

Apple's Golden Delicious Tax Deals:



Is Ireland helping Apple pay
less than 1% tax?

European United Left • Nordic Green Left



EUROPEAN PARLIAMENTARY GROUP

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A report for GUE/NGL by Emma Clancy and Martin Brehm Christensen

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Is Ireland helping Apple pay less than 1% tax in the EU?

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A study carried out for the European United Left/Nordic Green Left (GUE/NGL group) in the European Parliament.

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Summary and key findings

This report was commissioned by GUE/NGL members of the European Parliament's TAX3 special committee on tax evasion, tax avoidance and money laundering. It examines the corporate tax rate paid by Apple globally and in the European Union (EU) over the period 2015-2017, after it made significant changes to its corporate structure in 2015. These changes were made in response to the United States (US) Senate Subcommittee on Investigations examination of Apple's tax affairs in 2013, the European Commission's 2014 investigation into state aid provided by Ireland to Apple, and the changes to Irish tax residence law ending the ability of companies to be "stateless" for tax purposes. In addition to estimating the effective corporate tax rate Apple has paid from 2015-2017, this report also examines the nature of Apple's 2015 corporate restructure, and the methods it uses to continue to avoid paying tax today. Lastly, it examines the features of Irish tax law and policy that facilitate Apple's ongoing tax avoidance.

Tax rate in the European Union and globally 2015-2017

- 1) Apple may have paid as little as 0.7% tax in the European Union (EU) from 2015-2017.
- 2) Using data from Apple Inc's 10-K filings to the US Securities and Exchange Commission, we estimate that as a result of the new Irish structure, and Apple's broader global tax structure, Apple's tax rate for the period 2015-2017 for its non-US earnings is between 3.7% and 6.2%.
- 3) Two alternative calculations of the average rate paid on non-US earnings reach similar results, of between 4.5% and 6.7%, and between 4.7% and 6.9%.
- 4) Using data from Apple Inc's 10-K filings to the US Securities and Exchange Commission we estimate that Apple is paid corporate tax at a rate of between 1.7% and 8.8% in the European Union during the period 2015-2017. This estimate assumes that Apple's provisions for foreign tax equals money actually transferred to foreign governments.
- 5) If we assume the highly likely scenario that Apple's provisions for foreign tax is substantially smaller than the amount actually transferred to foreign governments, we estimate that Apple may have paid as little as 0.7% tax in the EU from 2015-2017.
- 6) Applying the range of estimated tax rates paid in the EU from 2015-2017, we estimate that Apple has avoided paying between €4 billion and €21 billion in tax to EU tax collection agencies from 2015-2017.

Apple's Irish restructure in 2015

- 7) Apple's new European tax structure remains shrouded in secrecy, partially due to a lack of financial transparency in Ireland and Jersey. Most of its financial information remains secret globally.
- 8) Apple continues to use Ireland as the centrepiece of its tax avoidance strategy. Following the US Senate inquiry (2012-2013) and the initiation of the European Commission's state aid investigation into Ireland (2014), Apple organised a new structure in 2015 that included:
 - The relocation of its non-US sales from 'nowhere' to Ireland;

- The relocation of much of its intellectual property from ‘nowhere’ to Ireland;
- The relocation of its overseas cash to Jersey.

9) As well as relying on the information revealed in the Paradise Papers and Apple’s statement responding to these revelations, this restructure can be observed in the macro-economic data of Ireland from 2014-2018, particularly in the first quarter of 2015. Major changes occurred in Ireland’s GNP, GDP, exports, imports, investment, external debt and more. Despite the relocation of sales income and intellectual property to Ireland, there was no observable corresponding increase in corporation tax received from Apple by Irish Revenue.

10) With the assistance of the Irish government, Apple has successfully created a structure that has allowed it to gain a tax write-off against almost all of its non-US sales profits.

Apple is achieving this by using:

- A capital allowance for depreciation of intangible assets at a rate of 100% (this rate will be capped at 80% from 2017, but the cap will not apply to the intangible assets brought onshore from 2015-2016, which can still benefit from the 100% rate);
- A massive outflow of capital from its Ireland-based subsidiaries to its Jersey-based subsidiaries in the form of expenditure on IP and debt;
- Interest deductions of 100% on this intra-group debt;
- Meeting the payment of its cost-sharing agreement with Apple Inc for research and development by availing of R&D tax credits provided under Ireland’s tax law that allows Apple and other companies to pay tax on R&D activities at a rate of just over 3%.

11) The Irish government introduced the 100% rate on capital allowances for intellectual property (IP) following a recommendation made by the American Chamber of Commerce in Ireland in 2014.

12) The law governing the use of capital allowances for IP is not subject to Ireland’s transfer pricing legislation, but it includes a prohibition from being used for tax avoidance purposes. Apple is potentially breaking Irish law by its restructure and its exploitation of the capital allowance regime for tax purposes. If the same legal reasoning used in the European Commission’s state aid ruling on Apple and Ireland is applied, Apple is in breach of Irish tax law, and owes Irish Revenue at least 2.5 billion additional euros in unpaid tax annually from the period 2015-2017.

13) The use of this structure has contributed to a significant increase in the amount of cash Apple is sitting on in offshore tax havens.

Features of Irish tax law that enable Apple’s tax avoidance

14) Apple is unlikely to be the only multinational corporation using this structure, which is advertised as a typical structure used by large corporations involved in trading in intellectual property by corporate law firms. We have called it the “Green Jersey” in reference to the use of the Jersey-based subsidiary by Apple, though it is not strictly necessary to use an offshore tax haven as Apple has.

15) The essential features of the Green Jersey scheme are:

- It can be used by large multinational corporations engaged in trading IP;

- It has specifically been designed by the Irish government to facilitate near-total tax avoidance by the same companies who were using the Double Irish tax avoidance scheme;
- While the Double Irish was characterised by the flow of outbound royalty payments from Ireland to Irish-registered but offshore tax-resident subsidiaries, this scheme is characterised by the onshoring of IP and sales profits to Ireland;
- Sales profits are booked in Ireland, but the expenditure the company incurs in the once-off purchase of the IP license(s) can be written off against the sales profits for years by using the capital allowance programme for intangible assets;
- It is beneficial for the company to complement the tax write-off by continuing to use an offshore subsidiary, but not for outbound royalty payments to flow to. The role of the offshore subsidiary is to store cash and provide loans to the Irish subsidiary to fund the purchase of the IP. The expenditure on the IP is written off, but so too are the associated interest payments made to the offshore subsidiary, which thus accumulates more cash that goes untaxed.

16) Many of the features of Irish tax law that were identified as factors facilitating tax avoidance in the Commission’s state aid ruling remain partially or fully in place in Ireland. Despite the announced phase-out of the Double Irish scheme, we have found that the “management and control” provision allowing the creation of Double Irish structures remains in place through several of Ireland’s tax treaties, including treaties with states considered to be tax havens.

17) Several other key features of Ireland’s tax regime that were criticised in the context of the Apple state aid ruling, and which remain fully or partially in place, include:

- Ireland’s intellectual property tax regime including R&D credits that are open to abuse, and the lack of withholding taxes on outbound patent royalty payments;
- The use of private “unlimited liability company” (ULC) status, which exempts companies from filing financial reports publicly. The fact that Apple, Google and many others continue to keep their Irish financial information secret is due to a failure by the Irish government to implement the 2013 EU Accounting Directive, which would require full public financial statements, until 2017, and even then retaining an exemption from financial reporting for certain holding companies until 2022;
- Ireland’s one-way transfer pricing laws that examine only the Irish-resident party involved in a transaction;
- Continued use of Advanced Pricing Agreements and Revenue “opinions”, which may not be subject to the same requirements on mandatory automatic exchange of information between EU member states under the third EU Directive on Administrative Cooperation.

What corporate tax rate is Apple paying today?

A picture of Apple's corporate structure today according to available data

Apple does not disclose the profits and taxes for the individual countries in which it operates. With regard to tax payments there is only a single distinction between the provision for tax in the USA and for "foreign" taxes (i.e. non-US). With regard to "operating profit", amounts are published only for five overall geographical segments¹: the Americas, Europe, Greater China, Japan and Rest of Asia Pacific. Americas includes both North and South America. Europe includes European countries, as well as India, the Middle East and Africa.

Looking at the global allocations of profits and sales across these five segments, profits roughly correspond to the size of net sales (see table 1 for 2017). Japan has the highest ratio between sales and operating income (0.46). Europe has the lowest (0.30) and these ratios do not change over the period 2015-2017.

However, looking at the provisions for income tax, the picture changes radically: there are only two numbers, one for the USA and another for the rest of the world (in the rest of this study the latter will be referred to as the "non-US" provision for income tax). Almost 90% of the total tax provision is allocated to the USA. We may ask why so little provision for income tax is placed outside the USA when Apple's own numbers state that more than half of the sales and operating income is outside the Americas². Where is this non-US tax paid? Does it correspond to the statutory tax rates in the countries where Apple operates, and if it doesn't, how does Apple then organise its business to facilitate such tax avoidance?

TABLE 1
Apple's global allocation of tax, net sales and operating income 2017

Table 1 Apple's global allocation of tax, net sales and operating income	Provision for income tax (billion USD)	Net Sales (billion USD)	Operating income (note: this is not pre- tax earnings) (billion USD)	Ratio between operating income and net sales (%)
Americas	13,9* (only for the USA)	96,6	30,7	32,0%
Europe		54,9	16,5	30,1%

¹ Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual

"The Company's reportable segments consist of the Americas, Europe, Greater China, Japan and Rest of Asia Pacific. Americas includes both North and South America. Europe includes European countries, as well as India, the Middle East and Africa. Greater China includes China, Hong Kong and Taiwan. Rest of Asia Pacific includes Australia and those Asian countries not included in the Company's other reportable segments."

² Apple does not disclose tax payments for the segment. For table 4, 5, 6, 10 and 11 use total non-US provision for tax income calculated as percentage of the total non-Americas earning (see more under "Assumptions"). This implies that sales and profits in Canada and Latin America (which together with USA constitutes the Americas segment) are excluded in the total non-Americas earnings but included in the non-US income tax provision. Again, this seems a conservative estimate, as the estimated tax rates comes out higher that would be the case if data for sales and profit had been available for Canada and Latin America.

