GLI GLOBAL LEGAL INSIGHTS

Corporate Tax

2021

Ninth Edition

Contributing Editor: **Sandy Bhogal**

glg global legal group

Ireland

Andrew Quinn, Lynn Cramer & Niamh Cross
Maples Group

Overview of corporate tax work over the last year

Financial services

Ireland is a leading European jurisdiction for the establishment of bond-issuing special-purpose vehicles ("**SPVs**") and securitisation companies. In 2019, the Irish share of the number of Euro area "Financial and Vehicle Corporations" ("**FVCs**") was 27.6%. FVCs are bond-issuing companies required to report to the European Central Bank.

Ireland is also a leading domicile for internationally distributed investment funds. In 2020, the total funds assets under administration in Ireland was €5.4 trillion, with the number of funds domiciled in Ireland as at March 2021 being 8,105 and approximately €3.5 trillion held in these Irish domiciled funds.

Mergers and acquisitions

2020 was another relatively strong year for M&A activity in Ireland and the market has been described as "resilient" in the midst of the COVID-19 pandemic. Three hundred and twenty-five transactions were announced in the first nine months of 2020, which marked a decline of just under 4% on the same period in 2019.

Aircraft leasing and aviation finance

Ireland is a global centre for aircraft leasing with over 50 aircraft leasing companies based in Ireland, including 14 of the world's top 15 lessors. Over the past 10 years, the commercial aviation industry had enjoyed sustained growth. However, the onset of the COVID-19 pandemic and the restrictions introduced in response to it have created unprecedented market conditions for the aviation leasing and finance industry. Those conditions and uncertainties are set to continue in 2021; however, it is expected that travel will ultimately rebound and there is certainly continued investor interest in the sector.

Intellectual property

Ireland is a leading location for the development, exploitation and management of intellectual property ("**IP**"). According to IDA Ireland, the number of global companies centralising their IP management in Ireland has made Ireland one of the largest exporters of IP in the world. Eight of the top 10 global technology companies, eight of the top 10 global pharmaceutical companies and 15 of the top 25 medical devices firms in the world are located in Ireland. In recent years, Ireland has attracted a range of innovative social media companies, including Google, Facebook, Twitter and LinkedIn, all of whom have established substantial operations in Ireland.

Tax disputes

2020 was another significant year for Ireland in the area of tax disputes. The Tax Appeals Commission (the "**TAC**"), which was newly reconstituted in 2016, made progress in dealing with a backlog of cases. The TAC closed 1,392 appeals during 2020 with the quantum of monies involved amounting to approximately €820 million. Two hundred and fifty hearings are scheduled for 2020, with further hearings to be added during the year. As such, this represents a significant area of work for Irish tax practitioners.

Of particular note are the developments in the *Perrigo* tax case over the past year. This case arose out of a €1.64 billion assessment issued by the Irish Revenue Commissioners ("**Revenue**") in 2018 against Perrigo Company plc. In February 2019, Perrigo brought proceedings in the Irish Commercial Court seeking judicial review of the decision by Revenue to raise that assessment. Those proceedings were brought primarily on the basis that Perrigo had a legitimate expectation that the transaction at issue be treated as a part of its trade. Perrigo argued that Revenue's amended tax assessment breached that legitimate expectation. In 2020, this claim was denied by the Court, which held that Perrigo had failed to establish any basis to interfere with the Revenue assessment. Perrigo has decided not to appeal this decision. The substantive points of tax law at issue in the case are scheduled to be heard before the TAC in November 2021.

In addition, the EU General Court determined on 15 July 2020 that Ireland did not give Apple illegal State Aid, so overturning the earlier European Commission decision. In September 2020, the European Commission announced its intention to appeal this ruling to the European Court of Justice.

Finally, in January 2021, it was announced that the pharmaceutical company AbbVie was bringing a Judicial Review action against Revenue arising from a tax liability of €587 million arising from the takeover of the pharmaceutical company Allergen.

