



An Roinn Airgeadais
Department of Finance

Ireland's corporation tax rules:

**Public consultation on the application of the
Authorised OECD Approach to the attribution of
profits to branches of non-resident companies**

March 2021

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www.gov.ie/finance

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1. Consultation Period

The consultation period will run from 16 March to 12pm on 16 April 2021. Any submissions received after this date may not be considered.

How to Respond

The preferred means of response is by email to: tpreview@finance.gov.ie

When responding, please indicate whether you are contributing to the consultation process as a professional adviser, representative body, business representative or member of the public.

Freedom of Information

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be published on the website of the Department of Finance.

Meetings with key stakeholders

The Department of Finance and Revenue may also invite key stakeholders to meet with them, including representative bodies, tax professionals and other interested groups or individuals.

After the Consultation

Tax policy issues from this public consultation will form part of the Minister for Finance's considerations in the updating of the rules for the taxation of branches/agencies of non-resident companies.

2. Background

As was indicated in the January 2021 update to Ireland's Corporation Tax Roadmap¹, following the substantial modernisation and extension of Ireland's transfer pricing rules in Finance Act 2019, the next step in this modernisation process is to extend transfer pricing rules to the taxation of branches in Ireland in line with the 'Authorised OECD Approach'. It is intended to bring forward legislation in Finance Bill 2021.

It is proposed to insert a new section into the Taxes Consolidation Act 1997 ("TCA 1997") that will provide for the application of an OECD-developed mechanism for the attribution of income to a branch of a non-resident company operating in the State. The OECD mechanism combines a general rule with detailed guidance as to the application of that rule. The rule – referred to here as the Authorised OECD Approach Rule or "AOA Rule" – is contained in Article 7(2) of the OECD Model Tax Convention ("MTC"), for the determination of profits attributable to a permanent establishment. The guidance on the application of this rule is set out in the OECD's 2010 Report on the Attribution of Profits to Permanent Establishments², published in July 2010, referred to here as the Authorised OECD Approach Guidance or "AOA Guidance".

How are branch profits currently taxed in Ireland?

Non-resident companies trading in Ireland through a branch or agency are chargeable to corporation tax in accordance with section 25 TCA 1997. Under section 25(1) TCA 1997, a company that is not resident in the State is within the charge to corporation tax if it carries on a trade in the State through a branch or agency. If it does so, the non-resident company is chargeable to corporation tax on all of its chargeable profits, wherever arising. Under section 25(2) TCA 1997, the chargeable profits of such a non-resident company comprise (i) any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency, and (ii) chargeable gains.

It is considered that the existing domestic legislation governing the computation of branch profits should be amended to bring it into line with international best practice in this area. It is proposed to do this by incorporating a provision similar to Article 7(2) of the MTC, which contains the AOA Rule, into domestic legislation and by adopting the AOA Guidance, as appropriate, in applying this provision.

¹ <https://www.gov.ie/en/publication/678e5-irelands-corporation-tax-roadmap-january-2021-update/>

² <https://www.oecd.org/ctp/transfer-pricing/45689524.pdf>

What is the Authorised OECD Approach (“AOA”)?

The AOA seeks to attribute to a PE or branch the profits that it would have earned at arm's length if it were a legally distinct and separate enterprise performing the same or similar functions under the same or similar conditions. Therefore, it incorporates separate entity and arm's length principles. The aim of the AOA is to apply to intra-company 'dealings', i.e. dealings among separate parts of a single enterprise, transfer pricing principles that apply to inter-company transactions, i.e. transactions between different, albeit associated, enterprises.³ The AOA seeks to achieve this by applying a two-step approach.

The first step requires a functional and factual analysis to be conducted, which involves 'hypothesising' the PE as a distinct and separate enterprise. The significant people functions are identified, which are then used as a basis for attributing assets and risks to the PE. Under the AOA, a PE is regarded as assuming risks in respect of which the significant people functions relevant to that risk are performed by the PE. Assets are generally attributed to a PE where the significant people functions relevant to the economic ownership of assets are performed by the PE. The AOA also requires an allocation of capital to the PE by reference to the assets and risks allocated to the PE. Internal dealings are recognised between the PE and other parts of the enterprise (which would include the head office or other PEs of the enterprise).

Under the second step, the remuneration of any dealings recognised between the PE and the enterprise of which it is a part is determined by applying, by analogy, the Article 9 transfer pricing tools (as articulated in the OECD transfer pricing guidelines which are applied under Irish transfer pricing legislation in relation to transactions between associated persons). This may involve comparing dealings between the PE and the enterprise of which it is a part with transactions between independent enterprises.

Purpose of this consultation

Prior to Finance Act 2019, a public consultation was held to obtain the views of stakeholders on the modernisation of Ireland's transfer pricing rules.⁴ As part of that consultation process, feedback was sought from interested stakeholders regarding the application of the AOA to the attribution of profits to a branch or agency for Irish tax purposes. The feedback received from

³ The OECD MTC distinguishes between the attribution of profits to a PE and transfer pricing in respect of transactions between separate entities. Article 7 deals with the attribution of business profits between the parts of a single entity using the *hypothesized separate entity* and *arm's length* principles whereas Article 9 deals with transfer pricing between two separate enterprises using the arm's length principle.

