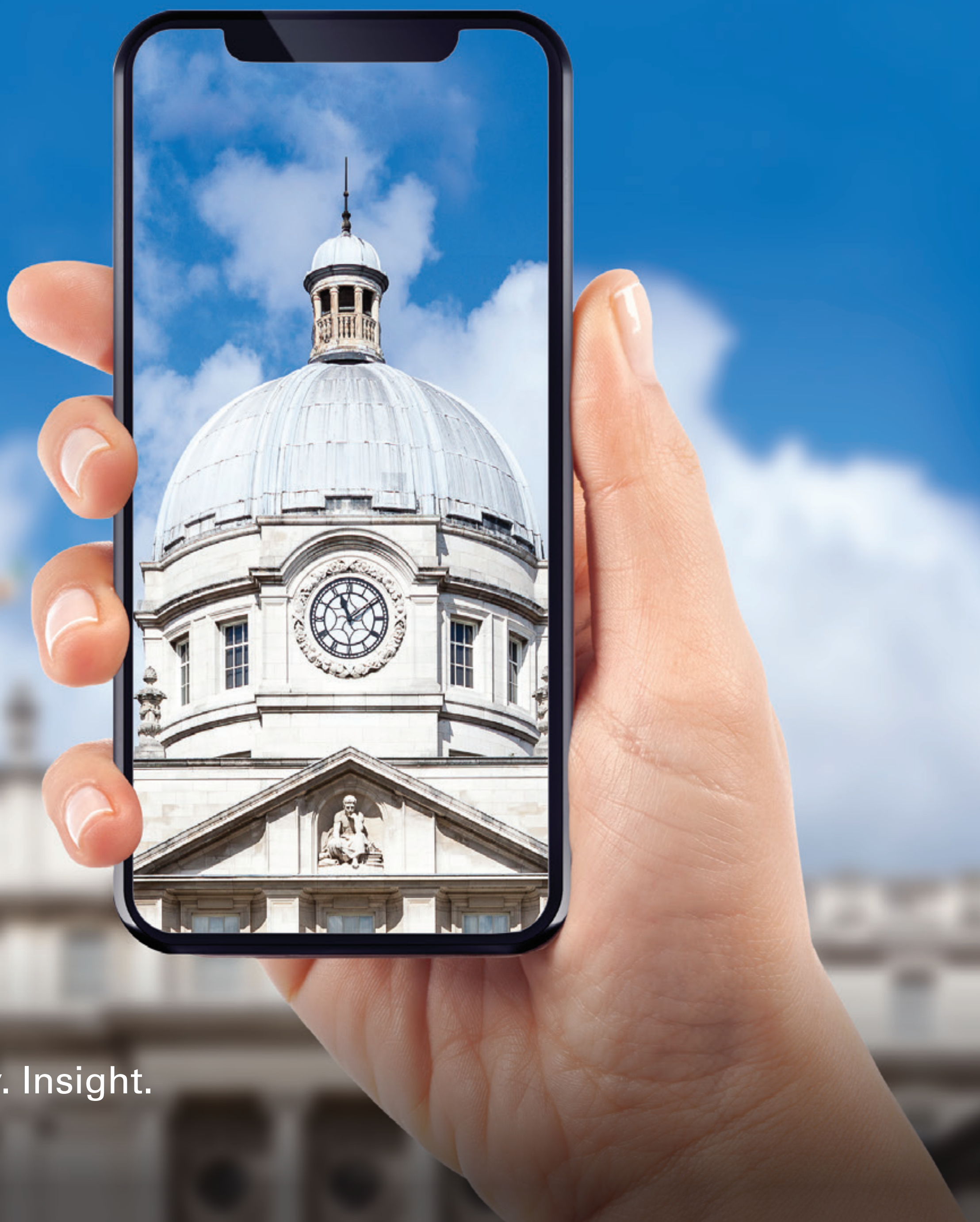
Taxing Times

Finance Bill 2019 & Current Tax Developments



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Tom Woods
Partner

Introduction

The Government published Finance Bill 2019 on 17 October 2019. The Bill contains the taxation measures announced in the Minister for Finance's Budget speech on 8 October 2019 as well as a small number of measures not previously announced.

Finance Bill 2019 was introduced by the minister against the backdrop of great economic uncertainty. While Ireland has enjoyed enormous economic success in recent years, with our fiscal accounts expected to move into surplus this year, the economy on the one hand is at risk of overheating and on the other is at risk of cooling down. The slowdown in the global economy and how Brexit unfolds will weigh heavily on our economic outlook. This uncertainty is further compounded by discussions at an OECD and EU level on BEPS 2.0, which is exploring how and if countries should allocate taxing rights on cross-border revenues and whether income should be subject to a minimum tax. These discussions have the potential to fundamentally rewrite the established laws governing taxing rights and tax rates, and could materially affect Ireland.

The Bill confirms the minister's announcement that, given the economic uncertainty, there would be no personal tax cuts. It includes the various tax reliefs announced in the Budget, including:

- Amendment to the R&D tax credit regime to make it more accessible and valuable (30% credit) to smaller companies
- Amendment to the Employment and Investment Incentive (EII) to increase the qualifying investment to €250k, or possibly €500k in the case of long-term investments, and allow the full tax relief in the year of investment
- Amendment to the Key Employee Engagement Programme (KEEP) to make it available to employees with fact patterns more commonly found in practice
- An increase in the home carer tax credit of €100
- An increase in the earned income tax credit of €150

The Bill also confirms the tax-raising measures announced in the Budget, including:

- An increase in carbon tax of €6/tonne
- An increase in the stamp duty rate on non-residential property to 7.5%
- An increase in the dividend withholding tax rate to 25% from 1 Jan 2020
- Certain IREF & REIT-related measures to raise additional tax

It was encouraging to see the minister take further steps to support a more environmentally friendly and sustainable economy. Measures in the Bill include:

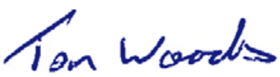
- Extending the 0% rate of BIK on electric vehicles to the end of 2022
- Extending VRT reliefs for conventional and plug-in hybrids to the end of 2020

The Bill also implements the anti-hybrid rules provided for in the EU Anti-Tax Avoidance Directive (ATAD). With the exception of the interest limitation rules which are due to be introduced in Finance Act 2020, almost all of the ATAD has now been adopted into our domestic law. The Bill also implements another EU/Directive, DAC6, which introduces a mandatory disclosure regime for certain cross-border transactions. Reporting of transactions will begin from 1 July 2020 but will capture transactions entered into on or after 25 June 2018.

Our legislation governing transfer pricing was also updated in the Bill to include enhanced documentation requirements and to extend the scope to cover certain non-trading and capital transactions.

The Government conducted a public consultation on a number of the matters covered in the Bill, including the new transfer pricing and anti-hybrid measures. These consultations are very welcome as they generally mean that the legislation which is introduced is more considered and avoids unintended consequences of the new laws.

There will be some disappointment that the Bill does not include measures to improve the competitiveness of Ireland's tax regime for international mobile talent or domestic entrepreneurs. We have a heavy reliance on the multinational sector for corporation tax receipts (77% of total). It is important that we support the multinational sector and the high earners they employ as best we can. In this regard, ensuring that Ireland can attract very senior executives (with a more attractive SARP regime) to lead the multinational organisations and help support their growth is key to addressing some of the exposure we have to this base. It is also important that we diversify and develop the domestic business sector. While some measures in the Bill do this, we see an improved Entrepreneur's Relief as being very important, and it is hoped that future Finance Bills will contain such measures.



Tom Woods
Head of Tax and Legal Services

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Personal Tax

Robert Dowley
Partner

Universal social charge

The Bill provides for the continuation of the cap on USC for medical-card holders aged under 70 with aggregate income not exceeding €60,000, as announced in the Budget. USC for such individuals will remain capped at a rate of 2% until at least 31 December 2020. Full details of the revised rates and thresholds are available in the Tax Rates and Credits 2020 table at the end of this publication.

As expected, the Bill confirms that these changes take effect from 1 January 2020.

USC continues to be capped at a rate of 2% for those aged 70 years and over with aggregate income not exceeding €60,000.

Tax credits

The Bill provides for the increases in the home carer tax credit from €1,500 to €1,600 and the earned income tax credit from €1,350 to €1,500 announced in the Budget. Both increases apply from 1 January 2020.

Living donors

Certain compensation payments made to individuals as reimbursements for expenses incurred in the donation of a kidney for transplantation are exempt from income tax.

The Bill extends the tax exemption to cover payments made to compensate individuals who donate a lobe of a liver. This change comes into operation from 12 March 2019.

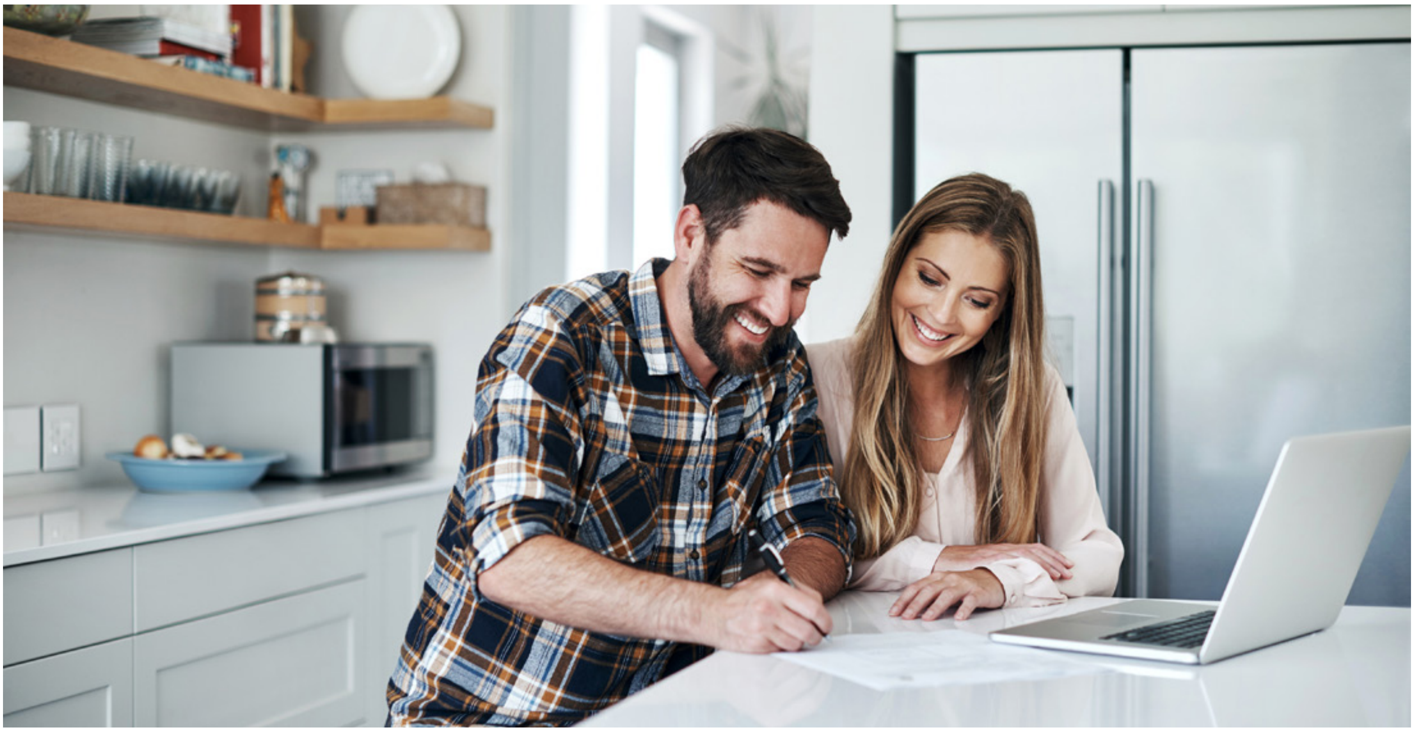
Taxation of payments under Magdalen Restorative Justice Ex-Gratia Scheme

Payments made to an individual under the Magdalen Restorative Justice Scheme, and any income and/or gains realised from the investment/ reinvestment of any such payments, are exempt from tax. Subsequent payments made by the Minister for Employment Affairs and Social Protection to such individuals are also exempt from tax following changes introduced in Finance Act 2018.

The Bill provides a clarification that the exemption for subsequent payments made by the minister only applies to a 'relevant individual', being a person who received a payment under the Magdalen Scheme.

Tax credits

The Bill provides for UK tax-resident individuals to retain their entitlement to certain personal allowances, deductions and reliefs (for example, the personal tax credit) when calculating their Irish income tax liabilities after the UK ceases to be a member of the EU. In certain circumstances, the available allowances, deductions and reliefs will continue to be determined on a pro-rata basis, based on



the individual's Irish and non-Irish income.

This section will apply once Part 6 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 comes into effect following an order from the Minister for Finance.

Payments from the Child and Family Agency

The Bill introduces a new section to provide for the exemption from income tax of certain payments made by TUSLA (the Child and Family Agency) or any corresponding payment made under the law of an EU Member State. TUSLA took over a number of functions from the HSE and now provides payments to carers (including relatives of a child who have had that child placed with them), foster parents and young people who are transitioning from care.

Once enacted, this exemption will apply to all qualifying payments, whether made before or after the passing of the Bill.

Provision is also made to continue the exemption for UK payments after the UK ceases to be a member of the EU.

Training allowance payments

The Bill includes a new exemption from income tax for payments (known as further education training allowances) made to individuals undertaking approved further education and training courses. This exemption will apply to such payments whether made before or after the passing of the Bill.

