

‘Impossible’ structures: tax outcomes overlooked by the 2015 tax Spillover analysis



Christian Aid Report 2017 | Part Two

Introduction

In 2014 the Department of Finance commissioned a 'spillover analysis' of the Irish tax system's possible impacts on the developing world. Published in July 2015, this spillover analysis looks both at Ireland's economic linkages with developing economies, and at the specifics of its domestic tax regime. The result is a sanguine picture of an economy linked only marginally to developing countries, and whose tax regime in any case prevents abusive tax treatments of income flowing into or through Ireland from those developing countries. However, our research shows that Ireland's tax code may be more harmful than the spillover analysis suggests.

In a separate document, we examine the claims made about economic linkages between Ireland and developing economies. This document compares claims made in the spillover analysis about the Irish tax regime with the reality of current Irish tax law, and with structures routinely used by multinational businesses in Ireland: including global multinationals deriving income from business across Africa, Asia and Latin America.

It finds that two years on from the spillover analysis, several outcomes of the Irish tax system which the spillover analysis dismisses as largely impossible and thus unimportant, are in fact both possible and increasingly prevalent. These include:

- ▶ tax-free treatments of royalty and interest flows, allowing Ireland to be used as a tax-free 'conduit' for financial flows out of other countries and into tax havens;
- ▶ Ireland's role as a low-tax jurisdiction for foreign-generated income, including for passive income like interest and royalties.

Amongst other 'impossible' tax outcomes, this paper finds that:

- ▶ The Double Irish has been replaced by the Single Malt: while the Double Irish was formally abolished in 2014, the spillover analysis ignored the fact that several major multinationals, including Microsoft, were already putting in place alternative structures (some U.S. tax advisers were already pointing clients to these alternatives by late 2014), which may provide exactly the same outcome by exploiting Ireland's tax treaty network. Such structures maintain the use of Ireland as a low-tax 'booking centre' for sales of goods and services in other countries: a status that the Irish government has protected by opting out in June 2017 of a key measure of an international agreement to reduce corporate tax avoidance.
- ▶ Figures released in April 2017 show that since 2015 there has been a dramatic increase in companies using Ireland as a low-tax or no-tax jurisdiction for intellectual property (IP) and the income accruing to it, via a nearly 1000% increase in the uptake of a tax break expanded between 2014 and 2017. The government forecast to the Oireachtas that this measure would allow Irish companies to reduce their tax liabilities by an additional €27m annually; in fact it may have reduced Irish companies' tax liabilities by up to €3.3bn, just from tax allowances on the intellectual property moved into Ireland in 2015 alone. (Measures introduced in Budget 2018 to mitigate this problem, following recommendations of the Coffey Report on Irish Corporation Tax, will have no impact on the tax-free income of hundreds of billions of dollars' worth of IP moved into Ireland from 2015 to 2017, and will retain IP tax breaks almost as generous for IP moved into Ireland from 2017 onwards).
- ▶ Figures released in July 2017 show that corporate groups are channelling interest payments on at least €70bn of related-party debt through tax-free Irish special purpose vehicles.

1) Royalty Outflows to Tax Havens

The Claim:

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 including the system of withholding taxes does not facilitate conduit structures that lead to loss of revenue for developing countries.

In contrast the tax system of other states included in the analysis do not have withholding taxes on interest and royalties and therefore interest and royalty payments may be made from these countries directly to tax havens without any tax being levied on these payments.

IBFD/Ministry of Finance Spillover analysis (2015), p.8

One major concern about Ireland's potential role in shifting profits out of other countries has been its possible use as a conduit i.e. allowing corporate groups to shift tax-deductible payments of interest or royalties from one country to a tax haven via an Irish company or sequence of companies, largely tax-free. The paradigmatic example is

the Double Irish, though other possible structures exist. (The Double Irish is particularly significant because, as well as allowing corporate groups to pay foreign royalties into tax havens via Ireland, it also enables U.S. headquartered multinationals to defeat U.S. anti-tax-haven measures, known as "Subpart F").

The spillover analysis argues that "[t]he existence of [Irish] withholding taxes... implies that it is not possible to pay interest and royalties directly from Ireland to companies resident in tax havens without Irish tax being withheld",¹ and that "Irish [outbound] domestic withholding taxes provide some protection against [Ireland's] use as an intermediate jurisdiction".²

In terms of the Double Irish specifically, in 2014 the Irish government announced the death of this structure through changes to Ireland's tax residency rules. The Double Irish works by channelling income as royalties and fees through Ireland to intellectual property (IP) held in companies which are registered in Ireland but tax-resident in tax havens like Bermuda and the Cayman Islands: a strategy famously used by U.S. headed multinationals, such as Google [and] Microsoft.³ To prevent these structures, the government proposed instead that Irish-registered companies should also be tax-resident in Ireland. Detailing the new rules in the 2014 Finance Act, then Finance Minister Michael Noonan told the Oireachtas that this change would be **"abolishing the ability of companies to use the Double Irish"**, helping to tackle **"aggressive tax planning by multi-national companies which has been criticised by Governments across the globe and has damaged the reputation of many countries"**.⁴

The 2015 spillover analysis took Minister Noonan's assurance entirely at face value. It repeated the claim that the rule changes **"will bring an end to the so-called Double Irish two-tier structure used in aggressive tax planning"**, and thus argued 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 including the system of withholding taxes does not facilitate conduit structures"**.⁵ It therefore stated that it was not necessary for the spillover analysis to examine Ireland's tax residency rules in any detail at all: **"therefore an extensive analysis of this element of the Irish domestic legislation is no longer a priority"**.⁵ However, the reality is somewhat different.

The Reality:

International tax advisers continue to offer clients opportunities to use Ireland as a conduit in precisely the ways that the Spillover analysis suggested two years ago were not possible:

Regarding the withholding of taxes it should be mentioned that the Irish tax legislation itself provides for significant withholding taxes on dividends, interest and certain types of royalties. The existence of these withholding of taxes also implies that it is not possible to pay interest and royalties directly from Ireland to companies resident in tax havens without Irish taxes being withheld.

IBFD/Ministry of Finance Spillover analysis (2015), p.8⁷

Irish Tax Legislation / Royalty Payments
Under Irish tax law, no Irish withholding tax (WHT) arises on the majority of royalty payments made by an Irish company, with the exception being film royalties and patent royalties, i.e. royalty payments that are considered as "annual payments" under the Irish tax legislation. However, film and patent royalties may be relieved from Irish WHT under domestic tax rules provided certain conditions are satisfied.

Article by Irish cross-border tax planning adviser on Irish WHT, July 2017⁸

The Spillover analysis claims that Irish tax law applies "significant withholding taxes on... certain types of royalties". In fact Irish tax law applies no WHT at all to most categories of royalties. For those categories still technically subject to WHT, domestic rules also remove WHT in an increasing range of situations. In particular, in 2010 the Revenue agreed to abolish WHT for patent royalties paid overseas by Irish companies, as long as the underlying intellectual property has not been developed in Ireland and is not registered in Ireland.⁹

Even where domestic Irish law does unambiguously apply WHT to royalties, as with patent royalties for patents registered in Ireland, Ireland's tax treaty network cancels this WHT on direct royalty payments into several low- or no-tax jurisdictions, including Switzerland, Bahrain and the UAE. In these jurisdictions, low-tax environments (in the case of several Swiss cantons), or the absence of corporate income tax at all (in the case of the UAE and Bahrain),¹⁰ can then reduce the final corporate income tax on royalties income to 0%.¹¹

The death of the Double Irish?

Efforts to end the use of the Double Irish structure, appear to have been effectively neutered. First, the Spillover analysis' dismissal of the Double Irish skips over the considerable caveat (placed in a footnote in the 2015 analysis) that these legal changes are grandfathered for existing companies until 1 January 2021: in other words, that it has permitted all existing users of the Double Irish to continue for another five years. Though such grandfathering is not in itself unusual, in the case of the Double Irish the new change didn't come into effect until 1 January 2015 rather than on Budget day itself, giving multinationals over two months to set up new or reinforced Double Irish structures which they could use for another five years.

Second, as the Spillover analysis itself recognises, the 2014 rule changes regarding tax residency are still overruled by Ireland's tax treaties with other countries. The provisions of these treaties, coupled with low taxes on IP income in these treaty partners, particularly Malta, provide an easily accessible alternative to the Double Irish which can create almost exactly the same effect, potentially rendering the Irish government's 2014 initiative toothless, and giving birth to the Double Irish's replacement - the Single Malt.

Irish parliamentarians have only recently begun to highlight this theoretical shortcoming.¹² As this report reveals, however, the problem has gone well beyond theory. Tax advisers were in fact promoting and setting up the first such 'replacement' structures as early as November 2014, the month after the rule changes were announced. Page 15 of this note shows, for the first time, that at least four multinationals have already begun instituting the Single Malt, including one put in place during 2017 by Microsoft, the world's third-largest tech company. As the January 2021 deadline of the 'grandfathering' provisions of the 'anti-Double Irish' measures in the 2014 Finance Act approaches, more multinationals may begin to line up their Single Malts.

In short: despite the Irish government's claims, the Double Irish can relatively easily be replaced – and is already being replaced in some circumstances —by equally effective structures which act in the same way to shift profits through Ireland to tax havens.

