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Ireland's Tax Code May Be Changing, But One Thing Remains: How Capital Allowances For Intangible Assets Continue to Draw Tech Giants to the Emerald Isle

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IRELAND'S TAX CODE MAY BE CHANGING, BUT ONE THING REMAINS: HOW CAPITAL ALLOWANCES FOR INTANGIBLE ASSETS CONTINUE TO DRAW TECH GIANTS TO THE EMERALD ISLE

By Daryl Caffarone

I. INTRODUCTION

Over the past decade, American multinational tech enterprises evaded over 100 billion dollars in taxes.[1] Inconsistent tax codes across the globe were used by corporations to offshore profits to lower tax zones, and the uncertainty of the digitized market made economic activity on the global-scale increasingly harder to track.[2] The Organization for Economic Co-operation and Development (hereinafter "OECD"), in conjunction with the Group of Twenty (hereinafter "G20"), has initiated plans to curb this international tax evasion and, for the most part, many countries have been compliant.[3]

In the shadow of the OECD's plans to prevent tax evasion, a tax system was created allowing a corporation to claim capital allowances for intangible assets purchased from their own intragroup subsidiary.[4] A company could, under this tax initiative, purchase intellectual property (hereinafter "IP") from itself and write off this purchase as a deductible capital asset.[5] Multinational enterprises (hereinafter "MNE(s)") no longer need to offshore their assets to evade high-tax areas; and can act without considering legality.[6] A MNE can take advantage of these capital allowances by relocating to the Republic of Ireland.[7]

This note proceeds in five sections. Section II analyzes the economic and sociopolitical history of Ireland. This section will give further insight into the modern advantages of the Irish tax code structure and why American MNEs continue to move groups and subsidiaries into Ireland.

Section III discusses the how international organizations have worked to prevent MNEs (in particular, MNEs with subsidiaries in Ireland) from utilizing these low-tax jurisdictions. This section scrutinizes a particular part of Ireland's tax code – Capital

[1] *See* George Iddenden, *No Tax Please, We're (Not) British: How the 'Silicon Six' Avoid Paying Tax*, CHARGED (Jul. 13, 2022), https://www.chargedretail.co.uk/2022/07/13/silicon-six-tax-avoidance/ [https://perma.cc/ANK2-Y8J8].

[2] *See Understanding Tax Avoidance*, OECD BEPS, https://www.oecd.org/tax/beps/ [https://perma.cc/JR4S-9E2T] (last visited Aug. 30, 2022).

[3] *Id.*; *see also Compliance Ratings Following Peer Reviews Against the Standard of EOIR*, GLOB. F. ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, https://www.oecd.org/tax/transparency/documents/exchange-of-information-on-request-ratings.htm [https://perma.cc/5JKM-AD5V] (last visited Aug. 30, 2022).

[4] *See* David Chance, *Why Google Might Still Benefit From Irish Tax Breaks*, INDEPENDENT.IE (Jan. 3, 2020), https://www.independent.ie/business/why-google-might-still-benefit-from-irish-tax-breaks-38830700.html?reg=true [https://perma.cc/74LG-NRFH].

[5] *Id.*

[6] *Id.*

[7] *Id.*

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Allowances for Intangible Assets (hereinafter "CAIA") – which has gone detrimentally unregulated by these aforementioned international organizations.

Section IV is an analysis of the legal challenges that have faced Apple Inc. (hereinafter "Apple") and its Irish subsidiaries; in particular, a case brought before the European General Court in 2016 and its subsequent appeal in 2020.

Lastly, Section V proposes two solutions preventing MNEs from avoiding taxes under the CAIA system. First, a recommendation in OECD steps to regulate this particular provision. Second, why Ireland must wholly reject CAIA.

II. BACKGROUND AND HISTORY

An investigation into countries with the weakest corporate tax laws, highest rates of corporate tax evasion, and a corporate income tax rate that belies the global average, has Ireland at the forefront of the analysis.[8] Negative media attention, international criticism, and lawsuits have made Ireland the poster-child for what not to do on the international economic stage.[9] Ireland's tax code and their ongoing influx of American MNEs have led to what some economists consider a "statistical cry for help" and other economists consider "suspicious at best."[10]

While this note delves into the mistakes of Ireland's past and present, it is imperative to preface the discussion of Irish tax law with a brief overview of Ireland's economic history pre-twenty-first century and colonial history that still impacts Ireland's socioeconomic zeitgeist today.[11]

After Ireland officially gained its hard-won independence from Great Britain in 1922, a contentious period of political and economic instability began for the newly freed state (known as the "Irish Free State"). From 1922-23, a violent civil war waged between those who supported and those who opposed the treaty to end the war with the United Kingdom (known as the Anglo-Irish Treaty) and the ensuing guerilla warfare led to significant loss of life and property.[12] Despite the heavy financial burdens of war, the Irish Free State remained a steady

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[8] Stephen Holland, *How Ireland Became One of the World's Biggest Tax Havens*, INDEPENDENT.IE (Dec. 4, 2021, 11:29 AM), https://www.independent.ie/regionals/sligochampion/business/how-ireland-became-one-of-the-worlds-biggest-tax-havens-41117761.html [https://perma.cc/L2KK-D9RC].

[9] *Id*.

[10] *See* Brad W. Setser, *Ireland's Statistical Cry for Help…*, COUNCIL ON FOREIGN RELS. (Nov. 1, 2019), https://www.cfr.org/blog/irelands-statistical-cry-help [https://perma.cc/2KG7-TQ75]; *see also* Cole Frank, *Tax Avoidance and the Irish Balance of Payments*, COUNCIL ON FOREIGN RELATIONS (Apr. 25, 2019, 11:36 AM), https://www.cfr.org/blog/tax-avoidance-and-irish-balance-payments [https://perma.cc/3P5N-TY77].

[11] Cormac O Grada, *The Irish Economy During the Century After Partition*, 75 THE ECON. HIST. REV. 336, 336-70 (2022), https://onlinelibrary.wiley.com/doi/full/10.1111/ehr.13106 [https://perma.cc/DFS9-C5JJ].

[12] *See* John Dorney, *The Irish Civil War – A Brief Overview*, THE IRISH STORY (July 2, 2012), https://www.theirishstory.com/2012/07/02/the-irish-civil-war-a-brief-overview/#.ZDmlp-zMK3K [https://perma.cc/2T9N-Z39J] (The Anglo-Irish treaty established and divided the independent Republic of Ireland, and the British-controlled country of Northern Ireland. This severance between the northern and southern parts of the Irish island caused a rift in the Irish independence movement. Some saw the Anglo-Irish Treaty as a victory since it officially established Irish freedom; others saw any capitulation to the British government as unacceptable and wanted to continue fighting to subsequently claim Northern Ireland as part of the Republic.).

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pastoral trader, with food and drink accounting for about six-sevenths of their exports.[13] In the late 1920s, Ireland had only two dozen manufacturing firms primarily located in Dublin and aside from Guinness, produced non-tradable goods having little impact on the Irish export-import economy.[14]

The 1930s saw a trend towards 'import-substituting industrialization,' to limit international trade and motivate the domestic market with homegrown alternatives.[15] Protectionist policies were to blame for the significant decline in income and output in the European Union (hereinafter "EU").[16] While Ireland was not necessarily *more* protectionist than other European nations at the time, Irish economists feared Ireland's small geographic size and somewhat homogeneous reserve of natural resources would end up hurting, rather than helping, Irish citizens.[17] By the late 1930s, on the brink of World War II, Ireland's economic growth on the international stage (i.e. its output growth) experienced a steady decline.[18]

World War II had a detrimental effect on the Irish economy, as it did on most European countries.[19] Immediately following the war, Ireland began to see the negative impacts of the import-substituting industrialization of the decade prior.[20] Manufacturing still accounted for a small range of specialized products, but most firms employed so few people they could not produce any substantial returns.[21] Actually, most firms produced or assembled foreign goods under license – something which, in the foregoing discussion, will begin to sound very familiar.[22]

The idea of multinational subsidiaries settling in Ireland became particularly attractive to American firms.[23] American firms were a valuable commodity because the U.S. dollar was generally rare across Europe, and American investment was not seen as a threat to Irish sovereignty, the way British investment would have been.[24] In other words, the seeds for what would later be a large, fruitful market for American multinationals were planted and carefully sowed by a wariness to rely on Great Britain in response to history.[25] In 1951, Ireland introduced tax reliefs on export profits through the "Double Taxation" scheme that would prove both beneficial and controversial in the Irish and international markets.[26]

From the 1960s to the early 1970s, Ireland's economic performance greatly increased (although some speculate performance could have been better had Ireland not relied so heavily on trade with the UK).[27] This increase would be short-lived as the 1980s ushered in a

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[13] *See* O Grada, *supra* note 11 at 336-70.

[14] *See id*.

[15] *See id*.

[16] *See* Bromhead, et al., *When Britain Turned Inward: The Impact of Interwar British Protection*, 109 AM. ECON. REV. (2019), 235, 327.

[17] *See* O Grada, *supra* note 11 at 336-70.

[18] *See id*.

[19] *See id*.

[20] *See id*.

[21] *See* O Grada, *supra* note 11 at 336-70.

[22] *See id*.

[23] *See id*.

[24] *See id*.

[25] *See id*.

[26] *See id*.; *see also* Relief of Double Taxation (Taxes on Income: Ireland- U.S.A) Regulations (Act No. 87/1956) (Ir.), https://www.irishstatutebook.ie/eli/1956/si/87/made/en/print [https://perma.cc/28JC-HAZV].