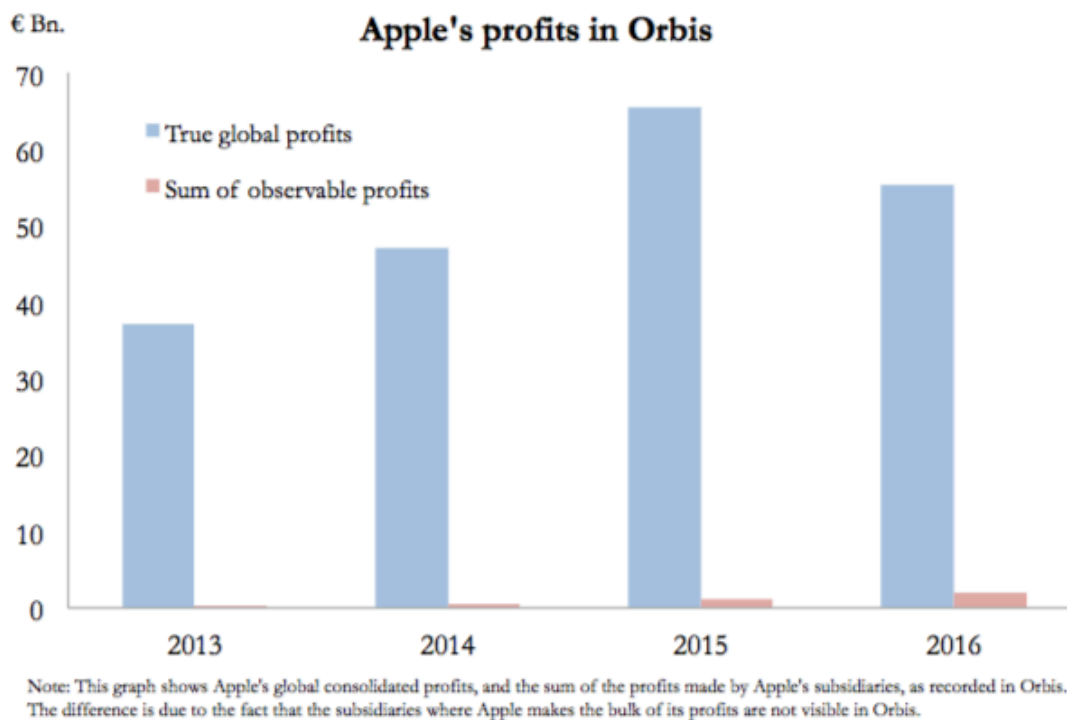
Greater China	1,7* (for all non-US)	44,8	17,0	38,0%
Japan		17,7	8,1	45,7%
Rest of Asia Pacific		15,2	5,3	34,9%
Non-Americans		132,6	46,9	35,4%

*Apple does not publish the amount for provision for income tax for the “non-Americans” taxes. Therefore, the amount for provision for income tax for the non-US is used instead. The misalignment between the Americas” segment and the USA, is described in the section below called ”assumptions”.

Source: Data for the table has been obtained from Note 10 of Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?DocType=&ndq_keyword= accessed June 2018

According to the world’s largest business database, Orbis, Apple had 241 subsidiaries in June 2018. It is plausible that Apple has additional subsidiaries for which Orbis has not succeeded in obtaining any information³. Moreover, Orbis holds financial information for only 37 out of Apple’s 241 subsidiaries, which means that about 80% of Apple subsidiaries disclose no financial information.

Apple’s profits invisible in Orbis database



Source: Tørsløv, T, Ludvig Wier and Gabriel Zucman (2018). ‘The Missing Wealth of Nations’, <http://gabriel-zucman.eu/files/TWZ2018.pdf>

Apple in Jersey and Cayman Islands

³ Some countries may have poor transparency standards and do not disclose any data from their national company registries and thus Orbis cannot know about them.

The Paradise Papers leak revealed that Jersey was to play a significant role in Apple’s new Irish tax setup starting in December 2014⁴. However, Orbis shows no Apple presence in Jersey, and searching for Apple in Jersey’s company register also proved fruitless. Thus, it is not possible for the public and investors to know exactly what Apple’s subsidiaries are engaged in in Jersey.

Orbis also shows that Apple has a subsidiary in the tax haven of the Cayman Islands. Its name is Xiaoju Kuaizhi Inc, and this subsidiary appears to play a central role in Apple’s company structure as it is the owner (parent company) of another 43 subsidiaries across most of the world. Xiaoju Kuaizhi Inc discloses no financial information in Orbis, and when searching for Xiaoju Kuaizhi Inc in the Cayman Island’s company register the result was “Name of entity not found”⁵.

TABLE 2
Number and transparency of Apple’s subsidiaries in EU countries.

Country	Total number of subsidiaries	Number of opaque subsidiaries
Sweden	1	
Czech	2	1
France	2	
Austria	1	1
Germany	4	2
Hungary	1	
Italy	4	
Spain	2	
Ireland	7	7
UK	6	3
Netherlands	3	1
Poland	1	
Portugal	1	
Belgium	1	
Finland	2	1
Estonia	4	3
Romania	1	1

Source: Orbis database, <https://www.bvdinfo.com> , see Appendix 1 for full dataset.

⁴ By the start of 2015, it had restructured its affairs in Ireland, including securing tax residency in Jersey for Apple Sales International and Apple Operations International, or close to 60 percent of Apple’s worldwide earnings. <https://www.icij.org/investigations/paradise-papers/apples-secret-offshore-island-hop-revealed-by-paradise-papers-leak-icij/>

⁵ The Cayman Island’s company register, <https://www.cima.ky/search-entities>

Apple's seven significant subsidiaries

In its Annual Report, Apple provides a list of significant subsidiaries. It states that “the names of other subsidiaries of Apple Inc. are omitted because, considered in the aggregate, they would not constitute a significant subsidiary as of the end of the year covered by this report”. Ireland does not disclose this financial information as Apple has five of its seven “significant subsidiaries” incorporated in Ireland.

Subsidiaries of Apple Inc.*	
	<u>Jurisdiction of Incorporation</u>
Apple Sales International	Ireland
Apple Operations International	Ireland
Apple Operations Europe	Ireland
Braeburn Capital, Inc.	Nevada, U.S.
Apple Operations	Ireland
Apple Computer Trading (Shanghai) Co., Ltd.	China
Apple Distribution International	Ireland

Apple discloses no financial information regarding any of these seven subsidiaries in its annual report. In the database Orbis financial information can only be found one of these seven subsidiaries; Apple Computer Trading (Shanghai) Co., LTD. This subsidiary has large sales of USD 35 billion (presumably to the Chinese market) but very limited profits (less than 2% of sales) and therefore the provision for income tax is also very limited in relation to the large sales. Thus, the question of where profits are allocated⁶ and if/how they are taxed remains unanswered.

Apple's global tax rate outside the USA

In its 2017 annual report⁷ Apple states that its total foreign (i.e. non-US) earnings in 2017 was USD 44,6 billion, and the total foreign provision for income tax was only USD 1,66 billion. Table 3 shows that Apple's tax rates on foreign earnings were only 3.7% to 6.2% for the years 2015-2017.

TABLE 3
Average tax rate on non-US earning 2015-2017 (billion USD and %)

Table 3 (billion USD)			
Average tax rate on non-US earning 2015-2017	2017	2016	2015
Non-US pre-tax earnings	44,6	41,1	47,6
Non-US provision for income tax total	1,7	2,1	2,9

⁶ Moreover, Apple Computer Trading (Shanghai) Co., LTD holds only an insignificant amount of cash and cash equivalents (USD 748 million) according to Orbis

⁷ Apple Inc.'s ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934, For the fiscal year ended September 30, 2017 , <http://investor.apple.com/financials.cfm> accessed June 2018.

Average Non-US tax rate (in %)	3,7%	5,2%	6,2%
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Source: Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual, accessed June 2018.

If one aggregates the operating profit minus “R&D cost” and “Other corporate expenses, net” for the segments outside “the Americas” one arrives at a figure a bit smaller than the “non-US” pre-tax earnings listed above. The implications of this mis-fit between “non-US” and “non-Americas” is explained below in the section Assumptions.

Calculating the average tax rate outside the Americas this way, the result is a tax rate between 4.5% and 6.7% for 2015-2017 (see appendix 3 for calculations).

TABLE 4
Average tax rate based on “non-American” operating profits minus “R&D cost” and “Other corporate expenses, net” (billion USD and %)

Table 4 (billion USD) Average tax rate based on “non-American” operating profits minus “R&D cost” and “Other corporate expenses, net”.	2017	2016	2015
Pre-tax earnings estimated as Total Operating profits minus “R&D cost” and “Other corporate expenses, net” for the segments outside the “Americas”.	37,1	37,3	44,7
Non-US provision for income tax total (non-American taxes are not available)	1,7	2,1	2,9
Average Non-US tax rate (in %)	4,5 %	5,7 %	6,6%

Source: Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018 (see appendix 3 for calculations).

Using Apple’s geographical segments’ net sales minus “Total cost of sales” and “Operating Expenses” we again come close to the averages above. The tax rate ranged between 4.7% and 6.9% for 2015-2017(see appendix 4 for calculations).

TABLE 5
Average tax rate based on “non-American” segments’ net sales minus “Total cost of sales” and “Operating Expenses”. (billion USD and %)

Table 5 (billion USD) Average tax rate based on “non-American” segments’ net sales minus “Total cost of sales” and “Operating Expenses”.	2017	2016	2015
Pre-tax earnings estimated as Total “net sales” minus “Total cost of sales” and “Operating Expenses” for the segments outside the “Americas”.	35,5	35,9	42,6
Non-US provision for income tax total (non-American taxes are not available)	1,7	2,1	2,9
Average Non-US tax rate (in %)	4,7 %	6,0 %	6,9 %

Source: Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018. (see appendix 4 for calculations).