Student support payments

A further new income tax exemption introduced in the Bill is for grant payments made to students by awarding authorities under the Student Support Act 2011 or equivalent payments in other EU Member States.

This section applies from 1 January 2020 but any qualifying payments made before 1 January 2020 are exempt from tax on a retrospective basis.

Capital acquisitions tax

Amendments to probate process

The Bill provides for changes to the information to be provided to the Revenue Commissioners and the Probate Office in respect of the estate of a deceased person and the method for providing that information.

At present, documentation must be submitted to the Probate Office when applying for probate or letters of administration. These new measures will allow for a probate application and related information to be submitted electronically.

This related information could include, for example, details of the property for which probate is being sought, details of the deceased person and details of inheritances arising as a result of the deceased person's passing. The exact information is to be specified in regulations to be made by the Revenue Commissioners.

The above changes will only come into effect following a ministerial commencement order and the issue of regulations by Revenue.

Dwelling house exemption

Currently, subject to qualifying conditions for a limited number of situations, an exemption from CAT may be available in respect of inheritances of certain dwelling houses. One of these conditions is that the taxpayer does not have a beneficial interest in any other dwelling house at the date of the inheritance. For the purposes of this condition, account must be taken of any dwelling house that is subject to a discretionary trust where the taxpayer is the settlor and a potential beneficiary.

To address a ruling by the High Court in 2018, the Bill provides that

- the exemption will not apply if the beneficiary becomes beneficially entitled to another dwelling, and
- any exemption granted will cease to apply and be clawed back if the beneficiary subsequently inherits any other dwelling house from the same disponer.

Where the exemption ceases to apply, statutory interest will only run by reference to the valuation date for the inheritance of the subsequent dwelling house. If that valuation date falls between 1 January and 31 August, the interest will run from 1 November of that year until the date of payment. If that valuation date falls between 1 September and 31 December, the interest will run from 1 November of the following year until the date of payment.

CAT threshold

Once again in the Budget speech, the minister announced an increase in the tax-free threshold for CAT purposes for gifts or inheritances from a parent to a child. The Bill provides for the threshold to increase from €320,000 to €335,000, and also confirms that the increase applies to gifts or inheritances taken on or after 9 October 2019.

The minister referenced concerns about the tax burden for families on inheriting the family home as being the driver for this increase. While the increase is a further step in the right direction, there is still significant ground to cover before the threshold is restored to its previous level, which was in excess of €500,000 before the financial crisis.

Full details of the revised tax-free thresholds are available in the Tax Rates and Credits 2020 table at the end of this publication.

Employment Taxes

Eoghan Quigley
Partner

Motor Vehicle Benefit-in-Kind

Benefit-in-kind on electric vehicles

As part of the Government's programme to address climate change, a 0% benefit-in-kind (BIK) rate was introduced for electric vehicles in 2018. This is an attractive position when contrasted with the rate of BIK on company cars generally, which is up to 30% of the car's original market value.

The Bill confirms the Budget Day announcement that the 0% BIK rate on electric vehicles will continue to apply for vehicles made available up to 31 December 2022, subject to the existing vehicle value limit of €50,000. This extension, along with increased funding for developing electric car infrastructure to increase the number of charge points nationally, should assist in incentivising the uptake of electric cars.

Changes to BIK effective from 1 January 2023

Company car BIK rate

The Bill inserts a new regime for taxing company cars, based on kilometres travelled and the CO2 emissions of the vehicle. A similar regime was provided for in Finance (No. 2) Act 2008 but was never brought into law. This will mean that, with effect from 1 January 2023, company car BIK will no longer be based solely on the value of the car and kilometres travelled. The BIK rates under the new regime will range from 9% to 37.5%, depending on the kilometres travelled and the CO2 emissions of the car. This may be compared with the existing BIK rates which range from 6% to 30% of the original market value of the car, depending on the kilometres travelled.

The actual rate of BIK will be determined by reference to the tables shown.

TABLE A

Business mileage		Vehicle categories				
lower limit	upper limit	A	B	C	D	E
kilometres	kilometres	%	%	%	%	%
--	26,000	22.5	26.25	30	33.75	37.5
26,001	39,000	18	21	24	27	30
39,001	52,000	13.5	15.75	18	20.25	22.5
52,001	--	9	10.5	12	13.5	15

TABLE B

Vehicle category	CO2 emissions (CO2 g/km)
A	0g/km up to and including 59g/km
B	More than 59g/km up to and including 99g/km
C	More than 99g/km up to and including 139g/km
D	More than 139g/km up to and including 179g/km
E	More than 179g/km

Company van BIK rate

The rate of BIK on employer-provided vans will increase from 5% to 8% of the original market value of the van, with effect from 1 January 2023.

Special Assignee Relief Programme (SARP)

SARP was introduced in 2012 to encourage the relocation of key talent in organisations to Ireland and allow the State to compete on the international stage in attracting businesses and key skills. As mentioned by the minister in his Budget speech, an independent review conducted earlier this year supports the existence of SARP as essential for Ireland to compete with other jurisdictions that operate specific tax provisions to attract skilled executives.

In recent years, with some fine-tuning, SARP has become a more commonly used regime. Approximately 800 individuals qualified for the relief in 2016. Where the relevant conditions are met, the individual will avail of a deduction of 30% on earnings over €75,000 up to a cap of €1 million for income tax purposes.

The relief is available for inbound employees for up to five years, provided all conditions are met each year.

The Bill confirms the welcomed Budget Day announcement that this scheme will be extended from 31 December 2020 to 31 December 2022, allowing employees arriving in Ireland in 2021 and 2022 to avail of this relief up to and including 2027, and cementing Ireland's competitiveness for attracting key talent.

However, it was disappointing that the opportunity to remove or amend the €1 million cap introduced in last year's Act was not taken. The introduction of this cap limits the effectiveness of the regime in attracting senior executives to live in Ireland, relative to other locations.

Foreign Earnings Deduction (FED)

FED was introduced in 2012 to encourage the expansion of Irish indigenous businesses into overseas markets, and in particular into emerging markets. The scheme is a key means of supporting Irish employers in managing the cost of sourcing business in emerging markets.

The programme works by allowing a limited deduction from income tax, by way of a refund through the personal tax return, for qualifying work days an employee or director spends in a specific jurisdiction, provided certain conditions are met. The relief can apply to all income earned from the qualifying office or employment, including share remuneration.

An independent review conducted earlier this year supported the existence and continuation of the scheme. The Bill confirms the Budget Day announcement that FED will be extended to the end of 2022.

Key Employee Engagement Programme (KEEP)

The minister announced in his Budget speech that a number of enhancements will be made to the Key Employee Engagement Programme (KEEP), which is an employee share option incentive scheme targeted at the Small and Medium Enterprise (SME) sector. The intention of the KEEP scheme is to help Irish SMEs to attract and retain employees. The KEEP scheme allows qualifying employees to exercise their share options without triggering an income tax charge. In the ordinary way, the employee would pay capital gains tax at a rate of 33% (or 10% where Entrepreneur Relief applies) on any gain arising on the future disposal of the shares.

In his Budget speech, the minister indicated that changes would be made in order to extend the relief to certain companies operating in a group, as well as allowing for greater flexibility for qualifying employees to move within such groups. The Bill confirms the Budget Day changes announced by the minister.

Currently, the rules operate to limit the applicability of KEEP relief to companies holding shares in a single subsidiary. The Bill provides for a number of technical amendments to the legislation so as to allow employees of companies who are within a group to qualify for KEEP. Broadly, a group will comprise the 50% direct and indirect subsidiaries of the holding company, at least one of which should be carrying on a qualifying trade (most trades other than construction, share dealing, professional services, financial activities and some others).

At present, only full-time employees and/or directors of a qualifying company who devote substantially the whole of their time to the service of the qualifying company qualify for the relief (with a minimum of 30 hours per week being required). The Bill clarifies that the 'qualifying individual' definition will be amended to allow for part-time and flexible working employees to qualify and for the movement of employees between qualifying companies within a qualifying group. In particular, KEEP relief will now be extended to qualifying individuals who devote at least 75% of their working time to a qualifying company or who work at least 20 hours per week for such a qualifying company.

Finally, the Bill confirms that the legislation will be amended to extend the relief to options over existing shares, as opposed to just newly issued fully paid up ordinary shares in a qualifying company/qualifying holding company.

The proposed amendments are subject to a ministerial commencement order.

A number of the technical amendments contained in the Bill are in line with our recommendations in response to the Department of Finance's public consultation in May 2019. However, the uptake of the scheme will likely continue to be restricted given the narrow definition of a 'qualifying group'. We hope that further amendments will be made to the KEEP scheme to bring it in line with the equivalent Enterprise Management Incentive ('EMI') scheme that successfully operates in the UK. The EMI scheme is more favourable as it is open to a broader range of companies and the rules are less complex than the rules which apply in the context of the KEEP scheme.

Employer's PRSI

While there was no mention of PRSI changes in the Budget, the scheduled increase in employer's PRSI announced in Budget 2019 is still on its way. With effect from 1 January 2020, there will be a 0.1% increase in the National Training Fund levy payable by employers in respect of reckonable earnings of employees in Class A and Class H employments.

The change results in the employer's PRSI rate increasing from 10.95% to 11.05% from 1 January 2020, placing an additional cost on employers.

PAYE assessments

The Bill includes a technical amendment to rectify an omission made in Finance Act 2017 in preparation for PAYE modernisation. This amendment will allow Revenue to reduce a PAYE assessment downward and deal with a scenario where a company would otherwise have had to formally appeal the assessment. This amendment will take effect from 1 January 2020.

Business Tax

Alan Bromell
Partner

Anna Scally
Partner

Dividend Withholding Tax (DWT)

DWT at 20% is currently imposed on distributions made by Irish resident companies. This is subject to a number of exemptions which means, in practice, DWT tends to apply only to distributions made to Irish tax-resident individuals and residents in countries which do not have a Double Tax Treaty (DTA) with Ireland, or are not in the EU. On Budget Day, the minister outlined that Revenue have identified a potential gap between the DWT collected and the income tax and USC ultimately payable by Irish tax-resident individuals.

To address this issue, the minister announced two changes in relation to DWT being (1) the rate, and (2) a 'modified' regime.

Finance Bill 2019 increases the rate of DWT from 20% to 25%, with effect from 1 January 2020. This increase will represent an incremental cash-flow cost for Irish tax-resident individual shareholders who may claim a credit for DWT against Irish tax payable on the distribution received. Equally, this will affect non-Irish-resident shareholders who do not avail of a domestic or tax treaty exemption, increasing the absolute tax cost of dividends to such shareholders to 25%.

From 1 January 2021, the Government intends to introduce a 'modified' DWT regime which will use real-time data collected under the PAYE system to allow a personalised rate of DWT to be applied to each individual taxpayer based on the actual rates of tax they pay.

As part of Budget 2020, Revenue have launched a public consultation under which they have invited submissions until 12 December 2019 on how the proposed DWT collection system would operate in practice. Complementing the public consultation, Revenue have also indicated they will engage directly with relevant representative bodies on DWT real-time reporting. These consultations are welcome as the modified regime could introduce significant complexity, in particular for companies with a wide shareholder base.

Schemes of arrangement

A scheme of arrangement is a particular mechanism provided for in Irish company law which is often used in large mergers and acquisitions involving

Nancy Leonard
Partner

Irish companies. It requires the consent of both the Irish High Court and the shareholders of the target company, and can simplify the merger or acquisition process. A transaction undertaken in this manner typically may involve making a payment to the shareholders of the target company on the cancellation of their shares; however, it does not usually involve a stamp duty charge as there is no conveyance of shares in the target company. As announced by the minister on Budget Day, stamp duty will now apply to such a transaction as if it were a conveyance of the target company's shares, where the related High Court order is made on or after 9 October 2019. The party making the payment is liable for the stamp duty.

It is disappointing that no transitional measures are included in the Finance Bill, meaning that certain large transactions in relation to which both parties are contractually bound will now face an unforeseen and material cost.

Employment and Investment Incentive

As announced by the minister in his Budget speech, a number of enhancements were made to continue the reform of the Employment and Investment Incentive (EII). Specifically, the main changes relate to the level and timing of EII relief available and the EII investment limit. Many conditions still need to be satisfied to ensure that relief is available.

Under current rules, initial relief of 30/40 of the EII investment is due in the tax year in which the investment is made and further relief of 10/40 of the investment may be due in the fourth tax year following the year of investment, if certain conditions relating to the number of employees or expenditure on research and development are met.

With effect from 8 October 2019, full income tax relief will be provided in the year in which the investment is made. The conditions relating to the number of employees or expenditure on research and development will not apply to investments after this date.

In addition, the maximum annual investment limit will be increased from €150k to €250k for 2020 and subsequent years of assessment. In the case of those who invest in EII for a minimum period of 10 years, a limit of €500k will apply from 2020.

From 1 January 2020, investors in certain designated funds (funds that have been approved by Revenue as such) will no longer have a choice as to the year of assessment that the deduction can be claimed. For investments made through all designated funds, the deduction will only be available in the year the amount was subscribed to the fund.

The Finance Bill also provides that a qualifying investor is obliged to provide information that Revenue may require through electronic means that Revenue makes available. Managers of designated funds are now obliged to return electronically details of holdings of eligible shares within 30 days of receiving the statement of qualification from a qualifying company. This information was previously required to be returned by 30 June each year.

