# THE CORPORATE TAX PLANNING LAW REVIEW

Second Edition

**Editors**
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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SECOND EDITION

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# PREFACE

We are pleased to present the second edition of *The Corporate Tax Planning Review*. This volume contains 22 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany, Korea, etc.); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city states of Singapore and Monaco; and several nations in the Global South (Colombia, Venezuela, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and at times uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Gavin Jordan, Tommy Lawson and Adam Myers at Law Business Research Limited for their editorial acumen and dedication to this project.

**Jodi J Schwartz**
**Swift S O Edgar**
Wachtell, Lipton, Rosen & Katz
New York, NY
April 2020

**Chapter 8**

# IRELAND

*Andrew Quinn and David Burke*[1]

## I INTRODUCTION

Ireland has a modern open economy that attracts a significant amount of inward investment by multinationals, investment funds and aircraft-leasing businesses. Key features of the Irish tax system include the 12.5 per cent corporation tax rate for trading income, tax-exempt regulated funds regime, a special purpose company regime that facilitates international financial transactions including securitisation and bond issuance, a network of over 74 double tax treaties, broad withholding tax exemptions for outbound payments and a participation exemption for gains on shares.

Ireland's international tax strategy is one of full engagement with international initiatives to combat tax avoidance and increase tax transparency. Ireland is committed to the OECD Base Erosion and Profit Shifting (BEPS) global tax reform process and has already taken a number of steps towards implementing the BEPS recommendations. Ireland has implemented the controlled foreign companies (CFC) and exit tax, interest limitation and anti-hybrid measures in the EU Anti-Tax Avoidance Directive (ATAD). The Irish government also ratified Ireland's choices under the OECD Multilateral Instrument, which came into effect in Ireland on 1 May 2019. Ireland has implemented the EU DAC 6 rules that provide for the mandatory and automatic exchange of information regarding aggressive tax planning by taxpayers in the EU. Ireland has emphasised the need to wait for the outcome of the work of the OECD Task Force on the Digital Economy before moving ahead with EU measures.

## II LOCAL DEVELOPMENTS

### i Entity selection and business operations

#### *Entity forms*

*Companies*

Businesses in Ireland tend to incorporate to take advantage of the benefits of separate legal entity status and limitation of liability. Ireland enacted amended and consolidated company law legislation in 2014 – the Companies Acts 2014 – which provides for the following forms of incorporated entity:

*a* private company limited by shares (LTD);
*b* designated activity company (DAC);
*c* public limited company (PLC);
*d* company limited by guarantee (CLG);

1 Andrew Quinn is head of tax and David Burke is of counsel at the Maples Group.

*e* unlimited company; and
*f* investment company.

The limited company has traditionally been, and is likely to remain, the most popular form for incorporated trading business. Companies involved in the issuance of listed debt securities will be formed as DACs. Investment funds are incorporated as investment companies or as an Irish collective asset management vehicle (ICAV).

Entities with separate legal form are taxed separately.

*Investment funds*

Investment funds in Ireland can be established in a number of different legal forms, including non-corporate forms such as unit trusts, common contractual funds and investment limited partnerships.

Unit trusts are taxed as investment undertakings for the purposes of Section 739B Taxes Consolidation Act, 1997 (as amended) (TCA) and are subject to the 'gross roll-up regime'. This regime also applies to investment undertakings constituted as investment companies and ICAVs. Under the gross roll-up regime, investment undertakings are, broadly, not subject to tax in Ireland on any income or gains they realise from their investments and there are no Irish withholding taxes in respect of distributions, redemptions or transfers of units by or to non-Irish investors if certain conditions are met. In particular, non-Irish resident investors and certain exempt Irish investors must provide the appropriate Irish Revenue approved declaration to the fund.

*Partnerships*

Partnerships and limited partnerships are treated as transparent for tax purposes in Ireland. Partnerships are generally used for investment purposes and also by certain professional services firms (e.g., accountants and solicitors). In addition, pension funds may make use of a particular form of tax-transparent investment fund called a common contractual fund.

*Tax residence*

A company that has its central management and control in Ireland is resident in Ireland irrespective of where it is incorporated. A company that does not have its central management and control in Ireland but is incorporated in Ireland is resident in Ireland, except if the company is regarded as not resident under a double taxation treaty between Ireland and another country. In certain limited circumstances and subject to defined cut-off periods, companies incorporated in Ireland before 1 January 2015 and managed and controlled outside of a double taxation treaty territory may not be regarded as resident in Ireland.

The term 'central management and control' is, in broad terms, directed at the highest level of control of the company. The Irish Revenue Commissioners and the Irish courts emphasise the location of the meetings of the board of directors.

*Tax rates*

Ireland has two rates of corporation tax, a 12.5 per cent rate and a 25 per cent rate.

The 12.5 per cent rate applies to the trading income of a company that carries on a trade in Ireland (including certain qualifying foreign dividends where paid out of trading profits).

