An Roinn Airgeadais
Department of Finance

# Corporation Tax
# Tax Strategy Group – 19/01

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**www.gov.ie/finance**

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# Introduction

1. Ireland's corporation tax regime is a core part of our economic policy mix and is a long-standing anchor of our offering on foreign direct investment (FDI). The 12.5% rate, which applies to a broad base, is internationally competitive and is notable for its long term stability. Certainty, transparency and a commitment to open engagement with stakeholders are cornerstones of the corporate tax regime.

2. 2013 saw a shift in the international tax landscape with the commencement of the OECD Base Erosion and Profit Shifting (BEPS) project. The resulting BEPS reports, published in October 2015, marked a fundamental shift in the international tax landscape for the taxation of multi-national enterprises. It also marked the commencement of an intensive period of legislative change across EU and OECD countries, as existing legislation is updated and new rules introduced to implement the new agreed standards.

3. Ireland has been at the forefront in implementing the BEPS recommendations, including country-by-country reporting; introducing the first OECD-compliant patent box (the Knowledge Development Box); early signature and ratification of the BEPS Multilateral Instrument; and agreement of the EU Anti-Tax Avoidance Directives (ATAD), the Dispute Resolution Mechanism Directive (DRM) and amendments to the Directive on Administrative Cooperation (DAC).

4. Ireland has also been, and will continue to be, pro-active in taking steps at domestic level to ensure that our corporate tax regime remains competitive and continues to contribute to employment and economic growth, while also meeting the newly-agreed international tax standards.

5. The international tax environment remains in flux. Since the publication of the BEPS reports there have been significant further developments, most notably the agreement of comprehensive US tax reform at the end of 2017 and an intensified debate on the taxation impacts of digitalisation at EU and OECD level.

6. The primary forum for this ongoing work is the OECD BEPS Inclusive Framework. This group has now published the "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy". This work plan provides a mandate to the various OECD technical working groups to work on the

technical detail of finding a sustainable globally agreed solution to addressing the tax challenges of digitalisation by the end of 2020. The work is being carried out on a 'without prejudice' basis.

7. Against this background of ongoing international change, it is important to support an environment of certainty for substantive business investment and job creation in Ireland. Ireland's commitment to sustaining an attractive, stable corporate tax regime will allow us to compete legitimately and to continue to promote genuine substantive investment in the State.

8. This TSG paper therefore contains:

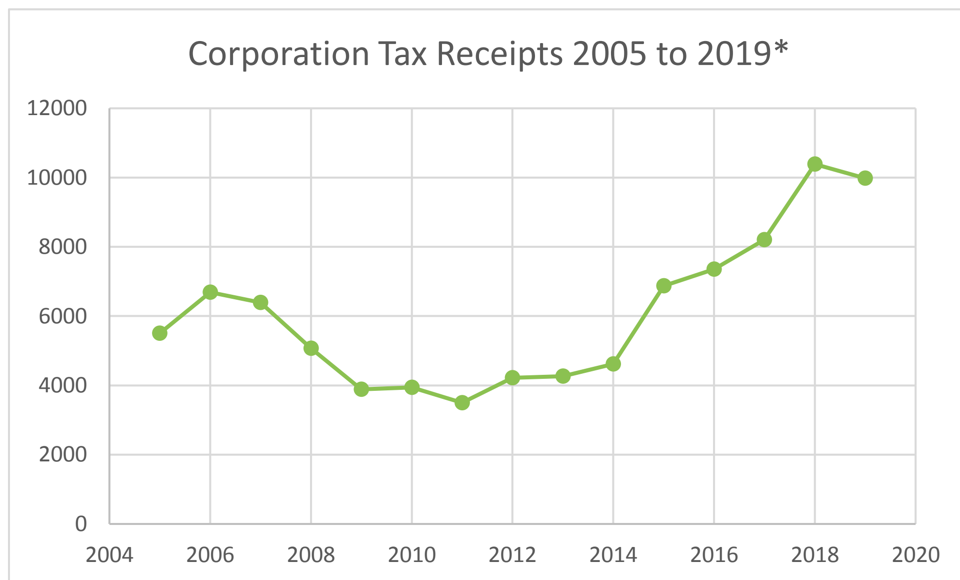
- An overview of trends in Corporation Tax receipts,
- An update on the commitments to further action, set out in the Corporation Tax Roadmap published in September 2018,
- Consideration of Ireland's position in the ongoing debate on international tax reform,
- Progress in the ongoing transposition of the Anti-Tax Avoidance Directives, and
- Consideration of a number of domestic reforms aimed at supporting business activities in Ireland.

9. TSG members should note that, following a commitment during debates on Finance Bill 2018, a separate TSG paper, TSG 19/02, has also been prepared, to examine Real Estate Investment Trusts, Irish Real Estate Funds and Section 110 companies as they invest in the Irish property market.

# Tax Trends

10. Net corporation tax (CT) receipts in 2018 were €10.4 billion, an additional yield of €2.2 billion (approximately 27%) in comparison to 2017. CT was the third largest taxhead, accounting for c.19% of total net receipts in 2018.

