



# Corporate tax secrecy and the state: the Apple case in Ireland

Debt and Development Coalition Ireland  
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**‘...any reduction of tax for Apple results in a loss of tax revenue that otherwise would have been available to Ireland’**

EU Commission, September 2014, p. 141

In 2014, the European Commission (EC) announced that it was to conduct investigations into whether or not state aid had been granted through secretive tax dealings, in contravention of EU rules, to Apple in Ireland, Starbucks in the Netherlands, Fiat in Luxembourg, and Amazon in Luxembourg.

Results are still pending. But the picture of widespread corporate tax avoidance which is emerging from these investigations depicts a broken global tax system being used by highly-profitable multinational corporations (MNCs) to minimise the taxes they pay at the cost of public revenues in the countries where they operate. In the case of Ireland's tax arrangements with Apple, the EC's preliminary findings have already shown evidence of secretive tax deals between Revenue and Irish subsidiaries of Apple Inc, resulting in the loss of significant revenues for the public purse.

It is estimated that the EU is losing around €1 trillion every year due to tax evasion and avoidance<sup>2</sup>. Meanwhile, secret tax arrangements also enormously reduce the tax take in those countries where companies such as Apple operate – including poorer regions such as Asia, Africa and the Middle East – but where it fails to declare tax liabilities that correlate with its economic activities and the value created. The world's poorest countries continue to

lose more revenue due to tax-dodging than they receive as development aid, as MNCs shop around for loopholes to avoid tax.<sup>3</sup>

In this context, the current situation in which Ireland has secretive tax arrangements with MNCs, beyond the scrutiny of the Oireachtas or the public because of a blanket view of taxpayer confidentiality taken by the Revenue Commissioners, is an affront to transparency, democratic governance and public accountability.

The effect of tax rulings such as Apple's is effectively to provide a massive state subvention, currently invisible, to multinational corporations, while severely undermining our international positioning on human rights and development cooperation through drawing badly-needed tax revenues away from the poorest countries.

1 The EC findings are in the EC document State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland Alleged aid to Apple, published on 30 September 2014 and referred to throughout this briefing. [http://ec.europa.eu/competition/state\\_aid/cases/253200/253200\\_1582634\\_87\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf)

2 Richard Murphy, Tax Research LLP – Closing the European Tax Gap: [www.socialistsanddemocrats.eu/sites/default/files/120229\\_richard\\_murphy\\_eu\\_tax\\_gap\\_en.pdf](http://www.socialistsanddemocrats.eu/sites/default/files/120229_richard_murphy_eu_tax_gap_en.pdf)

3 Christian Aid, Death and Taxes, 2008: <http://www.christianaid.org.uk/images/deathandtaxes.pdf>

## Irish corporate tax practice again in the limelight

**Ireland is firmly** in the international spotlight with regard to its corporate tax arrangements, as states lose patience with multinationals' race to the bottom on tax contributions. We can expect them to continue to seek action on the type of loopholes that allowed the controversial 'Double Irish' tax strategy, and which link in with opaque tax rulings, such as Ireland's secretive arrangement with Apple.

The European Commission is currently investigating Ireland's tax rulings for certain Apple subsidiaries in Ireland to assess if the outcomes constitute state aid that contravenes EU competition rules.

Tax rulings are comfort letters by tax authorities to companies giving clarity on how its corporate tax will be calculated, according to the European Commission. In particular, they are used to confirm transfer-pricing arrangements: the prices for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of the same group. This influences the allocation of the group's taxable profit between its subsidiaries located in different countries. We do not know how many tax rulings there are in Ireland, or to what effect, but Minister for Finance Michael Noonan has confirmed that there were 335 issued by Revenue between 2010 and 2012.

