Submission to the Review of the Corporation Tax Code - Public Consultation

Contributed by Oxfam Ireland

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1. Introduction

Oxfam welcomes this consultation process, and in particular its acknowledgement of the impact of tax practices and regulations on developing countries. Oxfam works in some of the poorest countries in the world and seeks to develop long term solutions to global poverty and inequality. We believe this is impossible to achieve as long as the current scale of corporate tax avoidance continues to drain essential financial resources from developing countries. The UN has estimated that developing countries lose around $100bn annually because of corporate tax avoidance schemes.[1]

Oxfam recognises that Ireland has been involved in the OECD Base Erosion and Profit Shifting (BEPS) process and various ongoing processes at EU level to address corporate tax avoidance. We agree with the Irish Government that these are the most appropriate avenues to deal with a number of issues related to corporate tax avoidance. However, Oxfam has serious concerns about whether the existing processes Ireland is engaged in go far enough to really address the problem of tax avoidance.

Whilst a program such as BEPS is welcome, in Oxfam's analysis it should be a stepping stone towards the wider reforms necessary to establish a truly equitable international tax system. A central flaw of the BEPs process is that the exclusion of developing countries has ensured that the existing OECD-developed system of international taxation has remained intact. This system generally allocates more taxing rights to the country where a multinational organisation originates (which is often within the OECD) and fewer taxing rights to the countries where the multinational corporations do business (into which category most developing countries fall). This broadly means that in cases where multinational companies have internal trade between subsidiaries in developing and developed countries, it is the latter that receives more rights to tax the flows and hence to receive more tax revenue.

[1] UNCTAD (2015). World Investment Report 2015 – Reforming International Investment Governance. UNCTAD, Geneva. http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

2. Answers to questions set out in consultation

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?

The GAAR under Article 6 of ATAD aims to tackle abusive tax practices not yet dealt with through other specific provisions. Article 6 is a tool for tax authorities to apply a standard EU-wide GAAR to ignore an arrangement or series of arrangements where the essential purpose is to obtain a tax advantage that defeats the object or purpose of the tax provision, and where the arrangements are regarded as non-genuine.

Oxfam Ireland would recommend the introduction of a new GAAR in Irish law, or to amend the current Irish GAAR to be textually as close as possible to Article 6. Having a standard EU-wide GAAR avoids companies abusing the small differences between national GAAR provisions, it provides companies with more tax certainty when engaging in EU cross-border transactions, and it would align EU Member States jurisprudence in their GAAR assessment.

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?

Despite ATAD setting very low minimum standards in relation to CFC rules, Ireland can improve on these minimum standards in its national implementation of the Directive. Oxfam urges Ireland to propose strong CFC rules which cover profit shifting to third countries. It is important to set the benchmark for triggering CFC rules at a high enough level to be effective (especially as Ireland's statutory corporate tax rate is already "low"). By way of illustration, it should be noted that the OECD has observed that many countries use a benchmark for triggering CFC rules at 75 per cent of that country's statutory corporate tax rate. Equally crucial is the fact that CFC rules should be easy to implement and mechanical to be efficient. For Ireland to have strong CFC rules the following elements should be considered:

1) CFC rules in Ireland should use the categorical approach regardless of the location of the CFC, as the transactional approach adds little to

current transfer pricing regulations and the arm's length principle. Moreover, the transactional approach only focuses on lost income by the parent company whereas the categorical approach is broader and takes income generated in any country other than the CFC country into account. Only the categorical approach will thus effectively discourage profit shifting worldwide, including profit shifting out of developing countries. In addition, EU Member States, without CFC rules in place should preferably implement the categorical approach, as a uniform approach across the EU is the best way to prevent double taxation risks and unnecessary legal complexity (e.g. Italy, Germany, France and others have yet to put CFC regimes in place following the categorical approach).

2) The Directive indicates that CFC rules should apply to foreign profits taxed at less than 50 per cent of the home country rate. This means the Irish threshold would be only 6.25 per cent. Oxfam urges that this threshold should be set much higher, at 75-100 per cent of the home country rate.

3) There should be no substance test on the CFC in a third non-EEA country as soon as the effective tax rate is below the 75-100 per cent of the home country of the parent company. A safe harbour clause should be included to meet reasonable concerns about any unintended effects of CFC rules on genuine business activities. The clause would allow companies to be exempted from the CFC charge if they can prove that CFC income results from real business activities and does not include profits shifted from one country to another for the purpose of tax avoidance.