Apple's earning and tax payments in the EU

Apple's geographical segment "Europe" includes European countries, as well as India, the Middle East and Africa. As Apple does not disclose financial data for individual countries it is not possible to know exactly how much of these sales takes place in EU countries, but a qualified guess goes as follows:

According to documents posted with the Indian Registrar of Companies, the Apple subsidiary Apple India Pty. Ltd had sales in India of USD 1.8 billion for the year ending March 2017, and USD 1.5 billion and 1.0 for 2016 and 2015 respectively⁸.

The number for Africa and the Middle East is likely smaller as this market is smaller, and Apple held only a 3%-7% market share in 2015-2016 in Africa and the Middle East⁹.

Apple's 2016 net sales in Russia totalled USD 2.0 billion, and in 2015 USD 1.2 billion¹⁰.

Taking into account other European non-EU countries (e.g. Norway and Switzerland), a rough guess is that 90% of the Europe segment's sales and operating income go to EU countries (see appendix 5 for calculations).

Undistributed earnings generated in Ireland

If Apple repatriates its international income back to the USA, for instance to use it to pay dividends to shareholders, Apple would have to pay US tax on the repatriated income. In order to avoid paying this tax Apple keeps most of its international profit outside the USA. In its annual reports Apple itself states that "substantially all of the Company's undistributed international earnings intended to be indefinitely reinvested in operations outside the U.S. were generated by subsidiaries organised in Ireland"¹¹.

⁸ <https://www.livemint.com/Companies/eKxCasrqfunWnccPHIwndN/Apple-India-sales-rise-17-to-18-billion-in-201617.html>

⁹ <https://stepfeed.com/iphone-sales-skyrocket-in-middle-east-and-africa-in-2015-7439> and <https://thenerveafrica.com/4801/apple-vs-samsung-the-great-smartphone-battle-is-coming-to-africa/>

¹⁰ <https://themoscowtimes.com/news/apple-reports-record-profits-in-russia-58523>

¹¹ Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual, page 55

"The foreign provision for income taxes is based on foreign pre-tax earnings of \$44.7 billion, \$41.1 billion and \$47.6 billion in 2017, 2016 and 2015, respectively. The Company's consolidated financial statements provide for any related tax liability on undistributed earnings that the Company does not intend to be indefinitely reinvested outside the U.S. Substantially all of the Company's undistributed international earnings intended to be indefinitely reinvested in operations outside the U.S. were generated by subsidiaries organized in Ireland, which has a statutory tax rate of 12.5%. As of September 30, 2017, U.S. income taxes have not been provided on a cumulative total of \$128.7 billion of such earnings. The amount of unrecognized deferred tax liability related to these temporary differences is estimated to be \$42.2 billion. "As of September 30, 2017 and September 24, 2016, \$252.3 billion and \$216.0 billion, respectively, of the Company's cash, cash equivalents and marketable securities were held by foreign subsidiaries and are generally based in U.S. dollar-denominated holdings.

"Amounts held by foreign subsidiaries are generally subject to U.S. income taxation on repatriation to the U.S."

These undistributed earnings have increased by USD 59 billion in the three years 2015-2017¹² and, according to Apple, they have been generated in Ireland and should have been taxed accordingly (see table 6) (see appendix 5 and 6 for calculations). Whether these undistributed earnings have been taxed correctly is contested in the EU Commission’s state aid ruling case against Ireland for the years 2003-2014. For the years 2015-2017 Apple itself claims that USD 59 billion has been generated in Ireland. Table 6 (below) shows what the possible effective tax rate has been paid.

Cash, cash equivalents and marketable securities held in Apple subsidiaries

According to the EU Commission’s Decision of 30 August 2016, Apple’s holding of cash, cash equivalents and marketable securities through non-US subsidiaries “corresponds substantially to foreign profits which were not subject to taxation”¹³. According to the Commission it is likely that Apple’s holding of cash, cash equivalents and marketable securities has been generated by subsidiaries organised in Ireland¹⁴. These statements are debatable as the court proceedings of the EU Commission’s state aid allegation is still in progress. Likewise, because it is impossible to say to what degree this would apply to Apple’s 2015-2017 income and tax payments.

Nevertheless, Ireland remains at the centre of Apple’s non-US operations and, according to Apple’s annual reports, the total amount of cash, cash equivalents and marketable securities has increased by USD 115 billion during the three years 2015-2017. If this USD 115 billion is considered as generated in Ireland we get an even higher amount for Apple’s earnings in the EU (see table 6) (see appendix 5 and 6 for calculations).

TABLE 6
Estimates of Apple’s EU incomes and tax payments for the three years 2015-2017

Table 6## Estimates of Apple’s EU incomes and tax payments for the three years 2015-2017 (see appendix 6 for calculations).	billion USD	Estimated tax rate (in %)
Operating income for the EU segment combined for 2015-2017*	35,161*	
Cash, cash equivalents and marketable securities held in Apple subsidiaries 2015-2017	115,000	

¹² Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual

From the 2017 10-K, page 55: “The Company’s effective tax rates for 2016, 2015 and 2014 differ from the statutory federal income tax rate of 35% due primarily to certain undistributed foreign earnings, a substantial portion of which was generated by subsidiaries organized in Ireland, for which no U.S. taxes are provided when such earnings are intended to be indefinitely reinvested outside the U.S.”... As of September 30, 2017, U.S. income taxes have not been provided on a cumulative total of \$128.7 billion of such earnings.

From the 2014 10-K: “As of September 27, 2014, U.S. income taxes have not been provided on a cumulative total of \$69.7 billion of such earnings.”

¹³ EU COMMISSION DECISION of 30.8.2016 ON STATE AID SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP). <https://eur-lex.europa.eu/eli/dec/2017/1283/oj>, Recital (43)

¹⁴ Ibid, Footnote 10 in Recital (43)

Undistributed income generated subsidiaries organized in Ireland 2015-2017	59,000	
EU portion of non-US provision for income tax *	1,982*	
Total non-US provision for income tax payments 2015-2017.	6,731	
(1) Average tax rate 2015-2017 assuming EU income equals pre-tax earnings estimated as total Operating profits minus "R&D cost" and "Other corporate expenses, net". And tax payments estimated by assuming the EU portion of non-US provision for tax payments*		5.6*
(2) Average EU tax rate 2015-2017 assuming EU income equals the undistributed income generated by subsidiaries organized in Ireland, and the entire non-US provision for income tax were paid in EU.		8.8
(3) Average EU tax rate 2015-2017 assuming EU income equals the undistributed income generated by subsidiaries organized in Ireland, and tax payments equals the EU portion of non-US provision for income tax *.		3.4*
(4) Average EU tax rate 2015-2017 if EU income equals "cash, cash equivalents and marketable securities", and the entire non-US provision for income tax were paid in Europe.		5.9
(5) Average EU tax rate 2015-2017 if EU income equals "cash, cash equivalents and marketable securities", and tax payments equals the EU portion of non-US provision for income tax.		1.7*
* The EU portion of tax payments is estimated by apportioned the provision for all non-US provision for income tax according to geographical segments' portion of total operating profit, 2015-2017 (see appendix 5 for calculation). And in the case of (1) the same technique is used to estimate the EU portion of "R&D cost" and "Other corporate expenses, net".		

Source: Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018. (see appendix 6 for calculations).

The above estimate points to a tax rate of Apple's EU income of between 1.7% and 8.8%. However, there are reasons to believe the rate could be even smaller, as will be explained in the following sections.

Assumptions

The estimates above are based on the following two assumptions:

Assumption 1

Unless otherwise stated, Apple's average rate for provision for income tax is assumed uniform for all non-US countries (i.e. that Apple should pay the same percentage on its income in the EU as in other non-US countries). This seems a conservative estimate as the average statutory corporate tax

rates are significantly lower in the EU compared to other major Apple markets outside the USA¹⁵ (see table 7).

TABLE 7
Tax rates in major Apple markets

Table 7 Tax rates in major Apple markets	Corporate Income Tax (CIT) rate 2018
China	25%
India	35%
Japan	31%
EU	21%

Source: See KPMG’s table of worldwide corporate income tax (CIT) rates, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>

Assumption 2

For tables 4, 5, 6, 10 and 11, the total non-US provision for income tax is calculated as a percentage of the total non-Americas earning, as the non-Americas provision for income tax is not available¹⁶. This implies that sales and profits in Canada and Latin America (which together with USA constitutes the Americas segment) are excluded in the total non-Americas earnings but included in the non-US income tax provision. This makes the estimation of tax rates less precise, but it is a conservative estimate, as the estimated tax rates comes out higher than would be the case if data for sales and profit had been available for Canada and Latin America.

Reasons to believe the effective tax rate is even lower

Assumption 3

The above tables and estimates assume that Apple’s provisions for foreign tax equals money actually transferred to foreign governments. However, it is likely this latter amount is substantially smaller.

Apple’s 10-K Cash Flow Statements do not disclose “Cash paid for income tax to foreign governments”; however, they do disclose the total “Cash paid for income taxes, net”. For 2015-2017 the total cash allocated for tax payments was only 70% of the total Provision for Income Tax (see Table 8).

¹⁵ See KPMG’s table of worldwide corporate income tax (CIT) rates, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>

¹⁶ EBITDA means “Earnings before interest, tax, depreciation and amortization”. In the estimate based on segments’ net sales, the income excludes “Total other income/(loss), net” which for the three years have been between 1,0 and -1,5 billion USD. These are excluded because there is NO reason to believe that there are equally allocated accross Apple Inc’s global operations. Moreover, as that amount has varied from + 1,0 to -1,5 the change to the total estimate would be minimal.

TABLE 8**Differences between cash allocated for tax payments and provision for tax payments in 2015-2017**

Table 8: Differences between cash allocated for tax payments and provision for tax payments in 2015-2017 (billion USD)	2017	2016	2015	Average
Cash flow allocated for income taxes, net	11,6	10,4	13,3	11,8
Provision for income taxes	15,7	15,7	19,1	16,8
Ration cash/provision	0,74	0,67	0,69	0,70

Source: Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018.

In its 2013 hearing the US Senate's Permanent Subcommittee on Investigations found a large discrepancy between Apple's federal tax returns filed to the Internal Revenue Service (IRS) and Apple's reported provisions for income tax as stated in its annual reports. Moreover, this discrepancy increased over the three-year period. Thus, in 2010 and 2011 the tax provisions in the annual reports were almost three times higher than the amount reported on actual tax return¹⁷.

