Ireland's Responsibility for the Impacts of Cross-border Tax Abuse on the Realisation of Children's Economic, Social and Cultural Rights

Second Submission to the Committee on the Rights of the Child:

Written Inputs to State Report

Submitted on 12th August, 2022 by:

ActionAid Ireland, Christian Aid Ireland, Global Legal Action Network, Integrated Social Development Centre (Ghana), Oxfam Ireland, Tax Justice Coalition Ghana, Tax Justice Network

This submission is public

Introduction

In July 2020, this coalition of organisations made a submission (the '2020 Submission') to the Committee's 87th Pre-Sessional Working Group, outlining how Ireland is failing to meet its obligations under the Convention on the Rights of the Child (the 'Convention') due to its facilitation of cross-border tax abuse, in particular by enabling corporate 'profit-shifting'.[1]

In November 2020, in its List of Issues Prior to Reporting ('LoIPR'), the Committee asked the Irish Government to "*describe the measures taken to ensure that tax policies do not contribute to tax abuse by companies operating in other countries, leading to a negative impact on the availability of resources for the realization of children's rights in those countries."*

In February 2022, in its combined fifth and sixth periodic reports to the Committee (the 'State Report'), the Government of Ireland asserted that "*its tax policy does not contribute to tax abuse by companies operating in other countries*", and that there are "*no negative spill-overs…on the economies of developing countries*" as a result of Ireland's tax regime and policies.[2]

The Committee will be aware that corporate profit-shifting is a practice which results in the siphoning of taxable revenues away from the countries in which those revenues are generated, undermining the capacity of their governments to fund essential public services and therefore to fulfil children's economic, social and cultural rights.[3] The Irish tax policies and associated profit-shifting structures described in the 2020 Submission, and further in section (2) below, enable multinational companies to significantly reduce their tax liabilities in countries where they make and sell their products and services, thereby eroding those countries' tax bases.

Though the details of multinational tax structures can be complex, they function primarily through entities located in higher-tax jurisdictions making payments – including service fees, interest payments and royalty fees for the use of intellectual property – to entities located in lower-tax jurisdictions, usually within the same corporate group. In this manner, profits are shifted into Ireland, which is itself a low-tax jurisdiction, and also on to even lower tax jurisdictions like Bermuda or the Cayman Islands.

Profit-shifting is particularly harmful for developing countries, which are more dependent on corporate income tax than wealthier countries.[4] While it is difficult to disaggregate country-specific estimates of shifted profits, almost all global estimates find that a greater proportion of profits are shifted out of lower-middle- and low-income countries.[5]

[1] ActionAid Ireland, Christian Aid Ireland, Global Legal Action Network, Integrated Social Development Centre (Ghana), Mary Cosgrove, Oxfam Ireland, Tax Justice Coalition Ghana, Tax Justice Network, *Ireland's Responsibility for the Impacts of Cross-border Tax Abuse on the Realisation of Children's Economic, Social and Cultural Rights'*, July 2020: https://www.christianaid.ie/sites/default/files/2020-11/CRC%20Tax%20Submission.pdf

[2] Dept of Children, Equality, Disability, Integration and Youth, combined fifth and sixth periodic reports submitted by Ireland (CRC/C/IRL/5-6), 15 February 2022, para. 82 -85, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2f5-6&Lang=en

[3] On the impact of both tax avoidance and tax evasion on the fulfilment of human rights, see: *The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights: reports by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights,* Cephas Lumina, UN Human Rights Council, Interim Report (A/HRC/22/42), 21 February 2013, esp. para. 7; Final Report (A/HRC/25/52), 7 May 2014, para. 23 and 27

[4] Corporate income tax (CIT) constitutes an average of 19.2% of all tax revenues in Africa, and 15.6% in Latin America and the Caribbean, while wealthy OECD states generate around 10% of their tax revenues from CIT. OECD Corporate Tax Statistics database: https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm; International Monetary Fund, 'IMF Policy Paper: Spillovers in International Corporate Taxation' (9 May 2014) p. 7: https://www.imf.org/external/np/pp/eng/2014/050914.pdf

[5] EU Tax Observatory, 'The scale of corporate tax avoidance': https://www.taxobservatory.eu/repository/the-scale-of-corporate-tax-avoidance/

Contrary to the assertions in its State Report, Ireland continues to be one of the world's largest conduits or destinations for multinational profit-shifting. Its role has been recognised by the European Commission, bodies within the U.S. Congress, and esteemed academic researchers.[6] Periodic European Commission analysis as recently as June 2022 reaffirmed Ireland's role as a conduit, noting that "*Ireland's legal structure regarding the withholding of taxes on outbound payments may encourage many companies to use Ireland's tax rules to engage in aggressive tax planning. Dividend, interest and royalty payment streams, relative to GDP, are therefore much higher than the EU average*", as well as inadequacies in its promised efforts to tackle such profit-shifting."[7] Two recent estimates from highly-respected econometric studies found that Ireland is the destination annually of between $44bn and $100bn of shifted corporate profits, respectively the fifth- and first-largest destination.[8]

