Chapter 1

IRELAND

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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, a 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 and anti-hybrid measures in the EU Anti Tax Avoidance Directives (ATAD I and II). The Irish government also ratified Ireland's choices under the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument) (MLI), which came into effect in Ireland on 1 May 2019. Ireland has implemented the EU DAC6 rules that require EU taxpayers and their intermediaries to report information about cross-border tax planning arrangements, in addition to the EU DAC7 rules, which extend these reporting requirements to certain servicers of digital platforms. 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. Ireland has also modernised the Irish investment limited partnership structure to bring it in line with international standards.

Ireland has signed up to the OECD's Inclusive Framework on BEPS, which is intended to reform the international tax rules to address the challenges arising from the digitalisation of the global economy. If the Inclusive Framework is implemented in the manner currently envisaged, a new corporate tax rate of 15 per cent will be introduced in Ireland for companies with an annual revenue in excess of €750 million.

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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;
b designated activity company (DAC);
c public limited company;
d company limited by guarantee;
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 businesses. 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 (ILPs).

Unit trusts are taxed as investment undertakings for the purposes of Section 739B of the Taxes Consolidation Act, 1997 (as amended) (the 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.

The Irish government has made several enhancements to the existing ILP legislation, bringing ILPs into line with other leading Irish structures such as ICAVs and the partnership structures offered in other leading common law jurisdictions.

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.

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 Ireland (i.e., foreign trade carried on wholly outside 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 (CGT) 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 CGT, 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 CGT 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 are beyond the reach 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

Research and development tax credit

A tax credit for qualifying research and development (R&D) expenditure exists for companies engaged in in-house qualifying R&D undertaken within the European Economic Area (EEA). This credit is 25 per cent of qualifying expenditure. Prior to the enactment of the Finance Act 2022, the credit could be used to reduce the company's corporation tax liability. However, for accounting periods the specified return date of which falls on or after 23 September 2023, taxpayers will have the option to call for payment of their eligible R&D tax credit in cash or to request for it to be offset against other tax liabilities. Where taxpayers choose the payment option, a new three-year fixed payment schedule will apply. However, for the first accounting period in respect of which the revised rules will apply, transitional measures will be in place in respect of eligible payments.

Additional changes to the regime introduced in the Finance Act 2022 are as follows:

a pre-trading expenditure incurred on qualifying R&D activities can be claimed as a payable R&D tax credit over a three-year period from the year that the company commences to trade;

b the first €25,000 of a claim on R&D expenditure will be payable in full in cash; and

c existing caps on the payable element of the credit are being removed.

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, may be 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 or net sales). The result is effectively taxed at a current rate of 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.

The Finance Act 2022 provides for a number of other amendments to the Knowledge Development Box, subject to a commencement order to be issued by the Minister for Finance. It is intended that these amendments will be commenced from a date that will be determined by reference to international progress on implementation of the Pillar Two 'Subject to Tax' Rule. First, the rate of the allowance given as a trading expense will be amended to 20 per cent of the qualifying profits, to give a new effective rate of 10 per cent for profits within scope of the relief. Second, the scheme is to be amended to reflect the new effective rate of 10 per cent when allowing relief for losses incurred by a company on activities that qualify for relief.

Knowledge digital gaming tax credit

In 2021, Ireland introduced a new tax credit for the digital gaming sector, subject to EU approvals. This credit operates as a refundable corporation tax credit for qualifying expenditure incurred in the design and development of digital games. The tax credit is available at a rate of 32 per cent of qualifying expenditure with a maximum limit of €25 million per project. A per project minimum spend requirement of €100,000 will also apply. The relief will be available only for projects in the digital gaming sector that have been issued with a cultural certificate from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media.

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 and 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. The allowance can be surrendered by way of group relief or carried forward if unused.

