Ireland’s Transfer Pricing Rules Public Consultation

American Chamber of Commerce Response

April 2019

The American Chamber of Commerce Ireland's priority is that Ireland remains a unique transatlantic trade and investment hub and an inclusive location-of-choice for talent and innovation with global impact.

The Chamber has conferred with its membership and is grateful for the opportunity to engage in another important public consultation focused on ensuring the Ireland's taxation code is certain, transparent and competitive. The modernisation of Ireland's Transfer Pricing regime, in line with OECD Transfer Pricing guidelines, aligns Ireland's taxation code to the evolving global standards.

This submission from the American Chamber reflects our views on the questions asked in the Department's public consultation document. However, members remain open to further engagement in assisting the Department develop its framework. Likewise, given the complexities of existing and potential provisions and their interaction with each other, the American Chamber would welcome continued dialogue as the Department develops its approach before finalising legislation .

Issue 1: Incorporation of the OECD Guidelines into Irish legislation

It is intended that Irish transfer pricing legislation will be amended to include a direct reference to the 2017 OECD Transfer Pricing Guidelines. Do you consider that this proposed course of action will give rise to any special issues?

The 2017 OECD Transfer Pricing Guidelines ("the 2017 Guidelines") are considered to be best practice in relation to the application of the arm's length principle and many jurisdictions have adopted these latest guidelines over the last 2-3 years. Whilst amending Ireland's domestic transfer pricing law, as contained in Part 35A of The Taxes Consolidation Act of 1997 ("TCA 1997"), is viewed as a natural progression for aligning our domestic law to the latest OECD standard, there are a number of key issues that must be considered in terms of timing and how the guidelines are adopted which merit attention.

Timing: The timing of implementation is critical for Irish businesses. With the proliferation of changes in international tax law arising from the EU Anti Tax Avoidance Directive ("ATAD"), US tax reform and Brexit related matters (both tax and non tax related issues to deal with), as well as material domestic tax law amendments over recent years, our members have been focusing resources on dealing with these immediate issues over the last 12-24 months. Businesses have been committing resources to dealing with these issues and assessing their operating models to ensure alignment with these domestic and international developments. Indeed, many US multinationals with Irish based operations are still working through the impacts of US tax reform as introduced in the Tax Cuts and Jobs Act of 2017, which is still in progress, given that the associated regulations are not expected to be finalised until later in 2019.

The new guidelines are a very material revision of the 2010 OECD Transfer Pricing Guidelines ("the 2010 Guidelines") with substantial amendments to chapters I, II, VI, VII and VIII. These updates introduce new concepts and principles which Irish based business would not have had to consider under the 2010 Guidelines.

It is imperative that enough time is allowed for business to assess the impact on project and budget planning. New concepts in the 2017 Guidelines will impact many operating models in a variety of sectors. Chapter 6 of The Review of Ireland's Corporation Tax Code ("the Coffey Report") recommends that transfer pricing related changes should take place no later than the end of 2020 with prospective application from 1 January 2021[1]. The American Chamber recommends that this timeframe is more appropriate to amend Ireland's domestic transfer pricing law, consistent with the recommendation made by Mr. Seamus Coffey in his report. This will allow business appropriate time to address the changes and impacts of the adoption of the 2017 Guidelines.

Understanding that uncertainties could arise by earlier adoption of the 2017 Guidelines, the Chamber would be pleased to discuss the concerns and pressure points which our member organisations are facing with the Department, given the pace of change which business is seeking to respond to currently.

Guidance: When Ireland does adopt the 2017 Guidelines, guidance in relation to the first accounting periods which are in scope for the new rules would be welcomed. The OECD view is that the 2017 Guidelines provides more clarity in relation to the application of the arm's length principle. However, this has resulted in a number of jurisdictions using the Action 8-10 principles in audits for open periods (i.e. accounting periods prior the adoption of the 2017 Guidelines). The 2017 Guidelines are in fact substantial revisions of the 2010 Guidelines with material updates to Chapter VI and the introduction of new concepts relating to the right to receive intangible related returns and performance of key functions known as DEMPE[2] functions. The assumption of risk related to DEMPE functions and the management and control of risk in respect of these activities is intended to drive the entitlement to intangible related returns.

