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13 December 2023

Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
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By email to businesstaxpolicy@finance.gov.ie

Dear Sirs/Mesdames:

Re: Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax including technical consultation

We are pleased to submit comments on behalf of Deloitte in response to your 'Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax including technical consultation' of September 2023. We appreciate this opportunity to share our views and trust that you will find our comments valuable to the discussion.

We look forward to continued collaboration with the Department of Finance on this and other tax initiatives, and are available to discuss anything in this document, as needed. In the meantime, if you have any queries, please do not hesitate to contact us at 01-417-2200.

Yours sincerely,

Tom Maguire

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Daryl Hanberry
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Tom Maguire
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1. Executive Summary

The views expressed in this response echo those outlined to the Department of Finance in our response to the public consultation document of 22 December 2021. Our responses to the 'Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax including technical consultation' and the specific consultation questions are set out in Section 3 of this response.

Our overall position is that a move to a full territorial regime (substantial shareholding exemption, participation exemption for distributions, and a foreign branch exemption) will be a positive change to the Irish tax code and will only enhance Ireland's attractiveness as a location for companies. Adopting such a regime will bring Ireland more in line with other EU Member States and the Pillar Two rules.

In summary, the key considerations we recommend are;

- An Irish participation regime for distributions must be broad and as simple as possible and provide certainty to taxpayers.
- Any opportunity to simplify the Irish corporation tax code and protect the country's competitiveness for FDI should be at the forefront in the design of any new tax regime.
- The current Irish double tax regime provides an effective and de facto exemption. There should be little or no downside or risk to the Irish economy in introducing a participation exemption for distributions. Once the participation exemption is an optional regime any unintended consequences following introduction of the regime should be mitigated.
- The simplistic operation of the exemption available under section 129 Taxes Consolidation Act 1997 ("TCA 1997") for Franked Investment Income (FII) should be mirrored, albeit with minor variations suitable to a participation exemption for foreign sourced distributions.
- The participation exemption for distributions should not fully align with the current section 626B TCA 1997 exemption without amendments.
- The participation exemption should at least include all companies within the scope of the Pillar Two rules, as well as Inclusive Framework countries who have signed up to the OECD BEPS Pillar Two rules, EEA countries, tax treaty countries, and countries that have signed up to the Convention on Mutual Administration in Tax Matters.
- The Irish regime should provide for a full participation exemption with an optional taxpayer election.
- There already exists many measures in the Irish tax code which protect the Irish tax base, there is no need to introduce specific substance requirements for a participation exemption.
- The existing anti-hybrid rules should operate in parallel with a participation exemption for distributions.
- Where the taxpayer applies the participation exemption regime, and the distribution received is exempt from Irish tax, consideration may be needed to appropriately amending the current CFC rules.
- A move to an optional foreign branch profits exemption will likely result in a similar level of tax take from Irish companies but with reduced time and complexity associated with the preparation of the company's corporation tax computation and return. A move to such an exemption would also bring Irish law in line with that of competitor jurisdictions.
- Ireland should introduce a foreign source distribution exemption (participation exemption) and a foreign branch profit exemption while simultaneously providing for a broad simplification of the existing double tax relief rules in Schedule 24 TCA 1997.

2. Overall comments

We recommend that Ireland introduces a participation exemption into domestic legislation so that foreign sourced dividends and distributions are fully exempt from tax in Ireland. In addition, an exemption for foreign branch profits should be introduced at the earliest opportunity. The introduction of both such regimes along with the current exemption from tax in the case of gains on disposals of share under section 626B TCA 1997, will move Ireland to a territorial corporate tax base and bring the country in line with other EU Member States and OECD countries.

Currently, Ireland is the only EU Member State not to have a participation exemption regime for dividends/distributions and is only one of four OECD countries (along with Chile, Korea and Mexico) that does not provide a form of participation exemption for dividends/distributions. Twenty-six of the OECD countries fully exempt all foreign-sourced dividends received by parent companies while eight countries allow 95 percent or 97 percent of foreign-sourced dividends to be exempt from domestic taxation.[1]

While the Irish double taxation regime relieves double tax, which in many cases effectively exempts foreign dividend income from Irish tax, the double taxation regime is cumbersome and outdated and puts Ireland at a disadvantage compared to other tax jurisdictions for FDI.

In recent years Ireland has taken a series of tax measures from EU and OECD levels and adopted under Irish law. Many such measures are in response to the EU's Anti-Tax Avoidance Directives “ATADs”, and the various amendments to the Directive on Administrative Cooperation (DAC), as well as implementation of the OECD’s action plan on base erosion and profit shifting (BEPS). The Department’s 'Corporation Tax Roadmap' (2018[2] and 2021 editions[3]) provides an overview of recent changes to Irish corporate tax rules which include significant ATAD compliant Interest Limitation rules, ATAD anti-hybrid rules, and a mandatory disclosure regime under DAC 6. Further changes are imminent in the form of the OECD Pillar Two initiatives and the EU Minimum Tax Directive. The new tax measures in respect of outbound payments are due to come into effect from April 2024 in response to specific recommendations from the EU Commission under the European Semester Framework.

While acknowledging the substantial workload that legislating for Pillar Two brought about, the collaborative work engaged in by the Tax Administration Liaison Committee (“TALC”) BEPS group was beneficial in being able to discuss such important measures in advance of legislation being formalised. We would welcome a similar approach be adopted for a participation exemption.

In our view, an Irish participation regime for distributions must be as simple as possible and provide certainty to taxpayers.

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[1] Tax Foundation, Centre for Global tax policy, Tenth Edition, International Tax Competitiveness Index 2023, Appendix Table E.
[2] gov.ie - Ireland’s Corporation Tax Roadmap (www.gov.ie).
[3] gov.ie - Ireland’s Corporation Tax Roadmap January 2021 Update (www.gov.ie).

3. Consultation Questions

Part I – Dividend participation exemption

General features

1. Would the introduction of a participation exemption for dividends prompt changes to current or future corporate group structures? Please provide details of relevant considerations, including information on group structures and sectors as appropriate.

2. Are there design features in other jurisdictions that operate a dividend participation exemption regime that should or should not feature in the design of an Irish regime? Please provide details.

3. Are there design features in other reliefs provided for in the Taxes Consolidation Act, 1997 that should or should not feature in the design of an Irish participation exemption? Please provide details.

4. How can complexity be reduced in the design of a participation exemption, while also ensuring the objectives of the regime are achieved and eliminating opportunity for aggressive tax planning?

The participation exemption, if it is broad and simple, will only serve to enhance Ireland's attractiveness as location for multi-national enterprises (MNE) holding and operational structures. We recognise that effectively in many cases companies will not pay additional tax in Ireland on dividends from foreign subsidiaries under our current double taxation regime (Schedule 24 TCA 1997). From a tax perspective, Ireland has a de facto exemption on such dividend income. However, as commented on above, this regime is cumbersome and complex to administer and is competitively outdated.

In our view, given the de facto exemption that already exists in our law, then there should be little or no downside or risk to the Irish economy. Once the participation exemption is an optional regime which the taxpayer can elect to apply (see later comments on optionality in this response), any unintended consequences following introduction of the regime should be mitigated.

The introduction of a participation exemption regime for dividends and distributions will be a positive change to the Irish tax code and will only enhance Ireland's attractiveness as a location for companies. It should benefit corporate groups already located in Ireland by simplifying their tax compliance obligations and will be a factor for other international groups considering Ireland as a holding company jurisdiction.