Meanwhile the Irish government has recently opted out of a key international tax reform specifically intended to crack down on the first stage of the Double Irish and similar replacement arrangements: the practice of many multinationals booking sales in a lower-tax jurisdiction like Ireland which are actually arranged by affiliate companies in other countries. (Thus, for instance, a Microsoft mobile phone may be sold to a distributor in Ghana, but its sale booked in Ireland, which serves as the 'regional centre' for sales of Microsoft products in Europe, the Middle East and Africa).¹³ The

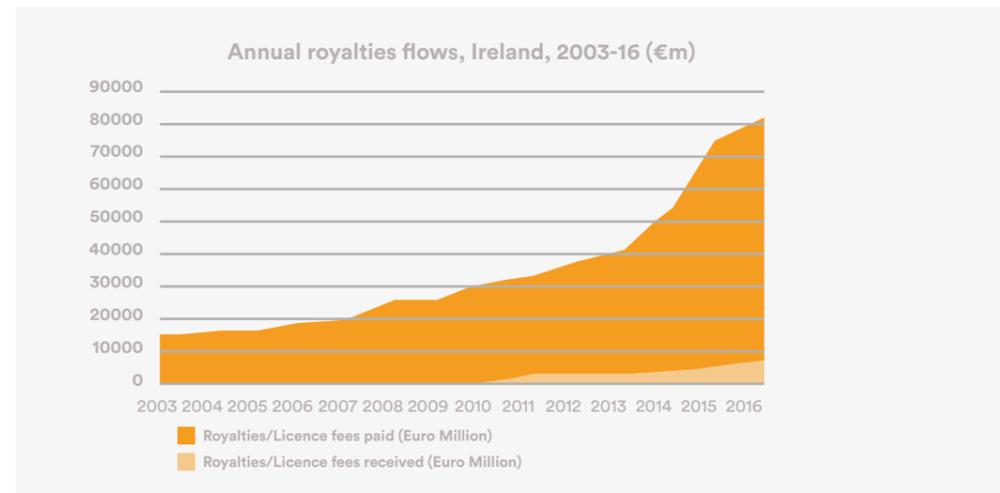
OECD's model tax treaty applies a very narrow definition of what constitutes taxable sales activity. It often restricts the countries where those sales are made from claiming that the sales income should be taxed in their country instead. In technical terms, it prevents them from asserting that the Irish company has a 'permanent establishment' in that country. After many years, Article 12 of the new OECD Multilateral Instrument, arising from the OECD Base Erosion and Profit Shifting (BEPS) process, seeks to correct this: it would alter states parties' tax treaties to widen the 'permanent establishment' definition in situations like this, preventing sales from being arranged in one country (like Ghana) but the income booked in another (like Ireland). Ireland signed the Multilateral Instrument with some fanfare on 7 June 2017, with then Finance Minister Michael Noonan announcing to journalists that the new Instrument means that "[i]f you make the widgets in Dublin, the tax liability on the profits from the widgets is an Irish tax liability . . . It will be illegal to transfer tax liability to other jurisdictions to avoid taxes."¹⁴ Yet in fact when it signed the Multilateral Instrument, the Irish government opted out of Article 12 – a key part of the Instrument aimed at preventing such transference of tax liability to other jurisdictions, which the Double Irish and its successors do.¹⁵

Without further and more profound Irish and international tax reform, there will remain serious limitations to the Irish government's highly-publicised initiatives to stop Ireland's permissive tax regime being used as a platform for global tax avoidance through the Double Irish and other such devices.

International Impact

Without firm-level data it is difficult to determine precisely how much income into Ireland is effectively 'flowing through' as royalties en route to a tax haven, via the Double Irish, 'Single Malt', or other structures. Nonetheless the scale and destinations of Ireland's royalty flows strongly suggests that Ireland's role as a royalties conduit has continued to grow throughout 2016 (the latest full calendar year for which figures are available).

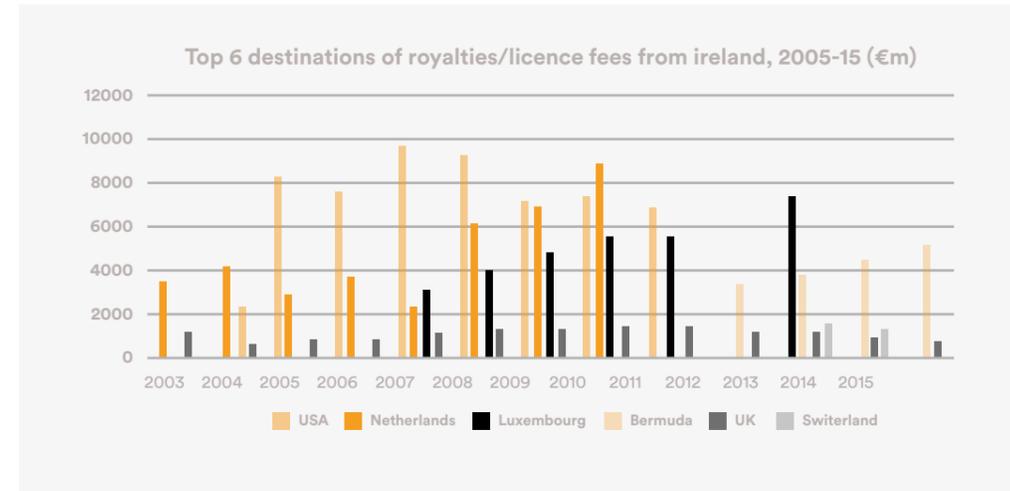
Figure 1: Annual royalties inflows and outflows, 2003-16



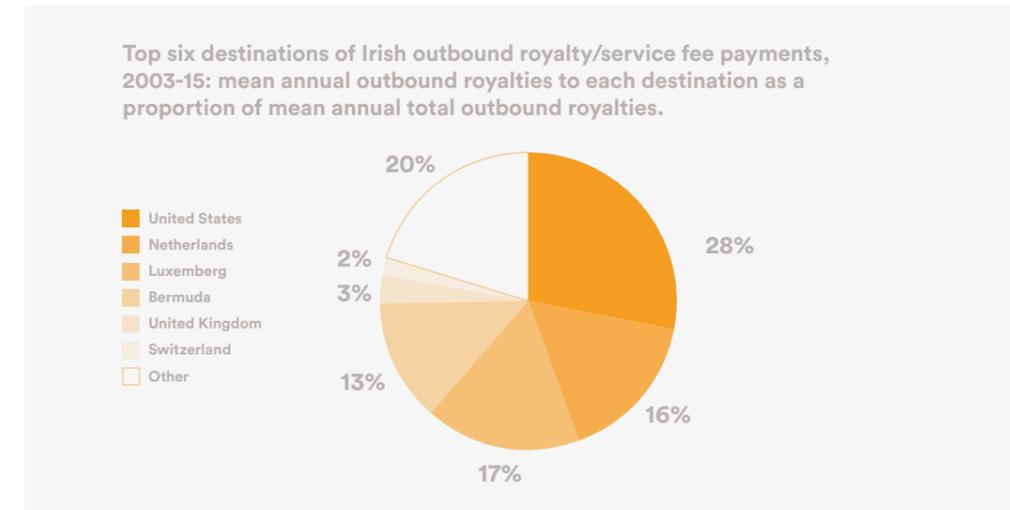
Source: Central Statistics Office, Table BPA04

Royalties leaving Ireland continue to dwarf those being paid into Ireland, and have indeed increased sharply since 2013. At least 50% of Ireland's outbound royalties/licence fee payments, and likely more, are destined to tax or treaty havens (Netherlands, Bermuda, Luxembourg and Switzerland).¹⁶

Figure 2: Top 6 destinations of royalties/licence fees from Ireland, 2003-15



Source: Central Statistics Office, Table BPA04 (N.B. in the years where no figures for these countries appear, this is due to the CSO's suppression of the data on confidentiality grounds, not because there was no flow of royalties)

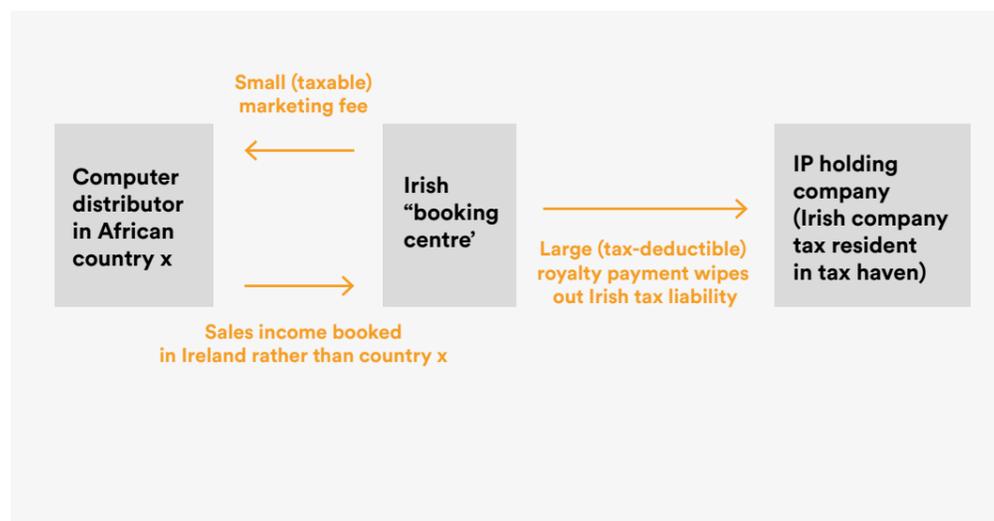


Source: Author calculations from Central Statistics Office, Table BPA04

This is the reverse picture of the genuine knowledge economy that the Irish government seeks to depict. Ireland does not appear, for the most part, to be the net recipient of income from intellectual property either developed in or relocated into Ireland. Rather, its huge trade deficit on royalties/licence fees is typical of a platform for Double Irish style commissionaire arrangements where Irish firms are receiving sales income on sales booked in Ireland (though often taking place elsewhere), and then paying out large royalties and licence fees, ultimately into tax havens.

The prevalence of such structures also undermines the Spillover analysis' argument that limited royalties inflows from developing countries means that such countries are not being adversely affected by Ireland's IP tax regime.¹⁷ Analysing incoming royalties income from other countries will not show the impact on those countries, because income shifted to tax havens via Ireland as royalties, through mechanisms like the Double Irish or Single Malt, often does not arrive in Ireland as royalties, but as sales income on sales of goods and services booked through Ireland (though often shipped/supplied from elsewhere). Such impact is invisible in an analysis confined, as in the Spillover analysis, to that of royalties income deriving from developing countries. **Several of the companies using Double Irish structures have significant sales and registered subsidiaries in developing countries: for instance, Microsoft has created phones specifically for developing country markets in Africa and Asia, its Ireland 'regional centre' books sales specifically for the Middle East and Africa, as well as Europe.**¹⁸

Figure 3: simplified Double Irish or 'Single Malt' structure



Royalties/IP Income: New 'Onshore' Incentives

The Claim

In the area of tax incentives, our analysis focused on the current R&D credit and the plans for a Knowledge Development Box as a company must be within the charge to Irish tax in order to qualify for the R&D tax credit, this incentive is unlikely to be associated with base spillovers due to profit shifting, and it has been stated that it will comply with the EU and OECD rules for the design of such incentives which are currently being finalised. However, it could be said that any preferential tax rate contains a risk for profit shifting and therefore for loss of revenue elsewhere.

