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Feedback Statement on New Taxation Measures to apply to Outbound Payments
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Feedback Statement on New Taxation Measures to apply to Outbound Payments

Dear Sir/Madam

The Irish Tax Institute welcomes the opportunity to engage with the Department of Finance regarding the Feedback Statement on New Taxation Measures to apply to Outbound Payments (Feedback Statement).

A series of commitments were made as part of Ireland's National Recovery and Resilience Plan (NRRP)[1] to tackle aggressive tax planning and to introduce legislation applying to outbound payments to prevent double non-taxation. It is in this context that the Feedback Statement seeks the views of stakeholders on a possible legislative approach to new taxation measures applying to outbound payments.

The Institute recognises that Ireland must introduce legislation to fulfil its commitment under the NRRP in respect of outbound payments. However, it is our firm view, that if Ireland is to remain an attractive location for investment, any new taxation measures applying to outbound payments must be proportionate while meeting the central objective of the commitment which is to prevent double non-taxation. The overriding concern raised by our members is that, as currently drafted, the proposed legislative approach outlined in the Feedback Statement will in many instances go beyond what is necessary to prevent double non-taxation and may give rise to unintended consequences.

[1] Ireland's National Recovery and Resilience Plan 2021, published 1 June 2021.

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Preventing double non-taxation

Following Ireland's commitment to the OECD base erosion and profit shifting (BEPS) project and the transposition of the EU Anti-Tax Avoidance Directives (ATAD1[2] and ATAD2[3]) into Irish law, extensive reforms have been implemented in domestic legislation over recent years to eliminate BEPS opportunities and to prevent aggressive tax planning. These measures include an ATAD compliant Interest Limitation Rule, Controlled Foreign Company (CFC) rules, anti-hybrid rules, extended transfer pricing rules and ratification of the BEPS multilateral instrument to ensure Ireland's tax treaty network is compliant with BEPS standards.

In addition to the above measures, Finance (No.2) Bill 2023 will transpose the Pillar Two Global Anti-Base Erosion Model Rules[4] (GloBE Model Rules) into Irish law. The GloBE Model Rules provide for a minimum effective tax rate of 15% for in-scope multinational enterprises (MNEs) and therefore, further limit the ability of such MNEs to reduce their taxes by availing of low tax or zero-tax regimes.

Notwithstanding the comprehensive range of recent domestic and international tax reforms, the Institute recognises that a commitment was made by Ireland as part of its NRRP and that new taxation measures applying to outbound payments must be introduced on foot of that commitment.

The Annex to the 2021 *Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Ireland*[5] and the European Commission's 2022 and 2023 Country Reports for Ireland[6] each clearly state that the objective of the commitment provided by Ireland in respect of the introduction of taxation measures to apply to outbound payments is to prevent double non-taxation.

Accordingly, we believe that given the extensive tax reforms which have already been put in place to combat aggressive tax planning, the proposed measures to be introduced in respect of outbound payments must be proportionate and should not go beyond what is necessary to achieve the objective of preventing double non-taxation. To do otherwise would unnecessarily weaken Ireland's international competitiveness as an investment location.

[2] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[3] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.
[4] OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/782bac33-en
[5] Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Ireland, ST 11046/21, 31 August 2021.
[6] 2022 Country Report – Ireland, Accompanying the document Recommendation for a Council Recommendation on the 2022 National Reform Programme of Ireland and delivering a Council opinion on the 2022 Stability Programme of Ireland, SWD(2022) 615 final/2, at page 7 and the 2023 Country Report – Ireland, Accompanying the document Recommendation for a Council Recommendation on the 2023 National Reform Programme of Ireland and delivering a Council opinion on the 2023 Stability Programme of Ireland, COM(2023) 607 final, at page 7.

To ensure that the proposed measures will only apply in cases of double non-taxation, it is critical that the legislative provisions are formulated to take account of tax paid on payments in another jurisdiction, even if the payments are not taxed on the entity that receives the payment from Ireland. For example, it should be possible to look through transparent entities such as partnerships and US check-the-box entities where the payment is ultimately subject to tax (albeit not necessarily by the immediate recipient).