⁴ <https://www.gov.ie/en/consultation/af7206-irelands-transfer-pricing-rules/>

stakeholders was broadly supportive of the possible adoption of the AOA. However, certain stakeholders suggested that further consultation on the issue would be needed.

In anticipation of legislating for the adoption of the AOA in Finance Bill 2021, we are now inviting further feedback from stakeholders. This document contains examples of what some of the legislation implementing the AOA may look like, along with consultation questions on a range of technical and policy issues. Interested stakeholders are therefore invited to:

- Give your views on the examples of draft legislation and specific questions set out below, noting that there is no requirement to answer every question.
- Provide numerical examples where possible to illustrate your points.
- Provide details of alternative approaches (however minor) that you consider might be beneficial.
- Provide details of relevant issues not covered in this Feedback Statement.

3. Adoption of the AOA

When enacted, the new provisions could apply for chargeable periods commencing on or after 1 January 2022.

Application of the AOA

The intention of the proposed legislation is to require that the income of an Irish branch or agency of a non-resident company is computed in accordance with the AOA, based on the AOA Rule and the AOA Guidance. Given the existing provisions which apply to the computation of chargeable gains, it is not the intention of the proposed legislation to prescribe a mechanism for computing the chargeable gains of a non-resident company carrying on a trade in the State through a branch or agency.

Basic rules

To incorporate the AOA into Irish legislation, it is likely that a new section would be inserted into the TCA 1997 to supplement section 25 TCA 1997. It is contemplated that the AOA will be provided for in Irish law by incorporating into domestic legislation a provision similar to Article 7(2) of the MTC. Article 7(2) provides that the profits that are attributable to a PE are the profits that the PE might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed through the PE and through other parts of the enterprise.

The proposed legislation could require that the subsection derived from Article 7(2) be construed to ensure, as far as practicable, consistency between the effect given by it and the effect which would be given if a double tax treaty entered into by the State, incorporating Article 7(2) of the OECD Model Tax Convention, were to be applied in accordance with the AOA Guidance in computing so much of the profits that are attributable to a branch, regardless of whether a double tax treaty entered into by the State incorporating Article 7(2) of the OECD Model Tax Convention actually applies.

A potential legislative approach could be as follows:

- (2) For the purposes of section 25(2), and without prejudice to the provisions of any double taxation relief arrangements, the trading income arising directly or indirectly through or from a branch and any income from property or rights used by, or held by or for, the branch (in this section referred to as “relevant branch income”), of a company not resident in the State, shall be the amount that is attributable to the branch in accordance with subsections (3) and (4).
- (3) For the purposes of subsection (2), the relevant branch income that is attributable to a branch of a company is the amount of such income which it would have earned, in particular in its dealings with other parts of the company, if it were a separate and independent company engaged in the same or similar activities (as the branch is engaged in) under the same or similar conditions (as obtained in respect of the branch), taking into account the functions performed, assets used and risks assumed by the first-mentioned company through the branch and through the other parts of that company.
- (4) For the purpose of attributing relevant branch income to a branch of a company, subsection (3) shall be construed to ensure, as far as practicable, consistency between—
- (a) the effect which is to be given to subsection (3), and
 - (b) regardless of whether such double taxation relief arrangements actually apply, the effect which would be given if double taxation relief arrangements incorporating paragraph 2 of Article 7 of the OECD Model Tax Convention were to be applied, in accordance with the authorised OECD approach guidance, to the computation of so much of the profits as are attributable to the branch of a company that comprise relevant branch income.

Q1; Comments are invited on the approach proposed above.

Relevant definitions

As set out above, it is proposed that the AOA Guidance could be incorporated into Irish legislation for the purposes of computing relevant branch income attributable to an Irish branch of a non-resident company. Subsection (1) of the new section could set out relevant definitions, including a definition of ‘authorised OECD approach guidance’ which would mean the guidance on the attribution of profits to permanent establishments set out in the 2010

Report on the Attribution of Profits to Permanent Establishments approved for publication by the Council of the OECD on 22 July 2010. It is also possible that this could include such additional guidance published by the OECD on attribution of profits to a PE as the Minister for Finance may designate by order, after the date of passing of the legislation.

Relevant definitions that may be included in the legislation could be as follows—

(1) In this section—

‘double taxation relief arrangements’ means arrangements having the force of law by virtue of section 826(1);

‘Article 7 of the OECD Model Tax Convention’ means the provisions which are contained in Article 7 of the Model Tax Convention on Income and on Capital published by the OECD on 21 November 2017;

‘authorised OECD approach guidance’ means the guidance on the attribution of profits to permanent establishments set out in the *2010 Report on the Attribution of Profits to Permanent Establishments* approved for publication by the Council of the OECD on 22 July 2010, supplemented by the whole or part, as may be designated by the Minister for Finance for the purposes of this section by order made under subsection (5), of such additional guidance, on the attribution of profits to permanent establishments, published by the OECD on or after the date of the passing of the Finance Act 2021;

‘branch’, in relation to a company, means a branch or agency through which the company carries on a trade in the State;

‘OECD’ means the Organisation for Economic Co-operation and Development;

‘Revenue officer’ means an officer of the Revenue Commissioners;

...

