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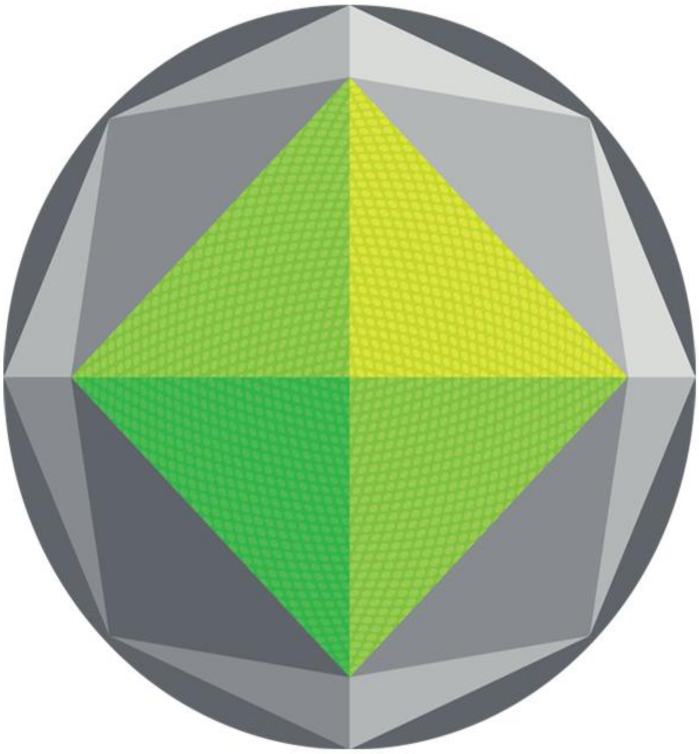

CFC Feedback Statement
Deloitte Response

September 2018

Deloitte
Deloitte & Touche House
Earlsfort Terrace
Dublin 2, Ireland

T: +353 1 417 2200
F: +353 1 417 2300
www.deloitte.ie

28 September 2018

ATAD Implementation – CFC Feedback Statement
Business Tax Team
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

VIA EMAIL: ctreview@finance.gov.ie

Dear Sirs/Mesdames:

We are pleased to submit comments on behalf of Deloitte in response to your call for feedback and consultation on the implementation of CFC rules as required by the ATAD provisions. 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 of Finance on this and other tax initiatives, and are available to discuss anything in this document, as needed. In the meantime, if you have any queries, please do not hesitate to contact me at 01-417-2200.

Yours sincerely,

Tom Maguire

Tom Maguire
Tax Partner

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Executive Summary

Since the adoption of the Anti-Tax Avoidance Directive ("ATAD") by the EU Council, developments in the international tax landscape have continued apace. These developments range from the ratification by a number of jurisdictions of the OECD's Multilateral Instrument, the EU's introduction of the Mandatory Disclosure regime, to US tax reform.

This sustained and unprecedented level of change is placing ever increasing demands on companies to stay abreast of international tax changes and the potential impact on their business models, such that clear and pragmatic legislative change at a national level is more important now than ever before.

The ATAD requires that Controlled Foreign Company ("CFC") legislation must be implemented into law with effect from 1 January 2019. Based upon the alternatives provided for within Article 7 of the ATAD, the Irish Government has decided that Ireland will elect for the "Option B" approach. The Option B approach attributes undistributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.

This requires an analysis as to whether the foreign entity would not own the assets, or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income.

The proposals contained within the Feedback Statement take account of the provisions set out within Article 7 of the ATAD, but have also included a number of unilateral provisions which we believe may bring certain companies within the scope of the CFC legislation which may not have been intended.

Left unchecked, we believe some of these provisions, which go beyond the standard required by the ATAD, have the potential to impact Ireland's competitiveness as a location for doing business for both domestic and inward investment companies.

In addition, we believe that certain provisions require further clarification in order to avoid uncertainty and ambiguity; albeit we acknowledge that the forthcoming CFC legislative provisions may not be reflected in their entirety within the Feedback Statement. We outline below a summary of our key observations and recommendations.

Control

The proposed control provisions within the Feedback Statement include both a present and a future right to direct the company's affairs. This broader definition of control goes beyond the ATAD which only looks for a present right to control. We would therefore suggest that Taxes Consolidation Act 1997 ("TCA97") s11 may be more closely aligned with the control provisions within the ATAD, and consideration should be given to this in determining the appropriate legislative test in this regard.