A key concern raised by our members is that the proposed approach to the legislation does not consider the range of scenarios where an outbound payment will already have been subject to Irish corporation tax and consequently, there is no possibility of double non-taxation.

For example, there are a range of domestic anti-avoidance measures, such as section 130 Taxes Consolidation Act (TCA) 1997, which recharacterises interest as a distribution in certain circumstances. However, notwithstanding that interest has been recharacterised as a distribution, the payment could be in scope of the proposed new measures even though the company will not have received a corporation tax deduction for the payment.

We note that the commitment made by Ireland refers to the introduction of measures which will include withholding taxes in the case of dividends. As dividends are not deductible for corporation tax purposes, it is unclear how double non-taxation could arise. Furthermore, Ireland already has an extensive dividend withholding tax regime with exemptions applying where the dividend (distribution) is paid to:

- a non-resident company that is resident in a tax treaty jurisdiction or in another EU Member State, where the company is not controlled by Irish residents;
- a non-resident company that is ultimately controlled by residents of a tax treaty jurisdiction or another EU Member State; or
- a non-resident company whose principal class of shares are traded on a recognised stock exchange in a tax treaty jurisdiction or another EU Member State.

In addition, detailed declarations must be in place before any dividend (distribution) can be paid free of dividend withholding tax.

We consider that the robust domestic measures already in place in respect of distributions are sufficient to address any risk of double non-taxation. Accordingly, it is our firm view that the broad scope of the proposed measures to apply in respect of distributions is disproportionate and should be reviewed.

Protecting Ireland’s ability to attract foreign direct investment

In our view, the introduction of the proposed provisions to apply to outbound payments as set out in the Feedback Statement would negatively impact Ireland’s position in competing for foreign direct investment. This is because the proposed measures, as currently drafted, are out of step with the approach being adopted by many of Ireland’s competitors.

The measures outlined in the Feedback Statement, if implemented, would apply to outbound payments to a specified territory irrespective of whether there are substantive activities carried on in the specified territory. The result is that the proposed measures are far-reaching and may unfairly impact groups that are carrying on *bona fide* substantive economic activities in a specified territory.

The EU Code of Conduct Group (Business Taxation) and the OECD Forum on Harmful Tax Practices both assess harmful tax practices. One of the factors that the EU Code of Conduct Group (Business Taxation) considers in its assessment of potentially harmful tax measures is whether tax advantages are granted even without real economic activity or substantial economic presence.[7] A key focus of the OECD Forum on Harmful Tax Practices in assessing preferential tax regimes is also the consideration of whether there is a substantial activity requirement.[8]

Notably, in the context of the potential introduction of additional defensive measures in respect of outbound payments to listed jurisdictions, Ireland’s Corporation Tax Roadmap – January 2021 Update stated that the design of measures “*would need careful consideration, and consultation, to ensure profits which are generated from actual substantive activities in listed countries are not unfairly impacted.*”

If Ireland is to continue to remain an attractive location for investment, it is important that any new taxation measures to apply to outbound payments are proportionate and are aligned with similar measures in place in other EU Member States.

Impact on existing arrangements

The Feedback Statement notes it is intended that the new provisions will apply for a payment of interest or royalties or the making of a distribution on or after 1 January 2024. This timeframe will provide groups with a very short period to assess the impact of the proposed provisions and if necessary, to restructure existing arrangements. For some

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[7] Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy - Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation - Taxation of saving. *Official Journal C 002, 06/01/1998 P. 0001 - 0006*

[8] OECD (2019), Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, page 40

groups, the implementation of these rules will come at a time when they are already striving to comprehend the impact of Pillar Two on their business.

The exemptions from withholding tax for interest on quoted Eurobonds and wholesale debt instruments exemption are longstanding exemptions that are relied on extensively in the Irish financial services industry to ensure efficient functioning of the capital markets. Consequently, the proposed measures will have a very significant impact on this sector.

Where there is no current requirement for the Irish entity to apply withholding tax to payments of interest, royalties or distributions to an associated entity, the underlying documentation in place between the entities is unlikely to cater for a scenario where the Irish entity is required to apply a withholding tax to the outbound payment. In certain circumstances, such as where the payment of interest from the Irish entity to the associated entity in the specified territory is being used to fund repayments of a third-party debt, it may be difficult to unwind such existing arrangements and would take time to put alternative funding arrangements in place.

