

GUEST ESSAYS CIVIL SOCIETY & THE PRIVATE SECTOR

LESSONS FOR TAX JUSTICE ACTIVISTS FROM THE APPLE RULING

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INTRODUCTION

In September 2013, after a prolonged investigation, the European Commission ruled that Ireland had breached European state aid regulations by agreeing pricing agreements with the technology company Apple that gave them unfair advantage over other companies. The Commission ruled that €13 billion (approximately US\$13.7 billion) plus interest should be repaid to the Irish state.

Responding to the ruling, Minister for Finance Michael Noonan rejected the findings and signalled his intention to recommend to Cabinet colleagues that the government appeal against the judgment to the European Court of Justice. He claimed that the ruling was an overreach of Commission competencies, and infringed Irish sovereignty, and in particular a country's right to set its own tax code.

His recommendation to the government to appeal the judgement was however not unanimously endorsed by the Irish Cabinet. Minister for Children and Youth Affairs, Katherine Zappone, refused to agree to an immediate appeal, requesting more time to read the judgment, and consider her position. Ultimately, the Minister agreed to the appeal, as part of a compromise that saw her securing some concessions around tax justice.¹

The findings generated huge international public interest and media coverage. Predictably people in Ireland aligned themselves along two main lines: those who saw the rulings as an acceptable price to pay for the jobs that Apple has brought to Ireland, and concluded that the state had no option but to appeal against the ruling, and those who saw the ruling as further evidence of multinationals not paying their fair share, and felt that the money therefore should rightfully be repaid to the state.

There are of course variations within those positions. But for tax justice activists in Ireland, it raised three main issues: taxation and its relationship with human rights, reputational damage as a result of a multinational company's tax avoidance schemes, and finally, questions of oversight and accountability.

THE BACKLASH

Very few people had anticipated the scale of the €13 billion ruling awarded to Ireland in unpaid Apple taxes. A ruling of a smaller amount had been expected and would have been easier to deal with politically. But the sheer scale of the ruling took people by surprise. The initial shock soon gave way to debate and division over the decision to appeal against the ruling, or as it was characterised, a refusal by the government to take the money.

The government's immediate response was to defend robustly the entire Irish tax code. The Commission ruling was characterised by government ministers and government party TDs (members of parliament) as an attack on Irish sovereignty, or as an example of a Commission jealous of Ireland's success in winning Foreign Direct Investment (FDI) from other European member states. Others saw the ruling as further evidence of Commission attempts to make way for a common consolidated corporate tax base, which would favour member states with larger markets.

The response from the Minister for Jobs, Enterprise and Innovation, Mary Mitchell O'Connor, was typical. Speaking at an event with US business leaders, the Minister conflated the findings of the ruling with an attack on Irish sovereignty, [declaring](#) that Ireland would "defend our sovereignty... and that our 12.5 per cent corporate tax rate is written in stone."

Michael McGrath, the Finance Spokesperson for Fianna Fail, the main opposition party, speaking at a Parliamentary Committee meeting with Margrethe Vestager, the European Commissioner for Competition, in January 2017, [suggested](#) that the Commission's state aid rules were being used "as a veil to undermine Ireland's corporation tax system."

Other ministers and officials made similar statements, staunchly defending what they saw as the integrity of the Irish tax system and in particular the 12.5 per cent corporate tax rate.

The ruling, however, had said no such thing, and Margrethe Vestager made clear in her initial press conference that the Commission had no issue with the Irish tax code as a whole, or with the 12.5 per cent rate. This seems to have been lost in the clamour to reject and dismiss the Commission ruling.

However, although the tendency to adopt such a defensive position on Irish tax code is not new, it is quite revealing.

Ireland has been on the receiving end of significant amounts of criticism about its tax code and the means by which it attracts large amounts of FDI. In 2011 for example, then-President Nicolas Sarkozy of France [attempted](#) to force Ireland

¹These included an early recall of the Dáil (the lower house Irish Parliament), a review of the tax treatment of multinationals in Ireland, and strong moves towards tax justice and transparency, including holding a high-level tax justice conference in February 2017.

