American Chamber of Commerce Ireland

Submission on the OECD's BEPS Project in an Irish Context – Public Consultation

Fiscal Division

Department of Finance

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Introduction

Since 2010 we have seen the greatest surge of US investment into Ireland in over a decade. Ireland remains a unique gateway for US investment into Europe. Today, over 115,000 people are directly employed in over 700 US firms in Ireland accounting for over 70% of all IDA supported employment. Collectively US companies have US $204b in foreign direct investment (FDI) in Ireland, representing almost 10% of all US investment in the EU. This investment remains instrumental in helping to create and develop a world class labour force; critical in dispersing technology and innovative capabilities across the economy and key in expanding the global reach of indigenous firms.

It is important to restate that it is in Ireland's national interest that Ireland's competitive corporate taxation regime with its headline rate of 12.5% remains. Ireland is a unique gateway for US mobile foreign direct investment into Europe. Any attempt to reduce Ireland's attractiveness as an investment location by harmonising taxes on enterprise across the EU will divert investment from both Ireland and the EU itself to other competing jurisdictions. Ireland should continue its constructive engagement in debates within the OECD, EU, and other forums. As we have stated before in other taxation submissions, it is imperative that the current international tax policy discussions focus on promoting international tax rules that are stable, predictable, non-discriminatory, transparent and administrable. These rules should not include onerous public disclosure requirements, but should aim to develop best practices and principled international tax policies that apply equally to all companies.

The Chamber has engaged in an extensive, structured and considered consultation with its members to raise their understanding of the OECD's Base Erosion and Profit Shifting (BEPS) project, benchmark Ireland's current tax competitiveness and gather their insights to form the recommendations within this submission. Importantly, this process has been led by executives within the multinational base, had direct input from over 100 firms and oversight from a total of 240 tax and finance executives of US based corporations operating in Ireland, and enjoys the endorsement of the Board of the Chamber.

Our overriding broad principle has been that Ireland has enjoyed a long term competitive, compelling and certain tax environment for FDI. While acknowledging that Ireland's tax system in the current climate must be a sustainable one which is seen as 'fair', it is important that Ireland's regime remains fit for purpose to retain and attract its continuing share of FDI into the country. Hence, the Chamber's submission clearly prioritises the areas where we want to see positive changes in Ireland's key tax offering.

The Chamber believes this Public Consultation process represents once in a generation opportunity to positively map out Ireland's overall tax offering for the next two decades, understanding that this is occurring against a background of international developments and changes that are impacting the Irish taxation policy environment. Nevertheless, we are of the view that overall Ireland (a country that exhibits high levels of transparency and enjoys significant substance around its portfolio of foreign direct investors) can be a significant net beneficiary from these changes if we act in our strategic economic interest, retaining investor confidence and our reputation as a business-friendly location while remaining internationally tax-compliant.

The Chamber will continue to monitor any developments in this area, and we are committed to working with the Government to offer our advice on how Ireland should engage with and respond to any international discussions on tax reform.

From its extensive consultation process, the Chamber has identified five broad “pillars” which are central to Ireland’s tax offerings as follows:

1. Intellectual Property
2. Research and Development Tax Credit Regime
3. Double Taxation / Withholding Tax Regime
4. Financing
5. Income Tax & Pension Policy

Our commentary on these “pillars” essentially covers the following questions posed within the consultation briefing document from the Department of Finance:

- “Q3. In a changing international environment what’s the best way for Ireland to ensure that its taxation provisions, for example in relation to intangible assets, are competitive?”

- “Q5. What are the critical considerations in shaping Ireland’s response to current international tax developments – either in general or with respect to particular issues?”

- “Q6. Are there any other priority areas or future challenges that should be considered as part of this process?”

While in no way reflecting its importance, at the end of this submission we have also considered Question 4. “Are Ireland’s company residency rules appropriate in the context of BEPS and other international tax developments?”

Pillar 1

Intellectual Property (IP) Introduction

Countries around the world are promoting the international competitiveness of their jurisdictions and are creating jobs by adopting policies that enhance the ability of companies to serve foreign markets. While recognising that the Irish Corporate Tax System affords a rate of 12.5% on trading income which is reasonably competitive, it is important to recognise that there is huge competition for mobile IP investment.

In our assessment, Ireland is not at the forefront of countries in which to locate IP and so any regime which attracts IP to Ireland would only bring an incremental benefit to the country. Given the current international tax environment we believe that it is imperative that Ireland seeks to continue to develop the attractiveness of its tax regime in order to encourage US MNC's to own, develop and exploit their intellectual property from Ireland.

In this context, we are of the view that an IP/Patent Box type regime (similar to the regimes that are currently in place in a number of other EU countries) should be the medium term strategic goal from an Irish tax policy perspective. Such 'exemption-based' regimes which do not require all significant research and development activities of the relevant IP to be specifically located in Ireland are compelling to companies operating in a global environment. We believe that such an IP/Patent Box regime is likely to be the most attractive type of regime to companies seeking to locate their IP and related activities in Ireland.

However, we do appreciate that there may be a number of external issues which could prevent the implementation of such a regime in the short term. On this basis, we believe that the near term strategic focus in this context should be to improve a number of key issues with the current Irish IP amortisation regime (Section 291A TCA 1997).

Overview of Current Amortisation Regime for IP

Section 291A TCA 1997 was introduced into Irish tax legislation in 2009. The Section provides that IP amortisation allowances are available to companies that carry on a trade in Ireland in respect of expenditure incurred on the acquisition of "specified intangible assets" provided certain conditions are met.

The acquiring company has the option of claiming the amortisation available over a 15 year period or in line with the amortisation of the IP in the company's statutory financial statements. The maximum amortisation available in any year is 80% of the relevant trading profits derived from the IP in that year. This 80% limit also includes any tax deductions available for interest payments made on funds that are borrowed to acquire the IP. Any excess amortisation can be carried forward for offset against future trading profits derived from the IP.

Section 291A TCA 1997 provides that any IP amortisation allowances claimed may be "clawed back" where the relevant IP is disposed of, ceases to be used for the purposes of the company's trade, or certain other events which can be regarded as a disposal in this context, within 5 years of the start of the accounting period in which the IP is used for the purposes of the company's trade for the first time.

Critique of current position

We are of the view that there are a number of significant issues with the current IP amortisation provisions which means that that the regime is a relatively unattractive option for many companies. These issues include:

1. Under the current amortisation regime the allowances will ultimately expire. This means it is difficult for companies to manage a consistent effective tax rate in respect of the profits derived from the relevant IP,

2. The current claw-back provisions are extremely onerous (particularly when companies do not have certainty on effective tax rate under the regime).

3. There are a number of practical issues in relation to the operation of the current regime, including the identification of what expenditure amortisation can be claimed on, and identifying revenue expenditure associated with the exploitation of the specific intangibles.

4. There are a number of issues with the regime surrounding the tax treatment of depreciation that ultimately mean it is difficult from an accounting perspective to reflect a consistent effective tax rate. We'd be pleased to engage with the Department further on this matter.

Our recommendations include steps that can be taken to deal with a number of these issues below.

However, it is important to note that the accounting treatment (which is a critical consideration for many companies) is always likely to be difficult under an amortisation based approach, and we believe it would only be altered under an exemption based regime

Recommendations

We have split our recommendations in this context into the following areas:

1. Quick wins/positive changes.
2. Amendments which would lead to significant enhancement of the regime.
3. Longer term objectives.