4) The definition of CFC income should be as broad as possible. Limiting CFC rules to certain types of subsidiary profits makes them less effective. Preferably income from goods and services as mentioned in the draft Directive should be included in the definition of CFC income and thus also cover profit shifting through intra-group trade in goods, an important type of CFC income that is now left out of the Directive (following the French CFC example.)

5) Both distributed and non-distributed CFC income should be included in the tax base of the parent company. Excluding distributed profits from the tax base might lead to a loophole in the CFC regime. In order to avoid double taxation a provision for double tax relief should be included in the legislation.

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?

The existing exit charge provision in Irish tax law is rather weak and the transactions listed usually do not trigger an exit tax in Ireland. Moreover, certain important exceptions in the current Irish exit tax regime easily allows companies to set-up tax avoidance structures (the 'excluded companies' provision). This is an important consideration, especially after the recent large onshoring of Intellectual Property (IP) in Ireland and exit tax would protect Ireland from a sudden exit of that IP. Oxfam therefore recommends that Ireland fully transposes Article 5 in the ATAD to the Irish tax code.

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', 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?

The key consideration is stopping aggressive tax avoidance. Hybrid instruments, often culminating in double non-taxation, have been tolerated for too long and have significantly eroded tax bases in several countries. Some well-known hybrid structures involve Ireland[2] and therefore Ireland should now lead by example. Companies have closely monitored the BEPS and EU legislative processes and have already started to adapt their tax strategies (i.e. unwinding their hybrid structures). In our view there is no significant reason not to introduce the anti-hybrid rules by January 2020. Other EU countries like Belgium and Netherlands are also implementing anti-hybrid rules in this period. Moreover, ATAD 2 provides exceptions for those hybrid structures established for genuine economic reasons like hybrid financial instruments.

Question 5-9

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

Oxfam is fully supportive of the recommendations set out in the 'Coffey Review' that domestic transfer pricing legislation should be applied to:

[2] For example the Double Irish

a) Arrangements agreed before 1 July 2010;
b) SMEs;
c) Non-trading income, including capital transactions.

Oxfam encourages that suitable resources are provided to Revenue so these additional functions can be undertaken as thoroughly as is possible.

However, Oxfam Ireland does not feel that these changes, though welcome, will address all profit shifting into Ireland. Oxfam Ireland reasserts that 'two way' transfer pricing legislation is needed to give Irish Revenue officials the power to investigate instances where profits are shifted from a high tax jurisdiction to Ireland, to avail of its low Corporate Income Tax Rate. This would allow officials to identify potential abuses which could lead to revenue losses in other countries, especially developing countries.

When Oxfam Ireland made this proposal to the 'Coffey Review' the review stated that there is adequate measures in place to address this issue. The review asserted that if transfer mispricing occurs, a foreign tax authority may adjust the transfer prices charged or taken by a foreign affiliate resident in their territory and attribute a higher quantum of taxable profit to the foreign affiliate. If the Irish Revenue agrees with this assessment an adjustment can be made under protocols set out in relevant Double Taxation Agreements. However, as is recognised in the review, not all tax authorities of developing countries have the institutional capacity to undertake such audits and identify sophisticated tax avoidance strategies.

The other reasons this proposal was rejected in the Coffey Review is because it is not common practice and it was asserted that there is a danger of double non-taxation if the other jurisdiction decides not to exercise its taxing rights. This concern can be easily addressed by inserting a protection clause in new legislation to ensure that a reduction in taxable income in Ireland will only happen when Revenue is satisfied that the income will be assessable in another jurisdiction.

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?

In answering this question, the following three points should be made:

1) This is perhaps the most important policy consideration of all in this consultation, but not a surprising one given the current international tax environment. It is true that Ireland is one of the few remaining OECD countries still applying a worldwide tax system for foreign-source dividends and branch income.

2) A move to territoriality does increase incentives for cross-border profit shifting via methods like transfer pricing and thin capitalisation.

3) Discussions of the potential effects of worldwide versus territorial taxation generally focus on the impact, firstly, on government revenue in the home country, and, secondly, on ''competitiveness'' of the home country in the globalised market. However, little consideration is given to a potential impact on low-income countries, especially the flows of foreign direct investment to those countries.

As Ireland is one of the last OECD countries to move to territoriality it is useful to have a look at how other countries successfully moved from one approach to the other approach. The case of Japan is especially interesting, and the lessons learned should be considered carefully.