11. As with most other taxheads, the yield from corporation tax fell significantly during the recession, but the yield has been rising steadily since 2011, as shown by the plot and table below.




| 2019* | 2018 | 2017 | 2016 | 2015 |
|---|---|---|---|---|
| €9,980m | €10,387m | €8,201m | €7,352m | €6,873m |
| **2014** | **2013** | **2012** | **2011** | **2010** |
| €4,617m | €4,270m | €4,215m | €3,500m | €3,944m |
| **2009** | **2008** | **2007** | **2006** | **2005** |
| €3,889m | €5,071m | €6,393m | €6,685m | €5,503m |

*Estimated.

Source: Revenue Commissioners; Stability Programme Update (April 2019)

12. There was a level shift in CT receipts in 2015, when receipts of €6.87 billion represented an increase of €2.26 billion, or 49%, on the 2014 receipts. This was also the first time post-recession that CT receipts exceeded the previous annual peak of c.€6.7 billion, recorded in 2006.

13. Increases in receipts are attributable to a variety of reasons including improved trading conditions and positive currency fluctuations. The increases are, however, broad based – tax receipts have increased more quickly from smaller companies in 2017 than those from large companies, and across most economic sectors. There are also increases in the numbers of companies (of all sizes) paying tax.

14. In 2018, CT receipts were €10.4 billion, representing a year on year increase of €2.2 billion or approximately 27%. CT receipts for 2018 were initially projected to be €8.5 billion. This over performance arose from a combination of:
    - enhanced trading conditions,
    - increased product sales, including among large multinational companies based in Ireland; and
    - certain one-off factors (including the implementation of IFRS 15 accounting standards by certain firms).

    Other factors include the wind-down of corporate losses carried forward from the crisis and new CT tax payers.

15. The bulk of this over-performance was flagged by the Revenue Commissioners as part of the budgetary preparations. Accordingly, the Budget 2019 CT forecast for 2018 was revised upwards by €1.1 billion. Subsequent to this CT performed much more strongly than had been anticipated (an extra €0.8 billion) and can be linked to improved corporate profitability.

16. A large proportion of the €1.9 billion over-performance is prudently assumed as non-recurring, with €0.7 billion of this amount not entering the tax base for 2019. The Stability Program Update[1], published in April 2019, forecasts the 2019 corporation tax receipts at €9.98 billion.

[1] https://assets.gov.ie/8305/88ffede238074f2cb88fc996854a12b3.pdf

17. In May 2019, the Revenue Commissioners published 'Corporation Tax 2018 Payments and 2017 Returns[2]'. Analysis of data from 2017 tax returns shows the majority of sectors are maintaining profitability from 2016 to 2017. In total, €159 billion of trading profits was reported by companies in 2017 returns. The analysis demonstrates a small increase in overall trading profits of €238 million from 2016 to 2017.

18. Over 56,800 companies claimed losses on their 2017 tax returns, to a total value of €12,726m.

19. Companies had 2 million employments in 2017 (553,500 were in multinational companies) with combined Income Tax, USC and PRSI payments for their employees of €18.4 billion (€7.9 billion for multinationals' employees).

[2] https://www.revenue.ie/en/corporate/documents/research/ct-analysis-2019.pdf

**Corporation Tax Paid by Sector 2017 and 2018 (€m)**

| Sector | 2017 | 2018 | Variance | % Variance |
|---|---|---|---|---|
| Agriculture, forestry & fishing | €43.95 | €76.47 | €32.52 | 74% |
| Mining & Utilities | €45.03 | €149.08 | €104.05 | 231% |
| Manufacturing | €2,090.23 | €3,219.00 | €1,128.77 | 54% |
| Construction | €171.06 | €262.65 | €91.59 | 54% |
| Wholesale & retail trade; repair of motor vehicles & motorcycles | €1,107.69 | €768.05 | -€339.64 | -31% |
| Transportation & Storage | €271.31 | €282.99 | €11.68 | 4% |
| Accommodation & food services | €93.26 | €118.61 | €25.35 | 27% |
| Information & communication | €1,367.68 | €2,094.50 | €726.82 | 53% |
| Financial & insurance activities | €2,302.55 | €2,105.40 | -€197.15 | -9% |
| Real estate activities | €100.78 | €129.47 | €28.69 | 28% |
| Professional, scientific & technical activities | €358.98 | €341.14 | -€17.84 | -5% |
| Administrative & support service activities | €197.25 | €772.05 | €574.80 | 291% |
| Public administration & defence | €4.80 | -€0.06 | -€4.86 | -101% |
| Education | €3.27 | €7.35 | €4.08 | 125% |
| Human health & social work activities | -€17.17 | -€7.34 | €9.83 | 57% |
| Other Activities | €60.36 | €67.64 | €7.28 | 12% |
| **Total** | **€8,201.03** | **€10,387.00** | **€2,185.97** | **27%** |

Source: Revenue Commissioners https://www.revenue.ie/en/corporate/information-about-revenue/statistics/receipts/receipts-sector.aspx

# Concentration of Corporation Tax Receipts

20. Corporation Tax in Ireland is considered to be concentrated with a high proportion of receipts coming from a small number of companies in the multinational sector.