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to raise its corporation tax rate as part of a European Union (EU) agreement to provide funds to a bankrupt Ireland. In 2016 Brazil [added](#) Ireland to its list of tax havens, while on the campaign trail in 2007, Barack Obama [referenced](#) Ireland's tax policy as an example of the kind of financial chicanery that his administration intended to put a stop to.

Understandably, this has made Irish officials sensitive and defensive, but has also impacted on the potential in Ireland to debate tax policy critically, beyond purely the question of whether an avoidance scheme is legally compliant, to encompass broader considerations of reputation, human rights and accountability.

BROADENING THE DEBATE: CIVIL SOCIETY'S ROLE

Professor Philip Alston is the current United Nations (UN) Special Rapporteur on Human Rights and Extreme Poverty. Speaking at a Christian Aid Ireland conference in Ireland in 2015, he [described](#) the Irish defensiveness of and attachment to Irish tax policy as akin to repeating a mantra, and mantras, as he described, are simply slogans that are repeated unthinkingly. He argued that Ireland's much-vaunted and hugely successful tax policies need to be kept under constant review and need to be re-examined in the light of the broader priorities that Ireland has as a society.

This is an important perspective for tax justice activists and one that Christian Aid continues to echo.

Tax and fiscal policies and their impacts cannot be divorced from broader societal priorities, neither domestically nor internationally. The impacts of tax and fiscal policy therefore need to be subject to a systematic human rights assessment that should include the impact of any policy on a state's ability to guarantee the rights of its citizens, including to education, housing and a quality health service.

Seen through a human rights lens, it is difficult to consider the efficacy of Irish corporation tax policy without, for example, considering 2016 figures from the Central Statistics Office that [showed](#) that almost 250,000 children are living in poverty in Ireland.

Viewing taxation through a human rights lens is also an approach that civil society can use to promote greater accountability from governments.

In 2015, the New York-based Center for Economic and Social Rights (CESR), along with two Swiss-based civil society organisations (CSOs) made a submission to the Committee on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In it they argued that Swiss financial secrecy was having an impact on Zambia's ability to raise sufficient revenue to ensure that women's rights are secured.

This approach, of using international human rights instruments, is a novel and potentially very effective way through which tax justice activists and the human rights community can hold states, including Ireland, to account for their fiscal and tax policies, and promote greater tax justice in support of human rights.

REPUTATIONAL RISKS

The Apple ruling also brought the issue of reputational damage sharply into focus. It certainly damaged Ireland's international image, and despite some commendable recent government initiatives to promote a more transparent and reformist image, the public impression remains of a country prepared to engage in a form of tax competition that pushes the bounds of legality to the maximum.² The effects of reputational damage are felt at multiple levels. For individual taxpayers, faith in the entire taxation system is undermined when a significant sector of the economy is seen as not paying its fair share. This was particularly the case in Ireland where the Apple revelations came at time when citizens were only starting to emerge from the effects of sustained policies of economic austerity.³

For governments, a positive reputation is crucial for building strategic diplomatic alliances. It helps engender trust, and for a small state on the periphery of Europe like Ireland, which depends more than most on cultivating alliances across Europe and the globe to protect and promote its interests, the impact of reputational damage cannot be overstated. And for companies and investors, reputational damage as a result of tax practice increasingly forms part of their risk assessments.

When it comes to reputation, part of the problem stems from the fact that many of the avoidance schemes that have come to light are defended as being technically legal. This is a common refrain from company and government spokespeople, as they seek to justify extraordinarily low tax payments. It also forms part of the Irish government's Apple appeal: that the state collected from Apple what they were legally required to.

Clearly however, being legally compliant does not necessarily mean ethically or morally compliant, and crucially does nothing to preserve hard-won reputations.

This is one of the main reasons Christian Aid has been lobbying for the establishment of a state body that would approach issues of tax transparency and fairness through a wider lens than simply legality. Such a body would be multi-stakeholder in composition and would include representatives of the private sector, international CSOs, human rights and international law specialists, and others, who could advise the government on issues related to corporate transparency and fairness and potentially play an important role in helping the government anticipate issues before they become crises.

Such a group could have usefully advised on the reputational damage that the Apple ruling was doing, and allowed the government to take pre-emptive action long before it came to light in the US Senate.