The participation exemption regime should be as simple and straightforward as possible. Given the changes introduced in recent years in response to the EU's Anti-Tax Avoidance Directives "ATADs", and the various amendments to the Directive on Administrative Cooperation (DAC), as well as implementation of the OECD's action plan on base erosion and profit shifting (BEPS) and the introduction of the Pillar Two rules from 31 December 2023, any proposed participation exemption should be as simple as possible legislatively and administratively to operate.

In addition, looking to our domestic tax provisions, the exemption should be modelled on the tax treatment of dividends and other distributions made by a company resident in the State under section 129 TCA 1997. The simplistic operation of this exemption should be mirrored, albeit with minor variations suitable to a participation exemption for foreign sourced distributions which we cover in subsequent sections of this response.

As outlined in the Department's consultation document Member States must design their participation exemption regime in accordance with the EU Parent Subsidiary Directive[4]. This Directive is concerned with relieving double taxation in the case of distributed profits within the EU from a subsidiary to a parent company. Under the Directive dividend receipts can be exempt from tax or subject to taxation but with a tax credit applying; the latter was adopted by Ireland. In changing our approach and by moving to exempting dividends under a participation exemption regime the conditions attaching to the flow of dividends into Ireland from other EU Member states under the Directive are to be considered.

To the extent that the Department considers that additional conditionality should be brought about to such a participation exemption then in our view regard should be had to some of those contained in our holding company regime in section 626B TCA 1997. However, we are of the view that the participation exemption for distributions should not fully align with the current section 626B TCA 1997 exemption without amendments mainly for the following reasons:

- The exemption should be applicable to companies resident in all jurisdictions, possibly with the exception of those countries included on the EU List of non-cooperative jurisdictions for tax purposes (see comments below).
- All distributions received by all companies should be within scope of the exemption and, all distribution types, not just dividends.
- The exemption should not be subject to a requirement to satisfy a trading test with regards to shareholdings or to the sourcing of profits.

As we noted earlier, Ireland is an outlier by not having such a regime. There is significant anti-avoidance legislation already in our law brought about by the ATADs (e.g., CFC etc) and also domestic legislation (e.g. section 590 TCA 1997 etc). In addition, the participation exemption will be subject to our well established General Anti-Avoidance Rule contained in Part 33, Chapter 2 TCA 1997.

Specified Jurisdictions

5. What are your views on the potential scope of jurisdictions that should be eligible for an Irish participation exemption?

6. Should Ireland seek to align with international norms and, if so, what other country or countries should Ireland seek to align with in terms of the list of specified jurisdictions that qualify for a participation exemption?

7. Should the scope of qualifying jurisdictions for a participation exemption align with the scope of existing Irish reliefs relating to foreign subsidiaries, such as relief under section 21B or the section 626B participation exemption for gains?

[4] Section 831 TCA 1997.

In our view, to ensure Ireland's regime is competitive and simple, the exemption should apply without any regard to the location of the paying company's residence or similar concept.

The participation exemption should at least include all companies within scope of the Pillar Two rules, as well as Inclusive Framework countries who have signed up to the OECD BEPS Pillar Two rules, EEA countries, tax treaty countries, and countries that have signed up to the Convention on Mutual Administration in Tax Matters.

However, if the specified jurisdictions are to be limited then we would suggest that companies resident in a "listed territory" on the EU list of non-cooperative jurisdictions should be excluded from the exemption. Either reference to, or a similar denial of exemption, could be made to section 835YA TCA 1997 which provides that certain exemptions from the CFC charge will not apply for an accounting period where that CFC is resident in a jurisdiction included on the EU list of non-cooperative jurisdictions for tax purposes.

It is important that recognition is given to jurisdictions that do not have a concept of residency and therefore an alternative provision similar to residency must be allowed for. Regard may be had to Pillar Two rules[5] which provide that generally where a company or entity is tax resident under domestic rules that will be its location for Pillar Two purposes however, e.g., where it is not possible to determine the location of an entity then it is "located in the jurisdiction where it was created". Essentially, the jurisdiction where the company was created or incorporated could be considered where the jurisdiction does not have a concept of residency.

It is also important that the period for which the EU list of non-cooperative jurisdictions is clearly provided for in the legislation considering that the EU may update this list during the calendar year.

Method of relief

8. A participation exemption could operate as an exemption, in that the income is excluded from the charge to tax, or alternatively the income could be included in scope but with a deduction in arriving at taxable income. In your view, are there any advantages and/or disadvantages for one method of relief over the other? Are there other methods of relief that should be considered?

In our view the participation exemption should exclude the full distribution from the charge to Irish tax. An exemption method would of course be the simplest and most straightforward approach but may give rise to additional practical difficulties on other areas which we will outline as part of this submission. Any opportunity to simplify the Irish corporation tax code and protect the country's competitiveness for FDI should be at the forefront in the design of any new tax regime.

For example, we are mindful of the potential "subject to tax" or "liable to tax" issue[6]. Certain benefits provided by tax treaties depend on the taxpayer being "liable to tax" to qualify as "resident of a Contracting State"[7]. A full exemption from corporation tax on the receipt of dividend income or a distribution from a foreign subsidiary may be regarded by other jurisdictions as failing the "liable to tax" test. This is not a new issue, for example, certain Irish funds that are not subject to Irish tax at the

[5] Article 4(1) of the Eu Minimum Tax Directive, proposed section 111D(2) TCA 1997, Article 10.3.1 of the OECD Model Rules.

[6] Article 4 of the OECD Model Tax Convention, Resident provides in para 1 that – For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

[7] Example is the Ireland and the United Kingdom of the Netherlands, Article 4.

fund level because the investor are not Irish tax resident are not regarded by certain foreign jurisdictions as ''liable to tax" and therefore fail the test as required by the tax treaty. Where the policy intention is that the company is subject to Irish tax rules albeit a full participation exemption is applicable and therefore no actual payment of tax in respect of the dividend income is required, it should be considered that the taxpayer satisfies the 'liable to tax' requirement of certain tax treaties.

We also refer to the EU Parent Subsidiary Directive which provides for an exemption of withholding tax in the jurisdiction of the subsidiary and an obligation for the parent company's jurisdiction to either exempt or apply a tax plus credit system only if all of the conditions are satisfied. One of the conditions[8] is that the company *"is subject to one of the taxes listed in Annex I, Part B to the Directive, without the possibility of an option or of being exempt"*. The subject to tax requirement of the Directive must be considered to ensure that the benefits of the Directive are preserved from an inbound withholding tax perspective.

Relief for the full amount or only part of the dividend

9. In your view, should an Irish dividend participation exemption provide a full or partial exemption? Please provide reasons for your answer.

The Irish regime should provide for a full participation exemption. In our view there is no need to restrict the exemption to anything less than 100% for the reasons of simplicity and competitiveness outlined above. Such a full exemption is not uncommon, for example, twenty-six of the OECD countries fully exempt all foreign-sourced dividends received by parent companies.[9]

Types of dividend/distribution and shares

10. What should the scope of a participation exemption be in terms of the type of dividend or other distributions that may qualify? What are the specific types of distributions that you envisage should or should not be eligible for exemption?

11. Should a participation exemption apply to both income and capital distributions and, if so, how should a capital distribution be defined?

12. Is there a rationale for extending a participation exemption to other classes of shares beyond distributions in respect of ordinary share capital?

13. Should a dividend exemption only apply in respect of shares which, if disposed of, would qualify for the section 626B participation exemption? Please provide details in support of your response.

In our view all distributions should be within scope but see our points earlier should the Department consider the imposition of additional conditions. In our view the exemption should be as flexible and simple as possible.

