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Crossed lines: two cases of tax policy incoherence

Sheila Killian¹

Abstract

This paper explores policy incoherence in a corporate tax context, using two examples from Ireland to illustrate different ways in which it can be manifest. The first case shows how aspects of Ireland's competitive tax regime are incoherent with the objectives of the country's overseas development aid. The second example describes how a domestically-focused anti-avoidance measure formed the bedrock of a multi-billion aircraft finance industry with considerable loss of revenue to the state. The two cases suggest that tax policy incoherence can arise from hegemony and aggressive tax planning, as well as from the more widely-studied dominant lobbyists.

1. INTRODUCTION

Policy coherence may be defined, following Blouin (2007, p169), using the OECD definition of policy coherence as 'a process through which governments make efforts to design policies that take account of the interests of other policy communities, minimize conflicts, maximize synergies and avoid unintended incoherence'.² Less ambitiously, it could be simply characterized as the absence of crossed lines, those accidental ways in which policies in different areas, such as health and development, or tax and welfare contradict each other or render each other less effective. Even this basic 'absence of incoherence' can be difficult to achieve, and requires active policy management. However, despite the challenges, such active management is a reasonable expectation on the part of the general population; this is in a way the essence of governance, and the goal of minimizing policy incoherence serves efficiency in government, and effectiveness in delivery of the social contract.

Beyond this basic expectation of policy management, in the case of policies around overseas development aid, Ashoff (2005) observes that the case for policy coherence derives further legitimacy from a range of international structures and treaties including

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² OECD (200, p17).

commitments made by under the UN Millennium Development Goals, the Maastricht and Amsterdam treaties,³ various OECD frameworks, etc. More fundamentally, there is also a pressing moral obligation to avoid creating negative externalities in the Global South, which frequently arise as a consequence of economic policies designed without regard for how they might conflict with development issues elsewhere.

Given the overriding case for policy coherence, the question arises as to what causes the lines to cross, and policies to become mutually ineffective? Blouin (2007) notes that policies are especially vulnerable to incoherence when a small, cohesive group of actors have the potential to share large benefits at the expense of a more marginal advantage that might otherwise accrue to a larger, more diffuse group of minority stakeholders. The tighter, better-organised group is in a better position to influence policy than a diffuse and less immediately interested population. This is essentially a version of the *cui bono*, the principle that the probable cause of an event can be detected by establishing who has gained. In cases where persistent or systematic policy incoherence arises, this principle calls into question the commitment of the government or governments to supporting the disadvantaged policies which may favour or protect more marginalized constituencies, and raises the possibility of a more powerful grouping dominating the national agenda. Despite its technical nature, there is no reason to assume that tax policy should be any less political than other national policies. There is also an element of chaos in how tax policies are implemented: the interaction of a complex and ever-changing set of variables which overlap in unexpected ways. As noted by Bird (2013):

... tax policy is shaped not only by ideas but also by vested interests, changing economic conditions, administrative constraints and technological possibilities, and, especially, by the nature and functioning of the political institutions within which these factors affect policy decisions. (Bird 2013, p9)

While considerable work has been done on the internal consistency and coherence of policies of tax and welfare on a national level, or of aid and trade internationally, far less attention has been paid to date to the impact of tax policies on the welfare of the population of other countries. Perhaps this is because, on one level, the ability to set tax policy is a cornerstone of nationhood, making tax the most domestically-focused and sovereign of fields. On the other hand, the power of multinational firms to create arbitrage opportunities by exploiting mismatches between the domestic tax systems of countries has been well documented recently, and the international impact of global tax evasion and avoidance is being addressed by bodies such as the UN, EC and OECD.

This paper highlights two cases of Irish tax policy incoherence. The first is perhaps the more straightforward and far-reaching, involving a conflict between the Irish policies of tax competition and overseas development aid. The second is more domestically-centred and focused on the unexpected exploitation of an anti-avoidance measure which led to the development of a multi-billion pound aircraft finance industry in the 1980s now turning over an estimated \$20 billion per year (Gill 2013). The principle of *cui bono* is less clear in these examples than in other studies on the topic and there is far less obvious national self-interest at play. The juxtaposition of these two examples raises the idea that tax policy incoherence can arise from other causes, including a

³ See Carbone (2008) for a comprehensive overview of EU commitments to policy coherence in the field of overseas development aid.

hegemonic acceptance of tax rules, and aggressive tax planning by taxpayers and their advisors.

