Response from the American Chamber of Commerce Ireland (AmCham) to the Department of Finance on New Taxation Measures to Apply to Outbound Payments

August 2023

The American Chamber of Commerce Ireland (AmCham) welcomes the opportunity to respond to the Department of Finance's Feedback Statement on New Taxation Measures to apply to Outbound Payments. AmCham is the collective voice of US companies in Ireland and the leading international business organisation supporting the Transatlantic business relationship. Our members are the Irish operations of all the major US companies in every sector present here, Irish companies with operations in the United States and organisations with close linkages to US-Ireland trade and investment.

AmCham members are concerned about the timing of this Feedback Statement, the duration of the consultation, and the proposed timing of the implementation of the legislation. The Department's recently published Tax Strategy Group paper acknowledges that "*the global corporation tax environment has been undergoing a period of intense change for a decade*". At this current juncture, international tax rules are changing fundamentally due to the OECD/Inclusive Framework on BEPS and the full impact of these rules on the Irish tax landscape has not yet been established. The release of this Feedback Statement has been poorly timed given the proximity to the Finance Bill and the implementation of the EU Pillar Two Directive. The Department is aware that Pillar Two guidance is still being developed, and the Department's second Feedback Statement on the implementation of the Pillar Two Directive has only just been released in recent days. As such, it has not been established whether there is a necessity for any new taxation measures to apply to outbound payments, given the likelihood that Pillar Two will negate the need for any such reforms.

AmCham notes that measures to apply to outbound payments were briefly mentioned at the Business Tax Stakeholder Forum in March. However, the scope and magnitude of the proposed legislation was not apparent. Going forward, **AmCham believes it would be beneficial if greater clarity could be provided to stakeholders in relation to the Department's legislative programme in any given year.**

AmCham, along with other stakeholders, made a submission to the original consultation on new taxation measures to outbound payments in November 2021[1]. The November 2021 consultation specifically referenced the May 2021[2] review commissioned by the Department and performed by Mr. Seamus Coffey on the changing nature of outbound royalties. This research demonstrated that the recent reforms of corporation tax rules, both in Ireland and internationally, were having the desired effect and outbound payments were increasingly going directly to the US,

[1] AmCham submission on new taxation measures to apply to outbound payments - November 2021 (amcham.ie)

[2] gov.ie - The changing nature of outbound royalties from Ireland and their impact on the taxation of the profits of US multinationals - May 2021 (www.gov.ie)

where such payments are taxed. It was widely expected that this trend would continue beyond 2020. Stakeholders also highlighted in responses to the November 2021 consultation that the measures agreed by the OECD Inclusive Framework and in particular the Pillar Two rules will significantly impact the use of zero and no tax jurisdictions thus negating the need for any new taxation measures to apply to outbound payments at this time. It is disappointing that this feedback does not appear to have been taken on board. As such, **AmCham strongly disagrees with the preface outlined in the current Feedback Statement that "*it is both prudent and necessary to introduce further legislation*".**

The Department should be cognisant that these new taxation measures, particularly at this juncture, may have an impact on Ireland's competitiveness as a location for inward investment. At a time of extensive international changes to the competitive landscape, and with a significant opportunity to expand Irish nexus for US MNCs in Ireland, this development is extremely unhelpful and goes well beyond the stated and required aims. By way of example, it was indicated by the Department that a Territorial System of Taxation would be brought in, effective 1 January 2024. Several multinationals with substantial operations in Ireland have been considering simplifying/consolidating their holding structures with a view to streamlining IIR administration and compliance in advance of the implementation of Pillar Two rules. Indeed, the Department's second Feedback Statement on Pillar Two issued on 27 July acknowledges the "*preparations being made by businesses to enable compliance with the rules when they come into force from 31 December this year*". **In the context of proposed changes to outbound payments along with the uncertainty in relation to the move to a Territorial System of Taxation, many AmCham members must now reconsider and rework their Pillar Two implementation and compliance plans. This has the potential to reduce Ireland's competitiveness for FDI and impact Ireland's reputation as an attractive and stable place to do business.**

The introduction of measures on outbound payments will add further complexity to an already complex Irish taxation system. In several recent consultation responses to the Department, AmCham has highlighted the urgent need for simplification of the Irish taxation system to address this growing compliance burden on businesses. Over the past decade, Ireland has made changes to its tax code, and these changes have resulted in an increasingly complex taxation system that is cumbersome for businesses to navigate. When viewed in tandem with additional non-tax obligations on business (for example, the implementation of the Corporate Sustainability Reporting Directive), new measures on outbound payments will further increase the administration burden placed upon business. **Rather than create additional measures that further increase the complexity of the system, Ireland must aim to simplify its tax code. Increasing**

the agility and adaptability of the taxation system is a crucial aspect of Ireland remaining a competitive and attractive location for FDI.