Quick Win Changes

The following are suggested amendments that we believe should be made to the current legislation to deal with some of the practical issues.

1. Amend Section 288/Section 291A TCA 1997 to provide that there is no claw-back of allowances previously claimed.

   The business models of companies are changing and while companies don't generally move IP on a regular basis, they need flexibility to move their IP at relatively short notice if required. The current claw-back provisions mean companies do not have flexibility to move IP within 5 years of acquisition into Ireland without giving rise to a claw-back of allowances already claimed. We believe this is an unattractive element of the regime for a number of companies that are considering locating their IP in Ireland. Accordingly, we recommend that the current claw-back provisions are removed. This change should be applicable to all companies; regardless of when the IP was acquired i.e. it should also apply to companies that are already claiming IP amortisation allowances under Section 291A.

2. Provide further guidance (potentially certain "safe harbour" tests) in relation to what activities should be regarded as trading in an IP context.

   IP amortisation allowances can only be claimed by companies that carry on a trade in Ireland. By their nature, IP activities can vary greatly on a company by company basis, with different business models requiring different levels of activities in respect of the development, maintenance and exploitation of IP.

   In this context, we believe that further guidance should be provided in relation to what level of activities undertaken by the IP owner and related Irish group companies should be regarded as carrying on an "IP trade".

   We believe that the following points should be specifically dealt with in the context of any guidance provided:

   a. Provide specific guidance on what activity is necessary for a company to carry on a trade of IP licensing.
   b. Provide guidance on various related group operations in Ireland that can be taken into account when considering whether the IP owning company can be considered "trading".
   c. Provide guidance on what IP development/exploitation activities can be outsourced to other group companies.

3. Amend the definition of "specified intangible asset"

Section 291A TCA 1997 defines what assets qualify for IP amortisation. Specifically, such assets are defined as a "specified intangible asset". Even though the definition of "specified intangible asset" is relatively broad, there can be practical difficulties when seeking to identify assets that qualify for IP amortisation e.g. allocation of value to each asset, whether certain types of assets (e.g. customer lists/databases) qualify.

We are making the following recommendations in this context. The definition of qualifying IP should be amended as follows:

   a. Include goodwill as a standalone asset within the definition of "specified intangible assets".

   b. Include customer lists/databases within the definition of "specified intangible assets".

   c. As an alternative to the first bullet point in the above recommendation, although it would not be a preferred approach, we would recommend that further guidance is provided on how the term "goodwill directly attributable to …" should be interpreted.

4. Remove interest payable on funds borrowed to acquire IP from the current Section 291A calculations.

   At present, any interest payable by a company on funds borrowed to acquire qualifying IP is taken into account when calculating the level of IP profits that can be offset by amortisation in any one year i.e. the 80% restriction. These interest payments are a funding cost of the company on the acquisition of a profit generating asset and in our view should not be included in the IP amortisation restriction calculation.

5. Increase the current year restriction on profits from the IP against which the IP can be offset to 90% of the relevant income.

   The current IP amortisation provisions provide that a maximum of 80% of the relevant IP income can be offset in any year. In order to increase the attractiveness of the regime, we recommend that this restriction is amended so that 90% of the relevant IP income can be offset in any one year.

Further to these suggestions, we should be cognisant that in achieving our objective of attracting more IP into Ireland, there will be a need to strengthen resources within the competent authority to have the capacity to engage with business (and thus give greater certainty) in the areas such as valuation and cross border dispute resolution . These are areas for improvement which international investment decision makers will need reassurances that the right level of resources are in place.

Amendments which would lead to a Significant Enhancement of Regime

Whilst we appreciate that the introduction of an IP/Patent Box regime is unlikely to be a short term option, amendments to the current regime which provide flexibility for dealing with the fact that the amortisation allowances will expire (due to the fact that overall allowance available is based on the expenditure incurred) needs to be considered.

Ultimately, we believe that amendments to the current regime which allow a company's amortisation allowances to reflect a more appropriate value of their IP would significantly enhance the regime's attractiveness. This would arise where it transpires that the initial cost incurred and significant further development work undertaken did not reflect the full potential value of the IP.

We believe that it is critical that changes are made to the current regime in this context if companies are to be encouraged to hold and exploit their IP in Ireland going forward and accordingly, we believe that the changes outlined below should be the key focus of any changes to the IP amortisation regime.

We have proposed three potential approaches that could be adopted in this context. If either of the first two of these changes were implemented, we believe, the attractiveness of the current regime would be significantly enhanced.

1. Allow for "revaluation" of allowances available every 3 years

   Our preferred approach would be to allow companies to revalue their IP amortisation allowances every 3 years. The amortisation allowance would be available on the market value of the IP at the time of the revaluation. The proposed approach would effectively deem a company to have incurred additional expenditure up to the market value of the IP in the scenario where the company has incurred significant expenditure and has had significant input into the ongoing development of the IP.

   The requirements into what is regarded as "significant input into the development of the IP" could be defined and could include provisions whereby the company must incur the R&D costs of the relevant IP, must have economic ownership of the IP developed, and that the employees of the company/related Irish group companies involved in the development, maintenance and exploitation of the IP would be in line with value of the IP, etc.

2. Allow for the transfer of IP tax efficiently between group companies
   An alternative solution in this context is to allow intra-group transfers of assets in a tax efficient manner. This could allow companies to claim IP amortisation allowances on the increased market value of the IP. Whilst this is not our preferred approach, we believe that these changes would provide opportunities to companies in this context and would significantly enhance the attractiveness of the IP amortisation regime.

3. Enhanced deduction for expenditure on acquisition of qualifying IP
   Whilst not our preferred approach is due to the fact that it does not deal with the significant issues created due to the ultimate expiration of the amortisation available, an alternative option to the solutions outlined above would be, under the IP amortisation regime, to provide companies with an enhanced deduction for expenditure incurred on the acquisition of qualifying IP.

   For example, Section 291A TCA 1997 could be amended to provide that expenditure up to [200%] of the expenditure incurred could be available for IP amortisation allowances.

Longer Term Goals

Whilst the recommended changes to Section 291A would, we believe, enhance the attractiveness of the regime, Ireland should have the ultimate aim of introducing an IP/Patent Box regime.

As already indicated, we appreciate that there are certain external reasons as to why Ireland would not seek to implement such a regime at this time.

However, we believe that it is important that Ireland continues to monitor these external developments and keep an open mind. To the extent other countries continue to implement/operate such regimes, and the external view of what terms are acceptable in respect of such regimes, Ireland should consider implementing such a regime in order to ensure that our overall offering in this context remains competitive.

There are certain attractive features of an IP/Patent Box regime for companies such as consistency of tax rate, consistency of accounting treatment, etc. that ultimately cannot be achieved under an amortisation based regime.

Pillar 2

R&D Tax Credit Regime

Ireland's R&D tax credit is considered to be a 'best in class' regime.

The regime has become very important to the FDI community in attracting and retaining R&D activity to Ireland. It is well established that the location of R&D activity has a significant impact on economic growth as it helps anchor related manufacturing and service activities in the State (i.e. the exploitation of the intellectual property created by R&D).