Furthermore, the GRADE (Government Revenue and Development Estimation) project of the University of St Andrews and University of Leicester recently published a policy brief entitled '*Addressing the implications of Ireland's tax policies on Determinants of Health and Mortality Rates*', in light of the above-mentioned question included by the Committee in its LoIPR. Using the peer-reviewed GRADE tool[9] and estimates of Ireland's contribution to global tax abuse, it estimated that lost revenue was equivalent to that required to "over a ten-year period, avert 21,919 Under-5 deaths and 2,700 maternal deaths; an additional 121,732 children would attend school for an extra year, 629,624 people (of which 76,042 are children and 158,699 are women under 50) would access basic drinking water and 1.2 million people (of which 154,968 are children and 311,337 are women under 50) would access basic sanitation". It concluded that "Ireland's tax policies come with a serious human cost and impact the right to health for many children."[10]

Consistent with these assessments, the effects of cross-border tax abuse for the realisation of human rights have been highlighted by a number of UN experts, including the Special Rapporteur on extreme poverty and human rights.[11]

The remainder of this submission responds to the material in the State Report, and provides updated analysis on (1) Ireland's 2015 'Spillover Analysis'; (2) Ireland's continued facilitation of profit-shifting and its impact; (3) Ireland's undermining of international cooperation on profit-shifting; and (4) Ireland's obligations under the Convention.

---

[6] European Commission, *Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*: https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf; US Senate Permanent Subcommittee on Investigations, *Hearing on Offshore Profit Shifting and the US Tax Code* (20 September 2012), https://www.govinfo.gov/content/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf. For an overview of relevant academic work, see footnote five the 2020 Submission (n1).

[7] European Commission, *Commission Staff Working Document: 2022 Country Report – Ireland*, 9 June 2022: https://ec.europa.eu/info/sites/default/files/2022-european-semester-country-report-ireland_en.pdf

[8] T. .R Tørsløv, L. S Wier and G. Zucman, 'The Missing Profits of Nations' (National Bureau for Economic Research Working Paper No. 24701) (Revised April 2020), pp. 27-28: https://www.nber.org/papers/w24701.pdf; B. di Bratta, V. Santomartino and P. Acciari, Italian Ministry of Economy and Finance, 'Assessing profit shifting using Country-by-Country Reports: a non-linear response to tax rate differentials' (DF Working Paper No. 11), February 2021): https://www.finanze.it/export/sites/finanze/.galleries/Documenti/Varie/Assessing-profit-shifting-using-Country-by-Country-Reports-Bratta-Santomartino-Acciari-2021-19-02C.pdf. For more detail on the scale of global tax abuse and Ireland's role within it, see Tax Justice Network, 'The State of Tax Justice 2021': https://taxjustice.net/reports/the-state-of-tax-justice-2021/

[9] See https://medicine.st-andrews.ac.uk/grade/

[10] Policy Brief #1.1, Case Study – Ireland', GRADE project, April 2021, pp. 3-4: https://med.st-andrews.ac.uk/grade/wp-content/uploads/sites/13/2021/04/Ireland-policy-brief.pdf

[11] M. S. Carmona, Special Rapporteur on Extreme Poverty and Human Rights, 'Report of the Special Rapporteur on extreme poverty and human rights', UN Doc A/HRC/26/28 (22 May 2014) para 24; P. Alston, 'Tax Policy is Human Rights Policy: The Irish Debate', Keynote Address at Christian Aid Ireland Conference, (12 February 2015): https://www.ohchr.org/Documents/Issues/EPoverty/Alston-Tax_policy.docx; J. P. Bohoslavsky, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, 'Impact of economic reforms and austerity measures on women's human rights' UN Doc A/73/179 (18 July 2018) para 23, and 'Guiding principles on human rights impact assessments of economic reforms' UN Doc A/HRC/40/57 (19 December 2018) para 11.5; A-M. de Zayas, Independent Expert on the promotion of a democratic and equitable international order, Statement at the 71st session of the General Assembly (20 October 2016).

1. Ireland's 2015 Spillover Analysis: incomplete and outdated

The Irish Government does not directly address Ireland's role in facilitating profit-shifting in its State Report, and no specific or recent measures in domestic Irish tax policy are described. Instead, it relies on a 'Spillover Analysis' conducted in 2015 on behalf of the Irish Department of Finance, which concluded that the Irish tax system does not lead to a loss of tax revenue in developing countries.[12] However, as outlined in the 2020 Submission and in detail in a report by Christian Aid Ireland, the 2015 Spillover Analysis was limited and insufficient in several crucial respects, which grossly under-represented the scale of relevant transactions between Ireland and developing economies.[13] In summary, it:

- examined financial flows between Ireland and **just thirteen developing countries**. Twelve of these countries were among the lowest developing-country recipients of Irish foreign direct investment (FDI) compared to the size of their economies during the period it analysed. By contrast, at least thirteen other low- or middle-income countries which (proportionally) receive far greater FDI from Ireland were omitted from the analysis entirely.

- examined investment data for these thirteen countries for **just two years** (2009 and 2012), only 4% of the available data on Irish overseas investment into developing countries during this four-year period (2009-2012).

- **ignored indirect investment** between Ireland and developing countries via other developed 'investment hubs', as well as types of financial flows often used for profit-shifting but not reflected in international investment figures, such as commissions/service fees.

- failed to consider or quantify **sales income booked in Irish 'sales hubs'** from customers in other countries, despite this being a key mechanism in many of the most significant Irish tax avoidance structures.

