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OECD Base Erosion and Profit Shifting Project in an Irish Context

A submission to the Department of Finance

22 July 2014

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OECD BEPS Project in an Irish Context – Public Consultation
Fiscal Division
Department of Finance
Government Buildings
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VIA EMAIL: bepsconsultation@finance.gov.ie

Dear Sirs

We are pleased to submit comments on behalf of Deloitte & Touche in response to your call for public consultation on the potential implications of the Base Erosion Profit Shifting project in an Irish context. We appreciate this opportunity to share our views and trust that you will find our comments valuable to the discussion.

We look forward to continued collaboration with the Department on this and other tax initiatives. We are available to discuss. If in the meantime, you have any queries, please contact Joan O'Connor (01-417-2476) or Pádraig Cronin (01-417-2407).

Yours sincerely

Pádraig Cronin

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Head of Tax and Legal for Deloitte Ireland

Enclosure

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Key Recommendation and Messages

The Irish government has been very pro-active in setting out its tax agenda in the context of the current international tax debate through the publication of the document in Autumn 2013, titled Ireland's International Tax Strategy, which focused on Rate, Regime and Reputation (the 3 Rs). Since that time, the debate has intensified in a number of areas, with many countries asserting their own views either verbally and/or through unilateral legislative action on issues that align to various Actions in BEPS, with a view to protecting and enhancing their own tax base. This country by country approach runs parallel with and to the BEPS agenda. In that context, we welcome the fact that the Minister for Finance is seeking feedback from interested parties on potential changes that may be necessary to enhance Ireland's positioning in view of its 3 Rs and its competitiveness for global multinationals in the current and post-BEPS environment, under the Public Consultation document issued May 2014, titled 'OECD Base Erosion and Profit Shifting Project in an Irish Context.'

The context for a number of the material issues in both international tax and financial services that are pertinent for Ireland, currently stems from US tax reform introduced at various stages since the mid-1980s.The introduction of the Cost Share regulations in 1986 and more importantly the Check The Box regime in 1997 created and facilitated the structure for US multinationals (MNCs) to operate and expand globally across jurisdictions with attractive non US tax structures and lower global effective tax rates than would have prevailed if the US tax rate had applied to all of the global profit.

This backdrop has led to strong competition among countries in the European and Asia Pacific regions for foreign direct investment ("FDI") from US MNCs. Various countries offer different structures to attract FDI, many with the objective of attracting inward investment and associated benefits. With the globalisation of trade through the last 17 years since 1997, the increased value of intangible property (IP) to business and the dominance of technology in global industry, we acknowledge the context and impetus for the OECD BEPS project in seeking to align profit allocation with all facets of global business operations. As Ireland has been successful with its tax regime in attracting foreign investment, there are a number of issues in the BEPS actions pertinent to inwards investment for Ireland.

In our view, it is vital to recognize the potential impacts of the changing international tax landscape and evaluate the existing tax framework to ensure and enhance the competitiveness of Ireland's tax regime for global business, while respecting the diversity of views amongst our OECD and EU partners and all of the contributors to this debate.

We believe that the main issue for Ireland is to maintain its competitiveness now and into the future. As there has been considerable debate over the last number of months in Ireland and in the US across many different business industry and representative groups on the Actions in BEPS of importance for Ireland, we believe that certainty should be brought to issues that could impact current inward investment or future inward investment. We note that Irish governments have shown leadership in this area over the years to date in terms of its management of tax policy and we would support and encourage such leadership at this juncture and into the future, so as to bring certainty for Irish FDI.

We have commented on the specific questions raised in the public consultation document. We have structured our response into two areas, international tax and financial services. While the issues are not mutually exclusive and there is overlap; given the importance of both sectors for Ireland, we believe it is appropriate to have a separate focus on each. We have cross referred the various items as appropriate.

We have not commented on the totality of the BEPS Actions. We would refer you to documents which our colleagues at Deloitte US, Deloitte UK and various other Deloitte colleagues together with ourselves have issued on Actions such as Transfer Pricing Documentation and Country By Country reporting, A Multi Laterial Instrument and which are contained at our website, **www.deloitte.ie** on the various BEPS Actions.

In summary, we are of the view that the following should be focused on as priority in 2014:

- We recommend that consideration is given to the tax law dealing with the corporate tax residence of companies and that certainty is brought to the issue. Any changes to the existing residence rules could impact commonly used IP and financing structures, such as the Irish-incorporated non-resident or "Double Irish" structures. To recognise the levels of capital investment, the scale of such investment and commitment by MNCs to Ireland, which varies from industry to industry, should changes be made to the current law, we consider it important that a substantial grandfathering period of a minimum of 5 years is offered to provide certainty to companies in the medium to long term and to allow companies sufficient time to alter their structures/assess alternative Irish-centred IP regimes, when necessary.

- We recommend that in conjunction with any change to the Double Irish structure, an income based IP regime is introduced.   Should a decision be taken to change the corporate tax rules on residence, in our view, Ireland needs to introduce, simultaneous with any such announcement, a competitive income based onshore IP regime, which will be crucial to sustaining Ireland's position in the FDI environment.

- We recommend that the regime for leverage is reformed and aligned with international practice in other countries, such as the US, such that interest on intra-group debt related to intra group acquisitions is tax deductible, subject to 50% of the profits remaining within the charge to Irish corporation tax and appropriate law to prevent erosion of the entire tax base..

- We have separately provided observations specific to the potential implications of BEPS on the Irish Financial Services industry, given its specialist nature, in situations where BEPS' focuses on a number of areas which are expected to have significant implications.

  Those areas include Action 6 (Prevent Treaty Abuse), Action 2 (Neutralise the effects of hybrid mismatch arrangements); Action 4 (Limit base erosion via interest deductions and other financial payments), Action 9 (Risks and capital) and Action 7 (Prevent the artificial avoidance of PE status). We are concerned that the envisaged BEPS actions could have an unintentional adverse impact on the Financial Services industry due to the broad and wide-ranging language of the discussion documents circulated to date. In addition, it is our view that a number of the Actions are interconnected, are not mutually exclusive and cannot be dealt in isolation. For example, Action 2 (Hybrids) is to be concluded by September 2014 whereas Action 4 (Base Erosion) is to be finalised in September 2015. However, the output of Action 4 will have clear implications on Action 2 and vice versa and therefore we would recommend that such items should be deferred and dealt with concurrently.