We strongly believe that an appropriate lead in time for the new taxation measures should be provided and that consideration must be given to grandfathering existing commercial arrangements. This would provide groups operating in Ireland with the time they need to assess the impact of the proposed measures on existing arrangements, to restructure such arrangements if appropriate, or to put the appropriate documentation and procedures in place to ensure withholding tax may be applied to in-scope payments.

It would also be important to clarify that the new provisions will not apply to an outbound payment which is accrued before, but is not paid until after, the new provisions come into effect.

Withholding tax administrative practices

Revenue has helpfully provided guidance[9] on situations where taxpayers can withhold tax at the rate set out in a double tax treaty from interest or royalties paid to residents of a treaty partner, rather than withhold and remit an amount of tax that is subsequently refundable under that double tax treaty. The Feedback Statement notes that as a consequence of the proposed measures to apply to outbound payments, existing administrative practices with regard to the requirement to withhold tax may be altered. It appears the intention is that where the proposed measures apply to an outbound payment, the practice prospectively would be to require tax to be withheld and a refund claim be made under the relevant double tax treaty.

[9] Payment and receipt of interest and royalties without deduction of income tax, Tax and Duty Manual, Part 08-03-06, Revenue Commissioners, June 2023.

In our view, a change in the current administrative practice is unnecessary and would be contrary to the principle of self-assessment. Such a move would add further complexity and increase the administrative burden for investors. It would also appear contrary to current efforts underway at EU level, as part of the FASTER initiative,[10] which aims to tackle burdensome withholding tax relief procedures that act as a tax barrier to cross-border investment.

Consultation Questions

We have set out below our specific comments on the technical detail of the proposed legislative provisions to apply to outbound payments of interest, royalties and dividends (distributions) as set out in the Feedback Statement.

Definitions

Foreign company charge

The proposed definition of 'foreign company charge' is based on the definition contained in Part 35B TCA 1997 and means *"a charge under the laws of a territory, other than the State, which is similar to the controlled foreign company charge".* The definition is therefore based on the premise that the foreign company charge must be similar to the Irish CFC rules. As CFC rules can operate differently across jurisdictions, it would be important that clarification is provided regarding when a foreign company charge will be considered similar to the Irish CFC rules.

Notably, Revenue guidance[11] on the anti-hybrid rules explains that when looking at charges that are similar to the Irish CFC charge *"what is essential is whether a corresponding amount, in respect of a payment, has been included as taxable income under some regime that taxes foreign profits".* The guidance states, that for the purpose of the anti-hybrid rules, income that is subject to rules in other EU Member States that are aligned with Article 7 of ATAD and a payment that gives rise to an amount that is included in the US Global Intangible Low Taxed Income (GILTI) calculation for the purposes of the group's US taxable income will be treated as 'included' for the purposes of the anti-hybrid rules.

Supplemental tax

The feedback we have received from our members is that the definition of supplemental tax is too narrow in scope and clarity is needed regarding certain aspects of the definition.

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[10] European Commission initiative for a new EU system for the avoidance of double taxation and prevention of tax abuse: Faster and Safer Relief of Excess Withholding Taxes. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13031-Withholding-taxes-new-EU-system-for-the-avoidance-of-double-taxation-and-prevention-of-tax-abuse-Faster-and-Safer-Relief-of-Excess-Withholding-Taxes_en
[11] Tax and Duty Manual, Part 35C-00-01, Revenue Commissioners at paragraph 4.2.2.

While it would appear the objective of the definition of supplemental tax is to ensure that the proposed measures only apply in situations where the outbound payment is not subject to tax, the only taxes which are taken into account in considering whether a payment is subject to supplemental tax are a foreign tax charge, a qualified IIR, a qualified UTPR or a qualified domestic top-up tax. Consequently, the application of the rules is likely to have a much greater impact for groups which are not within scope of the Pillar Two GloBE Rules.

The definition of supplemental tax, as currently drafted, does not take account of the many situations where the payment of the interest, royalty or distribution could be attributed as income to an entity other than the entity to which it is paid (other than under Pillar Two or a foreign company charge).

