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Consultation on New Measures to Apply to Outbound Payments
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Consultation 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 potential new taxation measures to apply to outbound payments.

The European Commission has recommended for Ireland to *"step up action to address features of the tax system that facilitate aggressive tax planning, including on outbound payments*" in its 2020 Country Specific Recommendations for the State.[1] In acknowledging this recommendation, the Update to Ireland's Corporation Tax Roadmap, which was published by the Department of Finance in January 2021, included two commitments: to consider additional defensive measures in respect of countries on the EU list of non-cooperative jurisdictions (Commitment 6) and to consider broader actions that may be needed in respect of outbound payments (Commitment 7).

Ireland's National Recovery and Resilience Plan (NRRP)[2] published in June this year commits to addressing aggressive tax planning and notes the *"final milestone will be the introduction of legislation to apply to outbound payments, to take effect from 1 January 2024 at the latest. The legislation will apply to both zero or no-tax jurisdictions and jurisdictions included on the EU list of harmful jurisdictions for tax purposes."*

[1] Recommendation for a Council Recommendation on the 2020 National Reform Programme of Ireland and delivering a Council opinion on the 2020 Stability Programme of Ireland

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

Directors: Karen Frawley, President, Peadar Andrews, Brian Brennan, Colm Browne, Oonagh Carney, Ian Collins, Amanda-Jayne Comyn, Maura Dineen, Stephen Gahan, Aileen Keogan, Aoife Lavan, Laura Lynch, Sarah Meredith, Colm O'Callaghan, Tom Reynolds, Kieran Twomey, Shane Wallace, Tommy Walsh, Martin Lambe (Chief Executive).

Immediate Past President: Sandra Clarke.

It is in this context that the consultation paper[3] seeks the views of stakeholders on the introduction of new taxation measures into Irish law to prevent double non-taxation in relation to outbound payments of interest, royalties, and dividends.

The potential new measures contemplated in the consultation document consist of a denial of deduction of costs or the imposition of withholding taxes. It is put forward in the consultation paper that such additional measures could apply to no-tax and zero-tax jurisdictions and to all jurisdictions included in Annex I of the EU list of non-cooperative jurisdictions for tax purposes (known as the EU list of non-cooperative jurisdictions).

Recent domestic and international tax reforms

When considering whether new additional defensive tax measures for outbound payments made from Ireland to listed and zero or no-tax jurisdictions are warranted, we believe careful evaluation must first be given to the impact and effectiveness of recent domestic and international tax reforms.

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[4] and ATAD2[5] into Irish law, extensive reforms have been implemented in domestic legislation over recent years to eliminate BEPS opportunities and to prevent aggressive tax planning.

We have detailed the extensive list of measures in the appendix to this letter, which include:

- Controlled Foreign Company (CFC) rules,
- anti-hybrid rules,
- incorporating the OECD 2017 Transfer Pricing Guidelines into the Irish transfer pricing regime and extending that regime to non-trading and capital transactions,
- ratification of the BEPS multilateral instrument to ensure Ireland's tax treaty network is compliant with BEPS standards,
- tightening the capital allowances relief available on capital expenditure incurred to acquire intellectual property,
- updating the rules for corporate tax residence,
- transparency measures comprising the automatic exchange of financial account information, tax rulings and country-by-country reports within the EU and
- the mandatory reporting of cross-border arrangements that could potentially be used for aggressive tax planning.

[3] Public Consultation on New Taxation Measures to apply to Outbound Payments, November 2021, Department of Finance.
[4] 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.
[5] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

Furthermore, Finance Bill 2021, which has been passed by both Houses of the Oireachtas, contains a range of additional measures which are intended to counteract aggressive tax planning. These include the introduction of ATAD compliant Interest Limitation Rules which will place a limit on the tax deduction for net borrowing costs of 30% of EBITDA for corporate taxpayers with limited exemptions, anti-reverse hybrid rules and the application of the authorised OECD approach (AOA) to the attribution of profits to branches of non-resident companies in Ireland.

In October, Ireland joined the OECD Inclusive Framework on BEPS *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*[6] (the OECD Agreement). Pillar Two of the OECD Agreement, which is planned to be effective by 2023, includes an Income Inclusion Rule (IIR) (which will impose top-up tax on a parent entity in respect of the low taxed income of a constituent entity) and an Undertaxed Payment Rule (UTPR) (which will deny deductions or require an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR). The OECD Agreement provides for a minimum effective tax rate of 15% for in-scope multinational enterprises (MNEs) and therefore, it will further limit the ability of such MNEs to reduce their taxes by availing of low tax or zero-tax regimes.