Effective rate and charge

In quantifying the CFC's equivalent Irish tax charge, the Feedback Statement provides that a number of assumptions must be made. Some of the assumptions that are required to be made may, in certain circumstances, result in a "notional" Irish tax charge for the CFC which could in turn cause the application of a CFC charge and that may not have been intended. Therefore, these assumptions should be revisited especially regarding intra group transactions if it is intended that the CFC charge is to be applied to a CFC's capital gains.

In addition, based upon the potentially significant volume of work involved in determining the notional Irish tax charge for multiple potential CFCs within a large group, we would support the suggestion that the ETR test be structured as an optional exemption until such time as it has been determined that a CFC is 'controlled' and has undistributed income. However, in the absence of seeing the full legislation and the potential ancillary effects of such option we cannot comment further.

The CFC Charge

In determining what income should be subject to the CFC charge in the controlling entity, article 8 (2) of the ATAD provides that the charge shall be limited to amounts linked to significant people functions ("SPFs") carried out by the controlling company. However, the provisions set out in section 4 of the Feedback Statement propose that the Irish legislative provision will go beyond the ATAD by considering SPF activities on a group-wide basis. While the intended purpose of this broader provision is stated in the Feedback Statement and can be understood, we believe that any provisions which go beyond the ATAD may have the potential to impact Ireland's competitiveness where our legislative provisions are more complex than those of other Member States.

Separately, we note the exclusion from the charge for 'negligible' increases in undistributed income as provided for within Paragraph 8 of Section 4. However, as 'negligible' is undefined, further clarification in relation to what constitutes negligible for the purposes of this section would be welcome. On a similar point, it must be noted that the ATAD allows an exception from the application of the CFC charge for, inter alia, entities with accounting profits of no more than €750,000 and non-trading income of no more than €75,000. The draft legislation is silent on such an exclusion and would be a welcome addition to the law as currently drafted.

Similarly, there are reliefs in the ATAD for double tax relief where a CFC's income is subject to a CFC charge and that income is subsequently distributed or the CFC is disposed of and the draft legislation in the Feedback Statement is silent thereon. Such reliefs would be a welcome addition and we would argue they should form part of the final legislation. We understand that the Feedback Statement by its nature cannot include all aspects of the proposed legislation.

The question as to how losses in the CFC are to be dealt with is not outlined in the Feedback Statement. Presumably, in computing the CFC's income under Irish rules, regard could be had to losses forward. Similarly, the question arises as to whether losses in other CFC's can be taken into consideration notwithstanding the non-applicability of group relationships (albeit by reference to Irish law) being ignored by the legislation and confirmation thereof would be welcome.

Undistributed Income

The inability of a CFC to distribute profits by reference to the application of law may be outside the control of the CFC. We believe the proposed provisions set out within Section 8, para 2 of the Feedback Statement should be revised and would suggest that recognition of legal provisions precluding the distribution of profits in line with TCA97 s434(7) be applied in respect of the relevant CFC provisions.

Section 8, para (3)(i) of the Feedback Statement, explains the relevant distributions to be taken into account in computing a CFC's unattributed income for the purpose of a CFC charge. These can only comprise those made to a relevant Member State. It is not apparent whether the definition of a relevant Member State is limited solely to EU Member States, or will also include jurisdictions with which Ireland has a double tax treaty. We would therefore welcome clarification on this point and would suggest that the relevant provision takes account of the significant number of taxpayer groups that could be adversely affected in the event that the narrower EU Member State definition is to be applied.

Miscellaneous Definitions

As referenced within the Feedback Statement, Member States should have regard to the EU Freedoms and, specifically, be cognisant of the Cadbury Schweppes case in respect of the "essential purpose" test.

Based upon Section 9 of the Feedback Statement, we believe that the definition of arrangements may, in certain circumstances, overstep the parameters understood to apply as a result of the

Cadbury Schweppes case. We therefore believe that the definition of arrangement should be amended to take account of transactions in accordance with relevant case law.

Separately, the definition of relevant assets and risks provides for an undefined timeframe over which a CFC's asset / risks must be tracked. We would suggest that the CFC charge should be applicable in respect of the relevant assets and risks held by the CFC in the current accounting period only. Alternatively, where this is not deemed appropriate, we would suggest that a defined timeframe is provided for in order to avoid an indefinite period having to be considered.