TABLE 9**Differences between tax returns filed with the IRS and the tax provision in annual report (10-K) 2015-2017**

Table 9: Differences between tax returns filed with the IRS and the tax provision in annual report (10-K) 2015-2017. (billion USD)	2011	2010	2009	Average
U.S. tax reported paid on Form 1120 tax return filed with the IRS	2,5	1,2	1,6	1,8
Total Federal Tax Provision (current plus deferred) reported on 10-K annual report filed with SEC	6,9	3,8	3	4,6
Ratio between <i>tax returns</i> and <i>provision for income tax</i>	0,36	0,32	0,53	0,40

Source: United States Senate Permanent Subcommittee on Investigations Hearing May 21, 2013 On Offshore Profit Shifting and the U.S. Tax Code. Part 2 (Apple Inc.) www.hsgac.senate.gov/download/?id=B2F27D33-856B-4B2A-8B55-D045DC285978 accessed June 2018, AND , Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018.

Table 8 describes Apple's total tax payments where the cash allocated for tax only made up 70% of the tax provision in Apple's annual reports. Table 9 describes the US tax payments where the tax returns to the IRS only made up 40% of the tax provision in Apple's annual reports.

Table 10 (below) applies this range of 40%-70% to the estimates of the EU tax rates listed in Table 6.

¹⁷ Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual

TABLE 10
Estimates of Apple's effective tax rate in the EU in 2015-2017

	Tax rate as estimated in table 6 assuming amounts according to "provisions for foreign tax"	Applying the 2015-2017 ratio between "provision for income tax and cash flow statement's "Cash paid for income taxes, net"	Applying the 2009-2011 ration between "provision for income tax" and paid on tax return filed with the IRS
Table 10: Estimates of Apple's effective tax rate in the EU in 2015-2017 (in %)			
(1) Average tax rate 2015-2017 assuming EU income equals pre-tax earnings estimated as total Operating profits minus "R&D cost" and "Other corporate expenses, net". And tax payments estimated by assuming the EU portion of non-US provision for tax payments*	5.6	3.9	2.2
(2) Average EU tax rate 2015-2017 assuming EU income equals the undistributed income generated by subsidiaries organized in Ireland, and the entire non-US provision for income tax were paid in EU.	8.8	6.2	3.5
(3) Average EU tax rate 2015-2017 assuming EU income equals the undistributed income generated by subsidiaries organized in Ireland, and tax payments equals the EU portion of non-US provision for income tax *.	3.4	2.4	1.4
(4) Average EU tax rate 2015-2017 if EU income equals "cash, cash equivalents and marketable securities", and the entire non-US provision for income tax were paid in Europe.	5.9	4.1	2.4
(5) Average EU tax rate 2015-2017 if EU income equals "cash, cash equivalents and marketable securities", and tax payments equals the EU portion of non-US provision for income tax.	1.7	1.2	0.7

Source: United States Senate Permanent Subcommittee on Investigations Hearing May 21, 2013 On Offshore Profit Shifting and the U.S. Tax Code. Part 2 (Apple Inc.) www.hsgac.senate.gov/download/?id=B2F27D33-856B-4B2A-8B55-D045DC285978 accessed June 2018, AND , Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018.

Table 10 lists the range of possible effective tax rates for Apple's income in the EU with the minimum being 0.7% and the maximum being 8.8%.

The maximum possible effective tax rate is 8.8%. This estimate assumes that Apple's only income in the EU is the undistributed income Apple itself states was substantially generated in Ireland, and it assumes that the entire non-US tax provision was paid in the the EU.

The minimum possible tax rate is 0.7%. This estimate assumes that Apple’s income in the EU equals Apple increase in “cash, cash equivalents and marketable securities” in the years 2015-2017, and it assumes that Apple only paid taxes in the EU corresponding to the EU portion of non-US provision for income tax apportioned according to geographical segments’ operating profits (see table 6 and appendix 5). It assumes a discrepancy between the provision for tax payments and taxes actually paid equal to the discrepancy uncovered by the US Senate subcommittee in 2013 (see table 9).

What amount does the EU lose from Apple’s tax gimmicks?

In 2013 in a testimony to a Congressional panel, Apple CEO Tim Cook said, “We don’t use tax gimmicks”. In light of the above facts and estimates this statement seems questionable. It seems like a reasonable demand that Apple and other large corporations share with the public how much they actually pay in tax and where they pay it. Table 11 shows that EU citizens lose billions of euros every year¹⁸. From 2015 to 2017 it adds up to an amount between 4 billion and 21 billion euros.

TABLE 11
Estimates of Apple’s EU incomes and tax payments for the three years 2015-2017 (see Appendix 7)

Table 11 Estimates of Apple’s EU incomes and tax payments for the three years 2015-2017 (billion Euro , applying the average 2015-2017 Euro-Dollar exchange rate of 0,897)	Different estimates for Apple's EU income 2015-2017	Applying EU average tax rate of 21 %	Tax payments applying effective tax rate of 8,8%	Tax loss when applying effective tax rate of 8,8%	Tax payments applying effective tax rate of 0,7%	Tax loss when applying effective tax rate of 0,7%
Pre-tax earnings estimated as total Operating profits minus “ <i>R&D cost</i> ” and “ <i>Other corporate expenses, net</i> ” for the EU segment combined for 2015-2017	32	7	3	4	0.22	6
Undistributed income generated subsidiaries organized in Ireland 2015-2017	53	11	5	6	0.37	11
Cash, cash equivalents and marketable securities held in Apple subsidiaries 2015-2017	103	22	9	13	0.72	21

Source: United States Senate Permanent Subcommittee on Investigations Hearing May 21, 2013 On Offshore Profit Shifting and the U.S. Tax Code. Part 2 (Apple Inc.) www.hsgac.senate.gov/download/?id=B2F27D33-856B-4B2A-8B55-D045DC285978 accessed June 2018, AND , Data are from Apple Inc. 10-K filings to the US Securities and Exchange Commission (SEC). http://investor.apple.com/sec.cfm?ndq_keyword=&DocType=Annual accessed June 2018. , AND , KPMG’s table of worldwide corporate income tax (CIT) rates, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html> (see Appendix 7 for calculations)

¹⁸ Applying the average exchange rate over the years 2015-2017. <https://www.oanda.com/currency/average>

Apple's tax structure in Ireland post-2014

Senate investigation

While other US multinational corporations were using the Double Irish, Apple went above and beyond when it came to tax creativity. Apple's offshore subsidiaries – Irish companies according to the US authorities – were “stateless” under Irish law, in what US Senator Carl Levin called the “holy grail of tax avoidance”. For a period of five years its main European, Middle East and Africa subsidiary didn't just reduce its tax bill but avoided paying any tax anywhere. The scheme was first outlined comprehensively in the detailed memorandum by the Senate Subcommittee inquiry into offshore profit-shifting by Apple in May 2013. The Senate report outlined how through the use of three Irish-registered letterbox companies, Apple Inc could claim they existed nowhere for tax purposes¹⁹.

Holding company Apple Operations International, or AOI, was solely owned by Apple Inc and in turn owned most offshore entities. AOI was incorporated in Ireland but was not tax-resident there. The second company, Apple Sales International (ASI) held the IP rights to sell Apple products in Europe, the Middle East and Asia. Through a cost-sharing arrangement on research and development (R&D) between Apple Inc and ASI, from 2009-2012 ASI paid \$5 billion to Apple Inc, while Apple Inc paid \$4 billion under the cost-sharing agreement over the same period. It was this fee from Apple Inc that was taxed in Ireland. ASI outsourced the manufacturing of its products from its Irish subsidiary to China, then collected sales profits from these products in its non-resident branch. While Apple Inc declared profits of \$38 billion (subject to the then US corporate tax rate of 35 per cent), letterbox company ASI declared profits of \$74 billion and paid less than one per cent in tax to Ireland. “Common sense says Apple would never have offered such a lucrative arrangement in an arm's-length deal with an unrelated party,” Senator Levin said²⁰. The third key subsidiary, Apple Operations Europe, was also registered in Ireland but not tax-resident there. Sales income for ASI from 2009-2012 was \$74 billion. In 2011, ASI paid tax of 0.005% – \$10 million of \$22 billion income – to Ireland²¹.

Commission state aid ruling

The European Commission opened an investigation in June 2014 as to whether two tax rulings, or advanced opinions, provided by Irish Revenue to Apple subsidiaries in 1991 and 2007 and determining profit allocation between resident and non-resident branches, constituted illegal state aid that selectively preferred the companies (AOE and ASI). The key points of the Commission's

¹⁹ United States Senate Permanent Subcommittee on Investigations Hearing May 21, 2013 On Offshore Profit Shifting and the U.S. Tax Code. Part 2 (Apple Inc.) <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf>

