ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY

A Response by the American Chamber of Commerce Ireland to the OECD Public Consultation

March 2019

We are pleased to set out below initial observations on behalf of the American Chamber of Commerce Ireland ('AmCham Ireland' or the 'Chamber') with respect to the OECD Public Consultation on Addressing the Tax Challenges of the Digitalisation of the Global Economy. Our input is supportive of multilateral consultation and agreement to address BEPS related matters. This is underpinned by our members' strongly held view that future additional recommendations in this area should be evidence-based, targeted to specific remaining BEPS concerns, and remain grounded in the agreed concepts of substance and value creation in terms of the allocation of taxing rights between jurisdictions.

AmCham Ireland represents the Irish-based enterprises that form an important hub for the two-way Transatlantic economy between the USA and Europe. The Chamber is the leading international business organisation in Ireland. Membership includes the top US companies in Ireland, the Irish companies that support them, and the growing number of Irish companies with business in the US.

Ireland's investment case as a transatlantic hub; its strong tradition of political stability; the availability of diverse talent and enterprise leadership, excellent international air and digital connectivity, ease of doing business and global competitiveness; an attractive research and development ecosystem of proven innovation capacity and (post-Brexit) a unique English-speaking common law jurisdiction within the EU single market —all these variables; help to explain and support the business case for continued enterprise investment in Ireland.

Open and Outward Looking Economy

In its review of Ireland's inward investment strategy twenty-five years ago[1], the OECD noted that Ireland was an early adopter of OECD pro-growth policy by focusing on the benefits of inward investment to globalise its economy. Since the 1950's there has been a deliberate Government industrial and economic policy to move away from import substitution, protectionism and restrictions on business ownership - creating an enterprise environment that is open and outward-looking to trade and investment in pursuit of employment growth, innovation and talent development.

Inward investment remains hugely important to Ireland and was instrumental in helping the country recover from its economic challenges following the 2008 financial crisis. Ireland is now home to over 1,200 overseas company operations that directly employ well over 230,000 people. Today, as well as seeing an accelerating indigenous start-up culture taking root, the country continues to attract businesses from sectors such as ICT, life sciences, financial services, engineering and business services. These investments in manufacturing, research and development and international service centres continue to make a pivotal contribution to Ireland's evolution into a modern and diverse society; and an economy that trades with confidence and ambition on the world stage.

No two other regions in the world are as deeply integrated as the U.S. and Europe, with Ireland a key hub for the transatlantic economy that generates some $5.5 trillion in total commercial sales each year. According to figures from the US Bureau of Economic Analysis, Ireland's share of U.S. investment stock in Europe was 12.6% in 2017. Reflecting this, U.S. direct investment stock in Ireland

[1] OECD Review of Foreign Direct Investment – Ireland (1994)

grew by 14%, to reach a new high, in 2017 of $446bn supporting over 155,000 direct jobs in over 700 enterprises.

Manufacturing employment among U.S. foreign affiliates totals roughly 52,000. Notably, 45% of U.S. affiliate output in Ireland in 2016 was classified as “manufacturing”, reflecting the fact that U.S. affiliates are in the business of developing products in-country, transacting business, creating good paying jobs, and providing good incomes to Irish employees in the process. Complementing this, Ireland’s investment stock in the U.S. totalled $147.8 billion in 2017. Irish Government figures suggest that close to 800 Irish companies are active in the US market, collectively employing more than 100,000 people. Ireland’s investment stakes in the U.S. are significant, generating an estimated $116 billion in affiliate sales in 2017 and $41 billion in U.S. economic output.

Guiding Principles

To support global trade and investment flows the Chamber believes any new framework of rules would be best advanced internationally to guarantee consistency on a level playing field for global business, whilst respecting national competences to set their own tax policies. The Chamber understands the importance of this issue and have an interest in the continuing multilateral discussion leading to a more stable and workable set of international tax rules that serve both governments and taxpayers.

The Chamber’s preliminary observations with respect to the current OECD consultation recommends that the following tests be considered:

Non-Discrimination: All businesses are becoming digitalised in order to sustain the competitiveness of their product and service offerings. Tax legislation should ensure industry-specific neutrality and avoid special tax benefits or penalties targeted to one industry versus another. A fundamental tenet of pro-growth tax policy is that the marketplace, not the tax system, should allocate capital and resources. Principles of non-discrimination and national treatment must be rigorously respected. For this reason, the Chamber is not supportive of proposals that would seek to ring-fence the digital economy to a specific set of business activities or business models (which is the likely outcome of the proposals focused on user participation or significant economic presence concepts) , but rather any future potential changes should reflect the digitalisation of the overall global economy.

Multilateral Consultation and Agreement: Given that the internet has made the cross-border provision of digital services increasingly practical and inexpensive, reforms to modernize the international tax system to evolve with the digitalisation of the global economy should be adopted only after constructive dialogues, such as the process currently underway at the OECD. Unilateral actions threaten global economic interests including trade, erode trust, and undermine prospects for international agreement. Country-specific mechanisms will cause fragmentation, translating into increased burdens for taxpayers and tax administrators alike. The OECD allows for consultation among a broad base of stakeholders from the private and public sectors, and is, in our view, the appropriate forum to achieve a consensus outcome which is proportionate and balanced.