Japan moved in 2009 from a credit system to an exemption system for dividends received from foreign subsidiaries. Before adopting a territorial system, Japan – like Ireland – used a credit mechanism to eliminate double taxation on domestic companies' foreign earnings. In adopting a territorial tax system, the Japanese government was also attempting to simplify its credit system as was imposing high compliance costs. The 2009 reform enacted a participation exemption without the simultaneous adoption of strong anti-base-erosion and anti-avoidance rules. Since then, Japan has periodically enacted tighter anti-base-erosion and anti-avoidance provisions. For example, the Japanese CFC rules have gone through several iterations, and just recently, in 2017, the Japanese government expanded the CFC rules to include any type of intangible income.

Japan’s ongoing attempts to strengthen its base erosion prevention rules suggests that our second consideration above is well-founded. The experience of applying and monitoring taxpayers upon enactment of the participation exemption has led to a recognition, in hindsight, among Japanese academics and policymakers that it would have been better to introduce the reforms simultaneously with tighter anti-base-erosion rules.

The Japanese example proves that moving from a worldwide to a territorial taxation model clearly increases the importance of strong CFC and other anti-abuse rules. Moreover, Ireland’s role as a low-tax jurisdiction for foreign-generated income, including for passive income like interest and royalties, only reinforces this need and our conclusion is simple: no matter which scenario is chosen in the end, Oxfam recommends that the Irish government urgently implements strong CFC and other anti-abuse rules.

How Oxfam would like CFC rules to be implement has already been detailed in question 2, however, the combination of a territorial regime with a low Irish statutory corporate tax rate increases the need to set the threshold for triggering CFC rules at a rate of 75-100 per cent, instead of 50 per cent, of Ireland’s corporate tax rate. Furthermore, the definition of CFC income should be as broad as possible (especially regarding intangibles) and should include income from goods and services, as well as both distributed and non-distributed CFC income; there should be no substance test on the CFC rules in a third non-EEA country; CFC rules in Ireland should use the categorical approach regardless of the location of the CFC; a safe harbour clause should be included to meet reasonable concerns about any unintended effects of CFC rules on genuine business activities. The Coffey Review confirms that should a decision be made to introduce a participation exemption for branch profits and dividends, consideration would have to be given as to whether such rules should be more extensive than the minimum prescribed by ATAD.

In addition to CFC rules, strong interest limitation rules and switchover rules should be considered when moving to territoriality:

- Interest limitation rules are a very effective measure against profit shifting as debt structures are widely used for BEPS. The interest limitation rules included in Article 4 of ATAD should be implemented as quickly and as ambitiously as possible. An example to follow in this respect is Romania. Romania has recently decided to apply a 10% EBITDA threshold as an interest deduction limitation rule instead of the 30% EBITDA minimum standard in ATAD. On the tax deductibility of net interest charges and other economic equivalent costs, Romania has decided a deduction up to 0.2 million EUR instead of 3 million EUR while

the exceeding part will be deductible up to 10% EBITDA. The Irish government should also bear in mind that interest limitation rules are not only in the interest of protecting the tax base, but also in the interest of a healthy and stable economy wherein companies do not rely too heavily on debt structures and are not incentivised to do so.

- A switchover rule was proposed by the European Commission in ATAD but was finally dropped. A switchover rule allows tax authorities to deny tax exemptions on dividends, capital gains and profits from permanent establishments which enter the EU from non-EU countries, if that income been taxed at a very low or no rate in a third country. 2016 figures prove that Ireland is receiving royalties/license fees from Africa (21 million EUR), and South and Central America (29 million EUR excluding Bermuda)[3]. These are small figures for Ireland, but less so for developing countries. It is important that Ireland ensures that these distributed profits were taxed in the source countries. If CFC rules are introduced solely focusing on non-distributed income, then switchover rules as proposed by the European Commission should be transposed in Irish tax law.

Finally, we reiterate our general policy recommendation that significant changes to Ireland's international tax strategy should systematically be subject to a spillover analysis to ensure there is no negative impact on developing countries. However, we do believe that the spillovers of a possible change to territoriality should be limited due to the already low Irish statutory corporate income tax rate.

In conclusion, Oxfam is not opposed to a change to territoriality if this change is accompanied by strong anti-abuse rules and a spillover analysis. If preference is given to simplifying schedule 24, anti-abuse rules and a spillover analysis remain relevant, however a simplification should not lead to a weakening of the current schedule 24.

[3] Christian Aid Ireland, 'Impossible' structures: tax outcomes overlooked by the 2015 Tax Spillover analysis' 2017, page 11.