[27] *See* O Grada, *supra* note 11 at 336-70.

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tumultuous era of unsuccessful deficit spending, a surging national debt, and heavy borrowing from abroad.[28] Unemployment rose to its highest rate (17.1%) and the population declined as many citizens migrated from the economically unstable country.[29] Ireland became known as one of the poorest countries in all of Europe.[30]

The Irish economy in the 1990's cannot be properly analyzed without first discussing the Double Taxation Agreement (hereinafter "DTA") between Ireland and the United States (hereinafter "U.S.") in 1951.[31] The concept of corporate tax evasion has the DTA as the quintessential archetype; in other words, the DTA allowed global corporations to move their taxable revenue from an operating firm in Ireland to a separate firm somewhere abroad with a reduced corporate income tax rate.[32] Ireland's corporate income tax rate was 10% while the U.S. (upon signing the Revenue Reconciliation Act in 1993) had a rate of 15% for a corporation's first $50,000 of taxable income and 35% for corporations with taxable income over $10 million.[33] The EU took notice of this overly-competitive tax rate and, after mounting pressure, Ireland introduced a new corporate income tax rate of 12.5% in 1998.[34]

The early 1990s saw a complete shift in the Irish economy.[35] Unemployment rates dropped 10% and the debt-to-GDP ratio plummeted from 100% in 1980 to 47% in 2000.[36] The Irish GDP per capita in 1996 soared more than 50% since 1973.[37] Success could be attributed to a myriad of different positive changes such as a remarkable increase in education, investment in infrastructure, and an influx of immigration.[38] An important aspect to the analysis of the growth of the Irish economy leading into the 21st century is the rising tide of technological advancement and an influx of American investment.[39] In 1993, high tech multinational corporations' output was 43% of the total manufacturing output in all of Ireland, and this

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[28] *See id*.

[29] *See id*.

[30] *See id*.

[31] *See* Jessica J. Poyner, *Investing in Ireland: The Enticement of U.S. High-Tech Industry to the Emerald Isle*, 10 PAC MCGEORGE GLOB. BUS. & DEV. L.J. 196, 208 (1997).

[32] Henry McDonald, *Ireland to Abolish Controversial 'Double Irish' Tax Arrangement*, THE GUARDIAN (Oct. 14, 2014), https://www.theguardian.com/world/2014/oct/14/ireland-abolish-double-irish-tax-scheme-apple [https://perma.cc/5N2A-4RHY].

[33] *See* Dermot McAleese, *The Celtic Tiger: Origins and Prospects*, POL'Y OPTIONS POLITIQUES 46, 48 (Jul.-Aug. 2000); *see also* Historical *U.S. Federal Corporate Income Tax Rates & Brackets, 1909-2020*, TAX FOUND. (Aug. 24, 2021), https://taxfoundation.org/historical-corporate-tax-rates-brackets/ [https://perma.cc/CMV9-C3NH].

[34] *See* McAleese, *supra* note 33 at 48 (however, the initial 10% rate would be applicable to corporations 'grandfathered into' the program up until 2010, therefore the EU's deterrent efforts cannot be seen as wholly successful).

[35] *See id.* at 47.

[36] *See id*.

[37] *See* THE ECON. AND SOC. RSCH. INST., MEDIUM-TERM REV.: 1997-2003 34-67 (David Duffy, et al. eds., no.6 1997), https://perma.cc/4NB3-KENJ.

[38] *See generally id.*; *see also* McAleese, *supra* note 29 at 47.

[39] *See* O Grada, *supra* note 11 at 357.

number continued to rise throughout the 1990s.[40] Between 1993 and 2001, nearly 300 high-tech industrial projects arrived in Ireland, including Apple, IBM, and Microsoft.[41]

Irish growth was larger than that of its European and Asian counterparts and heavily influenced by production in information and communication technology.[42] Contradictorily, expenditure on research and development was low, which indicates much of this tech growth was not originating organically out of Ireland's domestic market.[43] These two factors indicate Ireland had a heavy reliance on American multinational tech companies, which had been leading the charge for this new, technological frontier.[44] In the 1990s, the U.S. was approximately two years ahead of all European tech; the European market was highly seductive because U.S. tech multinationals could market 'old' technology for the same price as 'new' technology in their domestic market.[45] By 1995, Ireland contained 23% of all U.S. manufacturing investments in Europe (for context, Ireland was only 1% of Europe's entire population) and employment in the software industry rose over 25% from 1987-95.[46] When asked "Why Ireland?", spokespeople for major U.S tech firms stated many of the sociological benefits such as education and an eager workforce, but the one benefit that was perhaps the most significant was Irish 'tax incentives.'[47]

III. WHAT'S HAPPENING NOW

This section will discuss international corporate taxation in Ireland in the modern era. Subsection A will discuss the international response to large international tech companies taking advantage of low-tax jurisdictions to avoid paying billions of dollars' worth of taxes. Subsection B will analyze CAIA and explain why it is utilized by the aforementioned international companies.

A. The OECD and the Silicon Six

A 2021 report by the Fair Tax Foundation found that Facebook (now known as Meta), Apple, Amazon, Netflix, Google (now under their parent company Alphabet), and Microsoft

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[40] Antoin E. Murphy, *The 'Celtic Tiger' – An Analysis of Ireland's Economic Growth Performance*, EUR. UNIV. INST. WORKING PAPERS 15-16 (2000).

[41] *See id.* at 15; *see also* Garret FitzGerald, *What Caused the Celtic Tiger Phenomenon?* THE IRISH TIMES (Jul. 21, 2007, 1:00 AM), https://www.irishtimes.com/opinion/what-caused-the-celtic-tiger-phenomenon-1.950806 [https://perma.cc/LR5A-BAN8].

[42] *See* FitzGerald, *supra* note 41.

[43] *See id.*; *see also* Róisín Ní Mháille Battel, *Ireland's "Celtic Tiger" Economy*, 28 SCI., TECH. & HUM. VALUES 93, 103 (2003).

[44] *See* O Grada, *supra* note 11 at 357.

[45] *See* Poyner, supra note 31 at 196.

[46] *See id.* at 198.

[47] *See id.* at 196; *see also* John Hendren, *High-Tech Companies in U.S. Making the Old Sod Their Turf*, CHI. TRIB. (Sep. 9, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-09-09-9003150512-story.html [https ://perma.cc/LN6X-XZQD] (quoting Bill Stewart, spokesman for a California-based mainframe computer-maker, when asked why Ireland offered the best deal for a European venue after an examination of other European countries).

reported a tax disparity of $100 billion over the course of a decade (2011-2020).[48] For context, these companies (dubbed the "Silicon Six") paid roughly 3.6% of taxes on their total revenue.[49] One of the ways these companies facilitated such impressive tax avoidance is through profit sharing to tax havens; given the strategic locations of many of the Silicon Six's subsidiaries, these tax avoidance strategies are largely seen as foundational to the corporations' procedures.[50]

Inspired by the public outrage that followed the outing of the Silicon Six, the G20 called upon the OECD to come up with a system that could globally protect both corporate tax laws and countries abused by these tech powerhouses.[51] The OECD is a collaborative group of countries that make up 60% of the world's GDP and work together to come up with solutions to some of the world economy's most pressing issues.[52] Following the outing of the Silicon Six, the OECD came together to try to rectify the pervasive issue of profit sharing and tax-base erosion.

The OECD's fight against base erosion and profit sharing (hereinafter "BEPS") is a collaborative international measure meant to be followed by each of the OECD's 135 countries and jurisdictions.[53] The OECD's plan outlined two pillars: reallocate taxable income to market jurisdictions (so goods are not taxed simply where the parent or subsidiary company is incorporated) and raise the global corporate income tax rate to 15%.[54] The first pillar is a direct attack on what multinationals have been doing in Ireland since the 1990s; establishing taxable income in market jurisdictions outside where subsidiaries are located means companies that enjoy Ireland's lax tax rate now have to pay taxes based on where its products are sold.[55]

In 2021, advocates for the current Irish system foresaw an end to multinational incorporation and initially fought back against the OECD's plans.[56] When the OECD pillars were first enacted, Ireland refused to sign and campaigned with other smaller nations with low corporate income tax rates against the pillars because Ireland viewed it as excessively

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[48] *The Silicon Six and Their $100bn Global Tax Gap*, FAIR TAX, https://fairtaxmark.net/silicon-six-end-the-decade-with-100-billion-tax-shortfall/ [https://perma.cc/BRR2-JGTC].

[49] *See id.* (citing to the graph 'Silicon Six: taxes expected, booked, and paid (2011-20)').

[50] *See id.*; *see also* Rupert Neate, *'Silicon Six' Tech Giants Accused of Inflating Tax Payments by Almost $100bn*, THE GUARDIAN (May 31, 2021, 3:01 AM), https://www.theguardian.com/business/2021/may/31/silicon-six-tech-giants-accused-of-inflating-tax-payments-by-almost-100bn [https://perma.cc/A7B2-9G6F].

[51] *See* Iddenden *supra* note 1.

[52] *See e.g. The Organization for Economic Cooperation and Development (OECD)*, U.S. DEPT. OF STATE, https://www.state.gov/the-organization-for-economic-co-operation-and-development-oecd/ [https://perma.cc/Q3ME-7D7C] (last visited Oct. 8, 2022).

[53] OECD BEPS, *supra* note 2.

[54] *See generally Global Tax Reform*, KPMG, https://kpmg.com/ie/en/home.html [https://perma.cc/97ER-66Y2] (last visited Aug. 13, 2022).

