are substantially lower than the general rates of that country, or that grant advantages and incentives reserved for non-residents and/or for economic activities that “are isolated from the domestic economy and therefore offer no impact on the national tax base.”<sup>8</sup> In 1998, this definition was expanded through additional guidelines concerning State Aid laws (Article 107 TFEU) and direct business taxation.<sup>9</sup> Harmful member state tax competition was further defined as tax policy that favors specific undertakings or the production of certain goods by bestowing an advantage to recipients that relieves a tax burden, resulting in a revenue loss and the distortion of competition or trade between member states. Harmful tax competition precipitates the threat that “taxes might become the standout factor driving location decision,” driving FDI away from high-tax Member States and allowing MNCs to locate strategically in states with preferential tax treatment and other loopholes in order to avoid or distort tax liability.<sup>10</sup> These practices thus distort competition to favor FDI in low-tax states and reduce Member-State revenues.

Despite the aforementioned laws and policies that work against preferential treatment, the Irish tax regime allows the permissive application of EU competition policies in favor of MNC’s, and have thus resulted in significant economic benefits for Google and a steady-stream of FDI-driven development in Ireland. This permissive application of corporate tax policies will be analyzed along with the effectiveness of the EU’s enforcement of its competition policies with regards to Ireland, and the related efforts of the Commission to curb the market power of Google.

## **I. Ireland’s Favorable Corporate Tax Regime**

### *The FDI Regime: Ireland’s Political Economy from 1950 to 1980*

The Irish government began adopting an economic agenda that would appeal to FDI as far back as the late 1950s. The resulting policies and legislation gained widespread support, allowing the agenda to expand in the following decades and culminate in a highly competitive corporate tax regime that attracted a significant number high-tech MNCs, including Google, and catapulted the Irish economy into the 21<sup>st</sup> century. In the face of rising unemployment and emigration in the mid-20<sup>th</sup> century, the state adopted its first “Programme for Economic Expansion” in 1958 under the leadership of Seán Lemass, head of the Fianna Fáil party.<sup>11</sup> The program signaled a huge departure from previous decades of protectionism and import-substitution policies, because it centered on attracting FDI, promoting free trade, and providing capital grants and tax concessions to qualifying companies. Throughout the 1950s and ‘60s, such FDI-driven policies gained support from economic nationalists who desired less dependence on Ireland’s former colonial power, the United Kingdom. Moreover, state-led FDI development was indirectly supported by Fianna Fáil’s ability “to depoliticize and institutionalize the FDI regime, surrounding it with welfare state, agriculture, and regional policies that build broad populist support.”<sup>12</sup> By securing popular approval for the government’s role in the economy the Fianna Fáil could more freely establish extensive FDI-driven economic policies and legislation? The Fianna Fáil boasts of its development strategy to

<sup>6</sup>European Commission Taxation and Customs Unit, “Harmful Tax Competition: Code of Conduct,” last modified October 20, 2016.

[http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/harmful\\_tax\\_practices/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm)

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> “**Commission Notice on the application of the State aid rules to measures relating to direct business taxation**” October 12, 1998 [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y1210\(01\):en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y1210(01):en:HTML)

<sup>10</sup> Joshua D. Moore, “The Economic Importance of Tax Competition for Foreign Direct Investment: An Analysis of International Corporate Tax Harmonization Proposals and Lessons from the Winning Corporate Tax Strategy in Ireland.” *University of the Pacific, McGeorge Global Business & Development Law Journal* (2007), 365.

<sup>11</sup> “History of Fianna Fáil” last modified 2016, <https://www.fiannafail.ie/about-fianna-fail/history-of-fianna-fail/>. Accessed August 4, 2016

<sup>12</sup> Seán Ó’Riain *The Politics of High-Tech Growth* (Cambridge: Cambridge University Press, 2004), 176

this day as “instrumental in showing a middle way forward – a way which fundamentally understood that a strong economy and a fair society must go hand in hand.”<sup>13</sup> Indeed, the economy grew at a rate of 4% per year between 1958 and 1963, thereby gaining popular support for program initiatives to be extended and expanded thereafter.<sup>14</sup>

The Irish Development Agency (IDA), part of the Department of Industry and Commerce, was highly instrumental in fulfilling the first “Programme’s” FDI goals and gained substantial legitimacy and authority over industrial policy, allowing the agency to go to great lengths to attract MNCs. Under the Industrial Development Act, the IDA was incorporated in 1969 as an autonomous state-sponsored body outside of civil service and given responsibility for all aspects of industrial development, allowing it direct grant-giving powers. Although the IDA reported to the Department of Industry and Commerce, the agency “gradually became the center of policy-making as the Department of Industry and Commerce became more marginalized.”<sup>15</sup> Thus, as the IDA pursued a technology-focused industrial agenda in subsequent decades, the sector remained relatively insulated from political interference, due to limited personal ties with politicians. More importantly, it made the clientele that was intrinsic to other government-developed sectors, such as property and beef, less viable.

The lack of interference from political interests allowed the IDA to develop an effective agenda in the 1970s to attract the first wave of what would eventually include the world’s most prominent software developers. The agency’s publication, the *IDA Industrial Plan 1977-80*, emphasizes that “electronics and computer industries” were “targeted,” a strategy that continued, as laid out in the subsequent *IDA Industrial Plan 1978-82*. One case study of the development of Ireland’s information technology sector highlights that the Irish government did not actively intervene in the IDA’s execution of its strategy. Rather, “the IDA actively promoted Ireland as the European location for mobile electronics companies through grants/tax concessions.”<sup>16</sup> Indeed, after Ireland joined the EU in 1973, U.S. companies began to see the country as a gateway to a broader European market because of its English-speaking population. This factor complimented competitive corporate tax policies, easily making Ireland a more attractive option for MNCs than mainland, high-tax, non-English-speaking European countries. Inevitably, the strategy began to work: by 1988 there were 152 small (<50 employees) to large (>199 employees) foreign-owned electronics-based manufacturing companies operating in Ireland, a substantial leap from just twenty in 1974.<sup>17</sup> The companies that set up shop in Ireland during this period include some of most admired names in technology and innovation today, such as Apple Computers, Inc. (1980), Microsoft (1985), and Oracle (1987).<sup>18</sup> However, these companies have more recently become notorious for their continued use of the business-friendly Irish tax regime to avoid tax liabilities in their home country, the U.S., taking full advantage of tax grants handed to them by the IDA.