As a result, the 2015 Spillover Analysis paints a fundamentally incomplete picture of the economic links between Ireland and developing economies and downplays the serious impact of corporate profit shifting on the tax bases of developing countries. Furthermore, it is now significantly outdated, with the most recent available data (2016-2020) showing that of the top 40 recipients of Irish FDI, fourteen are eligible for official development assistance (ODA).[14] The Irish Government has not updated or repeated this analysis, though it continues to cite it seven years later, despite significant changes in national and international tax law and the global economy since it was carried out.[15]

It is also of note that the State Report does not engage with any of the criticisms of the Spillover Analysis made in the 2020 Submission. For the foregoing reasons, we respectfully submit that it is appropriate for the Committee to *conclude* that Ireland's 2015 Spillover Analysis is inadequate on the grounds that it is unduly narrow and out-of-date and therefore to *recommend*, at a minimum, that Ireland must conduct independent, participatory, comprehensive and periodic assessments of the

[12] Department of Finance, IBFD Spillover Analysis. Possible Effects of the Irish Tax System on Developing Economies (July 2015): https://assets.gov.ie/181168/10d97d7e-cf59-4b85-88ae-de377997d069.pdf

[13] Christian Aid Ireland, *Global Linkages: re-examining the empirical basis of the 2015 Spillover Analysis* (November 2017): https://www.christianaid.ie/sites/default/files/2018-02/global-linkages-tax-report.pdf

[14] Calculations from IMF Coordinated Direct Investment Survey (CDIS). These countries have significant economic linkages to Ireland but are omitted from the 2015 analysis.

[15] These changes include: the global implementation of the OECD's Base Erosion and Profit Shifting (BEPS) programme; reform of the taxation of U.S. multinationals via the US' 2017 Tax Cuts and Jobs Act; EU-wide reforms implemented through the first two Anti Tax Avoidance Directives (ATAD); and significant unilateral changes to Irish tax rules governing the tax treatment of intellectual property and capital allowances for its acquisition.

impact of its tax policies on the ability of other countries, in particular developing countries, to realise the rights of children under the Convention.

2. Ireland's continued facilitation of profit-shifting and its impact

While the specific structures used have evolved over time, changes to Irish tax law have continually protected the ability of multinational companies to shift profits out of developing countries and elsewhere. As outlined in our 2020 submission, these structures have mostly relied on the same two-step practice, whereby companies (1) book sales income in an Irish entity that acts as a 'sales hub', and then (2) shift profits to a low- or no-tax jurisdiction through payments to an Irish-registered but overseas-resident company. Originally dubbed the '**Double Irish'**, this mechanism and its many variants have arguably been one of the world's most-used corporate tax avoidance structures. As an indication of its scale, in 2019 alone Google used this mechanism to shift over $75.4bn of profits from worldwide advertising income through Ireland to Bermuda, where the standard rate of tax is 0%.[16]

The 2015 Spillover Analysis asserted that then-recent changes to Irish tax law "*will [by 2020] bring an end to the so-called Double Irish two-tier structure used in aggressive tax planning*", and thus that "*after the changes made to the residency rules in the Finance Bill 2014, it can be said that the current Irish tax system in general…does not facilitate [such] conduit structures*".[17]

Seven years later, however, the Irish tax system clearly does still facilitate such 'conduit structures', as well as tax shelters for overseas income in Ireland itself. Three policies in particular demonstrate this clearly:

(a) Tax breaks for acquisitions of intellectual property

As the Irish Government began to phase out the tax residency rules that made the original 'Double Irish' structure possible, some multinationals were able to effectively replace them by relying instead on tax breaks introduced in relation to the transfer of intellectual property (IP) to Ireland. This allowed these companies to continue to book sales income in Ireland from around the world and ultimately incur very low tax on these sale in Ireland *itself*, rather than having to shift the profits on to a third country like Bermuda. This arrangement came to be known as the '**Green Jersey'**, [18] and was facilitated by a series of measures which significantly expanded the tax deductions available for the acquisition of IP by one company from another within the same multinational group.[19]

In 2014, in the same piece of legislation which it claimed ended the 'Double Irish', the Irish Government simultaneously increased to 100% the amount of related profits companies could shield in this way, thereby shrinking the effective tax rate on those profits from 2.5% to 0%.[20] After intense public criticism this was restored to 80% in September 2017, but the huge amounts of IP that multinationals had moved into Ireland prior to September 2017 were explicitly exempted.[21] Any

---

[16] C. Taylor, 'Google used 'double-Irish' to shift $75.4bn in profits out of Ireland', *Irish Times*, 17 April 2021, https://www.irishtimes.com/business/technology/google-used-double-irish-to-shift-75-4bn-in-profits-out-of-ireland-1.4540519. See also European Commission, *Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple*, https://ec.europa.eu/competition/state_aid/cases/253200/253200_1851004_674_2.pdf ; US Senate Permament Subcommittee on Investigations, *Hearing on Offshore Profit Shifting and the US Tax Code* (20 September 2012), https://www.govinfo.gov/content/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf

[17] Department of Finance, (n12), pp. 8, 61

[18] E. Clancy and M. B. Christensen, *Exposed: Apple's Golden Delicious Tax Deals* (report for the GUE/NGL group in European Parliament), June 2018: https://left.eu/content/uploads/2018/06/Apple_report_final.pdf