Ireland is an interesting jurisdiction with which to explore these issues for three reasons. Firstly, it has been exceptionally consistent about its corporate tax policy, with a clear single-minded tax focus on attracting foreign direct investment. Secondly, it has an equally clearly-stated commitment to overseas development aid. Thirdly, its success in attracting foreign direct investment means the impact of its policies can be tracked internationally more clearly than, for example, those of a larger economy such as the US or the UK. For these reasons, the country provides an exceptionally clear set of cases which interact in an interesting way.

2. IRELAND'S TAX HISTORY

As outlined in Killian (2013) Ireland's tax policy has, since the mid-1950s, been steered towards the attraction of foreign direct investment. Since the introduction in Ireland of Corporation Tax in 1976, special reduced rates applied to exporters and manufacturing firms, which at the time were overwhelmingly foreign-owned. Export Sales Relief (ESR) applied a tax rate of 0% to the profits on goods made in Ireland and exported from the country expired in 1990, and was widely availed of by multinationals locating manufacturing and exporting subsidiaries in Ireland. Parliamentary records show that the cost of tax foregone to Ireland from profits on exported goods came to approximately £337 million⁴ per year in the late 1980s (Oireachtas 1988), but the strategy was successful in making Ireland an attractive location for foreign direct investment. At this time, the zero rate also applied to a designated zone around Shannon Airport in the South West, provided the companies located there were licenced by the government to avail of what was known as 'Shannon Relief'. When ESR expired, it was succeeded by Manufacturing Relief, which reduced the tax on profits from the sale of manufactured goods to 10%, a fraction of the rate applying at the time to non-manufactured goods. Because of the liberal court interpretation of the meaning of 'manufactured', the latter relief applied to a wide range of processes including, famously, the artificial ripening of fruit, the grading of coal and the inclusion of a red dye in commercial diesel. At around this time, a 10% rate also applied to Shannon companies, and to financial services firms operating in the International Financial Services Centre on Dublin's docklands.

Towards the end of the 1990s, Ireland came under increased pressure from the EU, to abolish these favourable tax rules. Up to the mid-1990s, the standard rate of corporation tax in Ireland was 40%,⁵ a marked contrast with the 10% rate. This ring-fencing of a favourable rate to one industrial sector breached the OECD (1998) guidelines on harmful tax competition, as well as several EU codes. As described in Killian (2006), the sustained pressure from Germany in particular made the status quo untenable. At the same time, it was accepted in Ireland that the low rate on manufacturing was key to retention of the country's stock of foreign direct investment.

The 10% rate was, in any case, due to expire in 2010, and with political pressure from overseas, it became apparent it could not be extended beyond that date. Ireland's response was to comply with the letter of the recommendation, and remove those rules that favoured manufacturing more than other forms of industry. However, rather than raising the rate on manufacturing to match the higher rate applying to other forms of

⁴ Equivalent to €429 million.

⁵ Falling to 38% from April. Source: Saunders (2000, p130).

business, the mainstream corporation tax rate on trading profits was reduced to 12.5% on a phased basis from 1 January 2000, and this rate was applied to all companies resident in Ireland.

In terms of attracting foreign direct investment, the strategy seems to have been extremely successful. Gray et al (2009, p43) document Ireland's disproportionate share of the US investment made into the EU, observing that in 2009, the total stock of US investment in the country was \$166 billion, or almost 5% of all US foreign direct investment worldwide. Since its initiation, the 12.5% has acquired a totemic national significance, and over time the four main political parties have come around to supporting the rate⁶. It has become routine for the Minister for Finance to preface the annual national budget speech by a statement of continued commitment to maintaining this rate. Despite difficult negotiations with the Troika of EC, IMF and ECB, successive Irish governments have maintained an unswerving loyalty to the policy of low and predictable corporate taxes. A good example is the striking display of cross-party solidarity that greeted a motion proposed in the national parliament⁷ in November 2010 by the current Minister for Finance, Michael Noonan, reaffirming Ireland's commitment to the 12.5% rate which, despite being proposed from outside the government benches, was supported by all of the parties. The government Minister for Enterprise, Trade and Innovation (Deputy Batt O'Keeffe), in supporting the motion, remarked:

Normally, I would not agree with an Opposition motion but on this occasion there is great value in this House sending a united message on the importance of keeping our corporation tax at 12.5%. (Oireachtas 2010)

His colleague Deputy Dara Dara Calleary, a more junior government Minister in the same department went on to say:

I affirm there will be no change to our corporation tax. It is an absolute red line in terms of any discussions that have taken place. Our corporate tax rate is critical to supporting our economic recovery and employment growth and is a cornerstone of our industrial policy and an integral part of our international brand. (Oireachtas 2010)