The participation exemption should apply for all distributions regardless of the nature. It should not be necessary to define "capital distributions" if the exemption is written in terms such that it applies to all distribution of a company.

[8] Article 2, Council Directive 2011/96/EU.
[9] Tax Foundation, Centre for Global tax policy, Tenth Edition, International Tax Competitiveness Index 2023, Appendix Table E.

Minimum shareholding requirements

14. What are your views on the application of a minimum holding period in respect of participations qualifying for exemption?

15. Are there circumstances in which dividends received shortly after a share acquisition should qualify (for example if the shares are subsequently held for a pre-determined length of time)?

16. Should a participation be determined by reference to a percentage of ownership, voting rights and/or other criteria? What is the appropriate percentage of participation that should apply and why?

In our view the design of the participation exemption regime should be simple and free of unnecessary complexity. Ideally there would be no minimum shareholding percentage requirement. However, to the extent that the Department would consider imposing a minimum shareholding requirement then consideration could be given to similar terms such as those outlined in section 626B TCA 1997 and indeed that outlined in section 831 TCA 1997. Therefore, if such conditionality were necessary then, broadly the participation exemption will be limited to cases where the Irish resident company has a direct or indirect interest of at least 5% in the company from which the distribution is ultimately sourced.

Optionality

17. Are you in favour of allowing businesses to choose whether to apply an exemption or to retain the current system of taxing foreign dividends and claiming a foreign tax credit? Please outline the key reasons in support of your answer.

18. Having regard to the above, if you are in favour, please outline your views on what basis optionality would operate.

19. What anti-avoidance measures should apply in order to deter and prevent aggressive tax planning with regards to an optional exemption regime?

Ireland should introduce a full exemption as discussed earlier in this submission, with an optional taxpayer election. Otherwise, the company will be subject to tax on the respective distribution(s) with the potential for relief under Schedule 24 TCA 1997. This exemption should apply on a distribution basis i.e., the taxpayer should be able to select the distributions subject to the exemption. It must be recalled that Ireland already operates a de facto exemption as currently written under Schedule 24 TCA 1997 and therefore the company should be allowed to decide the applicable regime in respect of each distribution.

As noted earlier there is significant anti-avoidance legislation already in our law brought about by the ATADs (e.g., CFC etc) and also domestic legislation (e.g., section 590 TCA 1997 etc) in respect of companies which would make the potentially exempt distributions. In addition, the participation exemption will be subject to our well established General Anti-Avoidance Rule contained in Part 33, Chapter 2 TCA 1997. Therefore, it should not be necessary to implement additional anti-avoidance legislation in respective of this exemption. It should be recalled that our current de facto exemption in schedule 24 TCA 1997 already operates within the above anti-avoidance legislative environment.

Specifically, optionality

20. Should a participation exemption apply automatically once qualifying criteria is met, or should a business elect to apply the exemption?

21. Should an election apply on a subsidiary by subsidiary, dividend by dividend, year to year or other basis?

22. Should an election be irrevocable once made?

a. If not, what are the circumstances in which you would wish to opt-out of the exemption regime (and revert to the current system of taxing the income and claiming a double tax credit)?

b. If an election were to be revocable or apply for a specific minimum time period, what is the appropriate minimum length of time that an election should apply for?

23. Are there examples of other jurisdictions, in addition to the UK, that allow optionality in relation to their participation exemption and if so, what are the key features that would or would not be suitable in Ireland?

In our view, Schedule 24 TCA 1997 should be retained, albeit with certain suggested simplifications which we discuss further below, with the participation exemption being an optional regime.

Each taxpayer should appropriately elect possibly by indicating such election on their annual Form CT1. The election should not be irrevocable.

As commented above, the election should apply on a distribution basis and not be irrevocable. It is important that the method of election is simple and not subject to a time restriction like such which applies under section 291A TCA 1997[10]. The election should be within section 959V TCA 1997[11] so that the taxpayer can amend their corporation tax return within the provisions of that section. As commented on in this response, Ireland already operates a de facto exemption as currently written under Schedule 24 TCA 1997.

Interest Limitation

24. Would the potential for an increased interest expense restriction as a result of the exemption of dividend income influence your view on the desirability of a participation exemption?

In the calculation of EBITDA under the rules, the quantum of interest equivalent that may be treated as deductible in a single accounting period, the relevant entity is required to identify its “EBITDA” per section 835AAB(5) TCA 1997. A core component of EBITDA is the assessment of “relevant profit or loss”, defined in section 835AZ(1) TCA 1997 as meaning (inter alia) “the amount of profits on which corporation tax falls finally to be borne”. Profits in this respect should be read in light of section 4 TCA

[10] Section 291A provides that a claim must be notified to Revenue within 12 months from the end of the accounting period in which the capital expenditure giving rise to the claim is incurred.

[11] Section 959V TCA 1997 provides that a person may amend a return and self-assessment by giving notice in writing (or by electronic means, where relevant) to Revenue. Such amendments may, in general, be notified up to four years after the end of the chargeable period involved unless a Revenue office has started enquiries, an audit or other investigation.

1997 which defines the term as meaning income and chargeable gains. Similarly, the amount of profits on which corporation tax falls finally to be borne refers to *"the amount of those profits after making all deductions and giving all reliefs that for the purposes of corporation tax are made or given from or against those profits, including deductions and reliefs which under any provision are treated as reducing them for those purposes[12]."*

Foreign dividend income is brought within the charge to Irish tax, albeit sheltered by a foreign tax credit and/or deduction. In the normal course of events (i.e., without the operation of a participation exemption regime), taxation should be reduced to nil (or nearly nil) through a combination a foreign tax deduction with the tax liability on same sheltered by a foreign tax credit, where available. However, in some instances the foreign dividend income would be relieved in full by way of a foreign tax credit as opposed to a deduction. In such cases, the removal of this income from the calculation of relevant profit or loss could result in a lower EBITDA for that relevant entity. Accordingly, optionality with regards application of the exemption or taxing of the distribution, will maintain the status quo between the de facto exemption with the application of Schedule 24 TCA 1997, and the participation exemption.

In addition, the design of the Irish participation exemption regime must satisfy the EU fundamental freedoms (the freedom of establishment and free movement of capital).

Section 247(4A)(a) TCA 1997 operates to deny interest relief in respect of a loan made to an investing company by a person that is connected with it, if the loan is used by the investing company to acquire the ordinary share capital of a company from a connected company. Such a restriction is disapplied in the case of matching dividend income arising directly or indirectly from the use of the loan (per section 247(4A)(d) TCA 1997) which is chargeable to corporation tax at the level of the investing company. Where a participation exemption is introduced for dividends, certain loans availing of the exemption from section 247(4A)(d) TCA 1997 could find their interest relief restricted accordingly. While we are conscious that such anti avoidance provisions have been introduced into section 247 TCA 1997 to address specific concerns, we would suggest that with the introduction of the Interest limitation Rules in Finance Act 2021, the underlying policy rationale behind such specific anti avoidance should now be re-examined. We would also point to the ongoing need to simplify section 247 TCA 1997 in light of the additional complexity now associated with tax relief for borrowing costs.