At an EU level, the Directive on Public Country by Country Reporting (CbCR)[7]which further enhances existing transparency measures, has recently entered into force, and must be transposed into the domestic legislation of each Member State by June 2023. The EU is also pursuing several other reforms including, proposals to amend the Interest and Royalties Directive, proposals to tackle the misuse of shell companies and a withholding tax initiative, which aims to introduce a common EU-wide system for withholding tax on dividend or interest payments.

Considering the plethora of domestic and international tax reforms which have been put in place in recent years and the further measures which are in the process of being implemented or will shortly be transposed into Irish law, we believe Ireland introducing further domestic defensive measures targeted at no-tax or zero-tax jurisdictions and jurisdictions included on the EU list of non-cooperative jurisdictions is premature at this time.

Instead, businesses operating in Ireland need time to assess and implement existing reforms given the complexity involved and Irish policymakers should ensure that taxpayers are provided with the necessary tax certainty, which has been recognised as a key factor that influences investment and other commercial decisions that impact economic growth.

[6] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 8 October 2021.

[7] Directive 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches

It is evident from the research undertaken by Mr. Seamus Coffey on the changing nature of outbound royalties from Ireland[8] (the Coffey Report), that the amendments to the Irish corporate tax rules, the reform of the US tax code under the 2017 Tax Cuts and Jobs Act, and the implementation of 2017 OECD Transfer Pricing Guidelines[9] have resulted in a very significant alteration in the flow of outbound payments from Ireland, with a substantial proportion of payments which were previously directed to EU Member States and offshore financial centres now being paid directly to the US. The report concludes that this trend of payments going directly to the US can be expected to continue in the coming years.

The data analysed in the Coffey Report clearly demonstrates the effectiveness of recent tax reforms, implemented both domestically and internationally, to address any prevailing BEPS and aggressive tax planning concerns relating to outbound royalties from Ireland previously highlighted by the European Commission in their country report.

In our view, it is essential that policymakers take time to assess the full impact of recent domestic and international tax reforms on outbound payments of interest, royalties, and dividends before determining whether new additional taxation measures are necessary.

Furthermore, given our commitment to implement Pillar Two of the OECD Agreement, which seeks to co-ordinate the implementation by countries of a minimum effective tax rate for in-scope companies, we believe it would be prudent for Ireland to await the publication of the proposed EU Directive on the transposition of the Pillar Two provisions before determining if additional domestic defensive measures are required in this State.

EU commitments to use defensive measures against non-cooperative jurisdictions

EU Member States have committed to use at least one of four defensive measures against non-cooperative jurisdictions for as long as they are on the EU list of non-cooperative jurisdictions.[10]

The four measures are:

- non-deductibility of costs incurred in a listed jurisdiction,
- CFC rules to limit artificial deferral of tax to offshore, low-taxed entities,
- withholding tax measures to tackle improper exemptions or refunds, and
- limitation of the participation exemption on shareholder dividends.

[8] The changing nature of outbound royalties from Ireland and their impact on the taxation of the profits of US multinationals, May 2021, Seamus Coffey.

[9] OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris.

[10] Guidance on defensive measures in the tax area towards non-cooperative jurisdictions, Annex 4, Code of Conduct Group (Business Taxation), Report to the Council, 25 November 2019, 14114/19

Ireland has already implemented one of the four defensive measures. ATAD complaint CFC rules were introduced into Irish law in Finance Act 2018. The CFC rules are anti-abuse measures, designed to prevent profits from being artificially diverted to offshore companies located in low or no tax jurisdictions. There are a few exemptions in the CFC regime, such as the low profit margin exemption or the low accounting profit exemption. As a defensive measure in respect of CFCs which are resident in non-cooperative jurisdictions, the CFC rules were amended in Finance Act 2020 to provide that these exemptions from the CFC charge would not apply where the CFC is resident in a non-cooperative jurisdiction

As Ireland operates a worldwide tax system rather than a territorial regime, our tax system already provides the protection that would be offered by a measure which would limit the participation exemption on profits from a listed jurisdiction.