There were also some further amendments, including:

- updates to the anti-avoidance clawback provisions to ensure that these also apply to investments to be held for 10 years;
- the application of interest to a clawback from the date that an investor ceases to be a qualifying investor;
- the provision of fixed penalties for failure to inform Revenue of a clawback event.

Unfortunately, many of the complex anti-avoidance provisions are retained and, indeed, compliance with the EU regulatory based conditions is still a prominent feature of the rules (including the requirement that all qualifying investments must be based on a business plan, with the concept of a business plan being defined in the law quite comprehensively).

Farm restructuring

In 2013 a relief from capital gains tax was introduced for certain farm restructuring. The relief applies to a sale, purchase or exchange of agricultural land where Teagasc has certified that this was for farm restructuring purposes to make the farm holding more efficient. The exemption was due to expire on 31 December 2019. This relief is being extended for a further three years to 31 December 2022. This is subject to a commencement order due to state aid approval requirements.

Certain approved pension schemes: exemptions and reliefs

Employer contributions to an approved occupational pension scheme set up for employees is an allowable expense in computing the profits of the employer's trade or profession. The Finance Bill extends this provision to also provide tax relief, in certain circumstances, for pension contributions made by a company to an approved occupational pension scheme established for the benefit of employees of another company.

Tax relief is available if the following conditions are met:

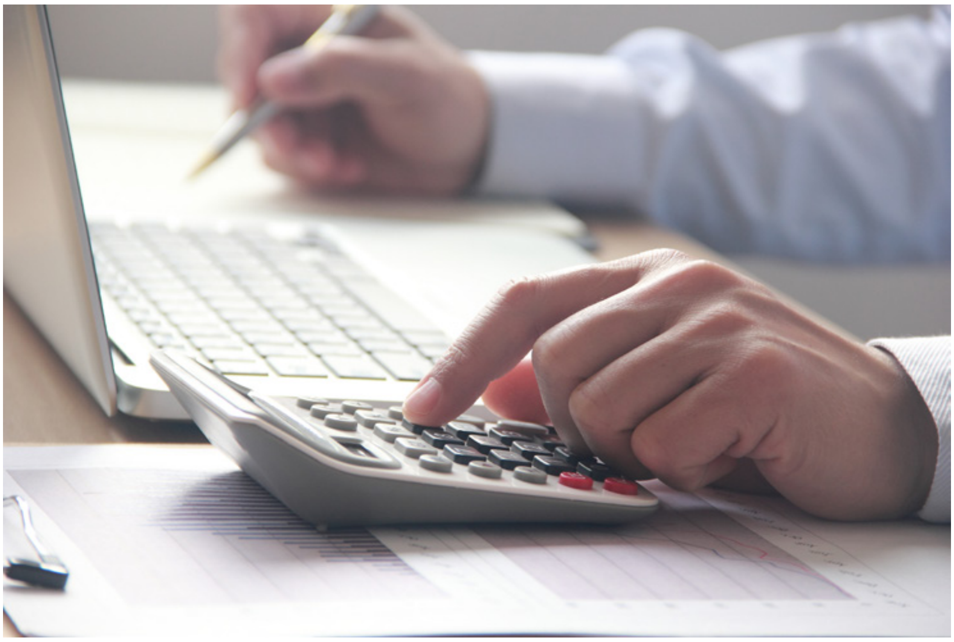
- The contributions are paid on foot of a legally binding agreement between two or more companies within a group, under a scheme of reconstruction or amalgamation,

Paul O'Brien
Partner

under a merger, under a division or under a joint venture (i.e. a non-group company),

- The scheme members are current or former employees of one of the parties to the agreement, and
- The contributions would be deductible if made by the employer of the scheme members.

This is a positive step in clarifying the availability of tax relief for pension contributions made in certain defined circumstances relating to corporate restructurings.



Emissions-based limits on capital allowances & expenses for road vehicles

The Finance Bill makes an amendment to the current regime whereby (i) capital allowances on expenditure incurred on business cars and (ii) the tax deductions for the costs associated with the hiring of business cars are determined by the CO_2 emissions threshold. The amendment has the effect of reducing the CO_2 emissions thresholds which determine the amount of expenditure which can qualify for relief.

This amendment will apply to expenditure incurred on the provision or hiring of a vehicle on or after 1 January 2021, except where prior to that date:

- a contract for hire was entered into, and
- the first payment under the contract was made.

Exemption for specified non-commercial state-sponsored bodies

Currently an exemption from certain tax provisions is available for specified non-commercial state- sponsored bodies. It applies to income tax and corporation tax which would otherwise be chargeable to tax under Schedule D Case III, IV and V. However, these bodies remain liable for DIRT.

The Finance Bill has included three additional bodies within this exemption:

- Children's Health Ireland
- Enterprise Ireland
- The National Oil Reserves Agency DAC

The exemptions are to take effect from the date of establishment of both Children's Health Ireland and Enterprise Ireland, and from 1 January 2020 for the National Oil Reserves Agency DAC. Tax paid by these bodies before the grant of the exemption is non-refundable.

Hard copies

The Finance Bill has amended the requirements for making and authenticating a hard copy of an electronic tax return submitted to Revenue. The requirement for the hard copy to be in a form approved by Revenue has been removed. The rationale for the removal of this requirement is that the practice of submitting electronic returns to Revenue is well established and therefore hard copies are no longer necessary.

General interest restriction measures not in the Bill

Still to come under Ireland's implementation of the EU Anti-Tax-Avoidance Directive (ATAD) is the introduction of a general interest limitation rule into Ireland's corporation tax regime. The rule provides that deductions for a wide range of borrowing costs net of interest income ('net borrowing costs') should be limited to 30% of taxable profits before interest, depreciation, amortisation and tax. The restriction applies to net borrowing costs on third-party debt such as bank debt, finance lease expense and well as intra-group borrowings.

Member states which already had

Olivia Lynch
Partner

domestic measures that afforded equivalent base erosion protection from financing costs could elect to defer implementation of the ATAD interest limitation rule until 1 January 2024 at the latest. Ireland considered that its suite of targeted anti-avoidance rules provide equivalent level of protection (as they effectively narrow the base of deductible costs). However, meeting the minimum standard of equivalence has been difficult to evidence due to the fundamental difference in approach to limiting cost deductions between the ATAD general interest limitation rule and Ireland's targeted rules.

Ireland has announced its intention to accelerate adoption of the ATAD interest limitation rule when it can effectively do so. The Department of Finance held an initial consultation on adoption of an interest limitation rule in tandem with the first stage of consultation on the adoption of the ATAD anti-hybrid rules. With the anti-hybrid rules included in Finance Bill 2019, it appears likely that Ireland will now move ahead to develop interest limitation rule measures for inclusion in Finance Bill 2020, with possible implementation from 2021.

This type of consultation is very welcome and should mean stakeholders' concerns are taken into account whilst ensuring that Ireland is compliant with the EU Directive.

Property & Construction

Jim Clery
Partner

Stamp duty increase

The Bill confirms the Budget increase in the rate of stamp duty on non-residential property from 6% to 7.5% with effect from 9 October 2019. This increase affects commercial property, farm land and goodwill, as well as all other non-residential property. There are limited transitional arrangements which apply the old 6% rate to instruments executed before 1 January 2020 on foot of a binding contract which existed prior to 9 October 2019.

The scheme which for the refund of stamp duty in respect of land which is subsequently used for residential development remains in place and the conditions remain unchanged. It has been confirmed that the effective rate will remain at 2% following a refund (i.e. a refund of 11/15 will apply to the 7.5% rate of stamp duty). The conditions to meet this refund scheme are onerous and subject to relatively tight time limits.

Help to Buy

The Help to Buy scheme has been extended, unchanged, for a further 2 year period to the end of 2021. This incentive provides a refund of up to 5% of the cost of a new house, subject to a maximum refund of €20,000, a maximum house price of €500,000 and a minimum LTV of 70%. The refund remains dependent upon the buyer having paid sufficient income taxes for prior years. The minister notes that 15,000 new home owners have availed of the scheme. We believe that the scheme has played a key role in restarting housing construction in Ireland. In that context, its extension is welcome.

Living City Initiative

The Living City Initiative has been extended until the end of 2022. It is a scheme of property tax incentives which applies to certain 'special regeneration areas' in the centres of Dublin, Cork, Limerick, Galway, Waterford and Kilkenny. The scheme provides for tax relief for qualifying expenditure incurred on both residential and certain commercial refurbishment and conversion work.

Changes to the REIT regime

A number of changes have been introduced to amend the REIT regime to increase the level of tax being collected on property gains by REITs.

The first measure introduced requires a distribution or reinvestment of the proceeds of a disposal of a rental property. This measure applies 25% tax for the REIT to 85% of the proceeds not reinvested or distributed to shareholders. The new rules seem inappropriately harsh as it appears that full distribution or reinvestment of the entire proceeds of a sale (rather than just the gain) is required and that no allowance is made for the costs of disposal or repayment of bank debt. This measure is likely to require refinement. In addition, where the proceeds are distributed, Irish dividend withholding tax (at the new rate of 25% with effect from 1 January 2020) will apply to such distributions, without the normal non-resident exemptions (subject to possible treaty relief).

The second measure amends the provisions for how a REIT would leave the REIT regime. It does not permit an uplift in tax base to market value, unless the REIT has been in existence for more than 15 years.

As mentioned above, the proposed increase in dividend withholding tax to 25% would also appear to affect REIT investors with effect from 1 January 2020.

Finally, announced with publication of the Bill, REITs will be subject to a 'wholly and exclusively' test for expenses in arriving at exempt income. This is presumably to be consistent with similar changes to IREFs and should have limited impact on public company REITs.

Financial Services

Gareth Bryan
Partner

IREF Anti-Avoidance Rules

The minister announced on Budget Day the immediate introduction of new anti-avoidance measures designed to counteract perceived aggressive tax planning by some Irish Real Estate Investment Funds (IREFs).

Background to IREF regime

Finance Act 2016 introduced a 20% withholding tax applicable to returns on investment made by certain investors in Irish regulated funds which hold Irish real estate investments (IREFs). A fund (or sub-fund of an umbrella fund) is considered to be an IREF where at least 25% of the market value of its assets is derived (directly or indirectly) from IREF assets. For these purposes, IREF assets include Irish real estate, shares in an Irish REIT, shares in a company which derives all/most of its value from Irish real estate or a REIT, units in another IREF, and loans secured on and which derive their value (or greater part of their value) directly or indirectly from Irish property. Whilst IREFs have not to date been taxable in their own right, they are responsible for operating withholding tax at a rate of 20% on the occurrence of certain taxable events for in-scope investors (certain categories of investor are exempt).

Deemed interest income

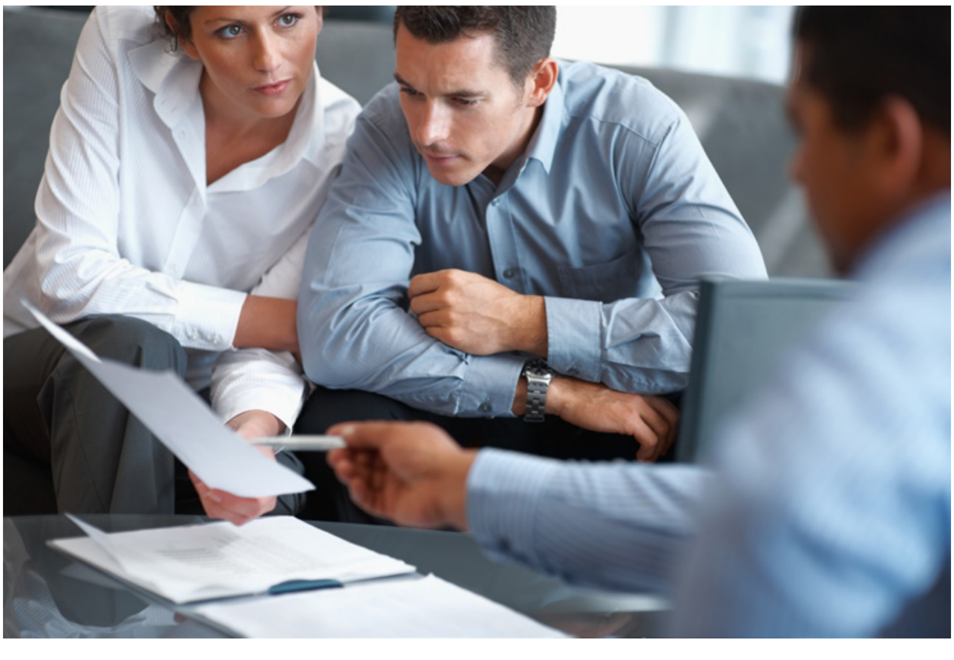
In his Budget speech, the minister acknowledged the important role that institutional investors play in terms of increasing supply, both of commercial and residential property, and noted that this type of investment is welcome at a time when increasing supply to meet housing challenges is of the utmost importance. He noted, however, that it is essential that an appropriate level of tax be paid by such investors. In this regard, the minister highlighted that the Revenue Commissioners had identified aggressive tax avoidance behaviour by certain IREFs as part of their review of the first financial statements filed by IREFs earlier this year. As a result, the minister has indicated that a number of anti-avoidance measures are being introduced to address the potential issues identified.

The Bill introduces two new rules aimed at disincentivising the use of debt by IREFs to reduce the level of profits which would otherwise be subject to withholding tax. Although the minister referred to the changes as limitations on interest expenses, in reality the rules seek to impose a cash tax liability on amounts equivalent to excessive interest expenses paid by IREFs. These rules now form part of the Finance Bill.