[55] *See e.g* OECD BEPS, *supra* note 2; *see also* Liz Alderman, *Ireland's Says As a Tax Haven May Be Ending, But Not Without a Fight*, N.Y. TIMES (Jul. 8, 2021), https://www.nytimes.com/2021/07/08/business/ireland-minimum-corporate-tax.html#:~:text=the%20main%20story-,Ireland's%20Days%20as%20a%20Tax%20Haven%20May%20Be%20Ending%2C%20but,put%20Dublin%20on%20the%20defensive. [https://perma.cc/C8AQ-KMN7].

[56] *See id.*; *see also 130 Countries and Jurisdictions Join Bold New Framework for International Tax Reform*, OECD NEWSROOM (Jan. 7, 2021) https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm [https://perma.cc/8YZ7-4ALG].

burdensome on their countries. [57] The Irish government's bleak prediction of the coming years claimed Ireland could lose 2 billion dollars annually and lose new investments due to the new reforms.[58] Bowing to the pressure from the EU, OECD, and the U.S., Ireland announced a corporate income tax rate increase to 15% to thus abide by the new global standard.[59]

Despite predictions to the contrary, multinationals continue to move assets and subsidiaries into Ireland rather than out of it.[60] Despite Ireland's push towards global compliance, their tax code still allows for a substantial tax break; CAIA (also known as depreciation allowances) for intragroup purchases of intangible assets.

B. Capital Allowances for Intangible Assets: What It Means and How It's Used

In 2021, Finance Minister Paschal Donohoe announced that Ireland would raise its corporate income tax rate to the global standard of 15% after years of staunch refusal to do so.[61] While the trend in Ireland's domestic tax policy seems to align with the OECD's anti-BEPS strategies, Ireland's treatment of CAIA's is an insidious loophole keeping these multinational corporations satisfied with their Irish residence.[62]

Capital allowances are the amount of investment that a company puts towards its long-term growth that could then, in turn, be deducted from its revenue.[63] Deductions from a company's revenue occur through depreciation; depreciation requires these deductions be taken out over time, usually years, at a percent rate that varies by country and depends on the asset being purchased.[64] Additionally, deductions for expenses can be written off to a certain extent, or a "cap"; for example: if Country A has an 80% cap on a capital allowances and Company B claims a capital allowance of $10,000, than the depreciation of this allowance will only reflect $8,000, leaving Company B with an additional $2,000 spent that did *not* count as a business cost.[65] In regards to intangible assets, this deduction is specifically referred to as an amortization deduction ("amortization").[66]

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[57] *See e.g.,* Alderman, *supra* note 55; *see also* OECD NEWSROOM, *supra* note 56.

[58] *See generally* Shawn Pogatchnik, *Ireland Seeks Tax Clarity from U.S. Before Inking Any Deal on Global Minimum Rate*, POLITICO (Sept. 21, 2021, 5:21 PM) https://www.politico.eu/article/ireland-tax-rate-us-corporate-profits/ [https://perma.cc/U2ZU-TGKM]; *see also Draft Stability Programme Update 2021*, IR.'S DEP'T OF FIN. (Apr. 14, 2021) (available at https://perma.cc/7V2M-BUKH).

[59] *See e.g.* Will James, *Ireland Bows to Pressure to Increase Its Corporate Income Tax Rate*, FORVIS (Nov. 8, 2021) https://www.forvis.com/alert-article/2021/11/ireland-bows-pressure-increase-its-corporate-income-tax-rate#:~:text=Under%20the%20new%20agreement%2C%20starting,be%20taxed%20at%2012.5%20percent [https://perma.cc/36EJ-T4GJ]; *see also* Pogatchnik, *supra* note 58.

[60] *See* Mark Paul, *Microsoft Moves $58.2bn Of Assets And Its Asian Trading Operation to Ireland*, THE IRISH TIMES (May 25, 2019), https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630 [https://perma.cc/8YGZ-3R52].

[61] *See* Morwenna Coniam, *Ireland Still Sees Minimum Corporate Tax Deal Being Delivered*, BLOOMBERG BUS. (Jul. 20, 2022, 6:45 AM), https://www.bloomberg.com/news/articles/2022-07-20/ireland-still-sees-minimum-corporate-tax-deal-being-delivered?leadSource=uverify%20wall [https://perma.cc/4XJ9-MN7P].

[62] Chance, *supra* note 4.

[63] *See e.g., Capital Allowance*, TAX FOUND., https://taxfoundation.org/tax-basics/capital-allowance/ [https://perma.cc/KYG9-QTWH] (last visited Oct. 6, 2022).

[64] *See e.g., id*.

[65] *See e.g., id*.

[66] Sean Ross, *Amortization vs. Depreciation: What's the Difference?*, INVESTOPEDIA (Sept. 14, 2022), https://www.investopedia.com/ask/answers/06/amortizationvsdepreciation.asp#:~:text=Amortization%20and%

CAIA is the amount of capital costs on intangible assets (i.e., intellectual property) a business can deduct from its revenue.[67] In the Finance Act of 2009, Ireland determined CAIA would be capped at 80%. In 2015, the cap increased to 100%; however, after backlash and a legal battle with the European Commission, Ireland reintroduced the 80% cap in 2017 but grandfathered in corporations with capital allowances that fell in the interim period (some corporations are still allowed a 100% cap).[68] While capital allowances are not uncommon, OECD countries have fluctuating rates of return available to certain assets and businesses; on average, businesses within the OECD can recover on capital allowances at about 70%.[69]

CAIA was designed on the heels of Ireland's restriction on their larger DTA model and facilitates both IP onshoring and sales profits to Ireland.[70] The aforementioned 2009 Finance Act expanded the definition of "intangible assets" for the sake of capital allowances.[71] This expansion included types of "internally developed" group intangible assets and any intangibles purchased from "connected parties."[72] Put simply, companies in Ireland with a small county subsidiary can purchase IP from the small county subsidiary and receive a tax break off this purchase for the next decade.[73] Apple can achieve the same tax breaks with a corporate tax rate reduced from 12.5% to only 2.5%.[74]

Companies are using their subsidiaries and corresponding purchases of IP to save them billions in unpaid taxes per year.[75] The next section specifically addresses CAIA between intragroup subsidiaries, which is generally uncommon throughout OECD member states, and counteracts efforts of the OECD's "arm's length principle".[76] The next section will also expand upon how tech companies utilize this feature of the Irish tax code and why the Irish CAIA system is ideal for corporations as compared to other OECD member states.[77]

20depreciation%20are%20two,to%20reflect%20its%20anticipated%20deterioration. [https://perma.cc/FP2C-DANT].

[67] Lisa Hogreve, *Capital Cost Recovery Across the OECD*, TAX FOUND. (Apr. 26, 2022), https://taxfoundation.org/publications/capital-cost-recovery-across-the-oecd/ [https://perma.cc/PT8N-PMQZ].

[68] *See* Martin Brehm Christensen & Emma Clancy, *Exposed: Apple's Golden Delicious Tax Deals*, EUR. UNITED LEFT/NORDIC GREEN LEFT OF THE EUR. PARLIAMENTARY GROUP 45 (June 2018); *see also Capital Allowances for Intangible Assets*, REVENUE (IRISH TAX AND CUSTOMS), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-09/09-02-05.pdf [https://perma.cc/LEF7-HS72] (last visited Oct. 6, 2022).

[69] Hogreve, *supra* note 67.

[70] Emma Clancy, *Apple, Ireland and the New Green Jersey Tax Avoidance Technique*, SOCIAL EUR. (Jul. 4, 2018), https://www.socialeurope.eu/apple-ireland-and-the-new-green-jersey-tax-avoidance-technique#:~:text=Ireland%27s%20capital%20allowance%20for%20intangible,taxable%20income%20over%2015%20years [https://perma.cc/X62F-2Z7R].

[71] *See Tag: Capital Allowances For Intangibles*, TPCASES.COM, https://tpcases.com/tag/capital-allowances-for-intangibles/ [https://perma.cc/JW56-C49L] (last visited Oct. 6, 2022).

[72] *See id*.

[73] *See e.g., id*.; see *also e.g.,* Clancy, *supra* note 70.

[74] *See* Christensen, *supra* note 68 at 41.

[75] *See* Clancy, *supra* note 70.

[76] *See e.g., id.*

[77] *See e.g., id.*

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IV. LEGAL ISSUE

This section will address the legal implications of Ireland's tax code and how the EU General Court has responded to Apple's relationship with the Irish government. Subsection A will discuss how the OECD has attempted to regulate the international market and prevent large MNEs from taking advantage of low-tax jurisdictions and whether Ireland abides by the OECD's principle. Subsection B will discuss the European Commission's case against Apple Ireland in 2016 and the subsequent appeal in 2020 and address the court's interpretive strategy (in particular, how it utilizes the OECD) and how the court ultimately fails to address important parts of Ireland's tax code.