Importantly, the EU Code of Conduct (Business Taxation) Group's *Guidance on defensive measures in the tax area towards non-cooperative jurisdictions* notes: "*Whichever measure chosen; it is appropriate that the Member State concerned ensures that the measure has the effect of encouraging a positive change leading to the removal of jurisdictions from the list. The measure would be considered to have this effect when it is applied in a situation linked to a listed jurisdiction and not applied either once the specific reason for listing of that jurisdiction is resolved or as soon as possible thereafter.*[11]

Therefore, if Ireland applies additional defensive measures to countries on the non-cooperative list, such defensive measures must only apply for the duration a country remains on the list to ensure the measure fulfils its intended policy objective of encouraging positive action and change. This approach was taken when the Irish CFC rules were amended in Finance Act 2020.

Identification of harmful tax practices

The EU Code of Conduct (Business Taxation) Group identifies jurisdictions that are non-cooperative for tax purposes by assessing third countries and providing these assessments to the Council of the EU for approval. Jurisdictions are assessed under the three headings of tax transparency, fair taxation, and implementing anti-BEPS measures.[12] Failure to satisfy these criteria can result in jurisdictions being included on the EU list of non-cooperative jurisdictions.

Under the fair taxation heading, the EU Code of Conduct Group considers preferential tax measures that could be regarded as harmful. The EU Code of Conduct provides that in assessing harmful tax measures, these are measures "*which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in*

[11] Ibid.

[12] https://www.consilium.europa.eu/media/24230/08-ecofin-non-coop-juris-st14166en16.pdf

the Member State in question are to be regarded as potentially harmful and therefore covered by this code".[13] As indicated in the Consultation Paper, this is known as the “gateway criterion”. Tax measures which fail this test are subject to a full assessment by the EU Code of Conduct Group using five further criteria to determine if the measure is harmful.

The OECD Forum on Harmful Tax Practices uses five “key factors” (one being that the regime has no or low effective tax rates on income from geographically mobile financial and other service activities) and five secondary factors to determine whether a preferential regime is potentially harmful.[14]

It is clear that both the EU Code of Conduct Group and the OECD Forum on Harmful Tax Practices take account of a wide range of factors to determine whether a no-tax or zero-tax regime may be considered a harmful tax practice.

Consultation General Questions

The Consultation Paper seeks the views of stakeholders on the introduction of measures to prevent double non-taxation in relation to outbound payments of interest, royalties and dividends and poses some technical questions regarding the issues to be considered regarding the drafting of such measures.

As outlined above, new additional defensive measures in respect of outbound payments to countries on the EU list of non-cooperative jurisdictions, no-tax or zero-tax jurisdictions are not warranted at this time in our view. An extensive range of domestic and international tax reforms have been implemented over the last number years and time is needed to assess the full impact of these reforms on outbound payments of interest, royalties, and dividends before determining if further changes are necessary.

Pillar Two seeks to apply a minimum effective tax rate of 15% for in-scope multinational enterprises (MNEs), which will undoubtedly further limit the ability of such MNEs to reduce their taxes by availing of low tax or zero-tax regimes. We believe it would be prudent for Ireland to await the publication of the EU Directive which will transpose the Pillar Two provisions into the domestic law of EU Member States before determining if additional defensive measures are required.

However, if policymakers decide to impose additional defensive measures, we firmly believe it would be appropriate for any such measures to be restricted to the EU list of non-cooperative jurisdictions. Applying any additional defensive measure to jurisdictions on the

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1998:002:FULL&from=EN
[14] 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

non-cooperative list only for the duration a country remains on the list, would ensure the measure fulfils its intended policy objective of encouraging positive change.

Feedback from our members suggests that should policymakers decide to impose any additional defensive measure domestically on outbound payments of interest or royalties, this should be in the form of withholding tax, which would be more straightforward to administer, rather than a denial of a deduction. Policymakers could consider applying withholding tax at a rate of 25% on such payments, similar to the higher corporation tax rate that currently applies to passive income.

The EU Code of Conduct Group *Guidance on defensive measures in the tax area towards non-cooperative jurisdictions* states that Member States which opt for withholding tax measures, should apply withholding tax at a higher rate when payments such as interest, royalties, service fee or remuneration, are treated as received in listed jurisdictions. Alternatively, the guidance provides that Member States can consider applying specific targeted withholding tax on such payments.[15]

The payor for the purposes of any defensive measure would be the Irish taxpayer on which the withholding tax deduction would fall. The payee should be widely defined, like the definition for anti-hybrid purposes, to ensure that the defensive measure would not apply if it can be demonstrated that the payment is subject to tax in another jurisdiction, for instance if the payment is paid to a tax transparent entity in a non-cooperative jurisdiction but is subject to a CFC charge, or similar foreign company charge in another jurisdiction.