IBFD/Ministry of Finance Spillover analysis (2015), p.8¹⁹

As well as the possibility that Ireland is a conduit moving income 'offshore' into tax havens via royalties and licence fees, the Spillover analysis also considered the possibility that Irish 'onshore' tax breaks, particularly for Intellectual Property (IP), might create a low-tax environment for income to that IP, which could be artificially shifted into Ireland rather than developed there. However, the analysis only considers R&D credits and the prospective Knowledge Development Box (KDB) whose details were not yet published at the time) (for more details on the Knowledge Development Box, see page 12. Both are given a clean bill of health on the basis that the KDB will be compliant with the OECD BEPS process, and that Irish R&D credits require claimants to be subject to Irish corporation tax.

The Reality

The 2015 analysis ignores what is now by far the largest Irish tax incentive for IP, available for both domestic and foreign-developed IP. This incentive potentially reduces to 0% the effective tax rate on income from IP placed in Ireland, and was dramatically expanded in 2015.

Before the Finance Act 2014, the minimum effective tax rate (ETR) was 2.5% taking account the combined capital allowance and related interest expense with the excess carried forward to future periods. This cap has been removed completely, allowing 100% of IP-related trading profits to be offset in any one accounting period, reducing the potential ETR to zero.

The low ETR, along with opportunities for a tax-free exit are very attractive. Some of the perceived challenges relating to the regime can generally be managed and we expect further improvements to the regime in future years.

As companies evolve from the Double Irish structure, we anticipate the given high values attributed to the offshore IP, many companies will seek to bring the IP onshore to avail of the onshore IP regime, which is supported by the significant presence that many multinational companies (MNCs) already have in Ireland.

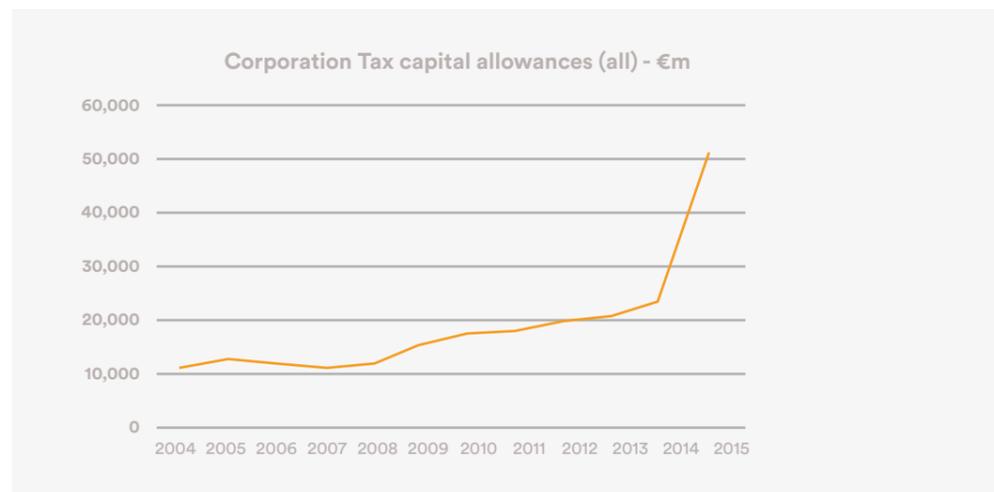
Louise Kelly, Tax Partner, Deloitte Ireland, 24 February 2015²⁰

An Irish company can offset the cost of intellectual property (IP) or rights it acquires, including from another part of its corporate group, against the tax on royalties or other income from that IP ("Section 291A" relief). It can also borrow money to acquire that IP and deduct the interest costs from that taxable income. In 2014 the government boosted these allowances from a maximum of 80% to 100% of related profits in any one tax year, potentially reducing the effective tax rate on such income from 2.5% to 0%, according to Irish tax advisers.²¹ As early as 2015, accountancy and tax advisory firms were already anticipating the switch from the Double Irish to 'onshore' structures providing a no-tax environment as effectively in Ireland as in Bermuda (see above). And while some other countries have introduced similarly generous tax breaks for companies wishing to 'on-shore' intellectual property, Ireland's role as a tax-free conduit for the resulting royalty income - evidenced by its huge royalties/licence fees trade deficit - makes such tax breaks particularly significant in its case.

These expanded tax breaks for IP income were followed by a dramatic increase in the placement of IP in Ireland: analysis of National Accounts data by the Department of Finance's recent independent review of Irish corporation tax found that Irish companies had 'on-shored' around €250bn of intangible assets into Ireland in the first quarter of 2015, immediately after the cap on intangibles capital allowances was lifted.²²

Notably, almost all the additional taxable profits booked in Ireland as a result of this IP 'on-shoring' were cancelled out by the dramatic rise in capital allowances claimed against IP income. Capital allowances claimed against corporation tax more than doubled between 2014 and 2015:²³

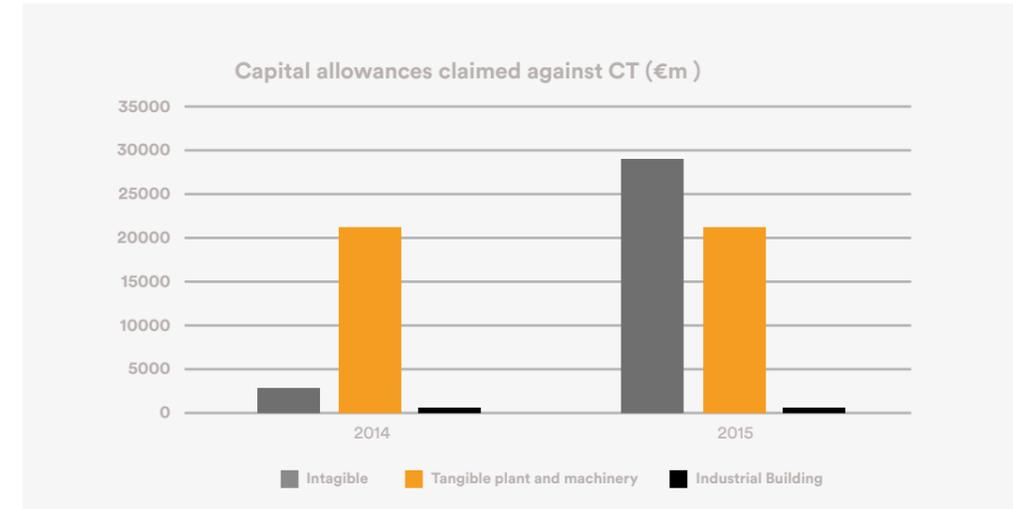
Figure 4: Capital allowances claimed against corporation tax, 2004-15



Source: Central Statistics Office, Table RVA07²⁴

Breaking these capital allowances down by category is only possible from 2014 onwards. This breakdown shows that capital allowances for tangible assets (the red column below) stayed almost the same between 2014 and 2015, increasing by just 2.2%. Almost the entirety of the increase from 2014 to 2015, therefore, constituted increased capital allowances for intangible intellectual property (see figure 5). These grew by 989% between 2014 and 2015. This increase (around €26bn) almost precisely matches the increase in 'intangible-asset related gross trading profits' that companies declared in Ireland during 2015. In other words, the enhanced capital allowances regime that Ireland instituted in 2014 has provided an effectively tax-free environment for the income accruing to billions of euros of IP companies moved into Ireland in early 2015.

Figure 5: Capital allowances claimed against corporation tax (by category), 2014 and 2015



Source: Revenue Analysis of 2015 Corporation Tax Returns and 2016 Payments²⁵

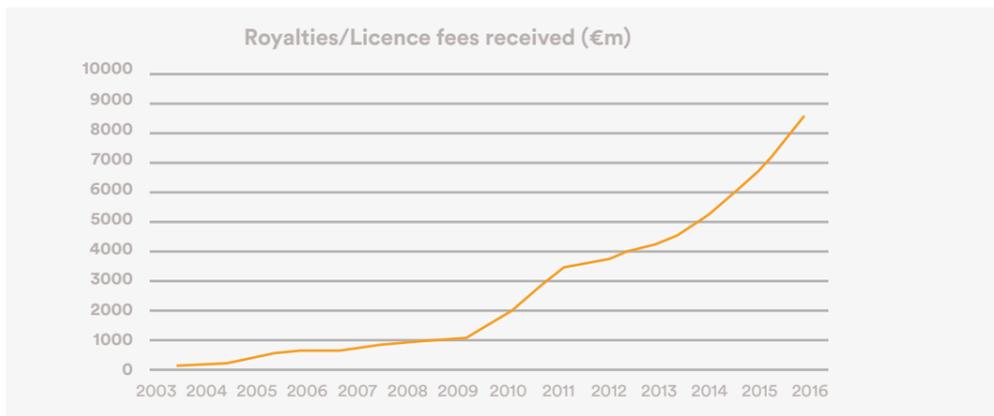
In October 2017, following a recommendation contained in the review of Irish corporation tax, conducted by Mr. Seamus Coffey, the Irish government returned the 80% cap to the amount of profits against which IP acquisition costs can be deducted. The regime will nonetheless continue to apply an extremely low effective tax rate – some 2.5% - on income accruing to IP shifted into Ireland after October 2017, and will continue to permit a 0% effective tax rate on such income for IP shifted into Ireland between 2015 and 2017.

International Impact

The provision of a nearly tax-free environment in Ireland for IP income has an impact not only on Irish tax take but on the tax revenues of (generally developed) countries where this IP was developed;²⁶ and on the tax revenues of (sometimes developing) countries where multinationals' subsidiaries may pay royalties or other fees to the Irish affiliate. The scale of this international impact from the dramatic rise in the tax-deductible acquisition of IP by Irish companies will not be fully evident until data for incoming royalty and licence fee payments are available for future years.

