Fianna Fáil
Submission to the Department of Finance

Review of Ireland’s Corporation Tax Code

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Introduction

As a small open economy on the periphery of Europe, Ireland must remain a competitive place to do business. Our industrial policy needs to ensure that Ireland remains an attractive location for multinational enterprises (MNE) and a competitive environment for small and medium sized enterprises (SME).

Clearly, the 12.5 per cent corporation tax rate is a vital ingredient in attracting and creating jobs in Ireland.

SMEs form an essential part of Ireland's economy. According to the most recent CSO data in 2014, there are 237,753 SME's in Ireland employing 919,985 people. MNEs are also vital for Ireland's economic growth and employment. According to IDA Ireland MNEs now employ around 200,000 people. Often overlooked is the fact that many SMEs rely on MNC's for their customer base.

This is why our corporate tax policy is so important. If we lose MNEs we will not only be losing employment and the associated taxes on employment (like PAYE, PRSI, USC for example) but it will also be devastating for many SME's as well.

Despite the apparent success of our corporate tax policy in terms of employment there is a risk that the Exchequer revenue derived from it may prove unsustainable. In 2017, corporate tax brought in over €8.2 billion in revenue to the Exchequer, up from €4.6 billion in 2014.

Given the sustainability issues surrounding our corporation tax revenue it is vital now that the Government set up a Rainy Day Fund to protect the Exchequer from such shocks as a fall in corporation tax revenue.

This revenue also has become more concentrated with a few MNEs contributing more and more to the overall figure. There is a clear risk that if these companies decide to change the way they structure their business that Ireland will suffer an immediate hit in Exchequer revenue.

It is for these reasons that Ireland must carefully examine each aspect of our corporation tax code before making changes that could have drastic implications to our industrial and fiscal strategy.

Tax transparency and Base Erosion and Profit Shifting (BEPS) – Fianna Fáil's overall position

Some arguments levelled towards Ireland have suggested that we are a tax haven in the same category as the Cayman Islands and other jurisdictions. Such comparisons are completely disingenuous and wide of the mark.

A lack of tax transparency is a key element of a tax haven and is a particular element that cannot be charged at Ireland. Tax transparency is where information on tax is open and available to other tax authorities. In this respect Ireland is exceptionally transparent when compared to other countries both within the EU and outside the EU.

Our corporate tax rules are set out very clearly in legislation and open for everyone to see and examine. Fianna Fáil supports international initiatives to improve tax transparency.

In this respect Fianna Fáil supports the implementation of the Base Erosion and Profit Shifting Initiatives (BEPS) published by the OECD. Ireland has been an early mover in the implementation of these proposals and we would like to see this continue.

However, Ireland should not implement BEPS uncritically. The proposals on the table at the moment appear to leave much to the discretion of individual tax authorities. We must be alive to the possibility that tax authorities in other jurisdictions may not act with the same consistency and transparency as the Irish Revenue Commissioners when there is competition for large employers.

It must be remembered that Ireland is a small open economy on the periphery of Europe. It is not appropriate for a country of less than five million people to be the world's taxman. Some have suggested that we, as a country, should step forward and stop companies shifting profits around the world in a tax efficient way.

This would only be a symbolic gesture and not solve the core problem and would be detrimental to Ireland's economy. It is for this reason Fianna Fáil supports international approaches through the United Nations, through the OECD and through the European Union to deal with this international issue.

The Implementation of the Anti-Tax Avoidance Directive (ATAD)

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?

As Ireland already has a General Anti-Abuse Rule enshrined in law Fianna Fáil sees no need to radically change the status quo in this regard. Perhaps some small changes will be needed to bolster the existing law but nothing substantial needs to change.

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?

BEPS Action 3 Report sets out a number of recommendations in relation to Controlled Foreign Companies and the tax treatment of them. Article 7 of ATAD defines what a Controlled Foreign Company is. Broadly a company is considered a CFC if it is subject to more than 50% control by a taxpayer or the associated enterprise of the taxpayer, and the corporate income tax paid on its profits is less than half the tax it would have paid had the income been taxed in the hands of its parent company.