Despite, or perhaps because of this universal domestic support, in recent years, Ireland's tax regime has again attracted adverse international publicity. This has focused less on the low headline rate, and more on the complex tax-motivated structures put in place by companies such as Google, Apple and Microsoft which reduce their global tax bills to extremely low levels. One example is the use of a structure known as the *Double Irish*⁸ whereby two Irish firms, one resident in Ireland and one in Bermuda are effectively regarded as a single Irish entity under US law, allowing profits to be routed through Ireland and sheltered in Bermuda. There is little or no benefit to the Irish exchequer from companies using the country as a conduit in this way. However, the nature of the scheme has brought scrutiny to the Irish tax system more generally, looking beyond the low rate of corporation tax to the rules on transfer pricing, the network of double tax treaties, and the establishment of shell companies in Dublin by some multinational

⁶ the only exception is the Socialist Party, which currently has one member in the 166-seat national parliament.

⁷ See Oireachtas (2010) for details of the debate.

⁸ Described in Killian (2011:32).

firms. The response of both government and opposition has consistently been to defend the sovereignty of Ireland's tax rate, and the transparency of the system.

However, although domestic political support for Ireland's corporation tax policies is overwhelming, and public support is strong, the way in which the Irish tax system has been used by some companies is incongruent with another key national commitment. In order to understand how Ireland's tax policy conflicts with its approach to overseas aid, it is important to understand the significance of the latter in the national psyche. Ireland scores very well on international measures of overseas development assistance. For example, the Centre for Global Development (CGDEV)'s annual Commitment to Development Index (CDI) ranks Ireland in the top ten in four of the past eleven years. This is driven by what CGDEV (2013) describe as 'its high quality foreign aid program, low emissions growth compared to GDP growth and its contributions to United Nations peacekeeping operations'.

In 2012, Ireland's Official Development Assistance amounted to €629 million, or 0.47% of GDP (Irish Aid, 2012). Despite the economic downturn, public support for overseas development aid remains high. A survey carried out in December 2012 found that 85% of the general public believed it was important to continue direct support to developing countries, and 88% of respondents were proud of Ireland's record in this regard (Dochas 2012). This pride in Ireland's aid record is also evident in the words of the relevant minister, Joe Costelloe, on launching a volunteering initiative in October 2012:

Ireland is renowned for our solidarity with those in the greatest need. I am confident that, through our new Volunteering Initiative, we will build on our reputation and maximise our contribution in the fight to end global poverty and hunger (Irish Aid 2013).

Irish assistance to developing countries is an important part of the national psyche.

Despite this commitment, there are examples showing how Ireland's tax rules have interacted in an unhelpful way with the development aims of the countries served by its overseas aid policy. Irish Aid's budget is targeted at nine priority countries, mostly in sub-Saharan Africa. These are Ethiopia, Lesotho, Malawi, Mozambique, Sierra Leone, Tanzania, Uganda, Vietnam and Zambia. Zambia's share of the overall budget was approximately €16 million in 2012, roughly half of which was spent on education projects, with the balance weighted towards HIV and Health, Governance and Social Infrastructure programmes. The work is carefully monitored, and has a very positive impact within Zambia, all of which is transparently reported by Irish Aid.

In February 2013, Action Aid produced a report focusing on the tax affairs of Associated British Foods and their Zambian Subsidiary (Lewis 2013). The report details how interest on a loan taken out by the Zambian company from a South African bank was channelled through a group company registered in Dublin. The loan was denominated in local Zambian currency, and repaid through a bank in Lusaka. However, the fact that the payments were routed through Dublin meant that withholding taxes of approximately 15% on the interest were avoided. Management and other fees were also routed through this Dublin company, again taking advantage of the absence of withholding taxes in the Ireland-Zambia double tax treaty. This action reduced the tax revenue collectible in Zambia not only by avoiding the payment of withholding taxes, but also by reducing the taxable profit in the Zambian Subsidiary. Since tax revenue is a far more sustainable source of income for a developing country than overseas aid, the

way in which the Irish company was used was at clear cross purposes to Ireland's overseas aid objectives.

More generally, aggressive tax competition on the part of Northern countries including Ireland puts pressure on developing countries to reduce their own headline rate of corporation tax in response, in an effort to win foreign direct investment and to reduce the motivation to set up complex, cross-border structures to divert taxable profit away from the main manufacturing base. As an example, Lewis (2013) reports that the already low rate of 15% applied to the profits of Zambia Sugar has been further reduced in 2012 to 10%.⁹ Altshuler and Grubert (2005) note that this should not be seen as a simple, incremental response. 'The results illustrate the importance of including both company tax planning and the cooperation of home and host governments in an accurate depiction of any race to the bottom' (Altshuler and Grubert 2005, p32). The corporate tax rates are falling not simply because of a process of mutual undercutting on the part of developing countries, but because of a more complex set of interactions involving a range of jurisdictions as well as the actions of multinational firms.

