

PRESENTATION
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IRELAND

Vulture Funds And State Aid In Ireland - A Prima Facie Case?

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HOSTED BY
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LUKE MING FLANAGAN MEP – INTRO

1. I just want to thank our speakers – we have Ed Honohan, Master of the High Court in Ireland and in that role I'd like to thank him here, in the European Parliament, for his outstanding work in trying to ensure that in the very uneven battle between banks, vulture funds and their teams of high-powered highly-paid legal teams on the one hand, and those whom they would dispossess and evict on the other, justice isn't just done but is seen to be done.
2. And I use that phrase very deliberately – Ed isn't about taking sides one way or the other, he's just doing his job, ensuring that due diligence is done and due process is followed in every case that came across his desk.
3. But of course that was the problem, for the banks and the vulture funds at least – Ed was *too* diligent, *too* objective, wasn't doing what was being done elsewhere in the Irish judicial system and allowing banks to get away with sloppy or incomplete legal paperwork. So, in a move that should have had our national media in Ireland outraged, but didn't – a sign of how badly we're served by that same media – they took that work from him.
4. If he wants to discuss that with ye, that will be for Ed to decide, but it's not what he's here about today.
5. Vulture Funds And *State Aid* In Ireland - A Prima Facie Case?, that's the title of his presentation and as it says on the blurb, *'In Ireland, some very modest Irish-registered companies, which enjoy special tax treatment, claim only nominal profits, arguing that their cost of funds eats almost all their revenue. Is this another example of tax-avoidance at point-of-sale, profits masquerading as costs? What is sham, what is real? Apart from the obvious (the potential for money laundering) the question must also be asked – should the profits on such investments be taxed where the securities are realised on default, or where the profits are booked?'*
6. *Trading in Irish property should be open to all market players on equal terms but the circumstantial evidence – strong evidence – is of an Irish market distorted by tax breaks not generally available.*
7. *In this presentation, Ed asks the question – has anyone joined the dots???*

ED HONOHAN



Lawyers v Politicians

8. One of the differences between lawyers and politicians is that lawyers tend to ask themselves questions – what I've just said, is it true, can I stand over it? I can't simply throw out a comment and say 'There, that's worth printing in the newspapers!'; I have to be able to say 'That's accurate, its can stand up to scrutiny. Any other lawyer will say "Yes, he must have done his homework!"'
9. It's very very difficult for somebody to prepare a presentation on a topic like this. I have to first of all read myself into it, and then make sure that anything I say can be backed up. The validity is the historical roots of a legal principle that supports the submission. A politician doesn't have to do that, he doesn't have to say 'I think we should drain the bogs, and I want to go back to James Dillon and move forward from there to talk about Mr. McGonigle and so on and so forth; he doesn't have to do that, he just throws an idea out there.'

on these facts. Moreover this trust takes effect in equity, not "in law". Second, his lordship held that, quote, 'It seems to me clear that... an approach involving the use of a trust binding on LBIE in favour of the affiliate was adopted'; although all that this assertion does is to assert that there should have been a trust but not whether or not one was actually created. The Court Of Appeal followed *Hunter v Moss* and purportedly applied the conclusion in *White v Shortall* but without delving into that case to identify whether or not the cases were sufficiently similar. This judgment does little to analyse the clear rejection *Hunter v Moss* in *White v Shortall* and the weight of journal commentary which similarly rejects it. There is nothing in the judgment to indicate why *Hunter v Moss* is to be preferred to *MacJordan v Brookmount*, nor indeed why any one case is to be preferred to any other.(9)

31. This is why we waste money on lawyers! That case went through three stages in London – there was a follow-up case as well. The reason I mention it is not simply to illustrate the fact that the law can be a bit of an ass times but that it also impacts on this question about what a charity is in the context of what we're dealing with here.

