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Jennifer A. McHugh

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BALANCING REPUTATION AND FOREIGN INVESTMENT INCENTIVES: IRELAND'S SECOND ATTEMPT AT COMBATING THE ABUSE OF IRISH REGISTERED NON-RESIDENT COMPANIES

I. INTRODUCTION

Home to approximately 1,345 overseas companies conducting business world-wide, Ireland is a preferred location for investment in Europe.¹ In its 1999 report, the Organisation for Economic Co-operation and Development, an international research organization whose membership consists of industrialized, Western countries, noted that the Irish economy has "notched up five straight years of stunning economic performance."² The Irish government, in its 1999 Economic Review and Outlook, points out that for the sixth successive year economic growth in Ireland will be among the highest in the world.³ In fact, the 1999 World Competitiveness Yearbook ranked Ireland the eleventh most competitive economy out of forty-seven states surveyed, placing Ireland ahead of both the United Kingdom and Japan.⁴ The abuse of Irish registered non-resident companies (IRNR), however, jeopardizes Ireland's superior financial services reputation.⁵

1. See PRICEWATERHOUSECOOPERS, *DOING BUSINESS AND INVESTING IN IRELAND* 1 (1999).

2. OECD, *ECONOMIC SURVEY OF IRELAND* (1999), available at <http://www.irlgov.ie/finance/mcc416.htm> (last visited Sept. 13, 1999).

3. See GOVERNMENT OF IRELAND, *ECONOMIC REVIEW AND OUTLOOK* (1999). This report contains information concerning Ireland's economic developments in 1998 and forecasts for 1999 as well as a commentary regarding the challenges facing the Irish government if it is to sustain its economic success. *Id.*

4. See PRICEWATERHOUSECOOPERS, *supra* note 1, at 5. A recent example of Ireland's ability to provide the skilled people, services, infrastructure, and cost competitive environment required to support a major global operation is the £34 million investment by Xerox Europe Limited in its Irish operations. See *Xerox to Add a Total of 600 New Jobs at Irish Operations in Dundalk and Dublin*, <http://www.entemp.ie/pressrel/201299.htm> (last visited Jan. 13, 2000).

5. See DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

IRNRs are companies that are incorporated in Ireland but regarded as non-resident for tax purposes.⁶ The advantages to IRNRs are two-fold. First, there is no Irish tax liability for Irish non-resident companies so long as they have no Irish element to their operations.⁷ Second, Irish incorporation masks the tax haven components of these non-resident companies from their competitors.⁸ Therefore, it is no surprise that many overseas investors were using IRNRs for such "undesirable activities" as fraud, money laundering⁹ and possibly drug dealing.¹⁰ Since these non-resident companies are registered in Ireland, their nefarious activities reflect negatively on Ireland's reputation as a well-regulated financial center.¹¹ The Irish government, seeking to protect its superior reputation, has implemented a two-prong legislative attack on corrupt IRNRs through its 1999 Finance Act and Companies (Amendment) Act.¹² Dual reform of Ireland's tax and company laws is the government's strategy to "weed out"¹³ undesirable IRNRs from the Irish company register while allowing multinational corporations (MNC) to continue using IRNRs for legitimate tax planning purposes;¹⁴ United States MNCs in particular.¹⁵

6. See Briefing Document attached to the Minister of State's written answer in response to a question raised in the Dáil concerning proposals to combat the IRNR problem, reprinted in *Memo on Ireland as Tax Haven*, IRISH TIMES, Feb. 26, 1998, at 19.

7. See John Kilcullen, *Irish Non-Resident Companies-The End?*, IRISH TAX REVIEW (July 1999), available at <http://194.125.145.47/lpbin/lpext.dll/IT> (last visited Sept. 22, 1999). The extent of Irish tax liability consists of situations where there may be a capital duty, stamp duty, CAT on shares or income tax on directors' fees. *Id.*

8. See *id.*

9. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

10. DÁIL DEB. (Apr. 11, 2000), available at <http://www.irlgov.ie:80/debates00/11april/sect4.htm>.

11. See *id.*

12. See Finance Act, No. 2 (1999); Companies (Amendment) (No. 2) Act, No. 30 (1999).

13. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

14. See Minister of Finance Charlie McCreevy, Speech concerning Finance Bill 1999 Second Stage (Feb. 16, 1999), at <http://www.irlgov.ie/finance/mcc384.htm> (last visited Sept. 13, 1999).

15. See Mary Walsh, *Ireland's 1999 Finance Bill Changes Corporate Residence Rules*, 18 TAX NOTES INT'L 711, 712 (1999).

Ireland's two-prong¹⁶ legislative attack on IRNRs is a necessary and positive step towards eliminating the illegal use of IRNRs that threatens Ireland's reputation worldwide as a credible investment location. Equally important, this legislation reflects Ireland's transition from a "periphery"¹⁷ European Union (EU) country with a rural-based economy to the EU country with the fastest growing industrial economy. By tightening Ireland's tax and company laws, this legislation strives to preserve the superior reputation Ireland has acquired through its economic advancement, while delicately balancing the need for Ireland's newly expanding economy to attract foreign investment. For this reason, this legislation does not provide for the total elimination of IRNRs.

Part I of this Note introduced the concept of Irish registered non-resident companies: what they are,¹⁸ what problems they cause and what remedial legislation Ireland enacted in 1999. Part II examines Ireland's past attempts to curtail the illegal use of these corporate forms and the factors that influenced the legislature when implementing its two-prong attack¹⁹ on IRNRs. Factors such as the negative impact on Ireland's reputation and that of the International Financial Services Centre (IFSC) in particular will be explored, as well as the influential role of European Union business directives and multinational corporations in structuring Ireland's legislative changes. Part III analyzes the necessity of a two-prong attack and its effectiveness in combating the IRNR problem in addition to proposing possible future changes. Alternatives that may prove more beneficial also will be considered. Part IV concludes with an explanation of why Ireland's two-prong legislation will secure Ireland's future attractiveness as a foreign investment location until its economy matures enough to allow for the elimination of IRNRs.

16. See Kilcullen, *supra* note 7.

17. Jessica J. Poyner, *Investing in Ireland: The Enticement of U.S. High-Tech Industry to the Emerald Isle*, 10 TRANSNAT'L LAW. 195, at n.62.

18. See IRISH TIMES, *supra* note 6.

19. See Kilcullen, *supra* note 7.

II. HARBINGERS OF REFORM

A. *The Urgent Need for Change*

With the ever increasing abuse of IRNRs, it was only a matter of time before the Irish government passed legislation to prevent Ireland from being a "convenient address" for companies that contribute nothing to the economy and damage Ireland's international standing.²⁰ A report published by a government appointed commission indicated that "since 1990, Ireland has begun to rival the Cayman Islands, British Virgin Islands, Mauritius and Liechtenstein as centers for the laundering of illegal monies earned from criminal activities, including drug trading and corporate tax evasion."²¹ Because these IRNRs' only connection with Ireland was their place of incorporation, it was exceedingly difficult for the Irish government to regulate them. Furthermore, penalties for failure to file tax returns were ineffective because these non-resident companies did not have assets, property, or corporate officers in Ireland.²²

Concerns about IRNRs escalated after the United Kingdom eliminated non-resident companies in 1988.²³ After this date, Ireland quickly became a favorite European tax haven among foreign investors. By 1998, there were up to 40,000 companies operated in Ireland by overseas investors, mainly established to hide money from their native country's tax authorities.²⁴ Mafia and Eastern European crime bosses are believed to be among the overseas investors who use IRNRs to launder money.²⁵ In response to these abuses, the Minister of Finance, Charlie McCreevy, stated in the February 26, 1998 Dáil Debates that he deplored the message that Ireland is a "Cayman Island type tax haven."²⁶ Exactly one year later, in a speech

20. See Cliff Taylor, *How to Cut Tax Payment by £50,000 on £250,000 Income*, IRISH TIMES, Feb. 27, 1998, at 7.

21. *Government Seeks to Crack Down on Money Laundering at Exchange*, 11 INT'L SEC. REG. REP. 5 (1998).

22. See Walsh, *supra* note 15, at 711.

23. See *id.*

24. See Siobhan Creaton, *Abuse Mars Financial Credibility*, IRISH TIMES, Feb. 13, 1998, at 7.

25. See Denis Coghlan, *Government to Target Money Laundering*, IRISH TIMES, Dec. 21, 1998, at C7.

26. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

to the Institute of Taxation, Minister of State, Martin Cullen, said that the "need for urgent change" became evident to him upon seeing an advertisement for the services of agents offering to set up IRNRs appearing in an Aer Lingus in-flight magazine.²⁷ Such advertisements, Mr. Cullen believes convey the "wrong impression" and damage Ireland's international standing.²⁸ The negative impact on Ireland's international reputation as a well-regulated legal and business environment, particularly for financial activities, is the Irish government's core concern.²⁹

Eventually, Ireland would have been blacklisted as a tax haven if steps were not taken to combat the illegal use of their non-resident companies.³⁰ Unlike traditional zero-tax or low-tax havens, Ireland, because of its 10 percent tax rate for manufacturing income and IFSC incentives, falls within the category of tax havens that imposes tax at normal rates but grants exemptions or preferential treatment to certain categories of income.³¹ Increased use of tax havens by criminals in the drug trade resulted in the emergence of an informal definition of "tax haven" known as the "smell test," based on the reputation of the country.³² According to the smell test, a country that "looks like a tax haven to those who are potential customers" will acquire the reputation and status of a tax haven.³³ The smell test highlights the importance of a good reputation to a country in the global economy. The changes to Germany's tax laws in 1998 are illustrative of the value of a country's reputation. The German tax laws were changed because the IFSC had acquired a reputation as a tax haven.³⁴ These tax reforms created "high uncertainty" among potential German investors in the IFSC and thus a subsequent drop in German IFSC in-

27. Minister of State Martin Cullen, Taoiseach Speech to the Institute of Taxation Annual Dinner (Feb. 26, 1999), at <http://www.irlgov.ie/finance/taxdinner.htm> (last visited Sept. 13, 1999).

28. *Id.*

29. See Walsh, *supra* note 15, at 711.

30. See Kilcullen, *supra* note 7.

31. See ADRIAN OGLEY, *PRINCIPLES OF INTERNATIONAL TAX—A MULTINATIONAL PERSPECTIVE* 89-90 (1993).

32. Kurt A. Wagner, *U.S. Taxation of Foreign Income: The Use of Tax Havens in a Changing Tax Environment*, 18 S. ILL. U. L.J. 617, 620.

33. *Id.*

34. See Colm Keena, *IFSC has a "Reputation as Tax Haven,"* IRISH TIMES, Dec. 14, 1998, at 20.

vestments. In practice, the IFSC's bad reputation caused the German authorities to go to "considerable lengths" to tax again any profits from Ireland.³⁵ A reputation as a tax haven, in this case, cost Ireland and the IFSC a number of German investors and the jobs their operations would have brought to the Irish economy.³⁶ This example highlights why Ireland is eager to combat the illegal use of IRNRs and to protect its reputation as a well-regulated financial center.

