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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 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 January 2022 being 8,372 and approximately €3.9 trillion held in these Irish domiciled funds.

A key investment focus through 2021 was sustainable finance, ESG and socially responsible investing. We expect this trend will continue and increase during 2022.

Mergers and acquisitions

2021 was an extremely strong year for M&A activity in Ireland as the market recovered from the uncertainty caused by the COVID-19 pandemic. 2021 saw a 25% increase in global M&A activity from 2020 and in Ireland, deal volumes exceeded $100 billion with almost 700 transactions announced. International interest in investing in the Irish market is highly notable, with significant levels of private equity interest coming from the United States and Europe in particular.

The dominant sectors for M&A activity in Ireland are technology, healthcare and financial services.

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. Between 2010 and 2020, the commercial aviation industry had enjoyed sustained growth. However, the onset of the COVID-19 pandemic and the restrictions introduced in response to it created unprecedented market conditions for the aviation leasing and finance industry. Those conditions and uncertainties continued in 2021; however, there has been a greater than anticipated rebound in travel numbers in early 2022 and the market as a whole has demonstrated impressive resilience against the extraordinary conditions arising out of the pandemic. Investor confidence in aircraft as an asset class has remained strong.

The onset of the war in Ukraine presented new challenges for the aircraft leasing sector. The sanctions imposed on Russia required Irish lessors to terminate all leases entered into with Russian airlines, and Irish lessors are continuing to work to recover all such aircraft. This led to disruption in activity for the sector in early 2022.

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

2021 was another active year for Ireland in the area of tax disputes. The Tax Appeals Commission (the "**TAC**"), which was newly reconstituted in 2016, closed almost 1,800 appeals during 2021 with the quantum amounting to approximately €3.15 billion. This figure represents the highest number of appeals closed in any year since the formation of the TAC.

Perrigo case

The largest reported settlement in 2021 concerned the *Perrigo* tax case. This case arose out of a €1.64 billion assessment issued by the Irish Revenue Commissioners ("**Revenue**") in 2018 against Perrigo Company plc. The assessment was the largest tax assessment ever levied by Revenue. The case was scheduled to be heard before the TAC in November 2021. However, in September 2021, Perrigo announced that it had settled the dispute with Revenue.

Apple case

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. The basis of this dispute concerns the application of the arm's length principle and the role of Apple's head offices. In September 2020, the European Commission announced its intention to appeal this ruling to the European Court of Justice and this appeal was lodged in February 2021.

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. The majority of such measures have since expired. However, the application of these measures and taxpayers' decision to claim them remains a focus of Revenue inquiry, particularly with respect to the COVID restrictions support scheme for business and the employment wage subsidy scheme.

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 concern 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.

Additional significant measures that have been announced during 2021 and 2022 are:

- Proposed EU Directive on "Shell Entities" (the "**UNSHELL Directive**").
- OECD Model GloBE Rules and the European Commission's Proposed EU Directive on GloBE Rules.
- Proposed EU Directive on Debt-Equity Bias Reduction Allowance.

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.

The Irish Finance Act 2021 reformed the "domestic carve-out", clarifying its scope and application with effect for accounting periods commencing on or after 1 January 2022.

The Irish Finance Act 2021 also introduced measures that provide for the application of the OECD developed mechanism (the "**AOA**") for the attribution of profits to a branch of a non-resident company operating in Ireland.

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

From 1 January 2022, reverse hybrid mismatch rules were introduced as required under ATAD. 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.

DAC6 was required to be transposed by each EU Member State by the end of 2019 with the measures taking effect from 1 July 2020. In addition, arrangements implemented between 25 June 2018 and 30 June 2020 are also subject to the reporting requirements. Intermediaries and/or taxpayers will be required to report any reportable cross-border arrangements within 30 days from the earliest of:

a) the day after the arrangement is made available for implementation;
b) the day after the arrangement is ready for implementation; or
c) when the first step in the implementation of the arrangement was taken.