Furthermore, any restriction to remove or restrict relief on borrowing costs in the case of dividends subject to a participation exemption would arguably undermine the operation of the relief itself as a charge on income. Under section 243 TCA 1997, charges on income are allowed as deductions against the profits of the accounting period in which they are paid. The deduction is a "deduction against total profits". It is not, therefore, a deduction made in computing any particular component of the company's income. In addition, Revenue have acknowledged that reliefs reducing "total profits" may be "pointed" to certain income streams within those profits and as such may relieve income other than foreign income (this has been recognised by the courts, see, *inter alia*, *Sterling Trust v IRC* 12 TC 868. We cannot therefore see a policy rationale for limiting interest relief where foreign dividend income is exempt as to do so would contradict the established and well understood mechanism by which a charge on income is used. This is particularly evident when we consider that pursuant to Finance Act 2017, section 247 TCA 1997 relief may be available on a loan used to acquire or lend to a holding company that indirectly holds ordinary shares in a trading company through one or more intermediate holding companies. Where the companies in such an arrangement are all Irish resident (including the investor), any dividend income receivable by the Investor would be treated as Franked investment income and thus exempt from tax. Notwithstanding this, tax relief may still be available in such cases

[12] S4(4)(c) TCA 1997.

and has been available for a number of years; we would therefore question why an amendment would now be required in the case of exempt foreign dividend income.

Lastly, we understand a review of interest relief will occur in the near term and we would suggest that the participation exemption would form part of that discussion.

Subject to tax rule

25. How should a participation exemption be designed in order to prevent double non-taxation?

Are there provisions of the current Irish corporation tax system, such as Controlled Foreign Company (CFC) and anti-hybrid rules, that could be enhanced in order to support this aim?

We are of the view that the Irish CFC regime would not require significant enhancements or amendments with the introduction of a participation exemption for dividends. Irish CFC rules are ATAD compliant and are functionally like CFC requirements in other EU and non-EU countries with participation exemptions. However, please refer to our comments later in this response on the CFC rules and a possible consideration of amendment to the current rules.

We are also of the view that no significant changes should be required to our anti-hybrid rules.

Substance in Ireland

26. What considerations are relevant to the design of substance requirements for a participation exemption that could be effective in promoting Ireland as a holding location for companies with economic substance in Ireland?

There already exists many measures in the Irish tax code which protect the Irish tax base, there is no need to introduce specific substance requirements for a participation exemption.

Irish Controlled Foreign Companies (CFC) rules in Part 35B TCA 1997 contain substantial substance-based requirements. See our comments later in this response on the CFC rules.

Further, the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS" “MLI” provides for a principal purpose test whereby a General Anti-Avoidance clause is introduced into any tax treaty where the treaty party jurisdiction also chooses a PPT option, essentially a General Anti-Avoidance Rule (“GAAR”) within each treaty similar in nature to our domestic GAAR. Therefore, a treaty partner which has adopted the MLI would have to adhere to this provision in order to claim treaty benefits in respect of dividends.

Trading requirement

27. What are your views on a potential condition of exemption whereby relief only applies to certain trading companies?

28. Should a participation exemption align with trading criteria applicable in other foreign subsidiary related reliefs such as section 21B and 626B? Please elaborate.

We are of the view that the exemption should be as flexible as possible and not subject to any requirement to satisfy a trading test with regards to shareholdings or to the sourcing of profits, as this can be overly restrictive and administratively burdensome on taxpayers.

As commented on earlier in this response, we do not believe that the exemption should align with the criteria applicable in section 626B TCA 1997 (unless certain conditionality regarding ownership is required but would not extend that to the trading requirement) nor the trading profits condition in section 21B TCA 1997.

Additionally, the regime should not apply a residence test for the payer jurisdiction or in respect of the underlying profits, as is a condition of section 21B TCA 1997. There should be no requirement to trace the profits of the payer company through multiple layers of a corporate structure to assess qualification for the exemption.

It is important that recognition is given to jurisdictions that do not have a concept of residency and therefore a provision similar to "residency" must be provided for. See our earlier comments on the Pillar Two rules for determining the location of an entity and an alternative "test" based on creation or incorporation.

The exemption should be in line with the tax treatment of dividends and other distributions made by a company resident in the State under section 129 TCA 1997 (see earlier comments).

Looking to similar participation exemption regimes internationally, there is generally no requirement to satisfy a trading test.

Transitional arrangements

29. Should there be a lead-in period before a participation exemption regime is introduced? If so, what is an appropriate length of lead-in time that should apply?

30. Would you still be in favour of introducing a participation exemption if unutilised foreign tax credits were lost?

31. Are there other transitional arrangements that should be considered?

It is vital that Ireland introduces a participation exemption for dividends/distributions as soon as possible and no later than 1 January 2025 for distributions received on or after this date. There is already a proposed one-year time gap between the proposed introduction of the participation exemption and the introduction of the Pillar Two rules. We do not consider any need for a lead in time, rather the optionality of the regime, as commented on earlier, should deal with any reasons that may otherwise necessitate a lead-in time.

Under the current Irish double tax regime, where foreign tax on dividends exceeds the Irish tax payable, the excess credit may be offset against Irish tax arising on other foreign dividends where the foreign tax is less than the Irish tax under Schedule 24 Para 9E TCA 1997. Unused credits may be carried forward indefinitely and offset in the same way in later accounting periods.

Under a participation exemption, we are of the view that unutilised foreign tax credits should be available to carry back to preceding accounting periods, possibly with a limit to three preceding periods. If this is not agreeable, the alternative whereby the distribution will be taxed will allow the company to utilise any foreign tax carried forward against taxable income, should that method be preferable. We have also outlined elsewhere in this response reasons for optionality to be a feature of the regime.

Consequential impacts

Franked Investment Income

32. In your view, what are the main opportunities or issues in applying similar treatment to domestic and foreign dividend exemption regimes?

33. Would you be in favour of aligning the tax treatment of domestic and foreign dividend exemption regimes, if this meant additional qualifying conditions would apply to the treatment of exempt domestic dividends?

As per our comments earlier in this response, the participation exemption should be modelled on the tax treatment of dividends and other distributions made by a company resident in the State under section 129 TCA 1997. The simplistic operation of this exemption, which is well established should be mirrored. The EU law treatment of dividends has already been established in the FII GLO cases (C-446/04 and C-35/11) such that no amendments were made to section 129 TCA 1997, the required amendments made to the tax treatment of dividends through section 21B TCA 1997 and Schedule 24(9I) TCA 1997. The credit brought about by the latter is being replaced by an exemption and as such we would argue that no further amendments would appear necessary.

Portfolio investors

34. What are the main advantages to the State and to businesses in the application of the portfolio exemption in its existing form under section 21B?

35. What are the arguments for or against retention of a portfolio exemption following the introduction of a participation exemption?

36. What would your views be on the introduction of a participation exemption if it required consequential amendments to, or removal of, the portfolio exemption?

37. What modifications or anti-avoidance provisions could be introduced to the tax treatment of portfolio investments in Ireland should a participation exemption exclude portfolio holdings?

There is no reason that we are aware of that the introduction of a participation exemption will require the removal of section 21B TCA 1997. Both regimes can exist independently where the taxpayer company is offered the optionality between electing to apply the participation exemption and subjecting the respective distribution to tax (in addition to the portfolio exemption in section 21B TCA 1997) as well as the reliefs under Schedule 24 TCA 1997.

As outlined in this response, our view is that the participation exemption should be as broad and simple as possible and apply to all distributions, capital and income, without trading or residency tests. Section 21B TCA 1997 is concerned with dividends derived from trading income based on the rules of that section. The policy intent is different but as noted above both can exist within the Irish tax code simultaneously.

In situations where the taxpayers is subject to tax in respect of the receipt of the dividend, the foreign dividend may be taxed at the 12.5% rate of corporation tax rather than the 25% rate subject to satisfying the conditions of section 21B TCA 1997. This tax treatment is important from the perspective of Ireland's competitiveness as a location for FDI and certainty on the tax system and adherence to EU caselaw cited earlier.