For example, Del Yocam, vice president of Apple’s manufacturing in the 1980s, revealed to *The Irish Times*, that “there were tax concessions for us to go there.”<sup>19</sup> In addition, an anonymous former Apple finance executive supported Yocam’s statement, claiming, “We had a tax holiday for the first 10 years in Ireland. We paid no taxes to the Irish Government.”<sup>20</sup> Barry O’Leary, the chief executive of IDA from 2007-2014, confirms that in 1980, “Any multinational attracted into Ireland that was focusing on the export market paid 0 percent corporate tax,” a tax holiday period that lasted until 1990, at which point the MNC’s were supposed to pay Ireland’s (at that time) 10% preferential rate for certain export-led

---

<sup>13</sup> “Speech by Fianna Fáil Leader Micheál Martin at Seán Lemass Commemoration,” September 27, 2015, <https://www.fiannafail.ie/speech-by-fianna-fail-leader-micheal-martin-at-sean-lemass-commemoration/>

<sup>14</sup> “History of Fianna Fáil” last modified 2016, <https://www.fiannafail.ie/about-fianna-fail/history-of-fianna-fail/>

<sup>15</sup> Seán Ó’Riain *The Politics of High-Tech Growth* (Cambridge: Cambridge University Press, 2004), 176

<sup>16</sup> Eileen P. Drew “Development of Information Technology in Ireland” in *Information Technology in Selected Countries: Reports from Ireland, Ethiopia, Nigeria, and Tanzania* edited by Eileen P. Drew and F. Gordon Foster, 24. Tokyo: United Nations University, 1994

<sup>17</sup> *Ibid.*, 23

<sup>18</sup> IDA Ireland, “Ireland for Software: Engineering Your Success,” last modified 2016.

<http://www.idaireland.com/how-we-help/resources/infographics/ireland-for-software/index.xml>

<sup>19</sup> “How Apple First Landed in Ireland” *The Irish Times*, May 25 2013, Accessed March 26, 2016

<http://www.irishtimes.com/business/technology/how-apple-first-landed-in-ireland-1.1405766>

<sup>20</sup> *Ibid*

companies, which was still the lowest rate offered in the EU.<sup>21</sup> Such policies consequently began to draw attention internationally in recent years because they easily constitute harmful tax competition by favoring particular market participants. Apple most recently came under scrutiny after the EU launched an investigation in 2014 into whether tax deals made with the Irish Revenue in 1991 and 2007 constituted state aid, a violation of EU competition policy. The Commission issued a ruling on the case on August 30, 2016, ordering Ireland to collect \$14.5 billion in back-taxes from the company.<sup>22</sup>

Yet, despite these generous tax concessions to MNCs, the electronics industry accounted for 19% of total Irish exports by 1988, and employment doubled in the computers industry between 1982 and 1987. Therefore, the IDA brought substantial material returns to Ireland with their favorable corporate tax grants to high-tech FDI.<sup>23</sup> Thus, the IDA continued to build on this strategy, ushering in a new wave of global tech giants and paving the way for what became Dublin's thriving "Silicon Docks."

#### *Revitalizing The Dublin Docks: The IDA and Google*

The IDA continued this impressive momentum for the next decade, attracting even more tech-giants to Ireland, including Intel (1989), Dell (1990), SAP (1997) and AOL (1997).<sup>24</sup> In the early 2000s, encouraged by government-sponsored urban development initiatives, the IDA leveraged Ireland's favorable tax regime to convince Google to establish its European headquarters in Dublin's eastern docklands in "its first major coup" in a decade-long effort to regenerate the outdated industrial wasteland.<sup>25</sup>

The Urban Renewal Act of 1986, which aimed to redevelop inner-city Dublin by providing incentives to attract private sector activity, was amended in 1997 with the Dublin Docklands Development Authority Act (DDDA). The DDDA Act established the Dublin Dock Authority to secure sustainable "physical, social, and economic regeneration" of the derelict East Side of Dublin around the Grand Canal Docks, one of two industrial areas in Dublin.<sup>26</sup> Similar to preceding legislation, The DDDA Act sought to modernize infrastructure in order to attract a more dynamic service and knowledge-based industry to the area. However, the DDDA Act of 1997 incorporated the critical component of local representation in its bureaucratic structure, which contributed to support for the initiative in the long-run. Further, the first Docklands Master Plan sought sustainable "mixed-use development" that integrated itself with existing communities by preserving a large percentage of land solely for public recreation and affordable housing, thus combining a "'perfect synergy' of economic, physical, and social redevelopment,"<sup>27</sup> echoing Seán Lemass's earlier national Programme for Economic Expansion in its ability to validate the government's hand in the economy by surrounding it with initiatives devoted to Irish welfare.

Indeed, the former Minister of Finance at the time, Ruairi Quinn, credits the reformatted legislation as a more comprehensive "project based around people rather than just bricks and mortar."<sup>28</sup> Over the next decade the ambitious project, executed by the Dublin Docks Authority with significant help from the IDA, transformed the "poisoned, scrubby, wasteland" docks into a "vibrant public space," known as the "Silicon Docks," for the impressive cluster of global tech leaders including Facebook, Twitter, Amazon, Yelp, and local startups, that parallel

---

<sup>21</sup> Ibid

<sup>22</sup> James Kanter and Mark Scott "Apple Owes \$14.5 Billion in Back Taxes to Ireland, E.U. Says" *New York Times*, <http://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html>

<sup>23</sup> Pamela Newenham "Recruiting Companies for the Docks: The Role of IDA Ireland and Enterprise Ireland" in *Silicon Docks: The Rise of Dublin as a Global Tech Hub* edited by Pamela Newenham, 51-65 Dublin: Liberties Press, 2015

<sup>24</sup> IDA Ireland, "Ireland for Software: Engineering Your Success," last modified 2016. <http://www.idaireland.com/how-we-help/resources/infographics/ireland-for-software/index.xml>

<sup>25</sup> J.J Worrall, "Game Changer: Google Moves to the Docks" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 41

<sup>26</sup> Dublin Docklands Authority, "About us: Docklands Authority" [www.dublindocklands.ie/index.jsp?p=99&n=138](http://www.dublindocklands.ie/index.jsp?p=99&n=138) Accessed May 8, 2016

<sup>27</sup> Joanna Roberts, "The Redevelopment: The Role of the Dublin Docklands Development Authority" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 41

<sup>28</sup> Ibid, 41

California's Silicon Valley<sup>29</sup>. However, it was Google's arrival in 2004, in particular, that is regarded as the "linchpin" and "founding father" of the Silicon Docks.<sup>30</sup>