Current features of the Irish R&D tax regime which are key to Ireland's attractiveness include the 25% tax credit rate, the ability to claim a broad base of expenditure including capital costs and flexibility in how the R&D credit may be utilised.

Cognisant of Ireland's ambition to attract R&D investment, it has introduced a number of enhancements to the regime, as follows:

- Recognising that development activities could be qualifying in nature particularly in a manufacturing environment
- Monetisation of the R&D credit, thereby ensuring a return on investment over a shorter time period
- 'Above the line' benefit of the R&D tax credit thereby allowing the credit reduce the unit cost of R&D

The above features of the R&D regime have been successfully utilised by companies to 'win' or 'preserve' very significant FDI investment and employment in Ireland

The Department of Finance (DoF) undertook a detailed review of the Irish R&D tax credit in 2013 to determine the effectiveness of the regime. The published conclusion was favourable and endorsed the regime. The Minister for Finance expressed the view that the "scheme itself continues to be 'best in class' internationally and it remains a significant aspect of Ireland's successful formula for attracting Foreign Direct Investment."

The Department stated that Ireland has an accessible and understandable R&D regime, as follows:

- "Ireland follows the broad international norm to include all direct costs of R&D",
- "Ireland is one of a smaller number of countries who allow indirect costs to be included",
- "The fact that outsourcing can take place anywhere in the world is particularly favourable".

The regime is competitive when compared on paper to other regimes however there are key flaws in its structure, its administration and a lack of connected thinking with regard to accessing key skills and the exploitation of IP. This needs to be addressed as part of Ireland's approach to BEPS.

Critique of R&D Current Position

1. Administration of R&D Tax Regime

   The DoF review of Ireland's R&D Tax Credit specifically did not comment on the administration by the Irish Revenue Commissioners of the R&D tax credit. There is widespread concern within the FDI community that the above statements that underpin the 'best in class' status are paper based and are not matched in practice on the ground.

   There appears to have been a constant shifting of the Irish Revenue's view as evidenced by the change in philosophy expressed in successive Revenue Guidelines for the R&D tax credit. There has been a very explicit narrowing of the interpretation of the qualifying base of the R&D tax credit. Clarity is required on many specific areas such as qualifying expenditure, outsourcing of R&D and payments to third parties for services to ensure that the intended policy of reducing the unit cost of R&D is aligned to the administration of the scheme in practice.

   The OECD (OECD Economic Survey Ireland September 2013) made some unfavourable statements regarding the Revenue approach to the Irish R&D tax credit referring to "heavy auditing" and the "unpredictability of Revenue rulings" on audit acting as disincentives to companies to utilise the regime. It is essential that the Irish administration of R&D regime is enhanced to create certainty for the FDI community given the long term nature of R&D investment.

2. Incremental Nature of the R&D Regime

The Irish R&D tax credit is calculated on the incremental R&D spend over the corresponding R&D spend in 2003 (i.e. the base year). When the scheme was first introduced, it was intended that the base year would continually roll, however Finance Act 2009 fixed the base year indefinitely at 2003. While the fixed base year does provide a consistent base amount, it has proved restrictive to a number of companies who have a longstanding history of R&D investment in Ireland and who made significant R&D investment in Ireland in 2003.This makes it extremely difficult for those companies to compete internationally for R&D projects as well as being disadvantaged competitively versus new entrants to Ireland.

The base year is extremely complicated in the context of business acquisitions and global restructuring (i.e. mergers/demergers etc.). Further ambiguity has been created by the Revenue appearing to have changed their view on the technical analysis.

In recent Finance Acts, there has been a degree of flexibility introduced in relation to the base year. This is positive. However is on a very small scale and not material in the context of impacting on inward R&D-led investment decisions. The Minister for Finance has indicated that the intention is to eliminate the base year and move fully to a volume basis when the exchequer position permits. Again, while this is positive, it creates a degree of uncertainty in its own right and a definitive road map would be useful to allow companies plan R&D investments.

None of Ireland's main competitors (e.g. UK, Singapore) operate an incremental basis. The Irish regime in contrast is overly complex and administratively burdensome.

3. Flexible R&D Business Models

International R&D business models are continually evolving to become more flexible, collaborative and open. The Irish R&D regime legislation is drafted in a manner that focusses on activities undertaken by the company itself and is therefore restrictive in terms of facilitating R&D collaboration. The in-house focus is also a limiting factor on companies engaging with academia and the Irish research ecosystem.

In addition, the Irish Revenue's interpretation of the outsourcing provisions within the legislation as well as other areas such as the treatment of international assignees is unclear and unhelpful.

The inward looking nature of the legislation means that the regime is rigid and inappropriate when looking at either the early lifecycle stages of basic or applied research as well as open R&D methodologies.

A particular area of concern is the fact that R&D is being conducted more and more in virtual teams and many Irish R&D teams are contributing to global projects. Flexibility is required as typically certain deep expertise will be located in various specialised satellite centres globally. This needs to be catered for in the Irish regime to enable Irish companies remain competitive and relevant.

4. Innovation Tax Policy

Most territories competing for R&D investment recognise that the R&D tax credit is only one component of a suite of complimentary tax initiatives required to attract investment. Currently the Irish R&D tax credit stands in isolation as a tool to attract R&D investment and therefore does not lend itself to establishing Ireland as a hub for R&D centres of excellence.

We recognise the desire of policy makers to address this with innovations such as rules that allow company pass some of the benefit of the credit onto individuals directly involved in R&D projects, but as yet this has had little impact on R&D-led inward investment decision making. There is no compelling incentive to attract key R&D champions or specific skilled resources to Ireland nor is there any real competitive tax regime developed to exploit profits earned from developed IP within the Irish system.

R&D is clearly a fore runner to creating intellectual property rights – however there is currently no connected thinking between the Irish R&D tax credit and the current intellectual property regime. In fact, there is a specific restriction on claiming the R&D tax credit on expenditure that is capable of being claimed under Section 291A TCA 1997 (IP regime).

This legislation should be amended to ensure that specific costs incurred in undertaking a qualifying R&D activity under the general framework of Section 766 TCA 1997 should be allowable notwithstanding that the costs may be capitalised as a component of the valuation of an IP asset.

This is important in the light of our recommendations for improving Ireland's IP regime. Particularly in respect of the proposal to be permitted to revalue IP assets every three years based on R&D undertaken.

As outlined earlier, the Irish R&D tax credit regime currently stands on its own as a tool to attract R&D investment and there is no incentive to attract key R&D champions or specific skilled resources to Ireland.

The current SARP regime has proved ineffective in helping Irish based companies encourage the transfer of knowledge via sourcing the required skills into Ireland. As outlined elsewhere in this report, the regime needs to be improved in the following manner to reduce the cost barriers for companies in assigning staff overseas to establish a mandate/project in Ireland:

a. Simplicity: the current regime is not user friendly.
b. Competitive: the relief available needs to be increased and extended to include USC and PRSI.
c. Skills shortages: the regime should be extended to cover new recruits while gaps in specialised talent and leadership skills remain a challenge.

International comparisons

The important role innovative companies' play in their national economies has led to the enactment of R&D tax incentives and grant programmes internationally to encourage R&D investments. There are R&D incentive programmes in circa thirty countries worldwide and most are improving their regimes in an attempt to maximise opportunities. The types of incentives available include grants, super deductions, IP amortisation and reduced tax for income associated with IP.