A possible amendment to section 21B is to consider broadening the residency condition so that it encompasses jurisdictions that do not have a concept of "residency". See our comments on the Pillar Two rules for determining the location of an entity and an alternative "test" based on creation or incorporation.

We are of the view that no specific anti-avoidance provisions are required to be introduced given the application of CFC, hybrids and GAAR provisions in our law.

Alignment with existing Irish reliefs for foreign subsidiaries

38. To what extent should criteria for a foreign dividend exemption align with criteria for other reliefs related to foreign subsidiaries, such as section 21B and section 626B reliefs?

39. Should a participation exemption for dividends align with the qualifying conditions for the participation exemption on gains under section 626B? If not, what are your views on a scenario where a participation in a subsidiary qualifies for one relief but not the other?

40. What are the features in other jurisdictions that operate participation exemptions for both dividends and gains that would or would not work well in Ireland?

We have commented on earlier in this response, we are of the view that the participation exemption for distributions should not fully align with the current section 626B TCA 1997 exemption, without amendments to that current exemption available. Nor should the participation exemption align with section 21B TCA 1997 for the reasons outlined earlier in this response.

Certain jurisdictions bring about a partial participation exemption and as noted earlier, in the interests of simplicity of application and increasing the attractiveness of our tax code, then such requirements should not be brought into our law.

Deductibility of expenses related to exempt income

41. What are the considerations in support of or against allowing a deduction for expenses related to exempt foreign dividend income?

In our view the need for symmetry between exempt income and expenses related to such income being restricted is questionable. As per our earlier comments, the participation exemption regime should be aligned insofar as possible with the tax treatment of FII under section 129 TCA 1997. Further, legislating for expenses "relating" to exempt dividend may be difficult in that it may prejudice a deduction for expenditure which relate to multiple income streams. It must be recalled that the participation exemption is in effect replacing a de facto exemption that currently exists regarding the reliefs for foreign tax that already exist in our tax code. Therefore, any significant change in this area would decrease our attractiveness as a holding company jurisdiction.

Close company surcharge

42. What are the considerations in relation to applying a close company surcharge in a regime incorporating a participation exemption for foreign dividend income?

In our view, the definition of investment income per section 434(1) TCA 1997 should be amended to include that distributions that are exempt, or could have been exempt, from tax under the participation exemption regime are excluded.

The definition of "investment income" in section 434 TCA 1997 which in turns feeds into the definition of distributable income that is subject to the close company surcharge explains that it *"… does not include…(b)any dividends or other distributions received by the company in respect of shares at a time when any gain on a disposal of the shares would not have been a chargeable gain by virtue of section 626B or would not have been a chargeable gain by virtue of section 626B if paragraphs (a) and (b) of subsection (3) of that section were deleted*". Consideration should therefore be given to extending this to distributions which meet the conditions of the participation exemption whether or not the exemption is applied i.e., it may be the case that the respective company elects of its application in the relevant accounting period. In order to ensure equality of treatment then consideration should also be given to removing the surcharge's application from Franked Investment Income. The law already contains a provision in section 434(3A) TCA 1997 that companies may jointly elect that the dividend or distribution paid between close companies, is to be treated for the purposes of section 440 TCA 1997 as not being a distribution.

Specific tax regimes

43. Please identify any corporation tax legislative provisions that could be affected by a change in how foreign dividends are taxed, along with consideration of the potential implications.

44. What amendments, if any, would be required to those provisions in order to ensure their continued operation in conjunction with a participation exemption?

Section 129A TCA 1997 essentially denies the tax treatment available under section 129 TCA 1997 and brings within the charge to Irish tax dividends paid by Irish tax resident subsidiaries but the profits out of which the dividend was paid arose while the company was not tax resident in Ireland. Such dividends are treated as "foreign sourced dividends" and therefore should be brought within the scope of the participation exemption regime for foreign sourced distributions.

As mentioned earlier in this response a possible amendment to section 21B is to consider broadening the residency condition so that it encompasses jurisdictions that do not have a concept of "residency".

Anti-avoidance rules

45. What type of anti-avoidance provisions should be incorporated into a participation exemption in order to eliminate opportunities for tax avoidance?

46. Are there features of existing anti-avoidance provisions that could be enhanced in order to support this aim?

In or view our existing suite of anti-avoidance measures are sufficient to eliminate any opportunities for tax avoidance or abuse of the Irish tax regime. The Irish General Anti-Avoidance Rule (GAAR) section 811C TCA 1997 applies to withdraw or deny a tax advantage that a person seeks to gain from entering into a tax avoidance transaction. A transaction is only a tax avoidance transaction, for the purposes of section 811C, if it would be reasonable to consider that it was not undertaken primarily for purposes other than to give rise to a tax advantage.

In addition, and as commented earlier in this response, the participation exemption regime must be consistent with already existing Irish tax legislation and align with the long-standing principal in developing anti-avoidance rules based on a principal purpose test.

Controlled Foreign Companies (CFC)

47. Are there other legislative amendments required to CFC rules in order to ensure they are robust enough in the context of a participation exemption?

The CFC rules under Part 35B TCA 1997 operate by attributing the undistributed income of a CFC derived from non-genuine tax avoidance arrangements to the Irish controlling or connected company. A CFC charge[13] will arise on the amount of the undistributed income attributed to "relevant Irish activities"[14] and there are non-genuine arrangements in place to secure a tax advantage.

Where a CFC charge arises, section 835R(6) TCA 1997 provides that the CFC charge shall be subject to corporation tax:

A. At 12.5% if the income would have been charged to tax under Schedule D, Case I (had it been accruing to the chargeable company); or

B. At 25% if the income would have been charged to tax under Schedule D, Case III, IV or V.

Accordingly, the undistributed income attributed to the chargeable company would therefore retain its character and would be taxed as if it had accrued to or was received by the chargeable company.

In a broad context, the introduction of a participation exemption should not impact on the attribution of undistributed income of a CFC to a chargeable company as amounts so attributed would continue to be subject to corporation tax in the normal manner. Irish CFC rules are ATAD compliant and are

[13] Section 835R TCA 1997.

[14] Section 835I TCA 1997. Meaning relevant functions performed in the State on behalf of a controlled foreign company group where such relevant functions are relevant to the legal or beneficial ownership of the assets, or the assumption and management of risks included in the relevant assets.

robust to protect against the artificial diversion of profits from Irish "controlling" companies to offshore subsidiaries in low tax, or zero tax, jurisdictions. A full participation exemption for distributions can operate in parallel without risk, in fact, most other EU jurisdictions operate both a participation exemption and ATAD compliant CFC rules.

However, the CFC rule operates by attributing undistributed income of the CFC to a chargeable company and the CFC charge will arises on an amount equal to the undistributed income. Therefore, if there is a situation where the foreign subsidiary, the CFC, distributes all of its profits to the Irish company, no CFC charge will arise on the basis that there is a zero undistributed amount. Where the recipient Irish company applies the participation exemption regime, that the distribution received is exempt from Irish tax then consideration may be needed to amend the current CFC rules. Consideration should be given to the effect of which could be that if the Irish company applies the participation exemption in respect of the respective distribution, then that income should be treated not being distributed for the CFC rules.

Anti-hybrids / Non deductibility in payor jurisdiction rule

48. What modification, if any, would be required to anti-hybrid provisions in order for Irish tax rules to remain ATAD compliant in conjunction with a participation exemption?

49. Are there specific features of anti-hybrid regimes in other jurisdictions that have a participation exemption that Ireland should adopt in addition to our existing anti-hybrid regime?