Under the provisions of DAC6, the first reports were required by 31 August 2020. However, as a result of the COVID-19 pandemic, the EU Council approved a deferral of the reporting requirements. It was up to individual EU Member States to determine whether to avail of the option to defer. Ireland chose to defer reporting. Further to the deferral, in Ireland, the reporting deadline for reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 was 28 February 2021 and the 30-day period for arrangements implemented after 1 July 2020 commenced from 1 January 2021.

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

In 2021, new treaties between Ireland and Kosovo and Kenya were signed, with the treaty with Kosovo coming into effect on 1 January 2023. On 30 December 2021, a Protocol to the existing treaty and amending Protocols between Ireland and Germany entered into force, with the provisions entering into effect on 1 January 2022. In addition, Ireland has signed Protocols amending the tax treaty between the two countries with the Isle of Man and Guernsey. Procedures to ratify these Protocols are under way.

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

Negotiations have also concluded on Protocols to the existing treaties with 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 EU 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**").

The interest limitation rule has been implemented into Irish law by way of the Finance Act 2021 and has taken effect with respect to accounting periods commencing on or after 1 January 2022. 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 in the year in which those costs are incurred, but such costs may remain available for carry forward.

The restriction on interest deductibility only applies in respect of the amount by which the borrowing costs exceed interest revenues and other interest-equivalent revenues. Therefore, to the extent an entity funds interest payments it makes solely from interest revenues and equivalent amounts it receives, then such entity should have limited, or no, exceeding borrowing costs. In such circumstances, there should be no material impact on the entity's tax position. However, there is uncertainty as to how any gains arising with respect to loan assets, including non-performing loan assets, will be treated for the purposes of the interest limitation rule.

The Irish interest limitation rule also provides for a *de minimis* exemption such that in circumstances where an entity's exceeding borrowing costs in a financial year are less than €3 million, no restriction should apply.

The legislation also provides for special rules with respect to entities forming part of a group.

Where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes ("**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 significant.

The rules also include a concept of a "single company worldwide group", which is particularly relevant to certain securitisation and structured finance vehicles. A "single company worldwide group" is a company that is neither a "standalone entity" nor a member of a "worldwide group" or an "interest group". Where a taxpayer meets this definition, it is entitled to apply the group ratio rules, subject to certain modifications. The result of this can be to reduce or eliminate the application of the interest limitation rule.

Proposed UNSHELL Directive

On 22 December 2021, the European Commission published a proposal for a Directive with the stated intention being to prevent the misuse of so-called "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 are subject to additional reporting requirements. In addition, they will be unable to access the benefits of double tax treaties and EU tax Directives. Significantly, other EU Member States, such as those paying to the entity, or those in which 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:

i) the entity derives more than 75% of its income from sources defined as "relevant income". Relevant income includes "passive"-type income such as dividends and interest;
ii) the entity is engaged in cross-border activity such that more than 60% of its assets or 60% of its income is earned or paid out of cross-border transactions; and
iii) in the preceding two years, the entity has outsourced the administration of its day-to-day operations and decision-making on significant functions.

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

i) it has its own premises, or premises for its exclusive use, in the Member State;
ii) it has at least one own and active bank account in the EU; and
iii) it has at least one director with the appropriate qualifications and decision-making authority who is not an employee of an unaffiliated entity and does not act as a director of an unaffiliated entity and who is resident in or near the Member State of residence of the entity.

Once an entity has been presumed to be a "shell entity" for the purposes of the UNSHELL Directive, and does not rebut such presumption, certain tax consequences will apply. These include that the Member State of residence may refuse to issue a tax residence certificate for that entity or to modify it, and other Member States shall disallow or disregard any double taxation agreements under certain EU Directives with the Member State of residence, and under certain other EU Directives, such as the EU Interest and Royalty Directive and the EU Parent Subsidiary Directive.