21. As a country that has been consistently successful in attracting leading multi-nationals to locate here, and given Ireland's level of integration with the global economy, it is not surprising that our corporation tax base has become concentrated.

22. However, there are risks associated with this concentration in corporation tax receipts. CT receipts represent a sizable element (18.7% in 2018) of Ireland's overall Exchequer tax receipts, and the share of CT receipts provided by the "Top 10" tax paying companies for 2018 was 45%, an increase from the 2017 figure of 39%.

23. This increase was partially driven by a one-off factors, such as changes in accounting standards (IFRS 15). In total these one-off-factors lead to €700 million in additional tax receipts in 2018. If these were excluded, the share of net receipts from the top 10 companies in 2018 would have been 43%.

24. Revenue data indicates that there is a year-on-year churn in the companies that comprise the Top-10 payers in any given year. However a fiscal vulnerability exists in the form of the exposure of the public finances to any significant changes to the profitability of this relatively small cohort of large corporation tax payers.

25. Steps have been taken in recent years to broaden the corporation tax base, including through the introduction of the 80% cap on capital allowances for intangible assets in Budget 2018 and the introduction of a broader Exit Tax regime in Budget 2019.

26. Measures have also been taken to support start-up and SME businesses, including the extension of the 3-year start-up relief in Budget 2019 and the SME-focused element of the 2019 R&D tax credit review (see below).

27. Tax receipts from the domestic sector increased in 2018 – approximately 77% of corporation tax receipts in 2018 were received from the multinational sector, as compared to 80% in 2017.

28. The Department is aware of the risks associated with the concentration of corporation tax receipts and will continue to monitor the situation closely and to consider potential measures to address over-reliance on potentially cyclical or over-concentrated CT receipts.

29. A range of base broadening measures have been introduced over the last decade which will ensure a continued broadening of the overall tax base. These include:
    - the introduction of the Universal Social Charge, the Local Property Tax and the sugar-sweetened drinks tax,
    - the increase in VAT for tourism related goods and services in Budget 2019,
    - the increase in the commercial (non-residential) Stamp Duty rate from 2% to 6% in Budget 2018,
    - the increase in the betting duty levy from 1% to 2% in Budget 2019,
    - the cessation of certain tax reliefs, such as the Home Renovation Incentive and the Start your own Business Relief, and;
    - the continued a roll-out of enhanced taxation compliance measures.

30. It is also noted that further potential for base broadening exists, particularly in the environmental area where important policy priorities exist.

# Update on CT Roadmap – Ireland's Commitments to Further Action

31. *Ireland's Corporation Tax Roadmap*[3], published in September 2018, set out the detail of 12 significant actions already taken with respect to Corporation Tax reform. It also set out a further 11 commitments to future action, and an update on progress is summarised below.

| No. | Commitment | Action to be taken by Ireland |
|---|---|---|
| 1 | **Controlled Foreign Company (CFC) rules**<br><br>**(BEPS Action 4, ATAD Article 4 and Coffey Recommendation)** | Legislation will be introduced in Finance Bill 2018 to introduce CFC rules with effect from 1 January 2019.<br><br>**Update:** CFC rules introduced in Finance Bill 2018 |
| 2 | **General Anti-Abuse Rule (ATAD Article 6)** | No further action is needed given the robustness of Ireland's longstanding General Anti-Avoidance Rule.<br>**Update:** ATAD commitment met |
| 3 | **BEPS Multilateral Instrument**<br><br>**(BEPS Actions 2, 5, 6, 14 and 15)** | The final legislative steps required to allow Ireland to complete the ratification of the Multilateral Instrument will be taken in Finance Bill 2018.<br><br>**Update:** Ratification of the Multilateral Instrument was completed by Ireland in January 2019 and the Instrument is now in force. |
| 4 | **Exit Tax**<br><br>**(ATAD Article 5 and Coffey Recommendation)** | Legislation will be introduced to replace the current provisions with an ATAD-compliant exit tax to take effect no later than 1 January 2020.<br><br>**Update:** ATAD-compliant Exit Tax introduced in Finance Bill 2018 |

[3] https://www.gov.ie/en/publication/b1fbf8-irelands-corporation-tax-roadmap/

| No. | Commitment | Action to be taken by Ireland |
| --- | --- | --- |
| 5 | **Interest Limitation rules**<br><br>**(BEPS Action 4, ATAD Article 4 and Coffey Recommendation)** | Ireland will introduce an ATAD-compliant interest limitation rule. The timing of that legislation will be determined following further engagement with the European Commission.<br><br>**Update:** Ireland remains of the view that our national targeted rules for preventing BEPS risks are equally effective to the ATAD interest limitation rule, however work has commenced to examine options to bring forward the process of transposition from the original planned deadline of end-2023. |
| 6 | **Hybrid Mismatch Rules**<br><br>**(BEPS Article 2, ATAD Article 9 & 9a)** | Legislation will be introduced in Finance Bill 2019 to implement anti-hybrid rules and further legislation will be introduced in a subsequent Finance Bill to introduce anti-reverse-hybrid rules.<br><br>**Update:** Work on transposition is ongoing and publication of a feedback statement is planned for July. |
| 7 | **Transfer Pricing Rules**<br><br>**(BEPS Actions 8-10 & Action 13, Coffey Recommendation)** | Legislation will be introduced in Finance Bill 2019 to update Ireland's transfer pricing rules.<br><br>It is intended to launch a public consultation in early 2019 and this may include consideration of whether any additional changes to Ireland's tax code are needed to ensure TP rules are fully effective in ensuring tax is paid where value is created and do not facilitate the transfer of profits to jurisdictions other than where value-creating activity takes place.<br><br>**Update:** Work on transposition is ongoing and it is intended that a feedback statement will be published during the Summer. |

