



## Department of Finance - Corporation Tax - Tax Strategy Group

September 2021

The following briefing is intended as a summary of key points of note regarding the Tax Strategy Group ("TSG") [Corporation Tax paper of September 2021](#) (the "TSG Paper"). The TSG Paper outlines the TSG view of the current Corporation Tax ("CT") regime, and its view of what the future may hold for reform. The headings used are the same as those contained in the TSG Paper for ease of reference.

### Corporation Tax Trends

- 2020 marked the first year that net CT receipts exceeded the previous annual peak of €6.7 billion in 2006, standing at €11.83 billion (€11.96 billion before €121 million was allocated to fund payments for the COVID Restrictions Support Scheme ("CRSS"));
- CT was the third largest tax-head, accounting for 20.7% (2019: 18.4%) of total net tax receipts<sup>2</sup> of €57.2 billion;
- Reasons for net CT increases include improved trading conditions, the exhaustion of historical losses from the recession and positive currency fluctuations. There were also increases in the numbers of companies (of all sizes) paying tax and across most economic sectors;
- As in previous years, average earnings (and consequently average tax payments) were highest among employees of foreign-owned MNCs;
- While the full effect of the pandemic on net CT liabilities will not be known until all 2020 and 2021 tax returns are fully filed (in late 2021 and 2022 respectively) and analysed;
- 2020 net CT receipts of €11.8 billion consist of preliminary tax (PT) payments for 2020 (€10.3 billion) and balances due for earlier years (€1.5 billion);
- the number of companies paying net CT fell by 6.5%, which is likely attributable to the effects of the COVID-19 pandemic;
- The Department of Finance carried out a comprehensive economic impact assessment of Ireland's CT policy in 2014. This identified that Ireland collects a similar share of CT as a percentage of GDP to the EU average;
- the ten largest CT payers in 2020 accounted for €6.0 billion or 51% of net CT receipts in 2020, equivalent to approximately 10% of all tax receipts in 2020. This amounts for a 6-14% increase between 2015-2019, attributed to the Covid-19 pandemic;
- The concentration of CT receipts from a limited number of sectors and companies results in potential volatility in receipts. Actions have been taken in recent years to mitigate the risk of over-reliance on potentially cyclical or over-concentrated CT receipts, in particular the "Rainy-Day Fund," which alleviated reliance on CT during the Covid-19 pandemic;
- However risk of future volatility remains, specifically, the allocation of CT receipts based on the location of a company's sales or users would benefit larger markets that are net-importers;

## Implementation of EU Anti-Tax Avoidance Directives

- the Anti-Tax Avoidance Directives (“**ATADs**”) were agreed at EU level in 2016 and 2017 to ensure co-ordinated implementation across EU Member States of anti-avoidance measures arising from, and related to, the OECD Base Erosion and Profit Shifting (“**BEPS**”) discussions;
- ATAD contains five separate anti-avoidance measures and work on three of these measures is now complete:
  - new Controlled Foreign Company (CFC) rules;
  - a revised Exit Tax were introduced in Finance Bill 2018; and
  - the anti-hybrid rules were introduced in Finance Bill 2019.
- Ireland’s existing General Anti-Abuse Rule (“**GAAR**”) already meets the required ATAD standard;
- Work is continuing on the two remaining measures:
  - anti-reverse-hybrid rules; and
  - an interest limitation rule.
- Anti-hybrid rules:
  - are intended to counteract tax mismatches where the same expenditure item is deductible in more than one jurisdiction, or where expenditure is deductible but the corresponding income is not fully taxable.
  - The first part of anti-hybrid rules was transposed on schedule in Finance Bill 2019, taking effect from 1 January 2020;
  - Finance Bill 2021 will legislate for the remaining element, anti-reverse-hybrid rules, with the new rules to take effect from 1 January 2022.
  - A reverse hybrid mismatch arises where an entity, referred to as a reverse hybrid entity, is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person by some, or all, of its investors and as a consequence some, or all, of its income goes untaxed.
  - In broad terms ATAD provides that, where one or more associated non-resident investors, holding in aggregate 50% or more of the hybrid entity, are resident in a jurisdiction that regards that entity as a taxable person and a reverse hybrid mismatch arises, then the hybrid entity shall be regarded as a resident of the Member State in which it is established and taxed on its income to the extent that the income is not otherwise taxed under the laws of the Member State or any other territory.
  - ATAD stipulates that the reverse hybrid mismatch provisions do not apply to a “collective investment vehicle” (CIV).
  - a CIV is defined as an investment fund or vehicle that is subject to investor-protection regulation in the country in which it is established, is widely held, and holds a diversified portfolio of securities.
  - application of the reverse-hybrid rule, when triggered, will require the imposition of a tax charge on an entity which, by definition, was not previously seen as a taxable entity in Irish law;
- ATAD requires Member States to implement a ratio-based interest limitation rule (“**ILR**”), designed to limit base erosion through the use of interest expenses to create excessive interest deductions.
- The general implementation date for the ATAD ILR was 1 January 2019, but a derogation is provided in Article 11 of ATAD such that Member States may defer implementation until 1 January 2024;
- Ireland’s existing targeted interest limitation rules are different in structure to the ATAD ILR. They are purpose-based tests designed to limit qualifying borrowings, supplemented by extensive anti-avoidance provisions relating to connected party transactions. This was challenged by the EC, though the Department is of the view that the 2024 deadline applies nonetheless.



