

**Statement to the Joint Committee on Finance, Public Expenditure and Reform, and  
Taoiseach,  
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I am an academic working in the School of Business, Trinity College. I have been working and researching the area of corporate taxation and the taxation of MNE's for many years.

MNE tax strategies are complex but often obscure. The tax strategies of Apple were first revealed in detail by a U.S. Senate Subcommittee<sup>1</sup> in 2013. These complex arrangements were known to very few. One reason for this is that all Apple subsidiaries in Ireland are incorporated as unlimited companies and file very little financial information.

There are three main aspects to my presentation.

Apple structure and Tax Strategy; Aspects of the Commission Decision; Some implications of the Apple appeal.

**(1). Apple Structure and Ireland**

Ireland is very important to Apple in terms of profitability and tax structure. Apple (Form 10K 2015, p. 58) states :-

“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.”

The Apple Group has seven subsidiaries incorporated in Ireland, three (AOI, ASI and AOE) are incorporated in Ireland but were not resident for tax purposes.

*Apple Tax Strategy*

There are a number of reasons for the success of Apple:- The development of ‘organizational competencies’, market power, and intellectual property. Apple profitability reflects all three aspects.

Organizational competencies includes ‘factoryless production’. For example ASI contracts with a firm in China to produce finished products. These are then shipped from China to the final market. While en route ASI pays for the goods. The U.S. Senate Report states ( 2013, p. 27) “Once ASI took initial title of the finished goods, it resold the goods to the

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<sup>1</sup> United States Senate Permanent Subcommittee on Investigations, Offshore Profit Shifting and the U.S. Tax Code Part 2 (apple Inc.) May 21s, 2013.

appropriate distribution entity, in most cases without taking physical possession of the goods in Ireland". ASI thus earned substantial income.

Apple Ireland is HQ for European operations, including India, Middle East and Africa (Commission Decision par. 42). The U.S. Senate Report (2013) found that one subsidiary in Ireland (Apple Sales International) had no employees, no fixed assets and income of \$22 billion in 2011 (64% of group income) and paid \$10 million in tax tax rate of 0.045 % (Table 1, appendix).

The effective tax rate for ASI fell to 10% of that number by 2014 to 0.005%. (Table (1) appendix.

The ability to remain incorporated in Ireland but not resident for tax purposes in any country was ended in the Finance Act 2013, (section 3. Apple Ireland has thus increased its tax payments and has been reported in 2016 as being 'the largest tax payer in Ireland' (Letter from Tim Cook to Apple customers, April, 30<sup>th</sup> 2016 available at <http://www.apple.com/ie/customer-letter>).

### *Effective tax rates for Apple*

Table (2, appendix) shows various measures of ETR for Apple for the period 2006-2015.

The Table shows that while the Apple group pays corporation tax (although not at the statutory rate), little corporation tax is paid outside the U.S. due to large foreign tax savings largely arising from Irish operations (Table 2, column 6).

The foreign tax charge on overseas earnings (non-U.S. tax charge/non-U.S. earnings) amounted to 5.2% for 2016 (ETR4, Table 2). An alternative measure shows an even lower ETR of 3.4% for 2016, although up from 1.2% in 2011 (ETR 5 Table 2).

Because Apples overseas tax rate is so low, a tax credit for overseas tax is also low, so that on repatriation of those profits, Apple would be subject to a much higher tax rate.

## **(2) The Commission Decision**

The Department of Finance summary of the basis of Ireland's appeal<sup>2</sup> does not refer to the fact that ASI and AOI are registered companies in Ireland, but rather refers to the 'Irish branches' of ASI and AOI.

There are several important legal requirements for an Irish incorporated company, as distinct from a branch. The country of incorporation has assumed greater significance because of European Court of Justice Rulings, for example in the case of Eurofoods

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<sup>2</sup> 'Explanation of the main lines of argument in Ireland's annulment application lodged with the General Court of the European Union on 9 November 2016', published on 19th December, 2016.

(incorporated in Ireland), there was a dispute as to whether the firm should be liquidated in Ireland or Italy the parent company Parmalat was located. The European Court of Justice ruled that the registered office, (the place of incorporation) was the 'centre of main interests' (CoMI), and where the firm should be liquidated even though this subsidiary had no employees and no fixed assets (Judgement of the Court of Justice in Case C-34/04 Eurofood IFSC 2 May 2006).