Guidance on how the new DEMPE concepts and entitlement to intangible related returns are to be interpreted by Irish Revenue upon audit would be welcomed by taxpayers. We understand from existing transfer pricing audits for open periods, that the 2017 Guidelines are not applicable. However, more formal guidance and certainty would be welcomed on this matter, including a specific legislative confirmation that the 2017 Guidelines are to apply to accounting periods commencing after 1 January 2021 ideally. For example, in relation to which parties are entitled to intangible related returns from the exploitation of intellectual property, the 2017 Guidelines in Chapter VI does not seek to recharacterise legal ownership of intangibles from the legal owner. Rather, the guidelines outline how members of a multinational group ("MNE") which perform key functions, control economically significant risks and contribute valuable assets should be remunerated. We refer you to the comments contained in the Coffey Report in Section 6 relating to the interaction of Action 8- 10 and Ireland's domestic deductibility rules as contained in Section 81 TCA 1997. Clarity on such interaction is critical for MNEs. It is our view that once the Irish group companies are compensated for their functions

[1] As outlined in "Review of Ireland's Corporation Tax Code" of June 2017 at paragraph 6.9.

[2] Development, Enhancement, Maintenance, Protection and Exploitation

performed, risks assumed, and assets used that any payments (which typically take the form of license fee payments) to the legal owner of intangibles is recognised and deductible under general domestic tax principles. It is acknowledged that other group members may be entitled to share in some of the intangible related returns, but it is clear from the 2017 Guidelines that such intangible related returns initially accrue to the legal owner with the resultant onus on the legal owner to compensate other group companies for their activities.

Financing and Treasury Transactions: In addition, for MNEs involved in financial and treasury transactions, there are certain aspects of the 2017 Guidelines implementing Action 8-10 which presently are the subject to continued review by Working Party 6 at the OECD. In July 2018, a non-consensus discussion draft: "BEPS Action 8- 10 Financial Transactions" was issued. The document sets out guidance for businesses and tax authorities on how to determine whether financial transactions between associated enterprises are consistent with the arm's length principle. It is acknowledged that the 2010 Guidelines (and indeed the 2017 Guidelines) lack any detailed guidance for financial transactions. In the discussion draft issued in July 2018, there are a substantial number of key sections that remain subject to more consultation and there are still many differences in opinion between members of the BEPS Inclusive Framework. A revised discussion draft may issue later in 2019 but this is a challenging area to obtain consensus. As the non-consensus discussion draft referred to above seeks to build on the Action 8-10 principles in the 2017 Guidelines, when Ireland does legislate to introduce the 2017 Guidelines into Part 35A TCA 1997, there will be a period where there is a lack of clarity. It is critical that Irish Revenue and the Irish Competent Authority consider this issue, as there is a potential for disputes and double taxation to arise for certain financing transactions, whilst we await a single international consensus on the application of the 2017 Guidelines in this area. Flexibility in terms of how taxpayers address financial transactions would be welcomed until the uncertainty in the area is eliminated when the final discussion draft is in place and legislated for into Irish law.

Digitalisation: With the work-stream underway at OECD level in relation to Addressing The Tax Challenges of the Digitalisation of the Economy, options are being considered in terms of measures to address base- eroding payments and rights to tax profits based upon marketing intangibles, user participation and significant economic presence. The output of this project, once complete, could potentially mean significant changes in the allocation of taxing rights across jurisdictions in which an MNE operates. In the intervening period, before finalisation of this project, we are seeing several jurisdictions taking unilateral measures to deal with this issue. It is vital that the Irish Competent Authority, in its dealings with counterparts over the coming years, is cognisant of any attempts to use measures not yet agreed at OECD level in the allocation of profits in-country which at present are not aligned with the 2017 Guidelines.

The American Chamber is concerned that the 2017 Guidelines would be adopted into Irish law, only then for additional changes to be adopted in short course, following completion of the current OECD project relating to the Digital Economy. As the potential output from this project may result in additional significant tax reforms/transfer pricing changes, it will be critical for any further changes to the transfer pricing guidelines that may arise are implemented on a collaborative basis with adequate time for companies in Ireland to prepare.

Dispute Resolution: From a dispute resolution viewpoint, we are seeing an increase in tax authority scrutiny and audits internationally which is resulting in the need for intervention by the Irish Competent Authority to deal with potential incidents of double taxation. It is critical that the Irish Competent Authority continues to be adequately resourced in terms of experienced transfer pricing professionals and continued training to deal with the proliferation of mutual agreement procedure ("MAP") cases which are presented. In many cases, the counterparty tax authorities deal with international transfer pricing disputes more frequently, which is understandable as many jurisdictions have transfer pricing regimes for many years before Ireland introduced a domestic regime in 2011. We see ambitious tax positions taken on foreign audits which seek to reallocate profits from Ireland . In situations where the positions taken are unreasonable, it is critical that the Irish Competent Authority has the relevant resources to challenge such positions taken and seek to protect the domestic tax base.