Finally, the Feedback Statement notes that consideration is ongoing regarding measures to address *"'cash box' subsidiaries, for example, where there are cash/capital rich companies with few or no employees in low tax jurisdictions and there are no SPFs in the State relating to the management of those assets…"* It is unclear as to the limitation of such considerations given the statements reference to "for example" in the above extract. We would argue, as we have done with other sections of this statement, that going beyond the ATAD's requirements is to bring about a potential competitive tax issue regarding other EU Member States which have to bring about this law. Indeed, by designating various forms of corporate entity as a CFC without referencing the requirements of the ECJ regarding breaches in the fundamental freedoms contained in the EU treaty could lead to EU law difficulties in the future. Therefore, we would argue that adopting a Cadbury Schweppes analysis to any form of corporate entity should be sufficient for meeting EU law requirements in itself and that should be taken into any considerations involving "cash box" companies.

Overall

Finally, we note Ireland has made strong advances to been seen globally as engaging in "best practice". While engaging in "best practice" is essential to maintain our international reputation, Ireland is a small open economy which is heavily reliant on FDI. Ireland does not operate in isolation and must be conscious of the positions being adopted by competitor nations. It is necessary that a desire to engage in "best practice" does not lead to Ireland agreeing to non-mandatory or more onerous provisions which are contrary to its competitive offering and position going forward.

ATAD Implementation of CFC Rules – The EU Context

The CFC Feedback Statement confirms that Ireland proposes to adopt the Option B approach originally set out within Article 7(2)(b) under the Council Directive (EU) 2016/1164 *'laying down rules against tax avoidance practices that directly affect the functioning of the internal market'*[1], also known as the ATAD directive.

The Option B approach is broadly directed at attributing undistributed income to a controlling company arising from non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage from the CFC (subject to conditions).

Option B, with its specific reference to tax advantages would be close in approach to that adopted in the Cadbury Schweppes case. The findings of the court, and in particular para 54 set out that freedom of establishment involves *"the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period…… Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there"*. One can see how this is factored into Option B and this is further echoed in para 55 of the decision which says that *"for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory".*

The latter is reflective of several ECJ decisions, which note that a national restriction on fundamental freedoms can be justified only where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose sole purpose is to obtain a tax advantage.[2] The ATAD's preamble notes that *"It is important that tax administrations and taxpayers cooperate to gather the relevant facts and circumstances to determine whether the carve-out rule is to apply."* Although tax administrations should work with taxpayers to determine whether the carve out will apply, caution should be taken such that the burden of proof does not lie solely on taxpayers to prove that the carve-out should apply. This is important in light of ECJ rulings as well as a 2007 European Commission document 'The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries' which states that *"the Commission considers that burden of proof should not lie solely on the side of the taxpayer and that account should be taken of the general compliance capacity of the taxpayer and of the type of arrangement in question"*[3] , and most recently the European court's ruling in Eqiom[4].

The Feedback Statement's point on page four that *"when implementing ATAD, Member States are required to have regard to the EU Freedoms and to ensure that the measures are implemented in compliance with established case law in this area"* is welcome confirmation of the above. The Feedback Statement re-emphasises this point on page 10 as follows; *"The term* "essential purpose" *would seem to reference existing European case law with regard to CFC rules, including the Cadbury Schweppes case in which it was found that CFC rules could be a justified restriction on the freedom of establishment on the grounds of prevention of "wholly artificial arrangements"."* The reference to the Cadbury Schweppes case is important and therefore the provision should be read with that in mind. It should be acknowledged that many cases in connection with the meaning of "wholly artificial arrangement" refer to the Cadbury Schweppes case and the implementation of this provision under Option B methodology should be no different.

However, an arrangement is defined within Section 9 of the Feedback Statement as inter alia a transaction or series of transactions etc. The Cadbury Schweppes case effectively looked at the latter when the decision notes at para 63 et seq as follows *"As stated by the applicants in the main*

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN

[2] See for instance *Cadbury Schweppes Overseas Limited v Commissioners of Inland Revenue, C-196/04, Automóveis de Aluguer Lda. v Fazenda Pública, C-282/12 and Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v Finanzamt Linz, Joined Cases C-436/08 and C-437/08*

[3] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0785&from=EN

[4] Eqiom SAS, formerly Holcim France SAS, Enka SA v Ministre des Finances et des Comptes publics C-6/16

proceedings … the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax. ….In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment, …In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality".