The first of these rules will apply where the total ‘specified debt’ (i.e. any debt borrowed by an IREF) exceeds an amount equal to 50% of the cost of the IREF assets. The second rule targets a scenario where the ratio of an IREF’s combined profits and interest relative to its interest falls below 1.25:1 (which would be the case where the level of interest payable on debt reduces profits by more than 80%).

Where either of the measures apply, the IREF will be taxed at a rate of 20% on an amount of deemed interest income, which cannot be sheltered by losses or allowances of any kind. The level of deemed interest income which is taxable depends on a specific calculation methodology prescribed by each measure, but that in each case is focused on counterbalancing the ability of an IREF to reduce its profits by way of debt funding. Although these two measures apply independently of one another, there are provisions to ensure double taxation does not arise where both apply.

While actions taken by the government and the Revenue Commissioners to counteract tax avoidance should be supported, any proposed changes should be carefully targeted and should not affect those investors that relied on Irish government policy and did not enter into aggressive behaviour. As presently drafted, the new rules have wide-ranging



Tim Lynch
Partner

consequences that will affect both domestic and international investors. For instance, an IREF with greater than 50% loan-to-cost third-party bank debt would be subject to the measures.

Nature of counteraction

The stated policy intent behind the new measures is to address IREF withholding tax avoidance. However, these measures appear to overreach that aim as not all investors are subject to IREF withholding tax. For example, Irish resident investors who are liable to 'exit tax' under the existing investment undertakings tax regime for funds are not subject to IREF withholding tax (as this would constitute double taxation). There are also exemptions from the IREF withholding tax for other Irish investors such as pension schemes, life assurance companies, and registered charities. The new rules will impose a tax irrespective of whether the investors in an IREF would have been subject to IREF withholding tax in the first place.

A similar issue arises with respect to debt which is used to finance assets the returns on which are exempt from IREF withholding tax. This includes dividends from property companies and certain income and gains from investments in REITs (where tax is paid by the company/REIT and so IREF withholding tax is not levied again at the IREF level) and income and gains from foreign property.

Third-party debt

Under the new interest limitation rule, there is no exclusion for third-party debt. This is surprising because the use of bank debt is common commercial practice in funding investment and development of property assets and, therefore, should not be considered an anti-avoidance issue. Furthermore, it is not uncommon for that debt to exceed 50% of the cost of the property (particularly where the debt is a refinancing of debt incurred at acquisition at a time when the value of the property may have increased).

Loss-making IREFs

In some cases an IREF might not capitalise its interest costs during the development phase of its property, causing it to incur a loss for that period (as it has no source of income). Under the new rules, no account has been made for this and a tax charge would arise in respect of all of the interest so incurred.

Similarly, in the event of a devaluation of IREF property, this could mean that the IREF has no net income during the accounting period even though it could have a material amount of rental income.

Other measures

Another measure introduced in the Bill seeks to deal with any expenses or disbursements made by an IREF (and taken into account in computing its profits) which were not wholly and exclusively incurred for the purposes of the IREF business. Under this new

Brian Brennan
Partner

rule, the IREF would be subject to tax (at a rate of 20%) on an equivalent ('deemed income') amount. The minister also introduced a number of additional amendments which are aimed at counteracting schemes to reduce the amount which is subject to withholding tax where units in the IREF are redeemed or cancelled.

The Finance Bill contains various technical amendments and a new provision that an IREF must file an IREF return even in years when it had no taxable event. It also includes an additional measure to deal with certain holders of 'excessive rights' (i.e. investors who own 10%+ of an IREF). Under existing rules, where such investors suffer IREF withholding tax on distribution, that income is deemed to be income from Irish immoveable property (i.e. land). The aim of this provision is to prevent a non-resident 10%+ investor from seeking a refund of IREF withholding tax under a double tax treaty (as treaties generally do not allow refunds for tax on income from Irish immoveable property). It is understood that some such investors may have identified a basis for refunds and have made claims on that basis. In an attempt to counteract this, the Bill introduces a tax charge at the IREF level on an amount equal to the amount paid to such an investor. The tax applies at a rate of 20%.

While the Bill removes the deeming provision which treats the payments as income from Irish immoveable property, many foreign investors will not be entitled to any refund under a double tax treaty (even with this change). Consequently, as this charge is in addition to imposing IREF withholding tax on those investors, this will result in a total effective tax liability of 33% in respect of profits arising for the benefit of those 10%+ foreign investors who do not qualify for relief under a treaty.

Moreover, the IREF is not permitted to recoup this tax from the relevant investor, so this additional tax cost will be borne (indirectly) by all investors and not just those who hold excessive rights.

Application

The new deemed income measures and measures relating to the computation of IREF taxable profits are to apply to accounting periods commencing on or after 9 October 2019 (though where an accounting period straddles this date, it is required to be split into two parts, with the latter part subject to the new rules). The other measures will apply from 1 January 2020.

Bank Levy

The Finance Bill includes the provisions that the minister introduced by Financial Resolution from Budget night to increase the rate at which the bank levy is charged from 59% to 170% of DIRT payable in the base year 2017.

This charge will preserve the existing contribution of €150 million paid by the affected financial institutions for 2019 and 2020. The 2019 payment is due on 20 October 2019 and the proposed change has been well signalled.

Additional Tier 1 [AT1] capital

The Finance Bill extends the treatment afforded to AT1 instruments to comparable instruments with equivalent characteristics to AT1 instruments which are issued by entities other than regulated financial institutions.

Provisions were originally introduced in Finance Act 2015 to clarify the tax treatment of AT1 instruments issued by regulated credit institutions and investment firms. AT1 instruments are generally a form of loss-absorbing capital which have characteristics of debt, but can convert to equity to absorb losses and meet regulatory capital requirements. The coupon on AT1 instruments is treated as interest for tax purposes and also qualifies for the interest withholding tax exemption available to quoted Eurobonds.

There is an existing anti-avoidance provision which ensures that the tax treatment afforded to AT1 instruments does not apply where the AT1 instrument forms part of a tax avoidance arrangement. This anti-avoidance provision will apply equally to comparable instruments issued under the extended provisions.

Repos and stock lending

The Bill includes measures to put on a legislative footing the long-time Revenue practice in relation to the tax treatment of repos and stock lending arrangements. This practice applies to certain counterparties and to transactions which do not extend beyond 12 months. The measures do not apply to transactions involving individuals or partnerships and are most likely to apply in practice to insurance companies, pension funds and collective investment vehicles.

In effect, the measures seek to ensure that the tax treatment follows the substance of the transaction, rather than its legal form. This is to ignore the legal disposal of the underlying shares or securities by the stock 'lender' to the stock 'borrower', treat the original holder of the security (the stock lender) as receiving the distribution or interest on the security during the lending or repo period, and permitting a deduction for a 'manufactured payment' by the borrower or repo counterparty but only to the extent of a taxable receipt on the borrowed stock.

The new legislation will apply to in-scope transactions entered into on or after 1 January 2020.

Brian Daly
Partner

Income, profits or gains arising or accruing in relation to a qualifying transaction will be treated as profits or gains from the lending of money.

Where a dividend arises to the stock borrower during the repo or stock lending period and withholding tax applies which is not recoverable by the borrower, the stock lender can make a refund claim if it would have been entitled to such relief had it received the dividend directly.

The provisions include anti-avoidance measures and set out record-keeping requirements.

Securitisation vehicles

As flagged in the budget, the Finance Bill includes a number of measures for securitisation vehicles.

Transfer pricing

Securitisations work by pooling investments and transferring the related cash flows to investors who subscribe for debt issued by the securitisation vehicle. Typically, the debt issued is tranched, with the most risk-averse investors taking the (safest) senior tranches, and the (riskiest) junior tranches carrying a right to all of the residual profits (after other investors have been paid). Under the Irish securitisation regime, the vehicle is kept tax neutral by allowing for tax deductions on all of the interest paid, including the profit-dependent interest on the junior tranche. This creates a tension from a transfer-pricing perspective as the interest paid on these junior notes is economically more like an equity return. For this reason, profit-dependent debt issued by securitisation vehicles is being excluded from the provisions in the Finance Bill which seek to extend the Irish transfer pricing regime.

Anti-avoidance

The Finance Bill includes additional anti-avoidance provisions for securitisation vehicles.

In general, a securitisation vehicle is entitled to a tax deduction for all of its interest expense, including the profit-dependent interest on its most junior debt. To qualify for this treatment, non-resident recipients of interest on profit-dependent debt must pay tax on that interest in a country with which Ireland has a double taxation treaty. This requirement does not apply to treaty residents who are generally exempt from tax (e.g. a pension fund) or where the debt is a listed quoted Eurobond (as tracking ownership would be difficult). However, this exception does not apply if the exempt recipient is a ‘specified person’ or if the listed debt is issued to a ‘specified person’ (a subsequent acquisition by a ‘specified person’ is also caught if it was part of an arrangement that the securitisation vehicle was aware of/or party to at the time of issuance).

Under the current rules, a ‘specified person’ includes a company which directly or indirectly controls the securitisation vehicle by having the power to secure that the affairs of the securitisation vehicle are conducted in accordance with its wishes. This power must be through the means of having voting power or through powers conferred by the securitisation vehicle’s constitutional documents or other documents regulating it.

The Finance Bill proposes substantially broadening the control test to also include a company which has the ability to participate in the financial and operating decisions of the securitisation vehicle and holds (directly or indirectly) more than 20% of its issued shares or the principal value of any profit-dependent debt issued by it, or the right to more than 20% of the interest payable in respect of such profit-dependent debt.

This is a significant extension to these rules and will necessitate careful examination of the powers afforded to holdings of profit-dependent debt.

The Bill also replaces an existing anti-avoidance provision with a somewhat stronger test which only permits a tax deduction for interest on profit-dependent debt where it would be reasonable to consider that the payment is made, or the security to which the payment relates was entered into, for bona fide commercial purposes and does not form part of any arrangement or scheme with a main purpose of avoiding tax.

These new rules are to apply from 1 January 2020. No provision is made for grandfathering existing transactions.

Investment limited partnerships

The Bill amends the legislation dealing with regulated funds constituted as Investment Limited Partnerships (ILPs). The changes correct the terminology used, to replace references to a “unit” and a “unit holder” with references to a “partnership interest” and a “partner”.

The amendments reconfirm that ILPs themselves are not subject to tax, as the income and gains are treated as arising to the partners directly. In addition, the Bill removes an anomaly in the legislation which currently provides that the profits of the ILP are to be allocated to the investors based on the value of the units they hold. This rule will be replaced with a provision which allocates the profits of the ILP in accordance with the partnership deed (which should reflect the commercial allocation of profits).

In addition, the Bill introduces a new provision (similar to existing rules for unregulated partnerships) whereby, if some of the ILP’s profits for any given year are not allocated to specific partners, they will be treated as allocated to the general partner.

These amendments apply to ILPs that are granted authorisation under the Investment Limited Partnership Act 1994 on or after 1 January 2020.

Liam Lynch
Partner

Regulated Irish agents of non-residents

The Bill updates existing legislation which provides for the removal of a potential liability to Irish tax that might arise to a non-resident who avails of the services of an Irish resident independent authorised agent who is a regulated investment or asset manager. The amendment updates the definition of an authorised agent to cross-refer to regulatory provisions which have replaced those referenced in the current legislation, e.g. Markets in Financial Instruments Directive ('MIFID') rules.

Life insurance

The Bill broadens the definition of an insurer, for the purposes of the general and life insurance premium tax levies, to specifically include Gibraltar-regulated insurers in the event of the UK leaving the EU. These provisions were previously updated by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 to ensure that UK-regulated insurers continue to be liable to the levies post-Brexit. The new provisions will be subject to a commencement order.

Fixed charge on book debts

Existing legislation provides that, where a person has a fixed charge over the book debts of a company and the company has unpaid tax liabilities, the charge holder is liable for the tax of the company up to the amount paid by the company to the charge holder in discharge of its debt. The charge holder's liability can be limited where they notify the Revenue of the existence of the charge within 21 days of its creation. A notification procedure where the charge has been transferred to another charge holder is not currently provided for.

The Bill introduces an opportunity for a holder of a fixed charge, to whom the charge has been transferred, to notify the Revenue of their charge and thus limit their exposure to liability. The notification must be made within 21 days of the transfer. For cases where fixed charges have already been transferred, holders have until 31 January 2020 to advise Revenue of the transfer in order to limit their liabilities.

International Tax

Orla Gavin
Partner

Exit tax

In line with the ATAD, Ireland amended its exit tax rules in 2018. The minister announced two technical amendments to the regime which took effect from Budget Day and have been confirmed in the Finance Bill.

The Irish exit tax applies by deeming there to be a disposal of assets at market value on the happening of certain events, where the assets are taken out of the Irish tax net without otherwise triggering a taxable event.

The main amendment has the impact of broadening the scope of the exit tax by removing the requirement in certain scenarios for the company transferring the asset or business to be resident in an EU Member State, and is consistent with the requirements under ATAD.

A further amendment was made to clarify the timing of the taxable event, being the deemed disposal, in a case where the exit charge arises due to a company ceasing to be tax-resident in Ireland. The clarification provides that the deemed disposal of assets by the company will take place immediately before the company ceases to be resident in Ireland.

Tax-deductible expenditure

The Finance Bill proposes two changes to the general rules applying to tax-deductible expenditure. The first provides that a tax deduction is not available for taxes on income. Revenue already held this view, and the amendment is stated to clarify the legislation. This is particularly relevant in the context of Irish companies that suffer foreign withholding tax on their business profits. The second amendment aligns the tax deduction for doubtful debts with impairment losses under the relevant accounting standards.