Key developments affecting corporate tax law and practice

COVID-19 pandemic response

Ireland introduced a number of tax measures aimed at assisting taxpayers experiencing difficulties caused by the COVID-19 pandemic. Among the measures introduced were the following:

- A COVID restrictions support scheme was introduced, which is targeted at those businesses worst affected by the pandemic and which allows certain businesses to apply for a weekly cash payment calculated by reference to the business' average weekly turnover in 2019 subject to a cap of €5,000 per week. Relief schemes for employees impacted by the pandemic are also in place.
- The suspension of a surcharge for late corporation tax return filings for accounting periods ending June 2019 until 1 July 2021. Late filing will also not trigger any restriction of reliefs, such as loss relief and group relief, as would ordinarily be the case.
- Unpaid VAT and PAYE arising during the COVID-19 crisis in 2020 and 2021 can be warehoused for a period of 12 months commencing 1 January 2022 to the end of December 2022. After the 12-month interest-free period, the warehoused debts can be repaid at a low interest rate of 3% *per annum*.
- The filing deadline for all 2019 share scheme returns was extended from 31 March 2020 to 30 June 2020. The filing deadline for all 2020 share scheme returns was 31 March 2021.
- The 90-day employer filing obligation applicable to the Special Assignee Relief Programme was extended for a further 60 days. This concessionary measure ceased to apply on 31 December 2020.

- Cross-border workers relief was not affected by employees being required to work from home in Ireland due to COVID-19. This concessionary measure will continue to apply for the tax year 2021:
  a) where an employee is required to work from home in Ireland due to COVID-19; and
  b) provided all other conditions of the relief are met.
- Similarly, Revenue agreed not to enforce Irish payroll obligations where an employee relocated temporarily to Ireland during the COVID-19 period and performed duties for their employer from Ireland. Revenue also agreed not to strictly enforce the 30-day notification requirement for PAYE dispensations applicable to certain short-term business travellers. In addition, PAYE exclusion orders were not adversely affected by an employee working more than 30 days in Ireland as a result of COVID-19. These concessionary measures ceased to apply on 31 December 2020.
- For the purposes of Irish tax residency rules, where a departure from Ireland was prevented due to COVID-19, Revenue will consider this *force majeure* for the purpose of establishing an individual's tax residence position. Revenue has issued guidance that cautions that due to the unanticipated length of the pandemic, it is appropriate to further consider the application and scope of this concession.
- For the purposes of corporate tax residence, Revenue disregarded the presence of employees, directors, service providers or agents in or outside Ireland resulting from COVID-19-related travel restrictions. In these circumstances, Revenue has advised that the individual and company should maintain a record of the facts with respect to any *bona fide* relevant presence in or outside Ireland.
- Following the adoption of Council Directive (EU) 2020/876, which allowed for the deferral of the exchange dates for DAC2, and the filing and exchange dates for DAC6, Revenue deferred the deadline for filing DAC2 returns in respect of the 2019 reporting period until 30 September 2020. This deadline will also apply for the filing of Common Reporting Standard and Foreign Account Tax Compliance Act returns. Finally, DAC6 reporting deadlines were deferred by six months.
- Importation of goods to combat the effects of COVID-19 from outside the European Union (the "**EU**") without the payment of Customs Duty and VAT from 30 January 2020 to 31 December 2021.

OECD BEPS and domestic legislation

There have been continued developments in Irish corporate tax law on the international front. These developments have been motivated by the Irish Government's continued commitment to the implementation of the reforms set out in "Ireland's Corporation Tax Roadmap", which was published in September 2018 and updated on 14 January 2021 (the "**2021 Corporation Tax Roadmap Update**"). This Roadmap sets out how, to date, Ireland has met its tax reform commitments under the 2018 Roadmap and laid out the next steps in Ireland's implementation of its various commitments to international tax reform. Most significant is Ireland's implementation of the reforms proposed as part of the OECD Base Erosion and Profit Shifting ("**BEPS**") process, the EU Anti-Tax Avoidance Directive ("**ATAD**") and the EU Directive on Administrative Cooperation.