3. Details of issues not covered in the consultation questions

3.1 Increasing Tax Transparency - Public Country by Country Reporting

Ensuring that companies publish where they make profits and where they pay tax provides decision makers, investors, journalists, and civil society organisations - especially those in developing countries - with data to help identify, review and, if necessary, reform aspects of the tax system that are being used for purely tax avoidance purposes. Without this information being made publicly available, it is not possible for legislators to adequately scrutinise how the corporate tax system is actually operating.

The Coffey Review assessed that Ireland fulfils the highest standards of tax transparency. However, the definition of tax transparency used in the review was surprisingly restrictive and didn't include any mention of public Country by Country Reporting (CBCR.) This is a strange omission considering that the TOR for the Coffey Review outlined that this assessment should have 'regard to benefits which may accrue to developing countries from enhancing global tax transparency' [4] it is arguable that a more expansive definition of tax transparency, to include public Country by Country Reporting, is justifiable, due to the potential benefits public CBCR could provide to developing countries.

To truly fulfil the highest standards of tax transparency, Ireland should agree legislation with its EU partners to ensure that multinationals publicly report on a country by country basis where they make their profits and pay their taxes.

The Irish Government has indicated that it has concerns that the public CBCR proposal being progressed in the EC Accounting Committee could lead to reporting mismatches. In Oxfam's report Opening the Vaults, we proposed solutions to potential reporting mismatches. Moreover, these issues can be addressed in the Accounting Committee. If there is a need for people with tax data expertise to engage, the Accounting Committee could bring in such expertise.

As a point of reference, Directive 2014/95/EU on disclosure of non-financial and diversity information was prepared by DG Internal Market and Services. The EC's implementation guidance for this directive covers a broad range of non-financial issues, from waste management to gender diversity. They were perfectly able to deal with that and consulted other DGs in the process.

[4] Coffey S., Review of Ireland's Corporation Tax Code, Department of Finance, 2017, p. 7.

3.2 Increasing Tax Transparency- Bilateral Advance Pricing Agreements (bilateral tax rulings)

Ireland should ensure that core elements of any bilateral tax rulings are disclosed and made public, excluding any sensitive data. The following points should be considered in relation to this proposal.

1) The Code of Conduct Group for Business Taxation has released guidelines on the issuance of tax rulings (endorsed by the ECOFIN on 6 December 2016.) Member states are expected to respect these guidelines immediately. It is moreover expected that the Code of Conduct Group will start monitoring member states' ruling practices from 2018 onward to see if the guidelines are respected. On the publication of rulings the guidelines mention the following:

"Where a tax ruling has horizontal application to the affairs of other taxpayers in similar situations (also referred to as general rulings by the OECD), it should be published and made easily accessible to other tax administrations and taxpayers. Ideally, such rulings should be published on the tax administration's website. If not published in full, the website should contain short summaries with links to where the ruling is accessible in full. Publication should take place as soon as it is practicable after the ruling is granted and, at the latest, within six months."

"If a Member State does not publish such rulings, for reasons of taxpayer confidentiality, it should however ensure that the conclusions reached in them are published on the tax administration's website. This can be in the form of either updated guidance, or more general conclusions, and will therefore be available to other taxpayers and tax administrations. This publication can be in an anonymous form without any reference to the taxpayer and thereby respect the principle of taxpayer confidentiality."

2) Belgium has a public database outlining all the final rulings negotiated with individuals or companies. These rulings are of course published on a no-name basis, in accordance with professional confidentiality rules. In general, the rulings are published in a great amount of detail in the original language. Moreover, the Minister of Finance in Belgium submits an annual report to Parliament with statistics and the general trends within the ruling practice. In Belgium this database is very useful for future applicants (either companies or individuals) to check whether a ruling on a certain issue is feasible (without having to incur huge consultancy costs). Also, the database is very interesting from a (legal) research perspective. Although ruling applications are not standardised in Belgium, it doesn't seem to be a burden for the administration to publish the rulings (no fee is even requested from taxpayers.)

3) Rulings are limited to determining how a certain law and/or administrative procedure apply to one or more specific operations or transactions intended, planned or undertaken by the taxpayer, these rulings normally contain no sensitive information if published on a no-name basis. The effects/consequences of the practical application of a ruling by a company are normally visible in the annual report or yearly accounting statement which are publicly available.

4) Within their CSR commitments, companies are encouraged to share publicly their internal tax policies, to correctly inform investors but also to be transparent towards customers (for reputational purposes). A good example of this is Binckbank[5].

5) Ireland became a full member of the Open Government Partnership in July 2014, with the submission of its first National Action Plan, reaffirming Ireland's commitment to governmental transparency and reform. This commitment should extend to the area of bilateral advance pricing agreements.

