Ireland's Responsibility for Cross-Border Tax Abuse
Assessment under the UN Committee on the Rights of the Child
Summary of the issues, October 2020

The UN Committee on the Rights of the Child has taken the decision to examine the impact of Ireland's international tax policy on the ability of countries of the Global South to raise revenue and fulfil their human rights obligations, in particular those that relate to children. It is the first time that the external impact of Irish tax policy will be assessed under an international human rights instrument, and comes in response to a detailed submission from a coalition of Irish, Ghanaian and international civil society organisations.

Tax as a human rights issue

Tax policy is critical for the realisation of human rights. It shapes states' capacity to raise revenue, fund essential public services, and consequently to fulfil their human rights obligations. Academics, UN experts and civil society organisations have all emphasised this link, particularly in relation to economic, social and cultural rights – without fair and functioning taxation systems, efforts to deliver adequate housing, healthcare and education and to tackle poverty and inequality are badly undermined.

Crucially, this impact is not limited neatly within national boundaries. In a globalised economy, multinational corporations can exploit divergent domestic laws and a climate of competition, rather than cooperation, between states to dramatically reduce their tax bills. Through complex corporate structures, profits are shifted across borders into low or no tax jurisdictions, sheltering billions of euro every year, eroding tax bases and public budgets.

These practices are particularly harmful for developing countries, which are more reliant on corporate income tax than higher income countries. Vital revenue is siphoned away, prolonging a country's reliance on aid, exacerbating inequality and keeping people trapped in poverty. In this manner, national laws which facilitate and encourage cross-border tax abuse can have a significant external impact.

Ireland's role in facilitating avoidance

Corporate tax policy has played a crucial role in the development of the Irish economy. It is one of a number of important factors that attract multinational investment, generating employment and significant tax revenue. However, it does come at a cost. Too often Irish tax policy is considered only from the narrow perspective of the benefits it can bring to Ireland – insufficient attention however is given to its negative impacts beyond our borders. Other countries' ability to raise badly needed revenue is undermined by tax avoidance, and in countries of the Global South, this can mean the difference between life and death.

Ireland's role in the international tax avoidance landscape is well-documented, recognised by EU institutions, UN Commissions, bodies within the US Congress, and academics. A recent working paper by the National Bureau of Economic Research (NBER) found that 'more than $616 billion in profits were shifted to tax havens in 2015, close to 40% of multinational profits', and identified Ireland as 'the number one shifting destination, accounting for more than $100 billion alone.'[1]

This is facilitated by several aspects of Irish tax law, including extensive reliefs and allowances on profits related to intellectual property (IP), liberal tax residency rules, an expansive tax treaty network, and the third lowest statutory corporate tax rate in the OECD. Since the 1990s, these policies, in combination with US tax rules, have enabled US-headed multinationals to shelter vast profits from tax, including from sales made in developing countries. When changes in Ireland's tax rules meant tax on IP-related income was effectively reduced to 0% in 2014, Apple are believed to have moved over $240bn of IP to Ireland, allowing the company to shield €27bn in non-US profits in one year alone.

Stalled efforts at reform

While the strategies and corporate structures used by companies like Apple have evolved over time, widely known under the rubrics of the 'Double Irish', its successor the 'Single Malt', and the current 'Green Jersey', the overarching state policy of facilitating avoidance remains.[2] This stands in stark contrast to Ireland's long-standing and hard-earned reputation as a champion of multilateralism, development and human rights.

Some of the more egregious avoidance schemes have been addressed through the OECD's global tax reform initiative, BEPS, but there are fundamental gaps in that process, preventing it from achieving its objective of aligning taxable profits more closely with economic activity. While Ireland has engaged extensively with BEPS, crucially it has opted out of a key provision emerging from it (Article 12 of the Multilateral Instrument), which would have put an end to one of the most popular avoidance practices used by US multinationals based in Ireland.

In addition, countries of the Global South have long argued against the legitimacy of the OECD as the body tasked with leading the international reform process, instead calling for the establishment of an intergovernmental body on taxation under the UN. Ireland however has resisted these calls, deferring instead to the OECD process which has been dominated by its powerful members and their priorities.

Ireland also continues to negotiate tax treaties with countries of the Global South in a manner that facilitates avoidance, and undermines other countries' capacity to raise revenue. In pursuing a recent tax treaty with Ghana, Ireland went against the advice of the Department

[1] Thomas R Tørsløv, Ludvig S Wier and Gabriel Zucman, 'The Missing Profits of Nations' (NBER Working Paper No. 24701) (June 2018, revised April 2020) pp. 27-28

[2] Christian Aid Ireland, 'Impossible structures: tax outcomes overlooked by the 2015 tax Spillover analysis' (2017) https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf; Oxfam Ireland, 'Mantras and Myths: A true picture of the corporate tax system in Ireland' (2017) https://www.oxfamireland.org/sites/default/files/upload/pdfs/mantras-myths-final.pdf

of Foreign Affairs, who advised that the effect of such tax treaties between 'developed and developing countries is that capital flows from developing to developed nations'.

Despite this, Ireland proceeded to negotiate aggressively to halve the level of withholding tax that Ghana could apply to royalties leaving Ghana to Ireland. As Ireland is the number one global destination for royalty flows, and Ghana's largest source of foreign direct investment, this is a significant constraint on Ghana's ability to raise taxes. On the completion of the negotiations, the relevant government minister was forced to apologise for misleading the Dáil, having repeatedly claimed that Ghana had approached Ireland seeking a treaty, when in fact the opposite was true. Ireland is currently expanding its network of tax treaties with a specific focus on low and middle income countries.

Assessment under the UN CRC

Growing public demand for tax justice has brought increased scrutiny on these practices, including by UN human rights monitoring bodies. In 2016, the UN Committee on the Elimination of Discrimination against Women (CEDAW) expressed concern regarding Switzerland's financial secrecy and tax policies and how they impact other states' capacity to raise revenue and fulfil women's rights. Successive UN Special Rapporteurs on extreme poverty and human rights have called on governments to stop facilitating avoidance, and to recognise the impact this has on some of the world's poorest communities.

In October 2020, the UN Committee on the Rights of the Child announced that, for the first time ever, the negative consequences of Irish tax policy will be examined under the framework of another key international human rights treaty: the UN Convention on the Rights of the Child (CRC). As a party to this Convention, Ireland is obliged to avoid policies that foreseeably undermine the realisation of children's rights, at home or abroad, and its progress is reviewed at UN level every five years. But as the evidence presented to the Committee demonstrates, it is currently failing to meet these obligations due to its facilitation of harmful tax avoidance.

Next steps

The Irish government must now formally address the impact of its tax policy on the realisation of children's rights in other countries, in a detailed submission due by the end of 2021. It will then be formally reviewed by the Committee at hearings in Geneva in May 2022 for compliance with its international law obligations under the Convention. The coordinating civil society organisations will also build on their initial submission and provide further evidence to the committee as part of this process.

International human rights law obliges Ireland to subject its tax policy to a human rights impact analysis, or 'spillover analysis', to determine the potential effect it has on the ability of other countries to guarantee the right to health, education etc. An appropriate body with relevant expertise, such as the Irish Human Rights and Equality Commission (IHREC,) could also be tasked with overseeing such an analysis.

For more information, please contact Sorley McCaughey, Head of Policy & Advocacy at Christian Aid Ireland, at smccaughey@christian-aid.org.