A. Does Ireland's CAIA Hold Out Against The OECD?

The Taxes Consolidation Act (hereinafter "TCA") 197, Part 35A details Ireland's policy in regard to transactions occurring within and between an enterprise with one common owner, otherwise known as transfer pricing.[78] The TCA abides by the OECD's transfer pricing guidelines, which is referred to as the "arm's length principle".[79] The "arm's length principle mandates that any transaction occurring between one business (i.e. an intragroup purchase) must abide by market standards for the same purchase; in other words, Subsidiary A must sell to Subsidiary B at the same price they would sell to a wholly different company.[80]Considering Ireland has upheld this OECD standard in their tax code, it would seem their intragroup purchases do not facially violate the OECD.[81]

Action 4 of the OECD's BEPS strategy places a limitation on interest deductions that could be considered the closest Action Plan that disavows the CAIA system.[82] The issue that this plan addresses is multinational groups adjusting the amount of debt in a group entity to thus achieve more favorable tax results.[83] These multinationals use intragroup loans to generate interest deductions and/or use intragroup financing to fund tax exempt income.[84]An Irish subsidiary using a purchase from another subsidiary to claim a capital allowance would violate the OECD provision that blocks "intragroup financing to fund tax exempt income."[85] However, the language of Action 4 is not specific enough to disavow the particular CAIA system.[86]

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[78] *See Transfer Pricing (Including MAP Requests)*, REVENUE (IRISH TAX AND CUSTOMS), https://www.revenue.ie/en/companies-and-charities/international-tax/transfer-pricing/index.aspx [https://perma.cc/XM54-4V95] (last visited, Aug. 30, 2022).

[79] *See id*; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[80] *See* OECD (2022), TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTER. AND TAX ADMIN., 31 (OECD Publishing Paris, 2022) https://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_0e655865-en [https://perma.cc/WK69-NADU].

[81] *See generally* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 78; *see also* T-778/16, Ireland v. European Commission, ECLI:EU:T:2020:338, ¶¶ 35-36 (Jul. 15, 2020).

[82] *Action 4 Limitation on Interest Deductions*, OECD, https://www.oecd.org/tax/beps/beps-actions/action4/ [https://perma.cc/6C4T-G7QX] (last visited Oct. 9, 2022).

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*.

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A capital allowance is a tool wielded by a government's tax code to facilitate corporate growth.[87]A capital allowance system is encouraged by a government's favor of certain corporate purchases.[88] Even if the OECD suggested a lower cap on capital allowances for intangible assets (lower than Ireland's current 80% cap) or set more stringent guidelines for depreciation calendars, the OECD would not be addressing the root of the issue.[89] The root of the issue is the intragroup purchase of intangible assets that *abide by* the "arm's length principle" and allow a multinational corporation to enjoy the benefits of capital allowances for years.[90]

The OECD's mission is to "equip governments with domestic and international rules and instruments to address tax avoidance" by using a set of enumerated Action Plans[91] Additionally, the EU has agreed to limit and prevent member states from facilitating any egregiously anti-competitive economic strategies.[92] Ireland's CAIA program directly conflicts with the OECD's principles without actually violating any of the Action Plans.[93] The European General Court (hereinafter "EGC") has similarly allowed CAIA to be generally unobstructed, despite the overarching goals of anti-competitiveness that the EGC claims to strive towards.[94]

B. Apple v. European Commission: From 2016-2022

In 2016, the EGC found that two Apple Group companies incorporated in Ireland paid an effective corporate tax rate of less than 1% which constituted an unfair competitive advantage within the EU.[95] Generally, invalidating or challenging domestic tax policies is not within the EU's jurisdiction or legal framework *unless* they invoke the EU's anti-competition treaty provisions.[96] The Treaty Establishing the European Union and the Treaty Establishing the European Community (both amended by the Treaty of Lisbon in 2007) created a Common Market between EU member states and, in Article 102 (originally Article 82), introduced a

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[87] *See* TAX FOUND., *supra* note 63.

[88] *See e.g., id*.

[89] *See id*.; *see also* Christensen, *supra* note 68.

[90] *See generally* Christensen, *supra* note 68.; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[91] *BEPS Actions*, OECD, https://www.oecd.org/tax/beps/beps-actions/#:~:text=Developed%20in%20the%20context%20of,and%20where%20value%20is%20created [https://perma.cc/HL2E-UUFZ] (last visited Oct. 9, 2022).

[92] COMPETITION POLICY: PROCEDURES IN ARTICLE 102 INVESTIGATIONS, EUROPEAN COMMISSION, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en [https://perma.cc/88DK-6WXA] (last visited Oct. 9, 2022).

[93] *See e.g.,* OECD, *supra* note 91; *see generally* TPCASES.COM, *supra* note 71.

[94] *See e.g.,* TPCASES.COM, *supra* note 71.

[95] *See e.g.,* T-778/16 at ¶¶ 316-21 (Jul. 15, 2020); *see generally* EUROPEAN COMMISSION, *supra* note 92.

[96] *See EU Court Overturns Commission Decisions in Landmark Apple Tax Case*, JONES DAY (Jul. 2020), https://www.jonesday.com/en/insights/2020/07/eu-court-overturns-commission-decision-in-landmark-apple-tax-case [https://perma.cc/AHK8-9T9B]; *see also* Julia R. Blue, *The Celtic Tiger Roars Defiantly: Corporation Tax in Ireland and Competition Within the European Union*, 10 DUKE J. OF COMPARATIVE & INT'L L. 443, 443 (2000) (available at: https://perma.cc/U48D-NK3B).

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potential legal basis for directly challenging a country's domestic tax policy.[97] Article 102 states:

> Any abuse by one or more undertakings of a dominant position within the international market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist of… unfair trading conditions.[98]

Article 102 is an attempt to prohibit any unfair or abusive policies by companies in conjunction with particularly advantageous domestic tax policies.[99]

In 2007, the Treaty on the Functioning of the European Union (hereinafter "TFEU") was implemented in conjunction with the Treaty of Lisbon in an effort to create an even closer union amongst the European member states.[100] Article 107 declares any aid unfairly granted shall be "incompatible with the internal market."[101] "State aid", a competitive advantage, is given by a country to a company.[102] The EU generally bans the use of state aid unless the aid can be justified in regard to a member's economic development.[103]

The two Apple Irish subsidiaries at the heart of the 2016 and 2020 legal challenges were Apple Operations Europe (hereinafter "AOE") and Apple Sales International (hereinafter "ASI").[104] In 2007, Apple summarized a new method for determining the tax base of ASI and AOE.[105] The chargeable profit of the two Irish branches (which are incorporated in Ireland as subsidiaries) was to *exclude* costs invoiced from other Apple subsidiaries, an amount which corresponds to the "IP return for the manufacturing process technology developed by that branch."[106] The initial 2016 ruling followed precedent established in *Belgium and Forum 187 v. Commission* in regard to unfair intra-group transactions held ("arm's length principle"):

> [A] reduction in the tax base resulting from a tax measure enabling a taxpayer to employ transfer pricing in intra-group transactions that did not

[97] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 2 & 102 [hereinafter Treaty of Lisbon].; *see also* Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[98] TFEU *supra* note 97 at. Art. 102.

[99] EUROPEAN COMMISSION, *supra* note 92; *see id*.

[100] TFEU *supra* note 97 at Art. 1.

[101] *Id.* at Art. 101.

[102] *See e.g., State Aid*, EUROPEAN COMMISSION: GLOSSARY, https://eur-lex.europa.eu/EN/legal-content/glossary/state-aid.html [https://perma.cc/B4JD-Y3ZW] (last visited Oct. 25, 2022).

[103] *See id*.

[104] T-778/16 at ¶ 3.

[105] T-778/16 at ¶ 17.

[106] T-778/16 at ¶ 19; *see* Stephanie Soong Johnston & Ryan Finley, *A Closer Look At Apple's Victory in EU Tax Case*, FORBES (Aug. 10, 2020, 11:37 am) https://www.forbes.com/sites/taxnotes/2020/08/10/a-closer-look-at-apples-victory-in-eu-tax-case/?sh=771deb823f8a [https://perma.cc/HH5S-LSX9].

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> resemble prices that would have been charged in conditions of free competition would confer a selective advantage on that taxpayer…[107]

The dispute concerned Section 25 of the TCA 97.[108] Section 25 refers to profits taxable for multinationals settled in Ireland; 25 TCA 97 states profits derived directly or indirectly from trade by the Irish branches *and* any income made from property or rights used and held by the branch are taxable.[109] Furthermore, in *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd* it was held that profits gathered from property controlled by the *non*-resident company cannot then be attributed to the Irish branch for tax purposes.[110] Therefore, the ECG in 2020 determined that the prior ruling erred in its assessment that ASI and AOE should be taxed for profits derived from IP licenses (IP licenses that were purchased from another Apple subsidiary, Apple Jersey) that were gathered from *non*-resident branches.[111]

The Commission argued that the intra-group transfer of IP was incompatible with OECD standards.[112] The Commission argued that the methods used to evaluate the profits derived from the transferred IP were *not* a "reliable approximation of market-based" outcomes, and thus violated the OECD's transfer pricing guidelines (i.e. the arm's length approach).[113] The court examined whether the OECD's "arm's length principle" need be applied to establish whether there is a selective advantage resulting from taxes determined after transfer pricing.[114] In other words, the "arm's length principle" is used to determine a normal allocation of taxes in an intra-group purchase and if normal standards have been met.[115]

Ultimately, the court agreed with the Commission's assessment and concluded that Ireland's evaluation was inconsistent with market standards.[116] However, it was unclear whether or not this inconsistent evaluation would lead to reduced taxable profits for the AOE and ASI.[117] It should be noted that while the OECD is not a binding legal entity, the EGC *did* affirm the lower court's use of the OECD's transfer-pricing standards; noting that the "Authorized OECD Approach" was based on work carried out by a group of experts and reflects international consensus regarding profit allocation.[118] Despite the avowal of the Commission's assertion and the legitimization of the OECD's transfer-pricing standards, the EGC court sets a higher evidentiary burden for establishing a breach of the arm's length principle.[119]

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[107] T-778/16 at ¶ 34.
[108] *Id*. at ¶ 174.
[109] *Id*. at ¶ 175.
[110] *Id*. at ¶ 179-80.
[111] *See e.g. id*. at ¶ 186-88.
[112] *Id*. at ¶ 315.
[113] *Id*. at ¶ 315-17.
[114] *Id*. at ¶ 194-97 (noting also that the principle is binding on a Member State whether or not the principle is incorporated into their tax law).
[115] *Id*. at ¶ 316-21.
[116] *See* JONES DAY, *supra* note 96; *see also id*. at ¶ 505-7.
[117] *See* JONES DAY, *supra* note 96; *see also* T-778/16 at ¶ 505-7.
[118] T-778/16 at ¶ 237-40.
[119] *See* JONES DAY, *supra* note 96; *see also* T-778/16 at ¶ 330.