3.3 Amend Double Taxation treaties

The OECD's Multi-Lateral Instrument (MLI) is one of the actions agreed through the BEPs process. It is an attempt to provide common minimum standards for all existing and future Double Tax Treaties (DTA.) The minimum standards set out in the MLI have been designed to close tax avoidance loopholes. Article 12 of the MLI relates to defining when a multinational company has a taxable presence or permanent establishment (PE) in a jurisdiction. This article makes it harder for multinational companies to claim that they don't have a permanent establishment/taxable presence in a third country if they use a third party to conclude contracts on the company's behalf, an approach that can be used as a tax avoidance strategy by companies. When Ireland signed the MLI in June 2017, it chose not to adopt Article 12, thus missing the opportunity to close this loophole. Ireland can still adopt Article 12 when it sends the MLI to the Dáil for ratification. Oxfam Ireland strongly urges that this happens.

International development NGOs, including Oxfam, have long advocated that the Irish government should adopt the UN Model Double Taxation Convention between developed and developing countries (the UN model) as the minimum standard, rather than the OECD model which is less favourable to developing countries. The Irish Government has so far failed to adopt the UN model for DTAs and its failure to adopt article 12 of the OECDs MLI brings into question

[5] Binckbank mentioned on pg 54 of the annual report 2015 that it has a tax ruling with the Dutch tax administration https://www.binck.com/docs/librariesprovider5/jaarverslagen/binckbank_jaarverslag_15_en.pdf

the Irish Government's repeated claims that it fulfils the highest OECD standards in relation to corporate tax reform. Both these issues need to be addressed.

There is a need to re-examine Ireland's network of DTAs to ensure that companies cannot avail of tax structures similar to the ''Double Irish'' post-2020. There is evidence emerging that companies are using Ireland's DTA with Malta to avoid tax in a similar fashion to the 'Double Irish', known as the 'Single Malt'[6].

Equally worrying are provisions in Ireland's DTAs, especially with countries outside of the Base Erosion and Profit Shifting (BEPS) process. Using such provisions, a business which wanted to use a 'Double Irish-like' arrangement could establish an Irish registered company which is 'effectively managed' and thereby tax resident in a country with which Ireland has a DTA, but is outside the BEPS process - such as Qatar or Panama. This would provide opportunities to avoid tax on royalties, especially as Ireland's DTA's have few anti-abuse provisions. This allows businesses to 'treaty shop' by placing Irish shell companies into their group structures to avail of access to Ireland's DTAs.

Oxfam once again calls on the Irish Government to re-examine Ireland's network of DTAs to ensure that companies cannot avail of tax structures similar to the 'Double Irish'.

3.4 Expert stakeholder group to advise Government on corporate tax avoidance

It is welcome that the Irish Government "recognises that aggressive tax practices are neither sustainable from a tax point of view, nor acceptable from a societal point of view."[7] Yet while there is a large institutional infrastructure to research and advise the government of how the tax system can grow the economy and maintain competiveness, there is no similar institutional apparatus in place in relation to tackling corporate tax avoidance, especially related to developing countries. Oxfam hopes that this consultation process is the first step whereby the issue of ' global tax fairness' is institutionalised into the state advisory and research structure, so that 'doing what is right' is adequately considered in terms of tax reform on an ongoing basis.

While recognising the steps Ireland has taken to address this issue, including the current consultation process, there is a need to put in place formal structures that will allow further dialogue between all stakeholders, including NGOs like Oxfam, on these important issues – issues that are only likely to

[6] Irish Times, November 14th 2017. https://www.irishtimes.com/business/economy/multinationals-turn-from-double-irish-to-single-malt-to-avoid-tax-in-ireland-1.3290649

[7] Michael Noonan, September 6th 2016, https://static.rasset.ie/documents/news/statement-by-the-minister-for-finance-apple.pdf

increase in importance in the coming years. The establishment of a broad-based stakeholder body, equipped with the capacity to conduct research and to advise accordingly would be an appropriate way to proceed and build upon the outcomes of Ireland’s efforts to reform its corporate tax code to date, and would provide the Irish government with a valuable additional resource with which to address these issues.

4. Conclusion

Domestic tax revenue in developing countries is the most important source of financing for development. Tax justice is necessary to alleviate poverty and achieve the Sustainable Development Goals. Irish people and our foreign policy have long supported the rights of people in developing countries: this consultation offers a welcome opportunity for the Irish government to ensure its taxation practices minimise the harm done to developing countries by tax avoidance.