B. Ireland's Attractiveness for Non-Resident Companies

Ireland acquired its reputation as a tax haven because various factors made it an attractive location for foreign investors. Loopholes in Ireland's corporation tax laws, for instance, allowed foreign investors to function as if they were regulated in a "tax haven country," while Ireland's superior reputation masked the appearance of their doing so.³⁷ Furthermore, the United Kingdom eliminated non-resident companies in 1988, thus giving foreign investors an added incentive to set up non-resident companies in Ireland.³⁸ After this time, Ireland, because of its lax tax laws, European Union membership, and worldwide reputation as a well-regulated environment for financial services,³⁹ became a favored location among foreign investors hoping to hide money from their native country's tax authorities.

Another reason Ireland attracted foreign investors was because setting up an IRNR was not only quick and easy but

35. *Id.*

36. *See id.* "There are about 35 stand-alone German operations in the IFSC, representing about 12 percent of the total stand-alone projects in the centre. About half of the German operations are in the banking and fund-management area, employing approximately 500 people. A further 50 managed operations are of German origin, accounting for 9 percent of total managed entities." *Id.*

37. *See* Kilcullen, *supra* note 7; Mark Brennock, *Tax Dodger, Money Launderer, Welcome to our Offshore Island: Want to Cut Your Tax Bill or Hide Your Dodgy Money in Ireland, a Prestige European Location?*, IRISH TIMES, Feb. 28, 1998, at 8.

38. *See* DAIL DEB. (Feb. 26, 1998), available at <http://www/irlgov.ie:80/debates/26feb98/sect3.htm>; Kilcullen, *supra* note 7.

39. *See* Coghlan, *supra* note 25; Carole Craig, *Ireland's List of Finance Priorities Includes Schedule of Rate Cuts for Corporation Tax*, BNA INT'L BUS. & FIN. DAILY, Jan. 22, 1999; Carole Craig, *Ireland Finance Bill Begins Scaling Back Rate for Corporations, Expands Benefits for Some*, BNA INT'L BUS. & FIN. DAILY, Feb. 16, 1999.

inexpensive.⁴⁰ Conveniently, the non-resident incorporation process also enabled beneficial owners to remain anonymous.⁴¹ The so-called "Sark Lark," for example, involved Channel Islanders who would become nominee directors so that the true identity of the beneficial owners, the foreign investors setting up IRNRs, could be concealed.⁴² One need only "turn to the back pages of the *Economist* or *Time Magazine*" to find advertisements that attest to the simple, inexpensive, and anonymous incorporation process offered to foreign investors wishing to set up non-resident companies in Ireland.⁴³ The number and content of these magazine advertisements serve not only to illustrate, but also to promote the illegal use of IRNRs that the Irish government now hopes to eliminate with its new legislation.⁴⁴

40. See Creaton, *supra* note 24; Brennock, *supra* note 37.

41. See Brennock, *supra* note 37.

42. Siobhan Creaton, *Non-Resident Tax Law Will Not Change This Year*, IRISH TIMES, June 5, 1998, at 1.

43. Creaton, *supra* note 24.

Both magazines carry numerous advertisements from companies offering to set up Irish companies for foreign investors through which they can conduct their business tax free. All offer a choice of ready-made companies, management and administrative services, and bank introductions for as little as £225. The service is similar to what they can provide in other parts of the world such as Hong Kong, the Seychelles and the Bahamas. Some of the advertisements are more intriguing though. Waterford-based Chartered Offshore Services, for instance, offers some free advice to any of its potential clients. Rule number one, do not use an incorporation agent in your country as this creates a file on your offshore identity in your own country. This is not wise," reads its advertisement in the *Economist*.

Id.

44. Like these advertisements, Mark Brennock's slightly witty Irish Times piece on tax dodging and money laundering, highlights the deference Ireland's incorporation process accorded to foreign investors wishing to set up IRNRs:

So you're a foreigner and you've got, say, a few hundred thousand pounds whose existence you would prefer was not revealed to the revenue authorities—or perhaps the police—in your country. Welcome to Ireland. For a mere £1,500 start costs and about £1,300 per annum after that you can have your problem solved, courtesy of an Irish Registered Non-Resident company. You approach a company formation specialist in Ireland . . . and fill in your company application form. The information required here is limited to the company name, its business, the names of the directors and shareholders. But, if you don't fancy putting your own name down as a director, don't worry: the company formation specialist is aware that you may have a difficulty. He or she can provide nominee directors and a correspondence address, and will also deal with your annual returns.

Foreign investors also were attracted to Ireland because, like the United Kingdom, Ireland had historically determined residence for purposes of tax on income and capital gains by reference to the location of management and control, rather than the country of incorporation.⁴⁵ In 1988, however, the United Kingdom closed off this loophole and since then, "particularly in Eastern Europe following the fall of communism and the demolition of the Berlin Wall, Ireland has been touted as a location where the [non-resident] company structure exists."⁴⁶ At first, the Central Bank tried to deter use of Irish non-resident companies, but after a few months their resistance waned. From then on IRNRs became very popular not only with international tax planners but also those foreign investors who wished to hide money from their native country's tax authorities.⁴⁷

After the United Kingdom's 1988 Finance Act, Ireland became the only European Union country that had not abandoned a management and control test for determining corporate residence.⁴⁸ Thus, Ireland was the only European Union Member State that allowed non-resident companies to incorporate without incurring any tax liability.⁴⁹ Essentially, a foreign investor, by setting up a non-resident company in Ireland, was able to reap the benefits of being an Irish registered company, yet remain non-resident for tax purposes simply by maintaining their management and control outside of Ireland.⁵⁰

Another tax incentive Ireland offered foreign investors was its 10 percent corporate tax rate introduced in 1980,⁵¹ that is now being phased out to comply with European Union state aid rules and the EU Code of Conduct on harmful tax competition.⁵² This tax rate applied to companies involved in manu-

Brennock, *supra* note 37.

45. See Walsh, *supra* note 15, at 711; Edna Faughnan, *Substantial Bill Includes a Rich Mix of Measures*, IRISH TIMES, Feb. 12, 1999, at 3.

46. DAIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

47. See Kilcullen, *supra* note 7.

48. See Faughnan, *supra* note 45.

49. See Coghlan, *supra* note 25.

50. See Donal McNally, *Seminar Papers: The Implications of Ireland's New Corporate Regime-An Update* (Sept. 17, 1999), available at <http://194.125.145.47/lpbin/lpext.dll/WH> (last visited Sept. 22, 1999).

51. See PRICEWATERHOUSECOOPERS, *supra* note 1, at 41.

52. See Michael Tutty, *Seminar on Strategy for the Development of Interna-*

facturing and international services activities, and to financial services activities located in specific areas.⁵³ As Ralph McDarby, General Counsel for Deloitte Touche, said "people fail to realise that because of our corporation tax rate-and 10 percent is a very sexy rate-we are a tax haven, and as such are attractive to foreign companies."⁵⁴

These tax incentives, in combination with the simple, inexpensive and anonymous incorporation process, and Ireland's international reputation as a well-regulated business environment, makes it an ideal location for foreign investors to hide money from their native country's tax authorities. Not only is Ireland a Member State of the European Union, but it is also home to the world renowned International Financial Services Centre. Together, these two factors formed the foundation of Ireland's superior international financial services reputation. Ironically, it was Ireland's reputation as a well-regulated financial center that served to mask the tax-haven proponents of its tax and company law system. Unlike transactions with blacklisted countries such as the Bahamas, the Cayman Islands, or the Isle of Man, transactions with an Irish-registered company were not automatically suspect.⁵⁵ Without

tional Financial Services in Ireland: The Fiscal and Taxation Environment (June 18, 1999), available at <http://www.irlgov.ie/finance/mcc446.htm> (last visited Sept. 13, 1999).

53. See PRICEWATERHOUSECOOPERS, *supra* note 1, at 41.

Whereas tax havens levy little or no direct taxes, certain countries which, in principle, impose direct taxes grant particular industries or types of activity an exemption from tax in order to promote their development. A number of developing countries offer such tax holidays, especially to manufacturing or labour-intensive industries. It is usual for developed countries to offer more targeted tax incentives to businesses, especially those in the financial services sector, in order not only to develop the skills of their workforce but also to integrate their economies more fully with other economies in the region. [An] example of this [is] the Irish incentives for Dublin financial services centre companies. Possibly the best known tax incentive offered by a European country is the Irish manufacturing relief, which provides for manufacturing activities to be taxed at a reduced rate of 10 percent. The definition of manufacturing for the purpose of this relief is also surprisingly wide, including as it does software development.

OGLEY, *supra* note 31, at 80.

54. Hugh Donovan, *IRNR Allegations Threaten Irish Business Image*, SUNDAY BUS. POST, Mar. 1, 1998, available at <http://www.sbpost.ie/archives/01-03-1998/news/irnr.html> (last visited May 16, 2000).

55. See Brennock, *supra* note 37.

the reputation stigma tax-haven countries bear, Irish-registered companies did not "arouse a second thought" by the revenue authorities in overseas jurisdictions.⁵⁶

In 1987, the IFSC was established to develop a strong international financial services industry that would boost employment and rejuvenate the Dublin docklands.⁵⁷ Today, the IFSC is the fastest growing center of its kind in Europe and many of the world's top banks and financial institutions now have operations in the IFSC.⁵⁸ The International Financial Services Centre is a "microcosm of the wider development of Ireland over the past decade" known as the Celtic Tiger.⁵⁹ At its inception, the IFSC had only 7 employees but by 1999 it had 7,000 employees.⁶⁰ "As an example of the financial scale of the docklands-based operation, the IFSC funds industry administrators or manages the equivalent of over twice Ireland's GNP annually."⁶¹ Companies operated through the IFSC are strictly regulated by Government departments and the Central Bank.⁶² Less regulated non-resident companies take advantage of the perception that they are part of the IFSC and thus regulated in the same manner, but this is not the case.⁶³ To foster this perception, foreign investors often give their IRNRs names which suggest that they operate through the IFSC. It is for this reason, that we see the new legislation prohibiting the use of company names that are "unwittingly similar" to any names already existing on the Company Register.⁶⁴ According to Noel Treacy, Minister of State at the Department of Enterprise, Trade and Employment, the most troubling aspect of

56. *Id.*

57. See *International Financial Services Centre*, at <http://www.irlgov.ie/taoiseach/organisation/ifsc/default.htm> (last visited Sept. 13, 1999). "The activities carried out at the IFSC include Banking and Asset Financing; Corporate Treasury Management; Fund Management, Custody and Administration; Futures and Options Trading, and Life Insurance and Reinsurance." *Id.*

58. See *id.*

59. Dept. of Enterprise, Trade and Employment, *IFSC is Microcosm of Celtic Tiger*, June 18, 1999, at <http://www.entemp.ie/80/pressrel/180699.htm> (last visited June 21, 2000). Ireland's booming economy in the 1990s, dubbed the Celtic Tiger, was memorialized by Don Crendon in his humorous play *Celtic Tiger Me Arse*.

60. See *id.*

61. *Id.*

62. See Craig, *Ireland's List of Finance Priorities Includes Schedule of Rate Cuts for Corporation Tax*, *supra* note 39.