In an Irish context, such a scenario exists under the anti-avoidance provision in section 806 TCA 1997 which is designed to counter individuals resident or ordinarily resident in Ireland avoiding tax by means of a transfer of assets, as a result of which income becomes payable to a person who is resident or domiciled outside of Ireland. Section 806 operates to treat the income arising abroad as chargeable to tax on the Irish resident where he or she has the power to enjoy any of the income or any capital sum which is in any way connected with the transfer or with any associated operation.

Notably, Revenue's guidance[12] on the anti-hybrid rules refers to anti-avoidance provisions similar to section 806 and section 590 TCA 1997. The guidance states that where an Irish payer can illustrate that a payment gives rise to a corresponding amount being included in the calculation of the amount charged to tax under such an anti-avoidance provision, the income should be regarded as included for the purposes of the anti-hybrid rules.

To ensure that a withholding tax will only apply in cases of double non-taxation, it is critical that the definition of supplemental tax is drafted so that it includes all taxes wherever they are paid. Like the position adopted in respect of the anti-hybrid rules, the provision should be drafted so as to take account of tax paid on the payments in another jurisdiction, even if the payments are not taxed on the entity in the jurisdiction that receives the payment from Ireland. For example, it should be possible to look through transparent entities such as partnerships and US check-the-box entities where the payment is ultimately subject to tax (albeit not necessarily by the immediate recipient).

In our view, it would be appropriate for a payment to be considered subject to tax in each of the following circumstances:

- where tax would be imposed in a territory that is not a specified territory, for example under a CFC charge or US check-the-box rules, but for the fact that the particular

[12] Tax and Duty Manual, Part 35C-00-01, Revenue Commissioners at paragraph 4.2.2.

ultimately investors are tax exempt (for example in the case of pension funds or government bodies);
- where payments which are paid to an entity in a specified territory, are promptly paid out to persons not based in a specified territory (such as in the case of certain back-to-back financing arrangements with third-parties);
- where a payment might be subject to other forms of direct taxation such as withholding taxes imposed by other jurisdictions (in the case of a branch) or Irish withholding tax applying at a reduced rate under a double tax treaty.

Furthermore, where a deduction is not taken for a payment, a double non-taxation outcome should not arise and therefore, the proposed measures should not apply.

As is the case in Ireland, it is common for the tax legislation in a jurisdiction to provide that if an entity is incorporated in the jurisdiction, then it is resident in that jurisdiction. But the proposed legislation does not appear to take the position of dual-resident entities into account.

For example, an entity may be incorporated in Country X, a specified territory, and is therefore deemed resident in Country X. The entity may also be tax resident in Country Y which is not a specified territory as it imposes tax on interest, royalties and distributions. Even though an outbound payment to Country X is subject to tax in Country Y, it is not clear under the proposed approach outlined in the Feedback Statement that the tax paid on the payment in Country Y will be taken into consideration for the purpose of determining whether the payment is taken into account in computing an amount of supplemental tax.

Supplemental tax is defined as including a qualified IIR, a qualified UTPR or a qualified domestic top-up tax. The definition means that, at least in the longer term, the application of the rules to MNEs within scope of the Pillar Two GloBE Model Rules will be limited. However, the timing of the application of the proposed measures to apply to outbound payments is not aligned with the timing of the implementation of the GloBE Model Rules. Consequently, there will be an interim period where MNEs within scope of the GloBE Model Rules will also need to consider if they are in-scope of the taxation measures to apply to outbound payments.

In addition, clarity is required as to whether a payment will be considered to have been taken into account in computing an amount of supplemental tax where a MNE avails of a safe harbour under the GloBE Model Rules, such as the transitional Country-by-Country Reporting safe harbour. Furthermore, it would seem that an outbound payment that is taken into account for the purpose of a domestic top-up tax which is not considered qualifying for the purpose of the GloBE Model Rules, would not meet the threshold of supplemental tax albeit the outbound payment will have been subject to tax.

Our members have also raised concerns that as dividends between associated entities would typically be excluded from GloBE income, such dividends may not be viewed as "*taken into account in computing an amount of supplemental tax*". We believe that an alternative approach which could be considered is that the proposed measures to apply to distributions would not apply if the distribution would have been treated as an 'excluded distribution' under the GloBE Model Rules (i.e., a 10% shareholding was held for a period of 12 months in the company making the distribution).

