Irish Tax Institute

April 2021

Application of the Authorised OECD Approach to the Attribution of Profits to Branches of Non-Resident Companies

Response to the Public Consultation

Table of Contents

1. About the Irish Tax Institute 3
2. Executive Summary 4
3. Institute Recommendations 5
4. Response to Questions in the Consultation Document 7
4.1 Basic rules and relevant definitions 7
4.2 Documentation requirements and considerations for enterprises of a certain size..... 7
4.3 Sectoral considerations and capital attribution 8

1. About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's Chartered Tax Advisers (CTA) and is the country's only professional body exclusively dedicated to tax.

The Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice. We benchmark our education programme against the very best in the world. The continued development of our syllabus, delivery model and assessment methods ensure that our CTAs have the skills and knowledge they need to meet the ever-changing needs of their workplaces.

Our membership of over 5,000 is part of the international CTA network which has more than 30,000 members. It includes the Chartered Institute of Taxation UK, the Tax Institute of Australia, and the Taxation Institute of Hong Kong. The Institute is also a member of the CFE Tax Advisers Europe (CFE), the European umbrella body for tax professionals.

Our members provide tax services and business expertise to thousands of Irish owned and multinational businesses as well as to individuals in Ireland and internationally. Many also hold senior roles in professional service firms, global companies, Government, Revenue, state bodies and in the European Commission.

The Institute is, first and foremost, an educational body but since its foundation in 1967, it has played an active role in the development of tax administration and tax policy in Ireland. We are deeply committed to playing our part in building an efficient and innovative tax system that serves a successful economy and a fair society. We are also committed to the future of the tax profession, our members, and our role in serving the best interests of Ireland's taxpayers in a new international world order.

Irish Tax Institute - Leading through tax education

2. Executive Summary

The Irish Tax Institute welcomes the opportunity to respond to the public consultation on the proposed application of the Authorised OECD Approach (AOA) to the attribution of profits to branches of non-resident companies in Ireland.

The proposed adoption of the AOA, which will extend transfer pricing principles to the taxation of branches in Ireland, represents an important step in the modernisation of Ireland's transfer pricing rules. The AOA rule is contained in Article 7(2) of the OECD Model Tax Convention (MTC), for the determination of profits attributable to a permanent establishment (PE). The guidance on the application of the AOA is set out in the OECD's 2010 Report on the Attribution of Profits to Permanent Establishments, published in July 2010, commonly known as, the AOA guidance.

In adopting the AOA into Irish law, we believe policymakers should align the legislation as closely as possible with the AOA guidance. Documentation requirements should be consistent with and should not be any more onerous than those which apply for Irish transfer pricing purposes to transactions between associated companies.

In our view, a lower compliance burden is appropriate for SMEs and therefore, simplified documentation requirements should apply for the purposes of the application of the AOA to branches of non-resident SMEs. This would be consistent with the approach implemented for SMEs in updated transfer pricing legislation introduced in Finance Act 2019.

The AOA provides for the attribution of capital to a PE to support the functions it has performed, the risks assumed, and assets attributed to it. The attribution of capital to a branch for the purposes of the AOA is a significant consideration for businesses, in particular those operating in the financial services sector. The AOA guidance sets out a number of different methodologies which can be used to determine the allocation of capital to a PE. In our view, policymakers should not be prescriptive regarding the method of capital attribution to be used but rather the legislation should allow the taxpayer the flexibility to choose the most appropriate methodology for their business that is permitted under the AOA guidance.

As a number of Ireland's double tax treaties pre-date the publication of the AOA guidance, it would be important in the event of a dispute with a treaty country regarding the application of the AOA to an Irish branch that the taxpayer has access to the Mutual Agreement Procedure to assist in resolving that dispute.

Finally, comprehensive Revenue guidance regarding the application of the AOA in an Irish context will be required to provide certainty for business and this should be available when the new framework becomes law. However, should the policy intention be to narrow any of the options provided in the AOA guidance, it would be essential that this is specified in the legislation rather than outlined in Revenue guidance.