- We recommend that the number of Double Taxation Agreements (DTAs) is extended from the current 60+ to 100+ to facilitate Ireland as a hub for global business.

- To ensure a comprehensive tax approach to the management and use of IP which is and will in our view remain central to global and country international economic development, we recommend that issues relating to supporting innovation through the R&D tax credit are addressed, such as certainty of use, elimination of application of practice retrospectively and consistency of treatment.

- We recommend that the Irish tax law and practice relating to the taxation of mobile employees is a subject of focus. As noted in the public consultation paper, one of the goals of the BEPS project is to ensure that taxation rights are better aligned with real economic activities, calling for a link between the location of profits and where the company's value-added activities take place. This presents an opportunity for Ireland to operate as a location for international business operations in areas where to date it has not been able to compete due to absence of specific talent or to which focus has not been given.

  Ireland is placed to support substance-based activities, due to improved infrastructure, easier access to the EU markets, much-improved economic competitiveness in recent years and availability of certain skilled talent. However, in establishing substance, the location of "decision-makers" in a country will be crucial, essentially requiring senior executives to be based in Ireland. It is vital that Ireland implements a tax policy which is effective in attracting the top talent to Ireland to allow Ireland to sustain its position in the FDI environment. We also note that while it is desirable, incentives for executives is subsidiary to the Irish corporate tax law and practice for FDI being competitive and certain for the future.

Responses to Consultation Questions

1.0 Question 1

Which of the international tax issues identified in the BEPS Action Plan would need to be considered the highest priorities for Ireland for examination with a view to action?

1.1. International Tax

The introduction of the United States' "check the box" in 1997 coupled with cost sharing regulations paved the way for increased competition among countries in Europe as well as Asia Pacific for foreign direct investment from US MNCs. As the result, multiple structures and preferential tax treatment were offered by competing countries to attract multinational corporations.

The OECD BEPS project brings further scrutiny to these structures. For example, as part of the BEPS Project, there is a review currently ongoing by the EU Business Code of Conduct Group in relation to all EU IP tax incentive regimes in Belgium, Cyprus, France, Hungary, Luxembourg, Malta,The Netherlands, Portugal, Spain and the UK. Ireland is not the subject of this review as it does not have an IP income based regime.

However, the 'Double Irish' structure has received unfavourable attention. We acknowledge that Ireland's residence rules have been the subject of scrutiny and criticism in recent years and note the action taken by the Minister in Finance (No 2) Act 2013 in respect of stateless' companies. We also acknowledge that the fact that international focus on the 'Double Irish' structure continues and the OECD's focus on the alignment of taxation rights with economic activity has led to a review of the appropriateness of Ireland's company residence rules.

Given that any changes to Ireland's company residence rules could impact a significant number of multinationals, we recommend that any changes to Ireland's company residence rules would not impact companies incorporated in Ireland on or before 31 December 2014, which hold any IP and financing rights at that date, for a significant grandfathering period of a minimum of five years. Such timescale would recognise and reflect large investments in infrastructure, commitments made to employees by MNCs over the decades and in more recent years.

We request that certainty in relation to the length of the grandfathering period is provided, as continued uncertainty may lead companies that are currently evaluating Ireland as a place for investment to look elsewhere or result in MNCs with existing operations in Ireland delaying or terminating further investment.

In our view, it is important that any changes to Ireland's residence rules are accompanied at the same time by the introduction of an income based onshore IP regime.

Other Actions that are of relevance and concern for MNCs include:

Action 3 – Strengthen CFC rules

If any action is taken on CFC rules, we recommend that such Action should be delayed until a multilateral, coordinated and consistent approach is adopted. It is important that Ireland's attractiveness as a location is not eroded by the introduction of a CFC regime and that the impact of such a regime is minimised in an open economy. We would suggest that any CFC changes need to be carefully considered with adequate time to allow all stakeholders to fully appreciate the implications of such rules.

Action 15 – Develop a multilateral instrument

While we can appreciate the desire to develop a multilateral instrument and the potential benefits of such an instrument, we would be concerned if such an instrument erodes the advantages of our existing treaty network.

1.2 Financial Services

The Irish financial services industry spans domestic and international markets and is often driven by international developments. It is a wide ranging industry covering Funds, Banking, Leasing, Insurance and Securtisiation. It is important that at all times Ireland remains a competitive and attractive location for inward Financial Services investment.

BEPS focuses on a number of areas that would have significant implications for the Financial Services industry.We are concerned that the envisaged BEPS actions could have an unintentional adverse impact on the Financial Services industry due to the broad and wide-ranging language of the discussion documents circulated to date.

At the outset and in a Financial Services context,it is our view that no unilateral action should be taken by Ireland in the short-to-medium term until agreement has been reached on the BEPS project.

The key issues in relation to BEPS include:

- Action 6 – Prevent Treaty Abuse
- Action 2 – Neutralise the effects of Hybrid mismatch arrangements,
- Action 4 - Limit base erosion via interest deductions and other financial payments
- Action 9 – Risk and Capital Rules
- Action 7 - Prevent the artificial avoidance of PE status
- Action 13 – Transfer Pricing Documentation and Country-by-Country Reporting

The outcome of these Actions could have unintended consequences for the Irish Financial Services industry.

Action 6 – Treaty Abuse (September 2014)

Action 6 in particular recommends that a Limitations of Benefit ("LOB") clause be included in DTAs. The inclusion of a LOB clause could jeopardise and have a detrimental impact on the ability of Irish financial services vehicles and companies to access our Treaty network. For example, a number of financial services entities, including funds and securitisation vehicles, will have investors who hold their investments via clearing systems. Where investments are held through such systems it will not be possible to identify the investors and therefore such entities will be not be able to satisfy the requirements of the LOB clause.