| No. | Commitment | Action to be taken by Ireland |
|---|---|---|
| 8 | **Consideration of a Territorial Regime**<br><br>**(Coffey Recommendation)** | It is intended that a public consultation will be launched in early 2019, seeking further input on the alternative options of moving to a territorial regime or conducting a substantial review and simplification of the rules for the computation of double tax relief.<br><br>**Update:** Consideration of moving to a territorial system of taxation has been deferred until there is greater certainty around the international taxation environment. |
| 9 | **Mandatory Disclosure Rules**<br><br>**(BEPS action 12, DAC6, and Coffey Recommendation)** | Legislation will be introduced in Finance Bill 2019 to ensure that Ireland fully implements the DAC6 Directive.<br><br>**Update:** Work on transposition is ongoing and legislation will be included in Finance Bill 2019. |
| 10 | **Dispute Resolution**<br><br>**(BEPS Action 14 and EU Dispute Resolution Mechanism Directive)** | Regulations will be issued before July 2019 to implement the Dispute Resolution Mechanism Directive and provide Irish taxpayers with access to this new arbitration framework.<br><br>**Update:** Regulations issued at end of June 2019 transposing this Directive. |
| 11 | **International Mutual Assistance Bill**<br><br>**(Coffey Recommendation)** | Work is ongoing on finalising the drafting of this Bill with a view to publishing a Bill before the end of 2018.<br><br>**Update:** Drafting on the Bill continues. |

# Implementation of EU Anti-Tax Avoidance Directives

32. Following the publication of the BEPS reports in October 2015, agreement was reached at EU level to progress five separate anti-avoidance measures via the Anti-Tax Avoidance Directives (ATADs) agreed in 2016 and 2017.

33. Work on three of these measures is now complete – new Controlled Foreign Company (CFC) rules and a revised Exit Tax were introduced in Finance Bill 2018 and Ireland's existing General Anti-Abuse Rule (GAAR) already meets the required ATAD standard.

34. Work is continuing on the two remaining measures – anti-hybrid / reverse-hybrid rules and an interest limitation ratio.

## Anti-Hybrid and Anti-Reverse Hybrid Rules

35. The first and most substantial part of anti-hybrid rules is due to be transposed in Finance Bill 2019 with the remaining anti-reverse-hybrid rules due for transposition in 2021. Anti-hybrid rules are intended to counteract tax mismatches where the same expenditure item is deductible in more than one jurisdiction, or where expenditure is deductible but the corresponding income is not fully taxable.

36. Following agreement of ATAD2, the territorial scope of the provisions was extended to include also hybrid mismatches involving non-EU countries, and also to address hybrid permanent establishment mismatches, hybrid transfers, imported mismatches, reverse hybrid mismatches and dual resident mismatches.

37. Implementation of these rules will be extremely complex. The text of the ATADs is relatively brief and focusses on the high-level concepts agreed. It now falls to Member States to draft the detailed legislation required to implement these concepts, and to integrate it successfully with existing legislation.

38. In view of the complexity of the legislation required to implement anti-hybrid rules, a Feedback Statement will be published in July and both Revenue and Department of Finance officials will engage with stakeholders to address any ambiguities or unintended consequences identified as a result.

# Interest Limitation Rules

39. Following from the Common Approach agreed in BEPS Action 4, ATAD 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).

40. The general implementation date for the ATAD interest limitation rule was 1 January 2019, but a derogation is provided in Article 11 such that Member States having national targeted rules for preventing BEPS risks which are equally effective to the ATAD interest limitation ratio may defer implementation until agreement on a minimum standard for BEPS Action 4 is reached at OECD level, but no later than 1 January 2024.

41. Ireland's existing interest limitation rules are different in structure to the ATAD rule. They are purpose-based tests designed to limit qualifying borrowings, supplemented by extensive anti-avoidance provisions relating to connected party transactions.

42. It is the opinion of the Department of Finance, supported by case study data, that Ireland's existing interest rules are at least equally effective to the rules contained in the Directive. However the European Commission have assessed applications for derogation using a ratio-based approach. As the Irish targeted national rules are structurally different to the ATAD EBITDA ratio rule, the data collected for the purposes of administering and enforcing our domestic regime does not provide the data points necessary to demonstrate a hypothetical EBITDA outcome.

43. While we remain of the view that the extended deadline of 1 January 2024 should apply, work has commenced to bring forward the transposition process.