The most significant developments in Ireland's implementation of these initiatives during 2020 and 2021 concerned the following:

- Transfer pricing rules.
- Anti-hybrid and anti-reverse hybrid rules.

- DAC6 – Mandatory Disclosure Regime.
- Double taxation treaties.
- Exit Tax Regime.
- Interest limitation rule.

Transfer pricing rules

Formal transfer pricing legislation (the "**Irish TP Rules**") was introduced for the first time in Ireland in 2010 in respect of accounting periods commencing on or after 1 January 2011, for transactions the terms of which were agreed on or after 1 July 2010.

A number of changes to the Irish TP Rules were introduced as part of the Finance Act 2019 and those changes have applied from 1 January 2020. The Finance Act 2019 changes brought the Irish TP Rules in line with the 2017 OECD Guidelines. They significantly broadened the scope of the Irish TP Rules and included an extension of the Irish TP Rules to non-trading and capital transactions. Additionally, arrangements predating 1 July 2010 were brought into scope for the first time.

In order to fall within the Irish TP Rules, there must be an arrangement between associated parties involving the supply and acquisition of goods, services, money, intangibles or chargeable assets. The rules provide that in the case of a transaction where the amount paid to the supplier exceeds, or the amount received from the customer is less than, the arm's length price, then the profits of the customer or vendor, respectively, will be calculated as though the price was an arm's length price.

The Irish TP Rules apply the arm's length principle, which is to be interpreted in accordance with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators.

The rules apply to both cross-border and domestic transactions. The Irish legislation contains rules to eliminate double counting where domestic transactions only are involved.

The rules apply even where both parties are within the charge to Irish tax to ensure that the rules are not discriminatory from an EU law perspective. However, where the profits of one party are adjusted under the legislation, the rules provide that, where the other party is also within the charge to Irish tax, they can make an election to use the arm's length price in the calculation of their profits so that the group is not disadvantaged.

Two persons are associated if one controls the other or both are controlled by the same person. The controlled person in each case must be a company. A company will be treated as controlled by an individual if the individual, together with relatives of that individual (i.e. husband, wife, ancestor, lineal descendant, brother or sister), control it.

Although the legislation was extended to include small and medium-sized enterprises, this is subject to enactment under a Ministerial order. Accordingly, the new transfer pricing regime does not currently apply to enterprises that employ less than 250 employees, and have a turnover not exceeding €50 million, or total assets not exceeding €43 million in value.

A "domestic carve out" from the Irish TP Rules applies to certain non-trading transactions where:

- both the supplier and acquirer are "qualifying persons" (i.e. resident and chargeable to tax in the normal course in Ireland);
- the arrangement is not one in which the sole or main purpose is the avoidance of tax; and
- certain other conditions are met.

A number of further changes were proposed in the Irish Finance Act 2020 to clarify the situations in which the "domestic carve out" would apply. Those changes were subject to a number of late amendments and the amendments are subject to enactment under a Ministerial order, which means they have not yet taken effect.

The 2021 Corporation Tax Roadmap Update now proposes to further extend the Irish TP Rules to the taxation of branches in Ireland in line with the Authorised OECD Approach. It is currently expected that legislation to implement this will be included in the Irish Finance Bill 2021.

Anti-hybrid and anti-reverse hybrid rules

Ireland has implemented legislation to address hybrid mismatch arrangements as required by Council Directive (EU) 2017/952, amending Directive (EU) 2016/1164 ("**ATAD II**"). The Irish implementing legislation (other than with respect to anti-reverse hybrid rules) took effect from 1 January 2020 in respect of all payments made after that date. Grandfathering of historic structures was not introduced.

A hybrid mismatch arrangement is a cross-border arrangement that generally involves a hybrid entity or hybrid instrument and results in a mismatch in the tax treatment of a payment across jurisdictions.