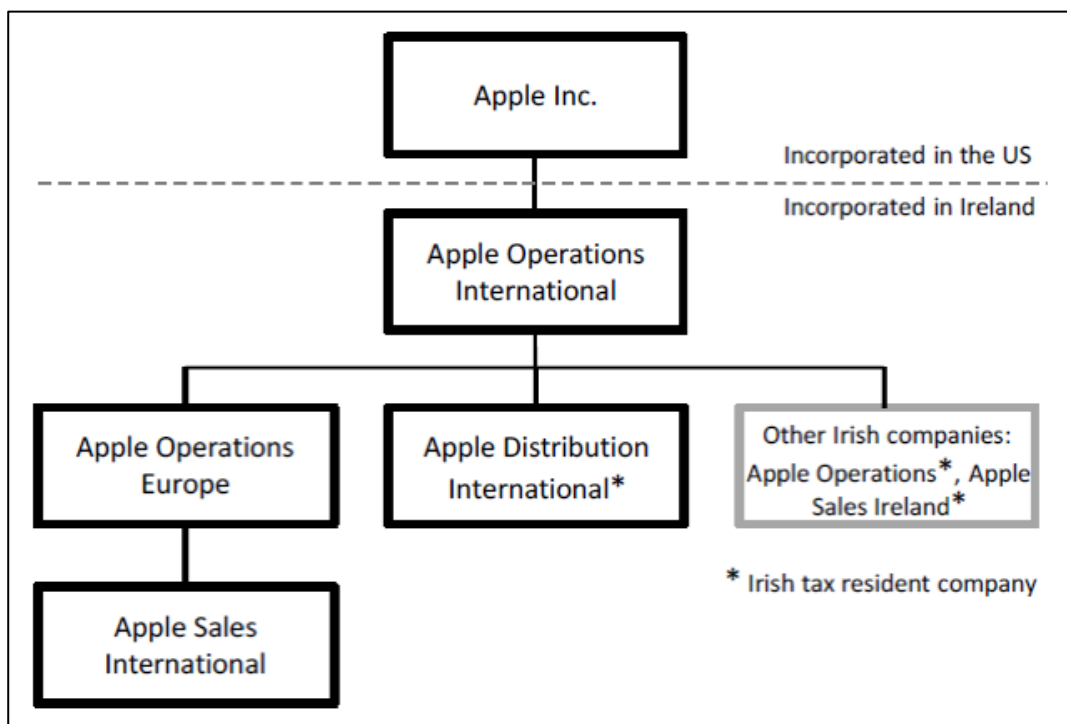
²⁰ Ibid

²¹ The Senate Subcommittee memorandum examines the relationship between Irish tax law on residency and loopholes in the US tax code (subpart F), specifically the ‘check-the-box’ and ‘look-through’ rules. The check-the box loophole was introduced in the 1990s and allows companies to literally check a box on its declarations to the IRS stating what kind of entity they are for tax purposes – meaning multinational corporations can declare offshore subsidiaries to be part of one single corporation and therefore not taxable. The look-through loophole introduced in 2006 provides relief from the anti-deferral rules for Controlled Foreign Companies in the US tax code.

preliminary findings in September 2014 were that the 1991 tax ruling appeared to have been “reverse engineered”, and that the 2007 amended tax ruling which calculated a 10-20 per cent increase on AOE’s costs was “meaningless in relation to the computer industry”²². Unlike most tax rulings, which usually last for three to five years, the 1991 ruling had no end date. The Commission said there was evidence the tax rulings was “motivated by employment considerations”, and that the terms of the tax rulings did not comply with the arm’s length principle for setting conditions between companies of the same corporate group.

The Commission’s final ruling in 2016 found Ireland had provided illegal state aid to Apple through these two tax rulings; that profits could not be attributed to the “head office” or stateless branches as there was no substance to them; that these profits must necessarily then be attributed to Apple’s Irish-resident subsidiaries; and that as a result Apple owed Ireland €13 billion plus interest. The Commission’s statement accompanying the ruling stated: “Specifically, Revenue endorsed a split of the profits for tax purposes in Ireland: Under the agreed method, most profits were internally allocated away from Ireland to a ‘head office’ within Apple Sales International. This ‘head office’ was not based in any country and did not have any employees or own premises. Its activities consisted solely of occasional board meetings”. The Irish government has lodged an appeal against the Commission’s findings, and has spent more than €4.5 million in legal fees in its appeal so far²³.

Apple’s pre-2015 corporate structure



²² European Commission, 2014. State aid SA.38373 (2014/C) (ex 2014/NN) – Alleged aid to Apple Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (2014/C 369/04) https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:C:2014:369:FULL&uri=uriserv:OJ.C_.2014.369.01.0022.01.ENG

²³ <https://www.irishtimes.com/business/technology/legal-fees-in-apple-state-aid-case-exceed-4-5m-1.3513597>

Source: Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2017) 5605). <https://eur-lex.europa.eu/eli/dec/2017/1283/oj>

Apple's 2015 restructure

As part of its state aid ruling, the Commission provided the diagram above outlining the subsidiaries that were central to Apple's corporate structure in Ireland from 2003-2014. The subsidiaries on the Commission's chart above can also be found on Apple's 2017 list of "significant subsidiaries". As of June 2018, the Irish Company Register²⁴ shows only a slight change in this structure in respect to 2016, as ASI and Apple Distribution International have swapped places in the setup. According to the latest data in Orbis (2017-2018) these Irish subsidiaries are themselves owners of more than 20 subsidiaries as part of Apple's global structure.

In the course of the state aid investigation, the Commission was informed of the details of Apple's 2014-2015 restructure. The report includes a page outlining the information that Apple and Ireland provided but all substantial details are redacted aside from the following points²⁵:

- Apple stated that the new structure was established in response to Ireland's change to Section 23A TCA 97, as from 1 January 2015 (ending "statelessness");
- Apple informed the Commission that the 2007 tax ruling on profit allocation ended at the end of 2014; and
- In relation to the new structure, the Commission requested "any underlying documents such as transfer pricing reports".

Paradise Papers revelations and Apple's response

In November 2017, the Paradise Papers were published by the International Consortium of Investigative Journalists (ICIJ). The leak came mainly from law firm Appleby and included several important revelations regarding Apple's post-2014 structure²⁶.

These revelations included the following information:

- Apple went jurisdiction-shopping following the 2013 US Senate Inquiry into its tax avoidance schemes;
- Apple's lawyers, Baker McKenzie, sent a questionnaire to Appleby representatives in six different tax havens in 2014 – the British Virgin Islands, Cayman Islands, Bermuda, Guernsey, Isle of Man and Jersey – requesting if they could confirm that the use of a Double Irish-type structure could work in these jurisdictions.
- Specifically they asked if these Appleby offices could "confirm that an Irish company can conduct management activities (such as board meetings, signing of important contracts) without being subject to taxation in your jurisdiction".
- Apple settled on Jersey and used the three-month grace period provided by the Irish government for new companies to establish a non-resident Irish branch when it announced the phasing out of

²⁴ The Irish Company Register, <https://www.cro.ie/>

²⁵ European Commission, 2016. COMMISSION DECISION of 30.8.2016 ON STATE AID SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, page 42

²⁶ <https://www.icij.org/investigations/paradise-papers/apples-secret-offshore-island-hop-revealed-by-paradise-papers-leak-icij/>

the Double Irish in October 2014 (Apple set up shop in Jersey in December 2014 according to the Appleby documents);

- This grace period allowed Apple to relocate the “management and control” of two out of three of its significant Irish subsidiaries – ASI and Apple Operations International – to Jersey.
- Apple Operations Europe relocated its tax residency to Ireland and purchased the IP license previously held by ASI’s “nowhere” branch.

While the establishment of the Jersey branches indicated the potential use of a Double Irish-type structure, it appears that Apple began using a significantly different tax avoidance technique from 2015, as first outlined by the ICIJ. Chairperson of Ireland’s Fiscal Advisory Council Seamus Coffey, writing in a personal capacity, examined the macroeconomic data available on changes in the Irish economy, particularly in the first quarter of 2015, to shed further light on Apple’s new structure²⁷.

Ireland’s macroeconomic data sheds some light

Many commentators speculated even before the release of the Paradise Papers that Ireland’s 26% growth rate in GDP in 2015 – a sudden increase of €41 billion – could be attributed to Apple’s decision to bring its intellectual property onshore to Ireland. This is true but it is only part of the story. According to the Commission’s state aid ruling, ASI made profits of €24-25 billion in 2014 (though this figure had been €35 billion in 2012).

In the first quarter of 2015, the following economic indicators were observed in Ireland by the Central Statistics Office, which revised its projections as follows²⁸:

- €15 billion was added to goods exports;
- €56.6 billion was added to exports;
- €20.2 billion was added to imports;
- €6.8 billion was added to investment.

Coffey attributes the rise in exports to the sales executed by Apple and now recorded in Ireland; the rise in imports to the purchase of parts and the fee paid by Apple to its Chinese manufacturers; and the rise in investment to research and development – the Irish subsidiary contribution to the cost-sharing agreement with Apple Inc in the US.²⁹

Two other indicators provide crucial insight into Apple’s restructure:

- While gross trade profits increased by €50.7 billion, deductions increased by €40 billion, including a €27.5 billion increase in capital allowances.
- Ireland’s external debt jumped massively by €250 billion in the first quarter of 2015 and has dropped quickly since then³⁰.

²⁷ <http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html>

²⁸ <https://www.cso.ie/en/statistics/externaltrade/> and <https://www.cso.ie/en/statistics/keyeconomicindicators/>, cited in <http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html>