Google ultimately chose the Dublin Docks as its European headquarters thanks to the great lengths the IDA went—and the tax incentives offered to Google—to secure its presence. After the dot-com bubble burst in the late 1990s, many European countries were skeptical of continuing development ties in Silicon Valley, but the IDA remained relentless in its outreach. A strategy group led by the IDA's Denis Molumby, formed and based itself in California, with one member, Gus Jones in Dublin, to collaborate with members of Google's senior staff—who had done business in Ireland, to convince the company to seriously consider Dublin as its European headquarters. Jones recounts that the IDA followed the "typical" procedure with Google that it had with other tech companies, hosting Google executives, including Chief Executive Eric Schmidt and Chief Financial Officer George Reyes, in Dublin to tour thriving tech companies and datacenters to crystalize a deal.<sup>31</sup> Despite these efforts, news arrived that Google had instead chosen Switzerland for its European headquarters. However, the IDA representatives "decided they weren't going to accept the decision," and continued to assert Dublin's case, with the preexisting datacenters and Ireland's lenient corporate tax regime "front and center of their arguments."<sup>32</sup> Google rejected the offer again, but this did not stop the IDA from pressing on. Jones sat down with Google's decision makers and "put Ireland's 'clear upfront' corporate tax schedule on the table as a positive against possibly negotiating rates in Switzerland," in addition to showcasing thriving Irish-based US companies against Swiss branches that "struggled to justify existence."<sup>33</sup> The IDA's persistence worked: Google confirmed it would revisit the decision, sending datacenter specialist Gerald Aigner to inspect the offered facilities in January 2003 with a "flaming sword of frugality."<sup>34</sup> Two days later, Google confirmed it would purchase three available datacenters and rent the 60,000-square-foot Gordon House on Barrow Street, right off of the Grand Canal, for its operational headquarters for Europe, the Middle East, and Africa. Today, Google employs over 6,000 people in Ireland directly and via contract,<sup>35</sup> and in June, 2016, Taoiseach Enda Kenney led the official opening of Google's newest Irish investment: a \$653.94 (€150) million data center.<sup>36</sup> Google's Irish operations have become so extensive that the Dublin headquarters could maintain operations worldwide if there were a power outage in California.<sup>37</sup>

The deal was indeed a monumental achievement for the IDA "that is still seen by those in the IDA as a seismic shift for investment in Dublin," and "directly responsible for many other Silicon Valley names such as Twitter and Facebook choosing to set up shop nearby."<sup>38</sup> As a flourishing tech hub, the docklands have experienced a variety of spillover effects, including a rise in indigenous IT development and start-ups. Dublin is now home to the Europe's largest tech conference and one of Europe's largest communities of entrepreneurs, Archipelago. Google plays its own active role by hosting monthly breakfast briefings with start-ups and entrepreneurs, collaborating with a variety of Irish universities for recruitment, financial sponsorships, internships, tech-talks, and seminars, and free software coding courses for teachers.<sup>39</sup>

---

<sup>29</sup> Joanna Roberts, "The Redevelopment: The Role of the Dublin Docklands Development Authority" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 41

<sup>30</sup> J.J Worrall, "Game Changer: Google Moves to the Docks" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 66-81

<sup>31</sup> Ibid., 68

<sup>32</sup> Ibid., 69

<sup>33</sup> Ibid., 69

<sup>34</sup> Ibid., 70

<sup>35</sup> IDA Ireland, Taoiseach opens new €150 million Google Data Center in Dublin , June 16, 2016

<http://www.idaireland.com/newsroom/taoiseach-opens-new-150-m/>

<sup>36</sup> Ibid.

<sup>37</sup> Joanna Roberts, "The Redevelopment: The Role of the Dublin Docklands Development Authority" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 55.

<sup>38</sup> J.J Worrall, "Game Changer: Google Moves to the Docks" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 71

<sup>39</sup> Mark Scott, "Google, Trying to Endear itself to Europe, Spreads \$450 Million Around," New York Times, July 19, 2016, accessed July 21, 2016, <http://www.nytimes.com/2016/07/20/technology/google-europe-lobbying-eu.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news&r=1>

However, Google, like Apple, has become more notorious than admired for its relationship with Ireland due to its controversial manipulation of the favorable Irish tax regime to avoid its tax liability. Beyond boasting one of the lowest corporate tax rates in the EU at 12.5%, Ireland also offers a 25% tax credit for qualifying research and development expenditures, in addition to a 12.5% deduction and write-offs for broadly defined IP holdings.<sup>40</sup> Google takes significant advantage of these incentives through a cost-sharing agreement between the parent company and its subsidiary in Ireland, GIH. Their Advanced Pricing Agreement (APA) with the U.S. Internal Revenue Service to license Intellectual Property (IP) to GIH, allows the subsidiary to license its IP to operations in Europe, the Middle East and Africa. In November 2005, the company reported that in its first three quarters after locating in Dublin, "it had significantly lowered" its global tax bill by 100 million Euros.<sup>41</sup> In recent years, Google came under fire for cutting its worldwide tax liability by billions, using its Irish subsidiaries to shift income in what is now known as a "Double Irish." Until the Finance Act of 2014, Ireland allowed entities incorporated under its laws to hold "non residency" status if their management and control is not located in Ireland. The Finance Act now requires companies incorporated in Ireland to be categorized as tax residents unless the company is headquartered in another country. Enforcement for existing entities, such as Google, is not scheduled to occur until January 1, 2021. As a result, Google utilizes the "Double Irish" loophole through its two Irish subsidiaries: GIH and GIL. GIH is a tax resident in Bermuda and collects royalties for the use of its IP—which it owns via the APA with the U.S. parent company—from the Irish tax resident, GIL. GIL can then deduct the royalty expenses from its taxable income, typically reducing its pretax income to less than 1% of annual sales. GIH does its part and diverts its substantial receipts through a third unit, Google Nederland Holdings, B.V. to avoid Irish withholdings tax. The Dutch unit, which lists no employees, then pays what it receives to the Bermuda entity, where there is a 0% corporate tax. According to a recent report by Reuters, Google moved \$12 billion (€10.98 billion) from the Netherlands to Bermuda in 2014 alone using the Double Irish "Dutch Sandwich" structure.<sup>42</sup>

Google is not alone in its use of this strategy. Starbucks, Amazon, IKEA, and Microsoft have been accused of similar tax-avoidance tactics. Yet, these attractive corporate tax policy features are the key factor in what drew so many big-market players to Ireland since the FDI strategy began in 1958. A 2014 report by Ireland's Department of Finance concluded the same holds true today: "If Ireland were to increase the 12.5 per cent corporation tax rate it would significantly reduce FDI flows into the country."<sup>43</sup> Further, despite the low rate, the high corporate tax base as a result keeps Ireland on par with OECD average corporate tax receipts. Ireland's percentage of total revenue from corporate tax receipts as of 2014 equals 8.3%, within half a percentage point of the average of 15 OECD countries (7.9%).<sup>44</sup> Therefore, from a domestic standpoint, comparatively, Ireland is not losing government revenue. However, EU Member states collectively lose between \$54.5 and \$76.4 billion in tax receipts a year to corporate tax avoidance (between €49.87 to €69.9) , which is partially made possible by Irish loopholes allowing MNCs to shift profits from operations across the EU and lessen liabilities.<sup>45</sup> Thus, many Member states resent the Irish corporate tax regime for being distortionary to the market for FDI and permitting gateways for tax avoidance and, consequently, EU-wide base erosion. EU efforts to curtail this type of "harmful" tax competition will be explored in Part II of this research.