For capital expenditure incurred on or after 11 October 2017, the aggregate amount for an accounting period of (1) capital allowances and (2) deductions for interest in respect of expenditure on intangible assets cannot exceed 80 per cent of trading income for that period (excluding such allowances and interest). Any excess allowances and interest can be carried forward to succeeding accounting periods.

Prior to the Finance Act 2020, no balancing charge would have applied (although a balancing allowance may have arisen) where an intangible asset was sold more than five years after the first accounting period in which the asset was acquired. The current position is that the disposal of any asset in relation to which capital allowances are claimed in respect of capital expenditure incurred on or after 14 October 2020 may now give rise to a balancing charge regardless of the period of ownership.

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 of the 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 that certain conditions are met. Any residual profit is also liable to corporation tax at 25 per cent. The regime is used in a range of international finance transactions, including investment repackagings, collateralised loan obligations and investment platforms.

Capitalisation requirements

Other than the interest limitation rules discussed below, Ireland has no thin capitalisation rules. There are, however, anti-avoidance provisions to close off potential abuses relating 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 the controlling company has the significant people functions relevant to assets or risks carried out by the CFC and are instrumental in generating the CFC's income; and

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

Anti-hybrid rules

Ireland introduced hybrid mismatch rules, as required under ATAD, which took effect on and from 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 or permanent establishment or as part of a structured arrangement to the extent that the payment is not 'included' in another territory.

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

Furthermore, since 1 January 2022, reverse hybrid mismatch rules apply that address mismatch outcomes that can arise due to an entity being treated as tax transparent in one jurisdiction but regarded as opaque in the participator's jurisdiction. Where applicable, the provisions operate to bring entities that are treated as tax transparent in Ireland within the scope of Irish corporation tax where it is owned or controlled by entities resident in a jurisdiction that regard it as tax opaque and, as a result of this 'hybridity', double non-taxation occurs.

Interest limitation rules

Similar to other EU Member States, Ireland has introduced an interest limitation rule (ILR) in accordance with ATAD. This took effect for accounting periods beginning on or after 1 January 2022.

The ILR potentially applies if a taxpayer's interest expense exceeds its interest equivalent income. The ability to claim a tax deduction for the excess interest is restricted to 30 per cent of earnings before interest, taxes, depreciation and amortisation (EBITDA) and limits 'exceeding borrowing costs' in a tax period to 30 per cent of EBITDA. The legislation incorporates a number of important exemptions and exclusions in line with ATAD. There is an exemption for 'stand-alone entities' and for entities where the net borrowing costs are less than the €3 million *de minimis* amount. There are also exclusions for legacy debt, which is debt put in place prior to 17 June 2016, and long-term infrastructure projects. There is no exception for financial undertakings such as regulated investment funds, banks and insurance companies, although in an Irish context Irish regulated funds should not generally rely on the deductibility of interest expenses to preserve their tax position as they are either tax exempt or tax transparent.

Where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes (i.e., a 'worldwide group'), the indebtedness of the overall group at worldwide level may be considered for the purposes of providing additional relief under one of two grouping rules. For many corporate and investment fund structures, the application of these grouping rules will be of significant importance.

The concept of a single company worldwide group may be of relevance to certain securitisation and structured finance vehicles. This is a company that is neither a stand-alone entity nor a member of a worldwide group or an interest group. Where a taxpayer meets this definition, it can apply the grouping rules by comparing its position as a single entity with its position as if it was a member of a worldwide group, with the latter taking into account related-party transactions for the purposes of the comparison.

In May 2022, the European Commission published the first draft of the 'debt-equity bias reduction allowance' Directive (DEBRA), which has interest limitation measures and is expected to apply alongside and in addition to the existing interest limitation rule introduced as part of EU ATAD. The draft DEBRA Directive provides that EU Member States shall implement the provisions into national law if agreed by 31 December 2023, to be effective from 1 January 2024.

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 or 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 or EEA Member State, the loss is deemed to be a 'trapped loss' (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 was 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 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.

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 Administrations 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 (SMEs).