Overall, the existing anti-hybrid rules contained in Part 35C TCA 1997 should operate in parallel with a participation exemption for distributions.

Section 835Z TCA 1997 provides for a specific definition of "included" for the purposes of the anti-hybrid rules. Part a(iv) of that definition deals with territorial tax regimes and circumstances where the recipient company (the payee) is established in a country with such a regime. Where there is an exemption from Irish tax on the receipt of the distribution is a feature of the Irish tax system, it should not give rise to a mismatch outcome.

We recommend that section 835AB TCA 1997 is retained as this section remains necessary to ensure that purely hybrid mismatches are neutralised in other instances, for example in the interaction of the Irish participation exemption with other jurisdictions that operate a worldwide system of taxation.

Interaction with Pillar II of the OECD Inclusive Framework

50. Are there features of the Pillar II regime that should be considered and taken into account when designing a dividend participation exemption?

In assessing GloBE income, the EU Directive on Pillar Two ("the Pillar Two Directive") provides that "excluded dividends" and are to be excluded in the calculation of the effective tax rate (ETR) for the jurisdiction and are therefore not subject to any additional top up tax.

In assessing whether a constituent entity is located in a low- tax jurisdiction and therefore subject to the top up tax under the Pillar Two Directive, regard must be had to whether the jurisdiction in question is subject to an effective tax rate below the minimum tax rate of 15%. The effective tax rate (per Article 26) refers to:

Adjusted Covered taxes of the constituent entities/ net qualifying income of the constituent entities in that jurisdiction.

Taking the denominator firstly, the net qualifying income of the constituent entities is defined in Article 26(2) of the Directive as the difference between the qualifying income and the qualifying losses of the constituent entities. Qualifying income or loss is defined in the Pillar Two Directive as meaning the financial accounting net income or loss of a constituent entity adjusted in accordance with Chapters III, VI and VII. Article 16(2) of the Directive continues to require the financial accounting net income or loss of a constituent entity to be adjusted for specific items including "excluded dividends".

Therefore, to the extent that the accounting standards recognise the dividend income received by the constituent entity in the calculation of Financial Accounting Net Income or Loss, the provisions of the GloBE rules would require such income to be carved out. Such an adjustment would be required irrespective of whether a participation exemption is introduced or not into Irish law.

This proposed domestic legislation contained in section 94 Finance (No.) Bill 2023 (the Bill), as passed by Dáil Eireann, broadly mirrors the Directive. The proposed section 111P TCA 1997 provides that the calculation of qualifying income or loss for the constituent entity shall be adjusted by "excluded dividends". The definition of excluded dividends broadly means a dividend or distribution in respect of an ownership interest other than a dividend or distribution arising from less than 10% ownership and owned for one year or less.

For the purposes of calculating the effective tax rate, section 111AC TCA 1997 as provided for in the Bill provides;

"(2) For the purposes of this Part, the effective tax rate of an MNE group or large scale domestic group for a jurisdiction for a fiscal year, shall be calculated as follows: ACJ / NQI where— ACJ is the aggregate adjusted covered taxes of all the constituent entities located in the jurisdiction, and NQI is the positive amount, if any, of the net qualifying income of all the constituent entities located in the jurisdiction determined in accordance with subsection (3)

(3) The net qualifying income or loss of the constituent entities located in a jurisdiction for a fiscal year shall be calculated as follows: AQI-AQL where— AQI is the positive sum, if any, of the qualifying income of all constituent entities located in the jurisdiction for a fiscal year, and AQL is the sum of the qualifying losses of all constituent entities located in the jurisdiction for a fiscal year."

In our view it is not necessary that the participation exemption regime for dividends/distributions matches the definition of an excluded dividend for Pillar Two purposes.

Transfer Pricing

51. Do you foresee potential impacts arising from moving to a participation exemption for Ireland's transfer pricing regime?

We do not foresee any potential impacts from a participation exemption for Ireland's transfer pricing regime.

Multilateral Instrument provisions

52. Do you foresee a need to adopt any provisions of the Multilateral Instrument in conjunction with a participation exemption?

The "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS" the "MLI" provides for a principal purpose test whereby a General Anti-Avoidance clause is introduced into any tax treaty where the treaty party jurisdiction also chooses a PPT option, essentially a General Anti-Avoidance Rule ("GAAR") within each treaty similar in nature to our domestic GAAR. Our domestic law would be sufficient to cater for unlikely matters in connection with the participation exemption.

Any other issues

53. In your view, are there any other relevant considerations that should be taken into account in the design of a participation exemption for foreign dividends, or the integration of the exemption into the existing corporation tax regime?

The new regime needs to be simple and provide certainty to taxpayers. Schedule 24 TCA 1997 is a patchwork of differing legislative changes and is not fit for purpose. Our overall recommendation is to enact new legislation to introduce a participation exemption for distributions, subject to our comments on optionality earlier in this response.

Even with the introduction of a participation exemption simplification of Schedule 24 TCA 1997 must be a priority in tax policy.

As commented on elsewhere in this response, the current legislative measures which underpin the operation of Schedule 24 TCA 1997 are cumbersome, complex to administer and outdated. In considering the potential simplification of Schedule 24, broadening the categories of income on which relief may be obtained and simplification measures for the pooling and carry forward of unrelieved foreign tax should be a priority.

In line with our comments previously submitted to the Department in response to consultations on a move to a territorial regime, in respect of the categories of income for which relief may be obtained, at present, relief under Schedule 24 TCA 1997 is only afforded with respect to specific income streams (interest, royalties etc). We would welcome a simplification of Schedule 24 TCA 1997 which would distinguish between income sources:

A. Income subject to tax at the rate of 12.5%; and

B. Income subject to tax at the rate of 25%.

We also reiterate our comments on the provisions governing the pooling and carry forward of excess double tax credits are complex and not universally applied to all sources of income on which double tax relief may be available. While current provisions allow for the pooling of excess credits arising on relevant interest, there is no provision for the carry forward of excess credits arising on such interest to later periods. In addition, the conditions attaching to whether interest is "relevant interest" for pooling purposes can be onerous. In contrast, it may be possible to rely on pooling provisions with respect to dividends and to carry forward any unrelieved foreign tax to later accounting periods. The differing requirements imposed depending on the type of income create unnecessary complexity and should be simplified.

Certain tax treaties depend on the taxpayer being "liable to tax" to qualify as resident of a Contracting State and for the benefits of the treaty to apply. A full exemption from corporation tax on the receipt of dividend income from a foreign subsidiary may not be treated by the foreign jurisdictions as "liable to tax" test. As commented on earlier in this response, where the policy intention is that the company is subject to Irish tax rules albeit a full participation exemption is applicable it should be made certain that the taxpayer satisfies the "liable to tax" requirement of certain tax treaties.

Part II – Foreign branch exemption

54. Are foreign branches currently used by Irish companies? If so, in what jurisdictions are those branches located? What are the current advantages of or reasons for using a branch structure?

55. What activity is carried out in the foreign branch structures? Responses should

include, for example, sectoral information, whether activity is trading or passive, etc.

56. If foreign branch structures are not currently used, are there specific features of the Irish tax code that influence this decision? If so, please provide detailed information.

57. If an exemption for foreign branch profits were introduced, would a restructuring to use foreign branch structures be considered by existing Irish groups, and if so for what reason(s)? What substantial activities would take place in Ireland?

58. Would a foreign branch exemption be of particular relevance to any sectors? If so, please describe the sector(s) and outline the relevant considerations.