This is relevant in the context of our own implementation of CFC rules as in the above case the court concluded that that setting up in a country to benefit from more favourable legislation is not in itself an abuse of the freedom of establishment. Therefore, in our view adopting a transaction by transaction analysis without looking at each transaction in light of the setting up in a foreign jurisdiction would, prima facie, go beyond dicta in Cadbury Schweppes which could lead to EU law difficulties into the future.

Definition of Control

(i) The ATAD defines a CFC by reference to two tests; a participation test and a tax rate test; the latter will be discussed later in this document.

The participation test is as follows;

"in the case of an entity, the taxpayer by itself, or together with its associated enterprises <u>holds</u> a direct or indirect participation of more than 50 percent of the voting rights, or <u>owns</u> directly or indirectly more than 50 percent of capital or <u>is entitled</u> to receive more than 50 percent of the profits of that entity".

The Feedback Statement recognises that the control test contained in ATAD Article 7(1)(a) defines 'control' in terms of a 50% direct or indirect shareholding or entitlement to profits or voting rights. It also aggregates the holdings/entitlements of 'associated enterprises'.

Section 1 of the Feedback Statement provides that the definition of control as contained within TCA97 s432 is being proposed, subject to certain amendments, as the basis for determining control for CFC legislative provisions.

On that basis, control under Irish CFC rules would include both a present and a future right to direct the respective company's affairs. The retention of this broader definition of control goes beyond the present tense test within the ATAD.

An example of the potential consequence of the Feedback Statement control provisions can be seen in a situation where persons holding share options could be brought within the analysis of whether a CFC exists based upon the fact that they would have a present or future right to acquire voting rights/shares, profits, etc. of the company. Indeed, a corporate group could arrange to sell a subsidiary to a third party and make the share disposal subject to a put/call option arrangement. In that instance, it is possible that the seller and buyer of that company could be construed as having control of that company. It is important to note that control is defined but a definition of a CFC by itself was not included in the Feedback Statement; arguably it could of course be inferred from the definition of control, but we assume that a definition of a CFC itself will have to be included in the Finance Act 2018 legislation.

Of course we are cognisant that the Feedback Statement can only, by its nature, comprise extracts from legislation. However, we would argue that using the definition of control in TCA97 s432 is disproportionate to the objectives set out in the ATAD. It would place a substantial administrative burden on taxpayer companies which goes beyond the ATAD's application. It would thereby present issues relating to our competitiveness when compared to other European countries which are all required to implement this legislation.

(ii) The Feedback Statement also proposes to insert a new paragraph, (d), to TCA97 s432 as follows:

"….a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire— (d) "any part of the issued share capital of the company and thereby control the composition of its board of directors…"

Paragraphs (a) through (c) (of section 432) refer to the greater part of share capital, such part of share capital that will give rise to greater part of profits, etc. whereas it is proposed that paragraph (d) refers to *"any part"* of the share capital. As with previous comments in this section of our feedback such legislative requirements go beyond that envisaged by the ATAD.

As the proposed control definitions with the Feedback Statement are broader than those set out within the ATAD, we respectfully suggest that TCA97 s11 may be more closely aligned with the control provisions within the ATAD.

Effective Rate Test and Calculation

(i) The second component of the ATAD's test in determining whether an entity is to be regarded as a CFC is the effective tax rate ("ETR") test. The test requires consideration of whether: *"… the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the corporate tax that would have been charged on the entity or permanent establishment under the applicable corporate tax system in the Member State of the taxpayer and the actual corporate tax paid on its profits by the entity or permanent establishment".* Subject to also meeting the participation test, an entity should be regarded as a CFC if this ETR test is met.

Section 2 of the Feedback Statement provides that a hypothetical tax liability should be calculated for the CFC as if it were resident in the parent company's jurisdiction and subject to that jurisdiction's rules on the calculation of taxable profits and resulting tax liabilities.

Section 3 of the Feedback Statement defines the national law requirement as follows:

"corresponding corporation tax in the State" means the amount of corporation tax which would be chargeable in the State in accordance with [section regarding corresponding chargeable profits] in respect of the controlled foreign company's corresponding chargeable <u>profits</u> in the State for the accounting period;"

"corresponding chargeable profits in the State" means the <u>profits</u> of a controlled foreign company which, applying the assumptions in [section regarding corresponding chargeable profits], would be the controlled foreign company's <u>profits</u> for corporation tax purposes for the accounting period;"

The word 'profits' is defined in TCA97 s4 for the purposes of the Corporation Tax Acts as income <u>and</u> chargeable gains. We would question if it is intended that such provisions include a reference to capital gains; this is noted because one of the assumptions in computing the effective tax rate is that a CFC not be part of a group. Taking that view may mean that TCA97 s617 may not apply to intra group transactions which could artificially increase the "notional" Irish tax charge beyond that which would have been in point for an Irish group company. Indeed, consideration would have to be given as to how a CFC charge on capital gains would interact with the already existing TCA97 s590.