Capital gains tax

As part of the measures introduced to cater for the risk of a disorderly Brexit, an amendment is proposed to ensure that a capital tax group remains in place where there are UK companies in the group.

The Finance Bill also introduces a number of technical amendments to the provisions which seek to restrict the amount of capital losses arising where there are depreciatory transactions.

Tax treaties

The Finance Bill provides for the introduction into law of the revised treaty with the Netherlands and a protocol to the Switzerland treaty.

Tax Appeals Commission

A number of changes relating to the operation of the Tax Appeals Commission are proposed. These include ensuring that the Appeal Commissioners notify the parties of the time and place of a case management conference (similar to the position for hearings), that a stay on proceedings can be granted to allow a mutual agreement procedure to proceed, and that the Appeal Commissioners can dismiss an appeal where a direction to attend a case management conference is not complied with.

Research & Development Initiatives

Damien Flanagan
Partner

Ken Hardy
Partner

Research and development tax credit

Following the announcements in minister Donohoe's Budget 2020 speech with respect to Ireland's R&D tax credit regime, Finance Bill 2019 sets out the details on how the changes announced will come into effect.

Small and micro company enhancements

- The R&D tax credit rate for small and micro companies has been increased from 25% to 30%.
- The methodology used to calculate the refundable R&D tax credit amount for small and micro companies has been enhanced. The cap on the amount of 'cash back' that can be received has been increased to the aggregate of twice the payroll tax liabilities for the relevant accounting period.
- A new section of legislation has been introduced which will enable small and micro companies conducting pre-trading R&D to claim the R&D tax credit before trading commences. Previously, companies would have only been able to claim for pre-trading expenditure in the accounting period when the company actually commenced trading.

  Under the new rules, small and micro companies can offset their R&D tax credit claim against the aggregate of payroll tax (i.e. income tax and USC, but not PRSI) and VAT liabilities for the period in which the pre-trading claim relates. Companies must make a claim for this pre-trading R&D tax credit within 12 months from the end of the accounting period in which the expenditure was incurred.

The enhancements above, which will apply following ministerial order, relate to small and micro companies only - i.e. companies:

a. that employ fewer than 50 persons, and

b. whose annual turnover and/or annual balance sheet total does not exceed €10 million.

Updates to the outsourcing provisions

The current limit on outsourcing to third-level institutes of education will be increased from 5% to 15%. This change applies in respect of all claimants and relates to accounting periods commencing on or after the passing of Finance Act 2019.

In an effort to ensure more effective administration of the outsourcing provisions, a company which outsources to third parties must now notify the third party in advance of, or on the day of payment of the third party's invoice, if that company intends to claim an R&D tax credit on that payment. We understand the purpose of this amendment is to ensure that the sub-contractors do not receive such notifications after their R&D claims have been filed.

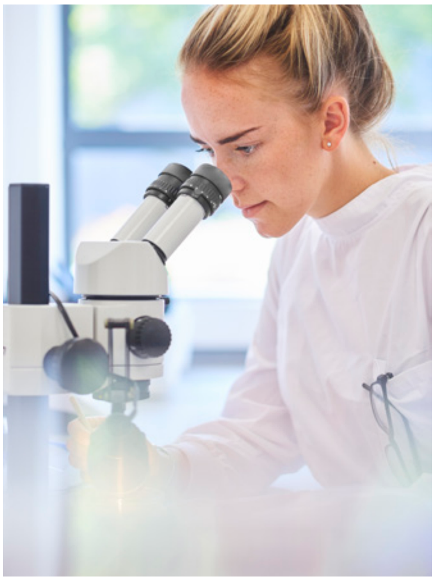
Grants

Any grants received by claimant companies which are funded by the European Union (including any bodies, institutions, offices or agencies of the European Union), must be deducted from qualifying R&D expenditure when filing an R&D claim. Previously, only grants received from the Irish State or European Economic Area states were required to be deducted. It is worth noting in particular that prior to this amendment, grants received from the European Commission (such as Horizon 2020 grants) did not need to be deducted from R&D tax credit claims.

Scientific research allowances

Capital expenditure on scientific research qualifies for capital allowances that are fully deductible for the period in which the expenditure is incurred. Expenditure incurred on or after 1 January 2020 on buildings or structures will only qualify for such allowances to the extent that the construction or development is itself scientific research.

The Bill also provides that an R&D tax credit cannot be claimed on such expenditure.



Conclusion

While improvements have been made in relation to the repayable credit for small and micro companies, a further enhancement with limited cost would have been for the repayable credit to be paid in one instalment instead of over three years.

We would further welcome the extension to medium-sized companies of the enhancements outlined for small and micro companies so that the entire SME cohort may benefit from the positive updates included in the Bill.

Transfer Pricing

Conor O'Sullivan
Partner

Changes to Ireland's transfer pricing rules introduced in the Finance Bill are to come into force for chargeable periods beginning on or after 1 January 2020.

2017 OECD Transfer Pricing Guidelines

As expected, the 2017 version of the Organisation for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines ('2017 OECD Guidelines') (including OECD guidance on Hard-to-Value Intangibles and Application of the Transactional Profit Split Method) are introduced as the reference transfer pricing guidelines for Ireland's domestic transfer pricing regime. They will replace the 2010 OECD guidelines that currently apply.

Any subsequent additional transfer pricing guidance that is published by the OECD after the passing of Finance Act 2019 can be introduced as designated by the Minister for Finance. For example, the OECD has been working for some considerable time on guidance on the transfer pricing aspects of financial transactions, and this guidance is expected in the near future. The guidance is expected to elaborate on how transfer pricing principles apply to the capital structure of multinational enterprises, thin capitalisation issues, pricing of loans and other credit arrangements, treasury functions, cash pooling and financial guarantees. Some of these are contentious issues. By adopting OECD guidelines only upon designation by the minister, Ireland retains flexibility and can make choices that best fit its wider tax regime in its adoption of future OECD transfer pricing announcements.

The 2017 OECD guidelines are already applicable under Ireland's international tax treaties and therefore the introduction of these guidelines into Irish domestic law will only affect transactions with non-tax-treaty countries.

The legislation includes certain principles in relation to substance over form and the non-recognition of a transaction. Comprehensive guidance in applying these principles is contained in the 2017 OECD guidelines. The wording in the Finance Bill differs from the draft measures released for comment on 2 September 2019 in Ireland's Transfer Pricing Rules Feedback Statement. We responded to these measures to express concerns that, in isolation, the proposed language was arguably capable of misinterpretation unless it was clearly connected to the OECD transfer pricing principles. The wording in the Bill is now more clearly aligned with the 2017 OECD guidelines and less open to misinterpretation.

In addition, wording is included in the Bill in relation to when a transaction could potentially be subject to non-recognition rules or disregarded for transfer pricing purposes. The Bill now explicitly references the 2017 OECD guidelines relating to non-recognition in making that determination. These welcome changes provide more certainty to taxpayers.

Non-trading transactions within the scope of transfer pricing

Current Irish transfer pricing rules only apply to transactions the results of which are taxable as part of a trade (under Schedule D, Case I or II). A significant but expected change is that 'non-trading' transactions will be brought within the scope of transfer pricing rules for chargeable periods beginning on or after 1 January 2020.

This will bring a large volume of commercial arrangements within scope. For example, many cross-border outbound funding loans will now require pricing in accordance with the arm's length principle. This will affect Irish groups that provide financing to foreign group companies to fund international businesses and markets. The income arising will be taxed in Ireland as passive income at the 25% rate of corporation tax unless the loan forms part of an active financing trade.

There is an important exemption for non-trading transactions where both parties to the transaction are within the charge to Irish tax (i.e. domestic transactions). Irish tax for this purpose includes capital gains tax, corporation tax and income tax. In the case of income tax, the person must also be Irish tax-resident.

Examples of transactions that remain outside the scope of the Irish transfer pricing rules include:

- loans (i.e. non-trading) where both companies are within the charge to Irish tax in respect of the profits from those loans,
- letting of properties where both companies are within the charge to Irish tax in respect of profits from the transactions, and
- Irish parent company financial guarantees provided to Irish subsidiaries where both parties are within the charge to Irish tax in respect of profits from the transactions.

This exemption from the requirement to apply transfer pricing applies only to the non-trading counterparty. The relief is also subject to the condition that the arrangement is not made with a main purpose to obtain a tax advantage as part of a scheme or arrangement involving another 'non-Irish' party.

The Bill provides that non-trading transactions where one of the parties to the transaction is a qualifying section 110 company are not excluded from the scope of transfer pricing rules.

Transactions between individuals and companies controlled by them

The extension of the transfer pricing rules to non-trading transactions also applies to non-trading arrangements between individuals and companies controlled by them (or by the individuals and their relatives). Irish tax-resident individuals can avail of the domestic exemption for non-trading loans and property letting arrangements with Irish resident companies but may find themselves within the scope of transfer pricing for transactions with non-Irish taxpayers such as a non-Irish resident company controlled by them.

Grandfathered arrangements agreed pre 1 July 2010

The exemption from transfer pricing rules for pre-July 2010 (i.e. 'grandfathered') arrangements is removed. Arrangements that were agreed prior to 1 July 2010 and were not altered materially since then can currently be ignored for Irish domestic transfer pricing purposes. These will now be within the scope of the transfer pricing rules from 1 January 2020. However, there is a relief from documentation requirements where the arrangements are between domestic taxpayers within the charge to tax in respect of profits from the arrangements and the arrangements have not changed.

This change in scope is likely to be most relevant to Irish trading companies with historic pricing arrangements, e.g. historic intellectual property (IP) licensing arrangements or historic service arrangements. A full assessment under OECD transfer pricing rules is required to determine an appropriate arm's length transfer price in respect of the licensing arrangement.

The 2017 OECD guidelines require taxpayers to look at the economic substance of the arrangements. This requires a greater focus on the key risks and drivers of business performance and where key decision-makers that control and/or mitigate those risks are located. For pricing IP, specific reference is made to identify the economically important decisions affecting enhancement, maintenance, protection and exploitation (DEMPE functions) of the IP. In analysing such matters, it is necessary to assess the contributions to the transaction of all relevant parties within a MNE group. The OECD guidelines caution the use of 'one-sided' approaches in determining the appropriate transfer price.

Application to capital transactions

The proposed legislation will apply the arm's length principle to determine the market value of chargeable assets for capital gains tax purposes and to capital transactions (i.e. for capital allowance and balancing event purposes) where the transaction value/capital expenditure exceeds €25 million.

These measures are intended to introduce enhanced documentation requirements but not to increase the scope of the tax charge otherwise applicable to capital transactions.

The transactions in chargeable assets that are in scope are those where the disposal would give rise to a chargeable gain. This means that if a disposal of an asset to an associated person would give rise to a tax-exempt gain, e.g. the disposal of shares that are eligible for the participation exemption, there is no transfer pricing requirement. Similarly, if the asset disposal is not recognised for capital gains tax purposes, e.g. certain disposals occurring under corporate reorganisation transactions, there is no new transfer pricing requirement.

The rules do not require transfer pricing documentation for a range of disposal events such as assets disposals to a

Andrew Gallagher
Partner

capital gains tax group member which occur for deemed no gain/no loss consideration.

Deemed disposal events, such as those arising under Ireland's exit tax regime, are also out of scope.

The main impact for taxpayers will be to ensure that valuations for in-scope disposals of chargeable assets are documented in accordance with the OECD guidelines. For corporate groups, this is likely to include cross-border disposals and acquisitions of assets such as property and intangible assets. In the case of intangible assets, the new reference guidelines mean that valuation must also take account of specific guidance in relation to dealing with the uncertainty of 'hard-to-value intangibles' and that the options realistically available to the parties have been considered. This would include the following types of issues:

1. How third parties would value an asset where its value is subject to fundamental uncertainty, e.g. whether a new drug obtains future regulatory approval for a new clinical treatment.
2. How third parties would value an asset being acquired by an entity that provides valuable and unique functions relevant to the asset's value or where the asset value is heavily dependent on its combination with other tangible or intangible assets.

The new rules appear to have a number of implications, including:

- The 2017 OECD guidelines will apply to determine the value of intangible assets for the purposes of claiming capital allowances. The new transfer pricing rules will apply in priority to the existing tax rules governing capital allowances and will only have the effect of reducing the allowances available to the taxpayer. This could have an impact on claims for intangible asset allowances on a transfer of intangible assets to Ireland. The Bill provides that these rules should apply only to assets acquired after 1 January 2020 and not to assets acquired prior to this date where capital allowances are claimed in subsequent accounting periods.
- Their application to disposals and acquisitions of chargeable assets by individuals where the disposal of certain assets with a market value in excess of €25 million is made to an associated person. This includes a disposal to a company controlled by the individual or by the individual and his/her relatives. Individuals already have to apply market value consideration when taxing capital gains arising on the disposal of assets to connected persons. In practice, this applies an additional documentation requirement to support the transaction value for certain high-value asset transfers.

Transfer pricing documentation

OECD transfer pricing documentation requirements (in accordance with Chapter V of 2017 OECD guidelines) have been introduced for taxpayer groups where annual consolidated group revenues (as reflected in the consolidated financial statements) are above specified thresholds.

The requirement to prepare a master file (in accordance with the 2017 OECD guidelines) is introduced for groups with consolidated revenues in excess of €250 million. The requirement to prepare a local file (in accordance with the 2017 OECD guidelines) is introduced for groups with consolidated revenues in excess of €50 million.