[19] For example, Section 13 of the Finance Act 2009; s.43 Finance Act 2010; s.37 Finance Act 2011

[20] S. 40 Finance Act 2014

[21] C. Taylor, 'Tax break on intellectual property changed to raise funds', *Irish Times,* 10 October 2017, https://www.irishtimes.com/business/economy/tax-break-on-intellectual-property-changed-to-raise-funds-1.3251422

companies that had "on-shored" IP during the three-year window could continue to use the 100% allowance.[22]

These changes have incentivised multinationals to book taxable income in Irish subsidiaries, derived from sales made all over the world, including in developing countries, and which could otherwise have been taxed in those countries. In the first quarter of 2015, Apple moved over US$240m of intellectual property to Ireland from another low-tax jurisdiction, generating a tax deduction that could shield over €27 billion a year of profits derived from sales in all non-US countries, including developing countries.[23] Likewise Microsoft has long used such structures to shift taxable profits from European, Middle Eastern and African sales to and through Ireland. Since 2019, it has made Ireland the hub for its sales in the Asia-Pacific region too - previously booked in Singapore - worth some $10bn a year.[24] In this way Microsoft is booking taxable sales revenue in low-tax Ireland from an increasing range of low- and middle-income countries.

(b) The 'Single Malt'

While some multinationals have relied on the above 'onshore' tax structure, others have instead turned to a new version of the original 'offshore' Double Irish. Dubbed the '**Single Malt**', this new structure allows multinationals to achieve the same effective result as under the Double Irish by shifting profits to low-tax jurisdictions with which Ireland has signed tax treaties, including Malta.[25]

After sustained criticism, in 2018 Irish Finance Minister Paschal Donohoe announced an agreement between Ireland and Malta to end the facilitation of what he acknowledged was "aggressive tax planning" using this arrangement.[26] However, due to the narrow drafting of this agreement, several multinationals – from Microsoft's subsidiary LinkedIn, to medical producers Allergan and Teleflex, and video game behemoth Tencent – have been able to continue to set up 'Single Malt' structures.[27] Last year, research from Christian Aid Ireland showed in detail that the 'Single Malt' still operates, and that Abbott Laboratories, one of the world's largest pharmaceutical companies and amongst the world's largest Covid test producers, constructed a 'Single Malt' tax shelter just months after the Irish Government claimed to have shut such structures down.[28] Faced with this evidence, the Irish government insists that the Ireland-Malta agreement is operating as intended, indicating its support for its narrow and partial impact.[29]

The impact is significant: the 'Single Malt' structure enables Abbott Laboratories to legally avoid paying millions of dollars in tax on pandemic super-profits generated through several billion dollars in

---

[22] S. 25 Finance Act 2017; S. Coffey, *Review of Ireland's Corporation Tax Code*, 30 June 2017: https://assets.gov.ie/7255/b275ad7f0874433b9d6d0c54c8f84764.pdf

[23] For the derivation of this figure from Ireland's national accounts, see S. Coffey, 'What Apple Did Next', 24 January 2018, http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html. For its structure of booking foreign sales in Ireland and relocating IP post-2014, see E. Clancy and M. B. Christensen (n 18)

[24] Microsoft Operations Ireland Ltd, annual accounts 2019, p.4; M. Paul, 'Microsoft moves $52.8bn of assets and its Asian trading operation to Ireland', Irish Times, 25 May 2019: https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630

[25] Christian Aid Ireland, '*Impossible structures: tax outcomes overlooked by the 2015 Spillover Analysis'*, November 2017: https://www.christianaid.ie/resources/campaigns/impossible-structures-2017-tax-report

[26] Statement from Minister P. Donohoe, December 2018: https://www.gov.ie/en/press-release/723aff-minister-donohoe-welcomes-agreement-between-revenue-commissioners-ma/; Competent Authority Agreement under the Ireland-Malta Double Taxation Convention 2008 (November 2018), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35/35-01-10.pdf ; Barry O'Halloran, 'Revenue to close 'single malt' tax loophole', *Irish Times*, 27 November 2018, https://www.irishtimes.com/business/economy/revenue-to-close-single-malt-tax-loophole-1.3712238

[27] Minister of Finance, written answer (Question to Finance), Dáil Éireann, 21 September 2021, https://www.oireachtas.ie/en/debates/question/2021-09-21/63/#pq-answers-63_185_186_187_188_189_190_195_196

[28] Christian Aid Ireland, *Abbott Laboratories Single Malt Tax Structure*, September 2021, https://www.christianaid.ie/resources/campaigns/abbott-laboratories-single-malt-tax-shelter-christian-aid-ireland

[29] Minister P. Donohue, written answer to parliamentary question, 21 September 2021, https://www.oireachtas.ie/en/debates/question/2021-09-21/187/

annual sales of rapid 'point of care' tests for infectious diseases including Covid-19, HIV and malaria, including to countries in the Global South. In this manner, sales income is shifted from some of the poorest countries in the world, such as Ethiopia and Nepal, into Ireland and on to Malta.[30] It enabled the company's testing division to achieve an effective tax rate of just 4% on €459m profits in 2020, while diminishing its tax liabilities in developing countries.[31]