(ii) Section 3 of the Feedback Statement also contains guidance on determining the ETR for the purposes of the tax ratio test, and certain "assumptions" must be made as part of the calculation. One of which is that the CFC is not a member of a group nor a consortium and the reader is directed to the point made earlier regarding the potential disapplication of TCA97 s617 as a result.

(iii) Finally, the ATAD sets out that, in assessing whether an entity is to be regarded as a CFC, the ETR test, together with the participation test are the initial matters to be considered as part of a group's CFC analysis. Further analysis to determine (a) if there is undistributed income, (b) whether there is a non-genuine arrangement, and (c) whether tax was the essential purpose of the arrangement must also take place.

Based upon the potentially significant volume of work involved in determining the "notional" Irish tax charge for multiple potential CFC's within a large group, the suggestion that the ETR test be structured as an optional exemption until such time as it has been determined that a CFC is 'controlled' and has undistributed income within the scope of the CFC charge is welcome. However, it must be noted that we have not seen the full extent of the legislation so cannot comment further on any ancillary effects of having the ETR test as an optional requirement.

The CFC Charge

The Feedback Statement on page 10 outlines draft legislation in relation to the CFC charge that will be imposed on chargeable companies in Ireland. Subsection 1 says that a CFC charge will be made on the chargeable company for the accounting period where in an accounting period;

(a) a controlled foreign company group has undistributed income, and

(b) relevant Irish activities in relation to the controlled foreign company group are carried on by the controlling company or a company connected with the controlling company, and in this section any such company shall be referred to as a 'chargeable company',*

A CFC group is defined later on page 15 as follows "*controlled foreign company group" means the controlled foreign companies, <u>taken together</u>, of a controlling company*;" The Irish tax payable analysis is done on a CFC by CFC basis rather than as "taken together" which is relevant for the charge as are the exceptions outlined in the section. Therefore a corporate group must "pull" all the CFC's together and then examine the entities one by one by virtue to the exceptions outlined in the section.

Relevant Irish activities are discussed below but basically involve significant people functions relating to assets and risks of the CFC. However, article 8(2) of the ATAD says that *"the income to be included in the tax base of the taxpayer shall be limited to amounts generated through assets and risks which are linked to <u>significant people functions carried out by the controlling company</u>".*

Therefore, the ATAD looks only at the controlling company but the Feedback Statement also requires that taxpayer companies look at companies connected with the Irish controlling company. Once again the Feedback Statement is going beyond the application of the ATAD and therefore one must be cognisant of the competitive issues which arise vis-à-vis the remainder of the EU Member States as a result.

Looking again at the definition, it mentions "*relevant Irish activities in relation to the controlled foreign company group are carried on by the controlling company or a company connected with the controlling company*, and in this section <u>any such company</u> shall be referred to as a 'chargeable company'"*. This states "any such company" so in light of this, does that mean that the Revenue Commissioners have the option of saying which company is to be the chargeable company, or is it intended that the chargeable company be the entity carrying on the SPFs? Presumably it should be the latter and that is implied by para (3) on page 10. To put it another way, "any such company" is to be referred as the chargeable company so does that mean there could be multiple chargeable companies? This is significant because the CFC charge is made on the chargeable company so clarity of implementation is required in this instance.

The definition of *"relevant Irish activities"* comprises *"…SPFs <u>performed in the State</u> on behalf of a controlled foreign company group, where such SPFs are relevant to –*

(i) the economic ownership of the assets included in the <u>relevant assets and risks</u> of the company or companies in the controlled foreign company group,
or

(ii) the assumption and management of the risks included in the <u>relevant assets and risks</u> of the company or companies in the controlled foreign company group;…"

It can be seen above that reference is made to "relevant assets and risks". That is defined on page 17 as follows ""*relevant assets and risks" means the assets which a controlled foreign company <u>has, or has had</u>, and the risks which a controlled foreign company <u>bears, or has borne</u>, where those assets or risks would not have been employed or undertaken but for SPFs performed in the State or by a company resident in the State on behalf of the controlled foreign company*;"

Is it intended that taxpayer companies have to track previously held assets/risks? If that is the case then the question arises regarding a temporal limitation on such lookback and indeed the date of commencement for such lookback. Once again, this is an example of the draft legislation going beyond the scope of the ATAD and therefore cognisance should be taken of the competitive issues which arise vis-à-vis the remainder of the EU Member States as a result.