Several EU countries have adopted "patent box" regimes that sharply reduce the corporate tax rate on qualifying IP income to low effective tax rates. These countries (including Belgium, France, Netherlands, and UK) are all strong competitors of Ireland in this space. The UK corporate tax reform has led to improvements in both their R&D regime as well as introducing a patent box. This is a particular challenge to Ireland as it has become relatively easy for US firms (and indeed Irish companies) to prioritise locating R&D activity in the UK over Ireland.

Ireland is in the minority in terms of adopting an incremental basis as opposed to a volume based regime. Others with an incremental basis appear to be Spain (the only other country in Europe), the US and South Korea.

Recommendations

Quick Win Changes

1. Administrative Certainty

   The administration of the regime needs to be clear and consistent. It also needs to reflect the overarching policy as outlined by Government and the Department of Finance and be strategically focussed on reducing the business cost of undertaking R&D in Ireland. Section 766 TCA 1997 should be amended to delete the term “in the carrying on….of research and development” and replace it with “for the purposes of research and development.”

   This is a broader test and is more aligned with the aim of reducing the business cost of undertaking R&D in Ireland. It is also more in keeping with the broader Revenue interpretation previously outlined in pre-December 2013 Guidelines.

2. Interaction with Current IP Regime

   The R&D legislation should be amended to ensure that certain costs incurred in undertaking a qualifying R&D activity under the general framework of the Section 766 TCA 1997 should be allowable notwithstanding that they may be capitalised as a component of the valuation of an IP asset.

3. Support Global R&D Projects

   The R&D regime needs to become more flexible in allowing Irish subsidiaries engage with connected parties (i.e. parent companies in overseas territories such as the US). Therefore the territoriality and connected parties restrictions contained in Section 766 TCA 1997 needs to be relaxed to allow Irish subsidiaries’ collaborations to be catered for in the legislation.

4. Emerging fields of science or technology

   The regime while remaining based on the OECD Frascati model needs to evolve to expand the qualifying fields of science to emerging areas such as the interaction between technology and human behaviour. This can be done by amending Statutory Index No.425 of 2004 and in particular Appendix 2 that outlines categories of activity that are not research and development activities.

5. Incremental Basis (i.e. base year)

   The incremental basis should be abolished to eliminate complexity and its focus on historical activity and documentation. At a very minimum, removing the discrimination against new projects from companies who made significant R&D investments in Ireland in 2003 is required with urgency. We acknowledge that the Government has indicated that the intention is indeed to move to a full volume basis for all companies - however the expected timeframe is ambiguous and needs clarification.

Amendments which would lead to a Significant Enhancement of Regime

1. Innovation Tax Framework

   Ireland should design a suite of complimentary innovation tax policy instruments to offer the complete range of front-end (i.e. Grants/credits) and back end (IP regime/tax rate) catalysts to attract FDI investment. This needs to be in tandem with an income tax regime that enables key international talent to be sourced and attracted to relocate to Ireland. We therefore reiterate the recommendations made in others pillars regarding the revaluation of IP assets every three years and the improvements to the competitiveness of Ireland's assignee tax regime (SARP) and its ability to attract key R&D resources both within the MNC's global organisation and externally.

2. Flexible R&D models

   Ireland needs to finesse the R&D tax credit regime to embrace collaboration, outsourcing and convergence globally. The current legislation is focussed too narrowly on "in-house" frameworks. Business models are moving rapidly towards flexible R&D models and workforce arrangements. S.766 TCA 1997 restrictions in respect of expenditure incurred by third parties who are under the control and direction of the claimant company should be abolished. This would increase the attractiveness of Ireland as an R&D hub. Equally, the caps in respect of outsourced R&D activities should be increased.

3. R&D Ecosystem

   It is essential that there is joined-up thinking across the entire Irish R&D ecosystem and therefore expenditure incurred by the FDI in stimulating and investing in the ecosystem should be incorporated into the tax credit regime. For example, the potential positive economic and social impact on the corporate (foundation) funding of SFI Research Centres involved in collaborative research projects should credits be allowed for these expenditures is worthy of analysis to further Ireland's innovation objectives.

Longer Term Objective

IP/Patent Box

As outlined in the IP pillar, we acknowledge that there are external reasons as to why Ireland currently would not implement a patent box regime. However, we recommend that Ireland continues to monitor the political debate regarding other regimes, such as the UK. Should the debate indicate that such regimes are deemed acceptable, Ireland should be in a position of readiness to implement a regime to ensure that our overall innovation tax package is competitive.

Pillar 3

Double Taxation / Withholding Tax Regime

Overview of Ireland's Current Position

In this section, we consider the treatment of withholding taxes on inbound and outbound payments. The primary focus is royalty payments, although we have commented briefly on dividend related matters also.

It is vitally important that Ireland can offer a competitive regime for dealing with withholding taxes suffered on inbound royalty payments. It is also important to at least maintain our current regime for granting relief for withholding tax on outbound royalty payments. Both are critical to ensuring that Ireland can compete internationally and be a hub for highly mobile, IP rich global operations.

As currently framed, our provision to grant relief for royalty withholding tax suffered on inbound payments is not competitive and requires a significant overhaul. Furthermore, while we have made good progress in recent years, further work is required to extend Ireland's tax treaty network. This would help to minimise the incidence of withholding tax being suffered by international companies doing business cross border from Ireland.

The American Chamber acknowledges that Ireland, aligned with its position as a small, open economy, affords a range of reliefs for withholding taxes on outbound dividend, interest and royalty payments and would urge that no changes are made to the relevant provisions (other than those that simplify the operation of the reliefs). This remains an important aspect of our offering for foreign direct investors.

In addition it is critical that efforts are made on a continual basis to expand Ireland's tax treaty network. It is vital that these efforts continue and that Ireland seeks to secure both a broad network of treaties and favourable, competitive terms. Particularly, Ireland is lacking treaties with many trading parties and for certain countries where we have treaties, the level of withholding tax permitted by the treaty can be high. We urge focus in these areas. We would be pleased to engage with the relevant Departments to validate and prioritise current requirements.

The relief afforded by Ireland for double taxation on inbound payments is an area, which in the view of the Chamber, requires consideration and amendment to maintain Ireland's competitive position, notwithstanding any changes that may be brought about as a result of the OECD Action on BEPS.

The mechanism for affording relief from double taxation on inbound interest and dividends is broad-based, and we urge that current rules are maintained and enhanced if possible.

However, a key focus should be to improve the relief afforded for withholding taxes suffered on inbound royalty payments.

Particular areas of concern to our members (which are expanded on below) include:

- the inability to pool credits,
- the formula based approach which serves to limit relief with respect to the actual '*Irish measure of income*' for many companies, and
- the unavailability of a carry forward for unutilised credits.

Having consulted with our members and considered competitive offerings in other jurisdictions, and bearing in mind comments above, our recommendations are set out below.

Critique of Current Regime

In considering what Ireland's enhancements and improvements should be with respect to the treatment of withholding taxes suffered on inbound royalty payments, we have outlined below the current position, and identified significant difficulties and limitations encountered by companies.