CHARITY STATUS AND SPVs

32. The use of charities as the shareholder for the SPVs is not as heinous as you might think; it's a device to ensure that in the unlikely event of the collapse of the investment fund, that the shares which are vested in charity will not fall into the insolvency. It's a device, a fall-back position, a safety-net for the shares in the event of an insolvency. So the use of an Irish charity to hold the shares in an SPV is not actually the source of our difficulty here, although we take offense at the fact that the word *charity* is used, and we say this is really a slap in the face of people who are affected by it. Nevertheless that's not the issue that the European Commission will be looking at in terms of State Aid. I'm still on language, and the language being used here, Irish financing SPV's using Section 110 – what strikes me is the reference to profit neutrality.
33. This is [an investment broker trying to sell SPV's](#) and he says '*Profit neutrality can then be achieved using profit participation loan notes, or Total Return swaps.*'(10)
34. **It means basically they don't pay any tax. A profit-participating loan is where the funding for the business, which is the buying and selling of distressed mortgages on this property, will be at a cost – we haven't got the money ourselves, really, we're just an SPV which has a small office, but we can borrow the money, and we get very very bad terms, or we get the terms which say basically, 'If you make a profit, you can give us all that as the interest to which we're entitled on the loan which we advanced to you'.**
35. So the SPV ends up saying 'This is a very bad business we're in, shocking, it's almost below the break-even point!'
36. **But the question must be asked – 'Why would you bother? Why would you bother setting up a business where you only break even? On this basis you're a mug, you should have opened a petrol station or taken a license for a McDonald's – you'd do better. But of course the answer is that it's because you and your funder are one and the same. You're just using a formula – it's all done by mirrors, you're using**

a formula to avoid the tax arising in Ireland. You're saying, all the money can be shipped so we have effectively the receivables in the business are being transferred abroad, with the result that Ireland is losing out, there's a massive capital outflow.

37. What we have is a difficulty in relation to discussing this at all, because I know here we are in the European Parliament – and I'm happy to be here, thanks very much (nods to Luke); there is an enormous amount of work done but it's quite clear that the volume of material that's available in this sort of area, which is a niche area, has a chilling effect on debate. So we have to look at some early indicators of distress and say whether we should be concerned. I found a quotation from a book written in 2008, before the crash, it's [The Law And Practice Of International Finance](#), published by Sweet & Maxwell. On page 459: *'Ideally the SPV is located in a favourable jurisdiction which has low or no taxes. Favoured jurisdictions include no tax jurisdictions such as Cayman, Gibraltar, British Virgin Islands, Bermuda, and Jersey, and low-tax jurisdictions such as Ireland, the Netherlands and Luxembourg.'*(11)

APPLE2 – OR NOT?

38. Any European MEP should sit up and say 'Well that's a bit concerning now isn't it? Because you know clearly money is moving for tax purposes and Ireland has been targeted on that. We have a long history actually of being 'cute' with the tax system and in this regard I have to draw attention to the fact that the Apple case is about transfer pricing; it's not really a State Aid case but there *is* an overlap. You can't avoid the Commission saying, 'Which of our DGs is going to look at this? Is it the Competition Authority or is it the Trade Authority, or at least the DGs? There's an element of overlapping involved so that even in the late 90s, which is when all this kicked off, we had documents produced which gave the famous guidelines on this. The first one I had was the Code Of Conduct, on Harmful Tax Competition, that's 1997 – you have to bear in mind we're talking about the 1997 Finance Act which introduced section 110.
39. The [Code Of Conduct, on Harmful Tax Competition](#), says – and this is quite alarming, it leaps out at you – *'The tax measures covered by this code include both laws or regulations and administrative practices'*(12). Straight away you say 'Oh God, I'm not supposed to be just looking at section 110, I'm supposed to be looking at how it's actually being implemented! In the Apple case it was about the ruling, which wasn't in legislation, and it was about how they reached the point where they decided on a ruling. Some of the evidence in the Apple case is really quite farcical. On such-and-such a date Apple came in and they said 'What about that 400 figure?' and Ireland said 'It looked like a good figure'. 'Where did it come from?' and we said 'Oh, we just plucked it out of the air!'
40. And this is recorded by the Commission as part of their evidence as to the irrationality if you like, the complete unreal figures that were being thrown around to see whether or not they could patch up the problem. It continues:

When assessing whether such measures are harmful, account should be taken of, inter alia:

Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or

Whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or

Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or...

Whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.(13)

TICKING ALL THE BOXES

41. You see, we tick the boxes and all these. This is the Code Of Conduct in 1997, that was followed by the [1998 notice on State Fiscal Aid](#), which sets the following four tests to identify State Aid:
- (1) The measure must 'confer on recipients an advantage which relieves them of charges that are normally borne from their budgets'...
 - (2) The advantage must be granted by the State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure...
 - (3) The measure must affect competition and trade between Member States...
 - (4) The measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The selective advantage involved here may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities...(14)
42. In relation to general availability of relatively short depreciation periods, Ireland pops out at you. Low tax rates – Ireland for instance, ridded itself of special and regional schemes and instead lowered its normal corporate tax rate to 12.5% for all profit-pursuing activities anywhere.
43. We have also have the history of the IFSC tax-break which was actually approved by the Commission back in 1981 and that's now been withdrawn, which means the Commission have changed their mind on it. So an evolving process here, a developing process since the late 1990's, **and the question that I'm most concerned about today is to try and identify what is the use of state resources which is part and parcel of this whole business.**
44. It's actually quite difficult to work out. What I think is, first of all we have to identify the market – what is the marketplace here, what's being traded for the purposes of the tax? And what's being traded is liquidity. The banks are trading their liquidity; they're saying '*We'd like some cash here, because, you know, our balance sheet doesn't look great. We'd like some cash here and we've got a few dodgy old assets that we can let*

you have at a discount. That's essentially the nature of the market, it's the principle market in which they're operating.

45. The government introduces a tax which says anybody buying the dodgy assets on a securitised basis, in other words where there's a blending as I call it of all the assets together, and then they're being sold out to investors – whether there's profit-participating or not is neither here nor there, that's the nature of the business; as I say it's almost a break-even business. They're trading in this, they buy the dodgy assets and give the cash over.
46. The question is, if that's non-tax, if there's no tax on that or virtually no tax, what *would* be the tax if there were no tax break? And the answer is, there would be the same tax, because it's a profit-participating loan so their cost basis is huge – the government hasn't introduced some imposition on that saying 'Your cost basis will have to be reduced'; they simply say it's just going to be a standard break-even trade where they just about break and get to pay a small amount of tax.

WHAT WOULD HAPPEN IF THERE WAS NO TAX-BREAK?

47. So the *real* question is, how is the tax break itself at a cost to state resources? This is where the economists come in – what would happen if the tax break *weren't* there? So then you have to say, first of all is it relevant to find out what would happen, is that something that needs to be analysed? And of course it is, because any selective tax – and this is a selective tax, because it's only limited to €10 million and upwards – may pass the tests if it's in line with the general tax principles or the policy tax or tax scheme, so that the question of what happens outside of the business is factored in by the Commissioner when they consider whether or not there has been a loss of revenue to the State.
48. What would happen? I think there are a number of stages you have to go through. First of all I think you would have the vulture funds going away, because they would say 'Now we'll have to pay a realistic price for these properties. They would say, 'other companies would come in prepared to buy poor assets of this sort, and those companies would pay *less* to the banks, they would be less useful for the banks for liquidity purposes because there's no longer any subsidy involved through the tax break. **You see the tax break essentially is a subsidy. The other companies, the non-SPV companies, would come in and buy the assets, and then when *they* traded the assets in the normal way, there would be a profit and there would be tax, so the tax lost is the tax that would be recoverable if the vulture funds weren't here.**
49. There are a number of steps in it and I'm not sure I'm not sure whether or not that hangs together from the economic point of view, but I can tell you this much – **if you look at the Apple decision, if you look at all of the materials that are here about State Aid and so on so forth, this is something that the Commission really should be getting their teeth into.**
50. I was asked, what aspects of the marketplace are ripe for analysis in this regard, and there are a number of different legislative matters which I think form part of the package for the tax break which I have to mention. I think there are about ten of them actually.