There is no precise definition of what constitutes a trade for this purpose but, broadly, where a company is carrying on an active business in Ireland on a regular or habitual basis and with a view to realising a profit, it should be considered to be trading for tax purposes.

The 25 per cent rate applies in respect of passive or investment income, profits arising from a possession outside of Ireland (i.e., foreign trade carried on wholly outside of Ireland) and profits of certain trades such as dealing in or developing land and mineral exploration activities.

A 33 per cent rate applies to capital gains.

The same capital gains rates also apply to gains earned by individuals directly or through transparent entities. Personal income is taxed at rates of up to 55 per cent.

***Domestic income tax***

Corporation tax is charged on the total or worldwide profits of Irish-resident companies. Profits constitute income from all sources with the addition of chargeable gains.

Non-Irish tax resident companies are not subject to corporation tax unless they are carrying on a trade through an Irish branch or agency, in which case they will be subject to Irish tax on the following items:

*a* the trading income arising directly or indirectly through or from the branch;
*b* income from property or rights used by or held by or for the branch; and
*c* gains that, but for the Corporation Tax Acts, would be chargeable to capital gains tax in the case of a company not resident in Ireland.

Non-Irish tax resident companies are liable for gains arising on the disposal of assets situated in Ireland that are used, held or acquired for business carried on in Ireland through a branch or agency, and on certain 'specified assets'. These include:

*a* land and buildings in Ireland;
*b* minerals and mining rights in Ireland; and
*c* unquoted shares or securities deriving their value or the greater part of their value directly or indirectly from the above assets.

***International tax***

*Taxation of foreign-source income*

An Irish branch or agency will be subject to Irish tax on trading income arising from the branch, income from property or rights used by or held by the branch and gains on 'specified assets'.

*Relief or credit for foreign taxes*

Relief for foreign taxes incurred on payments made to an Irish tax resident company may be available under the applicable double tax treaty.

Where a payment is made from a jurisdiction with which Ireland does not have a double taxation agreement, the domestic Irish tax legislation provides for unilateral credit relief. This may be available where foreign tax is incurred by a branch of an Irish resident company, where interest withholding tax has been incurred or when a parent company that is resident in the state receives a dividend from its subsidiary in respect of which tax has been paid. Ireland also offers unilateral credit relief for foreign withholding tax on royalty income and leasing income.

With regard to capital gains tax, Ireland allows a unilateral credit for tax paid on foreign capital gains in a country with which Ireland has a tax treaty but that treaty does not cover taxes on capital gains because it was agreed before the introduction of capital gains tax in Ireland.

*Exit tax*

Ireland operates an exit tax applicable at a rate of 12.5 per cent on any unrealised gains arising where a company migrates or transfers assets offshore, such that they leave the scope of Irish taxation. There are some exemptions provided for in the legislation, including where a migrating company continues to carry on a trade in Ireland with those assets.

*Activities and tax incentives*

*R&D tax credit*

A tax credit for qualifying R&D expenditure exists for companies engaged in in-house qualifying research and development undertaken within the European Economic Area (EEA). This credit is 30 per cent of qualifying expenditure where that company is a micro or small-sized company or 25 per cent of qualifying expenditure in the case of all other types of company. This credit may be set against a company's corporation tax liability. The tax credit is available on a group basis in the case of group companies. For accounting periods commencing before 1 January 2015, the amount of qualifying expenditure is restricted to incremental expenditure over expenditure in a base year (2003). The tax credit is calculated separately from the normal deduction of the R&D expenditure in computing the taxable profits of the company.

Qualifying R&D activities must satisfy certain conditions and, in particular, the activities must seek to achieve scientific or technological advancement and involve the resolution of scientific or technological uncertainty. Where a company has insufficient corporation tax against which to claim the R&D tax credit in a given accounting period, the tax credit may be credited against corporation tax for the preceding period, may be carried forward indefinitely or, if the company is a member of a group, allocated to other group members. The R&D credit can also be claimed by the company as a payable credit over a three-year period or surrendered to 'key employees' to set off against their income tax liability.

*Knowledge development box*

In 2016, Ireland introduced an OECD compliant 'knowledge development box' for the taxation of certain intellectual property. The amount of expenditure incurred by a company in developing, creating or improving qualifying patents or computer programs (i.e., 'qualifying expenditure') is divided by the overall expenditure on such assets before being multiplied by the profits arising from such assets (e.g., from royalties, net sales). The result is effectively taxed at 6.25 per cent. A potential 30 per cent uplift in the qualifying expenditure is available, capped at the total amount of acquisition costs and group outsourcing costs.