Nonetheless it is clear that this uptake, and the resulting revenue loss, has been dramatically bigger than the government forecast to the Oireachtas in 2014, when it projected that the increased uptake in IP capital allowances due to the change would lead to foregone Irish CT revenue of some €27m a year.²⁷ The actual increase between 2014 and 2015 suggests that the tax break was exploited over 120 times more than the Irish government predicted to the Oireachtas: providing a corporate tax break to the claimants of as much as €3.3bn over several years, just for IP brought into Ireland in 2015 alone.²⁸ Perhaps significantly, as well as a steeper rise in incoming royalties and licence fees from 2014 onwards (Figure 6 below), in 2016 Ireland began (for the first time since 2010) to report unredacted figures for royalties/licence fees received from Africa (€21m in 2016), and South and Central America (€29m in 2016, excluding Bermuda). These are small figures, but their appearance indicates for the first time that a significant number of Irish companies are receiving non-negligible royalty payments from these regions.²⁹ The impact on individual developing countries remains unknown because – as discussed in a separate paper – the Irish government is currently required to redact from publication figures for licence fees and royalties from all individual Asian, African and South American countries except five (Bermuda, China, Japan, South Korea and Brazil), due to a small number of reporting companies receiving payments from each country, triggering confidentiality provisions in the Statistics Act.

Figure 6: Royalties and Licence fees received in Ireland 2003-16



Source: Central Statistics Office, Table BPA04

IP capital allowances – which are available for income accruing to almost any type of IP placed in Ireland from anywhere in the world – may have a more significant international impact than the Knowledge Development Box (KDP), widely trailed as the ‘onshore’ replacement to the ‘offshore’ double Irish structure. The KDP, whose full details were not yet published when the spillover analysis was conducted in 2014-15, provides for a 6.25% tax rate to returns to IP developed in Ireland. Though some foreign-developed IP can be ‘bundled’ with Irish-developed IP and its returns covered by the KDP, nonetheless there are limitations to its use to reduce tax on income for IP developed elsewhere and moved into Ireland (in contrast to similar provisions in other European countries labelled as “harmful” tax measures by the EU, such as the UK’s Patent Box); and is limited only to patents and copyrighted software.³⁰ Until 2016 and 2017 corporation tax details are available it is difficult to assess the KDP’s impact.

3) Interest Flows

The Claim:

Irish tax legislation itself provides for significant withholding taxes on dividends, interest and certain types of royalties. The existence of these withholding taxes also implies that it is not possible to pay interest and royalties directly from Ireland to companies resident in tax havens without Irish tax being withheld.

IBFD/Ministry of Finance Spillover analysis (2015), p.8³¹

The Reality:

As with royalties, Ireland’s tax treaty network cancels WHT on interest payments into several tax havens, including Switzerland, Bahrain and the UAE. In these jurisdictions, low tax environments (in the case of several Swiss cantons), or the absence of corporate income tax at all (in the case of the UAE and Bahrain),³² can then reduce the final corporate income tax on interest income to 0%.³³

Tax attraction of Irish holding companies

Ireland operates a 20% withholding tax on interest and dividend payments but there are many exemptions available, including, where the interest or dividend payment is made to a company resident in the EU or a DTA. There are also exemptions from withholding tax for interest payments on listed company or a 75% subsidiary of a listed company, or to a company that is controlled by EU/DTA residents.

Source: McCann Fitzgerald, February 2016³⁴

In addition: for interest payments into any jurisdiction at all, even those where the interest will not be subject to tax, certain commonly used structures can cancel Irish WHT through other exemptions. These include listing the relevant debt as bonds on a small, effectively non-trading, stock exchange, often in a tax haven (the ‘quoted Eurobond exemption’): an exemption designed for reducing the cost of third-party investment, but which can be applied instead to what are in fact related-party, intra-group loans.³⁵

The Reality:

Withholding Tax

In general, withholding tax (currently at the rate of 20 per cent) must be deducted from interest payments made by an Irish company. However, two major exemptions from the charge to Irish interest withholding tax are provided under domestic legislation, the ‘quoted Eurobond’ exemption and the ‘qualifying person’ exemption.

Source: Matheson, ‘Ireland: the SPV jurisdiction of choice for structured finance transactions’³⁶

Ireland as a conduit for shifting interest income into tax havens: avoiding interest withholding tax

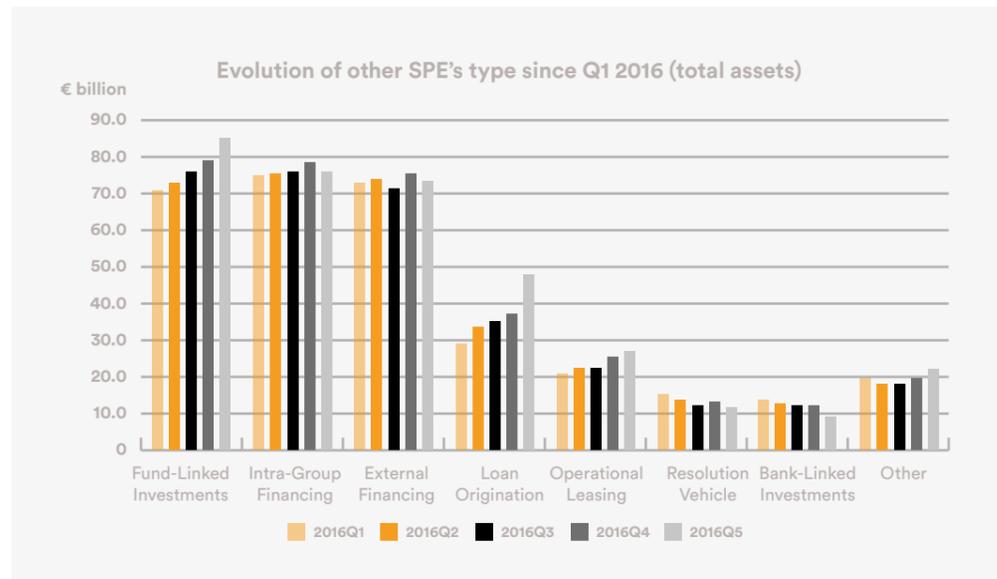
The spillover analysis asserts that Ireland cannot be used as a conduit for shifting income through loans and corresponding income payments into related parties in tax havens, because it imposes an outbound withholding tax on such interest payments. While bilateral tax treaties may reduce or cancel such withholding taxes, many countries (including Ireland) are often unwilling to sign such tax treaties with tax havens in order to prevent revenue loss through profit-shifting.

However, this analysis ignores a range of tax breaks in purely domestic Irish tax law that multinationals can exploit in order to shift interest income into tax havens without incurring withholding tax. One such exemption is the “quoted Eurobond exemption”. Originally introduced in Ireland (and the UK) to promote the liquidity of bond markets – in other words, to make it more attractive for companies to obtain investment from third-party investors and for that debt to be traded – the “quoted Eurobond exemption” cancels withholding tax on interest paid on bonds listed on a “recognised stock exchange”. Far from promoting third-party investment, the exemption has instead become widely used (some would say abused) by multinational companies to avoid withholding tax on loans from within their own corporate group or from their own shareholders. Since “recognised stock exchange” is not explicitly defined, multinational groups issue debt as bonds which are placed for trading on a little-used stock exchange such as the Cayman Islands stock exchange. They are then bought by another company in the group itself or by its shareholders, and thereby qualify for the withholding tax exemption. If the ‘purchaser’ of the debt is a group company resident in a tax haven, then profits can be shifted as interest payments into that tax haven.³⁷

The potential use of Ireland as an interest conduit is further enhanced by the effectively zero-tax regime provided for S110 companies: an area of the Irish tax regime that the Spillover analysis entirely ignored.

Though 'tax-neutral' S110 companies ("special purpose entities") have more recently come to public attention due to their use by so-called 'vulture funds' to buy up distressed mortgages,³⁸ their special tax regime, set up under Irish tax law in 1997, was originally intended for securitisation vehicles – in other words, companies set up by banks and investment funds to sell financial instruments to third parties. However, the first ever release of comprehensive data on S110 companies' assets and activities in July 2017 shows that as of early 2017 the majority of S110 companies are 'non-securitisation' entities, being used for a range of other purposes.³⁹ The second-largest of these purposes is for intra-group financing: in other words, precisely as tax-free conduits for over €70 billion of debt and corresponding interest flows within multinational corporate groups.⁴⁰

Figure 7: Capital of Irish Special Purpose Entities (SPE) by type, 2016-17



Source: Central Bank of Ireland, Statistical Release, 18 July 2017

International Impact

These figures do not, of course, suggest that all of this €70bn intra-group debt is being used to shift profits into low-tax jurisdictions. Nor is it clear where the interest on this debt flowing through Irish special purpose entities is coming from: unfortunately the geographical data gathered by the CBI records only the geographical location of the company setting up the special purpose entity, not the location of its assets or income.⁴¹

Nonetheless the legal regime and newly-released statistics surrounding S110 companies indicates that Ireland both can be used as a tax-free conduit for intra-group debt in exactly the way the Spillover analysis dismisses; and that it is being used extensively in this way, to the tune of some €70 billion of intra-group debt in S110 companies alone, and likely much more via more conventional corporate vehicles.

Replacement Structures for the Double Irish

Ireland's double tax treaties with other countries over-ride Irish domestic tax law. In line with OECD and UN models, most of Ireland's tax treaties retain the 'place of effective management' test to determine the tax residency even of newly incorporated Irish companies, instead of the new residency rules. (Several new tax treaties that Ireland negotiated and signed since the domestic residency rule changes in the 2014 budget changes also imposed this 'place of effective management test',⁴² though these will now be modified by the OECD Multilateral Instrument). In many cases, the 'effective management' test can be met simply by holding periodic board meetings in the jurisdiction in question, and often does not require meaningful economic activity in the jurisdiction to qualify for tax residency.⁴³

Given Ireland's network of tax treaties with low- or no-tax jurisdictions, U.S. tax advisors were quick to promote modified versions of the structure. As the tax partners of one U.S. tax advisory firm noted as early as October 2014, just after Noonan announced the rule changes:

“this does not mean the objective [of the Double Irish] cannot still be achieved in other ways. Ireland has an extensive treaty network. At least two of these treaties contain management and control residency standards and are with countries that have similarly low tax rates. Specifically, it is possible to form an INR [Irish Non-Resident company], as under existing structures, with its management and control in Malta. Pursuant to the treaty between Malta and Ireland (which should not be overridden by the new proposal), that company should be treated as a resident of Malta, and not Ireland (See Article 4(3) of the treaty). Malta does not impose any tax on royalties derived from patents, trademarks, or copyrights (resident non-domiciled companies also are exempt from Malta tax on foreign source income that is not remitted to Malta.) And since Malta is an EU member state, royalties paid from an Irish company to a Malta company should not be subject to Irish withholding tax. Thus, this Malta company should provide essentially the same benefits as the Bermuda company in the above Google example. Alternatively, the treaty between the United Arab Emirates (UAE) and Ireland likewise has a management and control standard, and the UAE does not impose corporate income tax. The Ireland-UAE treaty also exempts royalty payments from withholding tax. Thus, notwithstanding the Irish proposal, it should still be possible to achieve the same results using a company managed and controlled in Malta or the UAE, rather than in a Caribbean nation.”⁴⁴

The Double Irish is dead- long live the Single Malt!