The first thing is **section 110 was amended in the 2017 Act**; the question then arises – ‘Oh, well if it was amended, what was wrong with it? Should tax have been paid prior to that? Is there State Aid up to that point which was then eliminated? So that's a warning light straight away. Changing the statute at that point suggests strongly, *prima facie*, that something was wrong up to that point. And actually what happened in the 2017 Act was that Mr. Noonan managed to split out the property section of the SPVs – which, by the way, are not in themselves particularly offensive to business, they're a standard and acceptable way of funding in a non-bank sense; the securitisation model has been with us for a long time and when the 1997 Act came in securitisation was designed, it was in existence, and the IFSC said ‘We need to have some kind of ready smoothing of the process by which we have to pay tax’; it was simply managing the process of the Internet transactions that are going on round the 24-hour clock.

‘ROGUE’ SPVs – GENETICALLY MODIFIED!

51. **But it's what happened in the crisis when a ‘rogue’ SPV emerged – it was like a genetically modified SPV** – which was one that wasn't dealing in just stocks and money, it was dealing in property, real property, bricks and mortar, and that role model was never intended to be the beneficiary of the SPV tax break. It's rogue, it has a problem because of the fact that the asset is located in Ireland, and there are impacts on the Irish property market, on the housing market, which have to be taken into account in terms of the losses of revenue, the use of state resources.
52. I've a feeling that even if the Commission was simply to look up to that point and say ‘We're now been given the clear signal that there was something wrong, they would say that this is worth investigating. Next then you go on to say, well **what was the change in 2016/2017, and the answer is, we're not quite sure what it was but the principal difficulty with it is that it was drafted by the tax advisers! That itself gives rise to the prima facie case for investigation under State Aid.**
53. Look at the Apple decision, look at the comments made by the Commission about the Irish revenue authorities, and now say to yourself, what would be the outcome of an investigation into the 2016 changes? Where did they come from? Who drafted them? Do they understand them? How much of a discretionary element has been included? Is this a formula for taxpayers to write their own tax bill? Or rather, not write it but just put in a zero and fill in the details later!
54. So that's the first statutory problem that needs to be addressed. **There's NAMA legislation which in its operation, has generated an impetus to the sale of lands into the private sector which have been operated in a particular way, and the particular way we're talking about is a way which actually – and this is complicated as well – triggered a process of land hoarding, which has impacted on land prices and on the housing market in Ireland. The NAMA legislation is a context again in which the Section 110 property-regulated SPV's rate break has to be assessed.**

55. There's the factor of no state cooperation for co-ops, none at all; these are if you like the market environment in which the housing policy is operating, and the question is whether or not that impacts on the overall level of tax. There's the fact that the rulings that are made within the administration are never made public and we're none the wiser for everything that goes on behind the doors in the Department of Finance.
56. There is of course ECB pressure, and that's not something that the Irish government has been active in, but it has nevertheless acquiesced in presenting to the public the notion that banks are faced with the situation where they *have* to sell to SPVs. But the ECB is at pains to point out that they never said that; they said there are other ways of funding your illiquid banks and you should be looking at that, but no, the banks have been pushed to the point where the Irish government has said, 'We have now created an avenue for you, an exit strategy – this is the way to go.' So that is a motivating factor in the preservation of section 110.
57. I have a couple of other things as well.

