The Consultative Committee
of Accountancy Bodies-Ireland

Chartered Accountants Ireland
The Association of Chartered Certified Accountants
The Chartered Institute of Management Accountants
The Institute of Certified Public Accountants in Ireland

47/49 Pearse Street,
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Response to Public Consultation on the Coffey Review

About CCAB-I

The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) is the representative committee for the main accountancy bodies in Ireland. It comprises Chartered Accountants Ireland, the Association of Chartered Certified Accountants, the Institute of Certified Public Accountants in Ireland, and the Chartered Institute of Management Accountants.

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Introduction

The Coffey review into Corporation Tax policy in Ireland was born of political necessity, but government should be careful to use its recommendations to modernise the system, rather than as a justification to levy new taxes or expand the compliance burden on business. The CCAB-I believes that if adopted the net effect of the proposals would be to increase the tax take from the corporate sector.

Ireland is already unique among developed nations in the high proportion of corporation tax collected relative to other taxes. While some of the recommendations in the review are worthwhile and will align the country even more closely with best international practice, suggested measures impacting on the Small and Medium Enterprise sector will merely increase the burden of paperwork without significantly enhancing the integrity of the system.

Each proposal, whether concerning transfer pricing, the extent of profits taxable or the quantum of allowances has to be judged on its own merits. While it is important for Ireland to operate in line with best international practice, our Corporation Tax system must tax correctly all companies and branches within the charge to Irish tax. This should be in a manner appropriate to the needs of the Irish Exchequer and sustainable by reference to the structure of the Irish economy. We do not have to blindly adopt proposals advocated by other nations which compete with us for business and investments. The reform of the US Corporation Tax regime effective from the start of this year adds a context to cross-border tax issues which was not apparent at the time Mr Coffey drafted his review.

The Coffey review's focus on the implementation of proposals within a specific timeframe is positive however, and will reduce the inevitable ambiguity associated with a tax system in transition. Other recommendations concerning cooperation in the recovery of taxes across jurisdictions are also positive.

Question 1:
Article 6 of ATAD requires the transposition of a General Anti-Abuse Rule (GAAR) by 1 January 2019. As Ireland already has a robust GAAR, what changes, if any, are needed to ensure this meets the minimum standard required by the Directive?

Given the scope of Ireland's existing GAAR, additional legislation or reform of Sections 811-811D is not necessary or desirable and would only lead to further uncertainty in an already complex area. Ireland was among the first countries to adopt a General Anti-Avoidance Rule or Provision, and is among a very small number of countries where the efficacy of such a rule has been tested through to the top of the court system.

Question 2:
Article 7 of ATAD requires Member States to implement Controlled Foreign Company (CFC) rules by 1 January 2019. What are the key considerations regarding the implementation of CFC rules? In terms of the options for CFC legislation set out in Article 7, what are the key factors in determining the preferred approach for Ireland?

The stated objective of the ATAD is to provide for the effective and swift coordinated implementation of anti-base erosion and profit shifting measures at EU level. However, it is important to recognise that the ATAD goes further than the OECD's BEPS proposals by treating all BEPS measures as minimum standards in tax policy (irrespective of whether the OECD identified them as minimum standards, or advocated them as common approaches or best practices).

In terms of design features of a CFC regime, Option B[1] may be preferable as a gateway test but with a carve-out if the CFC can pass a substantive economic activity test in its own right. Subsidiaries with both low profits and low profits margins do not pose profit shifting risks. Nor do subsidiaries who distribute the majority of their profits back to Ireland. The Directive itself allows for such carve-outs from the CFC legislation and this should also be stated in Irish domestic CFC legislation. The de minimis tests provided for in the ATAD under both Options A and B could usefully be applied.

[1] The CFC charge should be applied on undistributed income of the CFC arising from non-genuine arrangements.

The activities of a group of companies in a jurisdiction in its entirety should be considered when assessing the substantive economic activity test rather than on an entity by entity basis. This is necessary as sometimes it is not possible to align substance and profit generation in the same entity in a jurisdiction for various commercial reasons.

An exempt period provision at entity level should be adopted in the Irish rules to ensure that Irish companies are not unduly penalised in the event of an international acquisition.

A provision should also be made for Irish companies acquiring an entity or entities which fall to be taxed under the Irish CFC rules for the first time such that a two year period is permitted for the Irish parent company to restructure as necessary before the income of the acquired entity is brought into the Irish tax net as CFC income. This is a design feature of other CFC regimes.