The new Irish tax residency rules mean that Irish-registered companies can no longer be tax-resident in the 'classic' zero-tax havens like Bermuda and the British Virgin Islands. However, it still allows Irish-registered companies to be tax-resident in other jurisdictions, including European ones, with which Ireland has a tax treaty. Some of these jurisdictions provide a low- or no-tax environment for royalty income as effectively as the 'classic' Caribbean tax havens. Moreover, since such structures use jurisdictions with which Ireland has tax treaties lowering or removing withholding taxes on cross-border income, such structures are actually simpler than older Double Irish structures, because they do not require a "Dutch sandwich" (the extra journey of the royalty income via a company registered in another EU jurisdiction like the Netherlands or Luxembourg that was previously required to avoid outbound Irish withholding taxes on royalties or fees being paid to a company resident in a non-treaty tax haven jurisdiction).⁴⁵ Most of Ireland's double tax treaties reduce or cancel outbound withholding tax on royalties, without the need to exploit the EU rules.

Despite the current Double Irish still having several years to run, several U.S. tax advisory firms are already promoting such alternative structures, particularly via Irish-registered companies tax-resident in Malta, which some are referring to as 'son of DIDS' [Double Irish with a Dutch Sandwich],⁴⁶ and which we refer to here as the Single Malt. One U.S. tax advisory firm contacted for this paper confirmed that "[w]e have seen some folks use Malta over the past couple of years...We have not seen big enough numbers to call the revised structure "prevalent," but certainly some people have sought and used Malta as an alternative to Ireland in these cases."⁴⁷

Though multinationals with existing Double Irish structures may not restructure until closer to the 2021 deadline, a preliminary search of the Irish and Maltese company registries show at least four multinationals which since October 2014 have already established such IP holding structures with Irish-registered but Maltese-tax-resident companies. Two examples are given below.

In July 2017 Ireland signed up to a provision of the OECD's Multilateral Instrument which would replace the blanket 'place of effective management' residency test in many of Ireland's tax treaties – crucial for the new structures - with a negotiation between the two countries concerned, though this negotiation must still be based on factors including "having regard to [the company's] place of effective management". Notably, however, several of Ireland's tax treaty partners opted-out of this particular provision of the Multilateral Instrument – including Malta. The Malta-Ireland tax treaty will therefore retain its old 'place of effective management' test for the foreseeable future.

Why Malta?

The Double Irish and its successors are tax structures designed to shift income into low-tax jurisdictions as royalties fees on intellectual property (IP). Though a no-tax jurisdiction like Bermuda or the Cayman Islands provides the maximum certainty that IP income will not incur tax, making them key targets for previous Double Irish structures, other jurisdictions are increasingly developing low-tax environments specifically for intellectual property through a combination of targeted tax regimes and tax allowances, and wider systems of tax refunds and revaluations designed to shrink effective corporate tax rates to a fraction of their headline rates.

Since 2010, income from many forms of intellectual property has been tax-exempt in Malta, regardless of whether or not the IP was developed in Malta or (in the case of patents) registered in Malta.⁴⁸ Though this Maltese IP tax break has recently come under fire from the OECD's BEPS process, and will be phased out in 2021, a number of other features of Malta's tax regime continue to make Malta an IP tax haven with effective tax rates on royalty income of between 0% and 5% for the foreseeable future.⁴⁹ These features include:

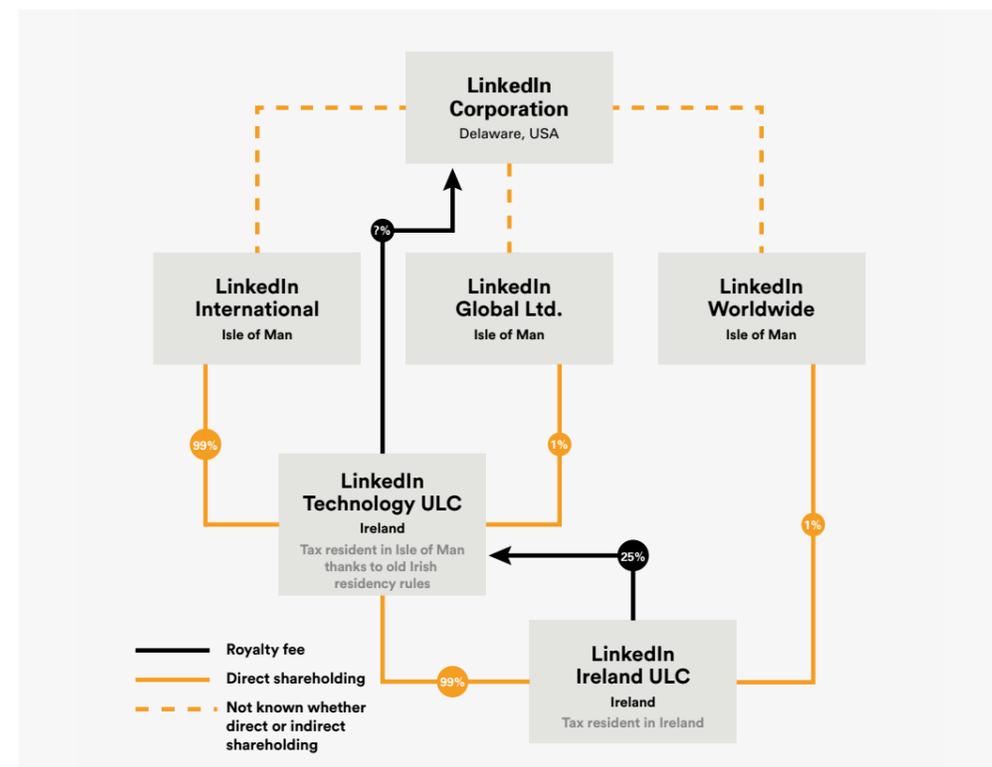
- Malta's 'full imputation' tax credit system, which refunds between five-sevenths and six-sevenths of the income tax on royalties income to a Maltese company's owners, leading to an effective tax rate of 5-10% on that royalties' income;
- the so-called 'step up' system for companies shifting tax residence to Malta. This provides a tax break that effectively wipes out Maltese tax on income accruing to assets, both tangible and intangible. In short: a company may acquire an asset, such as a patent or the right to use a particular invention, from a related company at a relatively low 'book value'. In practice its real-world market value may be many times larger than the 'book value' the company originally paid for the asset. The 'step-up' system in Maltese tax law allows companies to revalue assets from book to market value for tax purposes, and then deduct ('amortize') up to a third of the increased value of the asset against the income it receives from that asset for the next three years – even though the amount it can deduct in tax may be vastly larger than the price it originally paid for the asset (its 'book value'). This may effectively reduce the company's Maltese tax bill to zero; and also means that no Maltese capital gains tax will be due on the assets when they are sold or transferred.

Example: LinkedIn/Microsoft

The global business networking site LinkedIn, recently purchased by Microsoft Corporation, has operated a well-publicised Double Irish structure since 2009.⁵⁰ The company makes its money from providing recruitment and marketing services to other companies, and from 'premium' subscriptions from some users.⁵¹ With its non-U.S. customers it contracts sales of these services and subscriptions via an Irish subsidiary, LinkedIn Ireland.⁵² This is a widely-used 'commissionaire' or 'dependent agent' arrangement: local subsidiaries in different countries undertake 'marketing' for LinkedIn's services, for which they receive payments for their marketing services from LinkedIn Ireland;⁵³ but the actual sales of those services - except those to U.S. customers - are booked through the Irish company.⁵⁴

LinkedIn Ireland is tax-resident in Ireland, and thus subject to Ireland's 12.5% tax rate. However, its available accounts from 2010 and 2011 show that it made a substantial operating loss in these years, thus being liable for no Irish tax. (Accounts for subsequent years are not publicly available since the company became an 'unlimited company'). One of the reasons for the reduction of its profits is the fact that LinkedIn Ireland pays 25% of its turnover as a royalty fee to a second Irish-registered company, LinkedIn Technology Ltd, for the use of LinkedIn's proprietary intellectual property.⁵⁵ In turn, LinkedIn Corporation in Delaware USA, the ultimate holding company of the group, licences the use of this IP to LinkedIn Technology Ltd. LinkedIn Technology Ltd is registered in Ireland but is tax-resident in the Isle of Man, which levies no corporation tax on corporate profits.⁵⁶ By 2011, LinkedIn's non-U.S. revenue was already US\$168.4m, of which a quarter (some US\$41.7m) was placed as royalties in the Isle of Man.⁵⁷ By 2016, its non-U.S. revenue had ballooned nearly seven-fold to over US\$1.14bn.⁵⁸ If the same proportion of this revenue is currently moved into the Isle of Man as royalties as was the case in 2009-12 (which we cannot determine definitively since LinkedIn's Irish companies stopped filing accounts in 2013) this would constitute an annual receipt of some US\$285m of revenue into its tax-free Isle of Man vehicle. Without knowing the profit margins and country-specific tax rates in the EMEA countries where LinkedIn sells its products, it is very difficult to estimate the amount of tax this arrangement has saved LinkedIn. Assuming, however, that the acquisition costs to move the IP to the Isle of Man was negligible (see below), that 25% of LinkedIn's EMEA revenue was paid as royalties to the Isle of Man vehicle, and that the average corporate income tax rate in the EMEA countries where LinkedIn markets its products to customers is perhaps a conservative 20%, then we can estimate a possible maximum tax saving of perhaps US\$100m between 2010 (when the structure was set up) and 2015, or between US\$13-17m a year.⁵⁹