IRELAND'S SAD HISTORY ON THESE KIND OF ISSUES

58. There's the very fact that if you go down through the history of Ireland in relation to the Commission, we have a bad record. This is the [Primarolo Report](#) – Dawn Primarolo chaired a committee to identify unfair tax competitions, and this was back in late 1999. She said, '*In cases where participation exemptions are combined with an appropriate controlled foreign company legislation, the measures have not been given a positive evaluation*'. That means they went down.
59. There's a footnote to that, number 21 – Ireland jumps out of the footnotes all the time! – which says: '*The Irish delegation could not agree that any evaluation criterion under the Code should take account of the level of taxation applied in another country.*' The response to this then by Primarolo is: '*The Code is explicit in providing that the benchmark is the level of tax generally applying in the Member State. The fact that participation exemption regimes do not fit easily within the criteria in the Code is not a justification for coming up with entirely new criteria that go far beyond the Code.*'
60. That was the end of the objection. And you find this happens time and again. You find Ireland sticking its head out and getting slapped down. In the [recent Belgian case](#), laughingly called 'the excess profit exemption' – excess profit exemption, we're making too much profit so don't tax it! In that Belgian case – and you know Member States can show up to these cases and make their observations in court – well anyway, this went to court and the only country that showed up was Ireland. Paragraph 60 says: '*Ireland submits, in essence, that the contested decision seriously disturbs the balance of competences between the European Union and the Member States established, inter alia, by Article 3(6) TEU and Article 5(1) and (2) TEU, and confirmed by settled case-law.*'

61. In reply, Paragraph 61: *The Commission contends, in essence, that although the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with the State aid rules of EU law.*
62. And Paragraph 62: *In that respect, it must be noted that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, Commission v Spain, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). On the other hand, it is undisputed that the Commission is competent to ensure compliance with Article 107 TFEU. (16)*
63. You know, if you were in court and you made that submission and the judge said, 'But what about – sure you're wasting your time!'
64. Why did we show up? Who in Dublin said 'Let's send a hotshot team of lawyers out there!' I just don't understand it because that means now, the Commission says 'Oh it's Ireland again, you know, let's not laugh too much – they're here again, they've got another cockamamie story to tell!'

TWO ZERO-PROFITS ZERO-TAX MODELS

65. **We now have two zero-profits zero-tax models for housing. One is the cost rental model**, which has been available in Europe for donkeys' years, since the second world war, and it produces housing which – there or thereabouts – is available at an affordable and sustainable level. **The other is a model which is also zero-tax zero-profit, but it has the price of housing way up there, in order to pay the vulture funds.** So, I'm sorry, but if you look at those two models, two different ways of approaching the same problem, **why is it that we picked the vulture fund way?** I think there's going to be an inquiry somewhere down the line; someone is going to say, 'We have a housing crisis – where did we go wrong?' And this is going to be one of the key features. **It's because we made a choice made to re-liquidize the banks to make them solvent again, by means of subsidizing foreign capital to come in through a securitised scheme, acquiring the property and then selling it on.**
66. The logic of my proposals – **what I'm here to do is to say there should really be a State Aid investigation. I'm calling on the Commission to do that. I think I've laid out a prima facie case for that.**

AN ALTERNATIVE ROAD – THE REVENUE COMMISSIONERS

67. **But there is an alternative, which is even more interesting in a way, and it's also more immediate, and that is that the Irish revenue authorities are in a position to issue a tax assessment. Just pick a figure, say 'You're assessed this tax' – I'm sure some of you may already have received one of these! – and then you say 'Oh good God, now I have to call my accountant and I know I've got a problem!'**
68. There's absolutely no reason why the Irish revenue authorities shouldn't issue a tax assessment and say 'We think actually that you *don't* benefit under Section 110', and then let the argument commence. It's at that point we will flush out what exactly those

obscure sections mean, whether or not in fact there has been proof offered by the taxpayers as required under the section, whether or not there's been reasonable assumptions by the revenue authorities and so on and so forth. There's a whole mass of problems as a taxpayer if I get an assessment, when I now have to make sure that I fall within the four corners of that tax break, and I think you may find that the result of the tax assessment would be that in fact the exemption did *not* apply to the property-related SPVs.