²The current government and its predecessor both made efforts to improve Ireland's reputation by promising to phase out the 'Double Irish' arrangement, and do away with the issue of company statelessness that had been fundamental to how Apple had managed to avoid tax. The 'Double Irish' was a tax avoidance scheme favoured by many US multinationals based in Ireland, which exploited the different definitions of corporate residency in Ireland and the USA. The scheme enabled companies to reduce their tax bill far below Ireland's 12.5 per cent corporate tax rate by shifting most of their taxable income from an operating company in Ireland to another Irish-registered firm in an offshore tax haven such as Bermuda.

³The 2015 budget was the fifth regressive budget in row. See 'ESRI Report confirms Budget 2015 regressive', Social Justice Ireland, 12 December 2014, <http://bit.ly/2p0PGgw>.

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TRANSPARENCY AND ACCOUNTABILITY

The Apple case also raised important issues around corporate transparency and accountability. People were surprised that Apple had enjoyed favourable tax terms for so long - granted first in 1991, and renewed in 2007 - and angry that a huge multinational company enjoyed an effective tax rate as low as 0.005 per cent in 2014, but yet was subject to no parliamentary oversight or public scrutiny.

Research by the Debt and Development Coalition Ireland (DDCI) [revealed](#) that between 2011 and 2013, almost 300 rulings were granted by the Revenue Authority. Providing clarity and certainty for businesses in the form of rulings is an important part of the Revenue Authority's remit, and the vast majority of the rulings granted are presumably unremarkable. But there are questions around the level of secrecy that rulings enjoy. They are not the subject of debate in the Dáil or Seanad (Ireland's two houses of parliament) and have no political oversight outside the purview of the Minister of Finance and technical briefings issued by the Revenue Authority to the Department of Finance. But, as exposed by the Apple case, the financial implications of these rulings can be significant.

Christian Aid continues to support calls from DDCI to include revenue foregone as a consequence of tax rulings as an item of expenditure in the government estimates and budget, and for the basic elements of tax rulings to be published in the public interest.

Transparency remains central to tax campaigner demands. It is crucial to lay bare the full spectrum of what a company does in each of the countries in which it operates, for a number of reasons. For revenue authorities, being able to see the full picture of a company's activities will allow them to identify suspicious company activity, in particular the shifting of profit from one jurisdiction to another jurisdiction with a lower tax rate. Publicly accessible information is particularly important for developing countries with limited capacity to monitor and audit the operations of large companies.⁴ For investors, greater company transparency allows them to make more informed decisions as to how much of a risk a company's tax policy represents, while for companies, providing a full picture of their activities will minimise the possibility of partial information being misinterpreted by the media and general public.

LOOKING AHEAD

Tax justice campaigners will continue to focus on influencing two ongoing processes at the EU level, where negotiations continue around introducing greater transparency from companies in the form of public country by country [reporting](#), and [developing](#) publicly accessible registers across Europe of the beneficial owners of companies.

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These are important initiatives, and further evidence of international moves to greater transparency, and of growing intolerance of the kinds of tax avoidance demonstrated by Apple.

International intolerance of aggressive tax avoidance schemes places Ireland in a challenging place. Since the 1950s Ireland, necessarily many would argue, has based its industrial policy on an advanced form of tax competition. On one level the policy has been largely successful, with US multinational corporations now [employing](#) 150,000 people in Ireland.

However, the ongoing global demand for greater tax justice threatens the sustainability of Ireland's tax model, which has at its core the kinds of elaborate avoidance schemes offensive to so many. For campaigners in Ireland, there is a dual challenge in advocating for greater tax justice at home, while at the same time acknowledging that much of the Irish economy is bound up in US multinationals. Civil society's challenge therefore is both to be critical of those egregious practices that run contrary to human rights principles and damage Ireland's reputation, and to be propositional and constructive in articulating what a fairer and more sustainable Irish economic model might look like.

⁴ In this respect, if Ireland's appeal is unsuccessful, the government will be faced with the challenge of how to redistribute revenue to other jurisdictions who may have legitimate claim to some of the €13 billion. This is likely to include countries of Africa, Asia and the Middle East.