---

<sup>40</sup> PwC "Tax Facts: The essential guide to Irish tax," 2015.

<sup>41</sup> J.J Worrall, "Game Changer: Google Moves to the Docks" in *Silicon Docks: The Rise of Dublin as Global Tech Hub* ed. Pamela Newenham. (Dublin: Liberties Press, 2015). 79

<sup>42</sup> Toby Sterling and Tom Bergin, "Google accounts show 11 billion euros moved via low tax 'Dutch Sandwich' in 2014," February 19, 2016, accessed May 9 2016 <http://www.reuters.com/article/us-google-tax-idUSKCN0VS1GP>

<sup>43</sup> Department of Finance "Economic Impact of Ireland's Corporate Tax Policy: Summary Research Findings and Policy Conclusions" October 2014 [http://www.budget.gov.ie/Budgets/2015/Documents/EIA\\_Summary\\_Conclusions.pdf](http://www.budget.gov.ie/Budgets/2015/Documents/EIA_Summary_Conclusions.pdf)

<sup>44</sup> Irish Revenue "An Analysis of Corporate Tax Receipts in 2014-2015" April 2016 Statistics and Economics Research Branch

<sup>45</sup> Jonathan Chew "7 Corporate Giants Accused of Evading Billions in Taxes" *Fortune* <http://fortune.com/2016/03/11/apple-google-taxes-eu/>

## *Irish Support for its Tax Regime in the Present Day*

Despite substantial international media coverage of tax avoidance schemes born out of the Irish regime, Ireland's favorable treatment of Google and other MNCs led to a variety of material benefits for the state and have therefore garnered widespread public support, remaining a staple in the tax platform of Ireland's four largest political parties. Considering the role that FDI played in shaping Ireland's contemporary economy and that "the key electoral issue in contemporary Irish politics is not a party's ideological stance, but its record in terms of economic performance,"<sup>46</sup> it is not surprising the general political sentiment remains defensive about maintaining attractively low corporate tax rates. The platforms of the four most prominent parties—the center-right, Fianna Fáil and Fine Gael, the center-left Labour Party, and the far-left Sinn Féin—all defend a competitive, 12.5% corporate tax rate. Fianna Fáil, the second largest party holding 44 out of 158 seats in government and led by Micheál Martin, champions the tax agenda as key to FDI in Ireland and the country's economic sovereignty, stating in its manifesto for the recent election held in February 2016:

Our vision for Ireland is a thriving economy with a strong multinational sector and vibrant indigenous industry. Our corporate tax rate is a vital part of Ireland's attractiveness to Foreign Direct Investment and driving on our indigenous industries. We have a strong record of fighting to protect the rate and securing it in negotiations on EU treaties..... Ireland's rate is transparent and fair. We will: Not accept or implement any increase in Ireland's Corporation Tax rate. Oppose and, if necessary, veto any measure to weaken or reduce national control of corporation tax rates.<sup>47</sup>

Fine Gael, which won the 2016 election with 50 seats, and is headed by Prime Minister (Taoiseach), Edna Kenney, maintains a similarly defensive platform committed to "protecting our 12.5% rate of corporate tax and further enhancements to our corporate tax regime to encourage more investment, innovation and job creation."<sup>48</sup> The manifestos of the two smaller parties, Sinn Féin and the Labour Party, holding 23 and 7 seats, respectively, also insist on a competitive 12.5% as vital to the economy. As Eoin O'Malley, a politics lecturer at Dublin City University, observes the low corporate tax rate "is a talisman of Irish economic policy."<sup>49</sup>

Ireland's low corporate tax rates are at the core of an FDI-driven economic agenda that began in 1958 and continues to this day. The critical role of the IDA since 1969 in leveraging attractive tax policies—including concessions and grants—boosted jobs, exports, and industrialization while institutionalizing the FDI regime and establishing Ireland as the tech-manufacturing Silicon Isle. More recently, the IDA's push to bring Google to Dublin in 2003 initiated a vast regeneration of the inner-city docklands, now coined the Silicon Docks. Today, the IDA is a self-defined "global force in attracting FDI to Ireland and a key influencer in the development in the Irish economy and its reputation abroad."<sup>50</sup> Indeed, the IDA continues to be a force of economic opportunity for Ireland. In 2015, employment by IDA clients reached its highest level ever at 187,056, and IDA clients accounted for 66% of Irish exports, which were also up by 13%.<sup>51</sup>

Irish business interests are, unsurprisingly, the most defensive of the competitive rates that allow 21<sup>st</sup>-century technology-based industrialization to flourish. The Irish Business and Employers Confederations (IBEC) directly relates the corporate tax rate to global economic competitiveness, "other countries are catching up with us and now is time to enhance the competitiveness of our tax offering to win new investment. It is vital that we 'play to win' in

---

<sup>46</sup> Nicola Jo-Ann Smithe, *Showcasing Globalisation? The Political Economy of the Irish Republic* (Manchester: Manchester University Press, 2005) 53.