### Provisional finding #1: Loopholes in the 'Arms Length' Principle

The European Commission's investigation is focusing on the agreed transfer pricing arrangements, or Advance Pricing Agreements (APAs), between the Irish state and Apple, as contained in Irish Revenue's tax rulings – or "non-binding advance opinions", as Ireland styles them. APAs lay out how the transfer pricing and profit allocation by a company are considered by a revenue authority over a certain period of time. The Commission has stated that MNCs **'have a financial incentive when allocating profit to the different companies of the corporate group to allocate as much profit as possible to low tax jurisdictions and as little profit as possible to high tax jurisdictions'**.<sup>4</sup>

In an attempt to prevent this type of practice, the Organisation for Economic Cooperation and Development (OECD) established the 'arm's length principle', which is intended to ensure that transactions between companies of the same corporate group are not priced differently from those that would pertain between independent companies. In reality, however, its implementation is based on the assessment of 'comparable market prices' that do not really correspond to reality and allow artificial profit shifting from one subsidiary of a corporate group to another through inflated prices.

On the subject of Ireland's tax rulings to Apple, the European Commission maintained (in its preliminary view), the means of determining profit allocation between Apple's companies **'do not appear to comply with the arm's length principle'**<sup>5</sup> in several instances. Therefore, they appear to confer an advantage on Apple that is **'obtained every year and ongoing, when the annual tax liability is agreed upon by the [Irish] tax authorities in view of that ruling'**.<sup>6</sup>

### Provisional finding #2: 'No Scientific Basis' for profit allocation

Apple Inc. is incorporated in the USA. There are seven Apple subsidiary companies incorporated in Ireland<sup>7</sup>, but the tax rulings of 1991 and 2007 were made in relation to the Irish subsidiaries of Apple Operations Europe (AOE) and Apple Sales International (ASI).

Central to the European Commission's investigation is that Irish Revenue's determination of taxable profits for these two subsidiaries was not based on any sound accounting basis, **'not motivated in economic terms nor substantiated by any methodology explained in the documents provided by Apple to Irish Revenue'**, but based on negotiations between Apple and the Irish government, acting through Revenue. In these closed-door negotiations, the Commission held, Apple proposed and agreed to the amount of tax that would be paid to the Irish state. In some cases, figures for the Irish subsidiaries seemed to have been **'reverse engineered'** to arrive at a particular taxable income for the corporation.<sup>8</sup>

<sup>4</sup> EC Document SSA.38373 – Ireland Alleged aid to Apple, Section 2.1 (8) P. 3.

<sup>5</sup> EC Document SSA.38373 – Ireland Alleged aid to Apple, Section 3.1 (61) P. 17.

<sup>6</sup> EC Document SSA.38373 – Ireland Alleged aid to Apple, Section 3.1 (69) P. 19.

<sup>7</sup> See Figure 1, Appendix 1, in this document for a graphic of the structure of the Apple group in Ireland as noted by the European Commission.

<sup>8</sup> EC Document SSA.38373 – Ireland Alleged aid to Apple, Section 3.1 (62) P. 17-18

The discussions as to Apple's taxable earnings were not only lacking in any '*scientific basis*' for some of these figures but they were linked to the jobs that Apple provides in Cork, and therefore represented political negotiations rather than a tax liability settlement based on clear accounting standards.<sup>9</sup>

Such decisions, with multi-billion euro ramifications, have no place being kept behind closed doors.

## Apple wins – so who loses?

**It is estimated** that the EU is losing around €1 trillion every year due to tax evasion and avoidance.<sup>10</sup> But secret tax arrangements, such as those the Commission is investigating between Ireland and Apple, also affect people in those countries from which Apple's profits are being shifted (in the Middle East, Africa and Asia, as the US Permanent Sub-committee on Investigations noted in 2013). Many of these can ill afford this depletion of state revenues. A recent UNCTAD report suggests that "developing countries lost around \$100 billion per year in revenues due to tax avoidance by multinational enterprises."<sup>11</sup>

In effect, Apple's gain through tax dodging is these jurisdictions' revenue loss. These countries also lose out on the beneficial side effects of governance and state building through strengthening of democratic institutions.<sup>12</sup> Apple has been the clear winner to date, but the Irish government should pay more attention to who the losers are, and in what amount – whether they are taxpayers in Ireland, other EU Member States, countries of the Global South, or all of the above.