*Capital allowances on provision or acquisition of intangible assets*

Capital allowances (tax depreciation) are available for companies incurring capital expenditure on the provision of intangible assets for the purposes of a trade. The relief applies to a broad range of intangible assets (e.g., patents, copyright, trademarks, know-how) that are recognised as such under generally accepted accounting practice and are listed as 'specified

intangible assets' in the Irish tax legislation. The relief is granted as a capital allowance for set-off against profits arising from the use of the intangible assets. The write-off is available in line with the depreciation or amortisation charge in the accounts, or, alternatively, a company can elect to take the write-off against its taxable income over a 15-year period. There is no balancing charge if the intangible assets are held for more than five years. The allowance can be surrendered by way of group relief or carried forward if unused.

*Securitisation regime*

Securitisation companies are Irish resident special purpose companies that hold or manage 'qualifying assets' (which includes financial assets). The taxable profits of a qualifying company under Section 110, TCA are calculated as if it is a trading entity with the result that the company can deduct funding costs including swap payments and profit-dependent interest, provided certain conditions are met. Any residual profit is also liable to corporation tax at 25 per cent. The flexible nature of the regime has led to its use in a range of international finance transactions including investment repackagings, CDOs and investment platforms.

***Capitalisation requirements***

Ireland has no thin capitalisation rules. There are, however, anti-avoidance provisions to close off potential abuses related to indebtedness created by intra-group transfers in relation to artificial structures aimed at tax reduction rather than normal business activity.

*Controlled foreign companies regime*

Ireland introduced CFC rules from 1 January 2019. Ireland implemented the Option B model of the CFC rules as described in ATAD, an approach that attributes undistributed income arising from non-genuine arrangements structured for the essential purpose of obtaining a tax advantage. The Irish legislation provides that an arrangement shall be regarded as non-genuine if:

*a* the CFC would not have owned the assets or undertaken the risks that generated the income if it were not controlled by a company;

*b* it is that latter company where the significant people functions relevant to those assets or risks are carried out and are instrumental in generating the controlled company's income; and

*c* it would be reasonable to consider that the relevant Irish activities were instrumental in generating that income.

*EU anti-tax avoidance directive*

Like other EU Member States, Ireland is required to implement an interest limitation rule in accordance with ATAD. This will limit 'exceeding borrowing costs' in a tax period to 30 per cent of EBITDA. Such provisions were not included in Finance Act 2019 but are expected to come into Irish law soon.

Hybrid mismatch rules 'anti-hybrid' required under ATAD were introduced by Finance Act 2019, applying to payments made or arising on or after 1 January 2020. A hybrid mismatch arrangement is a cross-border arrangement that generally uses a hybrid entity or hybrid instrument and results in a mismatch in the tax treatment of a payment across jurisdictions.

The rules are of particular relevance to Irish companies used in fund and financing structures. In certain situations, the Irish company may be denied a deduction for a payment made to an associated entity, permanent establishment or as part of a structured arrangement to the extent the payment is not 'included' in another territory.

The new legislation also covers mismatch outcomes arising from double deductions, permanent establishments, withholding tax and tax residency. Its scope is, therefore, potentially very broad.

### ii Common ownership: group structures and intercompany transactions

#### *Ownership structure of related parties*

*Tax grouping and loss sharing*

If a company sustains trading losses in an accounting period, they can be offset against other trading income in the same accounting period or the immediately preceding accounting period. Any unused trading losses may be offset against non-trading income, including chargeable gains, on a value basis. The unused trading losses can be carried forward indefinitely against trading income in succeeding accounting periods; however, the losses must be utilised at the first available opportunity.

Group relief is also available for surrender between members of the same group. A group for these purposes broadly encompasses 75 per cent subsidiaries and can include companies resident in an EU state or a jurisdiction with which Ireland has concluded a double tax agreement (EU/DTA State). However, the ability for a foreign subsidiary to surrender group relief to an Irish company is subject to strict conditions, for example, the surrendering country is an EU/EEA Member State, the loss is deemed to be a 'trapped loss' (is not available for use in any prior or subsequent accounting period by the overseas subsidiary) and the loss could be available for surrender by means of group relief if the company were resident in Ireland, among other conditions.

*Controlled foreign corporations*

See Section II.i.

*Tiered partnerships*

Tiered partnerships would not give rise to any particular tax-planning opportunities in Ireland. For the general means of taxation of partnerships, see Section II.i.

#### *Domestic intercompany transactions*

*Related party transactions*

The Irish transfer pricing regime applies to trading and non-trading transactions involving the supply and acquisition of goods, services, money or intangible assets between associated persons or companies. As such, in order for the rules to apply, one of the parties to the transaction must be an Irish company subject to tax at the 12.5 per cent rate in Ireland.

The rules require that transactions between associated persons should take place at arm's length, and the principles in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration must be followed when analysing whether a transaction has been entered into at arm's length. There is an exemption for small and medium-sized enterprises.

If Irish Revenue determines that a transaction was not entered into at arm's length and has had the effect of reducing profits or increasing losses within the charge to Irish corporation tax at 12.5 or 25 per cent, an adjustment will be made by substituting the arm's-length consideration for the actual consideration.

*Participation exemption*

Ireland has a participation exemption that applies to capital gains on the sale of shares (see Section III).