44. Introduction of the ATAD interest limitation rule will be complex. Interest deductions are of relevance to every business in the country and our existing rules provide strong protections for our corporation tax base. The key challenge when integrating the new ATAD rule will be to deliver a system which is understandable and easy for both business and Revenue to administer, while also retaining the necessary protections for the tax base.

45. Having regard to these requirements, a timeline for transposition of the ATAD interest limitation ratio is expected to be determined by end-July.

# Update on the Implementation of other BEPS recommendations

## BEPS Multilateral Instrument

46. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) is one of the outcomes of the OECD BEPS project. The BEPS project sought to address the issues of non-taxation of income or payments and to ensure that profits are taxed in the jurisdiction in which the real business activity takes place.

47. The MLI was agreed on 24 November 2016 and there are now 88 signatories and parties to the MLI. Ireland, together with the vast majority of the signatories and parties, signed the MLI on 7 June 2017. Following on from that we formally deposited our Instrument of Ratification with the OECD in January 2019 which resulted in the MLI coming into effect from 1 May 2019.

48. The MLI contains optionality for countries who are adopting it. Some Articles are mandatory as they are considered minimum standards but some Articles are optional best practices. Under the provisions of the MLI, each jurisdiction is required to provide a final list of reservations and notifications in respect of the various options at the time of ratification. The OECD publish the position each of the signatories has taken on their website[4].

49. Article 12 of the MLI seeks to address the Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies. Ireland's position on signing the MLI was to opt out of Article 12. This position was shared by a significant number of other countries including our major trading partners such as Germany and the UK. However, during the Committee Stage of the Finance Bill 2018 debate, Minister Donohoe indicated that officials would carry out further analysis on Ireland's position regarding Article 12 of the MLI and include consideration of this as part of the TSG process.

[4] https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

50. Tax treaties broadly provide that an enterprise is taxed solely in its country of residence, except to the extent that it has a fixed place of business, a permanent establishment (PE), in a treaty partner country.

51. In such cases, the profits attributable to the PE can be taxed in the treaty partner country. The BEPS Action 7 Report looked at ways in which PE status could be circumvented. One such way concerned the use of ‘commissionaire structures’ to avoid tax, as, in civil law countries, such structures were able to avoid having a PE by operating in a manner that all sales were made in the name of the foreign principal.

52. Article 12 of the MLI proposed a new test for when an agent can constitute a PE and therefore create a taxable presence in the country where the sales happen. It provides that an enterprise of one country is deemed to have a PE in the other country if it operates through a dependent agent in that other country. This looks at whether a company’s presence on the ground in a country is acting autonomously or whether it is really just carrying out the wishes of the foreign company.

53. Article 12 is not a minimum standard and Ireland did not adopt this provision under the MLI. However, it was indicated at the time that our position on Article 12 would continue to be kept under review. It is open to Ireland to lift its reservation in respect of Article 12 at any future date.

54. When signing the MLI, Ireland decided against opting into Article 12 due to the continuing significant uncertainty as to how the test would be applied in practice. Some guidance has been developed at OECD level to determine what profits, if any, would be attributable to a new permanent establishment created under this new test. The position not to adopt Article 12 was confirmed on the ratification of the Convention.

55. Similar to Ireland, the majority of jurisdictions that have signed the MLI have indicated that they will not adopt Article 12. Latest OECD statistics indicate that of 88 signatories to the MLI, 48 jurisdictions have indicated that they have not chosen to adopt Article 12. It is open to a jurisdiction to change their mind between signature and submission of their reservations and notifications at the time of deposit of their instrument of ratification.

56. Of Ireland’s 74 treaty partners, 58 have so far signed the MLI with 34 of those indicating that that they do not wish to adopt Article 12. These treaty partners include major trading

partners such as Germany and the UK. One treaty partner had originally opted into Article 12 but in the intervening period between signature and ratification have changed the preference and inserted a reservation for this Article when depositing their Instrument of Ratification.

57. As of 29th May 2019, of the 88 signatories to the MLI, 26 had deposited the instrument of ratification with the OECD. Of those 26, only 8 have adopted Article 12.

58. Ireland’s position on Article 12 of the MLI is being kept under review. Having analysed the positions taken by other OECD Members it is clear that this is a position shared by the majority of signatories to the MLI. This majority may grow further as jurisdictions lodge their positions on each Article together with the Instrument of Ratification.

59. As the MLI is only just beginning to come into force for those who, like Ireland, moved quickly to ratify it, it is too early for any greater clarity to have been reached as to how Article 12 is being interpreted in practice by tax authorities.

60. An additional and significant consideration is that the ongoing reform of the international taxation landscape at the OECD, and discussed below, includes further consideration of the concepts of nexus and permanent establishment. One possible outcome of the OECD work may be further changes to the definition of permanent establishment which may supersede the definitions in Article 12.

61. At this juncture it appears to be prudent not to change Ireland’s position in respect of Article 12 but this position will be kept under review.