Relationship between the parties

The Irish legislation generally (other than with respect to withholding tax and tax residency forms of hybrid mismatch) only applies where the parties are (i) associated enterprises, (ii) head offices and permanent establishments, (iii) permanent establishments of the same entity, or (iv) parties to a structured arrangement.

Broadly, enterprises will be associated where:

a) one enterprise holds a certain percentage (25% or 50% 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 of 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 (this is subject to certain exceptions); or
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.

A structured arrangement is one where the mismatch outcome is priced into the terms of the arrangement or the arrangement was designed to give rise to a mismatch outcome.

Forms of hybrid mismatch

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.

Broadly, where a payment has been "included" by a payee, such inclusion will generally mean that a hybrid mismatch does not arise. Payments are considered to be included where the payee is:

- chargeable to tax on that payment (other than on a remittance basis);
- exempt from tax on its profits or gains;
- established in a jurisdiction that does not impose tax on such payment; or
- subject to a controlled foreign company charge or foreign company charge.

Application

The rules could apply whenever Irish companies make payments that give rise to a tax deduction in Ireland, but no other country taxes the associated receipt by reason of hybridity. If the hybrid rules apply to such a payment, the Irish company may be denied a tax deduction for the payment.

Anti-reverse hybrid rules

The 2021 Corporation Tax Roadmap Update outlines the intention that Ireland will introduce anti-reverse hybrid rules in the Irish Finance Act 2021. This would be in line with the schedule for implementation that was set out in ATAD II.

A "reverse hybrid entity" refers to a foreign-owned entity established or incorporated in a Member State that is treated as opaque for tax purposes under the laws of the foreign jurisdiction but as transparent in the Member State where it is established or incorporated.

Where the rules apply, the result will be that the reverse hybrid entity be regarded as resident in the relevant Member State and taxed on its income to the extent that it is not otherwise taxed under the laws of the Member State or any other jurisdiction.

EU DAC6 – Mandatory Disclosure Regime

Ireland has implemented the EU DAC6 rules, which require intermediaries and, in certain cases, taxpayers to notify tax authorities when they promote or, broadly, assist in implementing cross-border arrangements with particular tax "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 non-EU Member State). 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 have to 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 Part 33, Chapter 3A of the Irish Taxes Consolidation Act 1997 (the "**TCA**")) is one of the main benefits that a person may reasonably expect to derive from the arrangement.

Reporting obligations apply to intermediaries and, in certain cases, 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 aids or assists with reportable arrangements and knows, or could reasonably be expected to have known, 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.

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.

As originally implemented, reportable arrangements occurring between 25 June 2018 and 30 June 2020 were required to be reported no later than 31 August 2020. In addition, from 1 July 2020, reportable arrangements were intended to be reported within 30 days beginning from:

- the day after the arrangement is made available for implementation;
- the day after the arrangement is ready for implementation;
- when the first step in the implementation has been made, whichever is first; or
- the day after the intermediary provided, directly or by means of other persons, aid, assistance or advice.

However, as part of the response to COVID-19, the EU permanent Member State representatives on the Permanent Representatives Committee reached an agreement for an optional six-month deferral for both reporting and information exchange under DAC6. Ireland implemented this deferral with the following effect:

- Reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 had to be reported by 28 February 2021 (i.e. up to six months after the original deadline of 31 August 2020).
- Reportable cross-border arrangements occurring between 1 July 2020 and 31 December 2020 had to be disclosed within 30 days from 1 January 2021.
- Reportable cross-border arrangements occurring on or after 1 January 2021 should be disclosed within a 30-day period.

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 DAC6 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 complex legal interpretation of the legislation and potential exclusions.

Double taxation treaties

On 29 February 2020, a new treaty between Ireland and the Netherlands entered into force with its provisions coming into effect on 1 January 2021. On 21 October 2020, a Protocol to the existing treaty and amending Protocols between Ireland and Switzerland entered into force with the provisions entering into effect on 1 January 2021. On 19 January 2021, Ireland and Germany signed a Protocol amending the tax treaty between the two countries. Procedures to ratify the Protocol are under way.