*Dividends*

Domestic dividends received are not subject to tax as they are considered to be franked investment income.

*Losses*

There are specific anti-avoidance provisions to counter schemes to create artificial losses, which provide that where the seller of an asset is not chargeable to capital gains tax (or corporation tax on chargeable gains) in respect of the disposal of an asset subject to an option, the option will not be ignored in the tax treatment of a subsequent disposal of the assets by the purchaser.

***International intercompany transactions***

*Transfer pricing developments*

Finance Act 2019 introduced changes to Ireland's transfer pricing rules with effect from 1 January 2020.

The key changes include an extension of the transfer pricing rules to non-trading companies. In addition, taxpayers who are within scope must maintain records evidencing their compliance with the arm's-length rules. This will, for certain entities, include a requirement to prepare a master file and local file in line with the 2017 OECD Transfer Pricing Guidelines, an additional and potentially costly administrative burden. Of additional note is the introduction of provisions that impose penalties for non-compliance with requests to provide transfer pricing documentation to the Revenue Commissions. These include a higher rate penalty of €25,000 for the failure to produce a local file that is of relevance to large taxpayers.

There is no grandfathering of historic transactions although there is a modification to the requirements for full transfer pricing documentation for transactions entered into pre-July 2010.

The OECD final reports on BEPS have also triggered the implementation of a number of tax changes in Ireland that are relevant to transfer pricing:

*a* the updated OECD guidelines on transfer pricing were incorporated into Irish legislation;

*b* a formal advance pricing agreement programme was introduced by the Irish Revenue Commissioners in July 2016 to enhance certainty and transparency for taxpayers with multi-jurisdictional operations; and

c the legislative framework required to implement country-by-country reporting (CbCR) has been established and enacted, with effect from 1 January 2016. Irish Revenue released a set of guidance in respect of the interpretation of legislation and regulations on country-by-country reporting in Ireland, which is being updated periodically.

*Related party borrowing*

Other than the below points, Ireland does not currently operate what would be considered statutory thin capitalisation rules. In broad terms, an Irish-based borrower should be entitled to a tax deduction for payments of interest to a non-local affiliated lender (subject to the introduction of the interest limitation rules under ATAD already described). However, there are certain restrictions that would need to be considered, including but not limited to the following:

a the interest payments should be an arm's-length amount;
b the interest payment may be subject to withholding tax if the lender does not fall within relevant exemptions (see also Section II.i); and
c in certain cases, payments to a 75 per cent non-EU related affiliate may be recharacterised as a distribution and disallowed as a deduction.

*Interest withholding tax*

Irish tax legislation provides that tax at the standard rate of income tax (currently 20 per cent) is required to be withheld from payments of Irish-source interest.

However, there are a large number of exemptions available from the requirement to withhold on payments of interest, including for interest paid:

a in Ireland to a bank carrying on a bona fide banking business;
b by such a bank in the ordinary course of business;
c to a company that is resident in an EU Member State or a country with which Ireland has signed a double tax treaty where that territory imposes a tax that generally applies to interest receivable in that territory by companies from outside that territory;
d to a US corporation that is subject to tax in the US on its worldwide income;
e in respect of a 'quoted Eurobond' (provided certain other conditions are met); and
f to certain Irish entities, including qualifying companies for the purposes of Section 110 of the TCA, investment undertakings and certain government bodies.

*Dividend withholding tax (DWT)*

Dividends and distributions made by Irish-resident companies are generally liable to DWT at a rate of 25 per cent for the year of assessment in which the distribution is made. The Irish-resident company making the distribution is required to withhold the tax and pay it to Irish Revenue. Generally DWT must be deducted at the time the distribution is made, unless the company has satisfied itself that the recipient qualifies for an exemption and is entitled to receive the distribution without the deduction of DWT. There are a wide range of exemptions from DWT where the dividend or distribution is paid by the tax-resident company to certain persons (provided that certain declarations are completed) including:

a another Irish tax-resident company;
b companies resident in EU Member States (other than Ireland), or a country with which Ireland has concluded a treaty and are not controlled by Irish residents;

*c* companies that are under the control, directly or indirectly, of a person or persons who are resident in an EU Member State, or a country with which Ireland has concluded a treaty, and are not controlled by persons not so resident;

*d* companies whose shares are substantially and regularly traded on a recognised stock exchange in another EU Member State or country with which Ireland has concluded a treaty or where the recipient company is a 75 per cent subsidiary of such a company or is wholly owned by two or more such companies; and

*e* a company resident in another EU Member State with at least a 5 per cent holding in the Irish paying company (under Directive 90/435/EEC on the taxation of parent companies and subsidiaries).