<sup>47</sup> Fianna Fáil "An Ireland for All: Manifesto 2016," <https://www.fiannafail.ie/download/An-Ireland-for-all-Fianna-FaCC81il-Manifesto.pdf> Accessed April 29, 2016

<sup>48</sup> Fine Gael "General Election Manifesto 2016" [https://www.finegaele.ie/\\_uuid/b5055220-ec96-4f03-b18a-4506e8d3119c/manifesto.pdf](https://www.finegaele.ie/_uuid/b5055220-ec96-4f03-b18a-4506e8d3119c/manifesto.pdf) Accessed July 16, 2016

<sup>49</sup> Dara Doyle, "Even Sinn Féin Backs Ireland's 12.5% Corporate Tax Rate," Bloomberg, February 9, 2016, accessed July 16, 2016. <http://www.bloomberg.com/news/articles/2016-02-09/even-sinn-fein-backs-ireland-s-12-5-corporate-tax-rate>

<sup>50</sup> "IDA Ireland: History" last modified 2016 <http://www.idaireland.com/about-ida/history/>

<sup>51</sup> "IDA Ireland: Achievements" last modified 2016 <http://www.idaireland.com/about-ida/achievements/>

the competition for mobile investment.”<sup>52</sup> The IBEC not only supports current policies and favors to MNCs, but see the competitive advantage as so precarious, it believes not enough is being done in this regard. For example, “other countries” in the EU have begun lowering corporate tax rates in recent years to gain similar advantages. In 2010, the UK lowered its rate from 28% to 20%, and in March released a statement announcing that by 2020 it will reduce it to 17%, making the UK’s the second lowest rate of the OECD countries, after Ireland.<sup>53</sup> On the other hand, many EU countries are less willing to indulge a corporate tax rate race to the bottom and denounced Ireland’s competitive rate as unfair and distortionary. In protest, these countries are pressuring the EU to address the Irish policies that deter FDI in other, higher-tax countries.

## **II. The Efforts of the European Union to Combat Harmful Tax Competition and the Market Power of Google**

### *Closing the Double-Irish Loophole*

The attractive Irish corporate tax policies fueling impressive FDI-driven economic growth have faced significant restrictive supranational pressures from the EU in recent years for being harmful and distortionary to internal-market competition. In Margrethe Vestager’s confirmation address to the European Parliament, prepared to take on the role of Commissioner for Competition in the fall of 2014, she expressed the “very unfortunate arrangement,” the Double Irish-Dutch Sandwich, “to be a high priority” for her.<sup>54</sup> The *Financial Times* reported that the Commission “threatened to open a full-scale investigation of the Double Irish structure unless the government acted to shut it down.”<sup>55</sup> These threats came shortly after the Commission released its initial accusation of the Irish Revenue’s sweetheart deal with Apple’s Irish operations, adding increased pressure on Irish revenue and finance authorities. The Double Irish arrangement, which is permissive towards Google’s tax avoidance schemes, is criticized for allowing many other MNCs, including Microsoft and Facebook, to shift profits through Ireland to tax havens in Bermuda and the Cayman Islands. This entails shifting tax liabilities, out of countries where operations occur, including EU Member states. This loophole not only leads to tax-base erosion in other Member states, but distorts competition if companies choose to invest in Ireland solely to cut costs with its favorable tax policies. Thus, the Double-Irish loophole can be considered a practice of harmful tax competition, driving FDI away from other EU Member states, and a provision of illegal state aid due to the resulting revenue losses for Ireland and other EU member states. Therefore, under pressure by the Commission, Ireland changed its corporate tax structure in its 2015 budget, announcing in October 2014 that it would close the “Double Irish” loophole by requiring companies to register as tax residents from 2015 onward. However, existing companies are permitted to carry on business as usual through 2020. The six-year window will allow Google time to align its accounting methods with the new legislation. Irish Finance Minister Michael Noonan stated, “I want to make sure that the slur of the ‘Double Irish’ is no longer attached to Ireland’s reputation and it had become something that was thrown at us internationally.”<sup>56</sup> However, at the same time, the government announced a “Knowledge Development Box” tax rate of 6.25% on profits arising from IP assets that are the result of qualifying R&D activity carried out in Ireland. This will greatly benefit tech companies like Google that rely on intangibles and do little to substantially curb high-tech FDI favoritism towards Ireland.

---

<sup>52</sup> Ibid.

<sup>53</sup> HM Revenues & Customs, “Corporate tax to 17% in 2020” last modified March 16, 2016 <https://www.gov.uk/government/publications/corporation-tax-to-17-in-2020>

<sup>54</sup> Alex Barker, Vincent Boland, and Vanessa Houlder, “Brussels in crackdown on ‘double Irish’ tax loophole,” *Financial Times*, October 9, 2014, accessed May 11, 2016 <http://www.ft.com/intl/cms/s/0/ba95cff0-4fcd-11e4-a0a4-00144feab7de.html#axzz48E6zyY5w>

<sup>55</sup> Vincent Boland, “Dublin to shut Double Irish corporate tax loophole next year,” *Financial Times*, October 14, 2014, accessed May 11, 2016 <http://www.ft.com/intl/cms/s/0/161322e4-53af-11e4-929b-00144feab7de.html?siteedition=intl#axzz48E6zyY5w>

<sup>56</sup> “Ireland to phase out tax loophole,” *EurActiv.com*, *Reuters*, October 15, 2014, accessed May 11, 2016 <http://www.euractiv.com/section/euro-finance/news/ireland-to-phase-out-tax-loophole/>

## *EU Member-State Efforts to Reform the Irish Regime and Curb Tax Avoidance*

France, Germany, the UK, and to a lesser extent, Italy and Spain, stand out for their criticism of Ireland's tax regime and its favoritism towards MNCs. These countries pressure the Commission to regulate what in their view is harmful tax competition. French and German opposition to the 12.5% rate began in 2010 when Ireland sought an €85 billion bailout from the EU. When the prospect of an Irish bailout rose during election season in Germany, the Social Democratic Party, led by Angela Merkel, argued it would be "seeking far reaching commitments from Dublin" on tax issues, including a hike in the 12.5% corporate tax rate.<sup>57</sup> The European Council's governing Troika, ultimately agreed to give Ireland a three-year financial aid program, conditioned with heavy austerity measures, none of which targeted the corporate tax rate. Responding to this outcome, French President Nicolas Sarkozy stated in a speech at an Airbus factory, "I deeply respect the independence of our Irish friends and we have done everything to help them...But they cannot continue to ask us to come help them while keeping a tax that is half [of what other countries have.]"<sup>58</sup> France, with a 33% tax rate, cannot compete with Ireland's rate, which is indeed less than half of that. Germany is a close second, with a 30.2% rate. Despite higher rates, both France and Germany bring in significantly less corporate tax receipts as a percentage of total revenue in comparison with Ireland. France and Germany corporate tax revenues account for only 4.5% and 4.2% of total receipts, respectively, whereas Ireland's low-rate and broad-base system accounts for 8.3% of revenues.<sup>59</sup> This signals that there is a significantly smaller corporate tax-residency in both France and Germany. In its report on Sarkozy's statement, *The Irish Times* mentioned that he has long accused Ireland of "fiscal dumping," or unfairly attracting investment with such a low rate. French and German concerns about Ireland's advantage in attracting FDI feed into concerns expressed by the Commission that Ireland has been granting state aid in the form of harmful tax competition through its generous concessions, thereby distorting or threatening to distort competition and reducing revenues for Ireland's fellow EU Member states.