ASI and AOI were regarded by Revenue as not tax resident in Ireland (Commission Decision, par. 50) because:-

"ASI and AOE had a trading activity in Ireland through their respective branches and were **managed and controlled outside Ireland**, the companies were considered to be non-resident companies in Ireland under the trading exception of Section 23A TCA 97" .

Furthermore both companies were not resident in any other jurisdiction (Commission Decision, par. 52) states :-

"During the time that the contested tax rulings were in force, ASI and AOE could therefore be best described as "stateless" for tax residency purposes".

ASI and AOI had no fixed assets and no employees. In 2012 following a restructuring all Apple's Irish employees were transferred amongst five different Apple subsidiaries in Ireland<sup>3</sup>.

#### *The Role of the Branch Structure and Profit Split*

Apple has argued that ASI could be split into two branches (even though they had no fixed assets and no employees) and this argument was accepted by Revenue. The commission state:-

"The two tax rulings issued by Ireland concerned the internal allocation of these profits within Apple"

One branch in Ireland earned very little profit and paid tax on those profits. The other part 'headquarters branch' earned most profits and paid no tax. The net result for example, was that ASI for 2011, had pre-tax earnings of \$22 billion and paid \$10 million in tax (Senate subcommittee, 2013, p. 21).

The Commission (Press Statement 30th August 2016) States:-

"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

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<sup>3</sup> Senate subcommittee, 2013, footnote 103.

and did not have any employees or own premises. Its activities consisted solely of occasional board meetings. Only a fraction of the profits of Apple Sales International were allocated to its Irish branch and subject to tax in Ireland. The remaining vast majority of profits were allocated to the "head office", where they remained untaxed".

The Commission comment on this organisational structure (par. 271):-

"since ASI's and AOE's Irish branches do not have a separate legal personality from the companies to which they belong, neither those branches nor any other part of those companies, in particular their respective head offices, could be said to separately own the assets or owe the liabilities of those companies".

*Why were (a) ASI and AOI regarded "as non-resident companies" ?*

Apple and Ireland claim (Commission Decision, par. 113) states:-

"that critical business activities conducted by or for ASI and AOE are conducted outside of Ireland, for example through Apple Inc. employees or the board of directors of ASI and AOE".

In contrast the Commission could find no evidence that AOI or ASI were managed and controlled outside Ireland. For example (par. 282) states :-

"the only evidence provided of activities performed by ASI's and AOE's board of directors during the period when the contested tax rulings were in force is the decisions taken in the meetings of the boards, which are reflected in the minutes over the relevant time frame, provided to the Commission during the course of the investigation and illustrated in Table 4 and Table 5 of this Decision. Those minutes do not demonstrate that ASI's and AOE's board of directors performed active and critical roles with regard to the management and effective control of the Apple IP licenses".

*Why is ASI so Profitable if it has no fixed assets or employees?*

The Commission Decision (par 120) states "

"ASI and AOE have the beneficial ownership in their territory of the intangible property developed as a result of the R&D conducted under the CSA"[cost sharing agreement].

### **(3) Concluding Comments**

One of the criticisms of the Commission Decision is that Ireland would become a "tax collector for the rest of the world"

The Commission press release of 30<sup>th</sup> August 2016 states :-

“The amount of unpaid taxes to be recovered by the Irish authorities would be reduced if other countries were to require Apple to pay more taxes on the profits recorded by Apple Sales International and Apple Operations Europe for this period”.

The Commission Decision refers to two cases where this has happened , Italy and one other unnamed country (par. 99). The transfer is indirect. It is not a direct transfer from the Irish state.

Such reallocation of profit from Ireland to other countries (mostly EU countries) has become common. There have been around 100 such adjustments since 2005, involving a reduction in profits declared in Ireland, a consequent repayment of Irish corporate tax of around €900 million and an associated increase in reported profits and corporate tax payments in other countries.

There are likely to be far more cases involving Irish subsidiaries in future years, because of increased data provision to jurisdictions in other countries in particular country by country reporting. Such adjustments could be seen as a form of introduction of CCTB (Consolidated Corporate Tax Base) but on a bilateral basis.

Revenue in commenting on the decision to appeal the Apple decision stated :-

“MNE’s should pay tax on profits and it is not the function of revenue to defend the use of international tax law by multinationals”.

By appealing this case the Irish Government appears to be doing just that. The Irish Government Case is identical to the Apple case. The Irish Government has spent considerable sums in defending the Apple case and there will be further expenditures in the future. In the absence of these expenditures Apple expenditures are likely to be much higher.

