THE CORPORATE TAX PLANNING LAW REVIEW

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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Chapter 6

IRELAND

Andrew Quinn and David Burke[1]

I INTRODUCTION

Ireland has a modern open economy that attracts a significant amount of inward investment by multinationals, investment funds and aircraft-leasing businesses. Key features of the Irish tax system include the 12.5 per cent corporation tax rate for trading income tax-exempt regulated funds regime, a special purpose company 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 measures in the EU Anti-Tax Avoidance Directive (ATAD) and is in the process of consulting on the interest limitation and hybrid mismatch aspects. The Irish government has now ratified Ireland's choices under the OECD Multilateral Instrument, which will come into effect in Ireland from 1 May 2019. It has also introduced the EU DAC 6 rules that provide for the mandatory and automatic exchange of information regarding aggressive tax planning by taxpayers in the EU. Ireland has emphasised the need to wait for the outcome of the work of the OECD Task Force on the Digital Economy before moving ahead with EU measures.

II LOCAL DEVELOPMENTS

i Entity selection and business operations

Entity forms

Companies

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

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

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d company limited by guarantee (CLG);
e unlimited company; and
f investment company.

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

Entities with separate legal form are taxed separately.

Investment funds

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

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

Partnerships

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

Tax residence

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

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

Tax rates

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

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

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

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

A 33 per cent rate applies to capital gains.

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

Domestic income tax

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

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

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

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

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

International tax

Taxation of foreign-source income

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

Relief or credit for foreign taxes

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

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

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

Exit tax

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

Activities and tax incentives

R&D tax credit

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

Qualifying R&D activities must satisfy certain conditions and, in particular, the activities must seek to achieve scientific or technological advancement and involve the resolution of scientific or technological uncertainty.

Where a company has insufficient corporation tax against which to claim the R&D tax credit in a given accounting period, the tax credit may be credited against corporation tax for the preceding period, may be carried forward indefinitely or, if the company is a member of a group, allocated to other group members. The R&D credit can also be claimed by the company as a payable credit over a three-year period or surrendered to 'key employees' to set off against their income tax liability.

Knowledge development box

Ireland recently 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 ('qualifying expenditure') is divided by the overall expenditure on such assets before being multiplied by the profits arising from such assets (e.g., from royalties, net sales). The result is effectively taxed at 6.25 per cent. A potential 30 per cent uplift in the qualifying expenditure is available, capped at the total amount of acquisition costs and group outsourcing costs.

Capital allowances on provision or acquisition of intangible assets

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

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

Securitisation regime

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

Capitalisation requirements

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

Controlled foreign companies regime

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

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

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

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

EU anti-tax avoidance directive

Like other EU Member States, Ireland is required to implement an interest limitation rule in accordance with ATAD. This will limit 'exceeding borrowing costs' in a tax period to 30 per cent of EBITDA. The implementation date is 1 January 2019 but Ireland is seeking to defer this, as permitted by ATAD, until 2024, on the basis that existing Irish rules are equally effective. However, the EU indicated in a notice dated 7 December 2018 that a more stringent ratio-based approach will be taken, which means it is unclear if deferral by Ireland will be permitted.

ATAD-compliant hybrid mismatch rules must be implemented by Ireland by 1 January 2020, with the exception of anti-reverse hybrid rules, which must be implemented by 1 January 2022.

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ii Common ownership: group structures and intercompany transactions

Ownership structure of related parties

Tax grouping and loss sharing

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

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

Controlled foreign corporations

See Section II.i.

Tiered partnerships

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

Domestic intercompany transactions

Related party transactions

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

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

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

Participation exemption

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

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Dividends

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

Losses

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

International intercompany transactions

Transfer pricing developments

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

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

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

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

d the Department of Finance published an independent report on Ireland's corporate tax code in September 2017, colloquially referred to as the Coffey report. As part of Budget 2018, a consultation was announced on the recommendations contained in the Coffey report and five of the consultation questions relate to transfer pricing. One of the recommendations is to extend the Irish transfer pricing rules to non-trading transactions. The consultation and ultimate implementation of any of the recommendations may lead to changes in the Irish transfer pricing rules.

Related party borrowing

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

a the interest payments should be an arm's-length amount;

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

c in certain cases, payments to a 75 per cent non-EU related affiliate may be recharacterised as a distribution and disallowed as a deduction.

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Interest withholding tax

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

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

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

Taxation of inbound dividends

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

a an EU Member State;
b a country with which Ireland has a double tax treaty;
c a country that has ratified the Joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters; or
d a non-treaty country and where the company is owned directly or indirectly by a quoted company.

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

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

iii Third-party transactions

Sales of shares or assets for cash

Participation exemption

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

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Losses

See Section II.ii.

Tax-free or tax-deferred transactions

Transfers of shares and chargeable assets

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

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

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

Transfers of intangibles

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

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

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

iv Indirect taxes

VAT

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

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

Customs and excise

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

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

Insurance levy

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

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

i OECD-G20 BEPS initiative

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

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

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

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

Further engagement with the European Commission is currently being undertaken in respect of the interest limitation and hybrid mismatch rules, but transposition could occur as early as 1 January 2020.

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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 withdrawal approach by the EU to date on that basis.

iii Tax treaties

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

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

Notable typical or model provisions

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

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

Recent changes to and outlook for treaty network

The treaty with Kazakhstan came into effect in Ireland on 1 January 2018 and the new treaty with Ghana is currently undergoing ratification procedures.

Negotiations have concluded for new treaties with Azerbaijan, Oman, Turkmenistan 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 28 January 2019, which means that it will enter into force from 1 May 2019. The MLI operates so as to modify existing tax treaties and how each treaty is modified depends on the method of implementation adopted by each contracting state. The key provisions in respect of Irish double tax treaties will be in relation to the tax treatment of transparent entities, dual resident entities and the introduction of a principle purpose test.

IV RECENT CASES

i Perceived abuses

European Commission State Aid investigation – Apple

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

In coming to its decision the Commission focused on the arm's-length principle and whether Ireland applied that principle in its taxation of Apple. The two Apple entities that

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

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

Double Irish structure

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

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

Perrigo Irish tax assessment

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

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

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

V OUTLOOK AND CONCLUSIONS

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

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

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Following recommendations of a government report, it is expected that Ireland's transfer pricing rules will be extended this year in line with international best practice, and that consultation will begin on exploring moving to a territorial corporation tax base. It is also expected that legislation will be introduced to implement the requirements of EU Directive DAC 6 for mandatory reporting of certain transactions.

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

Final recommendations on taxation of the digital economy should be forthcoming from the OECD in 2020. There may be further EU tax proposals throughout 2019–2020 on a range of tax issues such as the common consolidated corporate tax base, financial transactions tax, digital sales tax and changes to the national veto system. However, none of these proposals have unanimous support across the Member States, so compromise will be needed for these to progress any further.

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Appendix 1

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Andrew is head of the Maples Group's tax team. 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. Prior to joining the Maples Group, Andrew was a senior partner with a large Irish law firm, and before that a tax consultant with Ernst & Young. He has been recommended by a number of directories, including *Chambers and Partners*, *The Legal 500*, *Who's Who Legal*, *World Tax*, *Best Lawyers*, International Tax Review's *World Tax Guide* and the *Tax Directors Handbook*. Andrew has also been endorsed in Practical Law Company's *Tax on Transactions* multi-jurisdictional guide. He was most recently recommended in *Who's Who Legal – Corporate Tax 2017*. Andrew is also the joint author of the book *Taxing Financial Transactions*, Irish Taxation Institute.

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