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, 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 CGT (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

A number of changes to Ireland's transfer pricing rules were introduced with effect from 1 January 2020. Most importantly, the existing rules were extended to cover non-trading companies, which had until then been exempt. Taxpayers within scope must maintain records evidencing their compliance with the arm's-length rules. This will, for larger entities, include a requirement to prepare a master file and a local file in line with the 2017 OECD Transfer Pricing Guidelines, an additional and potentially costly administrative burden. There is an exemption, applicable for the time being, from documentation requirements for SMEs.

A 'domestic carve-out' applies to certain non-trading transactions where both the supplier and the acquirer are 'qualifying persons' (i.e., Irish tax resident in the relevant period and chargeable to Irish tax in respect of the transaction) and the arrangement is not an arrangement in which the sole or main purpose is the avoidance of tax. Although Section 110 companies are excluded from the domestic carve-out, profit participating instruments are excluded from the scope of transfer pricing, consistent with their exclusion from the arm's-length test in Section 110.

Section 28 of the Finance Act 2021 implemented the Authorized OECD Approach (AOA) for the attribution of income to the Irish branch of a non-resident company. The AOA applies OECD transfer pricing principles to the taxation of a permanent establishment or branch on a separate entity or arm's-length basis. In line with the general Irish TP Rules, the extension of the application of the AOA rules to SMEs is subject to enactment under a ministerial order.

Section 35 of the Finance Act 2022 updated the definition of 'transfer pricing guidelines' to refer to the updated OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, which were published by the OECD on 20 January 2022.

Country-by-country reporting

The Country-by-Country Reporting Regulations have been in effect in Ireland since 1 January 2016. Country-by-country reporting (CBCR) requires groups with an Irish presence and turnover exceeding €750 million (the 'relevant groups') to file a country-by-country report (CBC report), which provides a breakdown of the amount of revenue, profits, taxes and other indicators of economic activities for each tax jurisdiction in which the relevant group does business.

Section 851A TCA provides that all taxpayer information is confidential and may only be disclosed in accordance with the law, and pursuant to this Section, the information contained in the CBC reports and equivalent CBC reports has, to date, been treated in the same manner as all other taxpayer information provided to or received by Revenue. However, Directive (EU) 2021/2101 as regards disclosure of income tax information by certain undertakings and branches changes this position. Under this new Directive, multinational groups, and where relevant, certain standalone undertakings, will be required to provide the public with a report on income tax information where they exceed a certain size. All EU Member States are required to transpose this new Directive into national law by 22 June 2023, and these reporting requirements will take effect from the commencement date of the first financial year starting on or after 22 June 2024.

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 arm's-length amounts;

b the interest payments may be subject to withholding tax if the lender does not fall within relevant exemptions (see also Section II.i and the following section); 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 that 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

Dividends and distributions made by Irish-resident companies are generally liable to dividend withholding tax (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 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:

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 Administrative Assistance in Tax Matters; or

d a non-treaty country and where the company is owned directly or indirectly by a qualifying 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, while certain trading companies will not be taxed on those dividends in those circumstances.

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 CGT. The subsidiary must carry on a trade, or the activities of the disposing company and all of its 5 per cent subsidiaries taken together must amount to trading activities. The exemption does not apply to certain disposals, including shares that derive their value from Irish land.

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 CGT arises for the disposing shareholders, and the acquiring shareholder is deemed to have received those shares on the same date and at the same cost as the old shares. The relief will apply only 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 CGT 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

As set out in Section II.i, capital allowances (tax depreciation) are available for companies incurring capital expenditure on the provision of specified intangible assets for the purposes of 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, where an election is made to opt out of certain CGT group relief provisions). 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 unless, in certain circumstances, those supplies are made exclusively to non-EU customers.

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.

Bank levy

Section 126AA of the Stamp Duties Consolidation Act 1999 provides for a levy on certain financial institutions (known as the bank levy). This has been extended to the end of 2023.