Ireland offers both a treaty-based credit relief and unilateral credit relief for foreign withholding taxes suffered on inbound royalty payments. The credit is limited to the amount of the Irish tax paid on a source by source basis. The determination of the income earned from each foreign source is based on a prescribed formula which requires the taxpayer to assume that the net income margin earned from each foreign source is equivalent to the overall net profit of the company irrespective of the actual profits earned from that source. Where companies invest heavily in Ireland in continually upgrading their product offering, this general investment is not attributable to any one foreign market and has the effect of reducing the company's capacity to absorb credit relief for foreign withholding taxes in countries where tax treaties do not afford relief. Where relief is not available under the credit mechanism, a deduction from taxable income is generally available for foreign withholding taxes suffered.

As a result of changes introduced in Finance Act 2012, there appears to be a basis for most taxpayers to deduct from their trading income foreign withholding tax borne in excess of the income from each foreign source calculated as described above, such that relief as a trading expense may be available for non-creditable taxes in excess of the Irish measure of income (IMI). However, this is extremely cumbersome and does not afford the taxpayers full relief for withholding tax suffered. In addition, due to the inability to carry forward excess credits in the period, no credit relief for any surplus is available to the taxpayer in future periods.

This contrasts heavily with the foreign tax credit relief which would be available to an Irish company which conducted its operations not in Ireland but through foreign branches and subsidiaries where relief for foreign taxes on profits from these foreign markets is available on a ‘pooled’ basis and surplus taxes may be carried forward for credit relief in future periods.

While Ireland has implemented various attractive measures to compete for international business, our withholding tax regime for in-bound royalties is not competitive in that it does not include a pooling or the ability to carry forward unused or excess credits. This significantly impacts upon our members decisions to do business from Ireland with certain countries. Furthermore, the regime is extremely complex and restrictive.

Furthermore, the view that a deduction cannot be claimed for withholding tax under general trading principles as incurred wholly and exclusively for the purposes of a company’s trade is very unsatisfactory, and the lack of clarity in this area is of concern for taxpayers, and creates uncertainty.

In relation to dividend income received by Irish holding companies, Ireland taxes those dividends (at 25% or 12.5%) and affords credit for tax withheld or underlying tax paid on the profits distributed. Although the end result tends in most cases to be no additional Irish tax, the administration and calculation is extremely complex. Ireland is an outlier compared to other jurisdictions in still having a credit system where many others have moved to a participation exemption-based regime. We would ask the Department to keep a close eye on developments in this regard. Specifically our Members would be in favour of a full participation based regime, but not necessarily if that was to come with the complexity of a controlled foreign corporation (CFC) regime. Clearly if a CFC regime was, for BEPS or other reasons to ultimately end up as a necessary feature of our regime, it would be important to move to a full participation regime to ensure we remain competitive.

Analysis of Approach Adopted in Certain Other Jurisdictions

The withholding tax credit regimes in many countries with which we compete for investment display better characteristics than those provided for under Ireland's regime. While differences arise in each, many offer characteristics that make them more competitive and attractive. In addition other countries are currently looking to improve their regimes. Ireland should monitor developments in other jurisdictions in considering improvements to the current withholding tax regimes.

We have provided in Appendix I an outline of some jurisdictions reviewed. Of particular note is:

- the availability of pooling and/or carry forward of surplus credits
- lack of a prescribed approach in determining the amount of income attributable to each foreign source to permit the taxpayer to claim credit relief based on its actual profits from each source and obtain better use of foreign taxes suffered,
- greater clarity on entitlement to claim a deduction from trading income of unrelieved foreign tax, as well as
- greater flexibility generally within the regimes.

Recommendations

In order to address the concerns outlined above, and ensure Ireland competes effectively for mobile IP rich foreign direct investment, we strongly urge consideration be given to improving the double taxation relief afforded on tax suffered on inbound royalty payments. Improvements to this area are key to ensuring Ireland is competitive internationally to win global mandates.

Quick Wins/Required Changes

With effect from 1 January 2014 there should be a removal of the requirement for Irish taxpayers to estimate the Irish measure of income limitation for foreign withholding taxes on a formula based approach – one size simply does not fit all. For example, consideration could be given to enable the taxpayer, particularly with different margins on products in different markets, to calculate based on actual net income from each foreign source. It should also be clarified that a full deduction for unrelieved or excess foreign withholding tax (WHT) should be permitted where credit is unavailable or limited.

In addition, unrelieved or excess foreign WHT should be deductible under general tax principles (on the basis withholding tax is an expense of business incurred "wholly and exclusively" for the purposes of a company's trade), if it is not otherwise deductible under specific WHT provisions.

In addition, immediate allowance should be made for the carry forward of any unutilised, surplus foreign tax credits (not taken as a deduction).

As an aside, it will be important to consider the interaction of withholding tax credit relief rules with capital allowances available on certain intangible property (under section 291A Taxes Consolidation Act 1997) where intellectual property is on-shored in Ireland. Relief for withholding taxes on income arising from the exploitation of assets eligible for relief under section 291A is currently ring-fenced against tax on income from those assets. As the operation of the allowances regime reduces the taxable measure of income and the amount of current tax payable, companies which invest in assets in Ireland face a further limitation on their ability to utilise withholding tax credits. This could potentially impact any decision to move intellectual property to Ireland. Ideally an enhanced regime would facilitate use of credits against tax on other income in order to minimise any loss of credit or deduction relief.

Amendments leading to significant enhancement of the tax regime

A key feature of a competitive offering in terms of tax relief for withholding taxes is the ability to pool surplus tax credits. Currently, in contrast to other areas of the Irish tax legislation (for example dividends, foreign taxes suffered on branch profits), no pooling is available for withholding taxes suffered on royalty income.

This is a significant disadvantage and renders Ireland uncompetitive in this area. However recognising that there may be cost implications to the introduction of the full scope pooling of credits, it may make sense to introduce this on a phased bases over the next 2/3 years.

However, if it was determined to phase it in (as opposed to making the bold move in FA 2014), this would need to be clearly expressed and delivered within an appropriate timeline.

Longer Term Objectives

We would stress the importance of continuing to develop Ireland's Tax Treaty network. As noted, Ireland has made positive steps in this area but we urge continued efforts. It is crucial for Ireland to continually improve on its competitiveness to attract and retain business into the future. In this regard, we would draw attention to other countries (e.g. the Netherlands and UK) which have succeeded in developing very extensive treaty networks while also offering broad-based withholding tax relief. As noted, Ireland is lacking treaties with many key trading partners. And in many instances where treaties are in place the level of withholding taxes remains high.

Finally in this area, while mindful of concerns regarding CFC legislation, any simplification which could be achieved to the taxation of inbound dividend payments and the treatment of dividend withholding tax suffered would be welcomed.

Pillar 4

Financing Pillar Introduction

The Current Competitive Position for Treasury Operations

Ireland historically is a well-known and attractive jurisdiction for treasury and financing operations (for financial services and non-financial services multinational corporations or MNCs).

Current features of the Irish treasury tax regime which are key to Ireland's attractiveness include 12.5% rate (requires substance/no brass plate operations permissible); no CFC; no thin-capitalisation / earnings stripping rules; unilateral credit relief for WHT on interest; a number of WHT/ DWT exemptions (incl. the quoted Eurobond and commercial paper exemptions); OECD based transfer pricing system; wide double taxation agreement (DTA) network; and a securitisation regime (Section 110) to facilitate raising of non-bank finance. A number of these, including the rate are not subject to changes under BEPS.