Negotiations have concluded for new treaties between Ireland and each of the following countries: Kenya; Kosovo; Oman; and Uruguay.

Negotiations have also concluded on Protocols to the existing treaties with Guernsey, Isle of Man and Mexico.

In addition to the negotiation of new treaties, certain of Ireland's existing tax treaties have been modified by the operation of the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS (the "**MLI**"). Ireland deposited its instrument of ratification of the MLI on 29 January 2019. The date on which the MLI modifies each treaty depends on when Ireland's treaty partners deposit their instruments of ratification. As a general rule, it has taken effect for Ireland's covered tax agreements as follows:

- with respect to taxes withheld at source, from 1 January 2020; and
- with respect to all other taxes levied by Ireland, for taxes levied with respect to taxable periods beginning on or after 1 November 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 are in relation to the tax treatment of transparent entities, dual resident entities, and the introduction of a principal purpose test ("**PPT**"). The PPT is significant and will essentially bring in a "business purpose" test that must be satisfied by a resident before it can be entitled to benefit from the treaty in question.

The 2021 Corporation Tax Roadmap Update also outlined Ireland's commitment to publishing a tax treaty policy statement and a public consultation with respect to this has been initiated.

Exit Tax Regime

Ireland introduced new "exit tax" rules for companies in the Finance Act 2018. The Finance Act 2019 extended those rules such that transfers by non-EU companies with a permanent establishment in Ireland are now also captured. Previously, only companies resident in Ireland or another EU Member State were within scope.

The Irish legislation permits a company to spread the tax charge and pay it over five years in equal instalments if an election is made and provided that the assets have been transferred to an EU Member State or a country with which Ireland has signed a double tax treaty and which is an EEA country.

Effective from 14 October 2020, a technical amendment to the legislation was made to clarify the operation of interest on instalment payments. The amendment provides that calculation of interest on exit tax instalment payments that remain unpaid on or after 14 October 2020 should be calculated on the outstanding balance and not by reference to the amount of the particular instalment due.

Interest limitation rule

ATAD, adopted by the EC Council on 12 July 2016, requires Member States to implement an interest limitation ratio, designed to limit the ability of entities to deduct net borrowing costs in a given year to a maximum of 30% of Earnings Before Interest, Tax, Depreciation and Amortisation ("**EBITDA**").

In 2016, the then Irish Minister for Finance stated that Ireland would not introduce the interest limitation rule until 2024 on the basis that Ireland had equivalent rules. However, the European Commission did not agree with this and on 25 July 2019 issued a formal notice to Ireland to implement the interest limitation rule. Following the issuance of this formal notice, the Irish Department of Finance stated that transposition could advance, which would lead to implementation at a date that is earlier than 2024. In the 2021 Corporation Tax Roadmap Update, it was outlined that Ireland has agreed to accelerate the transposition process with the intention that transposition will take place in the Irish Finance Bill 2021, with the rules taking effect from 1 January 2022. The Department of Finance commenced an iterative consultation process in early 2021 which is, at the time of writing, ongoing.

The interest limitation rule operates by restricting the tax deductibility of "exceeding borrowing costs". This is the amount by which the taxpayer's borrowing costs (i.e. deductible interest expense) exceeds its taxable interest revenue and other economically equivalent income.

Under the interest limitation rule, the amount of exceeding borrowing costs that can be deducted by the taxpayer is limited to 30% of the taxpayer's EBITDA. Under ATAD, Member States have a number of choices regarding implementation, including an option to allow taxpayers to deduct borrowing costs up to €3 million and to exempt certain entities, such as entities that qualify as financial undertakings. Ireland has not yet published draft legislation indicating which of the various options and derogations it will implement. Accordingly, the manner in which the interest limitation rule will apply in Ireland is uncertain.