<u>Zero-tax territory</u>

The definition of zero-tax territory is unclear and is potentially very broad. It would appear that jurisdictions with remittance-based taxation systems could come within the scope of the definition. In this regard, it would be helpful to confirm that it is intended that the existing treatment which applies for withholding tax purposes in respect to payments of interest to a territory with a remittance basis of taxation (such as Singapore) or to a territory with a territorial system of taxation (such as Hong Kong), as outlined in Revenue guidance[13], will continue to apply following the introduction of the proposed measures.

In addition, it would need to be considered whether domestic rules or exemptions that apply in a jurisdiction that is not a no-tax or zero-tax jurisdiction could potentially result in the jurisdiction coming within the definition of a zero-tax territory. For example, a participation exemption in a jurisdiction may operate in such a manner that all dividends derived by an entity that is a resident of the jurisdiction from a source outside that jurisdiction are exempt from tax unless that resident holds less than 10% of the entity paying the dividend. In those circumstances, the jurisdiction may not be considered to impose a tax that *"generally applies"* to dividends. We do not believe that this is intended.

We note that paragraph 1.1 of the Feedback Statement confirms that the proposed measures are not intended to apply to jurisdictions that are not no-tax or zero-tax jurisdictions but provide a participation exemption where the relevant conditions for that exemption are met in that jurisdiction. It is unclear whether the definition of zero-tax territory, as drafted, achieves this objective.

<u>Associated entities</u>

Subsection 2(a) of the definition of associated entities refers to an entity having "*not less than*" 50% of the issued share capital or voting rights of the other entity. We believe it would be appropriate for the definition to apply to "*more than*" 50% entities rather than "*not less than*" 50% entities.

[13] Tax and Duty Manual, Part 08-03-06, Payment and receipt of interest and royalties without deduction of income tax, Revenue Commissioners, June 2023, at paragraph 6.

The definition of associated entities is somewhat ambiguous as the test of whether entities are associated is not confined to generally understood concepts such as share ownership and control. Instead, it is proposed to introduce a new concept of 'definite influence' into Irish tax law. In our view, considering the far-reaching impact of the proposed measures, rather than introducing a vague new concept which is unfamiliar to taxpayers, it would be preferable to rely on existing concepts in Irish tax law, such as control, which are clearly understood by all.

The definition of 'definite influence' refers to an entity having the ability to ensure the affairs of the other entity are conducted '*in accordance with the wishes of the first mentioned entity*". We believe the term "*in accordance with the wishes*" is subjective and therefore, its meaning will not be clearly understood. For example, clarity would be needed regarding how the test would be applied in circumstances where a company director is granted additional powers.

Outbound payments of interest

The proposed provisions to apply in respect of the payment of interest are very broad and do not take into account the nuances of existing domestic provisions dealing with the taxation of interest. The result is that contrary to the objective of preventing double non-taxation, the proposed approach outlined in the Feedback Statement will result in the application of withholding tax irrespective of whether a tax deduction has been obtained for such interest.

As many Irish companies are subsidiaries of foreign companies, the activities of an Irish company is often financed by monies lent to the Irish entity by the foreign parent and interest is payable to that parent. Under section 130(2)(d)(iv) TCA 1997, such interest, if the interest is payable to a non-resident company of which the Irish company is a 75% subsidiary or associate, it is treated as a distribution and, therefore, is not deductible as a trading expense.

However, section 452(2) TCA 1997 allows interest to escape the application of section 130(2)(d)(iv) if the company so wishes where the interest is payable to a company which is a resident of a tax treaty country, or an EU Member State. The interest concerned must also be payable by a company in the course of its trade and be deductible for tax purposes but for the rule in section 130(2)(d)(iv). The treatment in section 452(2) is optional and the company can elect in its corporation tax return for the period in question to take a deduction for the payment of interest. In the absence of making an election, the interest is treated as a distribution by virtue of section 130(2)(d)(iv) TCA 1997.