In his Airbus factory speech, Sarkozy attached his complaint to broader plans for greater tax harmonization, stating, "With Merkel, we are going to reinforce European economic integration and we're going to progress towards fiscal convergence."<sup>60</sup> Indeed, political actors in both Germany and France have continued since then to push fiscal convergence initiatives that level the corporate tax playing field. Following the closure of the "Double Irish" loophole, the German, French, and Italian finance ministers addressed a letter to tax commissioner Pierre Moscovici calling for an anti-Base Erosion and Profit Shifting (BEPS) directive for Member states to adopt by 2015 to address tax avoidance and aggressive tax planning strategies of companies located in the EU, which is explored in more detail below.<sup>61</sup> This written statement came right after reports that Germany and France had put significant pressure on the Commission to force Ireland close the loophole.

These pressures to reform corporate taxation in the EU are fed by Member-state concerns and controversies regarding the tax avoidance schemes of companies like Google, which are unaffected by the closing of the "Double Irish" loophole and still uses Irish headquarters to lower global tax bills. As Edward Kleinbard, a U.S.-based professor of tax law at USC, explains in an interview with the *New York Times*, "this tax avoidance strategy...doesn't just minimize the companies' U.S. taxes...It's German tax and French tax and tax in the UK and elsewhere."<sup>62</sup> This basic market spillover effect from the favorable Irish tax policies that attract FDI towards Ireland and away from other EU countries not only generates frustrations

---

<sup>57</sup> Arthur Beesley and Susanne Lynch, "Irish debt linked to Angela Merkel talks on coalition," *The Irish Times*, October 11, 2013. Accessed May 12, 2016 <http://www.irishtimes.com/business/economy/irish-debt-linked-to-angela-merkel-talks-on-coalition-1.1556845>

<sup>58</sup> "Sarkozy ups pressure on Dublin to raise company tax" EurActiv, January 14, 2011. Accessed May 12, 2016 <http://www.euractiv.com/section/innovation-industry/news/sarkozy-ups-pressure-on-dublin-to-raise-company-tax/>

<sup>59</sup> Irish Revenue "An Analysis of Corporate Tax Receipts in 2014-2015" April 2016 Statistics and Economics Research Branch.

<sup>60</sup> Ibid.

<sup>61</sup> "Germany, France and Italy urge EU to write common corporate tax laws," *EurActiv, Reuters*, December 2, 2014, accessed May 12, 2016 <http://www.euractiv.com/section/euro-finance/news/germany-france-and-italy-urge-eu-to-write-common-corporate-tax-laws/>

<sup>62</sup> Charles Duhigg and David Kocieniewski "How Apple Sidesteps Billions in Taxes" *New York Times*, April 28, 2012. Accessed May 12, 2016 <http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html>

and criticisms towards Ireland but is evident in recent controversies in Spain, France, Italy, and the UK over Google's tax liability. On June 30, 2016, Spanish revenue authorities launched an investigation into tax evasion actions by Google.<sup>63</sup> Furthermore, French tax authorities demanded \$1.1 billion (€1 billion) from the company, while Italian tax authorities also challenged Google for \$327 million (€299.2 million) in back taxes.<sup>64</sup> In the UK, Her Majesty's Revenue Service opened a formal investigation of Google UK in 2009 and reached \$171.8 million (£130 million) settlement with Google.<sup>65</sup> The company agreed to pay higher taxes to authorities in the future but failed to provide details. However, the settlement was the subject of substantial criticism from a myriad of UK public officials, who urged EU authorities to investigate the settlement as a violation of EU competition policy. The Opposition Labor Party, for example, described the deal as "derisory," since Google's tax bill for the past decade amounted to \$245.15 million (£200 million) from total revenue of £24 billion.<sup>66</sup> This led to numerous calls by EU Member states for the Commission to investigate the settlement, which the Commission confirmed in January 2016 it would consider.<sup>67</sup> However, since the British voted in a referendum on June 23, 2016 to leave the EU, it is certain the Commission will not investigate the settlement. Together, these four cases make it evident that Google is not only taking advantage of Irish corporate tax loopholes to avoid taxes but may even be evading taxes across the EU. Further, it exhibits that the EU as a supranational body is struggling to properly address and inhibit the complex strategies of MNCs, like Google, that erode the tax bases of Member states.

### *EU Soft-Law through Corporate Tax Harmonization Efforts*

Amid the far-reaching objections and controversies across Member states over Ireland's corporate tax regime, the accounting behaviors of Google, and the considerable pressure from France and Germany for greater corporate tax reform for the EU as a whole, the Commission does provide soft law directed at curbing EU-wide tax avoidance through the release of action-plan proposals to promote fair corporate taxation. After decades of Member states' efforts trying to implement directives, regulations, recommendations, codes of conduct, and proposals toward greater corporate tax harmonization, the Commission proposed the Anti-Tax Avoidance Package on January 28, 2016.<sup>68</sup> The package aims to ensure effective taxation in the EU, increasing tax transparency, and securing a level playing field. Pierre Moscovici, the Commissioner for Economic and Financial Affairs, Taxation, and Customs explains the goals of the initiative in a statement; "Billions of tax euros are lost every year to tax avoidance—money that could be used for public services like schools and hospitals or to boost jobs and growth...This is unacceptable...Today we are taking major steps toward creating a level playing field for all our businesses, for fair and effective taxation for all Europeans."<sup>69</sup> The proposal is not novel; it largely reflects agreements made by the OECD countries on measures to limit tax BEPS. The BEPS package targets aggressive tax-planning strategies that exploit the gaps and mismatched tax laws around the globe that allow companies, including Google, to shift profits into low or no-tax areas, such as Ireland, where the economic activity that generated the value did not necessarily take place.<sup>70</sup>

On June 21, 2016 a large portion of the package became binding upon agreement by all twenty-eight member states and subsequent adoption by the Council. Adopted measures include: interest limitation to put a cap on interest deductions; exit taxes in the country of departure on the value of relocated business or business units, such as IP, to prevent the untaxed relocation of assets from one country to another and to ensure unrealized gains are

<sup>63</sup> [http://www.nytimes.com/2016/07/01/technology/google-spain-tax.html?\\_r=0](http://www.nytimes.com/2016/07/01/technology/google-spain-tax.html?_r=0)

<sup>64</sup> <http://www.wsj.com/articles/italy-claims-google-has-evaded-around-300-million-in-taxes-1453980364>

<sup>65</sup> "Google tax deal labelled as 'derisory,' as criticism grows" BBC, January 23, 2016. Accessed May 12 216 <http://www.bbc.com/news/uk-35390692>

<sup>66</sup> Ibid.