3. Institute Recommendations

Basic rules and relevant definitions

1. As many of Ireland's double tax treaties pre-date the AOA guidance, consideration will need to be given to the potential consequences arising from the application of the legislation in circumstances where the non-resident company is resident in such a treaty country. In these circumstances, it would be important in the event of a dispute with a treaty country regarding the application of the AOA to an Irish branch that the taxpayer has access to the Mutual Agreement Procedure to assist in resolving that dispute.

2. Comprehensive Revenue guidance regarding the application of the AOA in an Irish context will be required to provide certainty for business and this should be available when the new framework becomes law.

Documentation requirements and considerations for enterprises of a certain size

3. The documentation requirements for the purposes of the application of the AOA should be consistent with and should not be any more onerous than those set out in section 835G TCA 1997 for Irish transfer pricing purposes.

4. The simplification measures set out in Revenue's Tax and Duty Manual on Transfer Pricing[1] such as the option to prepare a Country File and the use of counter-party documentation to support a position adopted should similarly apply to branches. If a head office has prepared supporting documentation, then this should satisfy any obligation which the branch has to prepare documentation.

5. We believe that a lower compliance burden is appropriate for SMEs and therefore reduced documentation requirements should apply for the purposes of the application of the AOA to branches of non-resident SMEs.

6. Consistent with the reduced documentation requirements for SMEs for Irish transfer pricing purposes, documentation requirements should be disapplied for small enterprises and simplified documentation should be required for medium sized enterprises.

7. The thresholds for determining whether an enterprise is a small or medium enterprise should be applied at group level rather than at branch level.

Sectoral considerations and capital attribution

8. In our view, policymakers should not be prescriptive regarding the method of capital attribution to be used and Irish law should allow the taxpayer the flexibility to choose the most appropriate methodology for their business which is permitted under the AOA guidance.

[1] Transfer Pricing Tax & Duty Manual, Part 35A-01-01, paragraph 8.8.

9. If it is the policy intention to narrow the options permitted in the AOA guidance for attributing capital to branches, this should be specified in legislation rather than outlined in Revenue guidance.

4. Response to Questions in the Consultation Document

4.1 Basic rules and relevant definitions

The consultation document[2] states that the intention of the proposed legislation is to require income of an Irish branch or agency of a non-resident company to be computed in accordance with the Article 7(2) of the OECD Model Tax Convention and the 'authorised OECD approach guidance'. The 'authorised OECD approach guidance' (the AOA guidance) refers to the 2010 Report on the Attribution of Profits to Permanent Establishments approved for publication by the Council of the OECD on 22 July 2010. It is proposed that this definition may be supplemented by such additional guidance as may be designated by the Minister for Finance on or after the date of the passing of Finance Act 2021.

We welcome the direct reference to the AOA guidance in Irish legislation and believe that policymakers should align Irish law as closely as possible with the AOA guidance. We note that the AOA guidance refers to the 2010 OECD Transfer Pricing Guidelines and would suggest that further clarity is needed as to whether it is intended that the AOA guidance should be read by reference to the 2017 OECD Transfer Pricing Guidelines, rather than the 2010 OECD Transfer Pricing Guidelines.

As many of Ireland's double tax treaties pre-date the AOA guidance, consideration will need to be given to the potential consequences arising from the application of the legislation in circumstances where the non-resident company is resident in such a treaty country. In these circumstances, it would be important in the event of a dispute with a treaty country regarding the application of the AOA to an Irish branch that the taxpayer has access the Mutual Agreement Procedure to assist in resolving that dispute.

Finally, comprehensive Revenue guidance regarding the application of the AOA in an Irish context will be required to provide certainty for business and this should be available when the new framework becomes law.

4.2 Documentation requirements and considerations for enterprises of a certain size

The consultation document states that the legislation is likely to set out a requirement for the non-resident company to maintain and have available for inspection by Revenue such records as would be necessary to verify compliance with the new provisions. The legislation could also provide that specific documentation would be included in such records.