Domestic tax court cases

Perrigo Company plc

It was announced in December 2018 that Revenue had assessed a subsidiary of Perrigo Company plc to a tax liability of €1.636 billion, not including potential interest or any applicable penalties. Perrigo brought judicial review proceedings in respect of the Revenue assessment. Those judicial review proceedings were heard by the Irish High Court in June 2020 and it was ruled that Perrigo had failed to establish any basis to interfere with the assessment. Perrigo has decided not to appeal this decision and instead, the substantive matters of tax law arising in the case will proceed to be heard before the TAC in November 2021.

The Revenue assessment related to the sale in 2013 by what was then known as Elan Pharma International of its interest in certain IP was treated by the Company as a trading transaction. Revenue, after reassessing the transaction, declared it should have been treated as a chargeable gain, which is subject to a higher tax rate.

There has been significant public commentary on this matter given the size of the assessment and the broad application and significance of the tax position at issue.

AbbVie

In January 2021, it was announced that the pharmaceutical company AbbVie was bringing a Judicial Review action against Revenue arising from a tax liability of €587 million arising from the takeover of the pharmaceutical company Allergen. This action was referred to as a "precautionary measure" as the TAC had already ruled in favour of AbbVie, reducing the tax liability to nil, although Revenue has appealed this decision to the High Court because it disputes the ability of the TAC to make a ruling based on EU law.

The action taken by AbbVie relates to the introduction of a measure in the 2020 budget that meant schemes of arrangement, whereby shares are cancelled, would be liable for 1% stamp duty whereas previously, such schemes would have been tax exempt. The TAC held that the AbbVie scheme of arrangement was substantially entered into prior to the introduction of the Finance Act 2020 and thus AbbVie should not have been subject to this new stamp duty charge on the cancellation of its shares.

There has been significant interest in this case given the size of the assessment and the approach taken by Revenue in making this assessment.

European – Court cases and EU law developments

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 that, in its view, should have been allocated to the branches under the arm's length principle. The profits at stake were derived from the IP of the entities. Ireland had treated such profits as outside the scope of Irish taxation, on the basis that the entities were not resident in Ireland.

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.

The EU General Court determined on 15 July 2020 that Ireland did not give Apple illegal State Aid, so overturning the European Commission decision. In September 2020, the European Commission announced its intention to appeal this ruling to the European Court of Justice.

The process could take several years before a final outcome is reached.

Tax climate in Ireland

Ireland has a modern, open economy that attracts a significant amount of inward investment by multinationals and financial services businesses. Ireland has a 12.5% corporation tax rate for trading income on a regulated investment funds regime, a special-purpose company regime that facilitates international financial transactions including securitisation and bond-issuance companies, a network of over 74 double tax treaties, broad withholding tax exemptions for outbound payments based generally on the EU or tax treaty residence of the recipient and a participation exemption for gains on shares.

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. As set out above, Ireland is committed to the OECD BEPS global tax reform process and has implemented many of the BEPS recommendations.

Developments affecting the attractiveness of Ireland for holding companies

The Irish tax treatment of holding companies includes a participation exemption from capital gains, assuming certain conditions are met, and a 12.5% rate of corporation tax that applies to (a) dividends from other EU or treaty countries, or countries that have ratified the Convention on Mutual Assistance in Tax Matters, that are sourced from trading activities, and (b) dividends from foreign portfolio companies (i.e. those in which the Irish holding company has less than a 5% interest). Ireland also operates a foreign tax credit system, which can eliminate or reduce any Irish tax liability on the receipt of foreign dividends depending on the amount of the credit.

