Blocks 2 & 3
Miesian Plaza
50-58 Baggot St Lower
Dublin 2
D02 Y754
Ireland
www.shire.com

Review of the Corporation Tax Code – Public Consultation
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
ctreview@finance.gov.ie

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To whom it concerns

We are writing to you in response to the Public Consultation Paper issued by the Department of Finance in October 2017 on the review of Ireland's Corporation Tax Code. Specifically, we should like to address certain aspects of Question 2 of the Consultation Paper.

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"?

Background to Shire

Shire plc, an Irish tax resident company, is the ultimate parent of the Shire group ("Shire"), a global specialty biopharmaceutical group. Shire focuses on developing and marketing innovative medicines for patients with rare diseases and other speciality conditions. It has business units in Genetic Diseases, Internal Medicine, Neuroscience, Oncology, Hematology, Immunology and Ophthalmics. Shire plc is listed on the London Stock Exchange and NASDAQ. Its total market capitalisation at the time of writing is approximately US$45 billion. Following the merger with Baxalta on 3 June 2016, Shire now employs approximately 24,000 people with a presence in more than 100 countries around the world. The 2016 revenue was approximately US$11 billion.

Over recent years Shire has acquired Viropharma Inc., NPS Pharmaceuticals Inc., Dyax Corp and Baxalta Incorporated for a combined total consideration of approximately US$50 billion. As well as being the location for the ultimate holding company for the group, Ireland is the base for significant supply chain operations for Shire's global portfolio, a biopharmaceutical manufacturing facility in the course of construction, group financing & treasury activities and a shared services centre serving European operations.

Comments on introduction of CFC rules

Interested parties have been asked for comment on how to introduce CFC rules in Ireland.

We should like to make some key points from our perspective as a multinational corporation headquartered in Ireland.

1. ***Compliance burden:***

We have in excess of 250 companies in our group. Many of these companies are based in the US, EU, G20 as well as other countries and where we operate driven by our business model and strategy with no intention whatsoever to avoid tax through artificial arrangements. We are strong advocates of a "white list" such that companies which are tax resident in a country on the "white list" would be excluded from the CFC rules. This is an approach which has been adopted in a number of countries. The Anti Tax Avoidance Directive (Council Directive 2016/1164) (ATAD) defines a CFC in Article 7 by reference to, inter alia, a comparison between the tax paid by the CFC and the tax that would have been charged under the corporate tax system of the Member State (Ireland) of the taxpayer. We would recommend that the "white list" operates in such a manner that it is not necessary to perform the calculations of the tax that would have been paid in Ireland if the non-Irish subsidiary is tax resident in a country on the "white list". This would avoid the need for unnecessary calculations which could be potentially onerous in large groups.

2. ***Acquisitions:***

Many multinational groups such as Shire grow both organically and through acquisitions. As indicated above Shire has made approximately US$50bn of acquisitions since 2014. Groups acquired may have arrangements in place which could technically be in breach of future Irish CFC rules. In these circumstances we consider it is entirely reasonable to allow a period of time for the acquiring group to restructure the group acquired before the CFC rules apply. Given the potential complexity in the corporate structures of acquired groups we would suggest a grace period of 2 years from the date of acquisition. During this period the CFC rules would not apply to the Target and its wider group or to Shire entities created to enable that acquisition to transition to a new CFC compliant structure. The approach using a grace period has been adopted by the UK and resulted in a welcome reduction in the administrative burden of CFC compliance.

3. ***Specific People Functions – options***

Article 7(2) of the Directive broadly adopts 2 approaches to taxing a CFC's income:

1. The first approach (Option A) is to consider the type of income arising in the CFC and then to seek to tax that income in Ireland if there is no substantive economic activity in the CFC.
2. The second approach (Option B) is to establish whether the income in the CFC arises from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage: in this context arrangements are regarded as non-genuine if the CFC would not have owned the assets or undertaken the risks if it were not controlled by a company (in Ireland) where the significant people functions (SPFs) relevant to those assets and risks are carried out.

The SPF approach (Option B) has a number of benefits:

- It provides something of a "bright line" test where there are no SPFs in Ireland in respect of particular assets and risks. In this way a CFC can be quickly excluded from the ambit of the CFC rules making CFC compliance administratively more straightforward to manage. In these circumstances we suggest that there should be no requirement to perform the calculation of tax payable by the Irish parent and compare this to tax paid by the CFC.

- The SPF approach avoids the need to analyse the income of the CFC. This may not always be straightforward. For example, Article 7(2) (a) includes in the tax base of the taxpayer "royalties or any other income generated from intellectual property". This is potentially a wide definition of the income that may fall within the ambit of that sub-clause. Avoiding the need to analyse the CFC's income should be a beneficial simplification.
- We assume that Option B would follow guidance given by the OECD on significant people functions in their July 2010 Report on the attribution of profits to permanent establishments.
- Our initial views on the 2 options are of course subject to how each of these proposals may develop after the end of the Public Consultation.

In relation to Option B we suggest that there is a separate carve out where the CFC is performing substantive economic activity.

4. Capital Gains

Article 7 (2) (a) (iii) provides that dividends and income from the disposal of shares should be included in the tax base of the CFC parent. It is unclear whether the ATAD was seeking to cover income or gains from the disposal of capital assets. Given that Ireland has an exemption from capital gains on certain disposals of shares (broadly in or by trading groups) we consider it appropriate for Ireland to exempt capital gains from tax (not limited to disposals of shares subject to the participation exemption) under the CFC regime. This would be in keeping with the approach of other jurisdictions including the UK.

5. Dividend exemption

Question 10 of the Finance Department consultation document asks whether broadly Ireland should move to a full territorial system of taxation. Consideration as to whether this approach is appropriate was recommended in the Coffey Report. Our understanding is that from an Irish policy perspective a full dividend exemption would not be available in the absence of CFC rules. Given the proposed introduction of CFC rules we consider that a full dividend exemption should run in parallel.

Yours faithfully

Fearghas Carruthers
Head of Tax