63. See *IRISH TIMES*, *supra* note 6.

64. PRICEWATERHOUSECOOPERS, *supra* note 1, at 28.

this false perception is that it seriously damages the reputation of the IFSC as a center where reputable companies are properly regulated.⁶⁵ According to industry sources, the full impact of the damage done to the IFSC's international reputation by the activities of some IRNRs may not become evident for years.⁶⁶ But they believe that the damage may be serious and that the harm is "more likely to manifest itself, not so much in the amount of business that will leave the IFSC, but in the projects that will ultimately be lost to other countries."⁶⁷ Ultimately, the reputation of the IFSC as a well-regulated financial services center, that IRNR-owners were relying on to mask their illegal activities, was simultaneously being destroyed by their nefarious activities.⁶⁸

C. Ireland's First Attempt at Change

As a result of the negative impact IRNRs had on its financial services reputation, Ireland set forth new reporting requirements in section 58 of its 1995 Finance Act hoping to make Ireland less attractive to undesirable foreign investors.⁶⁹ Before Ireland's 1995 Finance Act, the technical requirement that obliged IRNRs to provide certain information was often overlooked.⁷⁰ In reality, IRNRs were not required to provide information to the Revenue Commissioners until they began to carry on a trade, profession, or business in Ireland.⁷¹ Section 58 amended section 141 of the Corporation Tax Act 1976 to require that "every company which is incorporated in the State and is neither resident in the State nor carrying on a trade, profession or business therein" must provide the Revenue Commissioners with a written statement containing particulars about the company.⁷² This statement must be given

65. See DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

66. See Creaton, *supra* note 24.

67. *Id.*

68. See Jane Suiter, *Teaching Banks How to Keep Hands Clean*, IRISH TIMES, Mar. 20, 1998, at 6.

69. See DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

70. See Declan Gavin, *New Reporting Requirements for Irish Nonresident Companies*, 12 TAX NOTES INT'L 1939 (1996).

71. See *id.*

72. Finance Act (1995), available at <http://www.irlgov.ie:80/ag/STATUTES/>

within thirty days of (a) the date it commences to carry on a trade, profession, or business, "wherever carried on," (b) any time there is a material change in the information previously given by the company, and (c) upon notice to the company by an inspector requiring a statement under this subsection.⁷³ Companies now were required to provide the Revenue Commissioners with information such as (1) the name of the company; (2) the addresses of its registered office in Ireland and its office in its principal place of business; (3) the nature of its trade, profession, or business; (4) the name and address of the company's secretary; (5) the name and address of the company⁷⁴ or individual(s) who have control of the company; (6) the territory where the central management and control of the company is usually carried out; and, (7) "such other information as the Revenue Commissioners consider necessary for the purposes of determining the territory in which the company is resident for the purposes of tax."⁷⁵

As the 1995 Explanatory Memorandum clearly states, these new reporting requirements were passed because "certain Irish incorporated non-resident companies have been used for undesirable activities and have brought Irish incorporated companies into disrepute."⁷⁶ The steps taken were intended to "turn the spotlight" on those using IRNRs for "unacceptable purposes" and in this way force them to conduct their affairs elsewhere.⁷⁷ This was the intent, but unfortunately not the result, as the reporting requirements were not enough to deter the improper use of IRNRs.⁷⁸ The problems with the 1995 pro-

95008004.htm (last visited Nov. 28, 1999).

73. *Id.*

74. The 1995 Finance Act states that:

Where the company is controlled by a company the shares in which are listed in the official list of a recognised stock exchange and have been the subject of dealings on the said exchange in the period of 12 months ending at the time at which the statement is delivered, the name of that company and the address of its registered office are required information.

Id.

75. *Id.*

76. DÁIL DEB. (Feb. 26, 1998), available at <http://www/irlgov.ie:80/debates/26feb98/sect3.htm>.

77. *Id.*

78. See *id.* During Dáil Debates, the Minister of State for the Department of Enterprise, Trade and Employment, Mr. Treacy, stated that "parties who use these companies are prepared to ignore their obligations under both tax and company

visions were two-fold. First, they could not be properly enforced because non-resident companies are controlled and managed abroad and there was usually no person in Ireland against whom proceedings could be initiated in the event of non-compliance.⁷⁹ Second, unless a company openly claimed to be non-resident, there was no way to identify it as such from the details filed with the Registrar of Companies.⁸⁰

One commentator suggests that the reporting requirements were a "warning rather than a serious policing policy."⁸¹ Even though the Revenue Commissioners were now entitled to receive information about the nature and business of IRNRs, it was still unclear that they could do anything if they suspected illegal activity unless these companies were in fact engaged in a trade or business in Ireland.⁸² So "what was the point of section 58" if the Revenue Commissioners had no power against companies they suspected were involved in tax evasion and other illegal activities?⁸³ Since IRNRs had no tax liability in Ireland, the state did not directly lose revenue because of them. This explains why Revenue failed to tackle the situation adequately.⁸⁴ In fact, Revenue regarded the IRNR situation as a company law problem to be dealt with by the Registrar of Companies.⁸⁵

As early as 1996, section 58's failure to effectively combat the unlawful use of IRNRs sparked discussion about further reform.⁸⁶ Some commentators suggested that Ireland switch to a "place of incorporation test" for determining corporate residency in order to eliminate the illegal use of IRNRs, but even at this time there were those who opposed this idea.⁸⁷

law and to challenge the authorities to come after them. For instance, in 1995, an article in an international magazine suggested that parties could ignore requests for information from the Revenue Commissioners on the basis that the chances they would be pursued by Revenue were rather remote." DÁIL DEB. (May 27, 1999), available at <http://www.irlgov.ie:80/debates-99/27may99/sect2.htm>.

79. See Walsh, *supra* note 15, at 711.

80. See Dept. of Finance, *Irish Registered Non-Resident Companies* (Nov. 13, 1998), at <http://www.irlgov.ie:80/finance/tsg/tsg9855.htm> (last visited Nov. 9, 1999).

81. Donovan, *supra* note 54.

82. See Gavin, *supra* note 70, at 1940.

83. Donovan, *supra* note 54.

84. See *id.*

85. See *id.*

86. See Gavin, *supra* note 70.

87. See *id.*

Four years after its first attempt and failure, the Irish government once again passed legislation to combat the abuse of non-resident companies.⁸⁸ In order to avoid the further damage that adverse publicity about IRNRs would have on the IFSC and Ireland generally, the Irish government passed the 1999 Finance Act and the Companies (Amendment) (No. 2) Act.⁸⁹ These two pieces of legislation comprise a "comprehensive package" of significant tax and company law measures aimed at ridding Ireland of undesirable IRNRs while retaining the legitimate use of IRNRs by multinational corporations for international tax planning purposes.⁹⁰

III. ANALYSIS OF NEW LEGISLATION

A. A Two-Prong Attack

1. 1999 Finance Act

Although Ireland's 1999 Finance Act makes numerous changes⁹¹ of great importance to the Irish economy,⁹² this Note focuses on the amendments made to the Taxes Consolidation Act of 1997 (TCA) to combat the unlawful use of Irish registered non-resident companies. The first significant amendment implemented to combat the abuse of IRNRs is section 23A(2) which redefines Irish corporate residency by making all companies incorporated in Ireland residents for the purpose of tax status.⁹³ This determination of corporate residency is a

88. See Finance Act, No. 2 (1999); Companies (Amendment) (No. 2) Act, No. 30 (1999).

89. *Id.*

90. Minister of Finance Charlie McCreevy, *supra* note 14.

91. The changes made to TCA sections 23A and 882 shall apply "(a) in the case of companies, which are incorporated on or after the 11th day of February, 1999, as on and from that day, and (b) in the case of companies which were incorporated before the 11th day of February, 1999, as on and from the 1st day of October, 1999." Finance Bill (1999), available at <http://www.irlgov.ie/oireachtas/frame.htm> (last visited Nov. 3, 2000).

92. See Faughnan, *supra* note 45. Other significant changes made in this Irish tax legislation include the phasing in of a maximum Irish corporation tax rate of 12.5 percent and the introduction of a new regime of withholding tax on dividend payments. See Cristiano Medori, *End of Irish Nonresident Companies is at Hand*, INT'L TAX REP. (Apr. 1999).

93. See Finance Act, No. 2 (1999). Section 23A(2) reads, "Subject to subsections (3) and (4), a company which is incorporated in the State shall be regarded for the purposes of the Tax Acts and the Capital Gains Tax Acts as residents in the State." *Id.*

break from the past because Ireland has traditionally determined corporate residence by a corporation's center of control and management.⁹⁴

There are two exceptions to the mandatory corporate residency requirement provided in section 23A:

(3) Subsection (2) shall not apply to a company which is incorporated in the State if the company is a relevant company and

(a) carries on a trade in the State, or

(b) is related to a company which carries on a trade in the State.

(4) Notwithstanding subsection (2), a company which is regarded for the purposes of any arrangements as resident in a territory other than the State and not resident in the State shall be treated for the purposes of the Tax Acts and the Capital Gains Tax Acts as not resident in the State.⁹⁵

The first way for a company incorporated in Ireland to avoid the mandatory residency requirement is to qualify under the active trading test.⁹⁶ In order to qualify as a non-resident under the active trading test, the incorporated company must not only carry on a trade in Ireland or be related to a company that carries on a trade in Ireland, but also be a "relevant company."⁹⁷ Section 23A(1) defines a "relevant company" as a company:

(i) which is under the control, whether directly or indirectly, of a person or persons who is or are

(I) by virtue of the law of any relevant territory, resident for purposes of tax in a relevant territory or relevant territories, and

(II) not under the control, whether directly or indirectly, of a person who is, or persons who are, not so resident, or

(ii) which is, or is related to, a company the principal class of the shares of which is substantially and regularly traded on one or more than one recognised stock exchange in a relevant territory or territories.⁹⁸

94. See Walsh, *supra* note 15, at 711.

95. Finance Act, No. 2 (1999).

96. See *id.*

97. *Id.*

98. *Id.* Section 23A(1) also defines "relevant territory" as an European Com-

The first classification of relevant company "focuses on the residence of those who ultimately 'control' the company and not on the residence of the company itself."⁹⁹ To determine whether a company is "relevant," it is essential to understand the meaning of "control" as defined by TCA 1997 section 432, subsections 2-6 (including the modifications made to subsection 6 by the 1999 Finance Act).¹⁰⁰ Section 432(2) states that a person has control of a company if the "person exercises, or is able to exercise or is entitled to acquire control, whether direct or indirect, over the company's affairs."¹⁰¹ More specifically, a person "controls" a company if they possess or are entitled to acquire (1) "the greater part of the share capital of the company or the greater part of the voting power in the company, (2) such part of the issued share capital as would entitle the person to the greater part of the income available for distribution, or (3) such rights as would entitle the person to the greater part of the assets distributable on a winding up."¹⁰²

These guidelines for defining control set forth by section 432 should be construed as to attribute control to persons whether or not they are residents of an European Union or tax treaty country.¹⁰³ Because more than one person can "control" a company according to section 432, it is only relevant to determine whether any who ultimately control the company meet the residence test; not if other groups who also ultimately control the company do not meet the test.¹⁰⁴ This requirement that ultimate residence be in an EU or tax treaty country discourages "treaty shopping" into an IRNR via an EU or tax treaty country.¹⁰⁵

munity Member State or a government with whom Ireland has a tax treaty agreement. *Id.*

99. Kilcullen, *supra* note 7.

100. *Id.*

101. Taxes Consolidation Act, No. 39 (1997).

102. Kilcullen, *supra* note 7.

Section 432 then goes on to say that if two or more persons together satisfy any of these conditions they will be taken to have control of the company. It also provides that 'entitled to acquire' includes anything which a person is now entitled to acquire in the future or will become entitled to acquire.

Id.