By way of example, Ireland's current treatment of dividends made by Irish companies is regarded by AmCham members as "*best in class*". Established almost a quarter of a century ago and embedded in the Irish domestic tax code, Ireland's broad exemption from dividend withholding tax provides both certainty and administrative simplicity for businesses. It is a competitive advantage when compared to most other jurisdictions and, following a move to a Territorial System of Taxation, should have been an important feature when advancing Ireland's credentials as a holding company location as MNCs reorganise in preparation for Pillar Two. The proposed change to the treatment of dividends is even more concerning when considering the stated objective of the outbound payment's legislation is to "*prevent double non-taxation*". **AmCham members are concerned that the proposed changes to the treatment of dividends will in fact lead to double taxation.** Dividends are not tax deductible in Ireland and therefore there is no erosion of the Irish tax base. Given competition from other jurisdictions focused on attracting FDI, the proposed change relating to dividends could prove counterproductive not just in the context of attracting inward investment but also in retaining the substantial investments that US MNCs have already made in Ireland.

In the context of remaining a competitive and attractive location for FDI, AmCham is advocating for confirmation from the Department that a Territorial System of Taxation will be introduced from 1 January 2024. Having previously indicated that this timeframe was feasible, the Department highlighted concerns at the recent Business Tax Stakeholder Forum in March, noting resource constraints given the Pillar Two agenda. However, the Department should be cognisant that we are at a juncture of significant change in business structures in preparation for Pillar Two compliance. **Delaying the implementation of a Territorial System of Taxation at this time will be a missed opportunity that will not be recovered.**

Whilst AmCham members are of the view that the introduction of new measures related to outbound payments is unnecessary, particularly at this time, should such measures be advanced by the Department, **AmCham asks that the following points be considered:**

- **Timing:** No corporate tax changes with respect to these measures should be announced and implemented on Budget Day. Knowing that the Pillar Two EU Directive must be implemented by 31 December 2023, and given the complexity of these new rules, time is needed by businesses to understand the impact and interplay of all new taxation measures and prepare accordingly. With respect to new measures for outbound payments, the Department should include grandfathering provisions and/or sunset provisions as there is an urgent need for businesses to be given more time to assess the implications and in particular address any unintended consequences.

- **Scope:** AmCham believes the scope of the draft legislation is wide ranging and goes well beyond what is required under Ireland's commitment to tackle aggressive tax planning and prevent double non taxation. US companies in Ireland have already made the point with regard to these proposed measures that Ireland is going well beyond the withholding measures in other EU countries, and that many jurisdictions internationally do not impose withholding tax on certain payments. Ireland should have a proportionate response to meeting its commitment under the National Recovery and Resilience Plan. Indeed, in satisfying its commitment, Ireland should take into account recent international tax changes and in particular Pillar Two rules which are expected to negate the need for such measures on outbound payments. However, should measures related to outbound payments be advanced by the Department, AmCham is of the view that these measures should be limited to payments to countries on the EU list of non-cooperative jurisdictions.

- **Dividends:** As outlined earlier, no changes should be implemented with respect to the current treatment of dividends made by Irish resident companies. Dividends are not tax deductible and do not erode the Irish tax base, and to this end, the proposed changes could result in double taxation.

- **Royalty Definition:** The proposed definition of royalties is extremely broad. AmCham recommends that the definition should be in line with the OECD Model Treaty.

- **Application:** AmCham is of the view that the definition of zero-tax territory is overly wide and is likely to have unintended consequences. For example, as currently drafted, it appears that the legislation will capture payments to treaty jurisdictions with special economic areas. AmCham requests confirmation that this is not the intention, and that the legislation is revised accordingly. In addition, the Feedback Statement states that "*it is intended to exclude outbound payments from the scope of the proposed measures where the amount is taken into account for the purposes of calculating a CFC charge or a top-up tax under the OECD GloBE rules*." AmCham is of the view that the definition of '*taken into account*' should be as broad as possible to provide certainty and stability to companies complying with Pillar Two and CFC rules. To be consistent with other areas of Irish law, such as the anti-hybrid rules, the definition of a CFC charge should be broad and should include income which is included in US Subpart-F or Global low tax intangible income (GILTI) computations. This definition should also include wording to take account of Pillar Two top up taxes which are deemed to be zero or not apply at all in some circumstances, for example, where companies qualify for a transitional or permanent safe harbour from Pillar Two. Furthermore, to be consistent with the policy objectives of Pillar Two, it should be clear that dividends are initially 'taken into account' in computing GloBE income (as the financial accounting income or loss figure is a below-the-line figure, dividends are generally included in this amount) notwithstanding the adjustment to GloBE income to then exclude dividends from the income which is subject to top-up taxes.

- **Simplification:** A Roadmap for Simplification of the Irish Taxation System needs to be developed to address the large and ever-growing tax compliance burden that businesses are dealing with.

- **Territorial System:** Confirmation that the Territorial System of Taxation will be implemented on 1 January 2024 is urgently needed.