Issue 2: Removal of the exemption for arrangements in place since pre-July 2010

It is intended to extend the transfer pricing legislation to arrangements the terms of which were agreed before 1 July 2010, commencing from 1 January 2020. Do you consider that this course of action will give rise to any special issues?

The provision of rules allowing certain pre-July 2010 transactions to fall outside the scope of Part 35A TCA 1997 provided many Irish businesses with certainty in relation to the operation of transfer pricing rules in Ireland. As we come to the end of such an exemption, it is an imperative for Irish businesses that certainty and guidance is provided in relation to the removal of the exemption.

The impact of such a legislative change will have significant impact for many sectors and in particular for smaller groups. Having transfer pricing documentation in place can be a costly and time-consuming exercise for many groups.

A substantial number of grandfathered arrangements relate to routine services and buy/sell transactions where the risk of mispricing is considered low. With that in mind, it is imperative that certainty is provided to business that the introduction of transfer pricing to such arrangements is on a prospective basis and not subject to audit scrutiny for past accounting periods (where grandfathering of pre July 2010 arrangements applies). We would also recommend guidance on how groups can deal with such arrangements going forward in terms of options available to manage transfer pricing risk – use of safe harbours for routine transactions, reduced documentation requirements and continued application of counterparty documentation where available.

From a legal perspective, we are aware that some businesses would have entered into long-term binding contracts with other related parties with the expectation that such contracts would be respected for the duration of the contract; e.g. certain long-term financing arrangements. We would recommend that such legal arrangements are respected and continue to fall outside the scope of transfer pricing rules until such time as they are renegotiated or refinanced by the parties involved.

Attention is also drawn to certain pre 17th June 2016 loans and interest restrictions under Article 4 of ATAD. Paragraph 4 of Article 4 of ATAD 1 states that "*Member States may exclude from the scope of paragraph 1 exceeding borrowing costs incurred on…(a) loans which were concluded before 17 June 2016, but the exclusion shall not extend to any subsequent modification of such loans…".* The ATAD's preamble explains at paragraph 8 that *"Member States could provide for a grandfathering clause that would cover existing loans to the extent that their terms are not subsequently modified i.e. in case of a subsequent modification, the grandfathering would not apply to any increase in the amount or duration of the loan but would be limited to the original terms of the loan".* This grandfathering clause is provided *"to facilitate the transition to the new interest limitation rule".* To the extent that this "interest grandfathering" is brought into our domestic legislation then the interaction with transfer pricing grandfathering needs to be addressed. In short, we would see the repricing of these loans as not amending the original terms of the loans for the purposes of the interest grandfathering provision given that the parties and their legal obligations etc. under the loans remain unchanged. Put another way, transfer pricing represents a tax fiction rather than a legal modification of the loans such that the interest grandfathering should remain unaffected as a result of transfer pricing impacts.

Many domestic Irish to Irish transactions are likely to be currently grandfathered and a practical solution to dealing with such arrangements would be welcomed. Whilst Part 35A TCA 1997 currently does not differentiate between cross-border and domestic related party trading transactions, consideration should be given to reconsidering the rules relating to domestic related party transactions, especially where both Irish companies are within the charge to tax at the 12.5% rate of corporation tax. We refer to the May 2018 Court of Justice of the European Union ("CJEU") decision in the Hornbach Baumarkt case[3]. It was confirmed by the CJEU that the prevailing German transfer pricing rules, which do not apply to domestic transactions between German companies, is not in principle contrary to the freedom of establishment. As part of any update to Part 35A TCA 1997, we believe reconsideration of the positon of domestic transactions is undertaken in light of international developments.

[3] C382/16
http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=20 2410&occ=first&dir=&cid=701953

Issue 3: Extension of transfer pricing rules to SMEs

Do you consider that transfer pricing legislation should be extended to small and medium enterprises? What level of documentation do you feel would be appropriate to require SMEs to maintain to demonstrate compliance with transfer pricing rules? If transfer pricing rules are extended to SMEs, what other measures might be considered to mitigate the compliance burden for SMEs? What particular issues do you consider might arise from the application of transfer pricing rules to SME transactions with effect from 1 January 2020?

