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Technical Briefing Note

Ireland's approach to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

On 7 June at the OECD in Paris, Minister for Finance, Michael Noonan T.D. will sign the 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS' on Ireland's behalf.

The OECD Base Erosion and Profit Shifting (BEPS) project made a series of recommendations for international tax changes to combat aggressive tax planning. Four of the BEPS reports make specific recommendations for changes that should be incorporated into bilateral tax treaties.

The multilateral convention provides a mechanism for countries to transpose these BEPS recommendations into their existing bilateral tax treaties. Some recommendations are considered to be "minimum standards" which countries have committed to, while others are recommended best practices that countries can choose to adopt. The multilateral convention therefore provides optionality for countries not to select all of the possible changes.

Ireland has 72 tax treaties in effect and the multilateral convention will enable Ireland to update the majority of these treaties to ensure they are BEPS complaint without the need for separate bilateral negotiations. In signing up to the multilateral convention, countries, including Ireland, will indicate their provisional approach to the options provided for in the multilateral convention. The OECD will publish these lists on their website following the signing ceremony.

Ireland's proposed approach is set out below. This approach will become binding on Ireland on foot of the ratification of the multilateral convention in Irish law. Ireland's tax treaties will be amended where both Ireland and the relevant treaty partner have fully ratified the convention in their domestic law.

The text of the multilateral convention and a detailed explanatory statement are available on the OECD's website at http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

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In signing up to the convention, each country must provide the OECD with the approach it intends to take to the various options within the convention. A country sets out its position through a series of adoptions, reservations and notifications. A reservation effectively means a country is opting out of an article and a notification sets out a country's choice where there are alternative options. There is further optionality to treat individual treaties differently in respect of particular articles.

Outlined below is a high level summary of the approach Ireland intends to take in implementing the multilateral convention:

Which of Ireland's tax treaties will be updated by the Multilateral Convention

Provision in the Convention	Ireland's approach	Commentary
Article 2 – Covered Tax Agreements	Include 71 of Ireland's existing tax treaties	Ireland will include 71 of our bilateral tax treaties which are in effect as being covered by the convention. It has been bilaterally agreed to exclude one existing treaty which is currently being renegotiated. It is possible that other treaties may be excluded before ratification of the MLI, if the treaty partner's domestic procedures require that a bilateral protocol is necessary to implement the anti-BEPS measures.

BEPS Action 2 – Hybrid Mismatch Arrangements

Provision in the Convention	Ireland's approach	Commentary
Article 3 - Transparent Entities	Adopt Article 3	Article 3(1) introduces a useful provision to ensure a consistent tax treatment when countries differently classify entities as being transparent or opaque.
Article 4 – Dual Resident Entities	Adopt	Ireland intends to adopt the new best practice rule in Article 4 on determining tax residence for dual resident entities.
Article 5 – Application of Methods for Elimination of Double Taxation	Reserve	Article 5 relates to methods to address problems where a country uses the exemption method to relieve foreign tax. Ireland adopts the credit method for eliminating double taxation as opposed to the exemption method, and therefore intends to reserve on this article.

BEPS Action 6 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Provision in the Convention	Ireland's approach	Commentary
Article 6 – Purpose of a Covered Tax Agreement	Adopt	Article 6 introduces new a Preamble into tax treaties to confirm that the intention of such treaties is to prevent double taxation while not facilitating double non-taxation or reduced taxation. Ireland intends to adopt this article, as it is a minimum standard.
Article 7 – Prevention of Treaty Abuse (This is a minimum standard)	Adopt Principal Purpose Test	Ireland intends to adopt the Principal Purpose Test (PPT) provided for in Article 7. This will introduce this general anti-avoidance clause into any treaty where the treaty partner also chooses the PPT option.
Article 8 – Dividend Transfer Transactions	Adopt	Ireland intends to adopt the anti-avoidance rule in Article 8 providing a minimum holding period to be met before certain reduced rates on dividends are available.
Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	Adopt	Ireland intends to adopt the anti-avoidance rule in Article 9 which is designed to prevent companies from artificially avoiding capital gains tax on the sale of real property.
Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions	Reserve	Article 10 provides anti-avoidance rules to target certain arrangements where foreign branch profits are exempt from tax. Ireland does not exempt such profits and therefore intends to reserve on this Article.
Article 11 – Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents	Reserve	Ireland intends to reserve on the "savings clause" provided for in Article 11. Ireland does not believe such a clause is necessary and it is not a standard part of our tax treaty policy to seek such clauses.

BEPS Action 7 – Artificial Avoidance of Permanent Establishment Status

Provision in the Convention	Ireland's approach	Commentary
Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies	Reserve	Article 12 introduces a new test for when an agent can constitute a permanent establishment (i.e. a taxable presence). Work is still underway at OECD level to determine what profits, if any, would be attributable to new permanent establishment created under this new

		test. Ireland intends to reserve on Article 12 due to the continuing significant uncertainty as to how the test would be applied in practice.
Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions	Adopt Option B and the Anti-fragmentation rule	Article 13 provides two options to clarify how certain exemptions from the permanent establishment test are to be interpreted. Option B is consistent with Ireland's longstanding interpretation of the provisions and Ireland intends to adopt this option. Ireland intends to also adopt the anti-fragmentation rule in Article 13(4) which is designed to prevent corporate groups from fragmenting a cohesive operating business into several small operations in order to avail of these exemptions.
Article 14 – Splitting-up of Contracts	Adopt	Ireland intends to adopt the anti-avoidance rule in Article 14 which is designed to prevent contractual arrangements being done in a manner which artificially prevents a long standing building site from being classified as a permanent establishment.
Article 15 – Definition of a Person Closely Related to an Enterprise	Adopt	Article 15 introduces a definition for the term "person closely related to an enterprise". Ireland intends to adopt this Article as the definition is relevant for the interpretation for Articles 13 and 14.

BEPS Action 14 – Improving Dispute Resolutions

Provision in the Convention	Ireland's approach	Commentary
Article 16 – Mutual Agreement Procedure	Adopt	Article 16 sets out standard time limits and procedural rules for how disputes under tax treaties should be dealt with. Ireland intends to adopt this Article. This is a minimum standard.
Article 17 – Corresponding Adjustments	Adopt	Article 17 provides for countries to unilaterally adjust the amount of tax paid by a taxpayer in certain cases. It is intended to provide a more efficient mechanism to resolve certain disputes, and Ireland intends to adopt this article.
Articles 18 – 26 (Part IV) - Arbitration	Adopt Part IV	Part IV deals with mandatory binding arbitration. Countries must first decide whether to opt into Part IV at all and, if they do, they must adopt or reserve on a

		number of articles dealing with how arbitration would work. Ireland intends to opt into Part IV as mandatory binding arbitration provides an important mechanism for ensuring disputes are resolved and that double taxation does not arise. Within the various articles, Ireland is open to the type of arbitration that is used. Ireland generally supports arbitration being available wherever possible except where: • the issue has been decided by a Court, • the case involves domestic anti-abuse rules, or • the taxpayer may be liable to penalties as a result of "deliberate behaviour".