## Update on the Implementation of other CT Roadmap Commitments

- The publication of Ireland’s Corporation Tax Roadmap (the “**Roadmap**”) in September 2018 represented a significant milestone in Ireland’s implementation of international tax reform. 11 commitments were made, eight of which have been met, with the remaining three expected for completion in 2021.
- An update to the Roadmap set out a pathway for further actions to be taken in the period ahead, confirming five existing commitments to further action and seven additional commitments to action, consideration or consultation
- Existing commitments to action:
  - a) Introduce ATAD-compliant interest limitation rules;
  - b) Legislate for reverse hybrids aspect of ATAD anti-hybrid rules;
  - c) Consultation on possibility of moving to a territorial regime;
  - d) Progress the International Mutual Assistance Bill;
  - e) Apply defensive measures in CFC regime to countries on EU Member States’ list of non-cooperative jurisdictions.
- Further Commitments to Action, Consideration and Consultation:
  - a) Consider additional defensive measures re countries on EU list of noncooperative jurisdictions;
  - b) Consider actions that may be needed in respect of outbound payments;
  - c) Adopt the Authorised OECD Approach for transfer pricing of branches;
  - d) Continue to meet international best practices on exchange of information and support efforts to enhance information exchange;
  - e) Proactively respond to the outcomes of international reform efforts;
  - f) Publish a tax treaty policy statement taking account of International developments;
  - g) Continued engagement in international fora and develop a new framework for domestic stakeholder engagement.

## Update on Apple State Aid Case

- In July 2020 the General Court of the European Union (“**GCEU**”) issued its judgement in the appeal of the European Commission’s 2016 Decision which alleged that Ireland granted illegal State aid to two Apple companies operating in Ireland through branches – Apple Sales International (“**ASI**”) and Apple Operations Europe (“**AOE**”).
- The GCEU annulled the Commission’s State aid Decision, finding in favour of Ireland and Apple.
- The Commission appealed the GCEU judgement to the Court of Justice of the European Union (“**CJEU**”) on the 25th September 2020. Ireland has responded to the Commission appeal as have Apple
- A hearing date has yet to be set by the CJEU and the timing of any such hearing is entirely at the discretion of the Court.

## Supporting Investment & Activity in Ireland

- a. Tax Credit for Digital Gaming Sector:
  - As the digital gaming tax credit by its nature is for the benefit of a particular sector, European Commission approval will be required to implement it;
  - The relief will be notified as a cultural relief, therefore a cultural certification process will form part of the credit;
  - The relief will be provided in the form of a refundable corporation tax credit, therefore it is intended that the target beneficiaries of the relief will be digital game development companies. The credit will not be available to individuals, sole traders or partnerships;
  - Officials are considering recommending a minimum spend requirement in order to avail of the credit. There is a required minimum development cost in order to qualify under the French credit which is set at €100,000; the UK’s Video Games Tax Relief does not have a minimum spend requirement;