²⁹ Ibid

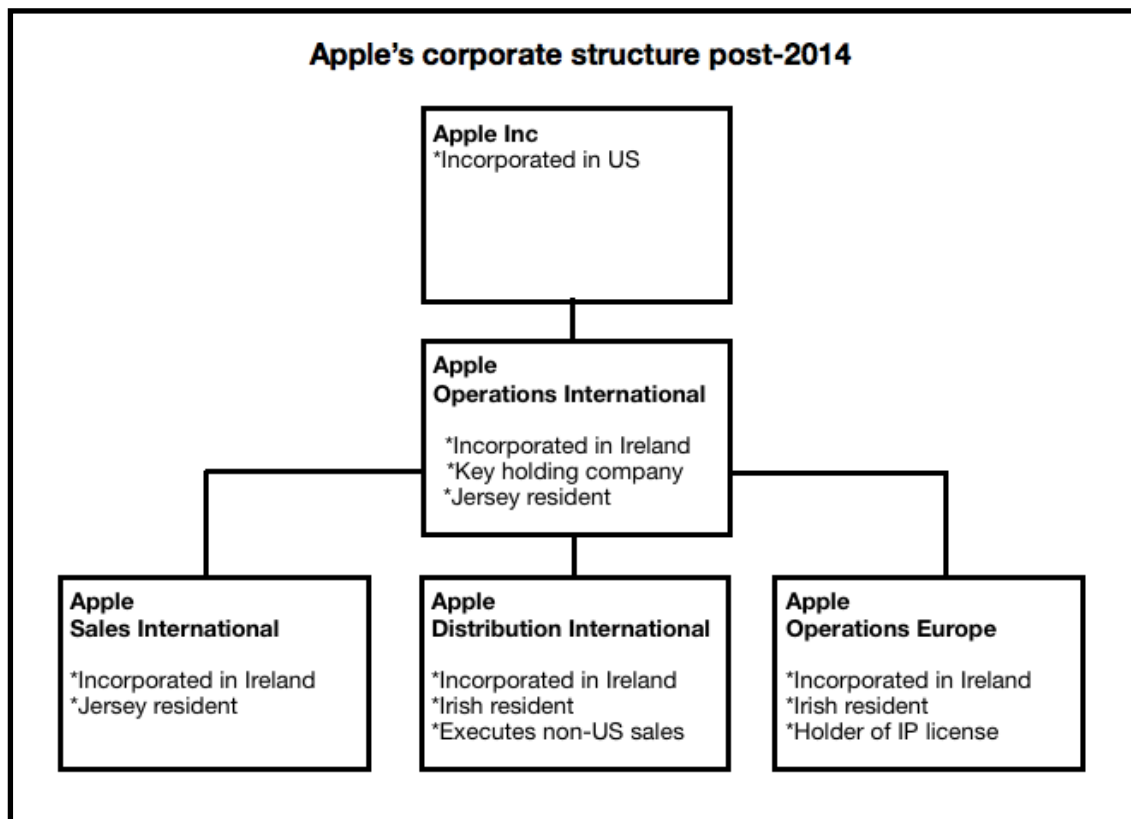
³⁰ Ibid

The rise in the use of deductions combined with the fact that Apple’s tax bill did not increase by any significant measure appears to confirm speculation that the capital allowance regime provided a near-total offset mechanism for sales profits. Additionally, the massive rise in debt suggests Apple borrowed a huge sum from one of its subsidiaries in order to pay for the relocation of the IP license to Apple Operations Europe, now Irish-resident. The quick repayment of this debt is likely a result of the government’s introduction of a deduction of 100% for interest associated with the purchase of IP falling under the capital allowances plan.

Is Apple’s use of the capital allowance illegal?

Coffey examines the breakdown of the GDP jump between the net amounts attributed to Irish residents – €21.6 billion of the €41 billion – and that accruing to non-residents, €19.6 billion. The €19.6 billion reflects after-tax net profit, suggesting Irish Revenue should have received an additional €2.5 billion in corporation tax from Apple in 2015³¹. Apple’s statement in response to the Paradise Papers rules this out as a possibility, as the company stated it had paid €1.5 billion to Ireland from 2015-2017, i.e., around €500 million each year³². Coffey suggests that if the Commission’s reasoning is upheld in the state aid case, the post-2014 structure may also be found to be illegal. Ireland’s law regulating the use of the capital allowance specifically rules out use of the allowance where “the main purpose or one of the main purposes is the avoidance of, or reduction in, liability to tax”³³.

Apple’s corporate structure post-2014



³¹ Ibid

³² <https://www.apple.com/newsroom/2017/11/the-facts-about-apple-tax-payments/>

³³ Taxes Consolidation Act 1997, section 291A (7) (c) <http://www.irishstatutebook.ie/eli/1997/act/39/section/291/enacted/en/html>

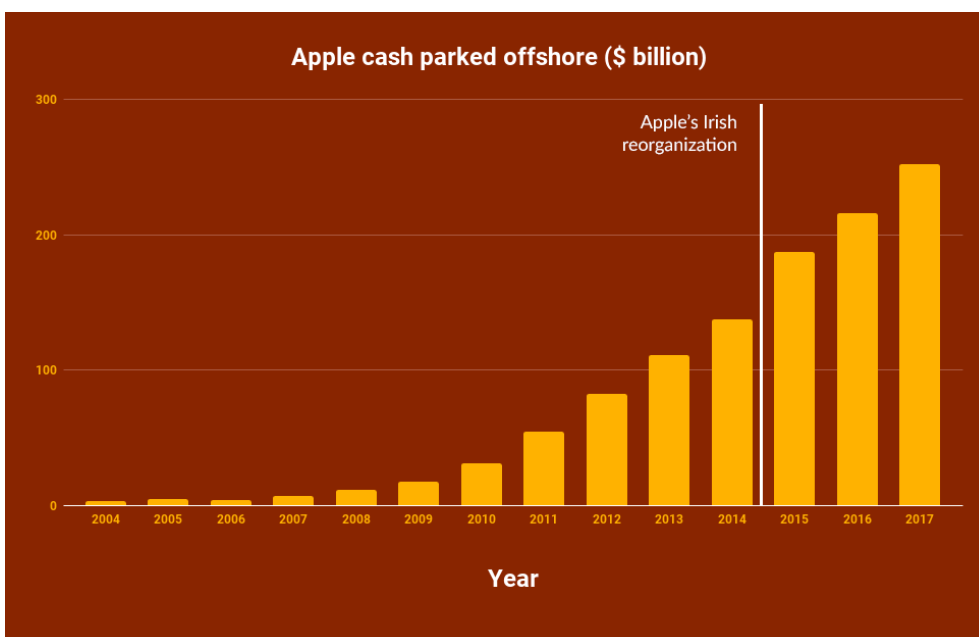
Source: An estimate based on information in Ireland’s Companies Register and the Paradise Papers revelations

Based on the available data and information, we suggest that Apple’s new corporate structure operates in the following way:

- Apple Operations International maintains its non-resident status but no longer holds the rights to Apple’s IP. Now based in Jersey it is likely to hold large cash reserves that are not subject to any tax;
- Apple Sales International is no longer responsible for sales. It has relocated from “nowhere” to Jersey;
- Apple Distribution International, which was always Irish-resident, now has responsibility for executing and recording sales in Ireland;
- Apple Operations Europe has been relocated to Ireland and made a one-off purchase of Apple’s IP license(s) from Apple Sales International in 2015. The IP is now held in Ireland;
- The expenditure AOE has incurred resulted in a massive transfer of wealth to zero-tax Jersey and Apple’s use of capital allowances has offset any additional tax on profits from sales, resulting in Apple maintaining essentially the same tax rate in Ireland post-2014 (Apple states that it paid Ireland USD 400 million in tax in 2014);
- In order to purchase the IP licenses, Apple Operations Europe borrowed huge sums of money from an offshore subsidiary, (possibly Apple Operations International in Jersey) and makes repayments from Ireland to the offshore subsidiary including interest repayments which can be written off in Ireland;
- One of the Irish-resident Apple subsidiaries maintains a cost-sharing agreement with Apple Inc and classifies its fee to the parent company as investment in R&D in Ireland, availing of R&D tax credits that lower the tax rate to 3.75%.

Apple’s mountain of offshore cash grows

The ICIJ chart below illustrates the cumulative impact of the Irish restructure on the amount of cash Apple holds offshore, estimating that by this year (2018) this amount will have doubled since 2014.



Source: ICIJ, 2017

The enablers: Aspects of Ireland’s tax law and policy that facilitate Apple’s tax avoidance

Apple relied on several features of Irish tax law and policy before 2015 in order to enact the tax avoidance strategy that was exposed by the investigations of the US Senate and the European Commission.

These included, but were not limited to:

- Ireland’s tax residency laws;
- Ireland’s intellectual property tax regime (Ireland’s withholding tax regime);
- Ireland’s transfer pricing laws;
- The use of private “unlimited liability company” status, which exempts companies from filing financial reports publicly;
- Advanced pricing agreements (APAs) and “opinions” issued by Ireland’s Revenue agency, and the secrecy surrounding these agreements.

In the majority of these areas, the Irish government has been forced by international pressure to enact change. This has largely taken place through the framework of implementing EU Directives and/or the OECD BEPS standards. However, through delays and exemptions, several of these features of Irish tax law that enable tax avoidance remain in place at present.

Ireland’s tax residency laws

The Double Irish tax avoidance scheme is used by mainly US multinational corporations whose business is based upon the exploitation of intellectual property. It relies on two Irish subsidiaries, both incorporated in Ireland: the first subsidiary is tax-resident in Ireland, but the second is tax-resident in an offshore tax haven with a low or zero corporate tax rate (eg, Bermuda). Under US law, both subsidiaries are considered to be Irish, and under Irish law the second subsidiary is a Bermuda company for tax purposes. Typically the Bermuda-resident subsidiary of the US multinational sells IP assets to the Irish-resident subsidiary, which collects sales profits and in turn transfers these profits to Bermuda in the form of payments for the use of IP. The royalties earned by the Bermuda-resident company would be subject to that state’s corporate tax rate – zero.

Apple’s tax structure before 2015 was not, strictly speaking, a Double Irish structure. Apple’s offshore subsidiaries, Irish companies in the eyes of the US authorities, were “stateless” under Irish law. US multinationals who have used, or are using, the Double Irish scheme include Microsoft, Google, Facebook, Pfizer, News Corp, Yahoo, AirBnB, Starbucks and IBM, among many others. To look at just one example of the scale of tax avoidance being facilitated by this structure, the US Senate Subcommittee inquiry into tax avoidance by Microsoft in 2012 showed that the company had avoided paying at least \$6.5 billion between 2009-2012 through the use of its subsidiaries in Ireland, Bermuda, Singapore and Puerto Rico³⁴.

Double Irish transition period

³⁴ <https://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code>

In 2013, the Irish Finance Minister announced that the ability for Irish-incorporated companies to be “stateless” was to end³⁵. However, the change enacted was limited. This limitation on statelessness only applied to companies managed and controlled in an EU member state or a treaty partner; it does not apply to those companies managed and controlled in countries Ireland does not have a tax treaty with, including several notorious tax havens. Then in October 2014, in response to international pressure arising from the US Senate and Commission state aid investigations, the Finance Minister announced: “I am abolishing the ability of companies to use the ‘Double Irish’ by changing our residency rules to require all companies registered in Ireland to also be tax resident.” However, he added that existing companies would have a “transition period” that is to last until the end of 2020, and that new companies would have until January 1 2015 to set up such a structure that can legally use the Double Irish until the end of the transition period³⁶.

Several US multinationals are quietly continuing to use the Double Irish to shift billions of euros into offshore tax havens. For the financial year of 2015, Google Ireland Limited’s revenue jumped 23% to €22.6 billion, but the Internet giant used the Double Irish scheme to reduce its taxable profits to just €341 million³⁷. The Irish-resident subsidiary paid “administrative fees” – mainly royalty payments – to a network of other Google subsidiaries that flow back to its Bermuda-resident Google Holdings Ireland. There are no existing estimates of the amount of profits that will be shifted to offshore tax havens by US multinationals between 2014-2020 through the continuing use of the Double Irish.