Entities in countries that have full tax treaties with Ireland should be excluded from the scope of any CFC regime because to do otherwise undermines the integrity of the DTA network.

Draft CFC legislation should be made available for consultation as early as possible in 2018. The CCAB-I strongly cautions against a short time period between the finalisation of the legislation for CFC rules and the effective date of implementation as this would deny companies the necessary time to assess the impact of the rules, the interaction with other Irish rules and indeed CFC rules in other jurisdictions. Insufficient consultation on CFC legislation will negatively impact business and Ireland's reputation as business friendly location.

Question 3:

Article 5 of ATAD requires Ireland to have an exit tax in four particular circumstances by 1 January 2020. Ireland currently has an exit tax which will be replaced by the ATAD exit tax. What are the key considerations in transposing Article 5?

Ireland has a longstanding exit charge provision that applies a capital gains tax charge on companies moving their tax residence out of Ireland, subject to a number of exceptions some of which were introduced over the years to reflect a European Court of Justice decision. Ireland will have to make changes to our domestic legislation to align our existing tax provisions with the ATAD. Such amendments require careful consideration and consultation and so should not be introduced any earlier than 1 January 2020.

Ireland's multiplicity of different corporate tax rates (12.5%, 25%, 33%) is not in line with international norms. In terms of an exit tax regime to align with ATAD, we should apply a 12.5% rate to the measure of the exit gain where the asset was in use for the purposes of a trade.

Question 4:
Article 9 of ATAD originally set out concise anti-hybrid rules applicable to intra-EU payments. In February 2017, the ECOFIN Council agreed an amendment to ATAD, ATAD 2, which extended the hybrid mismatch rules to third countries. ATAD 2 delays the implementation date for the introduction of any anti-hybrid rules to 1 January 2020 and allows a longer period, until 1 January 2022, to implement the elements of the rules which target so-called 'reverse hybrids', a type of hybrid entity that is treated as transparent for tax purposes in the payor jurisdiction and a taxable entity in the payee jurisdiction. What are the key considerations regarding the implementation of the hybrid mismatch rules?

Ireland needs to implement the Directive provisions but we do not need to go beyond the framework set out in Article 9 of ATAD and ATAD 2. Change should be confined to payments that are actually hybrid payments, not to mismatches arising on account of the tax system of another jurisdiction or arising from transfer pricing adjustments.

The introduction of a participation exemption regime may need to take account of the hybrid mismatch approach e.g. no foreign branch exemption unless the foreign branch is subject to foreign tax.

Irish CFC rules should allow a deduction for tax paid on income in other jurisdictions in the relevant period even if the tax is not necessarily incurred by the same entity considered to be taxable from an Irish perspective.

The securitisation regime set out in Section 110 TCA 1997 has already incorporated anti-hybrid mismatch principles into Irish legislation so further anti-hybrid rules are unnecessary for this sector.

In the context of the introduction of the hybrid mismatch rules more generally, given their inherent complexity, we would strongly recommend that a draft of any proposed legislation would be made available at least 12 months before the commencement date to allow ample time for public consultation and to enable the restructuring of existing arrangements, where necessary, to occur.

Question 5:

Following their adoption by the OECD Council in June 2016, the 2017 OECD Transfer Pricing Guidelines are now the appropriate reference point for transfer pricing rules. Recommendation 6 of the Review of Ireland's Corporation Tax Code states that *"Ireland should provide for the application of the OECD 2017 Transfer Pricing Guidelines incorporating BEPS Actions 8, 9 and 10 in Irish legislation."*

When incorporating the OECD 2017 Transfer Pricing Guidelines, what are the key considerations?

While it is expected that all OECD member and observer states will ultimately adopt the OECD 2017 Transfer Pricing Guidelines incorporating BEPS Actions 8, 9 and 10 ("2017 Guidelines") into domestic legislation, not all member and observer states have yet done so. Individual countries take different approaches to the implementation of OECD transfer pricing guidance. Reports published by the OECD[2] in November 2017 on the domestic profile of 31 countries regarding key transfer pricing principles demonstrates that the majority of the countries profiled did not have a legislative provision for OECD transfer pricing guidelines and instead, looked to the guidelines for interpretation purposes. The domestic rules of some countries make explicit reference to the approved OECD Transfer Pricing Guidelines while other countries, such as Ireland require a legislative change to reflect the updated guide in domestic transfer pricing requirements. This means that not all OECD members and observer states will implement the 2017 Guidelines at the same time or to the same degree of rigour as a legislative provision which Ireland will implement. Therefore, it is important that Irish based businesses/enterprises are not disadvantaged by Ireland being an early adopter of change. Ireland should observe the progress of other states and provide for a change to Irish domestic rules no earlier than 31 December 2020.