*Taxation of inbound dividends*

Foreign dividends received by Irish companies are generally subject to corporation tax at a 25 per cent rate. However, dividends received by an Irish company from non-resident subsidiaries are subject to corporation tax at 12.5 per cent where such dividends are paid out of the trading profits of a company that is resident in either:

*a* an EU Member State;

*b* a country with which Ireland has a double tax treaty;

*c* a country that has ratified the Joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters; or

*d* a non-treaty country and where the company is owned directly or indirectly by a quoted company.

Companies that are portfolio investors (i.e., companies that hold no more than 5 per cent in the company and do not have more than 5 per cent of voting rights) and that receive dividends from a company resident in an EU Member State or a country with which Ireland has a double tax treaty will be subject to corporation tax at the 12.5 per cent rate on those dividends.

Relief for foreign taxes incurred on payments made to an Irish tax resident company may be available under the applicable double tax treaty. Where a payment is made from a jurisdiction with which Ireland does not have a double taxation agreement, the domestic Irish tax legislation provides for unilateral credit relief. In practice, this usually results in little or no Irish incremental tax arising on the receipt of foreign dividends.

### iii Third-party transactions

#### *Sales of shares or assets for cash*

*Participation exemption*

Ireland has a participation exemption for capital gains. Where an Irish company disposes of shares in a company resident in Ireland or an EU/DTA State in which it has held at least 5 per cent of the ordinary shares for more than 12 months, any gain should be exempt from capital gains tax. The subsidiary must carry on a trade, or else the activities of the disposing company and all of its 5 per cent subsidiaries taken together must amount to trading activities.

*Losses*

See Section II.ii.

***Tax-free or tax-deferred transactions***

*Transfers of shares and chargeable assets*

Where shares are transferred as part of a bona fide scheme of reconstruction or amalgamation and certain additional conditions are met, no capital gains tax arises for the disposing shareholders and the acquiring shareholder are deemed to have been received those shares on the same date and at the same cost as the old shares. The relief will only apply where the company acquiring the shares has, or as a result of the transaction will have, control of the target company or where the share-for-share exchange results from a general offer made to the members of the target company.

Transfers of chargeable assets within a capital gains tax group can be made on a tax-neutral basis. A group for this purpose comprises 75 per cent effective subsidiaries of a principal company and can include companies in an EU/DTA State.

With regard to stamp duty (a tax on certain instruments, primarily on written documents, subject to certain conditions), group relief may be available and reconstruction or amalgamation relief from stamp duty may apply on a share-for-share exchange that is a bona fide reconstruction or amalgamation.

*Transfers of intangibles*

Companies carrying on a trade in Ireland can claim a tax deduction on capital expenditure incurred on the acquisition or development of certain 'specified intangible assets' for the purposes of their trade. The allowances can be claimed where the intangible asset is acquired from another party (including an affiliate, where arm's-length pricing rules apply). In the context of transfers of intangible assets between Irish group companies, allowances can be claimed where an election is made to opt out of certain capital gains tax group relief provisions.

Where the intangible asset is held for more than five years, there is no clawback of the allowances on a disposal (unless the asset is sold to a connected company who wishes to claim allowances). This is an important measure as traditionally the risk of a future 'recapture' of capital allowances can be problematic for companies with a high spend on capital.

There is an exemption from Irish stamp duty on the transfer of specified intangible assets.

**iv Indirect taxes**

***VAT***

VAT is a transaction tax based on EU directives as implemented into Irish law. It is chargeable on the supply of goods and services in Ireland and on goods imported into Ireland from outside the EU. Persons in business in Ireland generally charge VAT on their supplies, depending on the nature of the supply. The standard VAT rate is 23 per cent, but lower rates apply to certain supplies of goods and services, such as 13.5 per cent, on supplies of land and property, and zero per cent on certain food and drink, books and children's clothing. The supply of certain services, including financial services, is exempt from VAT.

VAT incurred will generally be recoverable as long as it is incurred by a taxable person (a person who is, or is required to be, VAT registered) for the purpose of making taxable supplies of goods and services. VAT incurred by a person who makes exempt supplies is not recoverable.

***Customs and excise***

Customs duties are payable on goods imported from outside the EU.

Excise duty applies at varying rates to mineral oils, alcohol and alcoholic beverages, tobacco products and electricity, and will also apply to certain premises and activities (e.g., betting and licences for retailing of liquor).

***Insurance levy***

There is an insurance levy on the gross amount received by an insurer in respect of certain insurance premiums. The rate is 3 per cent for non-life insurance and 1 per cent for life insurance. There are exceptions for reinsurance, voluntary health insurance, marine, aviation and transit insurance, export credit insurance, and certain dental insurance contracts.

## III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

### i OECD-G20 BEPS initiative

In Ireland, certain elements of the BEPS package have already been enacted into domestic law, including CbCR and updating of transfer pricing legislation. In particular, several elements of OECD BEPS will be introduced through the 'multilateral instrument' (MLI) that has been agreed between participating countries, including Ireland.