## Apple: the tip of the iceberg?

Responding to the European Commission decision to open a formal enquiry into Revenue's tax rulings to Apple, the Irish government stated that "Ireland does not have a statutorily binding tax ruling system". Rather, "the Revenue Commissioners, in certain limited circumstances, operate a system of non-binding advance opinions where companies can seek advice on the correct application of the law in their self-assessed tax filings."<sup>13</sup>

Revenue describes some of the circumstances where it will offer an opinion as being company restructuring, an inward investment issue, or a complex VAT or stamp duty issue.<sup>14</sup>

But whether Ireland has a 'statutorily binding system' or a less formal system of offering "advance opinions" (nominally available to all taxpayers, large and small) is not really the issue. Apple could and did, in practice, take these "non binding advance opinions" as its legitimate expectation of how it would be treated by Revenue in assessing the subsidiaries' taxable profits.

The emphasis on 'opinions' rather than 'rulings' reflects Revenue's awareness of the constitutional and legislative constraints under which it operates.<sup>15</sup> Under its system, there is no disclosure or publication of the number or substance of opinions expressed by the Revenue authorities to a taxpayer<sup>16</sup>, although opinions may be made available on a 'no-names' basis by request under freedom of information. The transparency gap is further demonstrated by the European Commission stating that the Irish government failed to supply it with any convincing transfer pricing reports or supporting documentation between Revenue and the Apple subsidiaries.

9 EC Document SSA.38373 – Ireland Alleged aid to Apple, Section 2.3.2 (36) P. 10.

10 Murphy, Tax Research LLP: [www.socialistsanddemocrats.eu/sites/default/files/120229\\_richard\\_murphy\\_eu\\_tax\\_gap\\_en.pdf](http://www.socialistsanddemocrats.eu/sites/default/files/120229_richard_murphy_eu_tax_gap_en.pdf)

11 <http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III.pdf>

12 Draft Report on Tax Avoidance and Tax Evasion as Challenges for Governance, Social Protection and Development in Developing Countries, 2015: European Parliament Committee on Development (PR\1053764\EN.doc)

13 <http://www.finance.gov.ie/news-centre/press-releases/ireland-confident-there-no-state-aid-rule-breach>

14 <http://www.revenue.ie/en/practitioner/tax-briefing/archive/67/tb05.htm>

15 European Parliament TAXE Committee briefing for delegation visit to Ireland.

16 Documentation for the visit to Ireland of the TAXE Committee, May 2015: Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy

After specific transfer pricing legislation was enacted in Ireland in Finance Act 2010, the first 12-month corporate income tax returns to which it applies were returns for accounting periods ending on or after 31 December 2011, due with Revenue from September 2012 onwards. “There is an increasing focus by the Revenue Commissioners... [through transfer pricing law and practice] on ensuring that multinational profits are not understated,” Minister for Finance Michael Noonan stated in response to a written Parliamentary Question in June 2015. From 2012 to end January 2014, “a number of transfer-pricing interventions were opened,” the Department of Finance informed DDCI in response to a research questionnaire in 2015. “To date, none of these have given rise to additional tax revenues.”

It is an additional and serious concern that, while Advance Price Agreements (a form of tax ruling) provided to corporations by other EU Member State tend to have a duration of 3 to 5 years, the agreements between Revenue and Apple’s Irish subsidiaries appeared to have no set expiry date, but to be indefinite in nature. While the Department of Finance alludes to the Commission investigation addressing advance opinions “a number of years ago” (1991 and 2007), these rulings have framed the Irish state’s tax relationship with Apple for decades.

## Consequences of a negative verdict for Ireland

In Ireland, the Department of Finance has stated that the government is “very confident” it will succeed in defending its position that there has not been any state aid involved.<sup>17</sup> It has also made it very clear that, if necessary, the Government will defend its position in the European Courts.

But if the Commission’s decision is a negative one, it generally requires the Member State to recover the aid (with interest) from the beneficiary organization within 10 years. If the Member State does not pursue this in due time, the Commission may refer the case to the European Court of Justice (ECJ); in any case, all decisions of the Commission are subject to review by the General Court and, ultimately, the ECJ.<sup>18</sup>

Apple noted in a regulatory company filing to the Securities and Exchange Commission (SEC) in the USA in April 2015 that a negative decision could have a material impact on the company’s books.<sup>19</sup> Securities lawyers consider a ‘material’ impact to be 5% of average annual pretax profits for the past three years<sup>20</sup>, which would suggest a very sizeable multi-billion sum due to be repaid. Bloomberg business news cited a potential US\$19 billion tax bill for Apple if the ‘state aid’ investigation goes against Ireland and it is forced to recoup the tax.<sup>21</sup>