69. **I think you would find that there would be a tax liability. That being so, the Commission's exercise would then be unnecessary. If some judge decides that the tax exemption appears to be watertight, the fall-back position is, okay, if it's watertight, then does it breach State Aid rules? Because that's a whole different question. So we have a pincer movement here which can arrest this problem, which is a combination of the domestic action and action in Brussels.**
70. Now you might ask yourself, would any politician in Dublin actually recommend this? The answer is probably they won't, because they don't understand it. They'd say, 'Well the Minister for Finance said it's something we've done and it seems to be working all right. It's in the statute now so it *must* be right!'
71. It's only when you drill down into this statute and compare it with what happened in the Apple case and all the other cases about how the Commission goes about its business to assess the impact of a State Aid, that you realize that there is a real *prima facie* case there to condemn the State Aid that that has been used in the particular context of the property-related SPVs, because the standard securitized model for funding is one which has been around since 1997.
72. I think it remains a tool which is available throughout the world. I should also say that this is not transfer pricing, it's not a transfer pricing question, so in the sense that you say this might be Apple 2, Apple being a transfer pricing case the parallel is not identical. There is an *element* of a question mark over the apportionment of costs which might be regarded as falling within the transfer pricing area of dispute, and so I would say there's a definite possibility that the Commission, having struck the blows if you like in Apple, are well prepared at this point to take on the State Aid measures in Section 110. And that's what I'm recommending.

MATT CARTHY - Question

73. Question: On your task of getting the Commission to initiate State Aid proceedings – it won't be easy. The Commission isn't always benign in these respects. They have a different approach to the to vulture funds and the role of vultures. A lot of people don't realize that the prevalence of vultures is really only happening in Ireland and Spain, it's not actually an EU-wide phenomena. The Commission is actually setting out to try and encourage other states to adopt the Irish model as a mechanism by which it can deal with the non-performing-loans issue. The Commission by-and-large deal with these things across the Commission, and while Vestager may have a particular input in terms of pursuing a case, it may not be shared across the board, so the case that's presented to

the Commission needs to be very strong when you want to get them to pursue a case on State Aid that might not necessarily be their instinctive position. We have raised questions in relation to what would appear to most people to be State Aid, in the form of tax-breaks being provided to the banks for example, the mechanism by which they're able to write off their losses during the years in which they were bailed out, which essentially means that they won't be paying taxes for up to 20 years – that to us is basically another grant, another bailout, but the Commission have refused to countenance this as State Aid on the basis that every bank can avail of the same mechanism. The case that appears to be the most obvious one that the Commission will present is that this is available to every vulture fund, therefore it's not de facto State Aid.

74. Ed Honohan reply: There are other companies who could buy the banks' bad assets, but they don't have €10 million to start off with, so straight away you've got selectivity there. You're saying, to buy into this you need €10 million from day one – that's what it says. I mean nobody in the non-profit area can afford to do that and you're not allowed into the data room, so you can forget it. So it is a *selective* aid and that ipso facto means there's a disturbance of a marketplace. There are foreign, that is European finance bodies, housing cooperatives etc. which could have been attracted into Ireland if an appropriate market existed.
75. There's an [article in Fordham International Law Journal](#) titled 'Transfer Pricing Rules in State Aid' by Richard Lyal, a member the European Commission, from 2015, Volume 38, Issue 4 – a very good article with up-to-date thinking about it(17). He's also critical of the court of course but that's the Commission and the court. But it's a very clear article, very clear argument.

PROFESSOR CONSTANTIN GURDGIEV - question

76. Question: It appears to me that Ireland's role has been like a Trojan horse throughout the years, for all sorts of the innovation and creativity surrounding the taxation regime etc. for the rest of Europe. Can you see this SPV structure section 110 being used to offshore out of Ireland into the rest of the EU and if so, is that in your view a legitimate point of pressure on the Commission to start an investigation?
77. Ed Honohan reply: I think it already *is* happening actually; it's certainly offshoring in the sense that we also have Irish SPVs, and the American SPVs and Cayman Islands and so forth, but we obviously have Irish SPVs, it's a vehicle that's available, but the securitisation is simply a recognition of where we are in world finance. It's impossible now – as you see the English courts found it impossible to say we have to cut the Gordian knot, we just have to go with the flow, that's what the English Court said. **I could see the Commission being concerned, certainly, if capital was being directed from Europe into Ireland. There's a case on it, Netherlands was involved in the case where they said they had a particular tax arrangement because they wanted to attract back capital that was being exported out of the country. I think that was also held to be selective under State Aid.**