Double Irish remains in place through double taxation treaties

In addition to the six-year transition period, there is a loophole in many of Ireland’s double taxation treaties that allows the Double Irish to continue to be used beyond the 2020 phaseout date. Although it has now been enacted in Irish legislation that Irish-incorporated companies will be Irish-resident for tax purposes by default, a provision in several tax treaties maintains a “management and control” test. Ireland’s tax treaties override domestic law – and under several tax treaties, a company resident in both Ireland and a country it has a treaty with will have tax residency determined according to the management and control rule. In other words, if a company is incorporated in Ireland, and routes its sales through Ireland, but claims its centre of management is in the jurisdiction of its treaty partner, the company can use the Double Irish structure.

This provision does not necessarily facilitate tax avoidance – but it does when the treaty partner is a low or zero-tax jurisdiction. A Christian Aid study (2017) has found that Microsoft (LinkedIn) and pharmaceutical company Allergan (Zeitiq) are both using this provision in the Ireland-Malta treaty in a Double Irish-replacement scheme dubbed the “Single Malt”³⁸.

³⁵ <http://www.thejournal.ie/michael-noonan-budget-2014-stateless-companies-1130546-Oct2013/>

³⁶ <https://www.irishtimes.com/business/economy/full-text-michael-noonan-s-budget-2015-speech-1.1962981>

³⁷ <https://www.theguardian.com/business/2016/nov/04/google-pays-47m-euros-tax-ireland-22bn-euros-revenue>

³⁸ <https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf>, pp16-18

A review of Ireland's 72 treaties was carried out as part of this study, which found that the "management and control" provision remains in place in many tax treaties, including with jurisdictions commonly considered to be tax havens such as Panama, Malta, Hong Kong, the United Arab Emirates, the Netherlands and Belgium³⁹.

The Irish government has resisted calls to revise its network of tax treaties in order to eliminate the management and control provision. In June 2017 Ireland signed the OECD's Multilateral Instrument (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS), which will allow it to update its existing treaties to meet certain standards without initiating bilateral negotiations with treaty partners. However, the Irish government refused to opt in to Article 12 of the Multilateral Instrument, which specifically takes aim at companies artificially avoiding permanent establishment status through double taxation treaties⁴⁰.

Ireland's intellectual property regime

Finding a replacement for the Double Irish

Intellectual property is central to profit-shifting involving Ireland. In a January 2011 briefing on "Uses of Ireland for German Companies", the largest corporate law firm in Ireland, Arthur Cox, advised: "The effective corporation tax rate can be reduced to as low as 2.5% for Irish companies whose trade involves the exploitation of intellectual property... A generous scheme of capital allowances as well as a tax credit for money invested in research and development in Ireland offer significant incentives to companies who locate their activities in Ireland."⁴¹ This advice regarding the use of Ireland was openly advertised by many corporate law firms and the Big Four accounting firms until the growth in public awareness of tax avoidance made such advertising controversial.

The Double Irish was one major feature of Ireland's intellectual property regime, but it was accompanied by an inexplicably generous capital allowance for intangible assets that was introduced in 2009 as well as significant tax credits available for R&D. At the same time as the Irish government announced the phase-out of the Double Irish in 2014, it introduced a Knowledge Development Box, while increasing the available capital allowance for intangible allowance and expanding the R&D credit. The combined effect of these measures has been to replicate the effect of the Double Irish regarding the effective tax rate paid by multinational corporations trading in IP.

Modified-nexus patent box leaves multinationals dissatisfied

In 2016 the Irish government introduced the Knowledge Development Box, a corporate tax rate of 6.25% for profits arising from certain forms of IP. Ireland had already introduced the first patent box, a lower rate of tax on IP-related profits, in 2000 before the introduction of the 12.5% corporate tax rate. The OECD-BEPS project proposed action to reduce the potential for profit-shifting abuse through patent boxes by ensuring there was a genuine link, or nexus, between the lower tax rate and R&D that was initially developed in the home state.

³⁹ <https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx>

⁴⁰ <https://www2.deloitte.com/ie/en/pages/tax/articles/multilateral-instrument-department-of-finance-announces-irish-positions.html>

⁴¹ http://www.finfacts.ie/biz10/Ireland_tax_multinationals_IP_intellectual_Property.pdf

A German-British compromise in November 2014 resulted in the so-called modified nexus approach being adopted by the OECD, which retained requirements for genuine local initial IP development but added concessions including a transition period and a 30 per cent “uplift” in what counts as qualifying expenditure to reflect outsourced intra-group research activities and costs⁴². Part of the OECD agreement was that all new entrants into existing patent box schemes that did not comply with the modified nexus approach would have to cease by 30 June 2016 and be abolished by 2021. When introducing the Knowledge Development Box in 2016, the Irish government stated that it would be the first and only patent box in the world to be fully compliant with the OECD’s modified nexus approach.

The Irish Knowledge Development Box took effect on January 1 2016. It applies a 50% allowance in tax relief to “qualifying profits”, resulting in a 6.25% tax rate. Qualifying profits arise from specified trade in “qualifying assets”, being intellectual property resulting from research and development carried out in Ireland or an EU member state. The intellectual property forms that can be qualifying assets are defined as being copyrighted computer software, inventions protected by patents and supplementary protection certificates, and plant breeders’ rights⁴³.

As a result of the requirement for a demonstrable genuine link to local R&D development, multinational corporations expressed mild disappointment with the Knowledge Development Box. The corporate law firm currently representing the Irish government in its appeal against the Commission’s Apple state aid ruling, William Fry, said: “Overall, the KDB is to be welcomed as it bolsters Ireland’s competitive tax regime and complements existing tax benefits for IP such as research and development relief and the capital allowances available in relation to intangible assets. Given the limitations where research and development is carried out by group companies, in the first instance, the KDB relief may be more beneficial to indigenous companies. However, with proper planning, the relief may also prove to be of benefit to multinational enterprises.”⁴⁴ In May 2018 the Irish government released figures showing that less than 10 companies had used the patent box since 2016 and the cost of operating it was €5 million⁴⁵.

R&D tax credits

Very little actual R&D is carried out in Ireland as a result of foreign direct investment. R&D tax credits against corporation tax were introduced in 2004 and expanded in 2015 as the Double Irish phase-out began. A 25% tax credit is available on all qualifying R&D expenditure in addition to a 12.5 per cent tax deduction – so, a total of a 37.5 per cent tax deduction on such expenditure, or in other words, a corporate tax rate on R&D activity of around 3.3%. Any company which trades in Ireland, carries out R&D activities in Ireland or in the European Economic Area, and incurs expenditure is eligible.

Before 2015, a base year of 2003 was in place – ie, a company could only claim credit for expenditure over and above what it incurred in 2003. This was to be a rolling base year in order to

⁴² <https://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf>

⁴³ <https://www.finance.gov.ie/news-centre/press-releases/minister-finance-publishes-finance-bill-2015>

⁴⁴ <https://www.williamfry.com/newsandinsights/news-article/2016/03/02/the-knowledge-development-box>

⁴⁵ <https://www.rte.ie/news/business/2018/0503/960030-few-companies-availing-of-knowledge-development-box/>

incentivise companies to spend more but the year didn't change, and the base year was abolished altogether in 2015. Under a Freedom of Information request, it was revealed in January 2015 that Department of Finance officials "expressed concern that changes to tax breaks in Budget 2015 would cost at least €50 million in foregone taxes annually and reward a relatively small number of companies" – just 15 firms, including one that would benefit by €14 million⁴⁶. The names of the companies were blacked out in the FOI release. It was reported in September 2015 that 200 audits carried out in 2013 found "several multinational firms have been found to be aggressively and improperly claiming tax credits for research and development to lower their corporation tax bills".

The Green Jersey: IP capital allowances and interest deduction

It is telling that some corporate law firms continue to advertise the exact same effective tax rate that can be achieved for IP-related activities in Ireland – 2.5% – in 2018 as they did in 2011. "Offshore magic circle" law firm Maples and Calder (which advises clients on the tax laws of the British Virgin Islands, the Cayman Islands, Ireland and Jersey) stated in January 2018 that Ireland's 12.5% headline corporate tax rate can be reduced to 2.5% for IP-related companies⁴⁷.

The law firm described a typical post-Double Irish structure, similar to that used by Apple after 2014. We will call it the "Green Jersey" in reference to the Paradise Papers revelations regarding Apple's use of Jersey in its new structure, as outlined in Section 1, but it is not always necessary to use an offshore subsidiary. "An Irish company can hold the IP and claim a deduction for capital expenditure incurred on the acquisition or development of the IP as well as any interest expense incurred to acquire the IP. The profits of the Irish company will typically be subject to the corporation tax rate of 12.5% if the company has the requisite level of substance to be considered trading. The tax depreciation and interest expense can reduce the effective rate of tax to a minimum of 2.5%."

The capital allowance for intangible assets was introduced in the Finance Act 2009, with a cap of 80%. It meant relief in the form of a capital allowance against trading income in a given reporting period or as a write-off against taxable income over 15 years. Deductions for associated interest expenses could also be written off up to an 80% cap⁴⁸.

In its Budget 2015 Submission (September 2014) the American Chamber of Commerce expressed its preference for the introduction of an 'exemption-based' patent box regime to replace the Double Irish. However, it acknowledged that "there may be a number of external issues which could prevent the implementation of such a regime in the short term", and that as a result, "the near term strategic focus in this context should be to improve a number of key issues with the current Irish IP amortisation regime (Section 291A TCA 1997)"⁴⁹. Specifically it called on the Irish government to "increase the current year restriction on profits from the IP against which the IP can be offset to

⁴⁶ <https://www.irishtimes.com/business/multinationals-exaggerated-research-activity-to-lower-tax-bills-1.2337877>

⁴⁷ <https://www.maplesandcalder.com/news/article/ireland-a-leading-location-for-holding-and-managing-intellectual-property-1646/>

⁴⁸ <http://www.irishstatutebook.ie/eli/2009/act/12/enacted/en/html>

⁴⁹ <https://www.amcham.ie/Amcham/media/SiteMedia/Submissions/Pre-Budget-2015-Submission.pdf?ext=.pdf>

90% of the relevant income” and to “remove interest payable on funds borrowed to acquire IP from the current Section 291A calculations”⁵⁰.