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 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 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 CFC and exit tax and hybrid mismatch rules are discussed in further detail in Section II.i.

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.

In October 2021, the Irish Minister for Finance announced that Ireland would sign up to the OECD's Inclusive Framework, which has the stated intention of reforming international tax rules in order to address the challenges arising from the digitalisation of the global economy. As part of its implementation, a new minimum global effective corporate tax rate of 15 per cent will be introduced in Ireland. The rate will apply to all large groups that have an annual turnover exceeding €750 million and that have either a parent company or a subsidiary in an EU Member State.

The EU Directive on minimum taxation (Directive (EU) 2022/2523) was published in the EU Official Journal on 22 December 2022. The Directive reflects the EU's commitment to implement the OECD Pillar Two rules. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2023. It is envisaged that these measures shall apply to financial years beginning after 31 December 2023.

iii EU Directive 2018/822 (DAC6)

The Finance Act 2019 enacted Directive 2018/822/EU (DAC6) 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 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 DAC6. Of the five categories of hallmarks, two must also satisfy a 'main benefit test'. The main benefit test will be met where obtaining a 'tax advantage' is one of the main benefits that a person may reasonably expect to derive from an 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.

iv EU Directive 2021/514 (DAC7)

Tax transparency rules were extended to digital platform operators under Directive 2021/514/EU (DAC7). DAC7 was transposed into Irish law by the Finance Act 2021 and Finance Act 2022.

Since 1 January 2023, reporting platform operators are obliged to collect and report prescribed information on reportable sellers using their platforms for certain commercial activities, including:

a the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces;
b the provision of a personal service (involving time or task based work);
c the sale of goods (tangible property); and
d the rental of any mode of transport.

Under DAC7, a platform is considered to be any software, including a website or mobile application, that allows a seller to connect to another user for the purposes of carrying out such activities. Furthermore, EU Member States will be obliged to automatically exchange this information.

The European Commission has also announced that it will introduce reporting requirements with regard to cryptoassets, e-money and digital currencies under the proposed DAC8, thereby bringing cryptoasset providers and platforms providing services in relation to cryptocurrencies and cryptoassets into the scope of automatic exchange of information. The DAC8 draft text is to be submitted to the European Parliament for consultation and to the Council for adoption, with the intention that its provisions will enter into force on 1 January 2026.

v Proposed directive on shell entities (unshell)

On 22 December 2021, the European Commission published a proposal for a directive with the stated intention being to prevent the misuse of 'shell' entities for tax purposes. The new proposals are aimed at entities that do not maintain sufficient substance within the EU. Entities that do not satisfy these substance requirements would be subject to additional reporting requirements. In addition, they would be unable to access the benefits of certain double tax treaties and EU tax directives, including the Parent–Subsidiary Directive and Royalty Directive. Significantly, other EU Member States, such as those paying to the entity, or those in whom shareholders are resident, will be entitled to impose tax on the income of the entity.

An entity will be in scope for the directive if it satisfies each of the following gateway tests:

a the entity derives more than 65 per cent of its income from sources defined as 'relevant income'. Relevant income includes 'passive' type income such as dividends and interest;
b the entity is engaged in cross-border activity such that more than 65 per cent of its assets or 55 per cent of its income is earned or paid out of cross-border transactions; and
c in the preceding two years, the entity has outsourced the administration of its day-to-day operations and decision-making on significant functions to a third party.

Once an entity meets all three gateway tests, it becomes subject to a reporting obligation, which will require the entity to demonstrate substance by showing that:

a it has its own premises in the Member State, premises for its exclusive use or premises shared with entities of the same group;

b it has at least one own and active bank account or e-money account in the EU through which the relevant income is received; and
c one of the following indicators is present:
- at least one director of the entity: is resident for tax purposes in the Member State; has the appropriate decision-making authority; actively and independently exercises this authority on a regular basis; is not an employee of an unaffiliated entity and does not act as a director of an unaffiliated entity;
- the majority of employees of the entity are resident for tax purposes in or near the Member State of the entity.