OECD Model GloBE Rules and the European Commission's Proposed Directive on GloBE Rules

On 20 December 2021, the OECD published the draft Global Anti-Base Erosion Model Rules, which are aimed at ensuring that Multinational Enterprises ("**MNEs**") will be subject to a

global minimum 15% tax rate from 2023 (the "**GloBE Rules**"). The GloBE Rules are part of the OECD/G20 Inclusive Framework on BEPS, which currently has 141 participant countries.

On 22 December 2021, the European Commission published a proposal for a Directive to implement the GloBE Rules in the EU. This proposes to introduce minimum effective taxation for MNEs with revenues of at least €750 million, operating in the EU's internal market and beyond. It provides a common framework for implementing the GloBE Rules into national laws of the EU Member States.

The proposal requires the unanimous approval of the EU Council before it is adopted.

Debt-equity bias reduction allowance

On 11 May 2022, the European Commission published the first draft of the Debt-Equity Bias Reduction Allowance Directive ("**DEBRA**"). This proposed Directive aims to encourage greater equity funding and discourage excessive debt funding and will contain two limbs: firstly, there will be "an allowance on equity", which will provide a tax deduction to taxpayers who increase their equity capital compared to the previous tax year; and secondly, interest deductibility will be restricted.

As currently drafted, the proposals contain limited exemptions such as for "securitisation special-purpose entities" and "special-purpose vehicles" as defined in certain EU legislation.

The proposal requires the unanimous approval of the EU Council before it is adopted.

Domestic tax court cases

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 resulting 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.

Cintra

In May 2021, the TAC ruled in favour of Cintra, a Spanish company with respect to an assessment for Capital Gains Tax ("**CGT**") from a sale of shares it held in a company that built and operated an Irish motorway.

This case considers the scope of Irish tax with respect to non-resident entities holding interests in Irish land. At a high level, non-Irish resident entities are liable to Irish CGT with respect to profits from the sale of land in Ireland or the disposal of shares that derived their value from land in Ireland. Cintra argued that it was not liable to pay Irish CGT on the basis that at no material time did it hold Irish land. It argued that the consortium, of which it was

a part, derived its value from the rights held pursuant to a motorway maintenance contract. Revenue counterargued that the consortium had excavated the land, built the motorway, and regulated the use of the land by motorists and that gains arising from the sale of the shares were therefore within scope of Irish CGT.

The TAC determined that for Irish CGT purposes, land is limited to an actual interest in the land itself and not a contractual license to use the land, meaning that the shares held by Cintra did not derive their value or the greater part thereof directly or indirectly from land in Ireland.

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. This appeal was lodged in February 2021.

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 (which may be raised to 15% in the future for large companies within scope of the GLoBE or Global Minimum Tax Rules), 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 75 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.

In line with this commitment to full engagement, the Irish Minister for Finance announced in October 2021 that Ireland would sign up to the OECD's Inclusive Framework, which is intended to reform the international tax rules in order 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% will be introduced in Ireland for companies with an annual revenue in excess of €750 million.

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.

The proposed UNSHELL Directive will need to be monitored as regards its potential impact on holding companies.

Industry sector focus

Securitisation

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. The implementation of the EU ATAD interest limitation rule implemented by the Finance Act 2021 is also relevant to these structures.

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. A steady number of ILPs were registered in Ireland in 2021 and interest in this new fund structure is significant.

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 is also a key consideration for any aircraft lessors. Aircraft lessors have traditionally utilised leverage to fund the acquisition of aircraft, so a restriction is significant on the tax deductibility of those interest payments and may lead to higher taxes.

Real estate

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.

Intellectual property

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. 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, anti-hybrid provisions and most recently the interest limitation rule.

Looking forward, the pace of change does not seem set to slow down. International tax initiatives continue to be developed and gain pace. In October 2021, the Irish Minister for Finance announced that Ireland would sign up to the OECD's Inclusive Framework, which is intended to reform the international tax rules in order 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% will be introduced in Ireland for MNEs with an annual revenue in excess of €750 million.

At EU level, the most significant developments to be monitored throughout 2022 are the progress of the proposed UNSHELL Directive and DEBRA.

* * *

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