In light of such negative consequences, we would not support the inclusion of a LOB clause in the treaty network. Broadly, those financial services companies operating in Ireland already have to satisfy requirements of Irish tax residency, being liable (or subject) to Irish tax and demonstrating that the Irish entity is the beneficial owner of its income/ gains. Where entities are already meeting these requirements, they should generally be able to rely on the treaties in place and any benefits from same without having to satisfy the requirements of a LOB clause.

In 2010, the OECD had previously expressed its positive view regarding the taxation of Collective Investment Vehicles ("CIVs") getting treaty access. In relation to Action 6 on Treaty Abuse, we are concerned that if the outcome is such that a LOB clause is adopted then this could result in all Irish funds not being entitled to tax treaty relief.

If the LOB clause is the route which is chosen to deal with treaty abuse, there should be a specific exclusion in particular for CIVs and securitisation vehicles. Any tax on income and gains which would arise for such entities could materially impact the performance of the entity and ultimately the return to investors which could render such vehicles to be uncompetitive.

Action 6 also proposes the introduction of a Main Purpose Test which is ambiguous due to its subjective nature and absence of bright line tests. We have a strong concern that this test will give rise to uncertainty and will be difficult to interpret and manage in practice.

Action 2 – Hybrids (September 2014)

We would reiterate our comment above that no unilateral action should be taken by Ireland.

Furthermore, it is our concern that the scope of the current proposals under Action 2 may have broad application and extend beyond related party transactions. In addition, the proposals place a burden on the issuer of the instrument and the identification of the investor may not be possible where the issuer has little or no knowledge of the investor. The proposals as currently envisaged are not workable and are likely to result in additional costs and uncertainty.

Any proposed measures should be tightly drafted and confined to address any specific aspects of law which can be exploited by hybrid arrangements. We therefore recommend the use of a 'bottom up' approach as a top-down approach may have unintended consequences, complexity and potentially double taxation.

A number of financial services companies require the use of certain instruments for regulatory purposes and these instruments would appear to be captured by the Hybrid rules. For example, a number of EU directives and regulations require certain securitisation companies to include Retention Notes (or Profit Participating Notes). Such instruments are required to be held to expose the manager or originator to the risk of non-performance of the securitised assets. Furthermore, Finance Act 2011 has already introduced measures in our securitisation regime to address transactions that were giving rise to "double no tax" outcomes. Therefore, in our view, no further action is required in Ireland to address the concerns raised by the BEPS proposals.

We are also concerned about the rules drafted under Action 2 to address imported mismatches whereby a third country could step in and deny a deduction because two other countries involved in a hybrid transaction do not impose tax. This is a complex area and due care and consideration needs to be given to the implications of such measures. The suggested third country approach to address this matter is highly questionable.

Finally, the proposals under Action 2, which require a 10% ownership threshold for related party transactions, are quite unworkable in a commercial context. It is our view that the scope of Action 2 should be limited to such transactions where a controlling interest exists (i.e. >50%).

Action 4 – Limit base erosion (September 2015)

We await the discussion draft on Action 4 (limit base erosion via interest deductions and other financial payments) which may also have implications for Action 2 and it is our concern that recommendations proposed under Action 2 could be implemented before the implications of Action 4 are known, appreciated and understood.

Intercompany funding is a crucial part of how many financial services companies operate in particular for treasury, leasing and special purposes companies. The use of derivatives, guarantees, and insurance arrangements is crucial for centralizing risk and for the efficient use of capital. The treasury, leasing and structured finance sectors are an important part of the Irish Financial Services industry and it is important that Ireland is seen as an attractive regime and location for such operations. We would be concerned that any measures which seek to limit the scope of deductible interest in intergroup arrangements or any measures which introduce Thin Cap rules could have a detrimental impact on the industry. If it transpires that Ireland needs to introduce any measures to address any perceived abuses, then it is important that Ireland does not act alone or fast-track any unilateral measures until there has been a consultation period with appropriate stakeholders and to ensure that there are no unintentional consequences from such actions.

It is our strong view that more time should be taken to properly consider the implications of Action 2 and Action 4 and that any final recommendations proposed under Action 2 should be deferred until due consideration is given to Action 4 so that both Actions can be addressed and considered in conjunction with each other.

Action 9 – Risk and Capital

The output of Action 9 – Risk and Capital is timetabled for September 2015 and we await the circulation by the OECD of the discussion draft. This action will be of importance to the financial services industry as the acceptance of risk is a key part of the day to day actitivies of many financial services companies. In addition, many companies in this sector are required to hold capital to support and meet any risks arising. The companies need to be appropriately remunerated for the risk that they have assumed and the capital requirements that need to be maintained. We would be concerned if the outcome of this Action impedes the day to day operations and the remuneration of activities undertaken by companies operating in the financial services sector.

Action 7 – Prevent the artificial avoidance of PE Status

This comment extends beyond the financial services industry. Many services company in Ireland deliver their services through the internet and through freedom of services principles as enshrined in EU law. Any redefining of the meaning of “Permanent Establishment” which would be triggered by a digital presence or through the provision of services could have a detrimental impact on the Irish Financial Services industry if this results in such companies being subject to tax in multiple jurisdictions.

Action 13 – Transfer Pricing Documentation and Country-by-Country reporting

We would be concerned that country by country reporting could be a significant compliance cost and system burden to financial services companies. A large number of financial services companies are involved in international transactions on a daily basis. Conscious of the existing layers of reporting that are already applicable to financial services company (e.g. FATCA, EU Savings Directive etc.), we are concerned that the costs and administrative burden of such reporting is likely to be more onerous on the Financial Services industry given the types of transactions entered into by such companies in this industry. The requirement to collect taxpayer data may require a number of companies to incur significant expenditure in updating their systems and give rise to additional compliance costs. We would recommend that any measures to introduce Country by Country reporting are carefully considered and that any duplication of information requirements (either domestically or internationally) are minimised.

2.0 Question 2

Are there other current international tax proposals that would be of concern to Ireland?

2.1 International Tax

Ireland’s positioning in the global business marketplace for MNCs depends on having:

- A competitive corporate tax rate and appropriate structures for management and use of IP taking into account the status of major competitor locations in the EU (e.g. UK, The Netherlands) and outside the EU (Singapore, Switzerland, Malaysia).

- Tax relief for interest on financing structures which is easily administrated and is in line with international best practice.