Due to the nature of Ireland's small open economy in comparison to other larger EU jurisdictions, the proportion of businesses characterised as SMEs is far greater here, including a healthy number of small or emerging inward investment enterprises. On that basis, the removal of the EU SME exemption[4] would be competitively unhelpful, burdening many businesses with increased costs and resources to satisfy transfer pricing requirements. Businesses are already dealing with very challenging business concerns, such as Brexit, which impact the SME sector in particular.

It should be noted that an SME exemption is used in many European jurisdictions to provide a measure of relief from having to prepare transfer pricing documentation. Any change to our domestic law in this regard immediately puts this sector at a competitive disadvantage vis-à-vis other jurisdictions with retain this exemption. In addition, we would draw your attention to paragraphs 5.32 and 5.33 of the 2017 Guidelines. The OECD acknowledge that many countries have introduced measures to exempt transfer pricing documentation rules for small and medium groups. When Ireland adopts the 2017 Guidelines, it is recommended that these recommendations as contained in Chapter V are retained, in particular given the impact on competitiveness.

To the extent that it is considered that the SME sector should be within the remit of Part 35A TCA 1997 going forward, we would recommend that some level of exemption or reduced compliance burden is retained. For example, we refer to the UK implementation of the SME exemption since 2004 as currently contained in the Taxation (International and Other Provisions) Act 2010 ("TIOPA10"). The UK generally follows the EU guidance in SMEs with the following exceptions:

- Where the SME elects for the exemption not to apply;
- Where the entity has a transaction or series of transactions with an enterprise (or party) resident in a non-qualifying territory;
- Where HMRC gives notice for the SME exemption not to apply. This applies to medium-sized enterprises only.

The above approach does retain a measure of relief for the smallest of business groups and the American Chamber is of the view that a total removal of this EU based exemption is not necessary as the risk of tax leakage from mispricing amongst these group affiliates of small enterprise is low.

[4] Commission Recommendation 2003/361/EC.

Issue 4 Extending transfer pricing rules to non-trading income and capital transactions

It is intended to extend the transfer pricing rules to non-trading income chargeable to tax under Case III, Case IV and Case V of Schedule D where such an extension would reduce the risk of aggressive tax planning as recommended by the Coffey Review. Are there are issues which may arise through the extension of transfer pricing rules to non-trading income and how may any such issues be resolved? Do you believe that the current market value rules are sufficient so that capital transactions do not need to be subject to separate transfer pricing rules? Could these rules be supplemented by additional documentation requirements?

The proposed extension of domestic transfer pricing rules to non-trading income will impact many sectors and financing activities in particular. Whilst the American Chamber acknowledges the need to review certain arrangements as highlighted in the Coffey Report[5], we believe that a broad-brush approach to bring all Cases of Schedule D within the scope of transfer pricing will disproportionately impact many groups that entered into non-trading transactions considered to be at a market price.

The proposed amendment also highlights our dual corporation tax regime for trading and passive transactions with potential for mismatch in the rate applying to companies on each side of the transaction – 12.5% versus 25% treatment. Where the parties to such transactions are all within the charge to Irish tax, we are of the view that there should be an exemption in such cases. We would also refer you to the discussion earlier in this submission in relation to exemptions for SMEs and the application of transfer pricing rules to domestic transactions in the context of the CJEU decision in the Hornbach Baumarkt case.

We would also emphasise that at this point, it is worthwhile that a discussion in relation to Ireland's dual corporation tax regime should be prioritised. It has been almost 20 years since the dual regime was introduced and with the passage of time and comparison to tax rates internationally in 2019, the 25% rate is considered uncompetitive and merits consideration. Ireland, as we know, competes internationally with other locations for inward investment and this also extends to ensuring that Ireland is a competitive location for treasury/financing operations. The uncertainty and complexity from a tax viewpoint of having two rates (in addition to the close company implications for passive income, where applicable) which may apply to financing transactions is unhelpful from a competitiveness perspective.