In addition to the actions to be taken as part of BEPS, Ireland is required to adopt laws and regulations necessary to comply with rules contained in the EU Anti-Tax Avoidance Directive (ATAD) (Directive EU 2016/1164). Ireland has implemented the CFC,exit tax and hybrid mismatch rules and is currently consulting on the interest limitation rules.

The exit tax applies at a rate of 12.5 per cent on any unrealised gains arising where a company migrates or transfers assets offshore, leaving the scope of Irish taxation. There are some exemptions, such as where a migrating company continues to carry on a trade in Ireland with those assets. The exit tax replaces the existing Irish exit tax regime, which applied where a taxpayer transfers assets or migrates its tax residence out of Ireland. The 12.5 per cent tax rate is lower than the 33 per cent rate that applied before the Budget 2019, unless an exemption applied. However, the new exit tax is significantly broader in scope. Historically, companies that were ultimately controlled by entities located in EU jurisdictions or countries with which Ireland has entered into a double taxation agreement would not expect to be subject to any exit tax, but this is generally no longer the case. In addition, under Finance Act 2019 transfers by non-EU companies, which have a permanent establishment in Ireland will now also be captured. Previously, only companies resident in Ireland or another EU Member State were within scope.

Ireland introduced CFC rules from 1 January 2019, choosing an approach that attributes undistributed income arising from non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage. This has been discussed in further detail at Section II.i.

Ireland has implemented provisions to address hybrid mismatch arrangements in the Finance Act 2019. This took effect from 1 January 2020 in respect of all payments made after that date, although grandfathering of historic structures was not introduced. The Irish legislation generally (other than with respect to withholding tax and tax residency forms of hybrid mismatch) only applies where the parties to a payment are related such that they are: (1) associated enterprises; (2) head offices and permanent establishments; (3) permanent establishments of the same entity; or (4) parties to a structured arrangement.

Broadly, enterprises will be associated where:

*a* one enterprises holds a certain percentage (25 per cent or 50 per cent depending on the particular provision) of the shares, voting rights or rights to profits in the other enterprise, or if there is a third enterprise that holds an equivalent interest in both enterprises;

*b* both enterprises are included in the same set out consolidated financial statements prepared under international accounting standards or Irish generally accepted accounting practice, or both enterprises would be included in the same set of financial statements if such statements were to be prepared in accordance with those accounting practices (subject to certain exceptions); and

*c* one enterprise has significant influence in the management of the other enterprise, where 'significant influence' means the ability to participate on the board of directors or equivalent governing body of that enterprise, in its financial and operating policy.

The forms of hybrid mismatch that the legislation addresses are those arising by virtue of double deductions, permanent establishments, financial instruments, hybrid entities, withholding tax and tax residency.

Very broadly, where a payment has been 'included' by a payee the inclusion will generally neutralise any form of hybrid mismatch. Payments are considered to be included where the payee is:

*a* chargeable to tax on that payment (other than on a remittance basis);

*b* exempt from tax on its profits or gains;

*c* established in a jurisdiction which does not impose tax on such payment; or

*d* subject to a controlled foreign company charge or foreign company charge.

The rules are of particular relevance to Irish companies used in fund and financing structures. They could apply whenever such companies make payments that give rise to a tax deduction in Ireland, but no other country taxes the associated receipt by reason of hybridity. This type of mismatch outcome could arise in one of four situations:

*a* the payment is not chargeable to tax due to differences in the characterisation of the payment in Ireland and another territory (e.g., the payment is treated as debt in Ireland but equity in the other territory);

*a* the payment is made to a hybrid entity and the mismatch outcome is attributable to differences in the allocation of payments to that entity between the territory in which it is established and the territory in which a participator in that entity is established. This situation could apply where an Irish company makes payments to a company that is disregarded for tax purposes by investors in that company;

*a* the Irish company is itself a hybrid entity and the mismatch outcome is attributable to the fact that payments by the company are disregarded under the laws of the payee territory; and

*b* the rule against imported mismatches applies where the hybrid mismatch does not arise with respect to the transaction entered into by the Irish company but a payment by the Irish company directly or indirectly funds a mismatch outcome arising outside Ireland.

In each of these situations, the Irish company may be denied a deduction for a payment made to an associated entity, permanent establishment or as part of a structured arrangement to the extent this payment is not taxed in another territory.

### ii EU proposals on taxation of the digital economy

Ireland has consistently expressed a preference for a global consensus approach to the question of taxation of the digital economy, particularly through the OECD, and has opposed a unilateral approach by the EU to date on that basis. The Irish Minister for Finance has emphasised the need for unanimity before any EU digital tax proposal can be agreed, and he said that his priority in the BEPS talks will be to ensure that Ireland's interests are central to the process of forming that globally agreed consensus.

### iii EU Directive 2018/822 (DAC 6)

Finance Act 2019 enacts Directive 2018/822/EU (DAC 6) into Irish law. This introduced a mandatory disclosure scheme that requires intermediaries and taxpayers to notify tax authorities when they promote or enter into cross-border arrangements with particular hallmarks.