- Ability to realise profit tax efficiently through dividends and/or capital gains.

- Appropriate treasury vehicles to manage cash, FX and derivatives in line with global capital market practices.

- DTAs containing appropriate clauses and in sufficient number to cover the countries with which Irish based companies undertake global operations.

The most immediate concern in the Actions is the draft for Action 6 which sets out a number of different approaches to deal with treaty abuse, including the LOB article and the Main Purpose Test. The LOB clause was based on the United States – Japan treaty and as such was designed to suit their own legislative approach and may not be applicable in a broader context for smaller countries.

The Main Purpose Test, as discussed earlier, is subjective and requires tax authorities to access the purposes of another party. The application of this test may give rise to uncertainty and involves significant resources of the tax authority which again is prohibitive in the context of smaller countries tax administration resources.

Given the potential negative impacts of these tests, we encourage government to continue its work with the OECD and to participate actively with in these initiatives to ensure that any agreed measure would not adversely impact Ireland. We recommend that any agreement by Ireland in respect of the introduction of a LOB clause should be on a case by case basis.

Other areas of relevance for MNCs include Action 6 (Prevent Treaty Abuse), Action 2 (Neutralise the effects of hybrid mismatch arrangements), Action 4 (Limit base erosion via interest deductions and other financial payments), Action 9 (Risks and capital) and Action 7 (Prevent the artificial avoidance of PE status), which require monitoring and alignment by government with Ireland's requirements for its positioning in the global marketplace.

2.2. Financial Services

In addition to the points mentioned above, the following current international tax proposals are of concern to the Irish financial services industry :

- The reputational impacts arising from the findings of the EU investigations into State Aid and EU Code of Conduct Group.
- The increased competition from other jurisdictions, in particular, the UK which has made a number of changes (including improvements to its tax system) in recent years to improve its competitive position through for example, lowering CT rate, lower income tax rates, patent box. It is important that Ireland's competitive edge is not eroded by the improvements undertaken in other jurisdictions.
- In response to BEPS a number of countries have taken unilateral action to amend their tax rules, for example interest deductibility rules, a sample of these countries include France, Mexico, Austria and Denmark. While it remains our view that no unilateral actions should be taken by Ireland, the positions taken by other countries should be actively monitored.
- Many financial services companies are regulated and already have a number of additional reporting requirements. We are concerned that other international tax proposals will further impact companies operating in the Financial Services industry and increase (or duplicate) their reporting requirements.For example, these proposals include Treaty Relief and Compliance Enhancement ("TRACE"), FATCA, Savings Directive, Financial Transaction Tax, VAT Reform, CCTB and US Tax Reform. All financial services companies and structures are likely to be affected by these measures and these proposals and their implementation give rise to increased compliance costs, irrecoverable tax costs (e.g. VAT) and administrative/ system costs. In light of the number of tax proposals and changes currently underway, there is a risk that companies will be faced with implementing a number of different system and administrative requirements to deal with the various reporting obligations required under these proposals. We are concerned that these proposals are lacking continuity and being implemented without co-ordinated oversight with the result that these different initiatives could give rise to inefficiencies and potentially duplication of reporting, increased compliance costs, system and data capture changes.

3.0 Question 3

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?

3.1 International Tax

Ireland is a small open economy and heavily reliant on FDI. Across all sectors, it is very important that Ireland remains competitive when compared to other jurisdictions. In order to compete, Ireland must have a set of tax measures that are attractive to FDI in relation to IP across all tax heads e.g. corporate taxation, financing of IP, withholding taxes (WHT) and computation of credits on income derived from IP, pooling of credits on IP income and effective credit for unutilised overseas WHT on IP, R&D credits for work leading to generation of IP, ease of identification of relief from stamp duty. These are some of the areas, where we believe that improvements to the tax provisions for IP can be made.

Finally through improving and and expanding the DTA Network from the current 60+ countries to 100+ is important as Ireland's businesses expand into Africa, Far East and South America, as this automatically benefits all businesses operating from Ireland, irrespective of their industry focus.

3.2 IP Regime

While Ireland is already considered a favourable location for holding and exploiting IP through allowing a tax deduction for the capital costs of acquiring specified intangible assets, there are restrictions on the level of tax deductions which may be claimed and ring fencing provisions also apply to require connection with income. immediate changes to the existing IP regime could be implemented.

Should a change be made to the Double Irish structure, we recommend that an income based IP regime is introduced at the same time to ensure Ireland's competitiveness for FDI.

A major focus of the current IP regime is that it is expenditure based, related to amortisation of IP and it does not take into account a potential increase in the market value of the IP. An income based regime will address this issue. Examples of the various IP regimes across the EU are set out in Appendix 1 for reference.

The introduction of an income-based approach would significantly enhance the competitiveness of Ireland's IP regime, and we believe that it is possible to implement such a regime that complies with the EU Code of Conduct..

3.3 R&D Tax Credits

As acknowledged in the October 2013 review of the R&D Tax Credit Scheme in Ireland, the scheme is "best in class" and internationally competitive. The scheme has been continuously enhanced since its introduction in 2004 and is positively appraised by the mix of both multinational and indigenous companies who avail of it. Key to the scheme's lucrativeness on an international level is not only the 25% rate, but also the payable and carry forward tax credit mechanisms, and broad scope for qualifying activities. The scheme has been successful in attracting FDI, and in supporting indigenous companies in expanding and advancing their operations.

However, critical to the success of the R&D Tax Credit Scheme is not only the incentives fiscal offering, but also the ease and confidence with which the credit can be claimed and the way in which it is administered. Market feedback on this varied depending on industry sector and size, and has indicated some areas of concern where improvements could be made.

3.3.1 Interaction with Global R&D centres

With the current and likely future global shortage of engineers, companies have identified Ireland as having a track record of producing pools of talented engineers, albeit relatively small compared to say India or Russia. Irish R&D centres once established will typically be one of 3 or 4 centres situated across the globe. Recognition needs to be given to the method of operation of such global R&D centres and the objectives set for an Irish centre in that context (e.g. the development and delivery of part of an overall uncertainty) through ensuring that tax law and practice is up to date with how R&D centres are managed and with their mandates.