[2] Transfer Pricing Country Profiles, published by the OECD, 7 November 2017. http://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm

The changes to transfer pricing rules for Ireland will create an increased reporting burden for companies in preparing the required documentation and ensuring it is consistent with its group companies located in other jurisdictions. This is all in addition to Country By Country Reporting obligations in operation in Ireland, iXBRL obligations and increased scrutiny of the activities of large companies by Revenue. It is therefore necessary to give Irish domestic businesses ample time to ramp up resources and align systems to prepare for the transition to the 2017 Guidelines.

We also have concerns over the capacity of revenue authorities to apply any new transfer pricing regime given the complexity of, and the delays inherent in, the current transfer pricing arrangements.

Question 6:
Domestic transfer pricing legislation should be applied to arrangements the terms of which were agreed before 1 July 2010.

Arrangements which were agreed before 1 July 2010 and which remain unchanged are not subject to transfer pricing rules. This is known as the grandfathering provision and this exception applies indefinitely as long as the terms of a pre-1 July 2010 arrangement does not change.

The question now of changing the grandfathering rule to retrospectively apply transfer pricing obligations has implications for the integrity of the Irish tax system. Retrospective change to tax rules implies that our tax laws are unreliable. Compliant taxpayers have a right to consistent tax rules and changes to compliance obligations for transactions which took place more than eight years ago does not reflect well on our tax system. Companies impacted by a retrospective change to transfer pricing obligations should be given until 31 December 2020 to put the documentation in place to support pricing policies relating to transactions in place prior to 1 July 2010. Any dispute on the pricing policy adopted should not result in an adjustment to the tax computations of the company for the accounting periods prior to 1 January 2021. Impacted companies should also be exempt from transfer pricing compliance reports for accounting periods prior to 1 January 2021.

Question 7:
If Ireland is to introduce transfer pricing rules for small and medium sized enterprises (SMEs) what are the key considerations? Should all enterprises be subject to transfer pricing rules or should the scope of the rules exclude entities below a certain threshold? If Ireland introduces transfer pricing rules for SMEs what would be the appropriate documentation requirements?

Expanding transfer pricing to the Small and Medium Enterprise sector will merely increase the burden of paperwork without significantly enhancing the integrity of the system.

It is important not to lose sight of the objectives of transfer pricing rules in Ireland and internationally. The rules are in place to ensure that corporate profits are not manipulated by artificial pricing of arrangements between associated parties to reduce the tax liability of a corporate. Ireland applies transfer pricing to domestic and cross border transactions. If these rules are extended to the SME sector, it is highly doubtful that additional taxes will be raised. A large proportion of Irish SMEs are closely held companies. The shareholders and directors of close companies traditionally extract profits by way of dividends and salary leaving minimal taxable profits. It is difficult to envisage how transfer pricing rules on this cohort of the SME sector is necessary or justifiable.

The Coffey review sets out estimates of the number of companies which may be potentially impacted by removing the transfer pricing exemption based on various size thresholds. While none of the categories identified implicate a significant numbers of companies, Ireland should prioritise measures to support and encourage the SME sector rather than introduce another layer of expensive compliance obligations to sate the unending demands of international observers. Recent reports on the vulnerability of corporation tax receipts due to a high dependency on a small number of firms,[3] makes the need to support the SME sector all the more pressing. The last thing this sector needs right now is the introduction of transfer pricing obligations which have no obvious exchequer benefits.

[3] Department of Finance, Annual Taxation Report 2018, p9.

Question 8 (a):
Consideration should be given to extending domestic transfer pricing rules to non-trading income.

Transfer pricing rules introduced in 2010 excluded non-trading transactions. The extension of transfer pricing rules to non-trading transactions now could give rise to mismatches in the corporation tax rate applying to the income earned by the originator and the corporation tax rate applying to the expense paid by the recipient (12.5% versus 25%). This will pose problems particularly for transactions between Irish resident parties and such transactions should be excluded from the proposal to extend transfer pricing to non-trading income.

Question 8(b):
Consideration should also be given to extending transfer pricing rules to capital transactions, having regard to whether such an extension would improve the existing provisions which already apply arm's length values to companies' transactions relevant to chargeable gains and capital allowances.