The phrase “Apple” and “Ireland” are continuously conjoined in the Commission Decision, giving the impression both cases are identical. For example (par. 53) states:-

“Ireland and Apple provided descriptions of the functions performed by the Irish branches of ASI and AOE, which were used as a basis to present and support Apple’s estimates of the taxable profit of those companies for Irish corporation tax purposes”

In the context of Brexit where we are likely to seek important concessions from our EU partners, and special economic measures (perhaps in an emergency) for certain sectors, it is unfortunate that in two major areas, the introduction of CCTB and CCCTB , and the Apple case, Ireland is in dispute with the Commission. The CCTB and CCCTB proposals are supported by a majority of Governments in the EU and by other groups, such as those advocating tax reform.

There is a high risk that by appealing this case, a number of EU Governments and perhaps more important public opinion in EU countries will interpret this appeal as support for Apple’s tax

strategy. Apple has deep pockets and this appeal could last several years – a constant reminder to public opinion that Ireland apparently supports Apples tax strategies.

In conclusion the commission case is very strong. Apple/Irish Government are likely to lose this case but irrespective of the decision, appealing this case is a mistake and is not in the public interest.

## Appendix

Table (1)  
Profits and Taxes Paid (\$ billions) for Apple Sales International (ASI) 2004-2014

	2004	2005	2006	2007	2008	2009	2010	2011	2014
Pre-Tax profits	\$0.268	\$0.725	\$1.18	\$1.844	\$3.127	\$4.794	\$12.0	\$22.0	n.a.
Tax charge \$ million	\$2.1	\$3.9	\$6.5	\$8.9	\$14.9	\$3.653	\$7.0	\$10.0	n.a.
Effective Tax Rate	0.78%	0.54%	0.55%	0.48%	0.48%	0.08%	0.06%	0.045%	0.005%

Source: - Permanent Subcommittee on Investigations Offshore Profit Shifting and the U.S. Tax Code, Part 2 (apple Inc.), p. 21, Apple Sales International Accounts filed with the Australian Securities and Investment Commission, European Commission Decision of 30.8.2016.

Table (2)  
Tax Payments and Effective Tax Rates (ETR) for Apple (\$ million) 2006-2016

Year	Group Pre-tax profits (1)	Tax shown in income statement (2)	Cash Tax Paid (3)	Foreign earnings (4)	Tax on Foreign Earnings (5)	Foreign Tax Savings (6)	ETR1 % (7)	ETR2 % (8)	ETR3 % (9)	ETR4 % (10)	ETR5 % (11)
2016	61372	15685	10444	41100	2138	5582	25.6	17.0	14.5	5.2	3.4
2015	72515	19121	13252	47600	2938	6470	26.4	18.3	15.8	6.2	3.3
2014	50483	13973	10026	33600	1489	4944	26.1	18.7	16.3	4.4	2.4
2013	50155	13118	9128	30500	1133	4614	26.2	18.2	16.0	3.7	1.8
2012	55763	14030	7682	36800	713	5895	25.2	13.8	13.0	1.9	1.3
2011	34205	8283	3338	24000	602	3898	24.2	9.8	9.3	2.5	1.2
2010	18540	4527	2697	13000	-93	2125	24.4	14.5	13.8	-0.7	n.a.
2009	12066	3831	2997	6600	310	647	31.8	24.8	15.4	4.7	n.a.
2008	8947	2828	1267	4600	200	500	32	14.2	13.4	4.3	n.a.
2007	5008	1512	863	2200	87	297	32	17.2	16.2	4.0	n.a.
2006	2818	829	194	1500	84	224	29	6.9	6.4	5.6	n.a.

Source: Form SEC 10K . The year end for each year is September.

Summary of definitions of ETR used in table (2).

ETR1 = Tax rate as defined in company accounts as Tax charge/pre-tax profit from the Income Statement (column 7).

ETR2 = Tax rate defined as cash tax payments (from cash flow statement) /pre tax profits (column 8).

ETR3 = Cash tax payment/(accounting depreciation + pre-tax profit). Depreciation is included in the tax base because depreciation as reported in company accounts is not a tax deductible expense (column 9).

ETR 4 = is defined as Foreign Tax Charge as % of Foreign Earnings

ETR 5 = Tax rate on unremitted profits. This measure estimates tax paid on unremitted earnings as the difference between the U.S. statutory rate of 35% and tax shown as due if remitted as disclosed in Form 10K. (column 11).