3.3.2 Enhanced guidance

A more interactive and up-to date mechanism for receiving both financial and technical guidance from Irish Revenue is sought. From a financial perspective, greater transparency on issues and decisions arising from these should be provided more frequently and made available not only to advisors and individual companies, but to all taxpayers. This will enhance the quality and consistency of claims being made.

From a technical perspective, more up-to date guidance on the assessment and determination of qualifying activities, perhaps even industry specific, is sought. Compared to our UK and Canadian counterparts, published guidance is lacking. This lack of guidance or the availability of an effective platform to raise eligibility queries can deter companies from claiming to the full extent possible. We have found considerable variances in the level of both understanding and awareness of the scheme depending on sector, which could be reduced with further guidance.

Given the increased enquiry and audit of claims in recent years, increased publication of the issues encountered and guidance to avoid them being repeated would be welcomed.

3.3.3 Claim certainty

There exists concern over the certainty of claims made and the fiscal benefit received. In the absence of an approval process and having an audit window of 4 years – this poses a significant timeframe during which a claim (and associated benefit received) could possibly be reduced. Inconsistencies in payment timeframes and audit/enquiry methodologies and approaches have been raised as a concern as well as the retrospective application of practice statements to past years. In our opinion these issues need to be addressed so that a higher level of confidence in the scheme is achieved.

3.3.4 Administration

The administrative burden of preparing and supporting claims is becoming an increasing concern. While a technical description is not required on submitting a claim, increased requests for such information and uncertainty on the required level of detail in responding is of concern. For larger companies undertaking more than a handful of projects (sometimes up to 100), preparing structured documentation to present all activities (to an unknown audience) can be counterproductive and claim prohibitive. Introducing a mechanism for such companies to present representative projects/activities should be considered. Similarly from a financial perspective, guidance on best practice and the levels of supporting documentation required would be welcomed.

3.4 Financial Services

The above suggestions on International Tax, IP Regime and R&D Tax Credits are of equal importance to the financial services industry.

4.0 Question 4

Are Ireland's company residence rules appropriate in the context of BEPS and other international tax developments?

4.1 International Tax

We acknowledge that Ireland's residence rules have been the subject of scrutiny and criticism in recent years and note the action taken by the Minister in Finance (No 2) Act 2013 in respect of stateless' companies. We also acknowledge that the fact that international focus on the 'Double Irish ' structure continues and the OECD's focus on the alignment of taxation rights with economic activity has led to a review of the appropriateness of Ireland's company residence rules.

Given that any changes to Ireland's company residence rules could impact a significant number of MNCs, we request that any changes to Ireland's company residence rules would not impact companies incorporated in Ireland on or before 31 December 2014, which hold any IP and /or financing rights at that date, for a significant grandfathering period of a minimum of five years. Given the large investments by a number of multinationals in recent years, it is important that they are allowed a significant grandfathering period to assess alternative Irish centred IP regimes and restructure, as necessary to align their substance and IP rights.

We request that certainty is brought to the situation as continued uncertainty may lead companies that are currently evaluating Ireland as a place for investment to look elsewhere or result in multinationals with existing operations in Ireland to delay or terminate further investment.

We also recommend that any changes to Ireland's residence rules are accompanied by the introduction of tax law on an income based onshore IP regime.

4.2 Financial Services

There is no specific comment in the context of the Irish Financial Services industry other than in the context of the comments already made above.

5.0 Question 5

What are the critical considerations in shaping Ireland's response to current international tax developments—either in general or with respect to particular issues?

5.1 International Tax

Critical considerations for government are to understand that the global capital markets focus on the Effective Tax Rate (ETR) for listed companies but not on the specifics of how this achieved. In that regard, MNCs have different global options to ensure that their ETR is competitive vis a vis their market peers, while ultimately being in line with the expectations, as previously signalled to the market.

Investment analysts have not focused on the impact of the BEPS debate or sought to compare and contrast the mertis of tax structures across different countries in their market analysis of listed MNCs. Boards of MNCs often have common board members on boards of many industry sectors, whose thinking is influenced by a perception of political risk attaching to the Double Irish and how this is managed. Their perception and the reality of how Ireland deals with the Double Irish structure and IP structuring for the future is important for FDI.

While Ireland may choose to unilaterally change certain tax rules such as the Double Irish, other countries in the EU may choose to retain their equivalent structures for management of IP during this period of time and into the future and indeed and countries outside of the EU will await the conclusion of BEPS before deciding on action. We acknowledge that there are other structures that can achieve a similar tax rate that are as effective and less controversial to the Double Irish. Therefore, we recommend that Ireland demonstrates its sovereign flexibility in management of and discussions on such matters in terms of the future structure for FDI.

5.2 Reform of the tax deduction provisions for interest on leverage

The ease of access to capital in global capital markets and the supporting tax deductibility of such interest and financing costs is of critical importance in faciliatiating MNCs doing business and basing themselves in Ireland as a hub for operations. It is also of importance to the financing operations that purchase and invest in corporates, such as private equity operations, venture capital operations.

Countries are concerned about unrestricted tax deductible leverage in eroding the in-country tax base, which concerns are reflected both in the BEPS Actions and in unilateral actions being taken by countries on financing and financing related matters. However, in our view, Ireland as an open economy must facilitate inter-alia free movement of capital in a manner that encourages corporates and MNCs to consolidate actual operations and their shareholdings in subsidiaries into Ireland through acquiring subsidiaries, while contributing to the Irish exchequer returns.

BEPS and the current unilateral tax trends are focusing on holding companies having substance through employing senior level executive management who operate from the holding company. This move towards structuring holding companies with senior executives provides an opportunity for Ireland to restructure its system on interest deductibility in recognition that there are and will be further international tax changes to encourage substance in holding companies, where such companies have the benefit of leverage. In the absence of taking unilateral measures on this issue, Ireland will fall behind best international practice.