As currently drafted, the proposal contains exemptions for certain entities including 'securitisation special purpose entity' and entities that have a transferable security admitted to trading or listed on a regulated market or multilateral trading facility.

The stated intention of the EU Commission is for the proposal to be implemented in all Member States by 30 June 2023, to apply from 1 January 2024. However, there is no certainty that the proposal will be introduced in its current form. A European Parliament legislative resolution of 17 January 2023 has been published on the proposed directive, to be considered by the EU Council. The proposal in its final form will require the unanimous approval of the EU Council before it is adopted.

vi Tax treaties

Ireland has signed comprehensive double taxation agreements with 76 countries, 74 of which are currently in effect. The agreements cover direct taxes, which in the case of Ireland are the following:
a income tax;
b universal social charge;
c corporation tax; and
d CGT.

Notable typical or model provisions

Although most Irish treaties follow the OECD Model Tax Convention, 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:
a a full exemption from withholding tax or reduction in the rate at which the withholding tax applies; or
b a credit for the foreign tax against the Irish tax payable.

Recent changes to and outlook for treaty network

Ireland and Kosovo signed a new DTA on 25 June 2021, which entered into force on 24 February 2022.

In addition, a number of protocols to existing DTAs have been entered into, with effect from 1 January 2023. These include the DTA between Ireland and:
a the Isle of Man, which entered into force on 19 December 2022; and
b Guernsey, which entered into force on 19 December 2022.

The Protocol to the existing DTA and Amending Protocol between Ireland and Germany also entered into force on 30 December 2021, with effect from 1 January 2022.

Negotiations have concluded for new treaties with Kenya, Ghana, Oman, 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 began to have effect for Ireland's tax treaties:

a with respect to taxes withheld at source, since 1 January 2020; and
b for all other taxes levied by Ireland, for taxes levied with respect to taxable periods beginning on or after 1 November 2019.

The MLI operates 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 Burlington Loan Management DAC v. HMRC [2022] UKFTT 290 (TC) (the Burlington case)

Although this was a UK decision, it is important not only because it involved a claim for relief under the UK–Ireland treaty but because of the potential insight it provides in applying main purpose tests in tax treaties.

The case concerned a claim for interest owed by a UK company to a Cayman company (CayCo). CayCo sold the claim for 92 per cent of its face value to an Irish company (IrishCo). When the interest was subsequently paid to IrishCo, 20 per cent was withheld, and IrishCo sought to reclaim this amount from HMRC under Article 12 (Interest) of the UK–Ireland DTA. HMRC denied relief on the basis that one of the main purposes of the transfer of the debt to IrishCo was to take advantage of Article 12 contrary to Article 12(5).

On the facts, IrishCo was aware that in the absence of a sale the claim was worth only 80 per cent of face value to CayCo and that CayCo was therefore willing to sell the claim for the best price it could get in excess of 80 per cent. IrishCo knew that the claim was being sold for tax reasons and that CayCo would suffer withholding if it did not sell. However, it is understood that IrishCo was not the only prospective purchaser that could claim tax relief, and awareness of this relief was simply a factor for IrishCo in calculating the price it offered to CayCo for the debt.

The First Tier Tribunal (FTT) decided that neither CayCo nor IrishCo had a main purpose of taking advantage of the withholding tax exemption provided by the DTT. IrishCo was entitled to a full exemption from UK withholding tax under the UK–Ireland DTT. The FTT chair stated that, 'in order for a person to be said to have a main purpose of "taking advantage" of a treaty relief itself in relation to a debt claim, something more is required than simply selling the debt claim outright, for a market price which happens to reflect the fact that certain potential purchasers of the debt claim have tax attributes which the seller does not have, to a purchaser which happens to be able to pay that market price because it has those tax attributes by virtue of being entitled to relief under a treaty'. Moreover, for CayCo to have a main purpose of taking advantage of Article 12 it would need to have been aware

that this was the relief being claimed. However, CayCo did not know the identity of IrishCo when it did the trade, as the trade was sold through a broker, even if it did know the identity before the trade was finally concluded.