Industry sector focus

<u>Securitisation</u>

Irish resident companies that hold and/or manage certain "qualifying assets" (which includes financial assets) and meet certain other conditions may be regarded as "qualifying companies" for the purposes of section 110 of the TCA. The taxable profits of such companies under section 110 of the TCA are calculated as if they are trading entities, with the result that they can deduct funding costs, including interest swap payments, provided certain conditions are met. Any residual profit is liable to corporation tax at 25%. The nature of the regime has led to its use in a range of international finance transactions including repackagings, collateralised debt obligations and investment platforms. Certain changes to the regime were introduced in 2011 and again as part of the Finance Act 2019, which means that deductibility of funding costs may be restricted where interest is paid to certain persons.

Investment funds

Ireland offers an efficient, clear and certain tax environment for investment funds regulated by the Central Bank of Ireland known as the "gross roll-up regime". As a general rule, investment funds (which fall within the definition of an "investment undertaking" for the purposes of section 739B of the TCA) 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, provided certain conditions are met. In particular, non-Irish resident investors and also certain exempt Irish investors must generally provide the appropriate Revenue-approved declaration to the fund. Irish funds should therefore only be required to withhold investment undertaking tax on payments in respect of certain Irish investors.

In addition, no stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of units in a regulated Irish fund. While Ireland has introduced a new tax regime for Irish real estate funds ("**IREFs**") holding Irish situate real estate, which could entail additional withholding tax arising out of certain events, including distributions to investors, this does not affect the tax treatment discussed above where the investment fund does not hold Irish real estate assets.

Finally, the provision of investment management services to a regulated investment fund is generally exempt from Irish VAT.

The enactment of the Irish Investment Limited Partnership (Amendment) Act 2020 has significantly enhanced the Irish investment fund offering. This legislation alongside complimentary tax law changes has modernised and enhanced the existing Irish investment limited partnership ("**ILP**") legislation, which is particularly applicable to private equity and venture capital investment. The ILP is treated as tax transparent for Irish purposes.

Aircraft leasing and aviation finance

Ireland is a global hub for aviation finance with over 50 aircraft leasing companies based in Ireland, including 14 of the world's top 15 lessors.

Tax reform measures introduced as part of the BEPS programme will be relevant to this sector.

For example, as set out above, the MLI has introduced a new PPT into certain Irish double tax treaties. This could deny a treaty benefit (such as a reduced rate of withholding tax) if it is reasonable to conclude, having regard to all facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

While tax treaty access is key for aircraft lessors given the worldwide nature of their business, many would have substantial operations in Ireland so it is unlikely that the new PPT test would be an issue in that case.

ATAD's interest limitation rule will also be a key consideration for any aircraft lessors. Aircraft lessors have traditionally utilised leverage to fund the acquisition of aircraft, so a restriction could be significant on the tax deductibility of those interest payments and lead to higher taxes.

<u>Real estate</u>

IREFs are regulated Irish funds investing in Irish property and related assets and are subject to specific tax treatment, including a potential withholding tax that applies on distributions from an IREF.

The Finance Act 2019 contained further changes to the tax regime that applies to IREFs.

The key points emerging from the Finance Act 2019 are as follows:

a) The IREF can be subject to Irish tax if the amount of debt incurred exceeds 50% of the cost of its IREF assets. There is relief where the debt incurred qualifies as third-party debt under the provisions.
b) The IREF can be subject to tax where it breaches certain ratio limits relating to the amount of its tax-adjusted interest expense. As above, there is a relief where the interest relates to debt qualifying as third-party debt.
c) The IREF can also be subject to tax where its accounts reflect a deduction for expenses or disbursements that are not wholly and exclusively laid out for the purposes of its IREF business.

The tax charge is a direct tax (rather than a withholding tax) of 20%. The computation of this tax charge is complex and will depend upon a number of factors.

Additional anti-avoidance and compliance obligations were also introduced. Finally, the Irish Minister for Finance has noted that he will continue to review the tax treatment of IREFs and is open to further legislative amendments if he perceives that the IREF regime is being used for ongoing tax avoidance. It would not be surprising if further changes are introduced.