However, similar to the anti-hybrid provisions, this should be balanced with a reasonable knowledge test to take account of the knowledge of the payor. For example, where a payment is made to a partnership which is widely held and the residence of each individual investor is not known to the payor, a reasonable knowledge test would avoid an excessive burden being placed on the payor to 'look through' the entity to which a payment is being made to determine the residence of each investor.

In drafting any defensive measure, policymakers could consider including a substance based carve-out similar to what is provided for in the OECD Agreement or in the US/Ireland double taxation treaty.

The definition of interest contained in the OECD Model Tax Convention and the definition of distribution contained in the Parent Subsidiary Directive could be relied upon. The meaning of royalties for Irish withholding tax purposes is based on well-established caselaw and in our view, any additional defensive measure should continue with this approach.

[15] Guidance on defensive measures in the tax area towards non-cooperative jurisdictions, Annex 4, Code of Conduct Group (Business Taxation), Report to the Council, 25 November 2019, 14114/19

In the event that any additional defensive measure is introduced domestically for outbound payments, the implications of any such measure for our treaty partners would also need to be carefully considered. For example, Panama is currently on the EU list of non-cooperative jurisdictions but as Ireland has a double tax treaty with Panama, the withholding tax provisions and the non-discrimination clause in the treaty would override any defensive measure (such as the imposition of a withholding tax or the denial of a deduction) introduced in Ireland to address outbound payments to that country,

In addition, it would be important to consider the non-static nature of the list of EU non-cooperative jurisdictions, which fluctuates and is subject to ongoing review. Therefore, similar to the position adopted in respect of the measures which apply to CFCs in listed jurisdictions, it would be necessary to include a legislative provision to specify the relevant list of non-cooperative jurisdictions (i.e., the list at a particular date) that would apply for say, accounting periods beginning on 1 January for a given year etc.

Irish policymakers would also need to be cognisant of the criteria that may be applied by the EU Code of Conduct Group to determine whether a jurisdiction meets the requirements to be on the list of non-cooperative jurisdictions. The European Parliament has recently called on ECOFIN to reform the EU list of non-cooperative jurisdictions[16] and to consider revised listing criteria. Indeed, ECOFIN has welcomed discussions on the revision of the scope of the mandate of the EU Code of Conduct Group.[17]

Measures in relation to outbound interest payments

The Irish tax code contains several existing targeted measures which apply to payments of interest. In general, an Irish resident company is required to deduct withholding tax from yearly interest payments. There are some exceptions to this rule, including where the interest is paid to a resident in a country with which Ireland has a double tax treaty.

However, the exemption will only apply where the tax regime in that treaty partner jurisdiction is one that imposes a tax that generally applies to interest receivable in that territory by companies from sources outside that territory, or where the interest is exempt from tax under the terms of the double tax treaty between Ireland and the relevant territory.[18]

Furthermore, interest on debt with 'equity type' characteristics (e.g., profit participating debt and convertible debt), and interest on debt without any 'equity' characteristics where it is payable to a non-resident 75% group member, may be re-characterised as a distribution for

[16] European Parliament resolution of 21 January 2021 on reforming the EU list of tax havens

[17] Council conclusions on fair and effective taxation in times of recovery, on tax challenges linked to digitalisation and on tax good governance in the EU and beyond, 27 November 2020, 13350/20.

[18] The withholding tax exemption does not apply where the interest is received by the non-resident company in connection with a trade or business carried on in the State through a branch or agency ((s246(3)(h) TCA 1997).

tax purposes, with the application of dividend withholding tax and the denial of a corporate tax deduction.

In addition to these targeted domestic measures outlined above, a range of domestic and international tax reforms have also been put in place in recent years. As stated earlier, Finance Bill 2021introduces ATAD compliant Interest Limitation Rules (ATAD ILR), which will place a limit on the tax deduction for net borrowing costs of 30% of EBITDA for corporate taxpayers with limited exemptions. The ATAD ILR will be layered on top of existing complex rules regarding the deductibility of interest. The implementation of Pillar Two will also ensure that a minimum effective tax rate of 15% will apply to in-scope MNEs.

Considering the vast range of existing provisions in the Irish tax code (and pending measures) that restrict the deductibility of interest payments and target base erosion risks, we believe new defensive measures in respect of interest payments to countries on the EU list of non-cooperative jurisdictions, no-tax or zero-tax jurisdictions are not required at this time. Instead, businesses should be given time to assess and implement newly introduced measures, like the ATAD ILR, given the complexity involved in overlaying these rules on top of existing domestic provisions to restrict the deductibility of interest.