103. *Id.*

104. *Id.*

105. Walsh, *supra* note 15, at 713.

The second classification of relevant companies refers to companies whose principal class of shares is "substantially and regularly" traded on one or more recognized stock exchange; including companies related to this classification of companies.¹⁰⁶ A company is "treated as related to another company if one company is a 51 percent subsidiary of the other company or both companies are 51 percent subsidiaries of a third company."¹⁰⁷ A company must use the following factors listed in TCA 1997 section 412 in order to determine a 51 percent subsidiary relationship: "(1) the percentage of ordinary share capital held; (2) the percentage of the profits available for distribution to which the parent is entitled; and (3) the percentage of the assets distributable on a winding up to which the parent would be entitled."¹⁰⁸ This second classification of "relevant company" is a concession, albeit small, to the handful of inbound investors to Ireland from non-tax treaty countries.¹⁰⁹ This observation is supported by the reduction of percentage required to establish a subsidiary relationship from 75 percent to 51 percent,¹¹⁰ thus making it easier to establish relatedness.

Contrary to the first classification of "relevant company" which is read expansively to attribute control to all persons possible, the second classification of "relevant company" is read narrowly, in that a company is not related to a parent company if any of the above TCA factors produce a percentage less than 50 percent.¹¹¹ In other words, if a company with a stock exchange listing in an EU or tax treaty country owns the Irish company directly or indirectly (at least 51 percent) then mandatory residence will not apply.¹¹² For example, a New York Stock Exchange listing subject to substantial and regular trading at the ultimate-parent level would protect an Irish-incorporated company with active trading operations from mandatory Irish residence.¹¹³

106. Finance Act, No. 2 (1999).

107. *Id.*

108. Kilcullen, *supra* note 7.

109. Walsh, *supra* note 15, at 713.

110. *See* Finance Act, No. 2 (1999).

111. Kilcullen, *supra* note 7.

112. *See* Walsh, *supra* note 15, at 713.

113. *See id.*

For a company to satisfy the "trade" requirement of 23A(3), it appears that its transactions within Ireland must not be merely singular and superficial, but rather consist of a "continuing economic activity undertaken with a view to profit," thus making it fall within the normal meaning of "trade" for tax purposes.¹¹⁴ This being said, no *de minimis* rules have been established for the amount of trading activity required in Ireland if a company is to continue to qualify as a non-resident. Therefore, it may be inferred that any level of trade will suffice provided it is genuine.¹¹⁵

The second avenue for a company incorporated in Ireland to avoid the mandatory residency requirement is to qualify under the treaty residence test.¹¹⁶ In order for a company incorporated in Ireland to qualify as a non-resident under the treaty residence test it must, by virtue of a tax treaty agreement, be resident in another State and not resident in Ireland.¹¹⁷ To avoid any possible confusion, many of these treaties also would provide a tiebreaker test of residence to ensure that a company dually resident under domestic law is deemed resident in the place of effective management.¹¹⁸

In short, to be exempt from mandatory residence, a company incorporated in Ireland must pass either an active trading or treaty residence test.¹¹⁹ A company incorporated in Ireland will be deemed a resident, therefore, unless the company or related company carries on a trade in the State and either (a) is ultimately controlled by a resident of an EU or tax treaty country or is listed on the stock exchange of an EU or tax treaty country or (b) the company is deemed a non-resident in Ireland under a tax treaty between Ireland and another country.¹²⁰ Ironically, many companies with real Irish operations will be excluded as residents, whereas many companies with no Irish connections will be included as residents.¹²¹

114. Kilcullen, *supra* note 7.

115. *See id.*

116. *See* Finance Act, No. 2 (1999).

117. *See* Finance Bill (1999), available at <http://www.irlgov.ie/oireachtas/frame.htm> (last visited Nov. 3, 2000).

118. *See* Walsh, *supra* note 15, at 713.

119. *See id.*

120. *See* Finance Act, No. 2 Explanatory Memorandum (1999).

121. *See* Walsh, *supra* note 15.

Section 83 of the 1999 Finance Act now requires companies incorporated in Ireland, resident or non-resident, to report certain significant information to the Revenue Commissioners that they were not compelled to disclose in the past.¹²² Each company must report the following information to the Revenue Commissioners within thirty days of commencing to carry on a trade, profession, or business whether commenced in or out of State.¹²³

- (1) the name of the company,
- (2) the address of the company's registered office,
- (3) the address of its principal place of business,
- (4) the name and address of the secretary of the company,
- (5) the date of commencement of the trade, profession or business,
- (6) the date up to which accounts relating to such trade, profession or business will be made up, and
- (7) such other information as the Revenue Commissioners consider necessary for the purposes of the Tax Acts.¹²⁴

Companies incorporated but not resident in Ireland, largely inbound investors and companies resident in treaty countries under tiebreaker clauses,¹²⁵ must provide additional information such as: the name of the territory in which the company is resident for tax purposes, the name and address of the company that carries on trade in Ireland (which may be the company itself or a related company), or the name and address of the ultimate beneficial owners of the company.¹²⁶ These reporting requirements symbolize considerable change for inbound investors who for the first time must disclose the

122. *See id.*

123. The required information must also be given within thirty days if there is a "material change in information previously delivered by the company" or if an inspector gives the company notice that it requires a statement. Finance Act, No. 2 (1999).

124. *Id.*

125. *See Walsh, supra* note 15, at 714.

126. *See Finance Act, No. 2 (1999).* Ultimate beneficial owners are the individuals who have "control of the company. If the company is controlled by a trustee or trustees of a settlement the term 'ultimate beneficial owners' is to include the settlor or anyone who can reasonably expect to become a beneficiary of the settlement or, where the settlors or beneficiaries are companies, the ultimate beneficial owners of the company or companies." Kilcullen, *supra* note 7. *See also Finance Act, No. 2 (1999).*

country in which their IRNR is tax resident.¹²⁷ Even more significant, however, may be the burden these reporting requirements place on some companies to disclose the ultimate beneficial owners; a public company, for instance, may find such a task nearly impossible.¹²⁸ However, "it should be emphasized that disclosure of ultimate beneficial owners will be required only when exemption from the new legislation is claimed based on a treaty tiebreaker and will not apply to inbound investors exempt based on real Irish activities."¹²⁹

Companies that are neither incorporated nor resident in Ireland, but carry on a trade, profession, or business in Ireland, also must report the address of the company's principal place of business in Ireland, the name and address of the agent, manager, or other representative of the company, and the date of commencement of the company's activities in Ireland.¹³⁰ If a company does not report the required information, the Revenue Commissioners may give notice in writing to the Registrar of Companies stating that the company has failed to deliver a statement under section 83.¹³¹

2. The Companies (Amendment) (No. 2) Act

To complement the corporate taxation measures introduced by the 1999 Finance Act to combat the illegal use of IRNRs, the Irish government enacted the Companies (Amendment) (No. 2) Act. The company law amendments include three main features: (1) a requirement that all Irish-incorporated companies carry on business activity in Ireland; (2) a requirement that all Irish-incorporated companies have an Irish resident director; and lastly, (3) a restriction on the number of company directorships that an individual may hold. According to section 42, a prerequisite to company formation is sufficient evidence provided by the company to the Registrar of Companies that it intends to carry on activities¹³² in Ireland.¹³³ A

127. See Walsh, *supra* note 15, at 714.

128. See *id.*

129. *Id.*

130. See Finance Act, No. 2 (1999).

131. See *id.*

132. "An 'activity' means any activity that a company may be lawfully formed to carry on and includes the holding, acquisition or disposal of property of whatsoever kind." Companies (Amendment) (No. 2) Act, No. 30 (1999).

133. See *id.*; Kilcullen, *supra* note 7; Dept. of Finance, *supra* note 80.

statutory declaration made by a director or secretary of the company to be formed,¹³⁴ stating that the purposes or one of the purposes for which the company is being formed is the carrying on of an activity in Ireland, satisfies this evidentiary requirement.¹³⁵ If the activity falls within the "relevant classification system,"¹³⁶ then the declaration must state the general nature of the activity and the division, group, and class of the system to which the activity belongs.¹³⁷ If the activity does not fall within the "relevant classification system" then the declaration must contain a precise description of the activity.¹³⁸ Each declaration also must contain the places in Ireland where the company intends to carry on the activity and the place, whether in Ireland or not, where the central administration of the company normally will be carried on.¹³⁹ By establishing a link between incorporation and the State, this provision prevents the use of IRNRs for exclusively foreign activities.¹⁴⁰

Pursuant to section 43, new companies must appoint and maintain at all times an Irish resident director.¹⁴¹ Existing companies have twelve months before such requirement becomes mandatory.¹⁴² This requirement ensures that there is a person within Ireland whom the Revenue authorities and the Companies Registration Office can pursue when a company fails to comply with its obligations under Irish law.¹⁴³ Alter-

134. See Companies (Amendment) (No. 2) Act, No. 30 (1999). A solicitor engaged in the formation of the company may also make a statutory declaration. See *id.*

135. See *id.*

136. *Id.* The "relevant classification system" is defined as "the common basis for statistical classifications of economic activities within the European Community set out in the Annex to Council Regulation (EEC) No. 3037/90 of 9 October 1990." *Id.*

137. See *id.*

138. *Id.*

139. See *id.*

140. See DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates99/27may99/sect2.htm>.

141. "Residency in this instance is a company law concept meaning that directors must be domiciled in Ireland." *Id.* For the precise calculation of the "relevant time" a person must be resident in Ireland in order to fulfill section 43's obligations see section 44(8),(9). Companies (Amendment) (No. 2) Act, No. 30 (1999).

142. See Companies (Amendment) (No. 2) Act, No. 30 (1999).

143. See DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates-99/27may99/sect2.htm>.

natively, if a company chooses not to appoint an Irish resident director they may post a £20,000 bond as a surety to pay any fines or penalties that may arise because of a company's non-compliance with the new tax or company law requirements.¹⁴⁴ Additionally, section 43(9) requires Irish resident directors to notify the Registrar of Companies in writing if they cease to be a director and there are no other Irish resident directors at the company.¹⁴⁵ Irish resident directors who fail to comply with section 43(9) are jointly and severally liable for any fine or penalty imposed on the company by section 43(3).¹⁴⁶ The purpose of this amendment, therefore, is to protect outgoing resident directors who notify the Registrar of Companies that to the best of their knowledge the company does not have an Irish resident director.¹⁴⁷ This protection is necessary because the outgoing director's belief that the company has no other Irish resident director may not be accurate. Therefore, by notifying the Registrar of Companies, outgoing directors can separate themselves from the IRNR's potential liabilities.¹⁴⁸ Without this protection, outgoing directors might be deterred from complying with their reporting obligations under section 43(9).¹⁴⁹

A company may be exempt from the Irish resident director and alternate bond requirements, however, if it has a Registrar of Companies' certificate evidencing that it has a "real and continuous link" with one or more economic activities carried on in Ireland.¹⁵⁰ In order to obtain certification, a company must get a statement from the Revenue Commissioners that there are reasonable grounds to believe that the company has such a link.¹⁵¹ Furthermore, the Registrar of Companies may withdraw a certificate upon receipt of information from the Revenue Commissioners that the company has ceased to have