(c) An extensive network of tax treaties

In our 2020 Submission, we described how Ireland's large network of seventy-three tax treaties, combined with the measures which encourage profit-shifting outlined above, can make Ireland a global 'leaky bathtub' for multinational profits generated in developing countries and elsewhere. We further noted that the IMF has warned developing countries of the risks of signing tax treaties with developed countries[32] and that it separately estimated that African countries may lose between 15% and 25% of their entire corporate income tax revenues when they sign tax treaties with 'investment hubs' like Ireland.[33]

In this context, we also provided an overview of the process by which Ireland entered into its most recently signed tax treaty with Ghana in 2018; part of an explicit Irish 'Africa Strategy' targeting four emerging African economies for new tax treaties.[34] In particular, we noted how the government ignored Irish civil servants' warnings about the potential effect of the proposed treaty for Ghana's revenue-raising ability; omitted 'minimum-standard' anti-avoidance measures that had previously been agreed at the OECD; and failed to undertake any impact assessment prior to concluding the treaty. We also noted that, according to estimates from the above-mentioned GRADE tool, revenue lost to tax abuse in Ghana in 2013 alone was equivalent to that which could have prevented 170 child deaths, if available to fund key determinants of health and mortality.

The Irish Government did not address this material in the State Report. We respectfully suggest that the Committee revisits this overview in our 2020 Submission as we submit that it demonstrates that Ireland abused its position of power, as a developed country, *vis-à-vis* Ghana in its negotiation of the tax treaty, with significant detrimental consequences for children's rights. We recall in this context that the Committee has previously noted in relation to Ghana that 'the budget for children's related expenditure appears to be insufficient to respond to national and local priorities for the protection of children'.[35]

In June 2022, the Irish Government published a new policy on tax treaties, which recognises the specific risks they pose for developing countries. It includes welcome commitments not to target certain countries for tax treaties, to conduct impact assessments, to "*consider the preferences of the*

[30] P. Leahy, 'Pharma giant Abbott using Irish 'single-malt' scheme to avoid tax on profits', *Irish Times*, 15 September 2021, https://www.irishtimes.com/news/health/pharma-giant-abbott-using-irish-single-malt-scheme-to-avoid-tax-on-profits-1.4674126; Christian Aid Ireland (n 28)

[31] See calculations in T. Hubert, 'The double malt – part one: How a pandemic boost to a multinational's Irish sales left a half-billion profit taxed at 4%', *The Currency*, 28 March 2022: https://thecurrency.news/articles/78037/distilling-the-double-malt-part-one-how-a-pandemic-boost-to-a-pharma-multinationals-irish-sales-left-a-half-billion-profit-taxed-at-4/

[32] International Monetary Fund, 'IMF Policy Paper: Spillovers in International Corporate Taxation' (9 May 2014) pp. 7 https://www.imf.org/external/np/pp/eng/2014/050914.pdf

[33] Beer and J. Loeprick, 'The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa', IMF Working Paper WP/18/227 (24 October 2018)

[34] Department for Foreign Affairs and Trade, ''Report on Africa Strategy Trade Consultations 21-23 March 2012', 5 April 2012, internal document released to researchers, reproduced in Mike Lewis, *A Negotiating History of Ireland's New Tax Treaty with Ghana*, 10 February 2019, pp. 17-18, https://www.mikelewisresearch.com/GH-IE.pdf; D. Coyle, 'Irish officials disregarded Dept of Foreign Affairs concerns over Ghana trade deal', *Irish Times,* 27 September 2019: https://www.irishtimes.com/business/economy/irish-officials-disregarded-dept-of-foreign-affairs-concerns-over-ghana-trade-deal-1.4031852

[35] Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Ghana' CRC/C/GHA/CO/3-5 (9 June 2015), para 14. For more on Ghana's vulnerability to illicit financial flows, see Tax Justice Network, IFFV Tracker: https://iff.taxjustice.net/#/profile/GHA

partner country regarding source taxation", and to incorporate agreed OECD anti-abuse measures.[36] However, these commitments apply only to Least Developed Countries (LDCs), which are very rarely prospective tax treaty partners compared to low- and middle-income countries with larger and faster-growing economies. Only two of Ireland's 73 existing tax treaties are with LDCs, Ethiopia and Zambia, whereas three of the six new tax treaties Ireland has signed since 2018 have been with developing economies which would be excluded from this new policy: Ghana (2018), Kenya (2021) and Kosovo (2021).[37] This policy is therefore extremely narrow and will likely be of limited practical significance in the foreseeable future.

In concluding this section (2), we emphasise that Ireland has not attempted to rebut the specific analysis contained in our 2020 Submission of the various ways in which its domestic taxation policies and series of international tax treaties undermine the ability of other countries to realise children's rights. As previously noted, it merely relies on its inadequate and outdated 2015 Spillover Analysis. We therefore respectfully submit that it is appropriate for the Committee to *conclude* that Ireland's taxation policies do in fact undermine the realisation of children's rights in other countries and to *recommend* that it amends those policies to ensure that they cease to have this effect.

3. Ireland's undermining of international cooperation on profit-shifting

In its State Report, Ireland submits that it "is a strong supporter of international tax reform and development" and further notes that it "has made strong contributions" to recent efforts by the OECD to address tax base erosion and profit shifting.[38] This submission is entirely at odds with the well-publicised, regressive, and obstructive role the Irish Government has played in this and other international processes.