The proposed measures to apply to outbound payments of interest do not take into account the optional nature of section 452. This means that notwithstanding that a company has chosen not to apply the treatment afforded under section 452 with the result that no

deduction from corporation tax has been claimed in respect of the payment of interest, withholding tax under section 246(2) will apply to the payment of interest.

Section 452(3A) only allows a section 452 election to be made for payments of yearly interest to a non-tax treaty jurisdiction. However, the proposed measures will treat payments of short interest as yearly interest for the purposes of section 246 (i.e., payments of short interest will be subject to withholding tax if the payment is made to a specified territory).

Therefore, as short interest would now be treated as yearly interest for withholding purposes, in our view, consideration should be given to extending section 452 to allow an election to be made for payments of short interest to a non-tax treaty jurisdiction. Otherwise, the new measures would apply notwithstanding that there is no option to take a deduction for the interest for corporation tax purposes.

There are other domestic measures which may deny a corporation tax deduction of an interest expense including the ATAD Interest Limitation Rule, transfer pricing rules, deemed distribution rules and the anti-hybrid rules. The proposed approach set out in the Feedback Statement does not take these scenarios into account with the result that withholding tax applies irrespective of whether a corporation tax deduction has been taken for the payment of interest.

We consider that such an outcome is not in line with the policy objective of preventing double non-taxation. Indeed, the outcome of such an approach would be double taxation as corporation tax at 12.5% would apply to the income from which the interest is paid and withholding tax at a rate of 20% would apply on the payment of the interest. In our view, if such measures, as currently drafted, are implemented, they would have a significant impact on Ireland as an attractive location for investment.

Each of the proposed measures to apply to outbound payments of interest, royalties and distributions refer to the sections applying where there is a payment "*to, or for the benefit of*" an associated entity. We would assume that the phrase is intended to apply to cases where the recipient of the payment is acting in a nominee capacity, however, we believe the wording used lacks clarity and should be reviewed.

Outbound payments of royalties

There are already targeted measures contained in the Irish tax code applying to the outbound payment of royalties which mean that an Irish resident company is required to withhold income tax from patent royalty payments. Under existing legislation, an exemption may apply where the royalty is paid in the course of a trade or business carried on in Ireland to a tax treaty partner country in certain circumstances.

The proposed definition of a ‘relevant royalty’ set out in the Feedback Statement is very broadly drafted. Rather than restricting existing exemptions from withholding tax on royalty payments, the proposed definition of royalty would result in withholding taxes applying to a whole new set of payments.

Notably, the proposed definition of royalty is wider than the definition of a royalty in Article 12 of the OECD Model Tax Convention[14] as it includes the use of, or the right to use software and the use of, or the right to use industrial, commercial or scientific equipment.

We consider that the proposed approach is excessive and unnecessary considering the research undertaken by Mr. Seamus Coffey on the changing nature of outbound royalties from Ireland,[15] which clearly demonstrates the effectiveness of recent tax reforms in addressing any prevailing BEPS and aggressive tax planning concerns relating to outbound royalties from Ireland.

The feedback we have received from our members is that the proposed approach, if adopted, would result in Ireland becoming uncompetitive. This is because Ireland would be an outlier in applying withholding tax on payments where other countries do not apply a withholding tax. It is our firm view that payments for the use of software and equipment rentals should not be included in the definition. Such an approach would be in line with the definition of royalty contained in the OECD Model Tax Convention. It would also align with the approach adopted by other Member States that have introduced defensive measures in respect of outbound payments.[16]

The proposed definition of royalty also includes payments in respect of commercial know-how. We believe that applying a withholding tax to payments for commercial know-how would significantly impact Ireland’s standing as a competitive location for investment as it would be inconsistent with the approach adopted by some European competitor countries.

A further concern that arises in relation to the proposal, is that the payment of a relevant royalty to which the measure applies, will be deemed to be an annual payment for the purposes of section 238(2) TCA 1997. This is significant as section 81(2) TCA 1997 does not permit a trading deduction for annual payments. Therefore, in the absence of amending section 81, this would mean that companies would need to consider whether the relevant royalty could be considered a charge on income.