144. See Companies (Amendment) (No. 2) Act, No. 30 (1999).

145. *Id.*

146. *Id.*

147. See DAIL DEB. (Nov. 3, 1999), available at <http://www/irlgov.ie:80/debates99/3nov99/sect2.htm>.

148. See *id.*

149. *Id.*

150. Companies (Amendment) (No. 2) Act, No. 30 (1999).

151. See *id.*

a real and continuous link with any economic activity in Ireland.¹⁵²

In addition, section 45 limits the number of directorships an individual may hold to twenty-five, subject to certain exemptions.¹⁵³ Section 45 contains reasonable grounds for exemption to benefit legitimate multi-directorships, including group situations where such multiple directorships will be counted as one.¹⁵⁴ Moreover, where there is prior screening of directors, as occurs in the regulated sectors, the holding of such directorships also may be exempted from the limit on directorships.¹⁵⁵ More specifically, section 45 excludes from the number of company directorships the following types of companies: public limited companies; related companies (e.g. part of the group); companies that hold a certificate of trade in the International Financial Services Centre or the Shannon Free Airport Development Zone; companies that operate in a regulated sector and are subject to authorizations (e.g. financial or insurance companies); and companies that have their central administration in Ireland or otherwise have a real and continuous link with Ireland.¹⁵⁶ A person who already holds twenty-five directorships must get authorization from the Registrar of Companies prior to taking another directorship with any of the companies listed above.¹⁵⁷ If a person acts as a director for more than twenty-five companies, without such authorization, they are guilty of an offense punishable by way of a fine or imprisonment.¹⁵⁸ The restriction on the number of

152. *See id.*

153. *Id.* For the purposes of section 45(1), "director" includes a shadow director (within the meaning of the Companies Act, 1990). *Id.*

154. *See* SEANÁD DEB. (Nov. 25, 1999), available at <http://www/irlgov.ie:80/debates-99/s25nov99/sect4.htm>; DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates-99/27may99/sect2.htm>.

155. *See* SEANÁD DEB. (Nov. 25, 1999), available at <http://www/irlgov.ie:80/debates-99/s25nov99/sect4.htm>; DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates-99/27may99/sect2.htm>.

156. *See* Medori, *supra* note 92; Companies (Amendment) (No. 2) Act, No. 30 (1999).

157. Section 45 contains a mechanism whereby applications can be made in the first instance to the Registrar of Companies and subsequently in certain instances appeals can be made to the Minister. *See* DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates-99/27may99/sect2.htm>; Companies (Amendment) (No. 2) Act, No. 30 (1999).

158. *See* Companies (Amendment) (No. 2) Act, No. 30 (1999); *see also* Medori, *supra* note 92.

directorships is designed to tackle the use of nominee directors to disguise beneficial ownership,¹⁵⁹ whereas the exemptions are intended to preserve legitimate multi-directorships.¹⁶⁰ The implications of an individual holding upwards of one hundred nominee directorships, Mr. Treacy points out, "cannot but bring the company law regime into disrepute."¹⁶¹

Section 46 gives the Registrar of Companies enhanced powers to strike companies off the register the first year they fail to meet their reporting requirements under the tax or company law provisions; namely, failure to make the statutory annual return to the Companies Registration Office or failure to register with the Revenue Commissioners for tax purposes.¹⁶² In the past, a company had to be in default for at least two years before the Registrar of Companies could begin strike-off proceedings.¹⁶³ These enhanced strike-off powers are a reaction to the abysmal compliance rate. Only 13 percent of companies met their obligations on time in 1997.¹⁶⁴ The Registrar of Companies' enhanced powers are to ensure that when individuals ignore their responsibilities, effective action can be taken against them.¹⁶⁵

Equally important, sections 47-49 provide for enhanced notification to the Registrar of Companies by individuals who have ceased to be directors. Previously, it was the responsibili-

159. See Dept. of Finance, *supra* note 80.

160. See DÁIL DEB. (May 27, 1999), available at <http://www.irlgov.ie:80/debates99/27may99/sect2.htm>.

161. SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie:80/debates-99/s25nov99/sect4.htm>. One individual was found to be the director of over 1,500 companies. DÁIL DEB. (May 27, 1999), available at <http://www.irlgov.ie:80/debates-99/27may99/sect2.htm>. Mr. Treacy is the Minister of State at the Department of Enterprise, Trade and Employment. See *id.*

162. Companies (Amendment) (No. 2) Act, No. 30 (1999); *Treacy Publishes Companies (Amendment) (No. 2) Bill 1999*, Mar. 22, 1999, at <http://www.entem.ie:80/pressrel/240399e.htm> (last visited Sept. 21, 1999). To "strike-off" a company means that it is removed from the Irish company register and thus has no legal existence. Brian McDonald & John Homan, *Finance Act Targets Irish Nonresident Companies*, 10 J. INT'L TAX'N 9 (1999).

163. See Dept. of Finance, *supra* note 80. Before a company is struck off the company register, section 46 provides for proper notification to the company of the proceedings against them. See Companies (Amendment) (No. 2) Act, No. 30 (1999); SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie:80/debates-99/s25nov99/sect4.htm>.

164. See SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie:80/debates99/s25nov99/sect4.htm>.

165. See *id.*

ty of the company to notify the Registrar of Companies of any changes in their directors. Section 47 now allows resigning directors to notify the Registrar of Companies themselves.¹⁶⁶ Similar to section 43(9), these amendments provide a mechanism for making outgoing directors personally liable where the officers of a defunct company, struck-off the register, continue to operate as if the company was not dissolved.¹⁶⁷ There have been instances, for example, where companies have deliberately failed to notify the Registrar of Companies of a director's resignation, despite the resigning director's request that the company notify the Registrar of Companies.¹⁶⁸ This type of misconduct highlights companies' abuse in this area and the need for change.

B. Effectiveness of the Two-Prong Attack

Based on past experience, the Irish government knew that any changes made to its corporate tax laws would be ineffective to combat the abuse of IRNRs unless it also created a mechanism to enforce violations. For this reason, Ireland's 1995 attempt to eliminate the illegal use of IRNRs failed. Minister of Finance, Mr. McCreevy's impassioned plea in the February 26, 1998 Dáil Debates illustrates the frustration felt as a result of failed attempts to combat this serious problem. "I want to make clear," Mr. McCreevy declared, "there should be no place for these undesirables in the company register of this State. The last government failed to solve the issue of how to weed them out in a way that left the healthy plants alone. Let us see if this government can do better."¹⁶⁹ This time the government has done better because now it is attacking the IRNR problem on two fronts.

Without rigorous enforcement, those using IRNRs for nefarious activities simply ignore their obligations under both tax and company law based on the arithmetical risk that they will get away with it.¹⁷⁰ For example, only one month after the

166. See Dept. of Finance, *supra* note 80.

167. See SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie/80/debates99/s25nov99/sect4.htm>.

168. See *id.*

169. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie/80/debates/26feb98/sect3.htm>.

170. DÁIL DEB. (May 27, 1999), available at <http://www.irlgov.ie/80/>

passage of the 1999 Finance Act, some "ingenious and clever people" had already found ways around the legislation.¹⁷¹ More onerous requirements and enforcement,¹⁷² therefore, were needed to bolster the new residency and reporting requirements in the 1999 Finance Act; thus the emergence of a two-prong legislative attack. The dual nature of Ireland's attack on IRNRs will make it successful this time in preserving its reputation as a well-regulated financial center while maintaining incentives for foreign investment. Ireland's second attempt will be successful because the new tax and company law measures target companies that have no economic connection with Ireland and thus are likely to be used for tax evasion or criminal activity.¹⁷³ Furthermore, the new measures not only minimize any adverse effects on legitimate business, but also are enforceable and not easily circumvented, thus ensuring their viability as an effective deterrent.¹⁷⁴ An example of the legislation's deterrent effect is the decreasing number of new IRNRs incorporating in Ireland; down from 20,874 in 1998, to 18,604 in 1999.¹⁷⁵ Equally important, the new measures are not administratively costly or cumbersome and are compatible with EU state aid provisions, namely the Code of Conduct on Business Taxation and the EU Treaty.¹⁷⁶

Compliance with the new tax and company law requirements ensures that "all companies will have to be linked more closely to the State and interface more fully with the Revenue Commissioners and the Registrar of Companies."¹⁷⁷ The

debates99/27may99/sect2.htm.

171. *Id.*

172. In addition to the Registrar of Companies having enhanced powers to strike companies off the register if they do not comply with either their tax or company law obligations, a huge investment has been made in modernizing the Companies Registration Office to improve their enforcement capabilities. See SEANÁD DEB. (Dec. 8, 1999), available at <http://www.irlgov.ie:80/debates99/s8dec99/sect4.htm>.

173. See Dept. of Finance, *supra* note 80.

174. See *id.*

175. See Houses of the Oireachtas, Select Committee on Finance and the Public Service, at <http://www.irlgov.ie:80/committees-00/c-finance/000301/page5.htm> (last modified Feb. 2, 2000); DEPT. OF TAOISEACH, STRATEGY FOR THE DEVELOPMENT OF THE INTERNATIONAL FINANCIAL SERVICES INDUSTRY IN IRELAND PROGRESS REPORT (Mar. 1, 1999), available at <http://www.irlgov.ie:80/taoiseach/publication/IFSI/progress.htm> (last visited May 16, 2000).

176. See Dept. of Finance, *supra* note 80.

177. DÁIL DEB. (June 13, 2000), available at <http://www.irlgov.ie:80/debates->

“strong co-operative effort” between the relevant revenue and company law authorities developed by the complementary tax and company law legislation is another strength of Ireland’s two-prong attack.¹⁷⁸ The rising number of companies struck off the register; 31,157 in 1999, compared to 10,003 in 1998, proves the effectiveness of this co-operative effort.¹⁷⁹ For these reasons, Ireland’s two-prong attack represents a positive step towards eliminating the illegal use of IRNRs that threatened Ireland’s stature as a reputable investment location.¹⁸⁰

The company law amendments were enacted to complement the significant corporate tax changes, therefore, in evaluating this legislation, it is important to focus on the overall package of measures. Together they constitute a powerful weapon against the use of IRNRs for undesirable purposes in the future.¹⁸¹ Moreover, these two pieces of legislation reflect Ireland’s economic advancement and its subsequent movement away from being a periphery EU country. The strength of the Irish economy allowed the government to take bold steps such as addressing the IRNR problem at the incorporation

00/13june/sect7.htm.

178. *Id.*

179. *See id.*

180. As *Irish Times* journalist, Denis Coghlan, suggests in his cynical piece written about the recent legislation, not everyone is convinced of the effectiveness of the new measures to combat the abuse of IRNRs. Whether this doubt arises because of frustration caused by past failed attempts at change or the approach of the acts themselves is not clear. Mr. Coghlan writes:

The money-laundering activities of some of the 4,000 or so companies involved and the billions of pounds that had flushed through the Irish system was dealt with in true Department of Finance style. Money-laundering became “questionable purposes.” And, under the new rules, mafia bosses and their buddies from the dark side would be required to identify themselves or the country in which their companies were trading. As for the Irish professionals who facilitated and grew wealthy on the trade, they would only be allowed to “front” for 25 companies in the future. All companies would have to lodge a £20,000 bond and file returns. The Revenue Commissioner would liaise with the Registrar of Companies to ensure non-compliant firms would be struck from the register. The Finance Bill will not cause mafia bosses and hardened tax evaders to shake in their shoes, but it is a hell of an improvement on the old situation.