Cognisant of Ireland's role in the international tax arena, Ireland has introduced a number of changes over the years to combat tax avoidance, e.g. Section 247 matching income rules (2006), Section 110 PPN "subject to tax" test (2011), denial of interest deduction for connected party asset acquisitions under Section 840A and Section 247 (2011). Irish tax law contains a general interest deductibility tax avoidance test in Section 817A (2000) and connected party symmetry of tax treatment rules for interest in Section 817C (2003) amongst others. Ireland also has a GAAR, Section 811 (since 1989). It is also worth noting that under Irish domestic rules since 1976 (the introduction of corporation tax), Ireland has not allowed a deduction for interest which is dependent on profits (PPNs) other than in the context of Section 110 where strict conditions are satisfied.

So overall, Ireland has taken many steps to ensure that it is an attractive jurisdiction for treasury services companies (FS) with requisite substance. Artificial debt push downs are not permitted and in fact Ireland has gone further than some countries in relation to interest deductibility generally (see later).

Given the importance of this industry it is critical that whatever changes Ireland may embark upon as parts of BEPS do not make it less competitive for attracting and retaining FS investment.

A Critique of the Current Position

The global trend towards the centralisation of treasury functions / in-house banking amongst MNCs is continuing strongly, aided by a desire for greater control over, and a diversification of, sources of liquidity and liquidity risk. Technological and regulatory developments are also facilitating a greater centralisation of the treasury function.

Any legislative provision in response to BEPS that has the effect of frustrating or obstructing the flow of capital / finance serves as a disincentive to establish or expand treasury operations in Ireland and indeed the EU/OECD.

The Section 247 interest deductibility rules are complex and overly restrictive compared to several other OECD jurisdictions (incl. the UK and the US), although they have the desired effect of not permitting artificial debt push downs. The legislative restrictions here on the acquisition of related party assets are also more conservative than several major economies (incl. the UK and the US). Overall Ireland has taken significant steps to ensure that there must be substance here and that MNCs cannot artificially lever up activities here.

In response to BEPS some countries (e.g. France, Mexico, Austria) have taken unilateral action to amend their interest deductibility rules. Notwithstanding these responses, payment of interest by operating companies in these countries to Irish FS companies taxable at the 12.5% rate continue to be deductible. Similarly countries such as the UK, Germany etc have had strict rules on interest deductibility for some time and again payment of interest from these countries to Irish FS companies taxable at the 12.5% rate is generally deductible.

Some Perspectives on Best Practice in other Jurisdictions

Belgium and Italy have a notional interest deduction regime ("NID") on capital. Interestingly the UK Labour party talks about introducing an allowance for corporate equity (ace) if elected, to equalise the treatment of debt and equity for companies.

A NID regime facilitates and encourages activities such as financing and aligns the tax treatment of equity and debt, thereby enabling in-house finance companies/banks to strengthen their capital structure without forfeiting an interest deduction, which is attractive in an era of increased regulation post the financial crisis.

The NID regime has enabled Belgium in particular to become a well-known jurisdiction for group financing. Switzerland is also considering the introduction of a NID regime as part of the Swiss Corporate Tax Reform III, but which would be limited to surplus equity.

Subject to the unallowable purpose legislation and other tests (incl. thin capitalisation / debt cap rules) the UK does not specifically disallow an interest deduction for borrowings used to acquire a share investment from a connected party (and also has a comprehensive participation exemption regime).

Subject to thin-capitalisation and other rules, the US does not expressly prohibit an interest deduction for borrowings used to acquire shares or assets from a connected party, although certain restrictions apply to interest deductibility where funding is received from a related party.

Recommendations

First and foremost it is key that whatever changes are made to legislation in response to BEPS, Ireland retains its competitive edge to continue to attract and retain FDI in the area of FS. Genuine FS companies employing treasury experts and carrying on bona fide commercial operations here should not be impacted by the BEPS Actions.

Accordingly an important objective for Ireland would be to hold on to what currently works, in particular our corporate tax rate of 12.5%, the Section 110 regime, no CFC rules, no thin capitalisation rules, the quoted Eurobond and commercial paper WHT exemptions and the excellent treaty network.

Overall, the Irish tax regime for treasury companies is very comprehensive in light of the changing international tax landscape and the objectives of BEPS. Irish companies have to comply with strict criteria to deduct interest whether in a trading or holding company context and artificial debt push downs are not permissible.

Certain hybrid structures enable groups to obtain benefits where structured cross border, but these benefits do not arise from eroding the Irish tax base. It is felt that with our comprehensive rules on interest deductibility, wide anti-avoidance legislation around these rules, and lack of base stripping caused by hybrids, Ireland should not rush to enact changes under Action Item 2 or 4 (see below).

As part of BEPS, under Action Item 4, an opportunity may also arise for Ireland to revisit its rules on interest deductibility and bring them more into line with some other OECD jurisdictions. (However, we certainly should not relax the rules on artificial debt push downs).

Over time if changes are made to Irish domestic law in response to BEPS Action items on financing (both hybrids Action Item 2 and treaty abuse Action Item 6 in 2014 and see next para for 2015 Actions) the changes should be delayed until a multilateral, coordinated and consistent approach is adopted across OECD states. In particular, decisions on changes to Irish domestic law should not be taken until there is clarity on the particulars of tax reform in the US.

Given that hybrids are only one cause of cross-border tax mismatches, it is important that the proposed hybrid and treaty abuse rules be coordinated with other BEPS actions, including the work on CFC rules (Action Item 3), interest deductibility (Action Item 4) and harmful tax practices (Action Item 5). Action should be taken only when the impact of the proposals under those other BEPS Actions can be fully considered and taken into account.

The complex area of imported mismatches in Action Item 2 warrants special mention. These rules as drafted are extremely complex and will most likely create many problems in practice. As a policy matter the question arises that if two countries involved in a hybrid transaction make policy decisions not to impose taxation it does not seem appropriate for a third country to step in and impose taxation through denial of a deduction. Accordingly this rule should ideally be abandoned in its entirety. If the proposals proceed, our recommendation would be that a narrowly targeted anti-abuse rule be applied.

The scope of Action Item 2 on hybrids should be confined to related party transactions where a controlling interest (>50%) is present.

Action Item 6 (treaty benefits) also holds potential negative implications for Ireland as a financing location if implemented as is. Our recommendation would be that either a general anti-abuse rule be included, or limitation-on-benefits rule ("LOB") be included (with derivatives benefits clause) but not both. However both are potentially problematic for Ireland and maybe a possible alternative might be that a better understood definition of beneficial ownership (around substance/employment) is implemented. There is no doubt that treaty benefits should be removed where a structure has been artificially set up solely for that purpose but the concern is that any changes could impact genuine commercial activities. It is also preferred that the outcome of Action Item 6 will be implemented as and when Treaties are renegotiated.

Care should also be taken to ensure that Action Item 15 on multilateral instruments does not erode the benefits of the treaty network built up over many years.

The possibility of a notional interest deduction (NID) regime for Ireland should be investigated. A NID regime should aid Ireland's attractiveness as a treasury / finance location in certain respects. Care, of course, must be exercised to ensure the resultant Irish effective rate of tax does not decrease to an unacceptable level.