For many other countries, the revenue threshold for both master file and local file is set at €750 million (or equivalent in local currency) in line with the threshold for country-by-country reporting. Therefore, the introduction of these new rules in Ireland could trigger a requirement for MNEs that did not previously need to prepare transfer pricing documentation.

The supporting documentation should be prepared no later than the due date for the tax return for the taxable period in question and must be available upon a request by Irish Revenue in writing. Such records must be provided to Irish Revenue within 30 days from the date of the request. Fixed administrative penalties can apply for a failure to keep the required records. In effect, this introduces a contemporaneous transfer pricing documentation requirement that did not exist previously.

The new rules do not specify that the Irish company itself must prepare the transfer pricing documentation or that the documentation must be kept in Ireland. Therefore, if appropriate documentation has been prepared for tax purposes in another country, provided that the documentation can be made available to Irish Revenue within 30 days from the date of being requested, that should suffice. Revenue may issue further guidance on transfer pricing documentation requirements in due course.

The Bill introduces a fixed penalty of €25,000 where there is failure by the taxpayer to provide a local file to Irish Revenue within 30 days of a request in writing. This penalty increases by €100 for each day on which the failure continues.

In addition, the Bill now also provides for tax geared penalties in relation to a transfer pricing adjustment. This applies unless the taxpayer prepares the appropriate records supporting the transfer pricing policy, provides those records to Irish Revenue within 30 days and can demonstrate that the records are complete and accurate, and reasonable efforts to comply have been made.

Small and medium enterprises

It is proposed that the transfer pricing rules will be extended to SMEs which are currently not subject to Irish transfer pricing legislation. However, the implementation date is subject to a ministerial commencement order.

The definition of an SME is an enterprise that:

- employs fewer than 250 persons, and
- has an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million.

In the 16 October 2019 press release on the Finance Bill, it was confirmed that the deferral of the measures for SMEs was due to the uncertainties faced by businesses at this time i.e. Brexit. It appears that the application of transfer pricing rules to SMEs, while deferred for now, will be introduced at some point in the future in Ireland.

Some SMEs may already be subject to transfer pricing rules in other countries but many will never have had to consider transfer pricing. It is important to note that there is no de minimis threshold (as found in some other countries).

VAT and other indirect taxes


Glenn Reynolds
Partner

Terry O'Neill
Partner

VAT

VAT rate on food supplements

The Finance Bill provides that the sale of food supplements of a kind used for human oral consumption will be subject to Irish VAT at the reduced rate (currently 13.5%) from 1 January 2020.

A potential change to the VAT treatment of food supplements, many of which have to date been treated as VAT zero rated, has been flagged for some time.

This change follows a review undertaken by Revenue which concluded that there was no legal basis to allow the zero rate to continue to be applied to many food supplements. The application of the zero rate was based on a concessional treatment applied since the introduction of VAT in Ireland. With the passage of time, and evolution in the nature of products available, it became more difficult both for Revenue and industry to apply the concession.

The withdrawal of the concessional treatment by Revenue planned for 1 March 2019 had been postponed to 1 November 2019 to facilitate a public consultation conducted by the Department of Finance and consideration of legislative changes by the Minister for Finance in the context of Finance Bill 2019.

The increase in the VAT rate applicable to the sale of food supplements will not be welcomed by industry and consumers. However, absent this change, the removal of the concessional treatment would have resulted in the application of standard rate VAT (currently 23%) to the sale of food supplements, rather than the reduced rate provided for in the Finance Bill.

It is important to note that the change only applies to food supplements of a kind used for human consumption. It does not affect the sale of products which are regarded as food of a kind used for human consumption for VAT purposes such as infant formula, or food for special medical purposes, which continue to qualify for the zero rate of VAT.

Equally, the change does not apply to certain folic acid and other vitamin and mineral products for oral use, which are licensed or authorised by the Health Products Regulatory Association. They continue to qualify for the zero rate of VAT.

Other important VAT changes taking effect from 1 January 2020

There are other important VAT changes due to take effect from 1 January 2020 which were not contained in the Finance Bill.

These changes are part of measures coming into effect in the EU from 1 January 2020 to simplify and ensure consistency in the application of the VAT rules concerning the cross-border sale of goods within the EU. The changes – referred to as 'Quick Fixes' – will in particular have implications for Irish businesses dealing in the cross-border sale and purchase of goods.

The 'Quick Fixes' include four changes:

1. Stricter tests for applying the zero rate of VAT to the cross-border sale of goods within the EU
2. Streamlining of the evidence required for proving goods have crossed an EU border and can qualify for the zero rate of VAT on sale
3. Simplified rules for the treatment of call-off stock arrangements across the EU
4. New rules for clarifying the VAT treatment applicable to different legs of chain transactions involving the cross-border movement of goods in the EU

It is critical that all Irish businesses involved in the cross-border trade of goods be familiar with these new rules. In particular, for Irish companies exporting goods to other EU Member States (including the UK until it leaves the EU VAT area), failure to satisfy the new tests could result in the requirement to charge Irish VAT on the cross-border sale of goods that would otherwise be VAT zero rated. The new rules may also result in changes to the current VAT treatment applying to call-off stock arrangements in the EU and chain transactions involving the subsequent supply of the same goods in the EU.

Businesses should also give consideration to system and processes changes that may be required to implement these changes.

VAT recovery on motor vehicles

Measures in the Bill provide that VAT recovery for motor vehicles first registered on or after 1 January 2021 will only be available in respect of motor vehicles with a CO2 emission threshold of less than 140g/km. VAT recovery is currently available in respect of motor vehicles with CO2 emission levels of less than 156g/km.

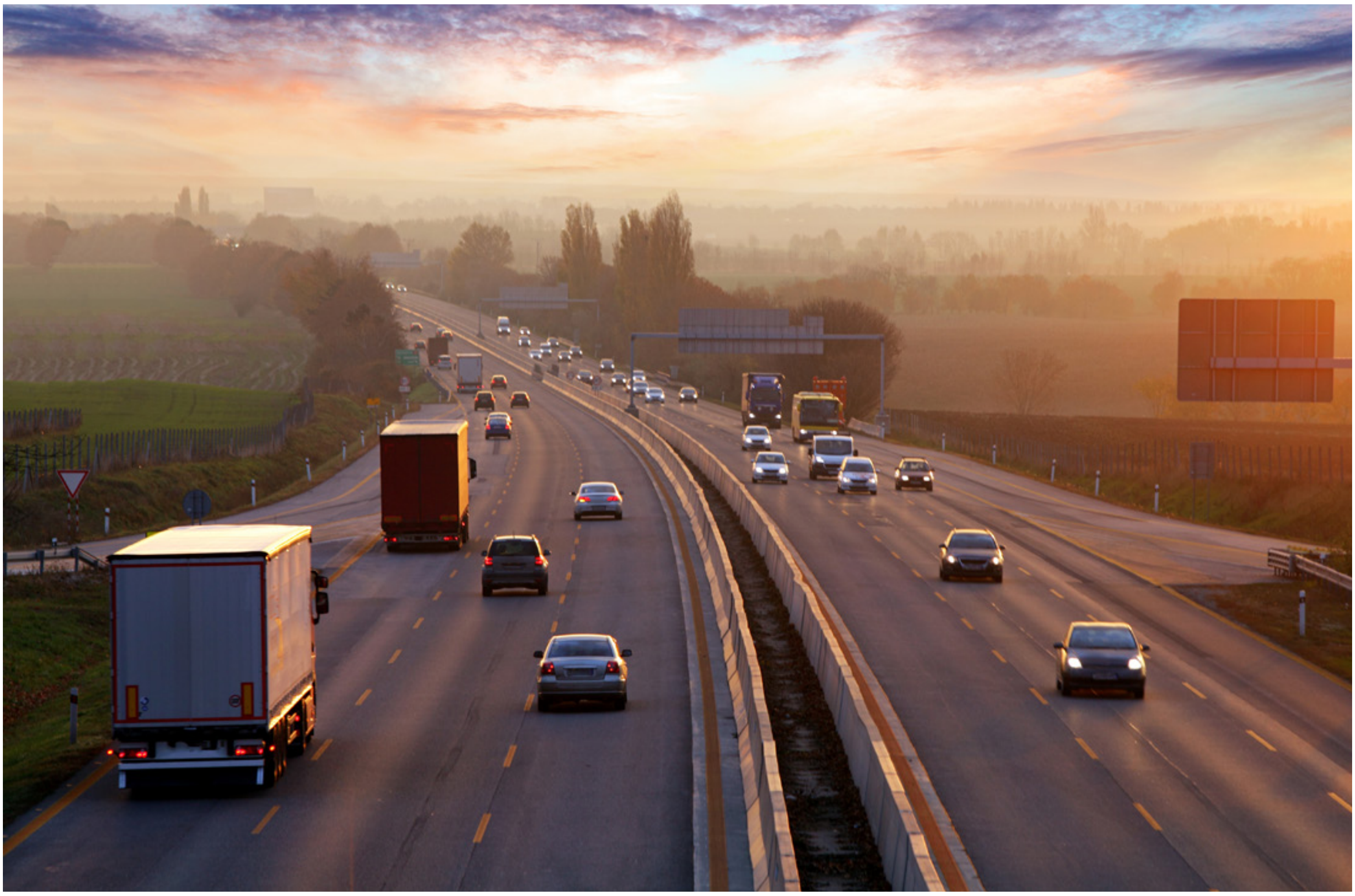
This change applies to certain defined motor vehicles where partial VAT recovery is currently allowed under VAT law where the relevant CO2 emission test is satisfied.

Excise duties

There are a number of excise-related measures in the Bill, including:

- Confirmation of the announcement in the Budget of an increase in excise duty on a packet of 20 cigarettes by 50 cents (including VAT), with pro-rata increases on other tobacco products. This increase took effect at midnight on Budget Day.
- Confirmation of the increase announced in the Budget in carbon

David Duffy
Partner



tax from €20 to €26 euro per tonne of CO_2 emitted. This increase applied to auto-fuels with effect from midnight on Budget Day, and will apply to non-auto fuels and vehicle gas from 1 May 2020.

- Confirmation of the announcement in the Budget for enhanced relief under the Diesel Rebate Scheme where the average price (exclusive of VAT) of gas oil purchased by a qualifying road transport operator is greater than €1,070 per 1,000 litres (€1.07 per litre), up to a maximum repayment of €75 per 1,000 litres. This measure will apply from 1 January 2020.

Betting duty

The Bill confirms the introduction of a relief from betting duty and betting intermediary duty, subject to a commencement order. The relief will allow for a reduction in the betting duty and betting intermediary duty liability payable by bookmakers and betting intermediaries up to a maximum of €50,000 per calendar year.

Vehicle registration tax

As announced in the Budget, the Finance Bill confirms: (i) the replacement of the 1% VRT surcharge for newly registered diesel vehicles introduced in Budget 2019 with a nitrogen oxide (NOx) emissions based surcharge and (ii) the extension of the VRT relief for the purchase of hybrid electric vehicles and plug-in hybrid electric vehicles to 31 December 2020.

Electricity tax

The Bill confirms the increase in the rate of electricity tax for business from €0.50 to €1.00 per megawatt hour in order to equalise with the rate for non-business. This increase will take effect from 1 January.

EU Mandatory Disclosure Regime (MDR)

Carmel Logan
Partner

Finance Bill 2019 gives effect to certain provisions in the sixth European Union (EU) Directive on Administrative Co-operation in tax matters ('DAC6'). DAC6 introduced a new EU-wide Mandatory Disclosure Regime (MDR) in respect of certain 'reportable cross-border arrangements' that could potentially be used for aggressive tax planning. The EU MDR requirements in the Bill sit side by side, as a parallel regime, with Ireland's domestic MDR.

The new provisions introduce a requirement for persons referred to as 'intermediaries' and, in some cases, taxpayers, to make a return to the local tax authority in the relevant Member State where there is a reportable cross-border arrangement, concerning taxes imposed by an EU Member State (other than VAT, customs duties and social security contributions) and which involve one or more of a list of specified hallmarks. The information reported to Irish Revenue will be automatically exchanged between all EU tax authorities.

The legislation applies to individuals and companies, and sets out the information that is to be reported, the time limits for reporting, in what limited circumstances an exemption from reporting may be available, and the penalties that will apply for failure to meet the requirements.

For arrangements the first step of which happens in the period on or after 25 June 2018 and ending on 30 June 2020, the reporting obligations should be met by 31 August 2020. Thereafter, reporting of arrangements is required to be made within 30 days of the trigger date. The trigger date is the earliest of (i) the day after the arrangement is made available/

Key questions and practical considerations for businesses

Who is responsible?

- Transactions may be reportable by intermediaries (i.e. banks, advisors) or taxpayers
- Businesses must determine what personnel and business units will be responsible e.g. Tax, Finance etc.

What audit trail will be in place?

- It will be necessary to put a process in place to determine whether transactions are reportable
- Where transactions are not reportable, backup documentation should be maintained to support this

When will the requirements apply?

- First reports under MDR to be filed in Summer 2020
- Retroactive effect – it is necessary to report arrangements entered into since 25 June 2018
- EU member states will automatically exchange information every three months

Where is the reportable data?

- The data and information to be reported may reside in multiple systems or business units
- Businesses should identify any difficulties that may arise in obtaining the data
- The reporting requirements will vary across jurisdictions

Why prioritise?

- The impact of MDR will span multiple areas of the business
- Implementation of the necessary business processes is likely to take some time
- Penalties for non-compliance may be significant

ready for implementation and (ii) the day on which the first step in implementation is taken.