<sup>67</sup> Jim Brunson and Josh Noble, "European Commission to examine Google's UK tax deal," Financial Times, January 28, 2016, accessed May 12, 2016 <http://www.ft.com/intl/cms/s/0/dc1e3cd4-c592-11e5-808f-8231cd71622e.html#axzz48E6zyY5w>

<sup>68</sup> European Commission, "Fair Taxation: Commission presents new measures against corporate tax avoidance" (Brussels, January 28, 2016) [http://europa.eu/rapid/press-release\\_IP-16-159\\_en.htm](http://europa.eu/rapid/press-release_IP-16-159_en.htm)

<sup>69</sup> Ibid.

<sup>70</sup> The OECD "BEPS 2015 Final Reports" <http://www.oecd.org/ctp/beps-2015-final-reports.htm>. Accessed July 29, 2016.

taxed where value is created; and, finally, the Controlled Foreign Corporation (CFC) rule that “allows the member state in which the company is resident to tax any gains on assets (e.g. intellectual property) that are parked in a low-tax country,” in order to prevent companies shifting passive income to a subsidiary in a low-tax country. In addition to its potential to curb BEPS behaviors, the President of the Economic and Financial Affairs Council, Finance Minister Jeroen Dijsselbloem, believes the package is capable of restoring public confidence in direct taxation, stating that “If big companies don’t pay their fair share, the public will be unwilling to pay theirs.”<sup>71</sup>

Finally, as part of the BEPS package proposed in January 2016, the Commission relaunched the Common Consolidated Corporate Tax Base (CCCTB), a proposal resulting from research conducted from 2001 to 2011. The CCCTB would establish “a single set of rules that companies operating within the EU could use to calculate their taxable profits.”<sup>72</sup> The CCCTB uses an accounting method known as Formulary Apportionment (FA), an algorithm that calculates a business’ tax liability derived from the factors of its economic activity in a country, such as labor and capital, rather than the income it reports to that country.<sup>73</sup> Economist Joann M. Weiner, an expert on FA, explains that under the system, “If a corporation has employees, sales, and factories in a country, it not only has income in that country, but it also has a tax liability, regardless of what its internal transfer prices indicate.”<sup>74</sup> If the CCCTB is adopted, it would eliminate all the advantages Google gained from shifting profits to Ireland.

The Fianna Fáil’s 2016 election manifesto speaks assertively against the re-launch of the CCCTB proposal as “essentially a fresh route to removing sovereignty over setting national taxation rates.”<sup>75</sup> This statement reflects the core of dilemma facing corporate taxation in the EU. Since joining the EU, Ireland has exercised its sovereignty and maintained one of the lowest corporate tax rates among member states in addition to an overall competitive corporate tax regime, including grants, concessions, and loopholes, as part of its FDI-driven economic agenda that began in 1958. Since joining the EU, Ireland has also experienced enormous growth in high-tech FDI, with the biggest names in digital innovation choose Ireland as their EU headquarters.

Indeed, it is of national interest to have full discretion over direct taxation, but if a Member state sets a highly competitive corporate tax rate that is significantly more attractive than other states’ in the internal market, the state with the competitive rate will distort or threaten to distort competition for FDI within market. Further, tax loopholes, such as the Double Irish-Dutch Sandwich, allow MNCs to take further advantage of the internal market, and avoid tax liabilities across Member states.

## Conclusions

The government of Ireland pursued policies for decades that are aimed at attracting FDI from high-tech industries. Ireland’s greatest tool was the IDA, to whom great authority was bestowed back in 1969 to attract FDI. Since then, the IDA has gone to great lengths to offer large tax concessions to qualifying companies in order to fulfill its goals of developing a knowledge-based industry fit to combat a 21<sup>st</sup> century economy driven by IT and digital innovation. There is overwhelming evidence that the IDA used the Irish corporate tax advantage to attract Google and a slew of other high-tech, “born-on-the-internet” companies to Ireland to establish European headquarters, effectively distorting internal market competition for FDI in its favor. The government and other major political parties of Ireland support the profitable operations of these companies to this day, allowing Google to continue

---

<sup>71</sup> EU, “Press Release: EU members tackle tax avoidance,” July 21, 2016.

<sup>72</sup> European Commission, Taxation and Customs Unions, “Common Consolidated Corporate Tax Base (CCCTB)” Last updated October 20, 2016, [https://ec.europa.eu/taxation\\_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en)

<sup>73</sup> Joann M. Weiner “It’s Time to Adopt Formulary Apportionment” (2009) [http://www.taxanalysts.com/www/freefiles.nsf/Files/WEINER-30.pdf/\\$file/WEINER-30.pdf](http://www.taxanalysts.com/www/freefiles.nsf/Files/WEINER-30.pdf/$file/WEINER-30.pdf)

<sup>74</sup> Ibid., 104

<sup>75</sup> Fianna Fáil “An Ireland for All: Manifesto 2016,” <https://www.fiannafail.ie/download/An-Ireland-for-all-Fianna-FaCC81il-Manifesto.pdf>. Accessed April 29 2016

avoiding billions in global tax liabilities, and thus, offering a permissive application of EU competition policies. However, there is mixed, albeit fairly inconsistent evidence that the EU successfully executed a more restrictive application of competition policy on these companies. This is evident from the pressure from the Commission and Member states for Ireland to roll back lenient tax policies and rein in the avoidance schemes of Google, in addition to growing efforts to target BEPS, indicating that there is a large international effort to curtail the market power of these companies.

However, the aggressive tax planning strategies of Google and other MNCs, in relation to their Irish operations, present a persistently substantial challenge to EU authorities, which have been previously unable to pressure Ireland to acknowledge its restrictive application of competition policy. Large MNCs have significant leverage over Irish authorities and policymakers and are a force that the EU is still struggling to balance economically. The economic benefits brought to Ireland by Google and other tech companies clearly made the Irish authorities inclined to provide favorable treatment to these companies in the hopes of increasing FDI, and with it jobs, exports, and industrial development, complete with a myriad of spillover effects, such as innovation clusters in Dublin. Google's significant role in shaping the regeneration of Dublin Docks resulted in positive perceptions of the company's presence in Ireland and, together with similar MNCs, provides jobs that shape a competitive technology-driven industrial environment. The economic benefits associated with these corporations clarify why Ireland remains defensive of its competitive rate and hesitant to relent toward greater corporate tax harmonization. In this way, Google represents a supranational force yielding the power to influence international governing bodies to sway economic policies in its favor.