Subsection 8 says that the section won't apply to an asset or risk where (when looked at on their own or in aggregate) the increase in undistributed income as a result of holding that asset or risk is negligible. The term "negligible" is not defined for the purposes of the legislation and therefore guidance on same would be welcome. On a similar point the ATAD allows an exception from the application of the CFC charge for, inter alia, entities with accounting profits of no more than €750,000 and non-trading income of no more than €75,000. The draft legislation is silent on such an exclusion and would be a welcome addition to the law as currently drafted.

Similarly, there are reliefs in the ATAD for double tax relief where a CFC's income is subject to a CFC charge and that income is subsequently distributed or the CFC is disposed of and the draft legislation in the feedback statement is silent thereon. Such reliefs would be a welcome addition and in our view should form part of the final legislation. We understand that the Feedback Statement by its nature cannot include all aspects of the proposed legislation.

Subsection 9 outlines the exclusion for non-genuine arrangements and subpara (b)(ii) thereof explains that an arrangement shall be regarded as non-genuine to the extent that, inter alia,"…it would be reasonable to consider that the relevant Irish activities were instrumental in generating that income". Guidance on the meaning of "instrumental" either through legislation, accompanying explanatory notes to the Bill or indeed as part of the Revenue's Tax & Duty Manual would be welcome. Indeed, subsection 9(a)(i) notes that "at no time" did the CFC bear risks with an essential tax purpose and clarity on a temporal limitation that has to be made thereon together with the materiality of the offending activity vis-à-vis the total of that CFC's activity would be welcome.

Paragraph 5(b) of Section 4 provides that that a charge under ss1 will not apply in relation to undistributed income which had previously been assessed to a CFC charge under that section. However, it is unclear based upon this wording what relief is available, if any, for a CFC charge suffered previously on the similar income in another jurisdiction i.e. whether relief can be taken for a CFC charge borne by another CFC of the Irish chargeable company.

The question as to how losses in the CFC are to be dealt with is not outlined in the Feedback Statement. Presumably, in computing the CFC's income from under Irish rules, regard could be had to losses forward in that CFC. Similarly, the question arises as to whether losses in other CFC's can be taken into consideration notwithstanding the non-applicability of group relationships being ignored by the legislation.

Definition of Undistributed Income

(i) Sections 4 and 8 of the Feedback Statement sets out that the CFC charge should only apply to undistributed income of the controlled entity and that the chargeable income attributable to the controlling entity will be comprised of the CFC's distributable profits of the accounting period *"as reduced by any relevant distributions made in respect of the accounting period."*

Section 8, Paragraph 2 of the Feedback Statement defines a CFC's 'distributable profits' and provides that this amount should be calculated as being the controlled foreign entities' accounting profits reasonably attributed to the relevant Irish activities and which are available for distribution, "notwithstanding any prohibition under the laws of the controlled company's territory of residence or otherwise". Therefore, it would appear that the intent of this is to ensure that legal restrictions and indeed unilateral restrictions through taxpayer behaviour cannot be taken into account in determining the amount of relevant distributions.

A rationale for restricting unilateral taxpayer action can be clearly understood but a legal prohibition is something that is outside the control of a CFC and therefore should, in our view, be allowed to be taken into consideration.

We would suggest that recognition of legal provisions precluding the distribution of profits in line with TCA97 s434(7) (i.e. "*Where a company is subject to any restriction imposed by law as regards the making of distributions, regard shall be had to this restriction in determining the amount of income on which a surcharge shall be imposed …*") is considered and applied in respect of the relevant CFC provisions.

Unilateral taxpayer action can be obviated by reference to this definition, see for example the Irish High court's decision in *Rahinstown*[5] where the court held that taxpayer action could not be taken into consideration regarding a close company surcharge on undistributed profits. The similarity of legislative intent can be seen between that provision and the CFC charge.