Ireland should also consider grandfathering existing arrangements if changes to legislation are to be made.

Ireland should also keep a close eye on changes to tax rates in OECD states. Whilst the 12.5% rate is Ireland's long standing brand, any changes (up or down) could create unwelcome uncertainty for FDI.

As a longer term goal but as part of BEPS the Irish Government might consider what action can be taken to get Ireland removed from black lists (CFC, tax havens etc.) to reflect the good standing of its tax regime with tax authorities worldwide.

Pillar 5

Income Tax and Pensions

Our member companies are of the view that fully loaded, income tax, PRSI and USC combined are at a level which is making it very difficult to retain and attract key individuals and specialised talent in Ireland. A marginal tax rate in excess of 50% is excessive and a step too far. When we compare Ireland to its key competitors, (mainly the UK and the US) the take home pay levels of Irish employees are substantially lower.

In the context of a focus in the BEPS process of aligning profits and activities it will be increasingly critical for companies to ensure that key executives are in Ireland to substantiate the key functions underpinning the profits of the organisation. Hence there is also a requirement for Government to provide a clear roadmap on the future makeup of the personal tax offering in Ireland.

We set out below our member's recommendations for income tax reform. We have concentrated on three main areas and also set out some comparisons between the Irish regime and the current regime in the Netherlands:

- Income tax
- Special Assignee Relief Program (SARP)
- Pensions Policy

1. Income Tax And Talent

   The relatively early point at which income is exposed to the highest marginal income tax rate is especially uncompetitive for a trading economy reliant on a highly open labour market within Europe. This is important as our member companies are of the view that fully-loaded (income tax, PRSI and USC combined) income tax burdens on skilled workers are now at a level which is making it very difficult to retain critical technical and leadership talent within the jurisdiction. The current position is also impacting our ability to attract talent to take up open positions in companies.

The current marginal tax rate of 52% when one includes PAYE/PRSI and USC is amongst the highest when compared with countries that Ireland currently competes with for investment. Hence we recommend that;

a) the marginal rate of income taxation should be reduced with a clear roadmap to reduce to a rate below 50% with the aim of retaining and attracting specialised and leadership talent.
b) the point at which employees hit the marginal tax rate should be increased to boost average employee's take home pay.
c) consideration should be given to a review of the benefits which are exempt from the BIK provisions with a view to enhancing the options available to employers in this area to encourage employee productivity and reward exceptional effort.

The cost to the employer of employing people has a direct bearing on employment numbers. We must ensure that labour costs are competitive both from the employee and employer perspective. We recommend that changes to Social Security costs and benefits should not adversely impact upon costs in the private sector. Employer's PRSI is a direct cost on employing staff. Higher charges would have a seriously detrimental effect on the ability of industry to hire and retain staff within Ireland.

We continue to call for the extension and broadening of the qualifying criteria for existing PRSI reliefs and exemptions with a view to lower Employers PRSI being used as an effective tool to drive additional headcount in existing companies.

2. Special Assignee Relief Program (SARP)

We refer to our recent detailed submission dated 12 May 2014 which was part of the Public Consultation process in relation to SARP.

We welcomed the introduction of a new assignee tax regime (SARP) in 2012 aimed at attracting leadership executives to relocate to Ireland. Again, the ambition is that such transferees will bring with them investment opportunities and the creation of new jobs. Feedback from our members suggests that, as it is currently designed, the existing regime is not fit for purpose. Ireland is thus losing out on investment opportunities and the creation of new jobs they bring with them.

We have set out below some further recommendations in relation to the SARP regime and how the offering may be enhanced to ensure Ireland remains an attractive environment for expatriate employees.

a) The exemption should be increased to 40% and the relief should be extended to USC and PRSI to make the regime competitive with other international regimes.

b) The relief should be simple to administer especially in the context of the many other issues that assignees need to consider when moving to Ireland. In this regard we believe that the current process of having the individual seeking prior approval in relation to making a claim be abolished, with the responsibility to administer the relief resting with the employer in line with the self-assessment regime that applies to all other taxes. The proposed change to a scheme which is administered by the employer is consistent with the existing provisions which allow SARP relief to be granted at source through payroll, and can be underpinned by reporting obligations if necessary.

c) The threshold of Eur500K should be abandoned in order to attract the most experienced, influential and valued individuals with the required skills in their industry to Ireland.

d) The exemption should apply to new hires and the existing condition of at least 12 months prior service with the foreign employer should be removed.

e) The requirement that the claimant must be resident in Ireland and not resident elsewhere should be removed. The application of this rule means that at a minimum, SARP is not available for the year of arrival or departure. As each country defines residence differently it may also mean that an assignee may not qualify for the relief at all, depending on how their home country determines their tax residence status.

If the current regime cannot be enhanced then the scheme should cease and be replaced with a new assignee scheme.

Pensions

It is of utmost importance that pension policy changes do not adversely impact upon the sustainable competitiveness of doing business in Ireland. Our views in relation to pension policy remain as set out in the Pre-Budget Submission 2014, in particular with regard to maintaining the Standard Fund Threshold ("SFT") at its current level, recognising it has significantly decreased in recent years. We have provided additional consultation on this specific issue in our letter to the Department on July 12th 2013.

In addition, we would be wholly opposed to any change which would give rise to a restriction in the age-based thresholds and annual earnings cap which determine the maximum pension contribution of an individual qualifying for income tax relief. Any such amendment would only serve to further dis-incentivise individuals from contributing to the funding of their future pensions.

There remain many uncertainties in relation to the whole areas of pensions especially in light of the decision by government to extend and increase the levy in Budget 2014. This has tended to discourage individuals from making contributions and is inconsistent with the overarching policy of encouraging individuals to make provision for their retirement and to reduce dependence on the State pension alone as a source of income in retirement. Therefore we recommend that:

a) The pension levy should be dropped in Budget 2015 as promised.

b) The individual's Personal Fund Threshold and the Standard Fund Threshold should be increased in line with the Consumer Price Index and indexation should occur automatically each year.

Comparator Regimes

In the context of the SARP, we believe that the Dutch '30% regime' for expatriates is an appropriate comparator, and is particularly relevant as it is operated by a country which directly competes with Ireland for FDI. The concession consists of a total tax deduction equal to 30% of employment earnings, plus exemption on certain benefits in kind, such as school fees paid for by the employer. The 30% regime has a number of notable differences compared to SARP, e.g.

a) The salary threshold is set at a considerably lower level than is the case in Ireland (€35,770, but can be lower, e.g. €27,190 for graduates under 30 holding a Master's degree). This compares with an entry point of €75,000 in Ireland.
b) While the employee must be recruited from abroad there is no prior service requirement with the same employer
c) The 30% tax deduction is applied to total employment income – i.e.no 'floor' and 'ceiling' as in Ireland (where the upper ceiling on qualifying earnings is set at €500,000).
d) The relief is given for 96 months (8 years) compared to 3 years in Ireland

Given the performance of the current SARP regime, it should be noted that any enhancement that encourages uptake would have a net positive effect on income tax revenue for the State.

Company Residency Rules for the 21st Century

The Consultation Document asks specifically *"Are Ireland's company residency rules appropriate in the context of BEPS and other international tax developments?"* The question is clearly framed against the background of a focus by recent US Senate Hearings and the OECD on the concept of Irish registered / incorporated non-resident companies (IRNRs).