## Other BEPS recommendations

62. BEPS Actions 8 to 10 developed new OECD transfer pricing guidelines with a particular focus on the taxation of intangibles. As set out in Ireland’s Corporation Tax Roadmap, it is intended to update Ireland’s transfer pricing rules in Finance Bill 2019 to incorporate the latest OECD guidelines. This is will form part of broader reform of Ireland’s transfer pricing rules. Following the recent public consultation, it is intended to publish a feedback statement in the coming months.

63. BEPS Action 12 recommended the introduction of mandatory disclosure rules in respect of transactions that met certain hallmarks. Ireland is one of only 3 EU Member States to already have a mandatory reporting regime in place. The regime requires tax advisers to notify Revenue when they promote or implement certain tax planning arrangements that meet the hallmarks of aggressive planning. This ensures Revenue have the information they need to ensure aggressive tax avoidance can be challenged.

64. The DAC6 Directive, which sought to implement BEPS Action 12 across the EU, requires Member States to introduce a common mandatory disclosure regime and to share all reports received with each other. As set out in the Corporation Tax Roadmap, Ireland will make any necessary changes to our mandatory disclosure regime to ensure we fully implement DAC6 in Finance Bill 2019.

65. BEPS Action 14 made recommendations in respect of how to improve the resolution of disputes among tax authorities. This work led to the Dispute Resolution Mechanism (DRM) Directive being agreed at EU level to enhance the framework for mandatory binding arbitration of tax disputes in EU law. This Directive has now been implemented in Ireland by way of Regulations.

# Supporting Investment & Activity in Ireland

66. In addition to the work ongoing to meet our international commitments for corporation tax reform, the annual process of tax reviews and consideration of domestic measures is also taking place. Three such issues are set out in further detail below.

## Research and Development (R&D) Tax Credit

67. The central purpose of the Research and Development (R&D) tax credit is to encourage companies to undertake high value-add R&D activity in Ireland, thereby supporting jobs and investment here.

68. Under the Department's Tax Expenditure Guidelines, the R&D tax credit is due to be reviewed in 2019. This review is ongoing – a public consultation has recently closed and an analysis of Revenue and CSO data is taking place. The review is scheduled for completion in advance of deliberations for Budget 2020.

69. During discussions at Dáil stages of Finance Bill 2018, it was confirmed that the 2019 R&D review would include consideration of aspects of the credit specific to SME companies, with a view to supporting their uptake of the credit.

70. Further information on this aspect of the review is contained in the TSG Paper 19/05 on Taxation Measures to Support SMEs.

## Tax Appeals Commission

71. An efficient and effective tax appeals process is an essential element to any functioning tax system. Efficient and fair administration of the tax system, both by Revenue authorities and by appeals bodies, are key factors in supporting businesses and ensuring broad-based compliance with tax legislation.

72. The Tax Appeals Commission ("TAC") was established in March 2016, replacing the former Office of the Appeal Commissioners. The objectives for the establishment of the

new structure included increased transparency and certainty for taxpayers and ensuring that the appeals system could be seen as fully independent from Revenue.

73. The main function of the Appeal Commissioners is to make determinations on matters that are in dispute between taxpayers and Revenue.

74. The TAC has transitioned from an office of two Commissioners and four staff in 2016, to three Commissioners (one temporary) and 17 staff in May 2019, with sanction in place to increase to a total complement of 6 Commissioners and 27 support staff in 2019. Work is ongoing to implement the recommendations of the O'Donoghue report on the workload and operations of the TAC, to enable it to address a significant backlog of appeal cases.

75. The Finance (Tax Appeals and Prospectus Regulation) Bill 2019, published in June 2019, includes legislative provision to allow for the appointment of a Chairperson of the TAC. Recruitment for this important role will commence at the earliest opportunity.

76. For the purposes of Finance Bill 2019, consideration is being given to potential changes to the legislation governing the appeals process, as outlined below:

### A: Publication of Some Determinations without Redaction

77. The TAC is tasked with the potentially competing objectives of maintaining the confidentiality of information provided during the appeals process while also being required to publish a report of each of their determinations on the internet not later than 90 days after notifying the parties. The reports are intended to be of precedent value to other taxpayers and advisors, however they must be published in a way that does not reveal the identity of any person whose affairs were dealt with on a confidential basis during the proceedings concerned, in so far as it is possible.

78. In the cases of longer, complex determinations, the level of redaction required can significantly reduce the precedent value of any determination. For example, where a determination relied on facts in published accounts, references to those facts could lead to identification of the taxpayer involved and the TAC will redact same. As a consequence, facts pertinent to the determination are not published. The

Commissioners have also noted that redaction of lengthy determinations is time consuming and diverts Commissioner time away from other cases.

79. Notwithstanding these facts, confidentiality is an important aspect of the appeals process.

80. However the TAC has noted that, where a party is dissatisfied with a TAC determination and appeals to the High Court, the full un-redacted determination must be lodged to the High Court and therefore enters the public domain. The TAC have therefore proposed consideration of an amendment whereby, in the case of determinations where either party has requested that the TAC prepare a "Case Stated" for the purposes of an appeal to the High Court, the obligation to redact details when publishing the determination should be lifted from the TAC.