- Department officials are also considering the inclusion of a cap on the maximum value of eligible expenditure in respect of which the credit which could be claimed.
- b. Accelerated Capital Allowance (“**ACA**”) scheme for Energy Efficient Equipment:
- The review of ACA identified that there is difficulty in assessing the energy savings resulting from the scheme as itemised details of each individual energy efficient product and the energy savings associated with that product are not required to claim ACA;
  - This limits the contribution of the scheme to the achievement of energy efficiency targets as the Energy Efficiency Directive requires that energy savings claimed must be validated;
  - Validating the energy savings associated with the ACA scheme represents a significant administrative challenge;
- c. ACA Scheme for scheme for Gas Vehicles and Refuelling Equipment:
- The purpose of the scheme is to contribute to the transition towards a low carbon economy;
  - The scheme seeks to accelerate the de-carbonisation of the transport sector and support the transition from fossil fuels, particularly in the heavy-duty land transport sector;
  - It is primarily valued as a stepping-stone to the use and production of renewable biogas for transport;
  - In terms of improvements to the scheme, the Department of Transport has proposed that consideration be given to amending the scheme to include hydrogen-powered vehicles and refuelling equipment.
- d. S486C – Relief from tax for certain start-up companies:
- The relief is granted by reducing the CT payable on the profits of the new trade and gains on the disposal of any assets used for the purposes of the new trade;
  - The relief has been extended on a number of occasions since introduction and currently has a sunset clause of end-2021;
  - A review of the relief is therefore being undertaken in 2021, and will include consideration of the significant changes to the business environment since the previous review of the relief in 2018, with Brexit and the Covid-19 pandemic presenting significant challenges to new businesses seeking to establish and grow.

### **Tax Appeals Commission (the “TAC”)**

- The Finance (Tax Appeals and Prospectus Regulation) Act 2019, enacted in December 2019, provided for the establishment of the role of Chairperson of the TAC.
- Following the completion of a recruitment process by the Public Appointments Service, Ms. Marie-Claire Maney was appointed as the first Chairperson of the TAC on 1 July 2020.
- It has become clear since the establishment of the TAC that there is a wide range in both the complexity and quantum of matters appealed to the TAC. It was therefore proposed that, in line with other comparable bodies, the TAC should have a tiered system of Appeal Commissioners to reflect the actuality of the case load it receives, and to provide a more efficient and cost-effective appeals service for taxpayers.
- The following two issues have been identified for consideration in the context of Finance Bill 2021:
  - f) Changes to the case stated procedure; and
  - g) Dismissal of an appeal – failure to comply with direction.
- Regarding case stated procedures the process has proven to be cumbersome and time consuming and places a significant administrative burden on the Appeal Commissioner to prepare and sign the case stated, a task which cannot be delegated to other staff within the TAC.
- The legislation stipulates that the signed case stated must be issued within 3 months of the date of the application. This 3 month timeframe has proven to be a challenging deadline to meet. The TAC have therefore proposed that the

time limit be amended, to assist in the preparation and management of the case stated workload. Specifically, it has been proposed that the draft case stated (rather than the signed case stated) would be issued 3 months after the original application.

- Where a party requests that the TAC prepare a case stated, the party must state clearly in what respect the original determination is erroneous in a point of law. It has been proposed to introduce a further amendment to specifically provide a power to the Appeal Commissioner to refuse an application where the applicant party has not stated clearly in what respect the determination is erroneous on a point of law.
- Regarding the dismissal of an appeal, additional powers were given to the Appeal Commissioners to dismiss an appeal when either party to the appeal fails to comply with a direction given to them.
- Representations have been made to the Department to suggest that this provision could be considered to be one-sided, on the basis that dismissing an appeal is to the benefit of Revenue (as the taxpayer's appeal against a tax assessment is being dismissed).
- It may be appropriate to address any failure of compliance with a direction of the TAC by the respondent to the appeal by establishing a clear escalation procedure to address any individual failure to comply, and / or to provide for publication of data in respect of any such instances in the TAC annual report.

**For further information, please contact:**



**Alan Connell**  
*Managing Partner and Head  
of Tax*

**T:** +353 1 6644 217  
AlanConnell@  
eversheds-sutherland.ie



**Tim Kiely**  
*Partner, Tax and Commercial*

**T:** +353 1 6644 290  
TimKiely@  
eversheds-sutherland.ie



**Melissa Daly**  
*Senior Associate, Tax*

**T:** +353 1 6644 208  
MelissaDaly@  
eversheds-sutherland.ie



**Robert Dever**  
*Senior Associate, Tax*

**T:** +353 1 6441 478  
RobertDever@  
eversheds-sutherland.ie



**Robert Boos**  
*Trainee, Tax*

**T:** +353 1 6441 445  
RobertBoos@  
eversheds-sutherland.ie

**Disclaimer**

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

**Data protection and privacy statement**

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.