While the decision is limited to the interpretation of Article 12(5), the reasoning of the decision is useful in the context of loan trades where the principal purpose test, as inserted by the MLI into Irish double tax treaties, is being considered. PPT may deny a treaty benefit where it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that treaty benefit is one of the principal purposes of the party seeking to rely on the relevant double tax treaty. While not identical wording to Article 12(5), it is submitted that *Burlington* may provide a useful insight into how PPT might be applied by courts in other cases.

ii Fiat Chrysler Finance Europe case (C-885/19 P) (the Fiat case)

On 8 November 2022, the ECJ adopted its final judgment in the *Fiat* state aid case. This is expected to have an impact on other state aid cases, creating a strong precedent against, notably, the EU Commission's *Apple* tax appeal.

The ECJ in *Fiat* followed the earlier Advocate General opinion and held that the Commission 'erred' under European law by applying external principles of an arm's-length transfer pricing standard (a 'European standard') that went beyond Luxembourg national law, when testing for the application of 'selective advantage' and thus state aid by Luxembourg.

In the earlier *Apple* case on the other hand, a lower European Court had agreed with the Commission that it could apply this European standard when analysing whether state aid rules had been breached by Ireland. It was inherent in this approach that state aid rules would not have been breached had the analysis been applied under Irish national law as it stood at the time. Ireland nevertheless still won the *Apple* case on the grounds that no selective advantage existed even applying the European standard, and the European Commission appealed that decision.

Consequently, the *Fiat* case has established a fundamental point; the analysis under European law as to whether selectivity and thus state aid exists can only be made by reference to national law and not another European standard. The application of the European standard is critical to the Commission's case in the *Apple* appeal; therefore, the *Fiat* case has established further grounds against the chances of a successful appeal against Ireland.

iii Orde van Vlaamse Balies and others (C-694/20): Obligation of Lawyers to Notify Other Intermediaries under DAC6 Infringes Legal Professional Privilege

As outlined above, DAC6 requires certain intermediaries and, in certain circumstances, taxpayers (if there are no intermediaries or if intermediaries are subject to professional secrecy) to report certain cross-border arrangements to national tax authorities. The DAC6 Directive allows EU Member States to exempt intermediaries from the reporting obligations where to require them to report would breach legal secrecy or professional privilege rules that apply in the Member State. As such, lawyers may benefit from a waiver of their reporting obligations under DAC6. However, there was still a requirement within DAC6 for such legal intermediaries to notify other intermediaries involved in the arrangement (where that other intermediary was not exempt from reporting obligations) or to notify the taxpayer directly that that other intermediary or taxpayer might be required to report the arrangement.

On 8 December 2022, the ECJ ruled that the obligation to notify other intermediaries imposed on lawyers is an interference with the right to respect for communications between

lawyers and their clients guaranteed in Article 7 of the EU Charter of Fundamental Rights. This is on the basis that it is not strictly necessary to meet the objectives of DAC6 and indirectly infringes the right to legal professional privilege.

It has been reported that the EU will use DAC8 (the proposed EU reporting rules for cryptoasset transactions) to amend DAC6 to reflect the ECJ decision in this case.

V OUTLOOK AND CONCLUSIONS

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

Ireland's approach to international tax policy is one of full engagement with international initiatives led by the OECD and the EU to combat tax avoidance and increase tax transparency. Ireland is committed to the OECD BEPS global tax reform process and has implemented many of the BEPS recommendations, including DAC6, anti-hybrid measures and interest limitation.

International tax trends will continue to dominate the tax landscape in 2023 with the expected agreement and implementation of OECD Pillar Two in all EU Member States, including Ireland, and further progress on OECD Pillar One and the EU Unshell Directive.

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