We recommend that a tax deduction on interest on borrowings to acquire shareholdings in subsidiaries is introduced up to a maximum of 50% of profits earned by a principal company or central entrepreneur, irrespective of how termed, and that such interest relief is capable of being offset only against incremental profits from 1 January 2015 onwards, excluding the normal projected growth of profits computed by reference to economic metrics such as GDP/GNP. By ensuring that 50% of the profits fall within the charge to corporate tax, the issue of base erosion without limit is being addressed. Furthermore by focusing the relief on incremental profits (overand above the normal profits derived from existing operations and such operations into the future) arising to a principal or central entrepreneur companies,which in practice would extend to all corporates, the relief is focused on structuring for the future growth and profitability of Irish centric operations, with substantial corporate executive presence and management of subsidiaries.

5.3 Attracting Overseas Executives

A feature of the BEPS review is the link between the allocation of profits and where the company's value-added activities take place.

The location of "decision-makers" in a country is crucial to establishing real substance in the country. BEPS is driving a requirement for senior executives to be based in Ireland either full time or part time. It is vital that Ireland supports this requirement and implements tax policies which are effective in attracting the top talent to Ireland to allow Ireland to sustain its position in the FDI environment.

Currently many companies "tax equalize" senior executives seconded to Ireland but this is quite costly particularly when share based compensation such as share options are factored in. This means that the burden of high marginal tax rates and limited reliefs is borne by MNCs which is a key concern from an FDI perspective.

SARP (Special Assignee Relief Programme) was introduced in Budget 2012/Finance Act 2012 and the Minister stated "This will allow multinational and indigenous companies to attract key people to Ireland so as to create more jobs and to facilitate the development and expansion of businesses in Ireland." However the limited use and restrictions inherent in the current SARP makes this uncompetitive by comparison with offerings in other countries seeking to attract the same talent and FDI.

SARP works by providing income tax relief on a proportion of income earned by employees who are assigned by their employer to work in Ireland. An employee can claim for 30% of his or her income between €75,000 and €500,000 to be exempt from tax where a range of conditions are satisfied. The income is not exempt from USC or PRSI. SARP allows expenses for school fees up to €5,000 per child and one trip to the home country to be reimbursed tax free.

There are a number of key restrictions with the current SARP regime. This is highlighted by the fact that only 15 people availed of the relief in 2012 as outlined in response to Dail (Irish parliament) Parlimentary Questions (PQs) on 8 April 2014. The following are some of the key restrictions which are causing practical problems:

- The assignee must not be tax resident anywhere outside of Ireland

  This restriction causes issues, particularly in the first year of an assignment, where the assignee may be dual resident in Ireland and another country for all or part of the first year of assignment. Similarly it can cause issues for assignees from certain countries that apply residence based on citizenship (US) or based on on-going links/ties to that country (UK statutory residence test, Dutch personal & economic ties). While Revenue has commented in guidance that this restriction will not prevent US citizens from being entitled to the relief the issue is not free from doubt and this does not address other countries.

- The assignee can only perform incidental duties outside of Ireland

  There is insufficient clarity in relation to this condition and it is unduly restrictive. In many cases senior executives are likely to have responsibility for operations in other parts of EMEA or the globe making it necessary for them to spend time working in other countries. The restriction in the relief where duties are greater than incidental makes this overly restrictive.

- The individual must have worked with the same employer for 12 months prior to moving to Ireland

  This requirement means relief is not available to new hires. For many companies seeking to establish within Ireland they will have a mix of existing employees and new hires to allow them to source the right expertise. New hires often have to be sourced from overseas due to the shortage in Ireland of skilled or suitably qualified candidates in the labour market. The lack of application of SARP to new hires greatly limits the effectiveness of the relief.

Other conditions which we recommend are reviewed include the cap of €500,000 and the non-application of the relief from USC. In summary, in our view, overall SARP is relatively complex and is ineffective due to the number of restrictions/conditions.

5.3.1 International Approaches

Many other jurisdictions with which Ireland competes for FDI have more effective tax incentives to attract senior executives. We have outlined a sample of these below.

5.3.1.1 United Kingdom (UK)

The UK a direct competitor for FDI in terms of its global positioning and in the context of BEPS. The UK has a lower marginal income tax rate of 45% (compared with 48% Irish income tax with USC) and a lower marginal social security rate (NI) of 2% on earnings above £41,860. This makes the UK more competitive at a base level. Coupled with these lower rates, non-UK domiciled individuals that have not been resident in the UK in the three years before arriving in the UK can claim overseas workday relief (OWR) in the year of arrival and the two following years. This enables earnings attributable to overseas workdays to be regarded as foreign income and to remain outside of the UK tax net provided it is not remitted to the UK.

The availability of the relief does not depend on where the employer is resident. In the context of senior executives who have responsibility for more than one location and are required to travel, this is attractive.

In addition, if the executive is assigned to the UK for a period of up to 24 months the UK will be viewed as a temporary location and travel to and from that workplace together with accommodation costs can be paid tax free. This compares very favourably with the Irish relief for temporary assignees which allows exemption for accommodation costs for just the first 12 months and only allows one home leave trip per annum.

5.3.1.2 The Netherlands

The Dutch regime is well known and often referred to by commentators on expat regimes. The "30% ruling" in The Netherlands allows the employer to pay a qualifying employee up to 30% of his/her total remuneration tax free for a maximum period of 8 years. The relief requires the employee to have specific expertise although this will be met once the employee meets a minimum salary level (€51,969 in most cases). The employee must be recruited from abroad/assigned from abroad and not have lived in The Netherlands during the previous two years.

In summary, we recommend simplification and expansion of SARP to be effective in attracting senior executives to Ireland. If key decision makers cannot be attracted to Ireland due to the high tax burden borne, irrepseiotve of whether by the MNC or in emerging companies by the individulas in part, Ireland's FDI position will be eroded.

5.3.2 Lack of Certainty

A further factor in deterring businesses from establishing in Ireland is a lack of certainty in relation to the income tax landscape. One area of concern is the lack of clarity from Revenue in relation to the taxation treatment of temporary assignees to Ireland. Revenue appears to be adopting the economic employer principle but have not, to date, stated this and have not communicated the application of this principle to any of our treaty partners. Businesses sending employees to Ireland on short term assignments of less than 6 months no longer have advance certainty as to whether a PAYE dispensation (and treaty exemption) will be granted. This creates a degree of uncertainty in respect of costs which businesses are finding it very difficult to manage. We believe that Revenue should confirm their position in relation to temporary assignees and issue guidance, preferably after consultation, regarding same.