Agreed Understanding of Value Creation: The Chamber supports a tax regime built on an agreed understanding of value creation in a reformed set of transfer pricing rules reflecting the need to consider fair-value attribution to the activities of businesses. It is with that perspective that the

Chamber believes that a tax on digital sales (as seen from unilateral proposals), or reforms focused on user participation or significant economic presence concepts, would be a poor starting place - as such blunt tools targets the turnover of digitalised enterprise, or targets a subset of industries within the overall global economy. Direct taxes should be levied on net income, not revenues. Proposals to tax revenues improperly ignore the costs associated with sales and would raise costs to consumers.

Agreed Understanding on Assigning Taxation Rights: It is acknowledged that current rules present challenges for an increasingly digital world. However, the principle that underscores the operation of the international tax architecture - that the profits of a business should be taxed in the countries in which it creates value - retains strong support within the international business community. A departure from how taxing jurisdiction(s) are traditionally assigned taxing rights, will cause great business and investment uncertainty, especially if disputes arise as a result of vague or/and untested concepts on which tax assessments are to be based. Any recommendations arising from the current OECD proposals should remain grounded in the agreed concepts of substance, aligning the taxation of profits with value creation, and the concepts that underpin the arm's length standard. The arm's length standard has underpinned international tax systems for many decades, and the Chamber would urge that any recommendations to address the digitalisation of the global economy remain grounded in the arm's length standard concepts.

Minimise Complexity and Facilitate Compliance: All tax-related legislation, including any OECD recommendations, should provide simple, predictable, and easy to understand tax rules to improve compliance and reduce the cost of tax administration. These measures should promote certainty through effective dispute resolution mechanisms, including mandatory binding arbitration, and appropriate safe harbours applicable to both businesses and governments.

Implementation of Reforms

The Chamber is of the view that any new OECD recommendations which seeks to address the issue of taxation in a more digitalised global economy should:

- **Arise as a result of an Evidence-based Approach** with a clear rationale for the changes being recommended and an economic impact assessment.
- **Apply equally to all Businesses** of all industries undertaking such activities.
- **Be based on principles that are Measurable and Neutral.**
- **Include Detailed Guidance on Profit Attribution** between jurisdictions based on all forms of value creation, grounded in the agreed concepts of substance and in the use of the arm's length principle[2].
- **Ensure Thresholds are Practical** and appropriate for compliance and non-discrimination.
- **Ensure Fairness and Not Disadvantage Smaller Open Economies** in favour of larger market jurisdictions.
- **Ensure that there are Appropriate Dispute Resolution Mechanisms** which are binding and effective
- **Ensure that there are appropriate changes to tax and trade agreements to Avoid Double Taxation outcomes.**

[2]With appropriate amendments, where consensus is achieved, to reflect all forms of value creation, including those arising from a more digitalised global economy

- **Provide Realistic Transition Rules** to provide adequate time for implementation and help minimize economic hardships businesses may face during transition to changes in tax systems

Addressing International BEPS Reforms

With respect to the separate set of proposals to address remaining BEPS concerns (proposed minimum global tax levels or enhanced anti-avoidance measures), the Chamber is concerned at the possible significant impact of such proposals in their current format. The rules are potentially complex, and where implemented by countries in different ways or where countries can unilaterally determine the minimum tax rate to be applied, could lead to significant complexity, double taxation and controversy.

These proposals come at a time when the work from the original OECD BEPS project is still being embedded into national tax systems and tax treaty frameworks. While many global businesses are still in the process of restructuring to ensure compliance with the OECD BEPS measures and EU ATAD measures, these initiatives have helped to resolve many tax anti-avoidance issues. As the OECD and others move forward to develop various design options for addressing challenges from digitalisation for businesses of all sizes and sectors, the focus should be on specific problems of tax avoidance and tax base erosion through abusive practices. The Chamber believes additional measures should only be considered in the future, if there is agreement that original OECD BEPS actions have failed or failed to target specific BEPS issues. This work should include a clear assessment of the impact of the original OECD BEPS project measures and undertaken as a separate work stream and with additional consultation processes.

Conclusion

We are pleased to set out observations on behalf of the American Chamber of Commerce Ireland with respect to the OECD Public Consultation on Addressing the Tax Challenges of the Digitalisation of the Global Economy. Our members understand that current initiatives seek to further modernise tax codes to reflect the transformation that digitalisation is bringing to the global economy but remain strongly supportive of multilateral consultation and agreement to address BEPS related matters. That support is underpinned by our member's view that future additional OECD recommendations in this area should be evidence- based, targeted to specific remaining BEPS concerns, and remain grounded in the agreed concepts of substance and value creation in terms of the allocation of taxing rights between jurisdictions.