Much of the commentary on the issue or IRNRs misses 3 fundamental points:-

- The primary concept of residency for Irish corporate tax purposes, based on where a company is managed and controlled, has existed since the foundation of the State. It was not introduced to facilitate tax planning by US or other multinationals.

- There is no erosion of the Irish tax base or loss to the Irish Exchequer from the use of IRNRs. Such companies have no Irish operations, no Irish income, no Irish assets and no Irish employees. As such there is no reason, from a solely Irish tax perspective, as to why Ireland should be seeking to bring such companies within the charge to tax here.

- The primary usage of IRNRs is by US multinationals who seek not to escape tax, but to defer the US tax under specific provisions meant to make their US companies competitive with non-US multinationals. Given the US tax system seeks to oversee the global tax affairs of US headquartered companies, the US is perfectly positioned to address the issue itself when it sees fit to do so.

However, the Chamber understands that the BEPS process is clearly a political one which is seeking to change some general tax principles. While accepting the principle that Ireland wants to ensure that its tax regime is seen globally as "fair", there are a variety of views over the timing of any moves on Ireland's corporate residency rules.

The overriding principle is Ireland should not unnecessarily put itself at a competitive disadvantage for foreign direct investment.

In that regard consideration should be given to the following:

1. If and when Ireland does make changes to its corporate residency rules, before, or at the same time, as any such change Ireland should make detailed announcement of the positive changes to the 5 "pillars" outlined in this documents (Intellectual Property / R&D / Double Taxation / Financing / Income Tax & Pensions). Indeed Ireland could significantly enhance its reputation as a forward looking, business friendly advocate by pre-emptively and unilaterally making separate standalone announcements in these areas.

2. Ireland could go ahead and make a public announcement to the effect that Ireland recognises the concern some countries in the OECD have raised over the use of IRNRs to facilitate the deferral of tax otherwise due in their home countries. Ireland is and remains committed to ensuring a level economic playing field in the global market place. Therefore, if OECD consensus is reached and competing jurisdictions make similar changes to their regimes, then Ireland will move swiftly to phase out and eliminate these structures by providing that all new Irish entities will be considered resident in Ireland and providing for the domiciliation of all non-Irish resident entities within a 7 year time frame.

As a matter of principal where “grandfathering” arises, having regard to Ireland’s history in this area (ranging from the 14 year transition on the elimination of the 10% rate to shorter periods on other occasions) and accounting for the volatile tax environment in the context of both the BEPS recommendations and their implementation, we would recommend a minimum period of transition of 7 years be applied.

Appendix I – An outline of WHT in selected regions

UK

Under the UK corporation tax regime, relief for WHT (or direct income taxes) borne on foreign royalty income is available on a 'source by source' basis. Here the UK is comparable to Ireland. However, the manner in which the relief operates, where it can be adjusted to fit the facts and circumstances of each taxpayer means that it is less likely that a UK taxpayer will see that general expenses of the trade adversely affect its ability to claim credit relief for foreign withholding tax. This is particularly the case where the company invests heavily at its home base developing innovations in its product offering.

A UK company calculates the UK measure of income attributable to each source based on revenues before deduction of the tax less attributable expenses. This is not done by means of a prescribed formula. Expenses not directly attributable or those attributable to UK based activities need not be proportionately allocated. Having determined the measure of UK income attributable to the foreign royalty income source, credit relief can then be claimed against UK corporation tax for the foreign tax up to the level of UK corporation tax attributable to that income.

A UK company can use a trading loss attributable to 'UK source' income in the period in priority to offset income from foreign sources with zero or low WHT thereby maximising the extent of the UK corporation tax attributable to foreign income with the highest rates of WHT available to absorb the credit relief for those taxes.

Alternatively, it is possible for a UK company to elect, on a source by source basis in each period, to claim an expense deduction for the foreign tax on the income. Where it is deducted as an expense of the trade and this creates a loss, the loss is available as a loss of the trade and is available for use in like manner to any other loss of the trade which is incurred in the period.

Like Ireland excess and unrelieved creditable tax cannot be carried forward for use in future periods.

Importantly also the UK has a more extensive tax treaty network than Ireland which, in practice, affords UK companies a broader scope of protection from source country taxes.

The Netherlands

A Dutch company typically calculates its claim to credit relief for foreign withholding taxes by determining the net profit from each foreign source of income on a 'source by source' basis. Again, this is broadly the approach in Ireland. However, as in the case of the UK, the Dutch measure of income attributable to each foreign source is based on actual profit attributable to that source i.e. unlike the approach in Ireland the local measure of foreign income from each source is not done by reference to a formula based approach.

A Dutch taxpayer can also elect to pool its claim for credit relief so that excess credits on one source of foreign income can be offset against Dutch corporate income tax on other foreign source income. This means that even before the relative difference in corporate income tax rates between Ireland and the Netherlands is taken into account, there is much reduced likelihood of a Dutch company finding itself in a position of not being able to claim credit relief for foreign taxes on its income.

Credit relief is limited or capped by reference to Dutch corporate income tax on the profits. Where credit relief is claimed, no expense deduction is available for unrelieved creditable tax. Excess credits which are not relieved in a period may be carried forward indefinitely by the company for use against corporate income tax on taxable income in future periods. This particular characteristic can also, we understand, be important from a US perspective, particularly in relation to access to foreign tax credits suffered on income which is ultimately distributed back to the US, and we would urge consideration of a specific carry forward provision.

It is also possible for a Dutch taxpayer to make an election, on a pooled basis, to deduct the foreign tax as an expense of the trade for the period. Where this occurs, the expense is treated as a business loss and is dealt with in like manner to any other business loss incurred in the period.

Again, the Netherlands has an extensive tax treaty network which provides protection to Dutch resident companies eligible for treaty relief from source country taxes on royalty flows.

Singapore

Singapore offers a pooling relief for foreign tax credits where the income from foreign royalties which has borne foreign tax is taxed 'onshore' in Singapore which has a corporate income tax rate of 17%. Certain conditions must be met for the royalties received to be available for pooling relief. These include the requirement that the foreign royalties must be payable by a source country which has a headline corporate income tax rate of at least 15%.

Credits calculated on a pooled basis are available to offset Singaporean corporate income tax at 17% on the income. The Singaporean company can make an election year on year and on a source by source basis to include income which has been subject to withholding in its 'pool' for the period the purposes of claiming credit relief. The 'pool' can include other foreign source income taxed in Singapore such as interest income. Due to the flexibilities and extent of elections available in

Singapore, companies can make choices in claiming credit relief for foreign taxes which maximise their ability to tailor the relief regime to their particular facts and mix of income.

There is no carry forward for excess credits .

Switzerland

Switzerland is currently engaged in a fundamental review of its corporate income tax regime. This is with a view to removing certain ruling regimes which are not currently considered to be best practice for a tax regime. A new Swiss corporate income tax regime is likely to include measures such as a Swiss 'innovation box', tax depreciation on intangible assets and an attractive basis to claim relief for financing costs on investment in intangible assets. The question of the treatment of WHT on foreign income flows is also clearly on the agenda for reform. This is a stated objective forming part of the overall review framework.