Measures in relation to the outbound payment of royalties

There are targeted measures contained in our tax code which apply to the outbound payment of royalties. An Irish resident company is required to withhold income tax from patent royalty payments. Under the 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. This exemption will only apply where the receiving company is resident in a relevant territory, the payment is made for bona fide reasons and not as part of any tax avoidance arrangement, and the country of the recipient has a tax that generally applies to royalty income receivable in that country from sources outside that territory.[19]

In addition to these targeted domestic measures outlined above, a range of domestic and international tax reforms have been put in place in recent years. The Coffey Report demonstrates the changing nature of the destination of outbound royalty payments from Ireland because of these tax reforms.

The Coffey Report notes that subsidiaries of US multinationals operating in Ireland generate significant sales using technologies developed in the US and the Irish operations of these multinationals pay for the use of the technology and much of these payments are made in the form of outbound royalties.

[19] Section 242A TCA 1997.

However, there was a significant change in 2020 in the destination of these royalty payments. The Coffey Report states that "*many US MNCs, most notably in the ICT sector, have restructured the licensing arrangements for their technology as a result of changes to the OECD Transfer Pricing Guidelines, revisions to Ireland's residency rules for Corporation Tax and the changes to the US tax code introduced by the Tax Cuts and Jobs Act of 2017.*"

Up to 2020, most of the outbound royalty payments from Ireland were directed to offshore financial centres, such as Bermuda and the Cayman Islands. However, the Coffey Report notes that after averaging €8 billion a year in the five previous years, royalty payments from Ireland to the US increased to €52 billion in 2020 and are likely to be higher in future years. Mr Coffey concludes that "*The changed pattern of royalty flows from Ireland is now more in line with the economic substance of these companies and the reporting of their profits is better aligned with the function, assets and risks that generate those profits*".

It is evident from the Coffey Report that amendments to the Irish corporate tax rules, the reform of US tax code under the 2017 Tax Cuts and Jobs Act and the implementation of the 2017 OECD Transfer Pricing Guidelines have resulted in a significant change in the flow of outbound payments, with a very substantial proportion of payments which were previously directed to EU Member States and offshore financial centres now being paid directly to the US. A trend, which the report concludes, can be expected to continue in the coming years.

The Consultation Paper acknowledges that the Coffey Report "*demonstrates that recent reforms of corporation tax rules, in Ireland, the United States and internationally, are having the desired effect and outbound payments are increasingly going directly to the US where they are taxed*". We would strongly agree with this statement. Consequently, in our view, new additional defensive measures in respect of royalties paid to countries on the EU list of non-cooperative jurisdictions, no-tax or zero-tax jurisdictions are not required.

Measures in relation to outbound dividend payments

Ireland imposes a withholding tax on distributions from Irish tax resident companies. Distributions are widely defined for Irish tax purposes and include dividends, as well as interest paid on related-party debt in certain circumstances. While there are some exemptions from dividend withholding tax, these are generally limited to tax treaty partners.

The Consultation Paper asks if any amendments are necessary to relevant legislation regarding the operation of dividend withholding tax, in respect of dividends to no-tax or zero-tax jurisdictions, or jurisdictions included on the EU list of non-cooperative jurisdictions for tax purposes, in order to ensure no double non-taxation. As dividend payments are not deductible for corporation tax purposes, it is unclear as to how double non-taxation can arise in such circumstances and therefore, no amendments are required to the relevant legislation in our view.

Conclusion

Since the commencement of the OECD's BEPS project, EU and OECD countries have undergone an intensive period of legislative change. As part of this process, extensive reforms have been made to the Irish tax code and Ireland is in the final stages of implementing the measures contained in the EU Anti-Tax Avoidance Directives as part of Finance Bill 2021. Businesses should now be given time to assess and implement these changes before introducing additional new measures specifically for outbound payments.

It is clear from the Coffey Report that the destination of outbound payments has changed significantly, and this trend is likely to continue for some time. We believe it is an imperative that time is taken to evaluate the full impact of recent tax reforms before implementing further domestic defensive measures.

Finally, given our commitment to the OECD Agreement, it would be premature in our view for Ireland to unilaterally implement additional defensive measures now domestically in advance of the proposed transposition of an EU Directive to apply the Pillar Two provisions to EU Member States.