Irish legislation has long established market value rules for capital asset disposals between connected parties (section 547 to 549 TCA 1997 and section 623 TCA 1997) for CGT purposes. Market value is also fundamental in connected party transactions for capital allowances purposes (section 312 TCA 1997 and section 291A TCA 1997).

On the basis that businesses subject to Irish CGT and benefitting from Capital Allowances are already required to meet rigorous market value standards, additional transfer pricing regulation is unnecessary.

Question 9:
The Coffey Review recommends that *"there should be a specific obligation on Irish taxpayers who are subject to domestic transfer pricing legislation to have available the transfer pricing documentation outlined in Annex I and II of Chapter V of the OECD 2017 Transfer Pricing Guidelines to ensure implementation of BEPS Action 13."*

Since May 2016, Annex I and II of Chapter V of the OECD Transfer Pricing Guidelines contain a list of the information which should be included on the master file and local file respectively. When providing for Annex I and II what will be the effects for business?

Irish transfer pricing rules under the 2010 legislation have a requirement that the taxpayer "…shall have available such documentation as may reasonably be required…" (Sec 835F(1) TCA 1997) to determine the charge to tax under Schedule D documentation and to "….be prepared on a timely basis…." (Sec 835F(2) TCA 1997). Accordingly, it is reasonable to expect that the obligation to have transfer pricing documentation ready for inspection will continue when the transition is made to the 2017 Guidelines.

As stated in our response to Question 5, Ireland should delay the implementation of 2017 Guidelines until the end of 2020 in the expectation that other OECD member and observer states will adopt the OECD rules no sooner than 2020.

Question 10:

With the introduction of CFC rules under Article 7 of ATAD, the Coffey Review recommends that *"consideration should be given to whether it is appropriate to move to a territorial corporation tax base in respect of the income of the foreign branches of Irish-resident companies and, in respect of connected companies, the payment of foreign-source dividends."*

The introduction of a CFC regime presents Ireland with the opportunity to introduce a unified regime for the taxation of foreign subsidiaries and foreign branches. A full participation exemption could then be applied to any repatriation of profits from either a branch or a subsidiary, and the current participation exemption on the sales of shares in subsidiaries could be extended to foreign branches, subject to the same conditions applying. This also aligns Ireland's treatment of foreign branches with the treatment afforded in much of the EU. The UK offers an optional foreign branch exemption, and this should be considered to provide maximum flexibility, for example this option might be exercised where otherwise the branch income could be subject to a CFC charge.

(a) Would moving to a territorial corporation tax base be a positive development for Ireland? What would be the effects for Ireland of such a move?

There are a number of benefits of moving to a territorial corporation tax base.

- A number of EU countries (including the UK, France, Germany and the Netherlands) have incorporated a full/partial branch exemption into their corporation tax regime. Therefore, in order to remain competitive following the introduction of CFC rules and BEPS measures, Ireland should introduce a branch exemption which should be attractive for international companies with a branch network to establish their headquarters in Ireland.
- The operation of the credit relief system is complex in terms of interpreting the provisions of Schedule 24 to determine whether credit relief is available for a particular item of income/gain, computing the credit relief and also in computing the branch profits assessable to Irish corporation tax. This level of complexity results in an additional tax compliance burden for Irish companies with a branch network when compared to the position of entities headquartered in countries with branch exemption regimes. Moving to a branch exemption for foreign branch profits should simplify the Irish taxation regime for Irish entities with a branch network and should be neutral from a tax collection perspective given that Irish tax on foreign branch profits are currently largely sheltered by foreign tax paid as things stand.

(b) To what extent does Ireland's ultimate choice of how CFC rules are implemented under Article 7 of ATAD impact on the question of moving to a territorial corporation tax base?

Under either option available under Article 7 of ATAD, the implementation of a foreign branch exemption and CFC legislation at the same time is consistent with maintaining the integrity of the tax system. The introduction of an optional foreign branch exemption would allow companies to elect to be taxed either under the general Irish tax rules on all income, or to apply the CFC rules to foreign branches and subsidiaries alike. In either scenario it provides a simplified and unified regime that can be applied across the board to meet the needs of businesses while at the same time protecting Ireland's tax base.

It would be important to retain an "opt out" option of the exemption regime where loss relief is more beneficial to the taxpayer. This means that the foreign tax credit regime needs to be retained and simplified.

ENDS. January 2018