81. This would improve the precedent value of the determination for other taxpayers and would reduce the administrative burden on the TAC. However it could be perceived as a barrier to parties considering an appeal of a determination to the High Court, as it is understood that not all requests for a Case Stated ultimately proceed to a High Court appeal.

82. An alternative approach could be to lift the redaction requirement only if / when the party who requested the Case Stated confirms that the appeal has been lodged with the High Court. Having regard to the timelines relevant to the Case Stated process, this may require an extension of the deadline for publication of determinations in respect of which a Case Stated has been requested from 90 days to 110 days.

### B: Case Management Conferences – consequences of non-appearance

83. As part of the appeals process, the Commissioners may direct parties to attend a Case Management Conference (CMC) on the appeal. With the agreement of the parties, the Commissioners may determine an appeal at or following a CMC without the need for a full hearing.

84. CMCs offer the opportunity for more expeditious and less formal resolution of appeals in many cases.

85. It has been noted, however, that the legislation governing CMCs does not provide any power to the TAC to address a failure by either party to appear at the CMC. In such cases, the appeal continues to be valid and to require determination by the TAC, notwithstanding that a party has failed to engage with an element of the appeals process.

86. It has been proposed that consideration be given to inserting a provision to specify that, where an appellant fails to attend a scheduled CMC, the appeal shall be considered to be withdrawn. This would be subject to safeguards ensuring the deemed withdrawal would not apply when non-attendance was due to absence, illness or other reasonable causes.

87. A provision of this nature could improve the efficiency of the CMC process and thereby improve the processing time for appeals before the TAC. However consideration would need to be given to appropriate safeguards to ensure it does not have unintended consequences for appellants engaging constructively with the appeals process.

### C: OECD Mutual Agreement Procedure (MAP) for transfer pricing disputes

88. The MAP article in tax agreements allows the national 'competent authorities' to resolve international tax disputes where the same profits have been taxed in two jurisdictions. Through MAP negotiations, the competent authorities will endeavour to agree the correct profit allocation between the companies in their respective jurisdictions. In Ireland, the Revenue Commissioners are the 'competent authority'.

89. Participation in the MAP procedure does not affect a taxpayer's right to lodge an appeal with the Tax Appeals Commission in relation to the same issue. However, should a TAC appeal proceed and issue a determination before the MAP reaches its conclusion, Revenue cannot derogate in its negotiations from the decision of the TAC.

90. Therefore MAP and tax appeals procedures do not generally proceed in parallel and both Revenue and the appellant generally request that TAC stay the appeal pending the outcome of the MAP.

91. The TAC is statutorily required (under section 949W Taxes Consolidation Act 1997) to specify the date by which an appeal is to be resumed. Such a requirement conflicts with the MAP process where negotiations may take several years to be concluded.

92. A possible solution to consider would be to amend section 949W Taxes Consolidation Act 1997 to enable the TAC to suspend an appeal pending the outcome of a MAP. This would allow the MAP operate as intended and for Ireland's competent authority to meet its commitments in relation to the OECD's BEPS project.

93. TSG members are invited to give their opinion on the three proposals outlined above.

## Additional Tier 1 Capital

94. In February 2019 the Department of Finance conducted a public consultation on potential amendments to Section 845C TCA 1997, which relates to the taxation of Additional Tier 1 Capital (AT1) financial instruments.

95. Section 845C was introduced following the transposition of the Capital Requirements Directive and the Capital Requirements Regulation (together known as CRD IV) in 2014. to provide clarity as to the tax treatment of AT1 instruments.

96. CRD IV introduced new capital structure requirements for financial institutions, specifying minimum levels of Common Equity Tier 1, Additional Tier 1, and Tier 2 capital as a percentage of risk weighted assets.

97. To comply with the requirements of the CRD IV, AT1 securities must have a number of features which are designed to aid loss absorbency in the event of a financial crisis. These features include:
    - The AT1 securities are perpetual in term with no incentive to redeem
    - AT1 securities are ranked below Tier 2 instruments, senior creditors and depositors
    - Distributions on the AT1 securities can be paid only out of distributable profits
    - Distributions can be cancelled at the bank's discretion and are non-cumulative
    - The AT1 securities convert into CET1 capital or are written down in the event that a bank's CET1 ratio falls below a certain threshold
    - Purchase is not funded directly or indirectly by the institution

98. Section 845C refers specifically to AT1 securities and it was noted in the public consultation document that, in line with similar amendments in some other EU Member States, amendments would be made in Finance Bill 2019 to take into account other comparable instruments with characteristics similar to AT1 instruments.

99. The consultation paper invited views on potential consequences of extending the treatment of AT1 securities to other comparable contingent convertible securities (CoCos) with similar characteristics, and on whether it is desirable to provide specifically for the tax treatment of such instruments on conversion.

100. A small number of responses were received to the consultation. The general consensus of the submissions is that CoCos with similar features to AT1 instruments, but which are not issued as AT1 capital instruments, are unlikely to be a feature of the Irish market. As such, no potential negative consequences of the proposed amendments were identified as a result of the consultation.

101. Consideration of the responses to the consultation does not suggest that any amendment to provide specifically for the tax treatment of CoCos on a conversion event is required.