However the European Parliament’s TAXE committee warned in a July 2015 draft report that the ability of a Member State to recover the amount of state aid found to have been granted “constitutes de facto a bonus for non-compliance, which is unlikely to discourage Member States, in case of doubt, from granting abusive tax benefits, rather than the contrary.” It called on the European Commission to consider modifying the existing rules on state aid to allow that the amounts recovered following an infringement “be returned to the Member States which have suffered from an erosion of their tax bases or to the EU budget, and not to the government which granted the illegal tax-related aid, as is currently the case.”<sup>22</sup>

## The eternal excuse of confidentiality

The Department of Finance informed DDCI in June 2015 that Ireland supports the European Commission proposal for mandatory automatic exchange of information on tax rulings between Member States, but not public disclosure. “Taxpayer information is confidential under Irish tax law and the Revenue Commissioners are prohibited from disclosing taxpayer information to third parties,” it stated.

The ‘advance opinions’ issued by Revenue would come within the scope of proposed EU rules on mandatory automatic exchange of information between Member States on advance cross-border tax rulings and advance pricing arrangements, even though they are not referred to in Ireland as tax rulings and are non-binding, according to Minister Noonan<sup>23</sup>. However, the proposed amendments under that Directive do not provide for the publication of these rulings.

17 <http://www.finance.gov.ie/news-centre/press-releases/ireland-confident-there-no-state-aid-rule-breach>

18 [http://ec.europa.eu/competition/state\\_aid/overview/state\\_aid\\_procedures\\_en.html](http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html)

19 <http://www.irishtimes.com/business/financial-services/eu-inquiry-into-apple-s-tax-arrangement-in-ireland-delayed-1.2200535>

20 <http://www.nasdaq.com/article/apple-warns-may-face-backtaxes-from-ec-probe-20150430-00120#ixzz3a1oMvmB4>

21 <http://www.irishtimes.com/business/economy/ireland-may-face-censure-over-apple-tax-dealings-1.2340472>

22 July 2015 Draft Report of the European Parliament Special Committee on tax rulings and other measures similar in nature or effect – Co-rapporteurs Elisa Ferreira and Michael Theurer (2015/2066(INI))

23 Minister Michael Noonan written response to PQ 12281/15 on mandatory exchange of information in the field of taxation <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail2015032500072#N11>

DDCI urges that the EU strengthen its push for greater corporate tax transparency after the LuxLeaks and HSBC Switzerland corporate tax avoidance scandals **by mandating Member States' tax authorities to publish the basic elements of tax rulings in the public interest.** If that requires legislative change to address entitlements to taxpayer confidentiality, as in Ireland's case, that should be tackled. MNCs would have a considerably harder time negotiating tax arrangements that do not stand up to scrutiny if all tax rulings in EU Member States were made public.

DDCI further urges that national tax authorities, which have a statutory status and accountability, should publish the basic elements of all tax rulings, regardless of whether new developments require corporations to disclose them as part of public country by country financial reporting. Publication of tax rulings would greatly empower the tax authorities of low-income countries to explore the potential tax liabilities of large enterprises that operate in their jurisdictions, whereas they are currently shut out by limited and limiting information-sharing protocols for tax authorities – and many will continue to be under current OECD BEPS proposals, which were intended to tackle Base Erosion and Profit Shifting by multinationals.

*'Publication of tax rulings would greatly empower the tax authorities of low-income countries to explore the potential tax liabilities of large enterprises that operate in their jurisdictions...'*