The EGC court admitted that although the evaluation of taxable profits following the intra-group sale of IP was not in accordance with the "arm's length principle", it did not violate the TFEU's determination of state aid; notably, the EGC made no reference as to why the evaluation was so low, in part, because AOE and ASI were able to consider the purchase a capital allowance.[120] The OECD's transfer pricing guidelines do not address the market evaluation of intragroup transactions that are used for capital allowances.[121] The EGC's court's 2020 decision, in following OECD principles, fails to address a pervasive issue underlying one of the tax loopholes that gave rise to the case.[122]

By annulling the previous ruling, the EGC legitimized Ireland's tax code by claiming the government's relationship with Apple did not render improper state aid in accordance with the TFEU.[123] Additionally, the Court set a precedent that the European Commission has a significant evidentiary burden to prove an intragroup purchase violated the "arm's length principle".[124] The implications of this ruling, unencumbered use of CAIA, and the nature of the "arm's length principle" will undermine the OECD's anti-BEPS mission if not properly curtailed.[125]

V. SOLUTION

This note proposes that for Ireland to truly prevent MNEs from utilizing BEPS strategies, CAIA for intragroup purchases should be both specifically regulated by the OECD, and Ireland should consider removing this provision in their tax code altogether.[126] Some may argue that removing the CAIA provision, or the provision that allows for CAIA to apply to intragroup purchases, is not enough to substantially deter BEPS in Ireland.[127] Some also speculate that by limiting the benefits of Ireland's corporate tax structure, MNEs will leave and move to friendlier tax jurisdictions.[128]

Therefore, Part A will discuss the impact of the OECD, and how existing Action Plans can be used to limit the ability of MNEs to utilize CAIA to undermine the anti-BEPS strategies in place. The OECD inspires both oversight from the international community and significant change in non-compliant member states, so if the OECD minorly altered its BEPS Action Plans, it could deter the nefarious use of CAIA by MNEs. Part B(1) will demonstrate how the IP-related provisions in the Irish tax code are already beneficial to tech companies (in particular, smaller tech companies who Ireland purports to support), and will incentivize companies to

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[120] *See* T-778/16 at ¶ 502-4.

[121] *See OECD Releases Latest Edition of the Transfer Pricing Guidelines For Multinational Enterprises and Tax Administrations*, OECD

[122] *See id.*; *see also* T-778/16 at ¶ 316-21.

[123] *See* JONES DAY, *supra* note 96; *see also id.* at ¶ 330**.**

[124] *See* JONES DAY, *supra* note 96.

[125] *See infra* Section V.

[126] *See e.g.,* OECD, *supra* note 121.

[127] *See e.g., id.*

[128] *See* Andrew P. Kummer, *Pro-Business But Anti-Economy? Why Ireland's Staunch Protection of its Corporate Tax Regime is Preventing a Celtic Phoenix From Rising From the Ashes of the Celtic Tiger*, 9 BROOK. J. OF CORP., FIN. & COM. L. 284, 3054 (2014) ("Opponents of raising the tax believe that while doing so would generate the benefit of a minimal increase in tax revenue, the benefit would be far outweighed by the cost of… driving the MNC's to friendlier tax jurisdictions.").

remain in Ireland to avail themselves of this favorable treatment. However, with the use of CAIA in conjunction with these other tax schemes, MNEs can pay an exorbitantly low corporate income tax rate; and by removing CAIA, Ireland defends its lucrative tax code from further abuse by large MNEs. Lastly, Part B(2), will examine how Ireland's shifting political landscape may be another reason companies are unlikely to abandon the Irish market.

A. What the OECD Can Do

As a member of the OECD, Ireland has committed itself to achieving the organization's 'fundamental aims'; the Convention of the Organization for Economic Co-operation and Development (signed in 1960) outlines to what member states have committed themselves.[129]Article 1 claims member states must contribute to the growth of world trade "in a *non-discriminatory* basis in accordance with international obligations."[130] Article 5 outlines how the OECD is to achieve its aims, which is through legally binding agreements on all member states.[131] These agreements (which then become obligatory) must be made mutually, by each member state, and comply with the constitutional procedures of each country before it is binding, as outlined in Article 6.[132]

Ireland has a permanent delegation within the OECD, which consists of an ambassador (as of 2021, it has been Gerard Keown) and diplomats, as do all over members.[133] Additionally, like all others who have signed onto the OECD's convention, Ireland contributes to the OECD's annual budget: as of 2019 Ireland contributed 1.3% of the OECD's total budget of €386 million.[134]

Ireland, in compliance with all of the above listed provisions of its OECD membership, signed on to the OECD's BEPS project in an attempt to collaborate with its international peers and prevent tax abuses levied in favor of MNEs.[135] The OECD is binding upon Ireland (and all of its member states) to the extent by which they consent to be bound, although the popularity and normalization of the OECD has made it so even those who have *not* accepted the OECD are still bound by it.[136] A treaty, such as the OECD, is binding in that

[129] *See Ireland and the OECD*, OECD, https://www.oecd.org/ireland/irelandandtheoecd.htm [https://perma.cc/HKE5-MBMZ] (last visited Oct. 25, 2022); *see also* Convention on the Organization for Economic Co-Operation and Development, art. 1, Dec. 14, 1960, 12736 U.N.T.S 888 (also available at https://perma.cc/Y3NG-9FZB).

[130] *See id*. at Art. 1.

[131] *See id*. at Art. 5 (as of 2021, the Irish ambassador has been Gerard Keown).

[132] *See id.* at Art. 5-6.

[133] *See* OECD, *supra* note 129.

[134] *See id.*; *see also Member Countries' Budget Contributions for 2019*, OECD, https://www.oecd.org/about/budget/member-countries-budget-contributions.htm [https://perma.cc/6U3F-N5NJ] (last visited Oct. 25, 2022).

[135] *See generally OECD BEPS*, IRISH TAX INST., https://taxinstitute.ie/tax-insight/international-tax-policy/oecd/oecd-beps/#:~:text=Ireland%20signed%20the%20Multi%2Dlateral,treaty%2Drelated%20measures%20preventing%20BEPS [https://perma.cc/2C6K-8D8Y] (last visited Oct. 25, 2022).

[136] *See* Richard Schwartz, *Are the OECD and UNCTAD Codes Legally Binding*, 11 INTL L. 529, 531 (1977) ("[W]here a provision in a treaty sets forth a widely accepted principle of customary international law, then that

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it creates a system of principles and norms that set forth a basis for a general rule of law.[137] For example, although Ireland avoided raising its corporate income tax rate from 12.5% to the OECD standard of 15%, it eventually succumbed to the international pressure – in other words, the international *norm* established by the OECD – and raised its income tax rate despite years of staunch protest.[138] In sum, the OECD is an impactful international body that wields its power to standardize the international economic market.[139]

Currently the OECD does not have any Action Plans that specifically analyze the effects of capital allowances for purchases of intangible assets with an MNE intragroup subsidiary.[140] However, there are several ways the OECD could monitor this favorable tax treatment using the Action Plans currently available to them.[141]

1. Action 5

Contained in Action 5, the OECD Forum on Harmful Tax Practices (FHTP) conducts reviews of preferential tax laws. The three main areas that the FHTP report on regard: (1) assessing tax regimes that unfairly impact tax bases in other jurisdictions, (2) monitoring a framework of transparency to exchange information regarding domestic tax rulings, and (3) reviewing of activities in 'no or nominal' tax jurisdictions.[142] The OECD published its 2022 peer reviewed results on harmful tax practices within member states.[143] Under the category 'IP regimes,' which consist of tax treatment of intellectual property between the years 2015-2022, the only Irish tax program reviewed was the Knowledge Development Box (hereinafter "KDB"), which was deemed 'not harmful' since it followed FHTP standards (an analysis of the Knowledge Development Box will be forthcoming, but for now it is useful to note the KDB is a lucrative tax incentive for companies seeking to create and own IP).[144]

The next prong of Action 5 refers to the 'transparency framework,' which compels a country to spontaneously exchange information on tax rulings.[145] The purpose of this framework is to find:

> [A] balance between ensuring that the information exchanged is relevant to other tax administrations and that it does not impose an unnecessary

provision is to be regarded as declaratory of accepted law and, as such, binding on nations that have not accepted the treaty.").

[137] *See id*. at 532.

[138] Lisa O'Carroll, *Ireland Ends 12.5% Tax Rate in OECD Global Pact*, THE GUARDIAN (Oct. 7, 2021, 1:30 PM), https://www.theguardian.com/world/2021/oct/07/ireland-poised-to-drop-125-tax-rate-in-oecd-global-pact [https://perma.cc/TJ2R-HDGB].

[139] *See generally* OECD BEPS, *supra* note 2.

[140] *See generally* OECD, *supra* note 91.

[141] *See generally id*.