Figure 8: LinkedIn Corporation IP structure, as of 1 January 2017



(Sources: LinkedIn Corporation 10-K filings with U.S. Securities and Exchange Corporation; annual reports, accounts and other filings with Ireland Companies Registration Office)

As well as shifting non-U.S. income into a tax-free haven, the Double Irish structure is also precisely designed to prevent this income from being taxed in the U.S. under 'controlled foreign company' rules (called 'Subpart F'). Modifications to 'Subpart F' called 'check the box', introduced in 1997, permit multinational groups to designate foreign subsidiaries as 'disregarded entities', effectively regarded under U.S. federal tax law as part of their parent company. In this case, LinkedIn Ireland can be designated as part of LinkedIn Technology (which U.S. tax law may regard as similarly tax-resident in Ireland, its place of incorporation), and any royalty payments between them disregarded for U.S. tax purposes.⁶⁰

In theory, transfer pricing rules should reduce the tax advantage of moving valuable IP rights from the United States to the Isle of Man, since the Manx company must pay the U.S. company for these rights: a payment which may be taxable in the USA. However, as a U.S. Senate investigation described in 2012, though transfer pricing rules require that the size of this (taxable) payment should be determined by the IP's market value, in practice "[v]aluing intangible assets at the time they are [internally] transferred is complex....The valuation problems are due in part because, in many cases, the assets transferred offshore are not traded on the open market, and therefore cannot be pegged to any comparable, third party transaction prices. Rather, the prices are typically based on estimates devised by the companies themselves."⁶¹ It is impossible for us to independently assess LinkedIn's valuation of these IP rights when it transferred them from the U.S. to its Manx-resident subsidiary. Nonetheless it is striking to compare LinkedIn's valuations of these IP rights with the levels of (tax-deductible) royalty fees they then immediately set for them. LinkedIn Technology Ltd first acquired the IP rights to make sales of LinkedIn's products in 2010, paying its U.S. parent company US\$536,234 for them.⁶² Yet the Manx-resident company then received (tax-free) over US\$10.7 million from its sister company in that first year alone for the use of those IP rights:⁶³ more than twenty times what LinkedIn claimed those IP rights were worth, and indeed nearly four times what LinkedIn claimed all its IP (patents and developed technology) was worth at the end of 2010.⁶⁴

New Rules, New Structures

The new rules introduced in the 2014 Finance Act may require LinkedIn Technology Ltd to become tax-resident in Ireland in 2021, and consequently for its royalty income (after presumably paying some out to the group's Delaware HQ) to be subject to Irish corporate income tax.

In December 2016, LinkedIn Corporation was acquired by Microsoft Corporation, which itself has long used a 'double-Irish' structure, first exposed by a prominent U.S. Senate investigation in 2012, to channel income from its sales in Europe, the Middle East and Africa (EMEA) to an Irish-registered company tax-resident in Bermuda.⁶⁵

Since its change of ownership, LinkedIn appears to be developing the structure of its holdings of intellectual property in precisely the 'future-proof' way described by tax advisers above. On 21 March 2017, Microsoft/LinkedIn registered a new Irish company, LinkedIn IP Holdings I Unlimited Company, owned by Microsoft Ireland Research. (The latter is the 'top tier' company of Microsoft's own Double Irish IP holding structure).⁶⁶ The new company is directed by Glenn Cogswell, Microsoft's Head of International Tax; and Benjamin Orndorff and Keith Dolliver, also the founder directors of Microsoft's Bermudan-resident Irish companies during the mid-2000s as Microsoft's senior in-house lawyers.⁶⁷ Though registered in Ireland, its place of business is an office in Valetta, Malta, according to filings made in June 2017 with the Maltese company registry.⁶⁸ Since this Valetta address is listed as the company's place of business and not a branch; and since the company's registered secretary is a Maltese national; this suggests that this new Irish-registered company is intended to have its place of effective management in Malta and thus to be Maltese tax-resident. This is, of course, precisely the situation which the Irish government claimed its 2014 rule changes would stop after 2020, precisely the situation which Ireland's tax treaty with Malta means will persist after 2020, and precisely the structure which the U.S. tax advisers cited above describe as being possible thanks to Ireland's tax treaty network. Unsurprisingly, LinkedIn IP Holdings I Unlimited Company lists its activities as "the business of, and activities associated with, the ownership and exploitation of intellectual property rights".⁶⁹

As a new unlimited company which has not yet filed much documentation (and which is in any case exempt from publishing company accounts in Ireland), it is difficult to determine what IP is to be placed in this new company, from where it will receive payments for the use of that IP, and precisely what its tax impact will be. Nonetheless it seems clear that at least one of the most well-known users of the Double Irish, Microsoft, has already identified the 'Malta route' as a potential replacement. We submitted our analysis and detailed questions on this structure to Microsoft, which declined to respond.

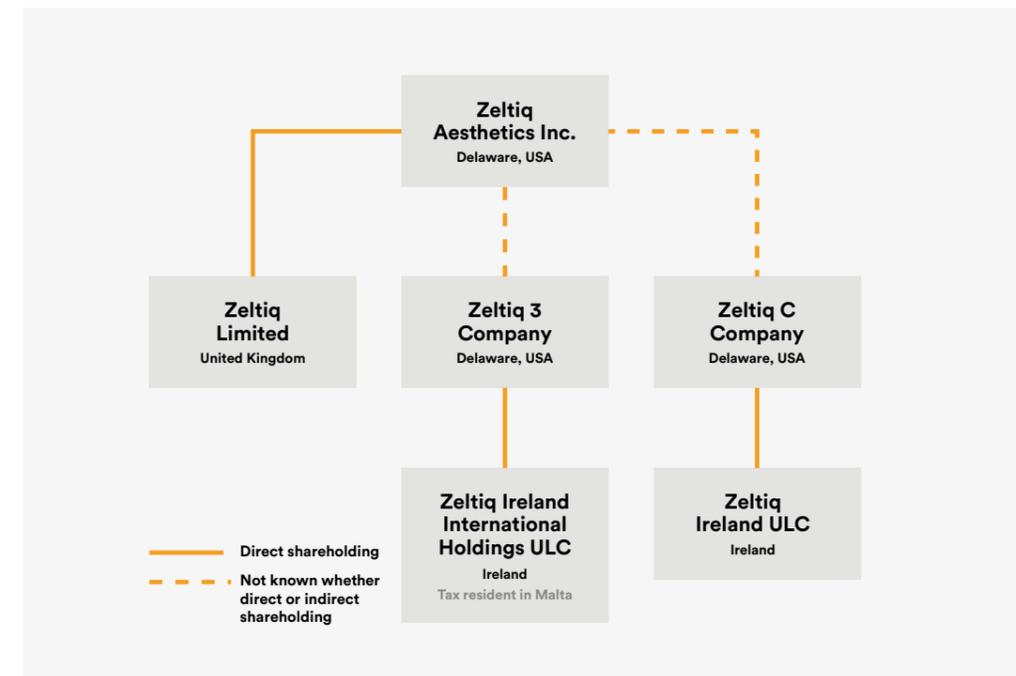
Microsoft and LinkedIn are not alone. The earliest company we have been able to identify to establish a similar Maltese/Irish structure is Zeltiq Aesthetics, a California-headquartered manufacturer of weight-loss products (which in 2016 was acquired by the major pharmaceutical conglomerate Allergan Plc). Zeltiq currently operates a relatively conventional international sales structure: in 2011 it established a UK subsidiary, Zeltiq Ltd, through which international sales of its products are made in return for both sales income, and an agency fee from its parent company in Delaware, USA.

In December 2015, Zeltiq's group's structure expanded substantially. It established two Irish subsidiaries called Zeltiq Ireland and Zeltiq Ireland International Ltd "for additional office support in Europe", according to its U.S. annual report. This Irish expansion thus ostensibly had real business substance: its 2015 annual report also announced the group's intention to begin some manufacturing activities in Ireland.⁷⁰ In December 2015, however, it registered a third Irish company, Zeltiq Ireland International Holdings Unlimited Company, which replaced the Irish-resident Zeltiq Ireland International Ltd. This last company, though Irish-registered, has a Maltese director and a Maltese-registered place of business.

As with the Microsoft example above, we cannot at present confirm the scale and arrangement of flows of income between the companies in this new structure. None of the Irish companies, as unlimited companies, have to file financial accounts, and indeed during 2016 Zeltiq's UK sales office has continued to make international sales and book the income in the UK, as previously.⁷¹ Zeltiq's parent company Allergan plc declined to respond to specific questions relating to financial flows through this structure, and told Christian Aid simply that "Allergan abides by all applicable tax laws and accounting rules and pays all taxes owed in all jurisdictions where it does business". While we make no claims that this structure is not perfectly lawful, Zeltiq Aesthetic's annual reports make it clear that the ultimate motivation of this structure is tax, and specifically the arrangement of licences and cost-sharing agreements for intellectual property to reduce tax burdens, as with all double-Irish structures:

"During fiscal [year] 2015, we implemented an international tax structure that includes a research and development cost-sharing arrangement, certain licenses and other contractual arrangements between us and our wholly-owned foreign subsidiaries. As a result of these changes, we anticipate that our consolidated pre-tax income will be subject to foreign tax at relatively lower tax rates when compared to the United States federal statutory tax rate and, as a consequence, our effective income tax rate is expected to be lower than the United States federal statutory rate."⁷²

Figure 9: Zeltiq Aesthetics structure (USA/Ireland/UK/Malta), 21 August 2017



(Sources: Zeltiq Aesthetics Inc 10-K filings with U.S. Securities and Exchange Corporation; annual reports, accounts and other filings with Ireland Companies Registration Office and UK Companies House)

Estimates of EMEA tax savings to LinkedIn Corporation group due to booking EMEA income in LinkedIn Ireland and royalty payments to LinkedIn Technology

This table shows a rough estimate for the scale of tax on its sales profits in Europe, the Middle East and Africa (EMEA) which LinkedIn Corporation may save as a result of its LinkedIn Ireland/LinkedIn Technology structure. From LinkedIn's public financial filings in the USA, and accounts filed with Ireland's Companies Registration Office, we have figures for LinkedIn's EMEA revenues, booked in Ireland (row D). We know that 25% of these EMEA revenues is paid out of Ireland to a no-tax jurisdiction as royalties. We therefore assume that without the Irish structure, the revenues paid out as royalties would in reality accrue to a higher-tax jurisdiction where the IP was developed or is being exploited. We take a conservative estimate that this jurisdiction would have a tax rate of perhaps 20% (though possibly higher, since much of LinkedIn's IP is likely to have been developed in the USA). Applying a 20% tax rate to the likely royalties paid out each year provides a maximum figure for the possible tax saving.