(5) The Minister for Finance may, for the purposes of this section, by order designate the whole or part of such additional guidance on the attribution of profits to permanent establishments, published by the OECD on or after the date of the passing of the Finance Act 2021, as being comprised in the authorised OECD approach guidance.

(6) Every order made by the Minister for Finance for the purposes of this section shall be laid before Dáil Éireann as soon as may be after it is made and, if a resolution annulling the order is passed by Dáil Éireann within the next 21 days on which Dáil Éireann has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Q2; Comments are invited on the approach proposed above.

Q3; Should all aspects of the AOA Guidance be applied in connection with the computation of relevant branch income in Ireland?

Documentation and enquiries

The legislation would also likely set out a requirement for the non-resident company to maintain and have available for inspection by Revenue such records as would be necessary to verify compliance with the new provisions. The legislation could also provide that specific documentation would be included in such records.

Q4; Comments are invited on the possible approach in relation to documentation requirements.

Q5; Are there any existing provisions or guidelines that you consider that the documentation requirements should be based upon?

Q6; What particular issues do you consider might arise if specific documentation requirements were to apply from 1 January 2022?

Considerations for enterprises of a certain size

Consideration may need to be given to whether the AOA should apply to companies of a certain size.

Q7; Comments are invited on the possible application of the AOA to all companies, regardless of size.

Q8; If the provision is not to apply to certain companies below relevant thresholds, should such thresholds be based on the branch or agency size/activity or the size/activity of the group? If based on the branch or agency size/activity, please outline how such thresholds would be measured.

Q9; Are there any special considerations required in respect of SMEs?

Specific considerations for certain sectors

The feedback from the transfer pricing public consultation undertaken in 2019 included requests for the opportunity for further consultation with the financial services sector in relation to the adoption of the AOA and application of the AOA Guidance.

Part I of the AOA Guidance sets out the principles of the authorised OECD approach and provides guidance on the practical application of these principles to attribute profits to PEs in general. However, it is acknowledged in the AOA Guidance that it is considered necessary to provide more specific and practical guidance on the application of the authorised OECD approach in commonly occurring factual situations.

The AOA Guidance is comprised of four parts. Part I contains general considerations regarding the application of the AOA. Parts II, III and IV supplement the general guidance in Part I with more specific considerations for applying the AOA to permanent establishments of banks (Part II), enterprises carrying on global trading of financial instruments (Part III) and insurance companies (Part IV).

Q10; Are there any industry or sector-specific considerations that should be borne in mind, particularly in relation to financial and insurance companies, when incorporating the AOA into Irish legislation? If so, please outline in detail (a) what those considerations are and (b) how they could be addressed.

Q11; Comments are invited on the appropriateness of the application of whole or part of the AOA Guidance to specific sectors. Where such comments are provided, please provide detailed reasoning and provide specific details of possible alternative approaches.

Life assurance – ‘old basis business’

Life assurance business written on or before 31 December 2000 is taxable under an aggregate system known as the I-E (or income less expenses) system.⁵ The I-E tax computation in respect of old basis business is based on investment return (i.e. Case III, Case IV, Case V and Chargeable Gains) as opposed to trading profits. Given these specific rules, it is proposed that the provisions implementing the AOA will not apply to such business carried on by an overseas life assurance company. The legislation for this provision could be as follows;

⁵ Guidance on the taxation of life assurance companies is available at <https://www.revenue.ie/en/tax-professionals/tadm/income-tax-capital-gains-tax-corporation-tax/part-26/26-00-02.pdf>

(XX) This section shall not apply to so much of the trade of an overseas life assurance company (as defined in section 706) as is life business (as so defined) that is not new basis business (as defined in section 730A).

Q12; Comments are invited on the approach proposed in relation to old basis business.

Capital attribution and funding costs

The AOA Guidance considers the capital attribution and funding of the operations of the PE and highlights the importance of “free capital”⁶. The AOA Guidance authorises a number of different approaches for (i) the allocation of capital and (ii) the allocation of funding costs to PEs.

Q13; Comments are invited on any issues that might arise as a consequence of the application of the different approaches (referred to above) provided for in the AOA Guidance.

Interaction with other provisions

Q14; Are there any special considerations required as regards the potential interaction of the provisions implementing the AOA with other provisions of Ireland's tax legislation, for example, with Ireland's anti-hybrid rules?

Q15; What changes, if any, do you consider should be made to existing legislation in the context of implementing the AOA into Irish legislation?

⁶ Defined in the AOA Guidance as “an investment which does not give rise to an investment return in the nature of interest that is deductible for tax purposes under the rules of the host country of the PE”.



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