[142] *See Action 5 Harmful Tax Practices*, OECD, https://www.oecd.org/tax/beps/beps-actions/action5/ [https://perma.cc/9CKX-JTS5] (last visited Oct. 26, 2022).

[143] *See generally* OECD, HARMFUL TAX PRACTICES – 2018 PROGRESS REP. ON PREFERENTIAL REGIMES (OECD Publishing, 2018 rev. ed. 2022).

[144] *See id.* at 6.

[145] *See* OECD, *supra* note 142; *see also* OECD, HARMFUL TAX PRACTICES – 2020 PEER REV. RPTS. ON THE EXCH. OF INFO. ON TAX RULINGS (OECD Publishing, 2021), https://www.oecd-ilibrary.org/sites/f376127b-en/index.html?itemId=/content/publication/f376127b-en [https://perma.cc/6PET-FUU5].

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administrative burden on either the country exchanging the information or the country receiving it.[146]

As of 2022, Ireland's transparency framework required no adjustments, and there were no recommendations made to enhance their transparency.[147] Action 5 should be used to compel Ireland to produce reports on both the size of an MNE's purchase being considered a capital allowance, and where that purchase is coming from – in other words, whether the capital allowances are a result of a transaction with an intragroup subsidiary.[148] For instance, the OECD's reporting on corporate tax statistics makes substantial mention of depreciation schedules and capital allowances, *but* it fails to note how a corporation could benefit from capital allowances as a result of intragroup purchases.[149] Action 5 should be expanded in the following ways:

> (1) include disclosure regarding how much tax relief MNEs are afforded due to CAIA within Ireland (or any other country that may copy this tax program),
>
> (2) disclose how much of the CAIA is a result of purchases with other subsidiaries (whether those subsidiaries be within the same jurisdiction or not),
>
> (3) disclose the depreciation calendar for each of these CAIA purchases to gauge the rate at which the MNE will continue to benefit from the initial transaction.[150]

Transparency is important in the fight against BEPS: how can MNEs be stopped from taking advantage of low-tax jurisdictions if no one even knows about it?[151] Moreover, transparency in Irish tax law and how American MNEs make use of it will be pertinent in the future as MNEs continue to incorporate in Ireland, especially following the European Court's 2020 *Apple* ruling.[152] For instance, in 2019, Microsoft's Irish subsidiary began accumulating ownership of other international subsidiaries, and Google refused to answer whether they would be taking advantage of the CAIA system following the expansion of their Irish entity.[153]

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[146] *See* OECD, *supra* note 145.
[147] *See id.* at tbl.1.
[148] *See* OECD, *supra* note 142.
[149] *See id*.
[150] *See id*.
[151] *See generally* OECD, *Corporate Tax Statistics: Third Edition*, 16-20 (2021), https://www.oecd.org/tax/tax-policy/corporate-tax-statistics-third-edition.pdf [https://perma.cc/C5F2-C8XQ].
[152] *See generally* OECD, *supra* note 141; *see also* Chance, *supra* note 4*; see also* Shubham Gupta, *Does Ireland Make Strategic Sense For Technology Companies?,* THE STRATEGY STORY, (Jun. 29, 2021), https://thestrategystory.com/2021/06/29/technology-companies-ireland/ [https://perma.cc/37UD-2UDW].
[153] *See* Paul, *supra* note 60.

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2. Action 4

Action 4 of the OECD's BEPs strategies limits interest deductions and the financing of exempt or deferred income.[154] A MNE can achieve favorable tax treatment by determining the amount of debt in a group entity; two examples of this are when MNEs use intragroup financing to fund the "generation of tax exempt income," and when groups use intragroup loans to generate interest deductions that exceed the expense.[155] This is the root of the issue created by unfair capital allowance allocation – or as the OECD refers to it, "taxable earnings before interest income and expense, depreciation and amortization (EBITDA)."[156]

To solve this issue the OECD has initiated a three-prong approach:

> [A] fixed ratio rule based on a bench mark net interest/EBITDA ratio; a group ratio rule which may allow an entity to deduct more interest expenses depending on the relative net interest/EBITDA ratio of the worldwide group; and targeted rules to address specific risks.[157]

Part of the OECD's implementation strategy has been the publication of *Corporate Tax Statistics,* which covers interest limitation rules and how these rules can be utilized to support Action 4.[158] However, this recent report lacks information regarding Capital Allowances for Intangible Assets through intragroup purchases, nor does the Action itself contain this highly specific tax practice.[159]

As of January 1, 2021, Ireland has limited the number of deductions an MNE can take, which aligns with the EU standard.[160] This means the maximum amount of an interest deduction cannot exceed 30% of the EBITDA.[161] While this is in line with the main goals of Action 4, it fails to address the underlying issue of CAIA.[162]

The final prong of the Action 4 strategy references 'targeted rules to address specific issues,' giving the OECD opportunity to address this form of interest deduction in a specialized and direct way.[163] A potential solution could come in the form of a lower cap for capital

[154] *See Action 4: Limitation on Interest Deductions*, OECD, https://www.oecd.org/tax/beps/beps-actions/action4/ [https://perma.cc/J9W7-S7QU] (last visited Nov. 8, 2022).
[155] *See id*.
[156] *See id*; *see generally* TAX FOUND., *supra* note 63; *see e.g., Anti-Base Erosion Profit Sharing (BEPS Measures: Interest Limitation Rule (ILR)*, https://www.revenue.ie/en/companies-and-charities/anti-beps-measures/interest-limitation-rule.aspx [https://perma.cc/4G6Z-XK2F] (last visited Jan. 19, 2023) (it may be unlikely an interest deduction will surpass an expense; however, the interest limitation rule states that the interest deduction may not exceed EBITDA, meaning it is possible the interest deduction may exceed the underlying expense which facilitated the deduction).
[157] *See* OECD, *supra* note 154.
[158] *See id*; *see also* OECD, *supra* note 151.
[159] *See* OECD, *supra* note 150; *see* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.
[160] *See* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.
[161] *See id*; *see also* OECD, *supra* note 154.
[162] *See* OECD, *supra* note 154 (while Ireland's limit on deductions align with the OECD's Action 4 recommendations, the limited deductions do not expressly include CAIA and therefore leave open an opportunity to continue to abuse this program).
[163] *See* TAX FOUND. *supra* note 63.

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allowances from intragroup purchases.[164] Ireland's cap on CAIA is currently 10% higher than the OECD's average (80% compared to 70%).[165]

The OECD could explicitly set the 70% standard for all of their member states and make an explicit provision that further lowers the cap for intragroup transactions.[166] A 70% cap or lower for intragroup CAIA would be a particularized action against MNEs with a significant enough pool of revenue; in other words, the smaller tech companies that are meant to benefit from CAIA would not feel the burden of a lower cap because they do not have subsidiaries to make intragroup purchases in the first place.[167] As previously mentioned, with the use of CAIA, Apple managed to pay an effective corporate tax rate of 1%, placing it directly in the purview of what the OECD is attempting to do with its Action 4 strategy (and, for that matter, all of its BEPS strategies).[168] By limiting the interest deductions available to MNEs, the OECD would be preventing an unfair advantage only available to MNEs with subsidiaries, in turn protecting smaller companies who may still want to take advantage of CAIA though lack the size of larger corporations.[169]

3. Actions 8-10

Actions 8-10 regard transfer pricing.[170] As discussed above, transfer pricing is guided by the arm's length principle that states that transactions between 'associated enterprises' must be priced as if each enterprise were wholly independent and engaging in a transaction under similar economic conditions and circumstances.[171] The OECD admits in its Action statement that the application of the arm's length principle could be subject to manipulation, such that the outcomes of the transaction do not ultimately correspond to the value underlining the economic activity.[172] To avoid any negative outcomes, Actions 8-10, "provide guidance to determine the transfer pricing outcomes in accordance with the actual conduct of related parties in the context of the contractual terms of the transaction."[173] Action 8 specifically addresses issues regarding the transactions of intangible assets.[174]

Hard-To-Value Intangibles (hereinafter "HTVI") can be moved around through various group members as another form of BEPS; to counteract this, the HTVI approach

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[164] *See* Hogreve, *supra* note 67.
[165] *See id.*
[166] *See id.*
[167] *See Ireland's SME Test: The "Think Small First" Principle*, DEPT. OF ENTERPRISE, TRADE AND EMPLOYMENT, https://enterprise.gov.ie/en/publications/publication-files/ireland-s-sme-test.pdf [https://perma.cc/5GZP-WWEF] (last visited Nov. 9, 2022) (describing the particularly limited size of micro, small and medium enterprises and their positive impact on the Irish economy).
[168] *See generally*, TAX FOUND., *supra* note 63; *see also* OECD, *supra* note 153.
[169] *See* OECD, *supra* note 153.
[170] See Action 8-10: Transfer Pricing, OECD, https://www.oecd.org/tax/beps/beps-actions/actions8-10/ [https://perma.cc/45GY-86G3] (last visited Nov. 9, 2022).
[171] *See id*.
[172] *See id*.
[173] *See id*.
[174] *See id*.

ensures that tax administrations may consider ex post outcomes of the transaction as presumptive evidence about the ex ante arrangement.[175] Additionally, a tax administrator can consider information that could or should have been known and considered between the enterprises engaging in the transaction.[176]

B. Why The Arm's Length Principle Is Hurting, Not Helping

The purpose of the arm's length principle is to maintain fair price evaluations in intragroup purchases that reflect the larger commercial market, ensuring that no intragroup purchase is too generous to the company doing the transaction.[177] However, the EU General Court has employed this principle sweepingly without actual consideration for the nuanced external factors that impact the intragroup transaction. Another way to limit, if not entirely cancel out, the use of CAIA for intragroup purchases would be for the court to expand their analysis of the arm's length principle in a way that reflects the nature of the transaction.