[14] Article 12, OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en.
[15] The changing nature of outbound royalties from Ireland and their impact on the taxation of the profits of US multinationals, May 2021, Seamus Coffey.
[16] For example, defensive measures adopted by Luxembourg and Cyprus relating to royalties do not include royalty payments in respect of software and equipment rentals. While defensive measures introduced in the Netherlands in respect of royalties do not include equipment rentals.

Outbound distributions

The commitment made by Ireland refers to the introduction of measures which will include withholding taxes in the case of dividends. As dividends (distributions) are not deductible for corporation tax purposes, it is unclear how double non-taxation could arise. Furthermore, as we have outlined above, Ireland already imposes a withholding tax on distributions from Irish tax resident companies (subject to certain exceptions).

In our view, the proposed approach outlined in the Feedback Statement in respect of dividends is not commensurate with the objective which the measure is intended to achieve and could damage Ireland's position as an attractive location for investment.

For many Irish companies with a parent company in a no-tax or zero-tax jurisdiction, no withholding tax currently applies to distributions to the parent entity as they are listed on a recognised stock exchange in a tax treaty jurisdiction. These distributions may now be within scope of the new provisions notwithstanding that there are genuine commercial reasons for the manner in which the group is structured.

For example, Bermuda is a major global reinsurance centre. Many Bermuda reinsurance groups have established their EMEA headquarters in Ireland in recent years with the result that the Irish entity is responsible for repatriating dividends to Bermuda for those groups.

As the Bermuda entity is typically listed on the New York stock exchange (i.e., a recognised stock exchange in a tax treaty jurisdiction) no withholding tax currently applies on dividend payments from an Irish entity to the Bermuda entity. However, if the proposed measures outlined in the Feedback Statement are implemented, depending on the Pillar Two position of the relevant entity, withholding tax could apply to such dividend payments as Bermuda would be considered a zero-tax territory.

As already noted, we believe that the robust domestic measures already in place in respect of distributions are sufficient to address any minimal risk of double non-taxation. The broad scope of the proposed measures to apply in respect of distributions is disproportionate and unwarranted. We would strongly urge that the proposed approach is reviewed.

If it is determined by policymakers that Ireland must introduce a measure in respect of dividends in order to fulfil its commitment under the NRRP, at the very most, it should be a very targeted measure applying only in the case of dividends paid where the ultimate control is held in jurisdictions included in Annex 1 of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. In our view, adopting such a targeted approach would be more proportionate given double non-taxation does not arise in respect of dividends.

Anti-avoidance provisions

A similar anti-avoidance provision is set out in the Feedback Statement in respect of the measures applying to payments of interest, royalties and distributions. In our view, the proposed anti-avoidance provision is broad and may give rise to unintended consequences.

In particular, the inclusion of the words *"or any part of"* within the anti-avoidance provision under each section is problematic. This is because the usual approach which is adopted when making an assessment as to whether the main purpose or one of the main purposes of an arrangement is the avoidance of the application of a charge to tax, would be for the arrangement as a whole to be considered rather than considering each element or "any part of" an arrangement. We consider that it would be appropriate for *bona fide* commercial arrangements to be clearly excluded from the scope of the anti-avoidance provisions.

Concerns have also been raised as to whether the anti-avoidance provision, as outlined in the Feedback Statement, could potentially capture steps that are taken to unwind arrangements currently in place under which there are outbound payments being made to a specified territory.

As the proposed measures are intended to disincentivise payments to specified territories, we would presume policymakers do not intend for the anti-avoidance provision to apply where a group rearranges its affairs to ensure that payments of interest, royalties or distributions are not made to specified territories. It would be helpful if clarity on this point is provided so that taxpayers can be confident that where they take such steps to restructure their business that the anti-avoidance measures do not apply.

Conclusion

As stated, the Institute recognises that Ireland must introduce legislation to fulfil the commitment made as part of the NRRP in respect of outbound payments. However, it is imperative that any new taxation measures applying to outbound payments must be proportionate and do not go beyond what is necessary to deliver the objective of the commitment to the EU to prevent double non-taxation outcomes, if Ireland is to remain an attractive location for business. The Institute would be happy to engage further in this consultation through stakeholder meetings or direct discussions. Please contact Anne Gunnell of this office at agunnell@taxinstitute.ie if you require any further information in relation to this submission.

Yours sincerely

Colm Browne
Institute President