Denis Coghlan, *McCreevy’s Criticisms Bear Fruit as Taoiseach Declines to Answer Questions*, *IRISH TIMES*, Feb. 17, 1999, at 14.

181. SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie:80/debates99/s25nov99/sect4.htm>.

stage,¹⁸² which it would not have been able to do without the pull of a strong economy behind it.¹⁸³ Whether Ireland's two-prong attack on IRNRs is analyzed in an economic or political context, it is clear that Ireland will benefit now and into the future because it chose an approach that not only solved the immediate problem, but was responsive to the needs of its economy.

C. Compliance with European Union Standards

In its attempt to solve the IRNR problem, Ireland not only had to consider the impact tax and company law changes would have on its attractiveness to foreign investors, but also the new measures' compliance with European Union state aid rules and the EU Code of Conduct on harmful tax competition.¹⁸⁴ Among the European Union Treaty articles the Irish government had to consider are: article 52, regarding freedom of establishment; article 53, prohibiting the introduction of new restrictions; article 56, permitting exemptions on public policy grounds (but only if the action is proportional and no other effective remedy is available), article 48, regarding free movement of workers; and article 59, regarding freedom to provide services.¹⁸⁵ The bond alternative to the Irish resident director requirement, for example, was a direct result of Ireland's obligation to comply with the EU Treaty. Although some legislators felt that a £20,000 bond was too easy a hurdle for criminals wanting to set up companies in Ireland,¹⁸⁶ the bond al-

182. See Dept. of Finance, *supra* note 80.

183. See SEANÁD DEB. (Nov. 25, 1999), available at <http://www/irlgov.ie:80/debates99/s25nov99/sect4.htm>.

184. Ireland's new corporation tax regime conforms with EU state aid rules and the EU Code of Conduct on harmful tax competition. See Minister of Finance Charlie McCreevy, *supra* note 14.

The Code of Conduct is a political agreement which is without prejudice to the rights and obligations of the Member States under the Treaty. It is designed to curb harmful tax competition by targeting tax measures which have a significant effect on the location of business within the Community and which provide for a significantly lower effective rate of taxation than the rate generally applying in the Member State in question. Such measures are regarded as potentially harmful under the Code.

Tutty, *supra* note 52.

185. See DÁIL DEB. (Nov. 3, 1999), available at <http://www/irlgov.ie:80/debates99/3nov99/sect2.htm>.

186. See DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/>

ternative was essential to ensure that Ireland complied with the EU right of establishment and did not discriminate against EU citizens wishing to set up companies in Ireland for whom an Irish resident director would be an "undue burden."¹⁸⁷ Again, for EU reasons, the bond alternative had to be a real alternative; thus it could not be limited to certain circumstances or be set too high.¹⁸⁸ If the bond were pitched too high, an EU citizen wishing to set up a company in Ireland who did not want to use the Irish resident director route could argue that the bond requirement constituted an "undue discrimination" under the EU Treaty provisions governing freedom of establishment.¹⁸⁹

EU law also restricted what requirements the Irish government could place on Irish resident directors. In order to prevent the election of nominee directors, proposals were made to prohibit employees of any agent of the company to be directors. This proposal failed, however, because according to EU law a Member State cannot ban anyone from becoming a director of a company.¹⁹⁰ Nevertheless, legislator Nora Owen cited the small number of requirements to be an Irish resident director as a weakness.¹⁹¹ The legislation she asserted, is "not worth the paper it is printed on" if secretaries and clerks in solicitors' offices could continue to be appointed as company directors without having any involvement in the operation of the company except to sign documents.¹⁹² Because this was a known problem, Mrs. Owen argued there should be at least as many requirements regarding who can be an Irish resident director as there are provisions for procuring a bond.¹⁹³

debates99/27may99/sect2.htm.

187. *Id.*

188. See SEANÁD DEB. (Nov. 11, 1999), available at <http://www/irlgov.ie:80/debates99/s11nov99/sect4.htm>.

189. See *id.*

190. See DÁIL DEB. (Nov. 3, 1999), available at <http://www/irlgov.ie:80/debates99/3nov99/sect2.htm>.

191. See *id.*

192. *Id.*

193. See *id.*

D. Preservation of Reputation

While Ireland had to draft its legislation to adhere to its EU obligations, the real goal was to rid the company register of "undesirables" in order to protect Ireland's financial services reputation. But in achieving this goal, the Irish government also wanted to allow companies legitimately using IRNRs for acceptable business activities to continue to do so.¹⁹⁴ Mary Harney, the Tánaiste and Minister for Enterprise, Trade and Employment, highlighted this crucial balance when she stated:

The Government recognises the importance of good regulation in achieving recognition for Ireland, and Irish companies, for high standards in all financial services. At the same time, we will seek to maintain the competitiveness of companies established in Ireland and to ensure that the level of regulation is appropriate and sufficiently flexible to suit the dynamism of the financial services sector.¹⁹⁵

There is a balance that must be struck between attracting inward investment and ensuring compliance with the new tax and company law measures. However, such balance also must take into account the implications the new measures will have on indigenous enterprise.¹⁹⁶ Because of this delicate balance, it follows that the solution's focus had to be on the "fraudsters and money-launderers," otherwise overly stringent regulation potentially could damage the economic interests of the State.¹⁹⁷ There is no doubt that eliminating the non-resident company structure would solve the problem, but balancing its interests, Ireland chose not to take this route. The fear was that enacting legislation eliminating IRNRs entirely negatively would impact legitimate businesses and discourage foreign investment in Ireland.

In essence, Ireland's two-prong legislative attack is a product of two countervailing interests: protecting Ireland's superior reputation and preserving its foreign investment incentives. Although these two interests appear to be in competition, in

194. See DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

195. Dept. of Enterprise, Trade and Employment, *supra* note 59.

196. See DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

197. *Id.*

fact, they are interdependent. If Ireland retained its lax tax and company laws, its reputation would have suffered, causing Ireland to be a less attractive investment location for legitimate businesses, despite the tax deferral benefits of IRNRs. Legislator, Nora Owen's, statement at the May 27, 1999 Dáil Debates reinforces this idea of interdependence between the seemingly countervailing interests of preserving reputation and foreign investment incentives: "We have a reputation as a well regulated financial services centre which we must continue to protect. The minute we lose that reputation some of the advances we have made in the last number of years will be put at great risk."¹⁹⁸

The International Financial Services Centre,¹⁹⁹ perhaps Ireland's most significant advance, was at the greatest risk. The perception that some IRNRs, not operating through the IFSC, were being regulated in the same manner as IFSC companies negatively impacted the IFSC's reputation as a well-regulated financial center.²⁰⁰ Mr. Treacy, speaking at the November 25, 1999 Dáil Debates referred to international financial services as the "jewel in the crown of Ireland's economy."²⁰¹ The IFSC, Mr. Treacy declared, has been the

driving force behind the development of the sector. It is largely responsible for the worldwide reputation Ireland now enjoys as a centre of excellence in the provision of financial services. The centre has provided a hub around which a world class support network has grown, encompassing software development, telecommunications, shared services centres and legal and accountancy skills.²⁰²

The extent to which financial services are an important feature of the Irish economy underscores why Part XIII of the Companies Act 1990, which makes specific provision for investment companies, was amended by section 54 of the Companies

198. DÁIL DEB. (May 27, 1999), available at <http://www/irlgov.ie:80/debates99/27may99/sect2.htm>.

199. See PRICEWATERHOUSE, IRELAND: A GUIDE FOR THE US INVESTOR 44 (1997) (providing general information about the IFSC).

200. See DÁIL DEB. (Feb. 26, 1998), available at <http://www/irlgov.ie:80/debates/26feb98/sect3.htm>.

201. SEANÁD DEB. (Nov. 25, 1999), available at <http://www/irlgov.ie:80/debates99/s25nov99/sect4.htm>.

202. *Id.*

(Amendment) (No. 2) Act 1999.²⁰³ Section 54 evolved in response to requests by the funds industry; representing companies located in the IFSC, for further disapplications from certain basic provisions of the company law.²⁰⁴ Sections 42-51 intended to solve the IRNR problem, however, will apply to investment companies. Section 54, therefore, was enacted by the Irish government to counteract these new requirements and ensure that the funds industry in the IFSC would remain competitive with its counterparts on the continent.²⁰⁵

While concessions are made to lessen the impact of this new legislation on Ireland's "jewel," its international financial services industry, it is important to note that these new tax and company law measures will make it more difficult for all companies, not just IRNRs, to incorporate in Ireland. One recent commentator points to the downside of taking widespread action in the company law area; the adverse implications it will have for business in general, particularly small businesses, because of the additional cost and administrative burdens.²⁰⁶ Insofar as possible, the tax and company law measures intended to tackle the IRNR problem, although they will apply to all companies, are designed not to have an "undue adverse impact" on entrepreneurs who want to use an IRNR for the legitimate furtherance of their business.²⁰⁷ Ultimately, the new tax and company law measures are expected to result in a somewhat slower incorporation process, but they are not expected to add significantly to the cost of incorporation.²⁰⁸

Despite the questionable impact these new measures may have on small businesses, this "enlightened legislation" is no doubt an endorsement of the "maturity of the Irish economy."²⁰⁹ Looking back to the "bad old days" of the 1970s and 1980s, legislator Paschal Mooney remembers reading in *The Economist* about mature economies, such as Switzerland, where there were very stringent company regulations, knowing

203. Companies (Amendment) (No. 2) Act, No. 30 (1999).

204. See SEANÁD DEB. (Nov. 25, 1999), available at <http://www/irlgov.ie:80/debates99/s25nov99/sect4.htm>.

205. See *id.*

206. IRISH TIMES, *supra* note 6.

207. SEANÁD DEB. (Nov. 25, 1999), at <http://www/irlgov.ie:80/debates99/s25nov99/sect4.htm>.

208. See *id.*

209. *Id.*

that Ireland at that time was not in the position to do the same.²¹⁰ In just a decade, however, Ireland has come “a long, long way.”²¹¹ “Once a joke economy with inflation about 15 percent and fiscal deficits about the same percentage of GDP, whose main export was its young people, Ireland got its act together in the late 1980s and fashioned itself as a low-cost English-speaking base for Europe.”²¹² The Irish economy, now dubbed the Celtic Tiger,²¹³ has done so well in fact that EU structural funds to Ireland are being phased out because Ireland’s infrastructure can now sustain itself.²¹⁴ EU aid reductions resulting from Ireland’s economic success highlight Ireland’s transition from a periphery EU country, with a weak rural-based economy, to an EU country with an economy mature enough to risk stringent regulations to save its financial services reputation. Intel’s selection of Ireland as the location for its next generation semi-conductor facility is a further endorsement of Ireland’s “capabilities and competitiveness.”²¹⁵ “This new investment, which was won for Ireland against fierce international competition, will bring the Intel Leixlip site to the summit of manufacturing technology in the semi-conductor sector globally and will make it the most advanced wafer fabrication site in Europe.”²¹⁶ By taking rigorous measures now to preserve its place among reputable investment locations, Ireland ensures itself a strengthened competitive environment in the future which will prove increasingly important with the introduction of the Euro and as Ireland becomes more involved in the global economy.²¹⁷

210. *Id.*

211. *Id.*

212. Hamish McDonald, *Celtic Tiger May Be in For a Pounding*, SYDNEY MORNING HERALD, Dec. 30, 1998, available at <http://property.smh.com.au/news/981230/world/world6.html> (last visited June 30, 2000). See also Meredith J. Coleman, Comment, *The Republic of Ireland’s Economic Boom: Can the Emerald Isle Sustain Its Exponential Growth?*, 21 U. PA. J. INT’L ECON. L. 833 (2000) (discussing the factors leading to Ireland’s economic boom).