To ensure that transfer pricing documentation requirements are proportionate, the master file and local file obligations apply only where turnover exceeds €250 million per annum in the case of the master file and €50 million in the case of the local file, with each test applying on a global consolidated group basis. We believe that the documentation requirements for the purposes of the application of the AOA rule should

[2] Ireland's corporation tax rules: Public consultation on the application of the Authorised OECD Approach to the attribution of profits to branches of non-resident companies, Department of Finance, March 2021.

be consistent with and should not be any more onerous than the documentation requirements for transfer pricing purposes as set out in section 835G TCA 1997.

Revenue guidance will be needed on the type of documentation required in the context of branches, for example, the documentation required for transactions between a branch and its head office (which are one legal entity). We believe that the simplification measures set out in Revenue's Tax and Duty Manual on Transfer Pricing,[3] such as the option to prepare a Country File and the use of counter-party documentation to support a position adopted should similarly apply to branches. Supporting documentation prepared by the non-resident company and stored outside of Ireland should satisfy the obligation of a branch to prepare such documentation.

The consultation document notes that consideration may need to be given to whether the AOA should apply to companies of a certain size. There is a long-standing approach under European law to distinguish SMEs from larger businesses because of their different economic and financial requirements and contributions. For the purposes of transfer pricing legislation, section 835F TCA 1997[4] disapplies the documentation requirements contained in section 835G TCA 1997 for small enterprises (which are defined as enterprises with less than 50 employees and an annual turnover and/or balance sheet total of less than €10 million). Medium sized enterprises[5] are required to provide simplified transfer pricing documentation only in relation to a 'relevant arrangement' (where the value of the related-party cross-border transaction exceeds €1 million or in the case of capital transactions, the value of the asset exceeds €25 million).

We believe that a lower compliance burden is appropriate for SMEs and therefore reduced documentation requirements should apply for the purposes of the application of the AOA rule to branches of non-resident SMEs. Consistent with the requirements for SMEs for transfer pricing purposes, documentation requirements should be disapplied for small enterprises and simplified documentation should be required for medium sized enterprises. This approach would be consistent with the principle enunciated in the AOA guidance that documentation requirements should not impose on taxpayers' costs and burdens disproportionate to the circumstances.[6] The thresholds for determining whether an enterprise is a small or medium enterprise should be applied at group level rather than branch level.

4.3 Sectoral considerations and capital attribution

The AOA provides for the attribution of capital, including 'free capital', to the PE to support the functions it has performed, the risks assumed and assets attributed to it. 'Free capital' means funding that does not give rise to a tax deductible return in the nature of interest.[7] The attribution of capital to a branch for the purposes of the AOA is a

[3] Transfer Pricing Tax & Duty Manual, Part 35A-01-01, paragraph 8.8.
[4] Section 835F TCA 1997 is subject to a ministerial commencement order.
[5] Medium sized enterprises are defined in the Annex to Commission Recommendation 2003/361/EC of 6 May 2003.
[6] 2010 Report on the Attribution of Profits to Permanent Establishments, 22 July 2010, at paragraph 224.
[7] 2010 Report on the Attribution of Profits to Permanent Establishments, at paragraph 28.

significant consideration for businesses, in particular those operating in the financial services sector.

The AOA guidance sets out a number of different methodologies which can be used to determine the allocation of free capital to a PE. In our view, policymakers should not be prescriptive regarding the method of capital attribution to be used and the legislation should allow the taxpayer the flexibility to choose the most appropriate methodology for their business which is permitted under the AOA guidance. This would enable taxpayers to use the most appropriate methodology for their business and it would also allow for consistency in the measurement being applied across the jurisdictions in which a group is established. We understand that Revenue permits such flexibility at present in determining the appropriate methodology to be used to assess the free capital which is to be attributed to a PE.

Detailed Revenue guidance regarding the application of the methodologies contained in the AOA guidance in practice, will be required to provide certainty for business. However, should the policy intention be to narrow any of the options provided in the AOA guidance, it would be essential that this is specified in the legislation rather than outlined in Revenue guidance.