Ireland is by no means unique in having tax policies that conflict with overseas aid targets. Weyzig (2013) comprehensively details the massive impact of way in which multinational firms use the Dutch Double Tax Treaty network to channel profits away from developing countries. The cost in terms of lost revenue to developing countries which can be directly attributable to the use of Dutch tax treaties is estimated to have amounted to €100 million in 2007. The study concludes that in the case of the Netherlands, the 'causes of policy incoherence are structural and political in nature, because the interests of developing countries inherently conflict with special interests of various large multinationals and Dutch service providers' (Weyzig 2013, p185).

3. ANTI-AVOIDANCE AND THE CREATION OF AN INDUSTRY

In addition to the well-documented tax reliefs aimed at attracting foreign direct investment, other, more obscure features of the Irish tax regime have been used to reduce the profits of both domestic and non-Irish firms. One interesting historical example was the use of so-called 'Section 84 loans' as a basis for an aircraft finance industry around Shannon in the 1970s. Section 84 referred to S.84 of the 1976 Corporation Tax Act, an anti-avoidance provision designed to prevent the owners of closely-controlled companies from using artificial structures to extract dividend income from their companies in the legal form of interest, thereby creating a corporation tax deduction that would not otherwise be warranted. The anti-avoidance rules applied to loans where the interest varied with the underlying profit of the company, and effectively re-designated those interest payments as dividends, thereby denying a corporation tax deduction to the paying firm.

In denying a corporate tax deduction to the payor of 'S.84 interest', the rules created an exemption from corporation tax for the receiver. If all Irish companies paid tax at the same rate, these two effects would wash out in a neutral way. However, this was not the case. As mentioned above, companies which held a licence to operate in the Shannon Free Zone were subject to tax at a rate of 0%, so long as they fulfilled the terms of their licence.¹⁰ This created a simple arbitrage opportunity whereby banks operating

⁹ This is a 'farming' rate, far below the headline corporate tax rate in Zambia.

¹⁰ mainly by contributing to the development of the airport and region, importing and exporting goods, and meeting minimum employment requirements.

in Ireland and subject to tax at the then rate of 50% could extend S.84 loans to Shannon companies, by ensuring that the interest rate on those loans varied in some small way with the profits of the Shannon firms. Interest paid on those loans was not deductible for corporate tax purposes, which made no material difference to a Shannon borrower whose rate of corporation tax was zero. In the hands of the bank, however, the interest was received as a dividend, which rendered it tax free. At the same time, the banks could borrow to finance the loan, and claim a full corporation tax deduction on the interest they paid. With the prevailing rate of tax being 50%, this essentially allowed banks to lend to Shannon companies at half the 'normal' rate, and still make the 'normal' rate of profit.

Like any arbitrage opportunity, this was soon pushed to its limits. First, it was quickly realised that the bigger the loans made, the bigger the profits, which led logically to the growth of an industry which depended on very large levels of borrowing: big ticket leasing. Since the goods bought and sold by Shannon companies had in many cases to be imported and exported through the airport, it was natural that this became a thriving aircraft finance industry. Secondly, the fact that the tax-based profit depended on the rate of interest applying meant that S.84 loans were commonly denominated in high-coupon currencies with correspondingly high interest rates, such as Italian Lira or Australian Dollars. An Italian Lira loan, for instance, with a base lending rate of 16% allowed for a potential tax-based 'super-profit' of 8% of the amount of the loan per year. With simple hedging of the currency risk through the medium of currency swaps, the S.84 structures could be effectively 'bolted on' to existing leases which were already in place, denominated, in the most part, in US Dollars. The addition of the 'Shannon route' to a pre-existing aircraft lease allowed the overall interest rate on the deal to be reduced dramatically, in many cases to negative levels. The overall spread on the deal was shared between the main financing companies, creating a massive competitive advantage for aircraft finance companies located in the Shannon Free Zone, and leading to the genesis of an industry there where none had previously existed.

These 'super-profits' were not, however, generated out of thin air. They were based on artificial structures in the form of S.84 loans which allowed the Irish lenders to reduce their Irish tax bills dramatically. Effectively, the profits were generated from the Irish taxpayer. Over the course of time, European banks also participated in S.84 lending by establishing Irish subsidiaries, and routing their lending through them.