An arrangement will be 'cross-border' where it concerns either more than one EU Member State or concerns one EU Member State and a third country. A cross-border arrangement will be reportable if it falls within any one of the hallmarks set out in Annex IV of DAC 6. Of the five categories of hallmarks, two must also satisfy a 'main benefit test' while the other three do not. The main benefit test will be met where obtaining a tax advantage (as defined in the Finance Act 2019) is one of the main benefits which a person may reasonably expect to derive from an arrangement.

The type of information that will need to be reported includes:

*a* identification of the taxpayers and intermediaries involved in the transaction, including name, address, date of birth, tax identification number, associated enterprises;

*b* details of the hallmarks making the arrangement reportable;

*c* a summary of the reportable cross-border arrangement;

*d* date on which the first step in implementing the reportable arrangement was or will be made;

*e* details of relevant domestic tax rules that form the basis of the reportable arrangement;

*f* value of the reportable arrangement; and

*g* identification of any other EU Member State or person affected by the reportable arrangement.

Reporting obligations exist for both intermediaries and certain taxpayers. The term 'intermediary' is very broad and can apply to a number of different participants in an arrangement. It includes anyone who designs, markets, organises or makes available or implements a reportable arrangement or anyone who helps with reportable activities and knows or could reasonably be expected to know that they are doing so. This could include accountants, financial advisers, lawyers, in-house counsel and banks.

If the arrangement is deemed to be reportable, the ensuing reporting obligation lies with all intermediaries involved in a transaction, unless an intermediary can prove that another intermediary involved has reported the arrangement. Disclosure need only be made once in respect of an arrangement. Consequently, it need only be made to the competent authority of one EU Member State. Where possible, disclosure should be made in the place of tax residence. Failing this, the report should be made in the state where there is a permanent establishment connected with the provision of the services. As a final resort, the report should be made in the place of incorporation and location of a tax, consultancy or legal professional association in which the intermediary is registered.

An intermediary is not required to report information with respect to which a claim of legal professional privilege could be maintained by the intermediary in legal proceedings. However, in such cases the intermediary must, without delay, notify any other intermediary, or the relevant taxpayer if there are no other intermediaries, of the obligations imposed on the other intermediary/relevant taxpayer as appropriate. The obligation may revert to the taxpayer in certain situations, including where all EU-based intermediaries invoke legal professional privilege.

Reportable arrangements between 25 June 2018 and 30 June 2020 must be reported no later than 31 August 2020. From the 1 July 2020, reportable arrangements must be reported within 30 days beginning:

*a* on the day after the arrangement is made available for implementation, or
*b* on the day after the arrangement is ready for implementation, or
*c* when the first step in the implementation has been made,
*d* whichever is first, or
*e* on the day after the intermediary provided – directly or by means of other persons – aid, assistance or advice.

The Irish legislation provides for monetary penalties for non-compliance. The severity of penalties depends on the type of breach involved. Certain breaches by taxpayers and intermediaries carry a penalty of up to €4,000 with a further penalty of up to €500 per day for each day on which the failure continues. The Irish implementation of DAC 6 is a significant new development potentially affecting many ordinary cross-border commercial transactions. Intermediaries and taxpayers will need to monitor transactions and assess whether they are reportable, particularly bearing in mind the legal interpretation of the legislation and potential exclusions.

### iv Tax treaties

Ireland has signed comprehensive double taxation agreements with 74 countries, 73 of which are currently in effect. The agreements cover direct taxes, which in the case of Ireland are:

*a* income tax;
*b* universal social charge;
*c* corporation tax; and
*d* capital gains tax.

#### *Notable typical or model provisions*

While most Irish treaties follow the OECD model tax treaty, particular Irish tax treaties may depart in some respect from the OECD model language (this is particularly the case with older Irish treaties).

Treaties will typically cover withholding tax on outbound and inbound payments of dividends, interest and royalties, providing for either: (1) a full exemption from withholding tax or reduction in the rate at which the withholding tax applies; or (2) a credit for the foreign tax against the Irish tax payable.

***Recent changes to and outlook for treaty network***

On 13 June 2019 Ireland signed a new treaty with the Netherlands, which will replace the existing treaty on its entry into effect. Ireland and Switzerland signed a Protocol on 13 June 2019 amending the existing treaty and amending protocols. This was ratified by Finance Act 2019.

Negotiations have concluded for new treaties with Kenya, Oman, Kosovo and Uruguay.

In addition to the negotiation of new treaties, Ireland's existing treaty base will be modified by operation of the MLI. Ireland deposited its instrument of ratification of the MLI on 29 January 2019, which entered into force from 1 May 2019. The MLI operates so as to modify existing tax treaties, and how each treaty is modified depends on the method of implementation adopted by each contracting state. The key provisions in respect of Irish double tax treaties will be in relation to the tax treatment of transparent entities, dual resident entities and the introduction of a principle purpose test.