There are broadly two approaches in implementing Article 7. Firstly, would be to attribute specified undistributed incomes of a CFC to the parent company. Secondly, would be to attribute undistributed income arising from non-genuine arrangements to the parent company.

The second approach applies to 'non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage'.

On the face of it, it would appear that the second option would be closely aligned with Ireland's General Anti-Abuse Rule whereby a 'tax advantage' is defined. However, in choosing the second approach consideration must be taken as to the effect it would have on our corporation tax regime as it stands. With such high corporation tax receipts we must be very careful in this respect. In considering option 1 Ireland must fully ascertain how much undistributed passive income there currently is in what would be classified as Controlled Foreign Companies.

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 already applies an Exit Tax when a company resident in Ireland ceases to be resident in Ireland. However, it appears that the Directive is tighter in definition than the current Irish law. The Exit Tax under the Directive stipulates that an exit tax must be imposed on four types of transfer:

a) The transfer of assets from the head office to a permanent establishment in another jurisdiction;
b) The transfer of assets from a permanent establishment to the head office or permanent establishment in another jurisdiction;
c) The transfer of residence of a taxpayer to another jurisdiction; and
d) The transfer of a business carried on by a permanent establishment in a Member State to another jurisdiction with the effect that the Member State relinquishes taxing rights over the transferred assets.

From what it can be seen it seems that there is still no real definition or criteria to follow in calculating the value of the assets transferred or the rate at which the exit tax should be applied. Given this Fianna Fáil believes that this should be agreed first before any Member State proceeds in enacting this. The date in which this needs to be transposed is 1 January 2020 so it will have to be finalised for the Finance Bill 2019.

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?

Anti-hybrid rules as specified in the Base Erosion and Profit Shifting (BEPS) Action 2 Report and in the Anti-Tax Avoidance Directive are designed to address mismatches in rules across jurisdictions. Hybrid mismatch arrangements can take on many forms but ATAD and ATAD 2 focus solely on intra-group scenarios. For example if one group entity pays another group entity in another jurisdiction cost in the first jurisdiction may be deductible for tax purposes

but it may not be considered taxable income in the corresponding jurisdiction. In this instance no tax would be paid at all.

This is a very complex area as there are a vast number of tax jurisdictions with varying rules. The primary risk is that groups use these different jurisdictions and rules to aggressively avoid tax.

In principal Fianna Fáil supports the need to close hybrid mismatches with other jurisdictions. However, transposing into Irish law is going to be very challenging. The deadline to implement the EU Directive has been extended to 1 January 2020.

It is vital that Ireland in the meantime fully ascertains the impact of implementing these rules. More generally, Ireland needs to be cognisant that not all countries will implement these rules at the same time. This is important from an OECD BEPS point of view as Action 2 was not agreed to be binding (ie minimum standard). Therefore, countries outside the EU may not implement these changes.

Fianna Fáil has always believed that changes must not be reserved for just one jurisdiction or just one country. Changes must be made internationally on an agreed basis rather than on an individual basis.

The Implementation of Actions 8, 9 and 10 of the OECD BEPS Package

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?

Transfer Pricing is already provided for under Irish law and it applies the arm's length principle which is consistent with the OECD Transfer Pricing Guidelines. Irish transfer pricing rules:

i. Do not apply to SME's
ii. Apply to trading transactions
iii. Do not apply to any intra company transactions before 1 July 2010
iv. Provide for either an upward adjustment of receipts – 'consideration receivable' – or a downward adjustment of expenses – 'consideration payable' – for tax purposes
v. Provide for transfer pricing documentation to made available by taxpayers.

Transfer pricing has grown to be a substantial part of Irish tax law as many multinational enterprises currently use Ireland as a base for global or European sales. Therefore while broadly supporting the implementation of Actions 8 to 10 of the BEPS project, Fianna Fáil believes that the Department of Finance and the Revenue Commissioners should undertake a thorough analysis of the potential implications for each of the changes outlined below in Questions 6 to 9.

Additional Considerations Regarding Ireland's Domestic Transfer Pricing Rules

Question 6: The Coffey Review recommends that "domestic transfer pricing legislation should be applied to arrangements the terms of which were agreed before 1 July 2010."

What are the key considerations regarding the implementation of this recommendation?