213. See McDonald, *supra* note 212.

214. See Poyner, *supra* note 17, at 215.

215. Dept. of Enterprise, Trade and Employment, *Intel to Create 1,000 New Jobs in IDA*, June 19, 2000, at <http://www.entemp.ie/pressrel/190600a.htm> (last visited June 21, 2000).

216. *Id.*

217. See SEANÁD DEB. (Nov. 25, 1999), available at <http://www.irlgov.ie:80/debates99/s25nov99/sect4.htm>; McDonald, *supra* note 212. The introduction of the single currency will have a greater impact on Ireland than most other EU Mem-

E. Reinsurance

A corollary to the tax and company laws Ireland enacted to combat the IRNR problem in general, are new regulations passed to deal specifically with fraudulent reinsurance companies.²¹⁸ The Insurance Act, 1989 (Reinsurance) (Form of Notification) Regulations, 1999 are an added attempt to protect the reputation of the IFSC as a high-quality international financial center.²¹⁹ Before 1999, the reinsurance sector had not been regulated in Ireland, but because of increasing fraud surrounding certain reinsurance companies located in the IFSC, the Irish government decided to take action.²²⁰ Regulation was formerly unnecessary because the majority of reinsurance companies registered in Ireland were subsidiaries of major international reinsurance groups based in the IFSC which meant that prior to registration each reinsurance company went through a thorough screening process.²²¹ These reinsurance companies, therefore, generally contributed positively to Ireland's international standing as a reputable financial services center.²²² Some reinsurance companies operating exclusively outside of Ireland, however, were not nurturing Ireland's reputation but damaging it by their unscrupulous and fraudulent activities.²²³ In fact, it was reported that as recently as January 16, 2000, two reinsurance companies associated with

ber States because the United Kingdom, Ireland's main European competitor, has opted out of the monetary union for at least another three years. During this period, fluctuations in the British pound will pose a threat to Ireland's competitiveness and overall economic success. See McDonald, *supra* note 212.

218. See Dept. of Enterprise, Trade and Employment, *Treacy Announces New Measures to Protect the Reputation of the IFSC*, Dec. 29, 1999, at <http://www.entemp.ie:80/pressrel/291299.htm>; DÁIL DEB. (Feb. 29, 2000), available at http://www/irlgov.ie:80/debates00/29_feb/sect16.htm; DÁIL DEB. (Apr. 11, 2000), available at <http://www/irlgov.ie:80/debates00/11april/sect4.htm> (last visited Apr. 11, 2000). See also DEPT. OF ENTERPRISE, TRADE AND EMPLOYMENT, PRESENTATION TO JOINT OIREACHTAS COMMITTEE ON ENTERPRISE AND SMALL BUSINESS ON THE DRAFT INSURANCE BILL 1999 (Nov. 2, 1999), available at http://www.entemp.ie:80/cr/bill_jo.htm (last visited June 21, 2000) [hereinafter *Treacy Announces*].

219. See *id.*

220. See DÁIL DEB. (Apr. 11, 2000), available at <http://www/irlgov.ie:80/debates00/11april/sect4.htm>; Dept. of Enterprise, Trade and Employment, *supra* note 59.

221. See *Treacy Announces*, *supra* note 218.

222. See DÁIL DEB. (Feb. 9, 2000), available at <http://www/irlgov.ie/oireachtas/frame.htm>.

223. See *id.*

the IFSC were under investigation by the Serious Fraud Office in the United Kingdom.²²⁴

The new regulations not only require reinsurance companies to provide more detailed information before registering in Ireland, but also reinforce the existing screening procedure of reinsurance companies performed by the Department of Enterprise, Trade and Employment's insurance division.²²⁵ In effect, the notification regulations are a first step towards bringing reinsurance companies under the same authorization and supervision procedures as insurance companies.²²⁶ As in its tax and company law legislation, here too the Irish government had to balance the need to protect the IFSC's financial services reputation with the desire not to impose an undue regulatory burden on industry.²²⁷ When announcing the new regulations, the Minister of Science, Technology and Commerce, Mr. Treacy, remarked that such measures only were taken after "full consultation with the insurance industry."²²⁸ "Protecting the reputation of the IFSC," Mr. Treacy stated, "is the joint responsibility of Government and Industry."²²⁹

F. Provisions made for U.S. Multinational Corporations

In addition to the economic and political factors discussed above, the legislature also considered the effect of its dual legislation on U.S. multinational corporations (MNC). No doubt the strong Irish economy acted as a springboard for the government's two-prong attack on IRNRs, but it was not strong enough for Ireland to completely eliminate the non-resident company structure. Unlike the United Kingdom, Ireland did not eliminate IRNRs entirely as many companies in its large multinational sector use non-resident companies for legitimate business activities.²³⁰ For economic policy reasons, such a

224. See DÁIL DEB. (Apr. 11, 2000), available at <http://www.irlgov.ie:80/debates00/11april/sect4.htm>.

225. See *Treacy Announces*, *supra* note 218.

226. See *id.*

227. See DÁIL DEB. (Feb. 9, 2000), available at <http://www.irlgov.ie/oireachtas/frame.htm>; DÁIL DEB. (Apr. 11, 2000), available at <http://www.irlgov.ie:80/debates00/11april/sect4.htm>.

228. *Treacy Announces*, *supra* note 218.

229. *Id.*

230. See Craig, *Ireland Finance Bill Begins Scaling Back Rate for Corporations, Expands Benefits for Some*, *supra* note 39.

measure would be imprudent. As of 1997, multinational corporations accounted for fifty-five percent of manufacturing output and forty-five percent of employment; three out of every four jobs was indirectly attributed to foreign investment in Ireland.²³¹ It is no surprise, therefore, that Ireland had a "vested interest" in maintaining its burgeoning foreign business environment,²³² relying on foreign investment more than most EU member states.²³³ For these reasons, Ireland calibrated its attack on IRNRs to take into account their positive effects, such as job creation.²³⁴ The fear was that too stringent a government response to the IRNR problem could result in a "baby with the bath-water" effect.²³⁵

Despite the significant presence of multinational corporations in Ireland, not everyone was convinced that Ireland should risk the continued use of non-resident companies for their benefit. One recent commentator said that there is no benefit to the Irish economy from multinational corporations using IRNRs for tax deferral purposes, except the fees paid to accountancy and legal firms to set up IRNRs.²³⁶ This viewpoint underscores the belief that since sufficient concessions for multinational corporations already exist, MNCs with manufacturing operations in Ireland will not pull out simply because IRNRs are abolished.²³⁷ At the February 26, 1998 Dáil Debates, legislator Derek McDowell listed numerous reasons, other than tax-deferring IRNRs, why multinational corporations would want to locate in Ireland, including tax concessions and a young, well trained, English-speaking workforce.²³⁸ In addition, Mr. McDowell cited Ireland's location as a convenient "foothold to the EU market" for U.S. multinational corporations.²³⁹ Believing IRNRs are of little or no benefit to the

231. See Poyner, *supra* note 17, at 199.

232. *Id.*

233. See *id.* See also Coleman, *supra* note 212 (discussing Ireland's heavy dependence on U.S. investment and the negative effects of such dependence should the U.S. face an economic downturn).

234. See John Iekel, *Controversy Erupts Over Abuse of Irish Tax Law*, 16 TAX NOTES INT'L 761 (1998).

235. *Id.*

236. See Brennock, *supra* note 37.

237. See *id.* DÁIL DEB. (Feb. 26, 1998), available at <http://www/irlgov.ie:80/debates/26feb98/sect3.htm>.

238. See DÁIL DEB. (Feb. 26, 1998), available at <http://www/irlgov.ie:80/debates/26feb98/sect3.htm>.

239. *Id.* "In the future, the use of a single European holding company for all

Irish economy, Mr. McDowell asserted, "I do not see why we should seek to facilitate [multinational corporations] further by providing a company law structure which allows them to avoid or defer the payment of tax in their home country."²⁴⁰ Even Intel, a U.S. multinational corporation with 5,000 Irish employees, said it would "welcome" the abolition of IRNRs.²⁴¹ In 1998, an Intel spokesperson stated that the company had "no interest in the perception that Ireland is a location for any sort of illegal activity."²⁴² Despite the force of this argument, this reasoning is flawed as it fails to grasp the potentially far-reaching implications eliminating IRNRs would have on future inward investment. The potential for tax deferral by multinational corporations is an attractive feature of doing business in Ireland. Elimination of this incentive may not cause multinational corporations with manufacturing operations in Ireland to leave, but it may negatively impact Ireland's standing in future investment location decisions made by MNCs.

Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney, on the other hand, stressed the importance of not placing any restrictions on MNCs which have made such an "enormous contribution" to Ireland's economic growth by investing in the economy and employing 50 percent of the workforce in manufacturing and internationally traded services.²⁴³ Realizing the tension, however, between this goal and combating the illegal use of IRNRs, Mary Harney followed this statement by calling for the crippling of IRNRs' capacity to facilitate illegitimate and criminal activities such as money laundering.²⁴⁴

Many multinational corporations use IRNRs as a legitimate vehicle to move their money.²⁴⁵ This type of company structure enables MNCs doing business in Ireland to take their

foreign investments may become more prevalent because of potential advantageous results under the European Union Directives." PRICEWATERHOUSE, *IRELAND: A GUIDE FOR THE US INVESTOR* 84 (1997 ed.).

240. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

241. See Sean Mac Carthaigh, *IDA Ireland says IRNRs are not Vital to Multinationals*, IRISH TIMES, Feb. 27, 1998, at 7.

242. *Id.*

243. DÁIL DEB. (Feb. 26, 1998), available at <http://www.irlgov.ie:80/debates/26feb98/sect3.htm>.

244. See *id.*

245. See *id.*

profits out of Ireland and invest them elsewhere without paying tax again when they reinvest.²⁴⁶ U.S. corporations, representing 40 percent of overseas companies operating in Ireland,²⁴⁷ benefit most from IRNRs. The U.S. tax deferral system makes IRNRs a valuable tax planning tool for U.S. multinational corporations in large part because of the relatively high Irish tax rates on passive income.²⁴⁸ Historically, passive income²⁴⁹ in Ireland has been taxed at rates up to 50 percent; the current rate being 28 percent.²⁵⁰ For this reason, many U.S. corporations typically set up their Irish manufacturing operations using an IRNR managed and controlled either in a tax haven country or in the United States.²⁵¹ Such an arrangement allows Ireland to tax only income connected with the Irish branch.²⁵² This leaves the surplus cash free to be transferred to the head office, based either in a tax haven country or the United States, from where it can be invested free of Irish tax.²⁵³

Because U.S. corporations are subject to U.S. federal income tax on their worldwide income,²⁵⁴ double taxation is

246. See *id.* "In Holland and Belgium companies use a holding company mechanism and in other countries they use a participation privilege mechanism. By virtue of that participation privilege they are prone to double taxation." *Id.*

247. See PRICEWATERHOUSECOOPERS, *supra* note 1, at 6.

248. See Walsh, *supra* note 15.

249. Passive income, in this context, includes the investment of surplus funds. See *id.*

250. See *id.* Note that the 1999 Finance Act sets forth a gradual schedule of reductions on the passive income tax rate to 25 percent starting January 1, 2000. PRICEWATERHOUSECOOPERS, *supra* note 1, at 41.