In addition, to the extent that it is decided to include non-trading transactions within the scope of transfer pricing in Ireland, consideration should be given to:

- Timing – as previously mentioned it is critical that Irish businesses have the opportunity to evaluate and plan ahead for such changes and there should be a reasonable lead time to prepare for the changes. The annual budget/Finance Bill cycle from October to December with tax changes taking effect from the following January does not provide sufficient time for

[5] As outlined in "Review of Ireland's Corporation Tax Code" of June 2017 at paragraph 6.4.2.

taxpayers to prepare for the changes. Where it is envisaged that the legislative amendments will be included in the Finance Bill in October 2019, consideration should be given to having an implementation date of 1 January 2021 at the earliest. The ongoing deliberations by Working Party 6 at the OECD on the financing aspects of Action 8-10 need also to be considered. These deliberations directly impact financing arrangements, and again, on that basis, consideration needs to be given to the commencement date of any domestic law changes until the outcome of this work at OECD level is completed;

- Guidance on Trading – taxpayers are reliant on a body of case law, UK Royal Commission Badges of Trade from 1954, published trading opinions over the years and Irish Revenue Guidance on Trading. With the importance of the financial/treasury sector, we recommend that more focused detailed guidance is provided to help taxpayers in determining whether an arrangement is considered trading or non-trading;
- Guidance on whether lending arrangements are in fact debt or equity – it is recognised that capital may be made available in the form of debt or an equity contribution. Guidance on what would be considered to be equity would be welcomed to guide business in terms of options available for the use of capital. The July 2018 non-consensus discussion draft on BEPS Action 8-10 Financial Transactions does address this issue in that it discusses how to accurately delineate the capital structure (i.e. mix and types of debt and equity) used to fund an entity within a MNE. This delineation is necessary before pricing a loan to determine whether the purported loan is regarded correctly or should be recharacterised as equity for tax purposes. Bearing in mind this current work at OECD level, there will be a requirement to address the debt/equity characterisation point in any changes to Ireland's domestic transfer pricing law.

With respect to extending transfer pricing rules to capital transactions, Part 19 TCA 1997 already provides for specific market value rules for transactions involving capital assets between connected parties. It is our view that this existing tax law is sufficient and additional documentation requirements over and above what would be in place for valuations undertaken is not necessary.

Issue 5: Extending transfer pricing documentation

What particular issues do you consider might arise if the enhanced documentation requirements were to apply from 1 January 2020? Are there any circumstances in which the documentation requirements should be reduced or limited in specific respects?

Many MNEs with operations in Ireland are already familiar with the two-tier transfer pricing documentation requirements as many other jurisdictions have already adopted new transfer pricing documentation requirements in accordance with the revised Chapter V of the 2017 Guidelines. On that basis and subject to areas we highlight below, the progression to the new approach can be implemented into domestic Irish transfer pricing law in a manner which causes minimal disruption for Irish businesses. Some areas which should be considered when moving to the new two-tier approach include:

- The Master File and Local File contents to be legislated for in Part 35A TCA 1997 should be aligned with the contents proposed by the OECD as contained in Annex I and II of Chapter V of the 2017 Guidelines. We have seen a number of jurisdictions implement the Master File / Local File requirement with enhanced local requirements and retention of some existing documentation requirements from existing local laws. This has resulted in an inconsistent adoption of the new documentation rules globally. Ireland should only adopt what is required in Annex I and II as best practice;
- Under Ireland's existing transfer pricing documentation requirements which are based on the 2010 Guidelines, counterparty documentation, if prepared, is considered to satisfy the domestic documentation requirement. This should continue when the 2017 Guidelines are adopted in Ireland;
- The retention of the EU SME exemption, as discussed earlier in this submission, should continue to provide a measure of relief for smaller groups operating in Ireland from the burden of having full documentation in place;
- Should the SME exemption be removed from Part 35A TCA 1997, consideration should be given to managing the documentation requirement in Ireland where related party transactions are not material, i.e. reduced obligation to require full documentation. Paragraphs 32-34 of Chapter V of the 2017 Guidelines provide guidance regarding materiality and recommendations for tax administrations regarding materiality thresholds to account for the size and nature of the local economy, the importance of the MNE group in the economy and the size and nature of the local operating entities and the MNE group. It is recommended that Ireland implement the OECD recommendations in the absence of the EU based SME exemption for Master File and Local File by the use of certain thresholds such as local/global turnover, balance sheet total or numbers of full-time employees before the new documentation requirements are applicable;
- Inclusion of a "simplified" transfer pricing documentation requirement to manage documentation requirements for smaller groups. For example, the Australian Taxation Office has issued guidance[6] on simplified transfer pricing record keeping options in an attempt to help reduce the compliance burden on Australian businesses. Where certain criteria are met, taxpayers can avail of simplified record keeping for transfer pricing purposes.
- Updated guidance in relation to transfer pricing documentation requirements should be provided to consider the above points, and also to provide clarification regarding timing of when the Master File and Local File will be required. A number of jurisdictions have a mandatory requirement for the Master File and/or Local File be submitted as part of annual tax filing process. We recommend that the current practice of aligning the completion of relevant transfer pricing documentation to the corporation tax return filing date be preserved. However, there should not be a mandatory filing requirement for the Master File and/or Local File, but rather a requirement only to provide relevant transfer pricing documentation and reports to Irish Revenue upon written request.