It is difficult to quantify the cost to taxpayers of these arrangements. Houghton (2002) estimates the direct cost to Ireland of Shannon Relief in 1989/90 as IR£29 million, equivalent to almost €37 million, based on applying a differential rate of tax to the profits of companies holding a Shannon licence. Parliamentary records from May 1988 support this figure, and also show the direct cost of the exemption from tax of S.84 interest received as dividends in 1987 to be £64 million or just over €81 million (Oireachtas 1998). Beyond this lies the amount of tax sheltered in Irish banks by interest paid on loans used to generate tax-free S.84 'dividends'. Since the detail on these loans is not in the public domain, no accurate estimate can be made. However, given that very large-ticket aircraft were financed in currencies with high interest rates, and that currency swaps created pure arbitrage opportunities for the consortia of lenders involved, the impact was certainly significant.

It is apparent, when viewed in this light, that the original aim of the S.84 provisions – the prevention of tax avoidance which would have led to a reduced tax take for the country – was utterly subverted by the creation of complex structures around S.84 loans

for aircraft finance. A measure intended to make it easier for the state to tax profits by preventing tax avoidance at a domestic level actually had the effect of inhibiting Ireland's ability to tax the profits of lending banks, and reduced the overall tax take in the country. It also spurred the creation of a massively successful aircraft finance industry, based on an unquantifiable level of occluded support from the Irish taxpayer.

4. CONCLUSION

The examples above show two very different kinds of policy incoherence. The first example of Ireland's tax competition and overseas aid is closer to the dominant theoretical frame on policy incoherence. The beneficiaries of Ireland's overseas development aid whose welfare is impacted are, as theorized, a diffuse group, insufficiently organized or focused on Ireland to seriously influence policy. This begs the question of *cui bono*; what group benefits from Irish tax policy? It is not necessary that this should be a cohesive and well-organised group which might be in a position to actively influence the direction of the policy. It is also possible, as discussed in Killian (2013) that the decades of successful tax competition in Ireland, widespread public and overwhelming all-party political support for the corporate tax regime might operate at an unconscious level; a given set of policies have dominance not because of any direct personal benefit to one set of actors, but because there is a pervasive hegemonic belief that this is the appropriate way to direct the economy, and that certain tenets of tax policy are not open to question or amendment.

The second example is in many ways more interesting. On the surface, it is a simple story of the exploitation of a tax loophole to achieve ends which were not anticipated by the writers of the legislation. The diametric opposition of the outcome to the intention, however, together with the way in which its impact extended to international tax jurisdictions and the sheer scale of the industry it created make it a striking example of how tax rules, unlike other areas of law, are particularly vulnerable to aggressive interpretation. This leads to a less-documented form of policy incoherence: the unchecked consequences of an effective change in the impact and meaning of legislation arising from the self-interested exploitation of rules on the part of taxpayers and tax advisors. In both cases we have self-interest operating directly or otherwise to create an economic benefit for a one party at the expense of another. In the first case, the policy incoherence is tolerated (consciously or otherwise) by the policymakers. In the second, it is actively created by taxpayers and their advisors, and enabled to grow by the inaction of policymakers. As noted by Bird (2013:9), 'In a very real sense, 'tax administration is tax policy' (Casanegra de Jantscher 1990, p179)'. The absence of action is in itself a policy decision, and may in this case have been influenced by the success of the burgeoning aircraft leasing industry in Shannon, and also by the growing hegemony of successful attraction of FDI in Ireland.

Outside of the tax sphere, Ireland has not been behind the curve in the area of policy coherence, especially in the area of overseas development. For instance, the Evaluation Services of the European Union three-C report noted in 2007 that

It is apparent that the Nordic+ Group – Denmark, Finland, Ireland, the Netherlands, Sweden and the United Kingdom – have been most active and score well above average in terms of well-defined policies and institutional measures taken. However, the steps taken by all governments and institutions in establishing operational PCD mechanisms have generally been pragmatic,

fitting in with established ways of doing things in each particular governmental context. (ESEU 2007, p27)

Regrettably, such pragmatism, and acceptance of the established ways of doing business may be at the root of both forms of tax policy incoherence highlighted above, supporting the notion that Ireland's successful record in securing foreign direct investment over the last three decades may have led to a form of tax policy capture which may inhibit innovation in corporate tax policies. The role of tax advisors and tax planners in the creation of an industry based on S.84 lending also suggests that in studies of tax policy incoherence, the reinterpretation of rules by the taxpayer and the professions should be considered as a very significant factor. The cost, particularly in the case of a tax policy that interferes with aid objectives, unfortunately goes far beyond the financial.

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