78. Constantin: Ireland has the 'roguest' of the SPVs of course, called NAMA SPV, the sole owner of this entire entity of NAMA, and there's a very interesting issue there as well related to that. I don't know if it's getting the traction here in Europe right now or not but it should. **This is a relationship between whether NAMA can be treated as a sovereign agency under the FSIA in the United States (Foreign Sovereign Investment Exemption Act) or should it be treated as a private entity as the Irish government has adamantly insisted it is, and Eurostat has issued a ruling as well. That's also a very interesting issue.**
79. A: I read in an interesting book some years ago a rather disheartening comment about how the law impacts on banking, how law affects banking at a time of crisis. It said that up to the point where there's a crisis the law operates, but as soon as there's a crisis the banks do what the politicians and the regulators tell them to do, and *that's* what the law is at that point, so in other words there's a switch – they have to do what regulators tell them to do, and that's their cover.

FOOTNOTES

(1) <https://www.theguardian.com/politics/2019/mar/12/this-was-may-unplugged-unvoiced-and-once-more-exposed>

(2) <https://yaleglobal.yale.edu/content/invisible-hand-globalization> Alan Greenspan, *The Age of Turbulences*, Penguin press, New York, 2007, 2007, p.530

(3) Idem: 'Today, oversight of these transactions is essentially by means of individual-market-participant counterparty surveillance. Each lender, to protect its shareholders, keeps a tab on its customers' investment positions. Regulators can still pretend to provide oversight, but their capabilities are much diminished and declining'.

(4) Idem p. 529

(5) Section (4A), paragraph (c)

<https://www.charteredaccountants.ie/taxsource/1997/en/act/pub/0039/sec0110.html>

(6) Section (6), paragraph (a).

<https://www.charteredaccountants.ie/taxsource/1997/en/act/pub/0039/sec0110.html>

(7) Paragraph (302).

[https://eur-lex.europa.eu/legal-](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.187.01.0001.01.ENG&toc=OJ:L:2017:187)

[content/EN/TXT/?uri=uriserv:OJ.L_.2017.187.01.0001.01.ENG&toc=OJ:L:2017:187](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.187.01.0001.01.ENG&toc=OJ:L:2017:187)
[:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.187.01.0001.01.ENG&toc=OJ:L:2017:187)

(8) <https://www.oireachtas.ie/en/debates/question/2018-11-22/33/>

(9) Page 459, paragraph 6-016:

https://books.google.be/books?id=_yYS2hJxOcIC&pg=PA141&lpg=PA141&dq=Lloyd+LJ+simply+concluded+without+presenting+a+reasoned++argument+of+his+own,+beyond+summarizing+the+arguments+of+others&source=bl&ots=7tzkn8oTSC&sig=ACfU3U2PIct9_ZRgaZUJmorfHDJ--ndL-Q&hl=en&sa=X&ved=2ahUKEwiVnKLHsZPhAhWEY1AKHSztBdYQ6AEwAHoECDEQAQ#v=onepage&q=Lloyd%20LJ%20simply%20concluded%20without%20presenting%20a%20reasoned%20%20argument%20of%20his%20own%20C%20beyond%20summarizing%20the%20arguments%20of%20others&f=false

(10) Heading 'Profit neutrality', page 3 of 3:

<http://www.osiritrust.com/whatsnew/Irish%20SPV%20using%20section%20110%20provisions.pdf>

(11)

Sale to a special purpose vehicle

6-015 The structure involves a sale of the receivables by the originator to a special purpose vehicle as explained above.