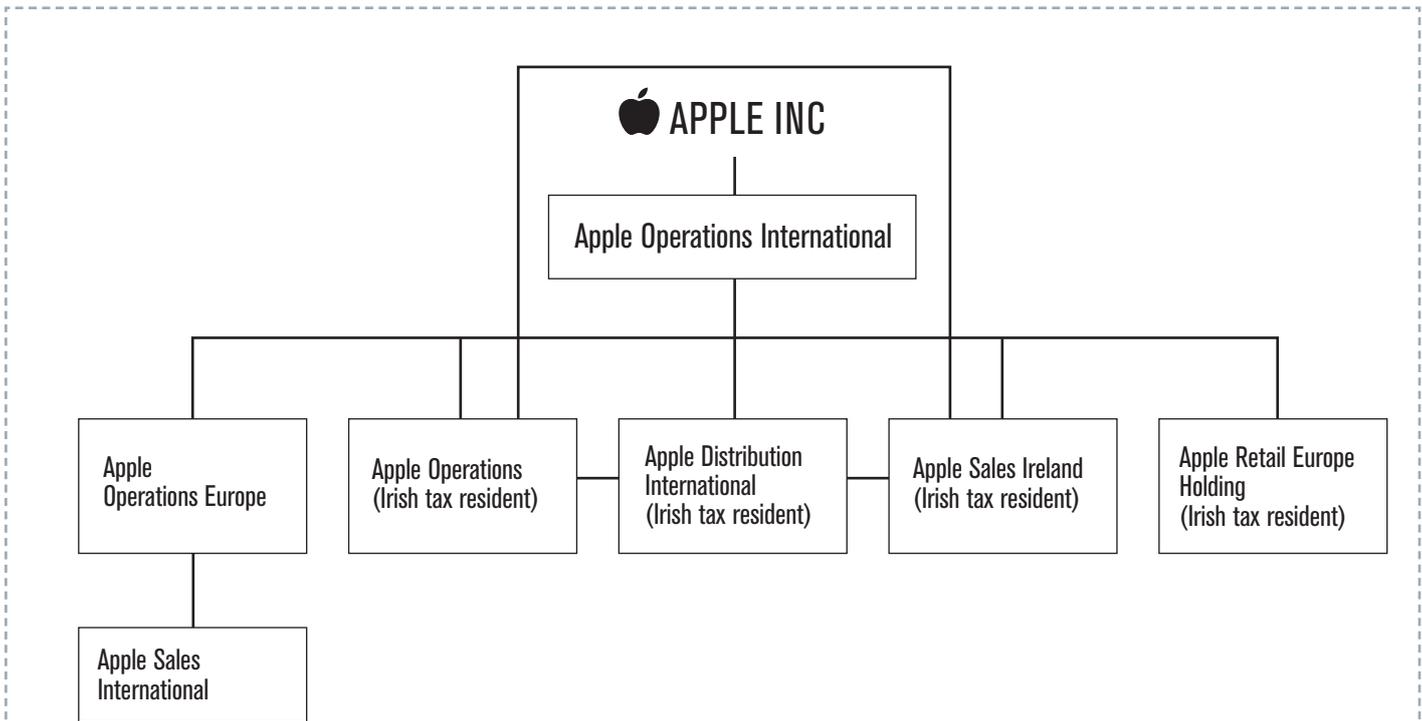
## The Way Forward

**The rules that** govern corporate taxation in the EU are out of step with the modern economy: uncoordinated national measures are being exploited by corporations to escape taxation in the EU and elsewhere, leading to major tax revenue losses for EU member states and their citizens, and for low income countries in the Global South.

Corporate tax rulings, such as Ireland's "advance opinions" for Apple subsidiaries, should not be provided behind closed doors. Political representatives, the Public Accounts Committee, the general public and other stakeholders (notably including the tax authorities of low-income countries) should be able to establish how much business each company and subsidiary does in each jurisdiction, the revenues they earn and profits that accrue, the taxes they are charged on those profits, and the basis on which those tax liabilities are calculated.

Beyond its tax rulings regime, Ireland needs to help bring greater transparency to corporate profits, taxable income and taxes paid at home and across the European Union; and to advance towards a fair global corporate taxation system that aligns with formal, binding EU commitments to policy coherence for development under the Lisbon Treaty.

Figure 1: Apple's company structure in Ireland<sup>24</sup>



The diagram shows Apple's corporate structure in Ireland. It includes companies incorporated in Ireland (all but Apple Inc.) and tax resident in Ireland, as described in the European Commission's preliminary report into its 'state aid' investigation of Ireland's tax arrangements with the corporation.