251. See Walsh, *supra* note 15.

252. See Poyner, *supra* note 17, at 213-14.

Irish tax law distinguishes between resident and non-resident companies doing business in Ireland. A non-resident company is only liable for the applicable corporation tax on income arising through that particular U.S. branch in Ireland. Branch offices of U.S. firms will most certainly be classified as non-resident for purposes of determining Irish corporate tax liability and therefore not be subject to tax on worldwide profits. In order for a corporation to be taxed as a resident of Ireland, the U.S. parent company would likely have to make a conscious decision to base its central control and management in Ireland. Therefore, there is little danger that a U.S. corporation would inadvertently be classified as a resident of Ireland for taxation purposes because, in most cases, the U.S. corporation conducting Irish operations will reserve its management and control over the entire corporation to the United States.

Id.

253. See Walsh, *supra* note 15.

254. See PRICEWATERHOUSE, IRELAND: A GUIDE FOR THE US INVESTOR 69 (1997)

usually circumvented by utilizing foreign income tax credits.²⁵⁵ For example, if a U.S. multinational corporation formed a foreign subsidiary to carry on Irish operations, generally the subsidiary's income would not be subject to U.S. tax until it was distributed as a dividend to its U.S. parent company.²⁵⁶ In planning their overseas operations, therefore, U.S. corporations generally seek to defer foreign income from U.S. taxation and adjust their average foreign tax rate according to all income sources so as not to exceed their effective U.S. tax rate.²⁵⁷ For these reasons, it is no surprise that statistics compiled by the United States Department of Commerce, in 1999, showed that for over a decade U.S. manufacturing operations in Ireland have averaged about a 25 percent after-tax return on their investments.²⁵⁸ U.S. corporations' extensive

ed.). U.S. corporations are usually subject to federal income tax when such foreign income is received or accrued. *See id.*

255. *See id.* Expense allocation rules and limits on separate classes of income, however, may reduce the amount of creditable tax in the current year. *See id.* *See* PRICEWATERHOUSE, IRELAND: A GUIDE FOR THE US INVESTOR 70-72 (1997 ed.) (for additional information on foreign tax credits).

256. *See id.* at 69-71. Note that there are exceptions to this general rule relating to controlled foreign corporations, passive foreign investment companies and foreign personal holding companies. *Id.* *See* Appendix 1 of PRICEWATERHOUSE, IRELAND: A GUIDE FOR THE US INVESTOR 103-120 (1997 ed.) (for examples of alternative Irish company structures).

257. *See id.* at 69.

Many U.S. multinationals which have existing manufacturing operations in high-tax foreign countries are in an excess foreign tax credit position due to a number of factors, including the relatively high levels of combined foreign income and withholding taxes and the U.S. expense allocation rules which require foreign source income to be reduced by certain U.S. deductions when computing the foreign tax credit limitation. This excess credit position points to a need for U.S. companies to reduce their foreign tax levels, wherever possible, and to generate more low-tax foreign source income. This would indicate that foreign investment in low-tax countries, such as Ireland, can particularly benefit U.S. investors.

Id. at 72. To comply with EU state aid rules, the 1999 Finance Act gradually phases out Ireland's 10 percent corporation tax rate for manufacturing and international services activities, so that by January 1, 2003 it will largely be replaced by a corporation tax rate of 12.5 percent for active income and 25 percent for passive income. The 12.5 percent tax rate will apply to active income from all operations; it will not be restricted to manufacturing, international services or financial service companies, thus creating new opportunities for overseas companies in Ireland that previously would not have qualified for the 10 percent tax rate. *See* PRICEWATERHOUSECOOPERS, *supra* note 1 at 41. *See* PRICEWATERHOUSECOOPERS, TAX FACTS 1999/2000 13 (1999), for a discussion of the standard rate of corporation tax and the 10 percent rate of corporation tax.

258. *See* PRICEWATERHOUSECOOPERS, *supra* note 1, at 12. *See* table in

use of IRNRs and Ireland's desire to protect this valuable tax planning tool for inbound investors explains the need for a complex solution to the IRNR problem rather than a simple elimination of this company structure.²⁵⁹

G. Repercussions of the Two-Prong Attack

Considering the breadth and complexity of the 1999 Finance Act and Companies (Amendment) (No. 2) Act, the transition period—less than eight months—may not be enough time for IRNRs to take the necessary measures to comply with the new legislation, including liquidation of assets where appropriate.²⁶⁰ In 1988, when the United Kingdom passed legislation eliminating non-resident companies, it provided a five year phase-out period for existing companies.²⁶¹ Ireland's decision to allow only a short transition period underscores their eagerness to tackle the illegal abuse of IRNRs head on; without giving fraudsters in the system time to work around the new legislation. One consequence of the short transition period is that many IRNRs will seek to establish small-scale trading activities in Ireland in order to qualify under the exception provided in section 23A(3) of the 1999 Finance Act.²⁶² In this way, companies can secure time to reorganize their affairs in an orderly fashion.²⁶³ Another possible alternative for companies unable to complete liquidation within the transition period is migration to a treaty country with a tiebreaker clause.²⁶⁴ On an immediate and practical level, many IRNRs have already gone into voluntary liquidation in order to circumvent the 1999 Finance Act's tax and reporting requirements.²⁶⁵

Along with the criticism surrounding the short transition period, a new measure under the Money Laundering Provisions of the Criminal Justice Act 1994 also has been pro-

PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN IRELAND 12 (1999), for a comparison of U.S. manufacturing operations in Ireland and with those in other European countries.

259. See Walsh, *supra* note 15.

260. See Kilcullen, *supra* note 7; Walsh, *supra* note 15, at 714.

261. See Kilcullen, *supra* note 7.

262. See *id.*

263. See *id.*

264. See Walsh, *supra* note 15, at 714.

265. See *Company Liquidations Rise by 23%*, IRISH TIMES, Dec. 22, 1999, at C17.

posed.²⁶⁶ In essence, such a measure would bring company formation agents and accountancy firms within the money laundering provisions by imposing on them a "know your client" requirement and subsequently obliging them to declare the identity of the IRNR's beneficial owner.²⁶⁷ This proposal also calls for more general examination of financial account records in cases where tax evasion is suspected.²⁶⁸ In the past, Revenue was not given such powers because as a periphery EU country, Ireland feared the flight of capital from its economy if regulations were too strict.²⁶⁹ As proven by Ireland's 1999 legislation, Ireland must no longer shy away from stringent regulation because of economic fears. In fact, Ireland's strong financial position would enable it to pass more regulations to combat any continued illegal activity but it is not clear whether additional measures will be either necessary or useful. Upon review, the Department of Justice, Equality and Law Reform commented that because of the "once-off nature of transactions" performed by company formation agents, it would be difficult for them to form a reasonable suspicion of money laundering by their clients.²⁷⁰ Additionally, the Department of Justice, Equality and Law Reform remarked that the amount of money involved in setting up an IRNR is trivial; consisting of merely the Registrar of Companies' fee and the agent's fee.²⁷¹ Furthermore, the person setting up the IRNR would not have started to use the company to conduct business yet, thus there would be no basis upon which a company formation agent could form a suspicion.²⁷² On the other hand, Nigel Morris-Cotterill, a British expert on money laundering, criticizes the way Irish money laundering regulations are interpreted, stating that there is no clear understanding of who is affected by the laws.²⁷³ Mr. Morris-Cotterill emphasizes that money laundering is a crime and that financial institutions should face penalties for not taking steps to prevent

266. See IRISH TIMES, *supra* note 6.

267. See Creaton, *supra* note 42.

268. See Jane Suiter, *Wider Revenue Powers to Tackle Fraudsters*, IRISH TIMES, Feb. 6, 1999, at 18.

269. See *id.*

270. Dept. of Finance, *supra* note 80.

271. See *id.*

272. See *id.*

273. See Suiter, *supra* note 68.

themselves from being used to facilitate this type of criminal activity.²⁷⁴ "Where the authorities cannot catch the person committing the underlying crime, there is an increasing tendency to follow the money and prosecute those who helped."²⁷⁵ It is this tendency, or perhaps a lack of confidence in the new tax and company law amendments, that is driving the proposal for a money laundering provision.

Although advocates for the money laundering provision question the effectiveness of Ireland's two-prong legislative attack, in the final analysis these measures, which tighten up Ireland's tax and company law structures, will be effective because they significantly detract from Ireland's attractiveness as a location for corrupt non-resident companies.²⁷⁶ To be sure, Ireland's apparent accomplishment of purging the Emerald Isle of corrupt IRNRs does not signal the end of such nefarious activities elsewhere.²⁷⁷ In 1998, James Brannam, chairman of the Sark Association of Corporate Administrators and then director of approximately 100 IRNRs, predicted such a scenario when he suggested that stricter Irish regulations would prompt most IRNRs to migrate to a more "relaxed jurisdiction."²⁷⁸ In essence, money laundering and other criminal operations facilitated by lax company structures will continue to exist but those companies previously using Irish incorporation as a "veneer of respectability" for their fraudulent activities will be forced to relocate to less regulated jurisdictions.²⁷⁹

IV. CONCLUSION

Ultimately, Ireland's 1999 legislation will "go down in history" inasmuch as it establishes the framework for Ireland's tax and company law regime for the millennium.²⁸⁰ "While the U.S. frets over tax avoidance, the Irish have taken the bull by the horns" in order to eliminate IRNRs threatening their reputation as a well-regulated financial center.²⁸¹ The lessons

274. *See id.*

275. *Id.*

276. *See McNally, supra note 50.*

277. *See id.*

278. Creaton, *supra note 42.*

279. Mary Canniffe, *Bill will Force Registered Firms into Tar Net*, IRISH TIMES, Feb. 27, 1998, at 7; Creaton, *supra note 42.*

280. Faughnan, *supra note 45.*

281. Medori, *supra note 92.*

learned from the 1995 Finance Act proved that a mere tightening of the tax provisions was not enough to rid Ireland of those foreign investors taking advantage of its lax tax and company laws. Ireland knew, therefore, that in order to effectively combat the illegal use of IRNRs it had to wage a two-front attack. The introduction of a second legislative prong, namely amendments to the company law, meant that the Irish government finally had a mechanism to enforce violations.

By attacking the IRNR problem head on, Ireland has secured its place among reputable financial centers worldwide. Eventually, Ireland's economy will mature enough to enable it to completely eliminate IRNRs. Until then, its two-prong legislative attack will maintain Ireland's position as a favored investment location in Europe. The complex provisions of the dual legislation ensure that the non-resident company structure in Ireland will serve as an incentive for foreign investment in the future rather than a facilitator of criminal activity. Furthermore, the sensitivity of the 1999 legislation to the conflicting needs of the Irish economy-the need to protect its financial services reputation as well as its foreign investment incentives-enabled Ireland to strike a delicate balance in restructuring its tax and company law regime. In essence, Ireland's successful balancing of reputation and foreign investment incentives sets the stage for its place among other mature economies in the global market in the years to come.

*Jennifer A. McHugh**

* The author would like to dedicate this Note to her parents, Úna and Gerard McHugh, and her brothers, Gerard and David, whose love and support have made every dream a reality.