The Coffey report recommended that domestic transfer pricing legislation should apply to arrangements made before 1 July 2010. However, it also states that the number and value of arrangements made pre 1 July 2010 is unknown. Given that transfer pricing is particularly important in Ireland's case, Fianna Fáil would recommend that a thorough analysis be done in order ascertain the full impact of such a change.

Question 7: The Coffey Review recommends that "consideration should be given to extending transfer pricing rules to SMEs, having regard to whether the concomitant imposition of the administrative burden associated with keeping transfer pricing documentation on SMEs would be proportional to the risks of transfer mispricing occurring."

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?

While the benefit of extending transfer pricing legislation to SMEs is clear, Fianna Fáil would have a serious concern that such changes would add to the administrative burden on many SMEs and thus increase the cost for them. This would occur at a very pivotal and critical time for our SMEs. With Brexit we are encouraging SMEs to diversify away from the UK and towards other markets.

Implementing this without first ascertaining the impact on SMEs could turn out to provide a disincentive to diversify. Providing an extra administrative burden will inevitably lead to an increase in costs as SMEs require more in terms of tax consultancy and legal expenses.

Less onerous documentation requirements are a must if this change is to be made. This not only makes sense to limit the burden on SMEs it also makes sense as the risk of serious global tax avoidance through transfer pricing is far smaller for SMEs than for large MNEs.

Question 8: The Coffey Review recommends that "consideration should be given to extending domestic transfer pricing rules to non-trading income. There is a strong rationale to extend domestic transfer pricing rules to non-trading income where it would reduce the risk of aggressive tax planning. 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."

In relation to the extension of transfer pricing rules to non-trading income, what are the key considerations of this proposal?

In relation to the extension of transfer pricing rules to capital transactions, what are the key considerations of this proposal, bearing in mind existing market value rules?

The Coffey Report recommends that domestic transfer pricing laws should be extended to non-trading income like interest and rental income. Ireland has had a very poor experience particularly when one considers the issues in relation to Section 110s.

Pending a thorough analysis of the current situation regarding intra-group transfer pricing for non-trading income, Fianna Fáil believes that such a change should be made. The Arm's Length test should be applied whether the income is trading or non-trading.

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?

Fianna Fáil believes that the provision of timely and accurate documentation is key element of tax transparency. As a consequence Fianna Fáil sees no reason why this recommendation in the Coffey Report should not be implemented. Given that there is a group revenue threshold of €750 million means that only the larger companies would have to implement these changes and these companies should be in a position to provide the documentation.

The Effects of Moving to a Territorial Corporation Tax Base

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."

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?

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?

The Coffey review recommends that should Ireland not move to a territorial corporation tax base, Schedule 24 should be simplified on a policy and tax neutral basis. Could such a simplification be an appropriate alternative to a territorial corporation tax base, particularly in the context of specific CFC implementation choices? How might such simplification be achieved?

While consideration should be given to such a move, it should not be made lightly. Such a change is likely to create substantial change for both the Revenue Commissioners and the companies themselves. This is likely to increase costs and uncertainty all at a time where there is already substantial change taking place.

Given that there is no current obligation for Ireland to move in this direction Fianna Fáil sees no reason to make a move in this regard in the near future. How we adapt to Actions required by the BEPS project and the European ATAD must be a priority for now.

Conclusion

Ireland is a small island nation on the periphery of Europe. As a country of around 4 million people it is entirely unreasonable to expect Ireland to tackle base erosion and profit shifting on its own. Not only would it be a fruitless exercise in addressing the problem it would also jeopardise our entire industrial policy and the hundreds of thousands of jobs that come with it and the huge corporation tax receipts we receive currently.

Fianna Fáil still believes that the solution to this global issue must be found on the global stage. Ireland must contribute to this process in a constructive manner and work with our European and international partners in that respect.

However, Ireland must also stand strong, for there are many who are seeking to undermine our 12.5% tax rate and to use every scandal to undermine our industrial policy. We as a

country must remember that taxation is and must remain the competence of sovereign Member States. This is enshrined under the Lisbon Treaty and Ireland must be prepared to use its veto in order to protect our corporation tax policy from those who wish to undermine it.