First, in our 2020 Submission, we outlined how Ireland has resisted efforts to establish a UN tax body to address cross-border tax abuse, long called for by developing countries and civil society organisations working on tax justice.[39] Ireland does not address this criticism in its State Report.

Second, Ireland has actively sought to narrow the scope of reforms designed to deter corporate profit-shifting and, relatedly, to limit international efforts to establish a global minimum corporate tax rate.

During OECD negotiations regarding the latter, the federation of African revenue authorities recommended that developing countries needed a global minimum corporate tax rate of at least 20% to protect their tax bases against a new 'race to the bottom', which they feared would be precipitated by a rate being set at too low a level.[40] The global average statutory corporate tax rate is 20%, while the average rate in Africa is 26.8%.[41] The G-24 group of lower-income countries similarly advocated a

[36] Department of Finance, *Ireland's Tax Treaty Policy Statement* (June 2022), pp. 13, https://www.gov.ie/en/publication/6ee4f-irelands-tax-treaty-policy-statement/
[37] Revenue Commissioners, 'Double Taxation Treaties' (n.d.), https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx
[38] State Report*,* Para. 82, 85.
[39] 2020 Submission, (n 1) pp. 8-9; Dáil Éireann debate, 30 January 2018: https://www.oireachtas.ie/en/debates/question/2018-01-30/73/; UN High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel), Implementation note on an intergovernmental UN tax body, February 2021: https://www.factipanel.org/docpdfs/Implementation%20Note%20-%20Intergovernmental%20tax%20body%20-%2014B.pdf; Eurodad, briefing paper on an intergovernmental UN tax commission, December 2019: https://assets.nationbuilder.com/eurodad/pages/529/attachments/original/1590691263/An_intergovernmental_UN_tax_commission_%E2%80%93_why_we_need_it_and_how_we_can_get_it.pdf?1590691263
[40] ATAF, *A new era of international taxation rules – What does this mean for Africa?*, 8 October 2021, https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa
[41] OECD, *Corporate Tax Statistics,* 29 July 2021, pp. 9-12, https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-third-edition.pdf

higher minimum rate.[42] A number of experts argued that a 25% rate was necessary to properly address profit-shifting and protect developing country economies.[43]

By mid-2021, however, ambition had been significantly watered down and 140 member states in the OECD's 'Inclusive Framework' had settled on a target rate of "at least 15 percent".[44] Ireland was a prominent advocate for a lower rate and later became one of only nine countries to refuse to support even this compromise language.[45] Ultimately, despite the repeated concerns of many low- and middle-income countries, Ireland successfully insisted on a further concession: to delete "at least" from the agreement, in an effort to ensure that not only would the proposed rate be set low at 15%, but that it should not be increased in future. Finance Minister Paschal Donohoe noted that "importantly we have secured the removal of 'at least' in the OECD text as we had sought. Some countries wanted higher minimum tax rates and I believe our position moderated those ambitions."[46]

As a number of esteemed experts and academics, including Nobel Prize-winning economists Thomas Piketty and Joseph Stiglitz, and former UN Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda Carmona, put it: *"This process has been watered down in such a way that it will overwhelmingly benefit rich countries. Proposals for a global effective minimum tax have been rejected in the pursuit of the lowest common denominator of 15%, a success for Ireland, a loss for the rest of the world."*[47]

The Irish Government's negotiating position, which well-informed news reports and U.S. bilateral lobbying efforts indicate substantially drove this global outcome, involved no direct consideration of its impact on developing countries.[48] A review of 35 of the 39 internal briefing notes prepared for the relevant Government Ministers during the negotiating period in September and October 2021 found no mention of development, international impact or spillover.[49] As Ireland's Tánaiste (deputy Prime Minister) Leo Varadkar told the Irish Parliament: "*these negotiations have been about larger countries trying to get a bigger share of the pie… it has not been about ensuring that countries in the developing world get a fairer share of the taxation*."[50]

Ireland has also opted out of a key provision (Article 12) of an OECD agreement (Multilateral Instrument, MLI), which is designed to address tax avoidance and would have made it harder for multinationals to avoid taxes on sales made in developing countries by booking them in Ireland.[51] The Irish Government stated in 2017 that it was waiting for further work to be completed at the OECD

---

[42] *Comments of the G-24 on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy agreed by 134 jurisdictions of the Inclusive Framework on the 1st of July 2021*, 19 September 2021: https://www.g24.org/wp-content/uploads/2021/09/Comments-of-the-G24-on-the-IF-July-Statement.pdf

[43] Independent Commission for the Reform of International Corporate Taxation (ICRICT), open letter to G20 Leaders, October 2021: https://www.icrict.com/press-release/2021/10/12/icrict-open-letter-to-g20-leaders-a-global-tax-deal-for-the-rich

[44] OECD Inclusive Framework, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy*, 1 July 2021, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf

[45] C. Taylor and E. O'Riordan, 'Ireland one of 9 countries to hold out on signing OECD global tax deal', *Irish Times*, 1 July 2021, https://www.irishtimes.com/business/economy/ireland-one-of-9-countries-to-hold-out-on-signing-oecd-global-tax-deal-1.4609129

[46] Minister P. Donohoe, Statement October 2021:https://www.gov.ie/en/speech/615f7-statement-by-minister-donohoe-on-decision-for-ireland-join-oecd-international-tax-agreement/