The Institute would be happy to engage further on the matters raised in this submission. Please contact Anne Gunnell at agunnell@taxinstitute.ie or (01) 6631750 if you require any further information.

Yours sincerely

Karen Frawley

Karen Frawley
Institute President

APPENDIX

Summary of recent domestic tax reforms implemented due to Ireland’s commitment to the OECD BEPS project and transposition of the EU Anti-Tax Avoidance Directives

Controlled Foreign Company Rules

Controlled Foreign Company (CFC) rules were introduced into Irish law Finance Act 2018. The CFC rules are anti-abuse measures, designed to prevent profits from being artificially diverted to offshore companies located in low or no tax jurisdictions.

The rules target undistributed income of a CFC, arising from non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage and attribute that income to its parent company. The CFC charge arises on the portion of undistributed income attributable to relevant Irish activities.

Finance Act 2020 amended the CFC rules to apply more restrictive criteria in respect of subsidiary companies resident in jurisdictions included in the EU list of non-cooperative tax jurisdictions.

Anti-hybrid Rules

Anti-hybrid rules were introduced in Finance Act 2019 and are intended to counteract tax mismatches that can arise where the same item of expenditure is deductible in more than one country or where expenditure is deductible for tax purposes in one country, but the corresponding income is not taxed in the other country. The measures deny a corporation tax deduction in respect of payments made by Irish tax resident companies where there is a hybrid mismatch outcome.

Transfer Pricing

Finance Act 2019 incorporated the OECD 2017 Transfer Pricing Guidelines into domestic legislation and extended transfer pricing rules to non-trading and capital transactions. The legislation has recently been extended[20] to designate the OECD’s Transfer Pricing Guidance on Financial Transactions[21] as being comprised in the transfer pricing guidelines for the purposes of Part 35A of the Taxes Consolidation Act 1997.

BEPS Multilateral Instrument – The MLI

Ireland has ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known as the MLI) to ensure Ireland’s tax treaty network is compliant with BEPS standards. One of the key changes is the introduction of a ‘principal purpose test’ into Irish bilateral tax treaties which denies the application of

[20] Taxes Consolidation Act 1997 (Section 835D (3)) Order 2021, S.I. No. 686/2021.

[21] The Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS Actions 4, 8-10, OECD, Paris, approved by the OECD’s Committee on Fiscal Affairs on 20 January 2020.

treaty benefits (for example, a lower withholding tax) if one of the principal purposes of the transaction or arrangement is to obtain treaty benefits.

Tax Transparency and Mandatory Disclosure
Ireland has adopted the OECD Common Reporting Standard (CRS) and the EU Directive on Administrative Co-operation (DAC) which provides for the automatic exchange of financial account information, tax rulings and country-by-country reports within the EU.

Finance Act 2019 also transposed DAC6[22] into Irish law which provides for the exchange of taxpayer information between the tax administrations of EU Member States for certain cross-border transactions that could potentially be used for aggressive tax planning. Tax deductible payments made to a jurisdiction that does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero are reportable if one of the main purposes of the transaction is to obtain a tax advantage. All payments which are deductible for tax purposes made to persons tax resident in a non-cooperative jurisdiction are reportable.

Corporate Tax Residence Rules
Ireland amended its corporate tax residence rules to ensure that a company is deemed to be tax resident in Ireland if it was incorporated in Ireland unless under the provisions of a tax treaty, an Irish-incorporated company is regarded as tax resident in another territory.

General Anti-Avoidance Rule (GAAR)
Ireland has had a GAAR since 1989 which targets abusive practices that are not otherwise dealt with through targeted provisions. No amendments were needed to make the existing GAAR compliant with the EU Anti-Tax Avoidance Directive (ATAD).

New Measures in Finance Bill 2021
Finance Bill 2021, which will shortly be enacted, contains the following new measures:

- ATAD compliant **Interest Limitation Rules (ILR)** which will place a limit on the tax deduction for net borrowing costs of 30% of EBITDA for corporate taxpayers subject to a small number of exemptions. The ATAD ILR will apply in addition to the existing comprehensive interest deductibility provisions in the Irish tax code.

- **Anti-reverse hybrid rules** which address tax mismatches that arise where an entity is a reverse hybrid entity. The purpose of the rules is to tax income in the State that would otherwise go untaxed because an Irish entity is regarded as tax transparent in Ireland but tax opaque in a territory of a relevant participator.

[22] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

- The application of the **Authorised OECD Approach (AOA)** to the attribution of profits to branches of non-resident companies in Ireland.