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Minister Paschal Donohoe TD
Department of Finance
Government Buildings
Upper Merrion Street
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18 November 2020

Re: Finance Bill 2020 – Committee Stage

Dear Minister

We wrote to you on 2 November 2020 setting out our concerns about Section 15 of Finance Bill 2020 relating to transfer pricing. This section proposes a complete redesign of the legislative framework underlying the 'Ireland to Ireland' rule as set out in section 835E TCA 1997.

Although the existing provisions of section 835E TCA 1997 had some limitations, taxpayers and their advisers had been engaging constructively with Revenue over the past year to get a clear understanding of how the rules should be interpreted and applied.

Indeed, as we understood it, proposed Revenue guidance had reached a very advanced stage and was expected to be finalised over the next few weeks. That guidance was the subject of discussion with Revenue at a TALC meeting less than two weeks prior to the publication of the new version of section 835E TCA 1997 in Finance Bill 2020. To be clear, there was no indication from Revenue that legislative changes of the scale proposed were under consideration.

We welcome your Committee Stage amendments relating to loans from individuals to companies and the expansion of the definition of 'qualifying loan arrangement' to include debts. However, it is our strongly held view that section 15 remains deeply problematic for Irish business. The ability to utilise cash within their groups is crucial to all business and never more so than in the current crisis circumstances. This section will make this very difficult for our large indigenous businesses.

These businesses were already very worried about the narrow nature of the exclusion from the transfer pricing measures introduced by Finance Act 2019 and the position has been exacerbated by section 15 of Finance Bill 2020. While we accept that the issue of a 'replacement loan' is addressed by the Committee Stage amendments, the circumstances where it can apply are extremely narrow and, according to our members, will be of little use to most Irish groups.

Member of the Confédération Fiscale Européenne

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Another difficulty for large Irish businesses is that the legislation does not allow for multi-tiered holding companies. The fact that the 'qualifying loan arrangement' provisions only apply to single holding companies owning a trading entity takes no account of the layered structures that, for various reasons, develop in groups as they grow and evolve.

The impact of this is that a holding company of a direct trading entity would receive more favourable treatment than a holding company that owns a trading entity through intermediate holding companies. Similar issues regarding holding companies have arisen before and we would question why the structure of section 247 TCA 1997 cannot be replicated within section 835E TCA 1997.

It is also difficult to comprehend the treatment of holding companies in the proposed legislation. For example, loans by individuals to trading companies or Irish rental companies can be regarded as 'qualifying loan arrangements' but loans by individuals to holding companies cannot be regarded as such. Similarly, a loan to a trader to enable it to pay interest on a bank loan or to refinance a bank loan can qualify as a 'qualifying loan arrangement' but a loan to a holding company for the same purposes will not qualify.

A further anomaly arising out of the section is that an Irish company owning Irish rental properties would be treated in a significantly more favourable manner than an Irish company owning EU rental properties.

The free use of property or other assets intra-group within Irish groups is very common. It also not unusual for individual shareholder/ owners to allow their business free use of their assets. Often, this is done to ring-fence assets from trading risks or to prevent double taxation. However, under the proposed rules, these arrangements will not qualify for relief under the ‘Ireland to Ireland’ provisions because no consideration for the use of those assets is levied. Relief may be available if consideration “greater than a nominal amount” is charged but how do you define a nominal amount. These arrangements could lead to the production of taxable income at the rate of 25% notwithstanding the fact that the assets are almost always used to produce trading income for the group.

The whole concept of charging 'greater than a nominal amount' is difficult to understand. It seems anomalous not to allow relief in ‘free use’ situations but potentially to grant relief in some limited situations where a less than arm’s length amount but ‘greater than a nominal amount’ of consideration is charged. This is an extremely complex form of words that we predict will give rise to significant uncertainty in the application of the legislation. It could result in less than arm's length amounts being permitted under the section which would be totally at odds with the purpose of transfer pricing rules. A more direct approach which exempts transactions between domestic entities, as occurs in other EU jurisdictions would be simpler and clearer and would lead to a more effective transfer pricing regime.

We would also point out that the legislation, as proposed, would substantially limit the applicability of the ‘Ireland to Ireland’ exclusion for Irish groups and would significantly increase their tax liabilities. This, despite the indication previously from policymakers that transfer pricing between two Irish entities should operate in a tax neutral manner and that the measures were not intended to be revenue-raising.

The proposed legislation would seem to depart from key OECD principles such as, the avoidance of double taxation, and is inconsistent with the principles enunciated in the recently introduced anti-hybrid legislation. The income inclusion without deduction outcome which follows from the one-sided nature of the transfer pricing charge and the restrictive nature of Ireland’s deduction regime (particularly for interest) may be

capable of being remedied through an amendment to the corresponding adjustment provisions in section 835H TCA 1997.

As mentioned above, the transfer pricing regimes in other EU countries either grant exemptions for transactions between two domestic entities or provide for a corresponding deduction where income is attributed to the supplier in a transaction. We would ask you, Minister, to consider adopting a similar approach in the design of our transfer pricing regime for transactions between two domestic entities in Ireland.

The existing approach is to apply transfer pricing while allowing for certain exclusions from the charge. An alternative approach would be to apply transfer pricing but to provide for corresponding deductions. This concept is already enshrined in section 835H, the purpose of which is to eliminate artificial increases in the domestic corporate tax base. Where an 'Ireland to Ireland' transaction is not undertaken for bona fide commercial reasons, then relief by way of a corresponding adjustment would not be afforded.

We are keen to understand your position on the above issues and in that regard, we think it would be helpful to have constructive engagement with your officials in advance of Report Stage. We believe it is possible to achieve your policy objective without disadvantaging our indigenous businesses.

Repayment or refund of payment made in excess of liability to tax assessed by taxpayer

In our letter of 2 November, we also outlined our concern about section 67 of the Bill which seeks to remove a well-established obligation on Revenue to pay interest where a disputed assessment is discharged by the taxpayer in advance of a tax appeal that is subsequently upheld by the Tax Appeals Commission.

We are disappointed that you have not reconsidered this provision which we believe will unbalance the appeals process to the detriment of the taxpayer. The imposition of interest charges disciplines the behaviours of both parties to an appeal. Our fear is that the removal of the interest obligation from Revenue could overtime influence the rigour of the assessment process.

We believe an overall review of the current interest rate regime would be more appropriate than a unilateral change of the kind proposed in the Finance Bill 2020. Such a review should include a consultative process and should take account of the need to protect the taxpayer as well as the Exchequer.

We hope all the matters outlined above can be considered in the context of the Report Stage on the Bill.

Yours sincerely

Sandra Clarke
Institute President