[47] ICRICT (n42) (emphasis added)

[48] Hanna Ziady and Mark Thompson, '136 countries agree to minimum corporate tax rate after Ireland drops its opposition', *CNN Business*, 8 October 2021, https://edition.cnn.com/2021/10/08/business/ireland-global-tax-deal-oecd/index.html ; David Lawder, 'U.S. Treasury's Yellen urges Irish finance minister to take global tax deal', *Reuters*, 23 September 2021, https://www.reuters.com/business/us-treasurys-yellen-tells-irish-finance-minister-tax-deal-is-generational-2021-09-22/ ;

[49] Documents released by Department of Finance under Freedom of Information, 8 December 2021. The Government partially redacted some of these documents prior to release, and entirely withheld the remaining four, so we cannot determine whether development or spillover effects were discussed in the redacted parts, but have seen no indication of this.

[50] Dáil Éireann debate, 7 Oct 2021: https://www.oireachtas.ie/en/debates/debate/dail/2021-10-07/32/#spk_171

[51] Article 12 expands the definition of a taxable 'permanent establishment' in bilateral tax treaties to give greater rights to the sales country to claim some of the taxable sales profits of the overseas selling company.

before signing the Article.[52] This OECD work was completed in early 2018, but Ireland maintained its opt-out when it ratified the MLI in early 2019: thereby denying its tax treaty partners, including developing countries, a key tool to claim taxable profits in arrangements like the 'Double Irish' or 'Single Malt'.[53]

Finally, Ireland notes in its State Report that it supports capacity-building efforts through the 2017 Addis Tax Initiative and a 2019 Domestic Resource Mobilisation (DRM) project. We do not doubt the importance of these efforts, which focus on strengthening developing countries' tax governance and administrative capacity. However, assisting developing countries to collect tax more effectively will have relatively little impact if those authorities are simultaneously faced with a shrinking tax base as a result of tax avoidance structures like those promoted by Ireland.

We therefore respectfully submit that it is appropriate for the Committee to *conclude* that Ireland has failed to cooperate internationally to promote the establishment of an international corporate taxation system which supports the realization of children's rights and to *recommend* that Ireland does so going forward.

4. Ireland's obligations under the Convention

As we noted in our 2020 Submission, as an absolute minimum, Ireland is required to 'refrain from acts which would defeat the object and purpose' of the Convention.[54] Furthermore, Ireland has a duty to respect, a duty to protect, and a duty to fulfil children's rights.[55] These duties apply whenever Ireland is acting within its 'jurisdiction', and the Committee has made it clear that this extends beyond the State Party's 'territory'.[56] The authoritative Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights interpret 'jurisdiction' to cover, *inter alia*: 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory'; and 'situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law'. [57]

The Committee has also explained that States 'must ensure that the best interests of the child are central to the development of legislation and policies that shape business activities and operations,

[52] Department of Finance, *Technical Briefing Note: Ireland's Approach to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (June 2017), pp. 4-5, https://assets.gov.ie/7714/153a244d2ab641e091c6d9446e8a1b9e.pdf

[53] Government of Ireland, *Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (29 January 2019), p.31, http://www.oecd.org/tax/treaties/beps-mli-position-ireland-instrument-deposit.pdf . Article 12 is not a panacea: there is debate about the definition of 'commissionaire arrangements' in common-law jurisdictions; it would only apply to countries with which Ireland has a tax treaty; and Article 12 does not apply where the selling company has absolutely no presence in the country concerned, as with online sales (though this does not appear to be the situation with Abbott's testing sales). Nonetheless it is one of a wider armoury of transfer pricing tools permitting lower-income countries to claw back taxable profits from arrangements like the one described here.

[54] Vienna Convention on the Law of Treaties art 18.

[55] Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14 para 16 (d); Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights CRC/C/GC/16 (hereinafter CRC, General comment No. 16) paras 4, 25-29, 41.

[56] See Convention on the Rights of the Child art 2(1); CRC, General comment No. 16 para 39. The Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (2012) (hereinafter Maastricht Principles) notes that this approach is reflected across a jurisprudence from bodies such as the International Court of Justice, the European Court of Human Rights, the Human Rights Committee, and the Inter-American Commission: Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, 'Commentary to the Maastricht Principles' 34 Human Rights Quarterly (2012) 1084, 1104–09. See also *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, paras 109 and 113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ Rep 168, paras 216-217.

[57] Maastricht Principles Section II, 6 princ 9.

such as those relating to… taxation… and other general economic trade or financial issues.'[58] As such, when Ireland develops tax policies or negotiates tax treaties, it must respect, protect, and fulfil the rights of children who stand to be affected by these actions.

First, the obligation to respect means that Ireland 'should not directly or indirectly facilitate, aid and abet any infringement of children's rights'.[59] This obligation requires State Parties to give full and transparent consideration to how any business-related policy, legislation or administrative acts will impact children's rights,[60] and to avoid conduct that will foreseeably risk impairing the rights of persons beyond the State's borders.[61] The Convention requires that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake measures to the *maximum extent of their available resources*...'[62] By actively facilitating corporate profit-shifting, and by pursuing tax treaties which reduce the resources available to developing countries, Ireland is breaching its obligation to respect.