The main objective of EU MDR is to provide EU tax authorities with early intelligence on new and innovative cross-border tax planning arrangements, as well as planning to circumvent disclosure of information under the Common Reporting Standard on financial products and non-disclosure of beneficial ownership of entities.

In seeking to pursue this objective, the scope of reporting has been cast very wide. It is much broader in scope than Ireland's domestic MDR and the UK's Disclosure of Tax Avoidance Schemes (DoTAS) with which it shares many design features. The EU MDR contains fewer exemptions or reliefs and it includes reporting of cross-border arrangements that have no tax benefit, or that are considered routine tax planning arrangements.

Ireland's implementing measures closely follow the wording of DAC6 whilst drawing on some existing definitions and concepts in Ireland's domestic MDR. It is hoped that, in the same manner as Irish Revenue worked closely with industry and tax practitioners to develop guidance for Ireland's domestic regime, Revenue's guidance will support business in meeting its reporting obligations under the EU MDR with as much certainty as possible. The expectation is that guidance will be available by the end of the second quarter of 2020. However, businesses already face the requirement since 25 June 2018 of capturing reportable information for the 31 August 2020 filing deadline.

What is a cross border arrangement?

A 'cross-border arrangement' is defined as an arrangement concerning either more than one EU Member State, or an EU Member State and a third country where at least one of the following conditions applies:

- Not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction.
- One or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction.
- One or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment.
- One or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction.
- The arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

It should be noted that a reportable arrangement can exist between third parties or connected parties.

What are the hallmarks?

Where a cross-border arrangement exists, details of the arrangement must be reported to Irish Revenue if the arrangement falls within at least one of the specified hallmarks, as set out in DAC6.

The hallmarks are very broadly cast. Some of them are linked to a 'tax main benefit' test such that reporting only applies in the event that a tax advantage is the main benefit or one of the main benefits of the arrangement. However, a number of the hallmarks are not linked to a 'tax main benefit' test and, therefore, are reportable irrespective of whether or not there is any tax benefit or advantage from that arrangement.

Hallmarks with no 'tax main benefit' test

The following is a brief summary of the types of hallmarks which are not linked to this 'tax main benefit' test.

- Cross-border arrangements between two or more 25%+ associated persons involving a deductible payment to a recipient not resident anywhere or to a recipient resident in an EU Blacklist or OECD non-cooperative jurisdiction (a 'person' can include an unincorporated body of persons, such as a partnership).
- Cross-border arrangements where there are deductions for the same depreciation on an asset in more than one jurisdiction (but the related profits are taken into account in both jurisdictions).
- Cross-border arrangements where relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
- Cross-border asset transfers where there is a material difference in the consideration amount treated as payable in the jurisdictions involved.
- Cross-border arrangements are taken to bring information outside of the scope of the Common Reporting Standard (CRS) or to conceal beneficial ownership information.
- Cross-border arrangements that involve: (1) the use of unilateral transfer pricing safe harbour rules; (2) the transfer of hard-to-value intangibles between associated enterprises; or (3) the intra-group transfer of functions, risks or assets where it is projected that there will be a decrease of 50% or more in earnings in the transferor jurisdiction.

James Kelly
Partner

As can be seen, the above hallmarks are potentially wide in scope and could apply to many transactions where there is no tax advantage.

In practice, in the context of individuals or groups implementing international restructuring and reorganisation events, consideration of the scope of the reporting regime is required where there is any cross-border transfer of assets or cross-border payments of deductible amounts, even where those transfers or payments benefit from long-standing and well-tested reliefs.

Companies operating in the financial services sector will need to closely review their internal procedures and controls to ensure that they can meet the scope of application of their reporting obligations under the automatic exchange of information/ accessibility of beneficial ownership information hallmark. This is because the information and personnel involved may not be found in the tax department but in systems and teams involved in meeting obligations under CRS and other financial information reporting regimes, as well as obligations under anti-money laundering measures.

Hallmarks with a 'tax main benefit' test

In addition to the above hallmarks, other hallmarks trigger reporting only where it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from the arrangement is the obtaining of a tax advantage.

DAC6 does not define 'tax advantage'. The definition of a tax advantage in the Irish adoption of the regime mirrors that set out in Ireland's domestic regime. It is broad in scope and includes relief or increased relief from tax repayment or increased repayment of tax, the avoidance or reduction of a charge or assessment to tax, deferral of any payment of tax, or the advancement of any repayment of tax.

Some of the hallmarks where the main benefit test applies overlap closely with those under Ireland's domestic regime. They include arrangements where a condition of confidentiality applies in respect of how the arrangement could secure a tax advantage, the fee is fixed by reference to a tax advantage, or the arrangements include substantially standardised documentation which is available without need for substantial customisation.

The interpretation in practice of the hallmark related to standardised products is of concern to businesses operating in the financial sector. In practice, these businesses often apply standardised documentation and procedures in the delivery of retail financial products (such as loans, pensions and savings products) which can afford tax relief to the customer. To address these concerns, it is hoped that guidance on the scope of application of the reporting requirements to these types of commonly occurring products can be developed in tandem with Irish Revenue.

Who is an intermediary?

The definition of 'intermediaries' is widely drafted and includes any person who designs, markets, organises, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.

The definition of intermediary under the EU MDR also includes any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know

that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Only persons with an EU nexus (such as being incorporated in, resident in, or having a permanent establishment in, an EU Member State or being registered with a professional association related to legal, taxation or consultancy services in an EU Member State) can be intermediaries.

Unlike the existing Irish and UK domestic reporting regimes, this means that reporting may be required by persons who are not primarily engaged in the provision of tax services, such as corporate service providers, fund managers, banks, etc. In-house teams in corporate groups could also be intermediaries as one company within a taxpayer group could be an intermediary in providing services, etc, to other group members.

The regime contemplates multiple reporting by multiple intermediaries, but removes the reporting obligation where an intermediary has written proof that another intermediary has already reported the transaction. Implementing guidance will be important in supporting taxpayers to apply this aspect of the regime.

The taxpayer may have to report

Where there is no intermediary, the reporting obligation falls on the 'relevant taxpayer', i.e. any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement, or has implemented the first step of such an arrangement.

This might arise, for example, where a taxpayer procures advice from a non-EU advisor (as noted above, only persons with an EU nexus can be intermediaries) or where it (or its employees) designs or implements the arrangement itself.

The legislation provides a reporting exemption for an intermediary where doing so would breach legal professional privilege. Where this occurs, that intermediary is obliged to inform any other intermediaries that it is applying this exemption, thereby placing the reporting obligation on other intermediaries or, in the absence of any other intermediaries, the taxpayer.

What are the reporting obligations?

Where a reporting obligation arises, the information to be reported in relation to the cross-border arrangement includes information identifying the taxpayer(s)/intermediary involved (including names and tax reference numbers), details of the hallmarks which make it reportable, a summary of the content of the arrangement, the reference number assigned to it, the value of the arrangement, and the identification of any other person in an EU Member State likely to be affected by the arrangement.

In addition, the taxpayer is required to include the reference number assigned to the arrangement in its annual tax return, for all relevant periods.

The reporting obligations are onerous and subject to completion within relatively tight time limits. Businesses will need to ensure their systems can capture the relevant information on a timely basis.

Penalties

The new provisions have also introduced penalties for non-compliance. Both fixed penalties of up to €5,000 and daily penalties of up to €500 can apply where a person fails to comply with the obligations imposed under these measures, with no cap.

What next?

- **Assess the impact** of these changes on the business
- **Monitor new and historic arrangements** to assess reporting requirements
- Design and deploy a **process** to ensure MDR compliance
- Consider whether **reporting software** is required (such as KPMG's MDR tool or alternative reporting solutions)

Implementation insights to date

The provisions have been in effect since 25 June 2018. Until now, there has been no Irish legislation or guidance published on DAC6.

In practice, as EU Member States have released draft provisions and moved towards enactment in 2019, KPMG member firms have found that there are differences between Member States in the implementation of their domestic legislation and interpretation even though they are all based on a single EU Directive. This can be expected to result in variation in the scope of reportable transactions in different EU Member States, such that a transaction reportable in one country might not be reportable in another. This merely increases the burden of compliance and administration for taxpayers.

Anti-hybrid rules

Gareth Bryan
Partner

The Finance Bill contains measures to implement provisions to counteract tax mismatches arising from cross-border hybrid arrangements. The measures are being implemented in accordance with requirements set out under the European Union's amending Anti-Tax Avoidance Directive ('ATAD2').

The measures seek to counteract non-taxation outcomes from payments made on or after 1 January 2020 under cross-border arrangements between associated enterprises which result in deduction without inclusion or double deduction outcomes.

It is understood that Ireland's policy intent is to implement the framework of the regime set out under ATAD2 but not to go beyond the Directive. In recognising the complexity associated with implementing measures that are not aligned with ATAD2, Ireland has consulted closely with industry representatives and tax practitioner bodies to take soundings on how best to knit these complex measures into the framework of Ireland's tax regime. We have been heavily involved in these feedback discussions and in testing and understanding their potential scope of application to cross-border arrangements that companies operating in Ireland have in place.

The measures apply to counteract hybrid mismatch outcomes to bodies corporate which are subject to income tax, corporation tax or capital gains tax. Most commonly, they can be expected to apply to companies subject to corporation tax in Ireland.

The measures also apply to counteract mismatches arising from deemed payments and profit allocations between a head office and a branch, or between branches of the same entity.

Mismatches not in scope

The measures do not seek to counteract mismatches which might arise due to the non-recognition of taxable income where one jurisdiction permits a taxpayer to deduct an amount of notional expense in measuring taxable income. This includes notional interest deductions on equity (NID) regimes as well as a unilateral downward adjustment in the measure of taxable profits to reflect arm's length pricing under a jurisdiction's transfer pricing regime.

Nil tax outcomes

A cross-border payment which is deductible against Irish profits can be subject to a nil taxation outcome which is not counteracted under the anti-hybrid rules. The measures achieve this by permitting the inclusion test to be satisfied where a payment is subject to tax at a nil rate, the foreign tax jurisdiction does not have a tax regime, the payment is received by an entity such as a government body or pension scheme which benefits from a tax exemption, or the payment arises to an entity taxed in a wholly territorial regime that does not tax foreign source income.

The measures also recognise that a payment can meet the inclusion test where it is taxed, not in the hands of the immediate recipient entity, but on a parent entity under a controlled foreign company (CFC) or a similar regime.

Associated persons

The rules generally apply to payments between entities which are associated enterprises. To be treated as an associated enterprise broadly requires the existence of a 25% common ownership relationship between entities, which is determined by reference to a combination of ownership rights. This includes percentage holdings of issued share capital, the entitlement to distributable profits and voting rights, which can be traced directly and indirectly through intermediate entities held by individual as well as corporate owners. Entities included in the same consolidated set of financial statements (or would be if International Accounting Standards applied) also meet this associated enterprise test. It appears that some types of mismatch will require a 50% instead of 25% relationship threshold.

Counteracting measures

The measures operate by setting out defined mismatches in a number of short chapters and specifying the Irish counteracting measure that is to apply.

As required under ATAD2, the counteracting measures generally have a primary counteracting rule, which is usually to deny the effect of the relief that has resulted in the Irish deduction. A secondary counteracting measure can also come into effect. The latter applies if, for example, Ireland is the recipient or payee jurisdiction under a deduction without inclusion mismatch arrangement and the other jurisdiction has not counteracted the mismatch by denying a deduction. This secondary measure could require the Irish counterparty to include the receipt in taxable income (by, for example, denying credit relief for an amount which would otherwise offset the Irish tax due). It could also deny the Irish taxpayer a deduction for an otherwise deductible payment under an arrangement which has resulted in a double deduction outcome in Ireland and in the foreign tax jurisdiction. The meaning of deduction is broadly cast to include deductions in measuring taxable profits not just for payments of interest and royalties but also payments for goods and services as well as payments comprising capital expenditure on assets. This includes expenditure on assets that results in deductible capital allowances.

Types of mismatches

Mismatches that are in scope of the anti-hybrid rules include those arising under financial instruments, hybrid entities, withholding tax mismatches, residency mismatches, permanent establishments, imported mismatches and structured arrangements.

Financial instruments

The financial instrument measures apply to payments on a broad range of financial instruments to the extent of the financing or equity type return on the instrument. As might be expected, the financial instrument measures apply to payments of interest on loans and debt securities, but also include payments related to a financing or equity return under stock lending and repo arrangements (which are described as hybrid transfers). The measures also apply to derivative and option arrangements as well as other arrangements which have a return that is equivalent to interest. This would include payments that are equivalent to interest under Islamic finance arrangements, and is understood to include the interest or financing element of lease rental payments under equipment leases.

The financial instrument rules seek to counteract deduction without inclusion outcomes for cross-border payments between associated enterprises as well as deemed payments between branches of the same entity where the outcome arises due to a difference in the characterisation for tax purposes of the financial instruments between Ireland and the payee jurisdiction. As described above, there should not be a counteraction under the anti-hybrid measures where, for example, an interest payment is deductible in Ireland but is not taxable because the foreign entity is a tax-exempt entity such as a pension fund or because, for

example, the payee entity is established in a nil tax regime. If non-refundable Irish withholding tax applies to the interest payment, this is not considered sufficient to satisfy the requirement for the interest payment to be subject to foreign tax.