Another area of uncertainty is in relation to non-resident non-executive directors in terms of both apportionment of fees between Irish and non-Irish duties and the treatment of expenses. Some companies obtained Revenue rulings at the time of setting up in Ireland. However we are aware that recently Revenue has, in some areas, sought to withdraw earlier rulings or to deem rulings issued by local districts to be invalid. This lack of certainty in this area is a further deterrent for FDI. Overall in the context of good corporate governance and having suitably experienced directors on boards, there is a requirement for many companies to appoint non-executive directors from overseas. We recommend that, to encourage FDI and enhanced board membership, travel and subsistence expenses for non-resident non-executive board members should be treated as tax free.

5.4 Financial Services

The above considerations also affect companies in the Financial Services industry.

6.0 Question 6

Are there any other priority areas or future challenges that should be considered as part of this process?

We have set out below some non tax matters that we believe are critical to the positioning of Ireland for future FDI across all sectors.

6.1 Skilled Labour Shortage

Coupled with the requirement for senior executives to be based in Ireland the businesses seeking to establish themselves in Ireland need skilled labour. There is an internal shortage of suitably qualified and skilled people in the market due to MNCs losing people through the recession. This shortage applies across many businesses but the IT sector in particular has a significant shortage. Businesses are struggling to attract the right people to positions in Ireland due to the high marginal tax rates. The OECD "Taxing Wages 2014" report issued in May 2014 shows that Ireland has the 9th highest marginal tax rate of 34 OECD countries. In addition the marginal rate applies at a much lower income level that in most other OECD countries.

To address the skills shortage and increase our competitiveness Ireland needs to address the marginal rate. We would encourage a reduction in the marginal rate of income tax to bring the overall combined rate (income tax plus USC plus employee PRSI) below 50%.

6.2 Increase in the exemption for the provision of temporary accommodation on relocation.

Currently under the Statement of Practice on Relocation an employer can provide temporary accommodation for up to 3 months to an employee relocating. Increasing rents coupled with high tax rates is reducing disposable income which is acting as a disincentive to relocating to Ireland. We recommend that the exemption for temporary accommodation is increased to 12 months.

6.3 Enhanced relief under the Irish Revenue Approved Profit Sharing Scheme (APSS).

The APSS is intended to encourage corporates to allocate shares to employees and as it is an all employee scheme, every eligible employee within a company can participate. Shares allocated under an APSS are exempt from income tax but are liable to USC and employee PRSI. Currently up to €12,700 of shares can be allocated annually free from income tax. We recommend that this exemption is increased to €25,000 per annum.

6.4 Exemption from income tax for certain share plans or implementation of a new approved Irish share scheme.

Many US MNCs operate Employee Share Ownership Plans (ESPPs) under which each employee can acquire shares at a discount. The discount is typically between 10% and 15%. The discount under these plans is below the maximum discount of 25% permitted under an Irish Revenue approved SAYE. These schemes operate in a similar manner to an SAYE with employees saving on a monthly basis to acquire shares. The main difference is a timing one in that under an ESPP employees acquire shares on a quarterly, half yearly or annual basis depending on the scheme rules rather than at the end of 3 or 5 years under an SAYE. As the discount is less than that permitted under an SAYE scheme, we recommend that exemption from income tax is extended to ESPPs and similar schemes which are operated as all employee plans.

6.5 Incentives for education up to PhD level for skilled talent to enhance knowledge within the labour market.

The strategy for Science Technology and Innovation supported the objective of developing PhD graduates with the skills necessary to develop and manage their careers across a broad range of employment sectors. High quality PhD graduates are a key element for continued development in and the success of hi-tech businesses in Ireland across pharmaceutical, IT including software development and consumer business such as food & ingredients. While there is existing tax relief for fees paid in respect of approved post graduate courses (including PhDs) this is somewhat limited with an excess and a maximum both applying and relief being granted at the standard rate of tax only. We recommend that increased tax relief is granted to graduates undertaking relevant post graduate degrees or PhDs to allow Ireland to increase the pool of talent within the labour market. One possibility would be to allow relief for the full fees (with no excess) for a relevant course or PhD at the marginal rate of tax with relief being given for taxes paid over the prior 4/5 years. This relief could be focused on the courses which will have the greatest impact in respect of the current and anticipated futures skills shortages.

6.6 Educational Infrastructure

International schools are a subject of discussion for over 25 years, since the inception of the IFSC. We note the economic benefits of having schools recognised globally of being at an international standard, which is evidenced in the UK educational system, where large numbers of Chinese, Russians, middle- Eastern families eduate their children at UK based fee paying schools that are able to direct the children to US universities or their equivalent. We believe that there is a requirement and a desire for government to facilitate the development of an international school in Dublin, that would be open to all children and which would as part of its remit support a major scholarship initiative for underprivileged children.

6.7 Financial Services

The above priority areas and challenges are also applicable to the Financial Services industry.

IP and Patent Box Regimes

Country	Belgium	Cyprus	France	Hungary
Status	Current	Current	Current	Current
Headline Rate	33.99%	12.5%	34.43%	19%
Maximum Effective Rate	6.8%	2.5%	15.5%	9.5%
Regime	Patent income deduction on qualifying income from royalties and income deemed to be sourced from patented intellectual property.	80% of the net worldwide royalty income from the exploitation of IP is exempt from tax. The IP must be owned by the Cypriot company.	Reduced rate of 15% applying to income from royalties and capital gains on the sale of patents, patentable inventions and manufacturing processes, as well as expenses incurred in relation to same.	50% exemption for royalty income against total net income in respect of royalties received. The 50% deduction cannot exceed 50% of total pre tax profits.
Application to IP other than patents	No application beyond patents and extended patent certificates.	Includes all intangible assets (patents, brands, franchises, copyright, designs etc.) registered in Cyprus or abroad.	No application beyond patents, patentable inventions and manufacturing processes.	Applies to royalties in respect of patents, other industrial designs and models, knowhow, trademarks, trade and business names, business secrets, secret formulas and processes, and copyrights (including software).
Substance/ Commentary or Other Incentives	The regime applies to both self developed and acquired or licensed patent rights. If the patent rights have been acquired, they must have been further developed. The Belgian company must have legal ownership of the patent, although ownership is not required if the patent rights are further developed. R&D Tax Credit to reduce costs by 5% - 5% by deduction. Payroll withholding exemption of 75%.	The IP must be owned by the Cypriot company. No substance.	Typically claimed by French based Pharma companies. R&D Tax Credit which takes the form of an actual cash payment from the government: 30% for expenses up to €100m and 5% thereafter. Possible to increase the credit in certain situations	From 2014, expenses arising from the R&D activity may be deductible from the corporate income tax base if certain conditions have been met.