Ireland's Spillover Analysis also fails to properly account for the impact of its tax policies on developing countries. That analysis' conclusion that these policies are justified on the basis of the relatively limited contribution to developing countries' lost revenues made by Ireland's tax policies is untenable as a matter of international law.[63]

Second, the obligation to protect requires that States 'take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights'.[64] Instead of *preventing* abuses, Ireland is *enabling* tax abuse, thus hindering the realisation of children's rights. Moreover, the duty to protect rights is relevant when States act through international organisations, for example when deciding whether to support international rights-protecting instruments and bodies. The UN Guiding Principles on Business and Human Rights require that when states act as members of multilateral institutions, they should 'encourage those institutions… to protect against human rights abuse by business enterprises'.[65] Ireland's consistent opposition to the creation of a UN tax body is inconsistent with its obligation to protect.

Third, the obligation to fulfil requires State Parties to take positive action to create an international environment which enables the fulfilment of economic, social and cultural rights.[66] The Committee has explained that 'to meet this obligation, States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children's rights. This includes clear and well-enforced law and standards on… taxation…'[67] Ireland is creating a regulatory environment which enables business enterprises to *prevent* children's rights from being realised.

[58] CRC, General Comment No. 16 (n 55) para 15.
[59] CRC, General comment No. 16 (n 55) para 26.
[60] *ibid.*
[61] Magdalena Sepúlveda Carmona (n 11) para 30. Emphasis added. The Maastricht Principles also explain that 'States must desist from acts or omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.' Maastricht Principles, Section II, 7, princ 13.
[62] Convention on the Rights of the Child art 4, emphasis added. As the Committee has recognised, 'ineffective taxation systems… can limit the resources available for the fulfilment of children's rights': CRC, General comment No. 16 (n 55) para 55.
[63] See, by analogy, the rejection by the ICJ in the *Bosnian Genocide* case of a similar defence where the Court noted that 'the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result […] which the efforts of only one State were insufficient to produce.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 para 430.
[64] CRC, General Comment No. 16 (n 55) para 28.
[65] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) 11, princ 10 (a). The Commentary to the Principles explains that '[c]ollective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards.' *ibid* p. 12.
[66] Magdalena Sepúlveda Carmona (n 11), para 31; CRC, General Comment No. 16 (n 55) para 29.
[67] CRC *ibid.* See also UN Guiding Principles on Business and Human Rights (2011) (HR/PUB/11/04) princ 3.

States must also engage in international cooperation with a view to securing the realisation of children's rights beyond States' territorial boundaries,[68] particularly in developing countries.[69] The Committee has noted that 'international… cooperation for the realization of children's rights can include… measures relating to taxation [and] combatting tax evasion'.[70] The importance of international cooperation in combatting tax abuse has been noted by the OECD,[71] the Managing Director of the World Bank,[72] the Committee on Economic, Social and Cultural Rights,[73] and the former Special Rapporteur on extreme poverty and human rights.[74] However, Ireland has failed to engage in international cooperation through its approach to tax treaty negotiations with developing countries, by opposing the establishment of a UN tax body, by resisting efforts to establish a minimum global corporate tax rate and by refusing to ratify Article 12 of the OECD's Multilateral Instrument.

Conclusion

In sum, Ireland has knowingly taken actions which undermine the capacity of developing countries to secure children's Convention rights. For the above reasons, these actions constitute a failure to comply with the Convention. On this basis, the submitting organisations respectfully request that the Committee makes the following recommendations in its concluding observations:

(a) Conduct independent, participatory, comprehensive and periodic impact assessments of its tax and financial policies to ensure that they do not contribute to tax abuse by national companies operating outside the State party that lead to a negative impact on the availability of resources for the realization of children's rights in the countries in which they are operating;

(b) Amend those taxation measures which undermine the realisation of children's rights in other countries to ensure that they cease to have this effect.

(c) Cooperate internationally to promote the establishment of a UN-led international corporate taxation system which supports the realization of children's rights globally.

[68] CRC *ibid* para 41. International Covenant on Economic, Social and Cultural Rights art 2(1) also requires that States parties 'take steps … through international assistance and cooperation' in order to create an environment conducive to the realization the rights recognized in the Covenant. See also Committee on the Rights of the Child, General comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6) CRC/GC/2003/527 para 60.

[69] Convention on the Rights of the Child arts 4, 17 (b), 22 (2), 24 (4), 28 (3). See also Optional Protocol on the sale of children, child prostitution and child pornography, art 10, and Optional Protocol on the involvement of children in armed conflict, art 10.

[70] CRC, General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art 4) CRC/C/GC/19 para 75.

[71] OECD, 'Addressing Base Erosion and Profit Shifting' (2013) 45 notes that it may be 'very difficult for any single country, acting alone, to combat BEPS [erosion or tax bases by profit shifting] behaviours.' See also OECD Final Reports of the BEPS project for reform of the international tax system to tackle tax avoidance (October 2015).

[72] Speech by World Bank Managing Director and COO Sri Mulyani Indrawati at Event on Tax Evasion and Development Finance (17 April 2015): https://www.worldbank.org/en/news/speech/2015/04/17/speech-wb-md-coo-sri-mulyani-event-tax-evasion-development-finance.

[73] Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities E/C.12/GC/24 paras 29, 37.

[74] Magdalena Sepúlveda Carmona (n 11) para 32.