The fight for Google to pay its fair share of tax in Europe is just the surface of the threat Google poses to EU authorities and Member states who are proponents of fair and effective competition in the internal market. In the EU, Google boasts a 90% share of the search-engine market, a staggering number in any market and even in comparison to its 76% share in the US.<sup>76</sup> This impressive market dominance has sparked a trilogy of ongoing anti-trust investigations by the Commission against the company since 2010, none yet successful. The claims followed a slew of complaints by other search engine providers about unfavorable treatment of their services in Google's unpaid and sponsored search results. These grievances were coupled with allegations that Google gives preferential placement to its own services in search results, and complaints from Google advertisers about restrictions on the portability of the advertising campaigns of their partners, thereby preventing them from advertising on other platforms and also placing partners under exclusivity contracts. Most recently, the Commission targeted Google's mobile phone device, Android, with a preliminary statement on April 20, 2016, accusing the company of abusing its dominant position "by imposing restrictions on Android device manufacturers and mobile network operators."<sup>77</sup> Android holds a 64% share of the European market.<sup>78</sup> The Commission also intensified its investigation of Google's comparison shopping platform and alleged restrictions on third-party advertisers by issuing two statements of objection on July 14, 2016, for which Google was given an extension beyond the standard of ten weeks to respond to.<sup>79</sup>

Google has gone to great lengths to respond appropriately and preserve its dominant position in the market and in the public eye. After Competition Commissioner Vestager issued her first statement of objection to the company in April 2015, on August 27, 2015, Google's General Counsel Kent Walker formally responded, "Economic data spanning more than a decade, an array of documents and statements from complainants all confirm that product search is

---

<sup>76</sup> Brad Stone and Vernon Silver "Google's \$6 Billion Miscalculation of the EU" Bloomberg, August 6, 2015, accessed April 20, 2016. <http://www.bloomberg.com/news/features/2015-08-06/google-s-6-billion-miscalculation-on-the-eu>

<sup>77</sup> European Commission "Antitrust: Commission sends Statement of Objections to Google on Android operating systems and applications," April 20, 2016, [http://europa.eu/rapid/press-release\\_IP-16-1492\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1492_en.htm)

<sup>78</sup> Brad Stone and Vernon Silver "Google's \$6 Billion Miscalculation of the EU" Bloomberg, August 6, 2015, accessed April 20, 2016, <http://www.bloomberg.com/news/features/2015-08-06/google-s-6-billion-miscalculation-on-the-eu>

<sup>79</sup> European Commission "Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules," July 14, 2016 [http://europa.eu/rapid/press-release\\_IP-16-2532\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2532_en.htm)

robustly competitive.”<sup>80</sup> Even more compelling are Google’s efforts “to endear itself to Europe” through heavy spending on a wide range of projects sponsoring European art, culture, and high-tech innovation, similar to the spillover benefits Google brought to the Dublin Docks. Google’s efforts to woo Europe escalated to \$450 million invested in its “soft lobbying” campaign, which ranges from “a newly created \$167 million fund for European publishers to help them adapt to the digital world,” to \$75 million dedicated “to train roughly two million Europeans in digital skills like e-commerce and online marketing.”<sup>81</sup> Since the onset of the antitrust investigations, the company also tripled its political lobbying budget in Brussels to \$4.2 million, and ranks in the top ten corporate lobbyists in the EU. Google’s level of spending speaks to its understanding of a fear much deeper than can be revealed by bureaucratic statements and accusations of tax avoidance: “We don’t want to be a digital colony of the U.S. Internet giants,” said former French Economy Minister Arnaud Montebourg said in an interview last year. “What’s at stake is our sovereignty itself.”

This is not to say that the EU has been all together ineffectual at curbing exploitive tax practices of the market’s dominant players, or will be in the future. There are recent cases in which the Commission successfully stopped allowances of Member state aid through tax breaks to corporations. In 2015, the Commission was able to make made effective rulings on the tax avoidance of Starbucks in the Netherlands, and of Fiat and Amazon in Luxembourg, curbing their power over the EU internal market. Further, with regards to Ireland’s tax regime, on August 30, 2016 the EU notably found Apple guilty of a sweetheart deal with Ireland after a two-year investigation, issuing a bill of \$15 billion in back taxes owed to Ireland. Vestager and her ally, Jean-Claude Juncker, president of the EU Commission, made it clear that the supranational body is drawing a hard line on MNC use of corporate tax havens and loopholes in the EU, and particularly Ireland, and will devote substantial resources to using its competition policies to fight international tax avoidance.

The Commission is indeed on an increasingly rigorous path in implementing these competition policies to uphold “fair and effective” competition. This effort is focused both on preventing the abuse of dominant positions that can distort internal market competition and the provision of state aid and harmful tax competition practices. The case of Ireland presents a challenge to these efforts, in its permissive application of such policies. Ireland’s corporate tax regime, instituted to attract FDI, leverages a competitive rate and other loopholes to disproportionately favor both economic development for the Irish public and, consequently, the companies who do business there, which utilize Ireland’s regime to avoid tax across Member states. The Commission efforts to uphold its principals of free-market competition are pursued to preserve the tax bases of Member states and the welfare of EU-wide market consumers. However, the Commission still grapples with finding the balance between state sovereignty and internal market competition. The European internal market thus permits a third party, Google and MNCs like it, to become supranational forces in themselves, with the ability to command high market shares and profits, and avoid tax liabilities. Google, at least, still stands both notorious in its ability to avoid billions in tax liability to EU Member states thanks to the favorable Irish corporate tax regime, and revered, as Google’s algorithms continue capture a 90% share of Europe’s search-engine market by universally providing its users with an organized and accessible platform to the world’s information.

**Acknowledgements:** Professor Michael J. Sodaro, Professor Joann Weiner, Susan Murcko, and Marc Parker for generous help in the drafting and revision process.

---

<sup>80</sup>Salvador Rodriguez “Google (GOOG) Rejects EU Antitrust Claims; Calls Amazon, Ebay Proof of ‘Robustly Competitive’ Market,” International Business Times, August 27, 2015. Accessed May 12, 2016 <http://www.ibtimes.com/google-goog-rejects-eu-antitrust-claims-calls-amazon-ebay-proof-robustly-competitive-2071735>

<sup>81</sup>Mark Scott, “Google, Trying to Endear itself to Europe, Spreads \$450 Million Around,” New York Times, July 19, 2016, accessed July 21, 2016, <http://www.nytimes.com/2016/07/20/technology/google-europe-lobbying-eu.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news&r=1>