The purchaser is usually a specially-formed single-purpose company whose shares are held by charitable trustees or foundations so as to be independent of the seller and not to be a subsidiary of anybody. The usual objective is that the purchaser should not be consolidated on the balance sheet of the seller. The originator is insulated from the insolvency of the SPV, and the investors in the SPV are insulated from the insolvency of the originator.

The SPV is formed as a public company, so as to be able to issue securities non-privately. The minimum capital requirement is an extra cost. The SPV may be formed in a tax haven jurisdiction.

6-016 Offshore SPV locations Ideally the SPV is located in a favourable jurisdiction which has low or no taxes (transfers, no withholding on the notes, a network of double tax treaties so that payments on the receivables are not subject to withholding taxes, no VAT on fees), creditor-friendly bankruptcy laws and security interests, political and legal stability, efficient low corporate costs, minimum capital requirements, and streamlined incorporation (no high minimum capital, number of directors), and minimal director liability (especially for not having stopped business before the onset of insolvency). Favoured jurisdictions include no-tax jurisdictions, such as Cayman, Gibraltar, the British Virgin Islands, Bermuda and Jersey, and low tax jurisdictions such as Ireland, the Netherlands and Luxembourg. Some investors have preferences for the jurisdiction of incorporation.

Trusts

6-017 Under this structure, the receivables are transferred to a trustee which holds them first for the benefit of the investors and then for the originator. The trustee issues pro rata certificates to investors. The originator's share is subordinated to that of the investors so that the investors have first bite—the junior share is the excess profit. The use of the securitisation trust in the US was originally inspired by US tax and accounting rules. These trusts are similar to collective investment schemes in the form of unit trusts, as opposed to open-ended investment companies.

A number of jurisdictions—mainly in the Napoleonic group—have legislation which uses the trust concept for a securitisation SPV. A trust exists where a trustee holds title to assets (has the receivables) on terms that the assets are immune from the private creditors of the trustee, not attaching creditors and bankruptcy creditors. Often these jurisdictions do not use the term "trust" (too Anglo-Saxon), but instead some such term as "common fund".

https://books.google.be/books?id=YtajfX_wbUkC&pg=PT147&lpg=PT147&dq=ideally+the+SPV+is+located+in+a+favourable+jurisdiction+which+has+low+or+no+taxes.+Favoured+jurisdictions+include+no+tax+jurisdictions+such+as+Cayman,+Gibraltar,+British+Virgin+Islands,+Bermuda,+and+Jersey,+and+low-tax+jurisdictions+such+as+Ireland,+the+Netherlands+and+Luxembourg.&source=bl&ots=4cRXjjSFzX&sig=ACfU3U2WJA0RDkb3zSu2OY4BcSQEhAnOtA&hl=en&sa=X&ved=2ahUKEwisvofbzZPhAhUOa1AKHYC-A9wQ6AEwCnoECBMQAQ#v=onepage&q=ideally%20the%20SPV%20is%20located%20in%20a%20favourable%20jurisdiction%20which%20has%20low%20or%20no%20taxes.%20Favoured%20jurisdictions%20include%20no%20tax%20jurisdictions

https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf

(12) Annex 1, paragraph A, third sentence:

https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf

(13) *ibid* – Code of Conduct for business taxation – tax measures covered – Paragraph B.

(14) Introduction, Item B, Paragraphs 9, 10, 11, 12:

[https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y1210\(01\):en:HTML](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y1210(01):en:HTML)

(15) Council of the European Union, Report from the Code of Conduct Group (Business Taxation) – the Primarolo Report, Paragraph 48, then footnote 21:

https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/primarolo_en.pdf

(16) JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition) – 14 February 2019 (State aid – Aid scheme implemented by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Excess profit exemption – Fiscal autonomy of the Member States – Concept of an aid scheme – Further implementing measures) – Paragraphs 60, 61, 62.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210761&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13712024>

(17) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2394&context=ilj>
Fordham International Law Journal – Transfer Pricing Rules and State Aid – Richard Lyal