[6] Practical Compliance Guideline PCG 2017/2

Issue 6: Application of the Authorised OECD Approach to branch profit attribution

Do you consider that the Authorised OECD Approach to attribution of branch profits would be an appropriate approach to adopt into Irish law? If the Authorised OECD Approach is adopted in Irish law, what documentation requirements should apply? Is there an alternative approach that should be considered in this context? Are there any industry or sector-specific considerations that should be borne in mind, particularly in relation to financial and insurance companies, in relation to branch profit attribution? Are there any special considerations required in respect of SMEs?

The Authorised OECD Approach ("AOA")[7] was introduced in the 2010 OECD Model Tax Convention ("2010 MTC") in order to achieve a uniform rule on the profit attribution to permanent establishments ("PEs") in OECD jurisdictions.

The Department of Finance indicated in its Corporation Tax Roadmap issued in September 2018 that it will launch a consultation in relation to movement towards a territorial tax regime. While this does not preclude the incorporation of the AOA into Irish law, a significant question must arise as to whether it is better to await the outcome of that consultation prior to deciding on the AOA issue. To do otherwise would potentially lead to unnecessary interim changes.

Incorporation of the AOA into Irish law poses issues of relevance to the Irish Permanent Establishments (PEs) of foreign entities, but also increasingly to Ireland based European hubs of many MNEs (particularly in the financial sector where we are currently seeing a significant number of such organisations move operations to Ireland as a result of the UK's decision to exit the EU).

It is noteworthy that there is limited guidance in relation to the 2010 Model Tax Convention on the attribution of profits to PEs as to how to apply the functionally separate enterprise approach in practice. The report allows for some variability in the operation of the functional separate enterprise approach such as in the area of capital allocation. In addition, the report is not prescriptive on matters such as debt-equity characterisation or how to differentiate where an internal dealing simply recognises the performance of a risk management service from where a dealing also involves the recognition of a transfer of risks being managed, resulting in a potentially different arm's length compensation. Such lack of guidance can result in uncertainty for taxpayers in a number of different scenarios, particularly for financial services companies.

Moving to a full AOA approach will impose additional burdensome compliance costs and uncertainties for businesses, particularly in the non-financial and SME sectors, in complying with documentation requirements.

Step 2 of the AOA requires that internal dealings between the branch/PE and its head office be priced by analogy with general transfer pricing principles. This increases the level of resources and costs needed to determine such arm's length prices and also whether or not it is in fact feasible to obtain

[7] Also commonly referred to as the functional separate entity approach.

arm's length prices for internal dealings. Guidance on cost effective approaches to comply with such requirements would be welcomed, particularly for non-financial and SME groups, who will not have dealt with these concepts before.

Consideration could be given to implementing AOA on a treaty by treaty basis which would allow Ireland to restrict the provisions of the AOA to jurisdictions that agree to apply the principles on a reciprocal basis. This would remove any uncertainty in relation to Ireland's network of double taxation agreements, most which were agreed pre 2010 with the old pre-AOA Article 7 wording. A second alternative approach which merits consideration, is a more limited adoption of the AOA for the financial services sector only. This approach would eliminate the compliance burden on sectors and SMEs that would not have dealt with AOA concepts in the past.

To conclude, the potential implementation of the AOA can be considered to be an important step in ensuring that Ireland forms part of a consistent taxation landscape for MNEs. However, unlike transfer pricing between associated enterprises, this will be more complex than including changes to Part 35A TCA 1997. Accordingly, taking account of the evolving commercial and taxation landscape, we believe that a statutory adoption of the AOA should not be implemented until it is clear whether Ireland will retain its worldwide system of taxation for companies (or move to a territorial based system). In addition, further detailed consideration should given to managing implementation, such that certain sectors and SMEs are not disadvantaged.