This estimate is undeniably crude – it does not account, for instance, for the counterbalancing tax on the acquisition of the IP – but gives approximate figures for the tax savings that may result from the structure.

Source			2010	2011	2012	2013	2014	2015	2010-15	2010-14
LinkedIn 10-K filings	A	Net revenue	243099	522189	972309	1528545	2218767	2990911	8475820	5484909
LinkedIn 10-K filings	B	Pre-tax profit	18966	22942	57114	49228	31205	-214730	-35275	179455
B/A	C	Pre-tax profit margin	7.80%	4.39%	5.87%	3.22%	1.41%	-7.18%	-0.42%	3.27%
LinkedIn 10-K filings	D	Net revenue (EMEA)	47463	109995	217342	358244	554567	730244	2017855	1287611
D*0.25	E	25% EMEA net revenue as royalties (1)	11866	27499	54336	89561	138642	182561	504464	321903
E*0.2	F	Tax on royalties at 20%	2373	5500	10867	17912	27728	36512	100893	64381
	G	Annual average							16815	12876

(1) 25% figure taken from LinkedIn Technology Ltd accounts

These examples show clearly how international tax agreements and transfer pricing rules continue seriously to limit Ireland's legislative efforts to prevent multinational businesses from using Ireland entirely lawfully as a platform for reducing their European and U.S. tax bills.

Reliant as they are on residence provisions in Ireland's OECD-standard tax treaties and EU laws governing the cross-border taxation of royalties, rather than on previous peculiarities of Irish tax-residency rules, couldn't such 'son of Double Irish' structures be set up in any EU member state? Why not double-English structures, or double-Dutch structures? It may be that multinationals are exploring other EU jurisdictions as booking

centres and royalties conduits to replace Double Irish structures. But amongst its EU peers, Ireland remains an almost uniquely attractive booking centre for sales of goods and services conducted around the world for at least three reasons.

- First, because of Ireland's comparatively very low 12.5% tax rate on trading profits. This low rate means that the tax liability on sales booked through Ireland – a tax liability which must be negated in such structures through royalty out-payments - is much lower to start with than it would be in many other EU countries.
- Second, because Ireland has opted out of the key provision of the OECD Multilateral Instrument (MLI), Article 12, designed to prevent sales being made in one country but booked in another (other EU member states have also opted out of Article 12, but not all).
- Third, because such structures often rely on multinationals being able to set at a very high level the royalty out-payments made by Irish 'booking centre' subsidiaries to tax-haven affiliates; and also for multinationals to set low internal prices, for tax purposes, to shift IP into Irish companies from the companies (usually in higher-tax jurisdictions) that actually developed the IP. Irish transfer pricing rules lag behind the latest revisions of the OECD transfer pricing guidelines, and particularly the BEPS recommendations on the transfer pricing of intangible assets (BEPS Action 8) in both areas. As the Department of Finance's September 2017 independent review of the corporation tax notes pointedly, this lag may in some cases "result in Ireland exercising taxing rights in respect of business profits that may appropriately be allocated to another jurisdiction in which the initial R&D was carried out. This outcome would not be in line with the key objective of BEPS Actions 8-10 to align transfer prices with economic substance."⁷³

Effective preventative measures will require more than changing tax-residency rules in domestic law. They might include:

- **Negotiating changes to Ireland's bilateral tax treaties to ensure that Irish-registered companies must also be Irish tax-resident, without exception.** This would prevent Irish-registered companies having tax residencies in low-tax environments, and thus stop multinational structures siphoning royalties income into such 'treaty tax havens'. This would in turn remove multinationals' incentive to book sales around the world in Ireland rather than in the countries, including developing countries, where the sales are actually made.
- **Removing its reservation to Article 12 of the MLI.** Agreeing to Article 12 would help prevent multinationals from booking sales in Ireland that are actually made in other countries, including developing countries – the first step in structures like the Double Irish, and the one which directly deprives those other countries of tax revenues. **TDs will have the opportunity to reverse this reservation when they debate the MLI's ratification during 2018.**
- **Applying more stringent transfer pricing rules to the valuation of IP and of returns to IP.** This would reduce the effectiveness of multinationals shifting profits from its sales around the world into tax havens through Double Irish-type structures, by ensuring that the tax-haven company could only acquire the IP for which it receives royalties by paying a fair price, properly reflecting the future income stream to that IP, to the affiliate in a higher-tax jurisdiction which actually developed the intellectual property. This payment would be taxable, reducing the amount of tax saved by moving the IP to a tax haven.

It is not the purpose of this report to design or recommend such reforms in detail, any of which would need to be carefully and comprehensively designed, and instituted alongside corresponding reforms by Ireland's tax treaty partners and other EU countries. Rather, it is to point out that, contrary to the Irish government's confident statements, and those of its 2015 'Spillover analysis', widely-heralded tax reforms have in fact failed to close down even the most celebrated of Ireland's tax avoidance structures. Such structures, and their successors, will not be ended without more fundamental changes to the key features of Ireland's international tax regime, and in some cases its tax agreements with other countries, that make these structures work.

Footnotes

1. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p 62
2. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p 7
3. Robert W. Wood, "How Google Saved \$3.6 Billion Taxes From Paper 'Dutch Sandwich'", Forbes, 22 December 2016; U.S. Senate, Permanent Subcommittee on Investigations, Hearing on Offshore Profit Shifting and the U.S. Tax Code, Exhibit 1a (20 September 2012), <http://www.hsgac.senate.gov/download/?id=7B9717AF-592F-48BE-815B-FD8D38A71663>
4. Financial Statement of the Minister for Finance, 14 October 2014, <http://www.budget.gov.ie/Budgets/2015/FinancialStatement.aspx>
5. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p. 8, 61
6. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p. 61.
7. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p.7. Emphasis added.
8. <http://www.pearse-trust.ie/blog/irish-wht-considerations-on-outbound-interest-and-royalty-payments> accessed 23 July 2017.
9. This change of practice reportedly followed lobbying by Feargal O'Rourke of PwC, who represents a number of large tech firms on tax issues in Ireland. See Jesse Drucker, 'Man Making Ireland a Tax Avoidance Hub Proves Local Hero', Bloomberg News, 28 October 2013, <https://www.bloomberg.com/news/articles/2013-10-28/man-making-ireland-tax-avoidance-hub-globally-proves-local-hero>. A practice note on the Revenue website confirms that this is still the case. Board of Revenue Commissioners, Statement of Practice SP/CT 01-10: Corporation Tax - Treatment of Certain Patent Royalties Paid to Companies Resident Outside the State, <http://www.revenue.ie/en/practitioner/law/statements-of-practice/>. I am grateful to Mary Cosgrove for pointing this out.
10. With the exception of hydrocarbon companies and (for the UAE) branches of foreign banks.
11. See treaty rates at <http://www.revenue.ie/en/practitioner/law/tax-treaties-rates.html>
12. Cliff Taylor, 'Multinationals still able to use 'Double Irish' tax arrangement after 2020', Irish Times, 9 November 2016, <https://www.irishtimes.com/business/economy/multinationals-still-able-to-use-double-irish-tax-arrangement-after-2020-1.2860102>
13. Jake Bullinger, 'Latest Microsoft Phone Targets Developing Markets', 425 Business, 5 January 2015; <http://425business.com/latest-microsoft-phone-targets-developing-markets/>; Microsoft Inc, Annual Report 2016, <https://www.microsoft.com/investor/reports/ar16/index.html>.
14. 'International pact launched to end tax 'treaty shopping'', Irish Times, 7 June 2017, <https://www.irishtimes.com/business/economy/international-pact-launched-to-end-tax-treaty-shopping-1.3111287>
15. Department of Finance, Ireland: Status of List of Reservations and Notifications at the Time of Signature (<http://www.oecd.org/tax/treaties/beps-mli-position-ireland.pdf>)
16. This figure is likely to be a considerable underestimate because it discounts entirely royalties/licence fees paid to the USA, although a substantial proportion of these payments are likely to be to corporations in Delaware, a jurisdiction commonly used as a tax haven for foreign-source IP income, since Delaware tax on income relating to intangible assets held by a "Delaware Holding Company," or a "Passive Investment Company (PIC)" is 0%. Such companies can also elect to be a disregarded entity for U.S. federal tax purposes, thereby not owing any tax on non-U.S.-source income (since U.S. tax liability then falls to the owner of the company, typically not U.S. tax resident).
17. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p.37.
18. Jake Bullinger, 'Latest Microsoft Phone Targets Developing Markets', 425 Business, 5 January 2015; <http://425business.com/latest-microsoft-phone-targets-developing-markets/>; Microsoft Inc, Annual Report 2016, <https://www.microsoft.com/investor/reports/ar16/index.html>.
19. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p.8.
20. Louise Kelly, 'Looking to the future: Life after the Double Irish', International Tax Review, 24 February 2015, <http://www.internationaltaxreview.com/Article/3430276/Looking-to-the-future-Life-after-the-Double-Irish.html>
21. Louise Kelly, 'Looking to the future: Life after the Double Irish', International Tax Review, 24 February 2015, <http://www.internationaltaxreview.com/Article/3430276/Looking-to-the-future-Life-after-the-Double-Irish.html>
22. S. Coffey/Ministry of Finance, Review of Ireland's Corporation tax code (12 September 2017), pp.124-127, <http://www.finance.gov.ie/wp-content/uploads/2017/09/170912-Review-of-Irelands-Corporation-Tax-Code.pdf>