The OECD acknowledges that the arm's length principle is not a perfect science, as the speculated price of any transaction between unrelated entities can never be entirely exact.[178] For instance, it is nearly impossible to allocate profits to each part of a production chain; and any deviation in the arm's length principle may be due to reasonable economic considerations that a cure-all 'arm's length principle' does not account for.[179] To properly compare the intragroup purchase to market conditions, the arm's length principle should consider the attributes of both entitles involved, the transaction itself, and a functional analysis of all relevant factors, which are difficult to come by.[180] Furthermore:

> [T]he EU [arm's length principle], is merely the base conceptual idea of an [arm's length principle], without any further guidance, and without being endowed with any specific content. In this context, the identification of any objective criteria from the [European] Commission's practice of the Court's case law is practically impossible, given the former's case-by-case approach.[181]

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[175] *See* OECD (2018), GUIDANCE FOR TAX ADMINISTRATIONS ON THE APPLICATION OF THE APPROACH TO HARD-TO-VALUE INTANGIBLES – BEPS ACTIONS 8-10, 9 (OECD/G20 Base Erosion and Profit Shifting Project & OECD Paris, 2018), https://www.oecd.org/tax/beps/guidance-for-tax-administrations-on-the-application-of-the-approach-to-hard-to-value-intangibles-beps-action-8.htm [https://perma.cc/GTS4-ULLD].

[176] *See id.*

[177] *See* Josh White, *Arm's Length Pricing in an Imperfect World*, INT'L TAX REV. (Apr. 25, 2019), https://www.internationaltaxreview.com/article/2a69yvx1bb2vzxy2y6yv4/arms-length-pricing-in-an-imperfect-world [https://perma.cc/BS3F-TKBV].

[178] *See* Dionysios Pelekis, *The Burden and Standard of Proof in the Tax Ruling Cases: A Practical Limit to the EU's Arm's Length Principle*, 12 J. OF EUR. COMPETITION L. & PRAC. 669, 671 (2021).

[179] *See id.* at 671; *see also* Glen Rectenwald, *A Proposed Framework For Resolving the Transfer Pricing Problem: Allocating the Tax Base of Multi-National Entities Based on Real Economic Indicators of Benefit and Burdon*, 22 DUKE J. COMP. & INT'L L. 425, 434 (demonstrating how complicated it is for MNE's to determine the arm's length price for intra-firm transactions).

[180] *See* Pelekis, *supra* note 178 at 671.

[181] *See id.* at 672.

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These limitations demonstrate that the arm's length principle, while useful in theory, is undermined by practical international tax law.[182] When the court utilized the arm's length principle in its *Apple* decision, it failed to recognize other aspects of the intragroup transaction that undermined the facially 'fair' purchase of assets.[183] In failing to acknowledge the CAIA applied to the transaction between Apple Ireland and Apple Jersey, the court's arm's length analysis also failed to factor in a key relevant component to the two enterprises' motivations.[184]

The EU General Court could apply alternative methodologies for challenging MNEs in cases regarding the abuse of intragroup transactions.[185] For MNEs located in Ireland, it would be a more thorough image of the nature of the transaction to investigate the capital allowances acquired for a given intragroup purchase. Rather than concluding the purchase abides by the arm's length principle, the court should instead evaluate additional factors embedded within the transaction itself to determine whether the MNE was taking advantage of a BEPS strategy.[186]

C. What Ireland Can Do

Ireland should fully remove the provision in their tax code that allows for capital allowances for intragroup purchases. Despite their tax code explicitly disavowing any nefarious use of the CAIA system, this is not enough to dissuade massive American MNEs such as the Silicon Six.[187] Ireland has numerous other advantages that could incentivize businesses to relocate to their island without the need for BEPS.[188] Moreover, these advantages are belied by the use of CAIA, so to abandon CAIA would ultimately further Ireland's goal of facilitating domestic IP development.

1. The R&D Tax Credit and KDB

Ireland's tax code is highly beneficial to large MNEs, even without CAIA.[189] Ireland has consistently sought to attract multinational tech and IP-based companies and has added other significant advantages to their tax code to facilitate such goals.[190] In 2015, Ireland instituted a Research and Development Tax Credit ("R&D Tax Credit"), which may be used to

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[182] *See id.* at 671.
[183] *See id.* at 672.
[184] *See id.*; *see also* Pelekis, *supra* note 178 at 671.
[185] *See* Beckett Cantley & Geoffrey Dietrich, *Apple v. European Commission: Losing the War on Corporate International Transfer Pricing*, 45 LOY. L.A. INT'L COMP. L. REV. 101, 116-117 (2022).
[186] *See* Pelekis, *supra* note 178 at 671.
[187] *See* Clancy, *supra* note 70.
[188] *See* Alderman, *supra* note 55; *see also* O Grada, *supra* note 11 at 357.
[189] *See generally Ireland: Corporate – Tax Credits and Incentives*, PWC (June, 29, 2022), https://taxsummaries.pwc.com/ireland/corporate/tax-credits-and-incentives#:~:text=A%20tax%20credit%20of%2025,corporation%20tax%20benefit%20of%2037.5%25. [https://perma.cc/4JCT-786L].
[190] *See* REVENUE (IRISH TAX AND CUSTOMS), RSCH AND DEV. (R&D) TAX CREDIT, (Part 29-02-03, last updated 2021) [https://perma.cc/P9SQ-M2L5]

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reduce a company's corporate tax rate.[191] Potentially, this 25% credit can be used as a refund for a tech company's research and development (hereinafter "R&D").[192] A company may receive a 25% tax credit for qualified R&D that includes 'science or technology,' basic applied or experimental research, and technological advancements.[193] Companies that seek to claim this credit need not hold IP rights over the finished product of the R&D, nor does the R&D work have to be 'successful.'[194] However, the R&D tax credit is only applicable to a company within the Irish tax system, and the qualifying R&D must be undertaken within the European Economic Area[195] or the United Kingdom (hereinafter "UK")[196]

In conjunction with the R&D Tax Credit, CAIA could lead to further tax breaks that exceed and undermine the original goal of the R&D Tax Credit, to encourage tech manufacturing in Ireland.[197] While the R&D Tax Credit is only available to companies under Irish tax law, since the company does *not* have to own the IP rights over the finished product, a corporation could move the IP through alternate subsidiaries and claim CAIA.[198] For example, Subsidiary A, which is located in Ireland, could produce the IP that is subsequently owned by Subsidiary B, located in the United States.[199] Subsidiary A takes a 25% tax credit, in accordance with the R&D Tax Credit; in turn, Subsidiary B sells the IP licenses to Subsidiary A who claims the purchase as a capital allowance and will then be excused from paying taxes for 80% of that purchase.[200]

In addition to the R&D tax credit, Ireland also has the Knowledge Development Box (hereinafter "KDB"), which is another resource created to incentivize IP production in Ireland.[201] A company that qualifies for KDB may have its qualifying profits taxed at an effective rate of 6.25%; a deduction equal to 50% of its qualifying profits.[202] To qualify for the KDB, the company must earn income from the qualifying asset that was created from R&D activities.[203] The qualifying assets include those created from R&D such as computer programs,

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[191] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* OECD, *R&D Tax Incentives: Ireland, 2021*, DIRECTORATE FOR SCI., TECH., AND INNOVATION (last updated Dec. 2021), https://www.oecd.org/sti/rd-tax-stats-ireland.pdf [https://perma.cc/RG2R-8PAB].

[192] *See generally* Bernard Doherty & James McMahon, *Research and Development (R&D) Tax Credit*, GRANT THORNTON, https://www.grantthornton.ie/globalassets/1.-member-firms/ireland/insights/publications/grant-thornton---research-and-development-tax-credit.pdf [https://perma.cc/KL7L-9B6M] (last visited, Nov. 11, 2022).

[193] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[194] *See id*.

[195] *See Countries in the EU and EEA*, GOV.UK, https://www.gov.uk/eu-eea [https://perma.cc/4FX2-W5Q9] (last visited Nov. 11, 2022).

[196] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[197] *See id*.; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[198] *See* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[199] *See generally* REVENUE (IRISH TAX AND CUSTOMS), *supra* note 68.

[200] *See id*.; *see e.g.* Clancy, *supra* note 70; *see also* TPCASES.COM, *supra* note 71.

[201] *See* Damien Flanagan, *Knowledge Development Box: Best in Class?*, KPMG (2016), https://assets.kpmg .com/content/dam/kpmg/pdf/2016/04/ie-itr-issue-1-2016-damien-flanagan.pdf [https://perma.cc/H4DD-VUPB].

[202] *Knowledge Development Box*, Revenue (Irish Tax & Customs) (July 6, 2022), https://www.revenue. ie/en/companies-and-charities/reliefs-and-exemptions/knowledge-development-box-kdb/index.aspx [https://perma.cc/7N5R-HJYF] (since Ireland is now raising its corporate income tax rate to 15% in the next fiscal year, the effective tax rate will now be roughly 7.5%).

[203] *See id*.