The Irish government immediately did both in its 2015 Budget but went a step further and introduced a 100% cap on the capital allowance that could be claimed for IP expenditure. This resulted in the amount of capital allowances being claimed by multinational corporations rising from €2.7 billion in 2014 to €28.9 billion in 2015⁵¹. In 2017 the Irish government announced that it would reintroduce the 80% cap, but would not apply it to the IP that was brought onshore from 2015-2017, which included Apple’s IP assets⁵².

The Department of Finance clarified that the same amount of capital allowance is available under the cap; it just has to be used over a longer period of time. The operation of the cap “is simply a timing matter” that “has no effect on the overall quantum of capital allowances for intangible assets available to use against the relevant trading income”⁵³.

The essential features of this technique are:

- It can be used by large multinational corporations engaged in trading in IP;
- It has specifically been designed by the Irish government to facilitate near-total tax avoidance by the same companies who were using the Double Irish tax avoidance scheme;
- While the Double Irish was characterised by the flow of outbound royalty payments from Ireland to Irish-registered but offshore-tax resident subsidiaries, this scheme is characterised by the onshoring of IP and sales profits to Ireland;
- Sales profits are booked in Ireland, but the expenditure the company incurs in the once-off purchase of the IP license(s) can be written off against the sales profits by using the capital allowance programme for intangible assets;
- It is beneficial for the company to complement the tax write-off by continuing to use an offshore subsidiary, but no longer for outbound royalty payments to flow to. The role of the offshore subsidiary is to store cash and provide loans to the Irish subsidiary to fund the purchase of the IP. The expenditure on the IP is written off, but so too are the associated interest payments made to the offshore subsidiary, which thus accumulates more cash that goes untaxed.

Withholding tax on patent royalties

The Double Irish was famously used in combination with a “Dutch Sandwich” – sending money first through the Netherlands and then to Bermuda or another tax haven. This was used to prevent outbound patent royalty payments from being subjected to a 20% withholding tax by Irish Revenue through a tax treaty. It became no longer necessary for multinational corporations to use the

⁵⁰ Ibid

⁵¹ <https://www.irishtimes.com/news/ireland/irish-news/multinationals-may-avoid-850m-in-irish-tax-fiscal-body-chair-warns-1.3288660>

⁵² <http://www.irishstatutebook.ie/eli/2017/act/41/enacted/en/html>

⁵³ <https://www.oireachtas.ie/en/debates/question/2018-05-16/8/>

Netherlands in this way after July 2010 when the American Chamber of Commerce successfully lobbied the Irish government to amend its tax code to get rid of the withholding tax.⁵⁴

Before July 2010, the only outbound royalties that were subject to a withholding tax in Ireland were on patents, but there was an exemption for payments made to EU member states or states that were part of Ireland's tax treaty network. From July 2010, this exemption was broadened to include outbound royalty payments to non-EU and non-treaty states if certain conditions were met. In March 2018, the Commission published a report on 'Aggressive Tax Planning Indicators' among EU member states, which found that 23% of Ireland's GDP from 2010-2015 was made up of royalty payments, while the EU average over the same period was 0.34% of GDP.

Ireland's transfer pricing regime

Ireland's transfer pricing regime was a key aspect of Irish law targeted by the Commission in the Apple state aid ruling. Ireland introduced transfer pricing legislation for the first time in 2010, exempting transfer pricing arrangements entered into before that date. Oxfam has described the legislation as "exceptionally weak"⁵⁵. The law gives Revenue the authority to examine whether a company may have understated income or overstated expenditure in a transaction with a related company in which the arms-length principle may not have been applied⁵⁶. The Irish government states that this legislation makes it OECD-compliant on transfer pricing. However, as the Commission points out in its ruling, of the five methods for assessing transfer pricing abuse identified in the OECD's 2010 Transfer Pricing Guidelines, the Irish legislation relies on the the least favoured method, the transaction net margin method (TNMM)⁵⁷.

The TNMM is "one-way" in that it only examines the profitability of the Irish-resident company engaged in the transaction. If Revenue believes a transaction where the profits of the Irish-resident company are understated or expenditure is overstated, it can request the company perform a self-review. If it is not satisfied with the results of the review Revenue may then decide to audit the company⁵⁸. However, most profit-shifting involving Ireland involves inflating the profits booked in the jurisdiction, not the other way around, so the transfer pricing legislation is largely meaningless. Additionally, there are no controlled foreign company (CFC) or thin capitalisation rules in Irish tax law, though CFC rules will be required under the EU's Anti-Tax Avoidance Directive.

Transparency and 'unlimited liability company' status

A key finding of this study was that it is exceptionally difficult to access financial information from Irish-resident multinational corporations as a result of the use of private "unlimited liability

⁵⁴ The *Financial Times* reported in May 2013 that the American Chamber of Commerce submission to the Irish government suggested Ireland's attractiveness as a location for IP investment could be "significantly improved" by scrapping the withholding tax on patent royalties. <https://www.ft.com/content/ee6c1b64-c1f2-11e2-ab66-00144feab7de>

⁵⁵ <https://www.oxfamireland.org/sites/default/files/upload/pdfs/mantras-myths-final.pdf>, page 6

⁵⁶ Taxes Consolidation Act 1997, Part 35A, Section 835A to Section 835H, <http://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/print#part35>

⁵⁷ http://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf, page 94

⁵⁸ <http://www.irishstatutebook.ie/eli/2010/act/5/section/42/enacted/en/html>

company” (ULC) status by Apple and other multinational corporations. ULC status provides an exemption for companies being required to publicly file their financial information when they file their annual return, meaning their financial affairs are kept secret.

The EU Accounting Directive (Directive 2013/34/EU) specifically requires that companies in the EU publicly file their financial information. EU member states were required to transpose the 2013 Accounting Directive by 20 July 2015. Ireland failed to do so, and in September 2015 the Commission made a formal request to Ireland for transposition. In June 2016 the Commission sent Ireland a reasoned opinion requesting the transposition of the Accounting Directive and finally referred Ireland to the European Court of Justice over its failure to transpose the Directive into its domestic legislation in April 2017.

The Companies Act 2017, enacted in May 2017 and applying from June 2017, was to impose the EU-wide standard on the production of financial statements on large companies. However, an exemption in the legislation means that holding companies with ULC status will not be required to file public financial reports until 2022.

The Irish government has also stalled on transposing the fourth Anti Money Laundering Directive into domestic law, missing the deadline of 26 June 2017. The Commission set a final deadline of 8 May 2018 for the publication of the legislation in its reasoned opinion; if Ireland missed this deadline it would be referred to the ECJ by the Commission in the final stage of its infringement procedure. The government published the legislation on 2 May 2018. Finally, while Ireland adopted country by country reporting according to the OECD standard in 2016, it has continued to oppose the EU Directive on *public* country by country reporting in the EU Council.

Tax rulings

Two advance tax rulings provided by Ireland’s Revenue agency to Apple Sales International and Apple Operations Europe were at the centre of the Commission’s state aid case against Ireland. The Commission’s state aid report revealed that at least 11 other Advance Pricing Agreements (APAs) were concluded between Irish Revenue and multinational corporations from 1998 to 2010, most of which were still in place in 2016. The Commission’s main finding in the ruling regarding these Revenue agreements was that no consistent criteria were applied in deciding how much tax these multinationals have to pay, and that there appears to be a pattern in the rulings of using a profit-splitting method that allocates only a small amount of profits to the Irish-resident branch or company⁵⁹. Despite calls by politicians and campaigners for the pricing agreements to be made public, they remain secret, and the names of the companies are redacted in the Commission’s state aid report.

Revenue introduced guidelines for bilateral APAs in 2016; however, the guidelines do not apply to agreements concluded before 1 July 2016. The EU Joint Transfer Pricing Forum stated in March 2018 that the total number of APAs in place in Ireland in 2016 was seven: five with EU member states and two with non-EU states⁶⁰. Under the EU’s third Directive on Administrative Cooperation (DAC3 – EU Directive 2015/2376), which Ireland implemented in 2017, EU member states are bound by mandatory automatic exchange of information requirements relating to cross-border

⁵⁹ http://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf, page 116

⁶⁰ https://ec.europa.eu/taxation_customs/sites/taxation/files/eu-jtpf-summary_record.pdf

APAs⁶¹. This information is shared confidentially with other member states, and certain limited data is provided to the Commission.

‘Opinions’

Revenue has another, less formal, instrument to issue tax rulings – advance opinions – that are not all subject to the same information exchange requirements of DAC3. Prior to 2016, Revenue did not collect data on the number and types of advance opinions it provided to companies. During the Commission’s state aid investigation, Revenue was required to compile data on opinions issued between 2010 and 2012, which was a total of 335. It issued 99 opinions in 2010, 128 in 2011, and 108 in 2012⁶².

In its Annual Report in 2016, Revenue reported that it had provided 254 opinions for that year⁶³. In 2017 Revenue renewed 60 opinions (after it introduced a five-year limit on the validity of its opinions), and provided 316 additional opinions⁶⁴. A breakdown of the types of opinions issued includes those related to withholding tax on royalties; other withholding taxes; availability of interest relief for loans. While the total opinions issued in 2017 was 316, Revenue exchanged details of 32 opinions issued over the same period under DAC3⁶⁵, around one-tenth. It is unclear if all of the opinions issued by Revenue that have cross-border or transfer pricing implications are being exchanged with other EU member states under DAC3 but the available data suggests this is unlikely.

⁶¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2376>

⁶² <http://www.thejournal.ie/apple-tax-ruling-ireland-revenue-2-3199492-Jan2017/>

⁶³ <https://www.revenue.ie/en/corporate/press-office/annual-report/2016/ar-2016.pdf>, page 98

⁶⁴ <https://www.revenue.ie/en/corporate/press-office/annual-report/2017/ar-2017.pdf>, page 61

⁶⁵ <https://www.revenue.ie/en/corporate/press-office/annual-report/2017/ar-2017.pdf>, page 26