ARTHUR COX

Arthur Cox LLP
Ten Earlsfort Terrace
Dublin 2
D02 T380

+353 1 920 1000
dublin@arthurcox.com
dx: 27 dublin

Dublin
Belfast
London
New York
San Francisco

arthurcox.com

Our Reference: FC/MD

8 August 2023

Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

BY EMAIL TO: intltax@finance.gov.ie

Re: Feedback statement on new taxation measures to apply to outbound payments

Dear Colleagues

We thank you for the opportunity to engage on this legislative proposal. Since the Irish proposal for the National Recovery and Resilience Plan was submitted in May 2021, much has changed. The overall objective of Ireland's National Recovery and Resilience Plan was to contribute to a "sustainable, equitable, green and digital recovery effort in a manner that complements and supports the Government's broader recovery effort", and while an effective and robust tax system is necessary for this aim, we submit that this legislative initiative originating from Country specific recommendations of the European Commission from 2019 and 2020 have become outdated and unnecessary given the plethora of other legislation that will address many of the problem drivers underpinning the commitment. Both from a tax administration and business perspective it simply adds another layer of uncertainty and complexity without the corresponding benefit for addressing the underpinning problem drivers.

The most notable legislation negating the necessity for this initiative is the transposition into Irish law of the provisions of Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (the "Pillar 2" Directive), which is currently being drafted for implementation before the end of the year. Furthermore, CRS and FATCA implementation has been completed and, along with the implementation of DAC 6, there is significant information sharing between tax authorities. These are in addition to significant developments to Irish transfer pricing rules, withholding taxes, distribution rules, "wholly and exclusively" deductibility rules, specific and general anti-avoidance rules, anti-hybrid rules and interest limitation rules. This additional layer is therefore unnecessary, for example, the changes to transfer pricing rules confirm that payments to tax haven jurisdictions (or indeed any other jurisdiction) will not be deductible unless they are based on an arms-length standard. Since (almost by definition) there is a lack of substance in those jurisdictions, it is unlikely that payments to tax haven jurisdictions will be deductible in any event under TP rules. Any change would simply add to the administrative burden for little or no tax or economic effect. On this basis, even though the Government committed to it as part of the RRP, we do not believe it is necessary in 2023. However, if the Government persist in implementing this legislation, the following observations arise.

Competitiveness and proportionality

With the introduction of this further layer of withholding tax legislation, Ireland is seeking to address the concerns raised on Aggressive Tax Planning Practices by the European Commission in the Country Specific Reports of 2019 and 2020. In this regard we note that the 2022 country-specific recommendations still request Luxembourg and Malta to take suitable action on outbound payments, and any actions already proposed by Luxembourg relate only to black-listed jurisdictions.

To take interest as an example, Ireland has a complex and comprehensive set of anti-avoidance rules dealing with the deductibility of interest. In addition, Ireland, unlike many EU counterparts (Germany, Luxembourg, Hungary), has long since imposed withholding tax on interest payments, and although, subject to exemptions these are based on reasonable and proportionate rationale. By introducing these new defensive measures on interest, where other jurisdictions such as Luxembourg are thus far not doing so, puts Ireland at a competitive disadvantage and results in Ireland baring an unfair burden under the RRP process when it acts on the CSRs but other Member States do not. We finally note that a legal question could arise under the free movement of capital, particularly considering this not being a pan-European measure.

Feedback Questions

Interpretation

Question 1
Comments on possible definitions

Supplemental tax
We note that transitional safe harbours under the Pillar 2 legislation should be included in this, most notably companies utilizing the temporary CbCR safe harbour.

It is equally essential that any tax imposed through the GILTI regime is expressly included.

Zero-Tax territory
While we believe that these measures should be confined to outbound payments made to jurisdictions on the EU blacklist, we note that the definitions should make more explicitly clear that a low or no tax jurisdiction will not include jurisdictions that impose tax on a remittance basis such as Singapore.

Associated Entities and definition of a corporate group

These defensive measures are intended to target the operations of large corporate multinational groups. We submit that for certainty, rather than using the "associated entities" definitions leading to uncertainty surrounding subjective criteria such as "definite influence" a clear and objective definition of a corporate group that is not tied to tax residence should be used.

Payment of Interest

Question 2
Comments are invited on this possible approach with regard to outbound payments of interest

In relation to outbound interest payments, we reiterate the points made in our previous submission that any measures should not apply to listed bonds or wholesale debt / commercial paper. It is generally not possible for a bond issuer to know whether a noteholder will be connected or what its tax status is. Accordingly, bond issuers will not know at the time of any interest payment whether they ought to withhold/deduct the interest payment. In addition, when undertaking a rated transaction, bond issuing companies will not be able to confirm to rating agencies whether withholding tax issues will arise in the future based on current law as the facts cannot be determined. The imposition of a withholding tax on bond issuing companies would fundamentally undermine the EU Capital Markets Union process by making such capital markets transactions impossible and impede Ireland's ability to operate as a jurisdiction for financial services. It is essential the current 'worldwide' exemption from withholding tax be maintained. In addition, debt in a recognised clearing systems must be exempted from any such imposition of withholding tax.

Distributions

Question 4
Comments are invited on this possible approach with regard to outbound distributions.

As was made clear by all of the submissions to the previous public consultation, due to the underlying principles of Ireland's worldwide system of taxation and the taxation of distributions, no risk of double non-taxation arises. This coupled with the fact that Ireland already imposes a dividend withholding tax, further defensive measures are unnecessary.

Consequential amendments

General Comments

We reiterate our position from the previous consultation that the rules for deductibility of interest have become overly complicated, and restrictive and must be fundamentally simplified and put on a modern footing.

We have no additional comments.

Yours faithfully

Arthur Cox LLP

ARTHUR COX