In addition, we would argue the definition of "relevant distribution" be defined as the actual distribution made by the CFC. This would recognise that where an amount in excess of the undistributed accounting profits which are reasonably attributed to relevant Irish activities is distributed then a CFC charge should not arise.

(ii) Section 8, Paragraph 3 contains the relevant formula to be used in calculating a relevant distribution for an accounting period. We note that Para (3)(i)(I) provides that only distributions made to persons resident for the purposes of tax in a relevant Member State which imposes a tax that generally applies to distributions receivable in that territory, by persons from sources outside that territory may be taken into account.

Based upon the proposed provisions contained within the Feedback Statement, it is not apparent whether the definition of a relevant Member State is limited solely to EU Member States, or will also include jurisdictions with which Ireland has a double tax treaty. If Member State was to be assumed to be only related to an EU country, we believe that many common group structures where both U.S. and, post-Brexit, UK companies holding affected CFC's could be adversely impacted.

We would suggest that, in so far as it is intended that relevant Member State is to be limited to EU Member States, then this definition should be revised to include distributions made *"directly or indirectly"* to companies resident in an EU Member State (including the State) in order to alleviate the potential adverse outcome where the distributed profits do ultimately remain within the EU. Our preference would be that the term "relevant Member State" comprise countries with which Ireland has a tax treaty.

(iii) Section 8, Paragraph (3)(ii) and (iii) provides that a distribution must have been paid within nine months of the accounting period, and *"the tax referred to in clause (I) has been paid and*

[5] *Rahinstown Estates Co v M Hughes, (Inspector of Taxes): III ITR 517*

has not been and does not fall to be repaid, in whole or in part, to the controlled foreign company or any other person on the making of a claim or otherwise."

It is possible that tax might not have been paid on income, purely because of the existence of certain reliefs (e.g. a CFC paying a dividend to its parent and a credit being available in Ireland on the underlying tax suffered in the CFC jurisdiction). Indeed it must be recalled that TCA97 sch 24 para 9I was enacted to eliminate EU law issues and it is unclear from the draft legislation whether such credit would mean that a CFC charge could be imposed as a result of no tax being paid on the distribution.

"Cash Box" companies

The Feedback Statement notes that consideration is ongoing regarding measures to address "*'cash box' subsidiaries, for example, where there are cash/capital rich companies with few or no employees in low tax jurisdictions and there are no SPFs in the State relating to the management of those assets…"* It is unclear as to the limitation of such considerations given the statements reference to "for example" in the above extract. We would argue, as we have done with other sections of this statement, that going beyond the ATAD's requirements is to bring about a potential competitive tax issue regarding other EU Member States which have to bring about this law.

In addition it must be recalled that the ECJ has said that "national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement".

By designating various forms of corporate entity as a CFC without meeting the above requirements as outlined by the Court could lead to EU law difficulties in the future. Therefore, we would argue that adopting a Cadbury Schweppes analysis to any form of corporate entity should be sufficient for meeting EU law requirements in itself and that should be taken into any considerations involving "cash box" companies.

Miscellaneous Definitions

(i) As noted earlier, Section 9 of the Feedback Statement defines arrangements for CFC purposes as, inter alia, a transaction or series of transactions etc. The Cadbury Schweppes case effectively looked at the latter when at para 63 et seq as follows *"As stated by the applicants in the main proceedings … the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax. ….In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment…has not been achieved… In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality"*.

This is relevant in the context of our own implementation of CFC rules as in the above case the court concluded that that setting up in a country to benefit from more favourable legislation is not in itself an abuse of the freedom of establishment. Therefore, in our view adopting a transaction by transaction analysis without looking at each transaction in light of the setting up in a foreign jurisdiction would, prima facie, go beyond dicta in Cadbury Schweppes and could have EU law difficulties.

(ii) Section 9 also includes a definition of "relevant assets and risks" and refers to assets a CFC "*has, or has had",* and risks which a controlled foreign company *"bears, or has borne".*

Based upon the absence of any guidance in relation to how long a period the CFC may have held assets, or borne risks for, it would appear that a controlling company may need to consider the asset and risk profile of a CFC for an indefinite period.

In order to avoid uncertainty in relation to the relevant in-scope period to be considered, we would suggest that the charge should be applicable in respect of the relevant assets and risks held by the CFC in the current accounting period only. Alternatively, where this is not deemed appropriate, we would suggest that a defined timeframe is provided for in order to avoid an indefinite period having to be considered.

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