<u>Intellectual property</u>

Ireland is a leading location for the development, exploitation and management of IP. The 12.5% corporation tax rate on trading income, a 25% tax credit on the cost of eligible research and development activities, capital allowances on the cost of acquiring certain intangible assets and a large double tax treaty network to facilitate the flow of funds between Ireland and other countries, are all features of the Irish tax system that are relevant to a business with IP.

The year ahead

Ireland has a stable, competitive tax regime based on clear, long-established rules. International business has benefitted from this environment, hence the number of multinationals headquartered in Ireland and major investment funds that invest through Irish funds and 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% tax rate and is indeed at the forefront of features such as the knowledge development box, it has also been among the first countries to implement OECD Country-by-Country Reporting, the MLI and other aspects of the OECD BEPS initiatives.

In recent years, many changes, primarily motivated by the OECD BEPS initiative and EU anti-tax avoidance measures, have been introduced to the Irish tax landscape, including transfer pricing, DAC6 and anti-hybrid provisions.

As we emerge into a post COVID-19 world, we do not envisage any slowdown in the pace of change in international taxation. At present, the Irish Government is preparing to implement ATAD's interest limitation rule and anti-reverse hybrid rules. Those rules are expected to be implemented in the Irish Finance Act 2021 and to take effect from 1 January 2022.

Meanwhile, international tax initiatives continue to be developed and gain pace. Final recommendations on the taxation of the digital economy were published by the OECD on 14 October 2020 under the so-called "BEPS 2.0 Project". On 5 June 2021, the G7 Finance Ministers and Central Bank Governors Communiqué was published, summarising what they termed a "historic agreement" on taxing multinationals. In this Communiqué, the G7 emphasised their commitment to addressing the tax challenges arising from globalisation and the digitalisation of the economy and to adopting a global minimum tax. In particular, they expressed a commitment to ensuring that market countries are awarded taxing rights on at least 20% of profit exceeding a 10% margin for the largest and most profitable multinational enterprises. They also committed to a global minimum tax of at least 15% on a country-by-country basis. While the final outcome of these proposals is unknown, there can be no doubt that further changes in the international tax landscape will be of interest and relevance to Ireland.

Andrew Quinn
Tel: +353 1 619 2038 / Email: andrew.quinn@maples.com
Andrew is Head of Tax at Maples and Calder, the 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 Securities 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*, and has been endorsed in Practical Law Company's *Tax on Transactions* multijurisdictional guide. Andrew is also the joint author of the book *Taxing Financial Transactions*, Irish Tax Institute.

Lynn Cramer
Tel: +353 1 619 2066 / Email: lynn.cramer@maples.com
Lynn is a partner at Maples and Calder, the Maples Group's law firm. Lynn is a qualified solicitor in Ireland and an associate of the Irish Tax Institute with significant experience advising investment funds, SPVs and corporates on the Irish tax regime, with a particular focus on tax planning for international clients. She acts for a broad range of international clients including investment funds, asset managers, investors, international corporates, financial institutions and family offices. She has particular experience in advising investment funds, financial services clients, property funds and SPVs on all aspects of cross-border structuring, including advice on VAT and the establishment and financing of fund platforms.

Niamh Cross
Tel: +353 1 619 2794 / Email: niamh.cross@maples.com
Niamh is a lawyer with the Tax group at Maples and Calder, the Maples Group's law firm and advises on a wide range of transactions including corporate, investment funds and financial services tax matters. Niamh has particular experience advising on carried interest structuring and financial services transactions.

Maples Group

75 St. Stephen's Green, Dublin 2, D02 PR50, Ireland
Tel: +353 1 619 2000 / URL: www.maples.com

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

AI, Machine Learning & Big Data
Banking Regulation
Blockchain & Cryptocurrency
Bribery & Corruption
Cartels
Employment & Labour Law
Energy
Fintech
Fund Finance
Initial Public Offerings
International Arbitration
Litigation & Dispute Resolution
Mergers & Acquisitions
Merger Control
Pricing & Reimbursement

GLI GLOBAL LEGAL INSIGHTS