23. Figures are not available for tax relief claimed on the acquisition of IP acquisition interest.
24. <http://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/saveselections.asp>
25. <http://www.revenue.ie/en/corporate/documents/research/corporation-tax-returns-2016.pdf>
26. Depending on the transfer pricing of the internal prices paid for the IP's acquisition by Irish affiliates of the multinationals concerned.
27. Department of Finance, Summary of 2015 Budget Measures – Police Changes, A11, <http://www.budget.gov.ie/Budgets/2015/Documents/2%20Summary%20of%202015%20Budget%20Measures%2014%20Oct%2000.09.pdf>
28. This figure is the reduction or deferral of corporate tax liability as a result of the capital allowances. It is not, of course, necessarily equivalent to revenue foregone by the Irish government, since without the rule change, the increase in the uptake of the capital allowances would likely have been considerably smaller. It may also vary depending on whether the claimants can realise the full capital allowance benefit in one year alone, or whether the capital allowance is used over several years.
29. Central Statistics Office, Table BPA04 released 21 September 2017, <http://www.cso.ie/en/releasesandpublications/er/its/internationaltradeinservices2016/>
30. This is consistent with the BEPS 'modified nexus' approach. Board of Revenue Commissioners, Guidance Notes on the Knowledge Development Box (August 2016), <http://www.revenue.ie/en/about/foi/s16/income-tax-capital-gains-tax-corporation-tax/part-29/29-03-01.pdf>
31. IBFD/Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), p.7
32. With the exception of hydrocarbon companies and (for the UAE) branches of foreign banks.
33. See treaty rates at <http://www.revenue.ie/en/practitioner/law/tax-treaties-rates.html>
34. <https://www.mccannfitzgerald.com/knowledge/international-tax/tax-attractions-of-irish-holding-companies->
35. See e.g. Grant Thornton's explanation of using the quoted Eurobond exemption to reduce all taxation on S110 companies to 0%: Grant Thornton, SPV Taxation (30 September 2015), <https://www.grantthornton.ie/globalassets/1.-member-firms/ireland/insights/publications/grant-thornton---spv-taxation.pdf>.
36. http://www.matheson.com/images/uploads/documents/Matheson2__Ireland_-_The_SPV_Jurisdiction_of_Choice_for_Structured_Finance_Transactions.pdf
37. A&L Goodbody, Irish Finance Companies: a guide to tax issues (n.d.), <https://www.algoodbody.com/media/Irishfinancecompanies-aguidetotaxandlegalissuesJan20121.pdf> For controversy in the UK parliament regarding the use of the UK's quoted Eurobond exemption for intra-group debt to avoid withholding taxes, see Emily Dugan, Richard Whittell, 'Taxman faces grilling over Quoted Eurobond Exemption scandal', Independent (UK), 27 October 2013, <http://www.independent.co.uk/news/uk/politics/taxman-faces-grilling-over-quoted-eurobond-exemption-scandal-8907688.html>
38. Charlie Taylor, 'Department of Finance closes vulture fund loophole', Irish Times, 26 July 2017, <https://www.irishtimes.com/business/economy/departement-of-finance-closes-vulture-fund-loophole-1.2781681>
39. CBI, Statistical Release : Special Purpose Entities (SPEs) Statistics Q12017, 18 July 2017, <https://centralbank.ie/docs/default-source/statistics/data-and-analysis/other-financial-sector-statistics/financial-vehicle-corporations/2017q1-ie-spe-publication.pdf?sfvrsn=6>. In Q12017, there were 875 'Financial Vehicle Corporations' (S110s involved in securitisation), holding assets of €410bn; and 981 'other Special Purpose Entities' (S110s not involved in securitisation) holding assets of €353bn.
40. CBI, Statistical Release : Special Purpose Entities (SPEs) Statistics Q12017, 18 July 2017, <https://centralbank.ie/docs/default-source/statistics/data-and-analysis/other-financial-sector-statistics/financial-vehicle-corporations/2017q1-ie-spe-publication.pdf?sfvrsn=6>, Chart 3.
41. Email correspondence with Statistics Division, Central Bank of Ireland, 19 July 2017. I am grateful to the generous help of the CBI statistics division staff to access and interpret this statistical release.
42. For instance, Ireland's new tax treaties with Pakistan and Zambia (2015)
43. See the authoritative commentary on Article 4(3) of the the OECD model convention on double taxation: "The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions"
44. Jeffrey L. Rubinger and Summer Ayres LePree (tax partners at Bilzin Sumberg), 'Death of the Double Irish Dutch Sandwich? Not so fast', 23 October 2014, at <http://www.taxeswithoutbordersblog.com/2014/10/death-of-the-double-irish-dutch-sandwich-not-so-fast/>
45. Council Directive 2003/49/EC of 3 June 2003 on a

- common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Official Journal of European Union, L157/49, 26 June 2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0049:en:HTML>).
46. See, for instance, this description by Culhane Meadows Haughian and Walsh PLLC, <https://www.culhanemeadows.com/7098-2/>; see also Michael Pesta and Brian Barner (tax partners at BDO USA LLC), 'Reports of the Double Irish's death are greatly exaggerated', 1 May 2015, <http://www.thetaxadviser.com/issues/2015/may/tax-clinic-04.html>;
 47. Email correspondence with Summer Ayres Lepree (tax partner at Bilzin Sumberg Baena Price & Axelrod LLP, Miami, Florida), 24 July 2017.
 48. Corrieri Cilia Legal, Taxation of Intellectual Property in Malta (n.d.), www.ccllegal.com/mt/en-us/file.aspx?f=26B
 49. KPMG, Malta: Country Profile (February 2016), <https://assets.kpmg.com/content/dam/kpmg/mt/pdf/2016/06/mt-malta-country-profile.pdf>.
 50. Jamie Smyth, 'Adobe shows its creativity with Ireland tax base', Financial Times (UK), 12 September 2013.
 51. LinkedIn Corporation, SEC 10-K filing, various years. <https://www.sec.gov/Archives/edgar/data/1271024/000119312512094556/d260171d10k.htm>
 52. LinkedIn Ireland was registered as a limited company (LTD) on 10 November 2009. On 25 November 2013 it re-registered as an unlimited company (ULC), removing the requirement to file annual accounts with the Irish company registry. In October 2016 it changed its name formally to LinkedIn Ireland Unlimited Company.
 53. LinkedIn Technology UK Ltd, annual accounts, various years.
 54. LinkedIn Ireland Ltd, annual accounts, CY 2011, p.3.
 55. LinkedIn Technology Ltd annual accounts, CY 2011.
 56. LinkedIn Technology Ltd annual accounts, CY 2011; LinkedIn Corporation, SEC 10-K filing, various years. <https://www.sec.gov/Archives/edgar/data/1271024/000119312512094556/d260171d10k.htm>
 57. LinkedIn Corporation, SEC 10-K filing, CY 2011, p.92.
 58. LinkedIn Corporation, SEC 10-K filing, CY 2016.
 59. For calculations, see Annex 1.
 60. For a straightforward description, see European Parliament, Directorate-General for Internal Policies, Policy Department A (Economic and Scientific Policy), Corporate Tax Practices and Aggressive Tax Planning in the EU, IP/A/ECON/2015-08 (November 2015), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563446/IPOL_IDA\(2015\)563446_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563446/IPOL_IDA(2015)563446_EN.pdf)
 61. U.S. Senate, Permanent Subcommittee on Investigations, Hearing on Offshore Profit Shifting and the U.S. Tax Code, Exhibit 1a (20 September 2012), p. 9, <http://www.hsgac.senate.gov/download/?id=7B9717AF-592F-48BE-815B-FD8D38A71663>
 62. LinkedIn Technology Ltd, Annual Accounts, CY 2010, p.11.
 63. LinkedIn Technology Ltd, Annual Accounts, CY 2010, p.9.
 64. LinkedIn Corporation, Form 10-K, CY 2010, page F-16.
 65. U.S. Senate, Permanent Subcommittee on Investigations, Hearing on Offshore Profit Shifting and the U.S. Tax Code, Exhibit 1a (20 September 2012), <http://www.hsgac.senate.gov/download/?id=7B9717AF-592F-48BE-815B-FD8D38A71663>
 66. U.S. Senate, Permanent Subcommittee on Investigations, Hearing on Offshore Profit Shifting and the U.S. Tax Code, Exhibit 1a (20 September 2012), <http://www.hsgac.senate.gov/download/?id=7B9717AF-592F-48BE-815B-FD8D38A71663>
 67. LinkedIn IP Holdings I Unlimited Company, Form M, filed with Malta Registrar of Companies, 26 June 2017
 68. LinkedIn IP Holdings I Unlimited Company, Form M, filed with Malta Registrar of Companies, 26 June 2017.
 69. LinkedIn IP Holdings I Unlimited Company, Form M, filed with Malta Registrar of Companies, 26 June 2017. This description may also be legally important in classifying the firm's royalties income as active rather than passive income, and thus obtaining a 5% rather than 10% effective Maltese tax rate via its refund system. See below footnote 28.
 70. Zeltiq Aesthetics Inc, 10-K annual report, CY 2015, <http://investor.coolsculpting.com/secfiling.cfm?filingID=1628280-16-12690&CIK=1415336>
 71. Zeltiq Ltd, 2016 annual accounts.
 72. Zeltiq Aesthetics Inc, 10-K annual report, CY 2015, <http://investor.coolsculpting.com/secfiling.cfm?filingID=1628280-16-12690&CIK=1415336>
 73. S. Coffey/Department of Finance, Review of Ireland's Corporation tax code (12 September 2017), paras. 6.3.9-6.3.11, <http://www.finance.gov.ie/wp-content/uploads/2017/09/170912-Review-of-Irelands-Corporation-Tax-Code.pdf>

Acknowledgements:

Written by Mike Lewis

—

Edited by Sorley McCaughey

—

Infographics by Zero-G Studio

—

Design by Alan Murphy

—

For more information contact Sorley McCaughey at smccaughey@christian-aid.org

—

With thanks to Mary Cosgrove, Dr. Sheila Killian, Dr. Micheál Collins, Prof. Jim Stewart

Christian Aid Ireland is an international development organisation. We work globally for structural change that eradicates the causes of poverty, striving to achieve equality and dignity for all, regardless of faith or nationality. We are part of a wider movement for social justice. We provide urgent, practical and effective assistance where need is greatest, tackling the effects of poverty, as well as its root causes.

Tax injustice is one of the fundamental obstacles to developing countries moving beyond a reliance on aid. Since 2007, we have worked to challenge and change international tax rules that keep people in poverty and entrench inequality between and within countries.



Christian Aid Ireland
Canal House, Canal Road
Ranelagh, Dublin 6
+353(0)14967040
www.christianaid.ie