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inventions protected by a patent, and IP for companies that are not patented but are patentable.[204]

The OECD has set specific guidelines for KDBs, such as Ireland's, in an effort to prevent MNEs from shifting their profits to favorable IP tax jurisdictions.[205] The OECD has instituted the "Modified Nexus Approach," which requires a 'nexus' between whatever income receives the benefit of a KDB, and the expenditures that contributed to such income (e.g. the R&D required for the production of the IP).[206] When the Irish KDP was announced in 2015, it was hailed as the "first OECD-compliant KDB in the world," as it sought to specifically target and benefit companies that produced their IP *in* Ireland.[207] Hence, there is a close nexus between the KDPs benefit, and the expenditure towards the benefit.[208]

The KDB is advantageous because it has the ability to specifically benefit smaller companies, unlike CAIA, which is a scheme most lucrative to larger MNEs with numerous international subsidiaries.[209] Since the KDB protects IP that is certified as 'novel,' 'non-obvious,' and 'useful,' (i.e. not patented) that gives smaller companies the opportunity to utilize the KDB without having to bear the cost of formally protecting IP with a patent.[210]

The KDB as a system intends to benefit companies that invest in protecting and creating IP in Ireland, however some exceptions do exist.[211] For instance, when considering qualifying R&D expenses, one may include the cost of outsourcing their R&D if the activity is carried out within the EU and by a non-related party (so neither a subsidiary nor parent company).[212] The KDB therefore cannot also be used to augment the tax breaks available under

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[204] *See id.* (not included are copyrights, design marks, and trade secrets).

[205] *See* BDO, *BEPS Actions Item 5 – Modified Nexus Approach For Preferential Intellectual Property Regimes*, BDO.COM (April, 2015), https://www.bdo.com/getattachment/3f965ec6-1b7d-457c-a894-00ae693368d5/attachment.aspx [https://perma.cc/FL25-VKR6]; *see also* OECD, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*, OECD/G20 BASE EROSION AND PROFIT SHARING PROJECT (2015), https://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf [https://perma.cc/EL64-BN3D].

[206] *See* BDO, *supra* note 205; *see* OECD, *supra* note 205**.**

[207] *See* Flanagan, *supra* note 201 (quoting Ireland's Finance Minister Michael Noonan announcing the 2015 Budget).

[208] *See id.*

[209] *See id*. (defining 'smaller companies' as those with an annual income from IP of less than €7.5 million, with fewer than 250 employees, and a turnover of less than €50 million *or* a balance sheet of less than €43 million).

[210] *See id*.

[211] *See* Laura Myles, *The Knowledge Development Box in Ireland – A Quick Overview,* FLYNN O'DRISCOLL, BUS. LAW., https://fod.ie/wp-content/uploads/2017/07/KDB-A-Quick-Overview.pdf [https://perma.cc/6PPF-C6FR] (last visited Nov. 16, 2022).

[212] *See id.*; *see generally Non-Related Party Definition*, LAW INSIDER, https://www.lawinsider.com/dictionary/non-related-party#:~:text=owners%20or%20Affiliate.-,Non%2DRelated%20Party%20means%20a%20person%20or%20entity%20that%20is,directly%20or%20indirectly%20by%20Borrower. [https://perma.cc/UN3A-3D7Y] (last visited Nov. 16, 2022) (defining 'non-related party' as a "person or entity that is not an Affiliate of Borrower, nor an officer of, or parent or subsidiary corporation of a shareholder of Borrower, or any person or entity otherwise controlled directly or indirectly by Borrower or Borrower's shareholders, or a parent or subsidiary corporation or partnership of Borrower or its shareholders.").

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CAIA within an intragroup purchase.[213] However, qualifying expenditure on R&D may include the sum of acquisition costs and group outsourcing costs called the 'uplift expenditure,' though this cannot exceed 30% of the overall qualifying expenses.[214]

The KDB works in conjunction with the R&D tax credit in that the KDB provides tax relief once successful R&D activity has resulted in qualifying IP income, while the R&D tax credit affords "cash tax savings" for those actually engaging in the R&D activities.[215] Similar to the aforementioned concern with the R&D tax credit in conjunction with CAIA, the use of all of these tax schemes with one another leads to magnified corporate tax breaks for MNEs producing qualifying IP.[216] Imagine the example above, with Subsidiary A (in Ireland) that produced IP owned by Subsidiary B (in the U.S.). The acquisition of the IP license costs 29% of their overall expenses for the produced IP; Subsidiary A's taxable profits would be reduced to 50% (due to the KDB), they would qualify for a 25% credit to refund for the R&D of the IP, and that purchase of the intangible asset between the subsidiaries, worth 29% of their overall expense, would be written off under CAIA.[217]

The R&D Tax Credit and KDB are two tax schemes that demonstrate Ireland's commitment to IP growth and are both attractive resources for tech companies looking to avail themselves of favorable tax treatment.[218] Unlike CAIA, both the R&D Tax Credit and KDB have the potential of helping smaller home-grown Irish tech companies, while CAIA is a tool wielded only for the benefit of MNEs with international subsidiaries.[219] Removing the CAIA provision of the Irish tax code, while leaving the R&D Tax Credit and KDB, is a way to continue to encourage IP-based economic growth for Ireland's domestic market and avoid any additional corporate tax evasion by large MNEs.

2. A Changing Political Landscape

Following the UK's exit from the EU, intellectual property laws for those with patents registered in the UK changed drastically.[220] This, in addition to the fact Northern Ireland's economy has grown at a faster rate than other British countries, demonstrates how the Republic of Ireland and Northern Ireland have become more promising home bases for large IP-based MNEs.[221] Additionally, a recent parliamentary election in Northern Ireland saw the

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[213] *See* Myles, *supra* note 211 ("Outsourcing costs may be included provided the qualifying R&D activity is carried on within the EU and by a non-related party").

[214] *See* Bernard Doherty, et al., *Knowledge Development Box (KDB)*, GRANT THORNTON (2018), https://www.grantthornton.ie/globalassets/1.-member-firms/ireland/insights/factsheets/grant-thornton---kdb---2018.pdf [https://perma.cc/RS6W-PHFZ].

[215] *See* Flanagan, *supra* note 201; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[216] *See* Doherty, *supra* note 192; *see also* Flanagan, *supra* note 201.

[217] *See* Doherty, *supra* note 192; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[218] *See* Doherty, *supra* note 192; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190.

[219] *See* Myles, *supra* note 211; *see also* RSCH AND DEV (R&D) TAX CREDIT, *supra* note 190; *see also* Clancy, *supra* note 70.

[220] *See* Sally Shorthose, *Brexit: English Intellectual Property Law*, BIRD & BIRD (Jan. 12 2021), https://www.twobirds.com/en/insights/2016/uk/brexit-english-intellectual-property-law-implications [https://perma.cc/Y5QL-WNHB].

[221] *See* Shawn Pogatchnik, *Northern Ireland Economy Outpacing Post-Brexit Britain*, Politico (June 1, 2022), https://www.politico.eu/article/northern-ireland-economy-outpace-post-brexit-britain/ [https://perma.cc/7A3B-567Z].

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overwhelming electoral success of the Sinn Fein party for the first time in Northern Ireland's 100-year-long-history; with a majority of seats in the Northern Irish Parliament, Sinn Fein could usher in a new era of Irish politics.[222] This is a significant development as it shows a changing tide in the sociopolitical landscape and could, potentially, begin a conversation for a referendum for Irish reunification.[223] Although at the moment unification is only speculative, the incorporation of Northern Ireland's market and citizenship is another Irish advantage that makes the country attractive to MNEs.[224]

VI. CONCLUSION

Despite efforts to meet the global standard for corporate tax compliance, Ireland has left deep loopholes in its tax code that have been taken advantage of by MNEs, such as the Silicon Six. With the overturning of *Apple v. European Commission,* the Irish tax code's Capital Allowances for Intangible Assets purchased through intragroup subsidiaries were tacitly legitimized.[225] There has been a progressive stream of MNEs incorporating in Ireland and onshoring intellectual property with the clear intention of following in Apple's footsteps and claiming capital allowances for the transfer of IP from subsidiary to subsidiary.[226] Despite the OECD's continued battle against BEPS, it has failed to properly address CAIA.[227] The OECD's long-supported arm's length principle actually does more damage to the global market than good, in that it inadvertently maximizes the capital allowances available to companies in their intragroup purchases.[228] To prevent more MNEs from taking advantage of the CAIA system, the OECD should utilize their current Action Plans to address the particular issue of capital allowances for intragroup purchases.[229] Furthermore, the European General Court must reevaluate its use of the arm's length principle when determining cases involving MNEs that avail themselves of CAIA. Tech companies will continue to move to Ireland for more than a particular CAIA program; a tax code that incentives R&D for IP and encourages smaller companies to grow and maintain a strong base in Ireland, accessibility to the European market, and a bright political future are all reasons why Ireland has no reason to fear a mass exodus of tech giants.[230]

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222 *See* Kimberly Cowell-Meyers, *A Sinn Fein Win In Northern Ireland Could Bring Big Changes*, THE WASH. POST (May 5, 2022, 5:00 AM), https://www.washingtonpost.com/politics/2022/05/05/northern-ireland-election-sinn-fein-dup/ [https://perma.cc/2VZ3-AFKZ].

223 *See id*.

224 *See id*.

225 *See* T-778/16 at ¶ 316-21; *see also* Gupta, *supra* note 152.

226 *See e.g.* Paul, *supra* note 60.

227 *See* OECD, *supra* note 91 (despite the OECD's strategies to prevent BEPS, they have failed to address CAIA).

228 *See* White, *supra* note 177; *see also* T-778/16 at ¶¶ 316-21 (Jul. 15, 2020) (references the arm's length principle as a standard to judge intragroup purchases but fails to take into account the purpose of the purchase being for CAIA).

229 *See e.g.* OECD BEPS, *supra* note 2.

230 *See* Alderman, *supra* note 55.