Of the companies incorporated in Ireland, Apple Operations International, Apple Sales International and Apple Operations Europe are not tax resident in Ireland. The European Commission investigation concerns secret tax rulings on the profit allocation to Apple branches granted by Irish Revenue in 1991 and 2007 in favour of AOE and ASI.

- AOE, formerly Apple Computer Ltd, is a 100% subsidiary of Apple Operations International (which is an Irish-incorporated but non-tax resident company with no branch in Ireland). AOE is an Irish incorporated non-tax resident company carrying on a trade through a branch in Ireland.

- ASI, formerly Apple Computer International and originally Apple Computer Accessories Ltd., is a 100% subsidiary of AOE. ASI is an Irish-incorporated but non-resident company that is carrying on a trade through a branch in Ireland.

According to the information provided by Ireland to the European Commission, the actual territory of tax residency of AOE and ASI is not identified. The Business Post reports from a US Senate investigation into Apple's tax practices that Apple Operations International (\$30 billion 'income' from 2009-2011) and Apple Sales International (\$74 billion 'income' 2009-2012) **have no legal tax residence anywhere in the world**<sup>25</sup> Fortune.com reports that Apple Operations Europe also maintains that it has no legal tax residence, and that its declared profits are not taxable by any country.<sup>26</sup>

Various media reports arising from the Senate investigation suggest that Ireland's actual corporate tax rate in Ireland has been less than 2%.

<sup>24</sup> Diagram from the European Commission document: State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – 'Ireland Alleged aid to Apple' [http://ec.europa.eu/competition/state\\_aid/cases/253200/253200\\_1582634\\_87\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf)

<sup>25</sup> Six Points to Remember from Apple Tax Report [by the US Senate] <http://www.businesspost.ie/#!story/Home/News/COMMENT%3A+Six+points+to+remember+from+Apple+tax+report/id/89127228-1885-19ab-de53-d27110688187>

<sup>26</sup> Meet AOI, Apple's Mysterious Irish subsidiary – updated: <http://fortune.com/2013/05/20/meet-aoi-apples-mysterious-irish-subsiary-updated/>

# Recommendations

**To end the use of tax rulings to minimise corporate tax bills and to enhance corporate tax transparency, DDCI is urging the government to take the following actions;**

## **In relation to tax rulings;**

- Publish fully, and ensure full parliamentary debate on, the findings of the EC investigation regarding Ireland's tax arrangements with Apple;
- Commission a full independent review of historic and current tax rulings practice by the Revenue Commission, particularly its approach to corporate transfer pricing schemes and its interpretation of the need for confidentiality;
- Reform Revenue practice to ensure compulsory transparency around the basic elements of any tax rulings made, with only limited and temporary exceptions for reasons of taxpayer confidentiality;
- Mandate the Public Accounts Committee to carry out a full review of the use of tax rulings by Apple and other MNCs, with a view to identifying any past abuses of the system and reforms required, and to clarifying the economic costs and benefits of tax rulings provided;
- Use information on tax rulings provided under the EU's new mandatory exchange of information among tax authorities to ensure that corporations headquartered or operating in Ireland are not using tax rulings to facilitate tax avoidance;
- Include revenue foregone as a consequence of tax rulings as an expenditure in the government estimates and budget;
- Carry out a study (within Spillover Analyses subsequent to the first one in 2015, for example) into the revenues lost to developing countries as a result of Ireland's tax rulings, and outline how Ireland will remediate such effects, in line with its commitment to policy coherence for development under the EU's Lisbon Treaty.

## **In relation to tax transparency more broadly;**

- Mandate public country by country financial reporting (CBCR) for all large enterprises;
- Publish and debate in the Oireachtas the Spillover Analysis, released in October 2015, of the impact on countries of the Global South of Ireland's tax policies, and then remove practices that have negative impacts;
- Urge an end to EU opposition to the establishment of an intergovernmental tax body under the auspices of the United Nations, which could ensure that Southern countries can participate equally in the reform of global taxation;
- Support the initiation of a global study, jointly with developing countries, on the merits and feasibility of more fundamental alternatives to the broken global tax system, such as a move towards unitary taxation or the European Commission's proposed Common Consolidated Corporate Tax Base.