In our experience it is common for Irish companies to have a foreign branch. The reasons for Irish companies establishing a foreign branch are wide ranging. Factors include location of people, skills availability, infrastructure, compliance requirements, research and development opportunities, along with tax systems. Often companies will establish a foreign branch as a way of extending their operations into a foreign jurisdiction without there being a need to set up a separate entity.

In our experience the following are some examples of Irish companies that operate through a foreign branch:

- Irish companies operating in the technology and software industries will expand into foreign jurisdictions due to the availability of people and skills in those jurisdictions. Post the Covid-19 pandemic, the place where employers and employees are located are not essentially aligned. The mobile workplace means that companies may establish branches unintentionally or it may be due to the needs of their employees to work from another jurisdiction.
- For the engineering industry, the location of the work, availability of resources or the short-term nature of the contract may require a branch operation rather than setting up a separate legal entity.
- In the insurance and reinsurance sector, for EU regulatory reasons, Irish companies may establish a branch or branches in foreign jurisdictions.

- Financial services companies may require a physical presence in a foreign jurisdiction for sales and customer services purposes.
- Irish start-up companies looking to scale their business may establish a branch in the foreign jurisdiction in the short to medium term for many reasons such as availability of funding, market penetration, developing suitable workforce and infrastructure.

As commented on earlier in this response, the use, or not, of a foreign branch structure is often not dependent solely on the tax systems. The existing operation of double tax relief under Schedule 24 TCA 1997 would, in general, provide for relief either by way of a double tax credit or a partial credit with the remaining foreign tax relieved by way of a deduction in the computation of taxable profit for the Irish company. However, the complex calculations can result in cumbersome administration of the tax relief which may act as a disincentive for companies to locate, or who are located, in Ireland, to establish a foreign branch.

A move to an optional foreign branch profits exemption would likely result in a similar level of tax take from Irish companies but with reduced time and complexity associated with the preparation of the company's corporation tax computation and return. A move to a branch exemption would also bring Irish law in line with that of competitor jurisdictions.

59. What features of tax exemptions in other jurisdictions that operate both participation and branch exemption should Ireland consider? Please include:

a. the name of the relevant jurisdiction;

b. details of the features; and

c. why those features should be considered.

We recommend consideration be given to adopting the following features of the UK foreign branch exemption regime[15] with suggested modification for the Irish regime:

Optionality – A UK resident company can choose, in relation to the UK tax treatment of its overseas Permanent Establishments ("PEs") between maintaining a "tax plus credit" system (similar to the Irish double tax credit regime) and making an election to enter an exemption regime. We recommend that the Irish foreign branch exemption contain such optionality.

Election – Under the UK regime, companies elect for exemption (available from 2011) from UK corporation tax for the profits of an overseas PE of a UK company (other than certain insurance companies). Where an election is made, the profits and losses of all a UK company's PEs will be exempt from UK corporation tax.

We are of the view that the election should not be permanent, it should apply in respect of the accounting period concerned. As commented on in respect of a participation exemption for distribution, it is important that the method of election is simple and not subject to a time restriction and the taxpayer must have the ability to amend their corporation tax return within the self-assessment provisions[16].

[15] Section 18A CTA 2009.

[16] Part 41A TCA 1997.

Group companies –The election in the UK applies to a company only (company-by-company basis), i.e., where the company is part of a group, that election will not affect any other UK companies within the group and each group company can choose whether or not to make the election. An election for the Irish foreign branch exemption regime should apply on a company-by-company basis therefore other companies in the group are not impacted by the election.

Foreign Branch profits - The exemption should apply to both income and gains of the foreign branch.

60. Please outline the potential consequential considerations you envisage would be required should a foreign branch exemption be introduced, including the potential impact on:

a. transfer-pricing provisions;

b. anti-avoidance measures, including but not limited to ATAD/anti-BEPS measures;

c. special tax regimes for particular sectors or structures (for example, Part 26 TCA 1997 which deals with Life Assurance Companies); and

d. any other Irish tax code provisions.

Transfer Pricing

Section 25A TCA 1997 aligns Irish transfer pricing rules with the OECD's 2010 Report on the Attribution of Profits to Permanent Establishments ("the AOA guidance"). Section 25A(3) and (4) TCA 1997 require an assessment of the branch as if it were a separate and independent company and adopting the AOA guidance and approach. However, in pointing the taxpayer to these sections, section 25A(2) TCA 1997 specifies that such an approach is only to apply "for the purposes of section 25(2)….". Section 25(2) TCA 1997 in particular speaks to the treatment of a company not resident in the State, specifying that for the purposes of corporation tax, the chargeable profits of a such a company carrying on a trade in the State through a branch or agency shall be any trading income arising through or from the branch or agency (section 25(2)(a) TCA 1997).

Accordingly, section 25A TCA 1997 operates to import the AOA guidance in the context only of that section and in particular Irish branches of non-Irish resident companies.

With respect to treaty jurisdictions, we would note that treaties entered into by Ireland would adhere (in general) to the OECD Model Tax Convention. Accordingly, with respect to the attribution of taxing rights in the context of a permanent establishment, Articles 7(1) and 7(2) are of relevance.

The effect of Articles 7(1) and (2) attribute taxing rights with respect to foreign permanent establishments not only to the Contracting State but to the other Contacting State in which business is carried on through a permanent establishment, and to adopt the OECD Authorised approach accordingly. Irrespective of whether a foreign branch exemption is introduced or not, we would expect that Irish companies with foreign branches should nevertheless apply the relevant treaty articles in play to ensure the correct attribution of profits to such branches. Accordingly, legislative amendment in this regard should not be required.

Similarly, best practice would suggest that in the absence of specific pricing rules in the State of the PE, the OECD Authorised Approach would generally also be used for branches in non-treaty countries.

Such an approach would not, in our view, be adversely affected where a foreign branch exemption is introduced.

CFC regime

In line with our comments previously submitted to your Department on a move to a territorial regime, Article 7 of the Anti-Tax Avoidance Directive ("ATAD1") provides that:

"The Member State of a taxpayer shall treat an entity, or a permanent establishment of which the profits are not subject to tax or are exempt from tax in that Member State, as a controlled foreign company …."

ATAD1 accordingly recognises that a permanent establishment may be treated as a controlled foreign company in instances where the profits of such a PE are exempt from or are not subject to tax. We are aware of the policy objective and purpose of the existing CFC rules, being to prevent the artificial diversion of profits to low tax jurisdictions. The CFC rules currently contained in law could, in theory, be used to combat non genuine arrangements arising from the use of an exempt foreign branch; such an approach would negate the need for complex anti avoidance arrangements within the branch exemption rules themselves.

However, further potential legislative amendment would be required to appropriately bring exempt foreign branches within the scope of CFC rules as outlined below.

From an Irish perspective, a "controlled foreign company" is defined as a company which is:

(a) Not resident in the State; and

(b) Controlled by a company or companies' resident in the State.

The CFC provisions as currently enacted in Irish law are therefore limited solely to a company. The rules operate by attributing the *undistributed* income of a CFC, arising from non-genuine arrangements put in place for the essential purpose of avoiding tax, to the controlling company. Article 7(2)(b) ATAD1 provides that "Where an entity or permanent establishment is treated as a controlled foreign company under paragraph , the Member State of the taxpayer shall include in the tax base…. the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage."

Clarity would be required as to what constitutes "undistributed income" in the context of a branch. Furthermore, section 835Q TCA 1997 allows for the undistributed income of a CFC to be reduced by the amount of any "relevant distributions" made in the accounting period and similar clarity would be required here. Technical amendments may be required to Part 35B to address these challenges.