## IV RECENT CASES

### i Perceived abuses

***European Commission State Aid investigation – Apple***

The European Commission decision relating to the *Apple* case was published on 19 December 2016. The investigation centred on whether Ireland allowed Apple to adopt a method of taxation that provided it with a competitive advantage and breached EU State Aid rules. The Commission concluded that this did occur, and ordered Ireland to recover approximately €13 billion, plus interest, from Apple.

In coming to its decision the Commission focused on the arm's-length principle and whether Ireland applied that principle in its taxation of Apple. The two Apple entities that were the primary focus of the decision were both non-Irish resident, but maintained an Irish branch. Under Irish law, at that time, only the profits derived from an Irish branch were subject to tax in Ireland. The Commission examined the profits, which, in its view, should have been allocated to the branches under the arm's-length principle. The profits at stake were derived from the intellectual property of the entities. Ireland had treated these profits as outside the scope of Irish taxation, on the basis that the entities were not resident here.

As part of its decision, the Commission effectively determined that the absence of employees and verifiable activity in the head offices meant that a significant amount of that activity should be allocated to the Irish branches. This finding will be studied very closely by companies that have historically utilised similar structures in Ireland.

The case is now with the European General Court for ruling and a decision is expected in the second half of 2020. The decision by the EGC may be appealed to the ECJ, and consequently it may be much longer before a final resolution is arrived at.

***Double Irish structure***

The 'double Irish' structure referred to a structure whereby intellectual property was held by an Irish-incorporated company that was managed and controlled outside Ireland, and, therefore, was not Irish tax resident under the rules then in force.

In 2015, the Irish government terminated those arrangements, essentially preventing an Irish company from being tax-resident elsewhere. The implementing legislation included a grandfathering provision that requires that existing schemes will be phased out by 2020, broadly accepting a tax treaty partner country in certain cases.

***Perrigo Irish tax assessment***

It was announced in December 2018 that the Irish Revenue Commissioners had assessed a subsidiary of the listed company Perrigo Company plc, Perrigo Pharma International, to a tax liability of €1.636 million, not including interest or any applicable penalties. As at the time of writing, this assessment has been appealed by the company to the Tax Appeals Commission in Ireland.

The action being taken by Perrigo Pharma International arises from an assessment for 2013. At the time of the issue in dispute, Perrigo was known as Elan Pharma International. The amended assessment related to the sale in 2013 by Elan Pharma International of its interest in certain intellectual property. It is understood that The Irish Revenue Commissioners, after reassessing the transaction, declared it has been treated as a chargeable gain, which is subject to a higher tax rate rather than a trading transaction.

There has been significant public commentary on this matter given the size of the assessment, and tax advisers have sought to assess the possible outcomes of that assessment and appeal.

## V OUTLOOK AND CONCLUSIONS

Ireland has a stable competitive tax regime based on clear, long-established rules. International business has benefited from this environment, hence the number of multinationals headquartered in Ireland and major investment funds that use Irish investment companies.

While it is a time of unprecedented change in the international tax environment, Ireland is keeping pace and adapting to these developments. While Ireland remains committed to its 12.5 per cent tax rate and introduced competitive enhancements such as the knowledge development box and intellectual property amortisation, it has also been among the first countries to implement CbCR, the MLI and other aspects of the OECD BEPS initiatives.

The Finance Act 2019 introduced many changes to the Irish tax landscape, including transfer pricing, DAC 6 and anti-hybrid provisions. Guidance is expected to be published by Irish Revenue in due course on each of these new provisions.

As part of its implementation of EU ATAD, Ireland is running a public consultation on the introduction of interest limitation rules. When introduced, these rules will impact the financing of international investment through Ireland.

Final recommendations on taxation of the digital economy should be forthcoming from the OECD in 2020. There may be further EU tax proposals throughout 2020–2021 on a range of tax issues such as the common consolidated corporate tax base, financial transactions tax, digital sales tax and changes to the national veto system. However, none of these proposals have unanimous support across the Member States, so compromise will be needed for these to progress any further.

**Appendix 1**

# ABOUT THE AUTHORS


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Andrew is head of the tax at Maples and Calder, Maples Group's law firm. He is an acknowledged leader in Irish and international tax and advises companies, investment funds, banks and family offices on Ireland's international tax offerings. Andrew is chair of the Irish Debt Securitisation Association, the industry group representing the Irish securitisation industry. Prior to joining the Maples Group, Andrew was a senior partner with a large Irish law firm, and before that a tax consultant with Ernst & Young. He has been recommended by a number of directories, including *Chambers and Partners*, *The Legal 500*, *Who's Who Legal*, *World Tax*, *Best Lawyers*, International Tax Review's *World Tax Guide* and the *Tax Directors Handbook*. Andrew has also been endorsed in Practical Law Company's *Tax on Transactions* multi-jurisdictional guide. Andrew is also the joint author of the book *Taxing Financial Transactions*, Irish Taxation Institute.


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