IP and Patent Box Regimes

Country	Liechtenstein (Non EU)	Luxembourg	Malta	Netherlands
Status	Current	Current	Current (Not currently giving rulings)	Current
Headline Rate	12.5%	29.22%	35%	25%
Maximum Effective Rate	2.5%	5.84%	0% (Exempt)	5%
Regime	Notional deduction of 80% of the net income from IP acquired or created on or after 1 January 2011. Income from IP used within the same group and income from IP licensed to a third party are within the scope of the IP regime. Must be registered on any IP register.	80% of the income and the gains arising from the exploitation of IPR is exempt from tax. This applies to IPR acquired or registered after 31 December 2007.	Royalties and similar income deriving from qualifying patents, copyrights and trademarks are exempt from tax in Malta.	Income derived from self-developed intellectual property is effectively taxed at 5%. Innovations in business processes & products (including software related intangibles & trade secrets) can qualify. Typically proof of such qualification is either the patent or a wage tax certificate to demonstrate the employee is involved in developing the IP.
Application to IP other than patents	Applies to patents, designs, models, utility models, trademarks, copyrights (including software)	Includes software copyrights and software, domain names, patents, trademarks, designs and models.	Applies to patents, copyrights and trademarks .	Applies to profits derived from both patented and non-patented (where an R&D declaration has been granted by the Authorities) intellectual property.
Substance/ Commentary or Other Incentives	No substance. Notional interest deduction on weighted average equity (4%).	Substance to be determined on a case by case basis and depending on the risks and functions performed by the Luxembourg company. Corporate taxpayers that develop and use patents for their own activities may benefit from a notional deduction that amounts to 80% on the income that would have been earned if they licensed it out. IP rights acquired directly from a related party are excluded from the regime, however, it may be possible to avail of the regime where the IP was developed by a group company Qualifying rights are also exempt from net wealth tax.	The company needs to actually own the rights to the patented intellectual property and have received income from the licensing of same. This license must be granted for the purposes of using the patent in a productive environment. No substance.	Given this regime requires development, typically substance of some R&D people is expected - at least 2-3. Theoretically it is possible to have zero people and have contract manufacturing arrangements with another jurisdiction with the board controlling the activities. However, given that a ruling is required, this would be rare. For patented IP, the R&D can be carried on outside The Netherlands, either by the company itself or a third party. In contrast, for non-patented IP for which an R&D certificate has been obtained, at least 50% of the R&D must be carried out in The Netherlands or the Dutch company must manage the development of the IP. A research and development allowance applies for costs and expenditure directly related to the R&D activities. For 2014, this is 60% of R&D costs, excluding wage costs. Given the rate of 25%, the marginal benefit is 15%.

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IP and Patent Box Regimes

Country	Spain	Switzerland (Mixed Company Regime)	Switzerland (Nidwalden) IP Box	UK
Status	Current	On hold	On hold	Being phased in over 5 years
Headline Rate	30%	12 - 22%	12.7%	21%
Maximum Effective Rate	15%	20% of headline	8.8%	10%
Regime	50% deduction of gross income from the licensing of intangibles. Applies to self developed patents only.	Deduction of 80% on the income of a mixed company - applies to companies with predominantly foreign business activities (80% of expenses incurred abroad). In turn, the incentive applies only to foreign sourced net royalty income.	IP Box only available in the Swiss Canton of Nidwalden, but is under the evaluation by other cantons and on federal level. Applies to all IP and irrespective of source.	Ultimately the newly introduced patent box regime will allow companies to elect to apply a 10% rate of corporation tax to qualifying patents, including whether paid separately as royalties, or embedded in the sales price. Patent box can work whether the patent is licensed in or owned.
Application to IP other than patents	Applies to patents, secret formulas, processes, plans, models, designs, and know-how (information concerning industrial, commercial or scientific experience).		Applies to intellectual property based on the OECD definition ("Literary, dramatic, musical, artistic and scientific works are intellectual property which is protected by copyright, patent, registered design, trade mark, etc.")	Applies to income from qualifying patent derived income. For a company to be within the Patent Box it must actively hold a patent that's been granted by the UK Intellectual Property Office, the European Patent Office or equivalent IP offices in certain other countries in the EEA , and receive income relating to that patent.
Substance/ Commentary or Other Incentives	The licensor must have created the intangibles that are being licensed. In addition the company must use the intangibles for carrying on a business activity and must not be resident in a tax haven. Deductions are available for R&D.	Historically no specific head count requirement for the mixed company regime. There are companies in existence with no employees under grandfathering rules. Mixed company rulings are still available but it is recommended to have the level of substance that is operationally required. Possible to get the mixed company ruling with at least one employee and a plan to have more in the future.	Sufficient activity required to argue that the IP is managed – typically 2 to 3 people are needed to argue this. Higher substance requirements are expected in the future for the Swiss wide IP Box.	If the IP is licensed in, then at least one person to manage the IP is needed in order to benefit from the regime. If the patents are owned by the UK company, then some form of development has to occur which likely means a team of at least 3 people. In addition, the patent holder must be actively involved in the decision making connected with the patent, and either itself or a group company must have performed significant activity to develop the patented invention. European Commission considers that some aspects of the regime breach the EU Code of Conduct on Business Taxation. The EU's Code of Conduct Group for Business Tax met in October but did not conclude on it. The next stage was a discussion at the 10 December 2013 EU Finance Ministers (ECOFIN) meeting on the matter. This meeting was also inconclusive.

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