Anti-Hybrids

Section 835AB TCA 1997 is designed to provide to the effective interaction between the anti-hybrid rules and Ireland's existing worldwide system of taxation. In particular, the provisions allow for certain "disregarded payments" to be treated as included for the purpose of the anti-hybrid rules with the objective of only neutralising actual economic hybrid mismatches and not juridical mismatches which arise because of a worldwide system of taxation.

Section 835AB TCA 1997 refers to payments between the head office of an entity and a permanent establishment of that entity or between two or more permanent establishments of the entity. Where a foreign branch exemption is introduced, we would be of the view that section 835AB TCA 1997 as it currently operates in the context of branches/permanent establishments may cease to be beneficial and therefore may warrant amendment.

We would not, however, recommend a removal of section 835AB TCA 1997 as this section remains necessary to ensure that purely hybrid mismatches are neutralised in other instances (for example in the interaction of the worldwide system of taxation and US check the box elections).

Exit Tax

Article 5(1) ATAD1 provides for an exit tax charge which arises on the occurrence of any of the following:

(a) A taxpayer transfers assets from its head office to its permanent establishment in another Member State or in a third country insofar as the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;

(b) A taxpayer transfers assets from its permanent establishment in a Member State to its head office or another permanent establishment in another Member State or in a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer;

(c) A taxpayer transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State;

(d) A taxpayer transfers the business carried on by its permanent establishment from a Member State to another Member State or to a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer.

Section 627 TCA 1997 imposes an exit tax charge pursuant to ATAD1, applicable where:

i The company transfers assets from a permanent establishment in the State to its head office or to a permanent establishment in another Member State or third country (transposing Article 5(1)(b));

ii The company transfers a business (including the assets of the business) carried on by a permanent establishment of that company in the State to another Member State or to a third country (transposing Article 5(1)(d));

iii The company ceases to be resident in the State and becomes resident in another Member State or a third country (transposing Article 5(1)(c)).

With respect to (i) and (ii) above, such events refer to the movement of either assets or a business from an Irish branch of a foreign company as opposed to a foreign branch of an Irish company; as such we would not expect the introduction of a foreign branch exemption to interfere with such pre-existing exit tax charge provisions.

The existing Irish exit tax provisions have not, however, transposed article 5(1)(a) into law. The rationale for such an omission would likely stem from the worldwide regime of taxation currently operated in Ireland. In the event that an Irish resident company were to transfer assets to its foreign permanent establishment, the company would nevertheless retain taxing rights over assets transferred. If a foreign branch exemption were to be introduced, such assets would likely be removed from the Irish tax net; amendment may be required to existing legislation to take this into account.

Consideration should be given to instances where an exit tax charge may arise on the migration of tax residence from Ireland to another Member State or third country pursuant to section 627(2)(c) TCA 1997. In ordinary circumstances, where an Irish tax resident company migrates its tax residence to another Member State or third country, the company is deemed to have disposed of and reacquired of its assets, resulting in a charge to tax in respect of the assets which are no longer within the Irish tax net. In the context of a foreign branch exemption, we would suggest that such an exemption should exempt not only income of the foreign branch but gains on the disposal (and deemed disposal under exit tax rules) of foreign branch assets.

Pillar Two

The proposed section 111A(2) TCA 1997[17] provides that a "constituent entity" means

a) an entity that is a member of an MNE group or of a large-scale domestic group, or

(b) any permanent establishment of a main entity that is a member of an MNE group referred to in paragraph (a),

but does not include an entity that is an excluded entity within the meaning of section 111C;"

A permanent establishment in turn is defined in several ways with accompanying rules to identify the jurisdiction in which it is located.

In general, the proposed section 111D(4) TCA 1997 provides that for Pillar Two purposes a PE is deemed to be located in the jurisdiction where it is treated as a PE and liable to tax under the applicable tax treaty in force. Where no such treaty is in force, ss4(b) provides that the PE is deemed to be located in the jurisdiction where it is subject to income taxation based on its business presence, or where it is situated under ss4(c) (where the jurisdiction has no corporate tax system but where the jurisdiction would have had the right to tax the income if such a system were in place). The effect of such provisions means that for the purposes of calculating GloBE income for an Irish resident company with a foreign branch, the income of the branch would need to be identified and carved out.

Equally, the proposed section 111Z TCA 1997 provides for specific rules assigning covered taxes between jurisdictions; accordingly, taxes paid/payable by the Irish head office should be carved out in the calculation of the Irish Covered taxes when calculating the Irish jurisdictional effective tax rate.

The Pillar Two rules recognise that in order to allow Member States to benefit from top up tax revenues collected on low taxed constituent entities located in their territory, Member States should be able to elect to apply a domestic top up system. Accordingly, top up tax levied with respect to a foreign PE would likely be collected in that other Member State, with foreign PEs being treated as constituent entities for the purpose of the Pillar Two rules. Such an outcome is likely to arise irrespective of whether Ireland adopts a foreign branch exemption or retains a purely worldwide regime.

Income and gains

Section 26(1) TCA 1997 provides that *"Subject to any exceptions provided for by the Corporation Tax Acts, a company shall be chargeable to corporation tax on all its profits wherever arising".* Profits in this context is to be read in conjunction with section 4 TCA 1997 as meaning "income and chargeable gains". In the context of an Irish tax resident company, gains made on assets held not only in Ireland but also assets held by or attributable to a foreign branch are within the scope of Irish tax. We would

[17] Part 4A, Chapter 1 of TCA 1997 (as inserted by Finance (No.2) Bill 2023, subject to enactment).

therefore suggest that where a foreign branch exemption is introduced, it should exempt not only income of the foreign branch but also gains.

Unutilised foreign branch losses

Currently, where tax suffered on branch profits cannot be allowed as a credit, it may be possible to rely on pooling provisions under Schedule 24, para 9FA TCA 1997. Such provisions allow "unrelieved foreign tax" to be set against corporation tax arising on foreign branch income. Where the unrelieved foreign tax exceeds the total tax payable and cannot be relieved in the current year, the excess may be carried forward and treated as unrelieved foreign tax of the next accounting period.

We are of the view that unutilised excess foreign tax should be available to carry back to preceding accounting periods, possibly a restriction to the three preceding periods. If this is not agreeable, optionality of the regime should allow the company utilise any excess foreign tax against future taxable branch profits.

Schedule 24 TCA 1997 simplification

For reasons outlined earlier in this response, Ireland should introduce a foreign source distribution exemption (participation exemption) and a foreign branch profit exemption while simultaneously providing for a broad simplification of the existing double tax relief rules in Schedule 24 TCA 1997.

61. The international corporate tax landscape has undergone and is continuing to undergo significant reform. What impact do current and proposed future reforms have on your rationale for a transition to a foreign branch exemption?

There has been considerable change in the international tax landscape in recent years, Ireland has taken a series of tax measures at EU and OECD levels. Further changes are imminent in the form of the OECD Pillar Two initiatives and the EU Minimum Tax Directive as well as new tax measures in respect of certain outbound payments. Additional changes are afoot, EU initiatives, such as FASTER, BEFIT and the Unshell Directive "ATAD III", will likely impact on Ireland's tax code.

The move to a full territorial regime (substantial shareholding exemption, participation exemption for distributions, and a foreign branch exemption) will be a positive change to the Irish tax code and will only enhance Ireland's attractiveness as a location for companies. Adopting such a regime will bring Ireland more in line with other EU Member States and the Pillar Two rules.

Any undue delay, will in our view, put Ireland at risk of becoming a less attractive location with an outdated and inadequate corporate tax regime.

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