102. TSG members are invited to give their views.

# Ongoing International Tax Reform

103. The last few years have seen significant developments globally on international corporate tax reform. Ireland has been an active participant in, and supporter of, this work through various international fora.

## OECD work on addressing the tax challenges of digitalisation

104. In March 2018, the Inclusive Framework of the Organisation for Economic Cooperation and Development (OECD), delivered an interim report in which it committed to reach a long-term consensus-based solution on the tax challenges arising from the digitalization of the economy for its final report in 2020.

105. This process has led to the publication and adoption of the "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy" by the OECD Inclusive Framework on BEPS session in May. This work plan was subsequently endorsed by G20 Finance Ministers on 9 June, and OECD working groups have been charged with addressing the technical issues that arise with a view to finding a sustainable globally agreed solution in 2020.

106. The primary focus of the OECD work is to examine how profits are distributed within multinational groups and recommend new methods that take account of the increasing digitalisation of the economy. The work plan has identified a series of proposals which provide a basis for further discussion. These proposals are organised under two distinct pillars.

107. Pillar 1 examines potential revised nexus and profit allocation rules to redesign aspects of the international corporate tax framework in response to the tax challenges arising from digitalisation. There is not yet any agreement at the OECD on how wide or narrow this work should be with potential different approaches under discussion.

108. The work plan outlines that technical work will seek to draw on the commonalities among the various Pillar 1 proposals under discussion to seek a single proposal which could form the basis for political agreement. However substantial technical issues remain to be discussed and resolved.

109. A public consultation held in March 2019 highlighted the concerns of stakeholders regarding additional costs and the administrative burden that were likely to result from increasing complexity in an already complex system. In recognition of this, the work plan gives regard to ways to simplify the proposals with a view to minimise compliance costs and disputes.

110. In a speech in late May, Minister Donohoe commented that it might be possible to find a globally acceptable agreement within this broad Pillar that provides certainty. He noted key criteria that any agreed outcome must meet. The Minister outlined that any agreed outcome must:

- Follow the well-established principle of aligning taxing rights with value creation
- Be modest and appropriately targeted to cause as little disruption to the long established international corporate tax framework.
- Be based, to the greatest extent possible, on existing transfer pricing rules which are deeply embedded in the international tax framework.
- Ensure that the bulk of profits remain taxable in exporting countries under the existing corporate tax framework. This can help to ensure that such countries are not disproportionately impacted.
- Not disproportionately benefit large countries at the expense of smaller ones.
- Be focused on providing certainty into the medium term for governments and for business.

111. The second area under discussion at the OECD, Pillar 2, focuses on the global anti-base erosion (GloBE) proposal put forward by France and Germany. Under this Pillar, the members of the OECD BEPS Inclusive Framework have agreed to explore, on a 'without prejudice' basis, the possibility of agreeing global rules on minimum effective taxation levels.

112. The proposal contains two main elements. The first element is an income inclusion rule that would require countries to introduce rules which tax the profits of overseas subsidiaries in their parent jurisdiction if their overseas tax liability is below a minimum level. The second proposed element is an undertaxed payments rule which would empower countries to deny tax deductions on certain cross border payments if the effective tax rate of the relevant income flow is below a minimum level.

113. Significant technical issues remain to be considered and broader questions such as what level a minimum rate would be set at have not yet been discussed. The Work Plan provides a mandate for these technical discussions to begin on a 'without prejudice' basis.

114. In a speech in late May, Minister Donohoe noted that the Pillar 2 proposals remain problematic, not least because of a lack of clarity as to what its proponents are trying to achieve. He indicated that he remained to be convinced of the validity and appropriateness of this proposal in reaching an agreed outcome.

115. Following the publication of the OECD Work Plan, technical work is now underway in respect of both Pillars. Ireland is an active participant on these working groups.

116. The Work Plan indicates that the OECD will seek political consensus on the outline of the proposed solutions by January 2020. This outline will have to include a determination of the nature of, and the interaction between, both Pillars, and will have to reduce the number of options to be pursued under Pillar One. The technical work would then continue with a view to final reports being published by the end of 2020.

## Ongoing tax reform work at EU level

117. While the primary focus of tax reform efforts is at the OECD, work continues at EU level on a range of direct tax issues.

118. There had been a focus on the Commission's proposal for a Digital Services Tax but ultimately agreement was not reached at EU level. EU Finance Ministers have agreed to discuss the OECD work on tax and digitalisation concurrently at European level with a view to identifying any common perspectives. This work will continue under the Finnish Presidency.

119. The CCCTB proposal remains under discussion in the Working Party on Tax Questions. In line with the commitment in the Programme for Government, Ireland is engaging constructively with this proposed reform while critically analysing the proposals and considering whether it is in Ireland's long term interests. Unanimity will be required before any proposal on CCTB or CCCTB is adopted.

120. Work continues on the EU list of non-cooperative tax jurisdictions. The list has been enormously successful at encouraging countries to make commitments and introduce reforms to bring their tax systems into line with international best practice. Discussions also continue in respect of whether defensive measures are necessary in respect of countries that fail to take action and remain on the EU list

121. The Tax Strategy Group may wish to consider these issues.

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