The financial instrument measures apply both a primary and a secondary counteracting measure. The primary counteraction applies where a payment is deducted in Ireland. It operates to deny a deduction for the payment. Where Ireland is in receipt of a hybrid payment which is not taxed in Ireland and the other country has not acted to counteract the outcome through the application of equivalent anti-hybrid measures, Ireland will include the income in taxable income. Take, for example, a receipt which is taxed as a dividend in Ireland on a financial instrument but is deductible for foreign tax purposes because it is viewed as a payment equivalent to interest. If the foreign jurisdiction has not counteracted the deduction, the Irish company should tax the dividend without the benefit of credit relief for foreign taxes that might otherwise be available in taxing the dividend.

The measures also seek to counteract effective non-inclusion outcomes due to long-term deferrals in the taxation of the interest payment under a financial instrument where it would not be expected that such a deferral would arise if the financial instrument was entered into as a bargain made at arm's length.

Hybrid entities

Mismatches can also arise due to entities which are treated as a taxable person in one jurisdiction but whose owners or members are treated as the taxable person in another jurisdiction. Irish taxpayers who are members of groups parented in the United States of America can find that elections made for US corporate income tax purposes can result in a company which is considered to be opaque for Irish tax purposes being disregarded for US tax purposes. Both deduction without inclusion and double deduction outcomes could potentially arise. For a deduction without inclusion outcome, similar primary and secondary counteracting measures as are outlined above apply. For a double deduction outcome, where Ireland is the payer territory, Ireland will not deduct the payment. Double deduction outcomes do not arise where the deductions are offset against profits that are taxed in both jurisdictions. This is referred to as dual inclusion of the payment. As noted above, the meaning of inclusion under Ireland's anti-hybrid rules extends to income which is taxed on a parent under a foreign CFC or a similar regime. There are also measures which recognise that a payment can be treated as included where a parent entity is taxed on worldwide profits, including those of foreign permanent establishments.

Unfortunately, it is not clear that the legislation addresses situations where a parent entity is taxed on profits of foreign subsidiaries on an elective basis (e.g. where a subsidiary elects to be a disregarded entity of parent). This may mean that transactions between two or more such disregarded subsidiaries could inadvertently result in a mismatch outcome. For example, costs incurred by such a subsidiary would be deductible by it and the parent but, if the income against which it deducts that cost is earned from another disregarded subsidiary, the income is treated as received by it locally but is disregarded by the parent. Given that, in this situation, the parent taxes the group's worldwide external profits, it would seem inappropriate to have a mismatch outcome.

Withholding tax mismatch

The measures also seek to counteract an outcome where there are double claims for withholding tax relief and where at least one of the parties is subject to corporation tax. This might arise, for example, under a hybrid transfer or repo/stock lending transaction.

Residency mismatch

The residency mismatch anti-hybrid rules apply to deny a double deduction outcome which arises due to an entity being resident for tax purposes in Ireland and in another jurisdiction. Ireland's corporate tax residence rules already contain certain protections against Irish incorporated companies being dual resident because Ireland does not treat an Irish incorporated company as resident for tax purposes where such a company is considered to be resident in a tax treaty jurisdiction under the terms of the relevant tax treaty. However, if an Irish resident company has obtained a double deduction because of its dual residence status, the anti-hybrid rules will operate to deny the Irish deduction.

Permanent establishments

The Irish measures seek to counteract a disregarded branch. Take, for example, a non-Irish resident company which is considered to have a branch presence in Ireland under a foreign tax regime and that branch meets the threshold to be recognised as such under OECD principles. If not taxed in Ireland, the measures will operate to recognise a taxable branch and subject the Irish branch's profits to Irish corporation tax.

Imported mismatches

If a mismatch outcome does not arise when the arrangement between the Irish company and foreign entity is tested, an imported mismatch arrangement may nonetheless arise where the payment by the Irish entity funds directly or indirectly a foreign arrangement which would give rise to a mismatch outcome if it was tested under the Irish anti-hybrid rules and that mismatch outcome has not been counteracted. It appears to be intended that these measures are to apply to arrangements involving associated enterprises with at least a 50% common relationship. The imported mismatch provisions apply where there is a mismatch occurring outside the EU. The presumption in Ireland's anti-hybrid rules is that other EU Member States will have implemented similar counteracting measures so that there is no requirement (as permitted under ATAD2) to counteract imported mismatches for potential mismatches arising between entities taxable in EU Member States.

Structured arrangements

Even where there is no ownership relationship between the parties to an arrangement that gives rise to a mismatch outcome, the rules can apply to counteract a deduction or tax income where the arrangement has been designed to achieve a mismatch outcome, the benefit of which is priced into the arrangement.

International fund structures

The measures are relatively complex and apply to certain international fund structures which might have invested in Irish companies and where an associated enterprise relationship might exist which could bring within scope cross-border payments of deductible amounts. This complexity arises in part because of the difficulty in identifying the ultimate owners and determining if an associated enterprise relationship exists when tracing ownership rights through multiple tiers of international holding structures. Ireland's measures have attempted to foresee that taxation might arise at different levels through the structure by permitting taxpayers to treat a payment as being included for foreign tax purposes where, for example, it is taxable on an ultimate investor – but first, it is required to identify the relevant entities and tax territories in order to test if the deductible payment has been included in income for foreign tax purposes.

It is hoped that Revenue guidance will be developed in tandem with industry representatives in order to provide support in implementing the measures in the case of common international fund investment structures.

The draft measures, included in a Feedback Statement released during July 2019 for consultation, suggested that Ireland might seek to simplify the classification of foreign entities for Irish tax purposes by following the foreign tax classification of those entities. Feedback during the consultation period suggested that this approach might introduce further uncertainties into the Irish tax treatment of long-standing investment structures where Irish investors have based their analysis on the Irish tax treatment of receipts from such investments based on case law precedents that have evolved over time. In recognition of the complexities that classifying foreign entities can present when applying the anti-hybrid rules to arrangements with foreign entities, it is expected that detailed Revenue guidance on the application of case law precedents to the classification of foreign entities will be developed in the coming months.

Banks and other financial services entities

The Feedback Statement on the draft anti-hybrid rules asked the banking community whether seeking to exclude from scope certain loss-absorption regulatory capital instrument would be worthwhile. As this exclusion is permitted under ATAD2 only until the end of 2022, it was not considered that excluding them would provide sufficient long-term certainty for banks in Ireland on the treatment of these capital instruments. The Finance Bill measures do not reflect any exclusion for loss-absorption regulatory capital instruments issued by banks or other financial institutions.

The measures recognise that companies engaged in trades which include buying and selling of securities can engage in repo and stock lending transactions as a regular part of that business. These 'on market repo transactions' are excluded from the scope of the measures. This relief is available for Member States in implementing the anti-hybrid rules so as to ensure that the measures do not inadvertently affect market-based transactions.

Personal income tax rates (unchanged)

	At 20%, first	At 40%
Single person	€35,300	Balance
Married couple/civil partnership (one income)	€44,300	Balance
Married couple/civil partnership (two incomes)*	€70,600	Balance
One parent/widowed parent/surviving civil partner	€39,300	Balance

* €44,300 with an increase of €26,300 maximum

Personal tax credits (changed)

Single person	€1,650
Married couple/civil partnership	€3,300
Single person child carer credit	€1,650
Additional credit for certain widowed persons /surviving civil partner	€1,650
Employee credit	€1,650
Earned income credit (increased)*	€1,500
Home carer credit (increased)	€1,600

* Applies to self employed income and certain PAYE employments not subject to the PAYE credit

Help to Buy Scheme (extended)

Income tax rebate, capped at €20,000, for first time buyers of a principal private residence. The relief is 5% of the house value (capped at €400,000). No relief for houses valued greater than €500,000. Claimants must take out a mortgage of at least 70% of the purchase price. The scheme only applies to new builds, self builds or a converted building not previously used as a dwelling and not to second hand properties. The scheme will be extended until 31 December 2021.

Home loan interest relief granted at source on principal private residence* (unchanged)

Married/widowed** - First time buyers loan taken out from 2009 to 2012	
After year 7 (where applicable up to and including 2017)*	Lower of €900 or 15% of interest paid
2020	25% of relief available in 2017
Married/widowed - Other mortgages, loans taken out from 2004 to 2012**	
2017*	Lower of €900 or 15% of interest paid
2020	25% of relief available in 2017
Married/widowed - First time buyers loan taken out from 2004 to 2008**	
After year 7 and up to and including 2017*	Lower of €1,800 or 30% of interest paid
2020	25% of relief available in 2017
Single persons	
Thresholds set at 50% of those outlined above for married/widowed persons	

* Loans taken out on or after 1 January 2013 do not qualify for Mortgage Interest Relief. The relief available in 2017 was extended in Budget 2018 on a tapered basis to 2020
** Applies to civil partnerships/surviving civil partner also

Local Property Tax (varying rates) (unchanged)

Market Value less than €1,000,000*	0.18%
Market Value greater than €1,000,000: - First €1,000,000	0.18%
- Balance	0.25%

* Market Value less than €100,000 - calculated on 0.18% of €50,000. Market Value €100,000 - €1,000,000 assessed at mid-point of €50,000 band (i.e. property valued between €150,001 and €200,000, assessed on 0.18% of €175,000).
- Applies to residential (not commercial) properties. Exemptions for houses in certain unfinished estates and newly constructed but unsold property.
- Certain payment deferral options may be available for low income households
- From 2015 onwards, local authorities can vary the basic LPT rates on residential properties in their administrative areas. These rates can be increased or decreased by up to 15%
- LPT liability for 2020 will continue to be based on the value of the property as at 1 May 2013. Revaluation for LPT has been deferred to 1 November 2020.

Value Added Tax (unchanged)

Standard rate/lower rate	23%/13.5%
Newspapers, electronically supplied publications and sporting facilities	9%
Flat rate for unregistered farmers	5.4%
Cash receipts basis threshold	€2m

Dividend Withholding Tax (changed)

Rate	25%*

* With effect from 1 January 2020 (previously 20%)
** A modified DWT regime will be introduced from 1 January 2021 under which it is proposed to use real-time data collected under the modernised PAYE system to apply a personalised rate of DWT to each individual taxpayer

PRSI contribution (changed), Universal Social Charge (unchanged)

	%	Income
Employer	11.05%* (increased)	No limit
	8.8%* (increased)	If income is €386 p/w or less
Employee (class A1)**		
PRSI	4%	No limit**
Universal Social Charge	0.5% (unchanged)	€0 to €12,012***
	2.0% (unchanged)	€12,013 to €19,874
	4.5% (unchanged)	€19,875 to €70,044****
	8% (unchanged)	> €70,044

* 0.1% increase in National Training Levy from 1 January 2020 included in Employer PRSI for Class A and Class H employments
** Employees earning €352 or less p/w are exempt from PRSI. In any week in which an employee is subject to full-rate PRSI, all earnings are subject to PRSI. Unearned income for employees in excess of €3,174 p.a. is subject to PRSI. Sliding scale PRSI credit of max. €12 per week where weekly income between €352 and €424
*** Individuals with total income up to €13,000 are not subject to the Universal Social Charge
**** Reduced rate (2.0%) applies for persons over 70 and/or with a full medical card, where the individual's income does not exceed €60,000

Self-employed PRSI contribution, Universal Social Charge (unchanged)

	%	Income
PRSI	4%	No limit*
Universal Social Charge	0.5% (unchanged)	€0 to €12,012**
	2.0% (unchanged)	€12,013 to €19,874
	4.5% (unchanged)	€19,875 to €70,044***
	8% (unchanged)	€70,045 to €100,000
	11% (unchanged)	> €100,000

* Minimum annual PRSI contribution is €500
** Individuals with total income up to €13,000 are not subject to the Universal Social Charge
*** Reduced rate (2.0%) applies for persons over 70 and/or with a full medical card, where the individual's income does not exceed €60,000

Tax relief for pensions (unchanged)

- Tax relief for pensions remains at the marginal income tax rate
- The Defined Benefit pension valuation factor is an age related factor that will vary with the individual's age at the point at which the pension rights are drawn down
- Except where a Personal Fund Threshold applies, the Standard Fund Threshold is €2m

Capital gains tax (unchanged)

Rate	33%
Entrepreneur relief (reduced rate)*	10%
Annual exemption	€1,270

* Relief remains capped at lifetime limit of €1m chargeable gains

Capital acquisitions tax (changed)

Rate	33%
Thresholds	
Group A (increased)*	€335,000
Group B	€32,500
Group C	€16,250

*Increased Group A threshold applies to gifts or inheritances recived on or after 9 October 2019

Corporation Tax rates (unchanged)

Standard rate	12.5%
Knowledge Development Box rate	6.25%
Land (not fully developed) and non-trading income rate	25%
Exit tax*	12.5%

* Applies to unrealised gains arising where a company migrates or transfers assets offshore, such that they leave the scope of Irish taxation

Stamp duty - commercial and other property (rate increased)

7.5%* on commercial (non residential) properties** and other forms of property not otherwise exempt from duty.

* Rate of 7.5% applicable on and from 9 October 2019. Transitional arrangements will apply whereby the 6% rate will apply to instruments executed before 1 January 2020 where a binding contract existed prior to 9 October 2019.
** There is a refund scheme available to reduce the rate of stamp duty to 2% on certain residential development proprerty transfers. It is intended that the 2% rate will continue to apply to eligible property under the refund scheme.

Stamp duty - residential property (unchanged)

1% on properties valued up to €1,000,000

2% on balance of consideration in excess of €1,000,000

Deposit Interest Retention Tax (changed)

DIRT (rate reduced)	33%*

* 41% rate remains for exit taxes on financial products

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