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AMERICAN CHAMBER of COMMERCE IRELAND

Feedback Statement on Participation Exemption in Irish Corporate Tax System for Foreign Dividends – Strawman Proposal

Submission from American Chamber of Commerce Ireland (AmCham) to the Department of Finance.

May 2024

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The American Chamber of Commerce Ireland
The Voice of US-Ireland Business

The American Chamber of Commerce Ireland (AmCham) is the collective voice of US companies in Ireland and the leading international business organisation supporting the Transatlantic business relationship. Our members are the Irish operations of all the major US companies in every sector present here, Irish companies with operations in the United States and organisations with close linkages to US-Ireland trade and investment.

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Executive Summary

The American Chamber of Commerce Ireland (AmCham) welcomes the opportunity to make a submission to the Department of Finance in response to the Strawman Proposal for the Participation Exemption to be introduced into the Irish corporate tax system for foreign dividends. Please see AmCham's response to each section of the proposal outlined below.

AmCham welcomes and supports certain aspects of the Strawman Proposal, in particular, a 100% corporation tax exemption on dividends. However, AmCham recommends the following amendments to the proposal in order to increase the regime's attractiveness and flexibility, whilst aligning with international best practice:

- Default exemption treatment with the option to elect out on a dividend-by-dividend basis.
- Removal of unnecessary criteria (such as the 3-year election period) and the expansion of the geographic scope of the exemption beyond EU/EEA/tax treaty jurisdictions to a global exemption regime, consistent with Ireland's role as a hub for global as well as regional business.
- Effective date of 1 January 2025 by reference to the date of dividend receipt rather than an accounting period basis.
- Exemption should not seek to distinguish between 'income' and 'capital' distributions but should apply to all dividends / distributions received by Irish resident companies / branches.
- Anti-avoidance provisions should be limited to what is required by Ireland's international obligations, and to guard against specific, identified forms of abuse.

AmCham notes that the Strawman Proposal does not contain details of what is contemplated regarding a possible branch exemption, which is keenly awaited by certain regulated and other investors. AmCham requests that the Department of Finance outlines a clear timeline for the implementation of a branch exemption to remove the ongoing uncertain position.

AmCham also emphasises the importance of not further restricting interest deductibility to remain competitive for US FDI and suggests limiting changes to CFC rules to those required by the Anti-Tax Avoidance Directive. In fact, Ireland should be looking to further simplify its tax regime to ensure its competitiveness with the arrival of the Global Minimum Tax, such as the overall improvements to s626B and the interest deductibility rules together with a review of the need for multiple tax rates.

Extent/Effect of Exemption

AmCham agrees with the proposal for relief to be provided in the form of an exemption from corporation tax with 100% of the dividend in scope. Further, AmCham agrees that where an exemption is availed of, a tax credit will not be available in respect of foreign tax paid on the foreign dividend.

Geographic Scope

AmCham recommends that the geographic scope should not be restricted to EU/EEA/tax treaty jurisdictions, but rather expanded to minimise the complexities of dealing with both the exemption and Schedule 24. Restricting eligibility solely to certain jurisdictions may not align with the evolving tax landscape, especially in the context of Pillar Two rules.

Ireland is a hub for global business and AmCham member companies have subsidiaries across the world, including in major jurisdictions with which Ireland has no tax treaty – for example; Brazil and Indonesia. Allowing no route to exemption for dividends from such countries, other than using an alternative jurisdiction as a holding company, would impair the value of the exemption and potentially repatriation of funds from those jurisdictions.

AmCham notes the implication in the Feedback Statement[1] that the limitation in scope is a means of guarding against double non-taxation, and that reference to Pillar Two might offer a similar safeguard. Indeed, there are many such potential examples, as were identified in the recent legislation to address outbound payments, and complying with any one of these should be sufficient. For example, a dividend paid by a resident of a non-treaty country may still qualify for an exemption if the source entity is within the scope of Irish or foreign CFC rules.

AmCham therefore advocates for the introduction of a regime that is as wide in scope as possible to ensure Ireland's competitiveness as a holding company location, and that any such safeguards as mentioned above are limited to what is necessary to address a specific policy goal.

Finally, AmCham advocates that if it is decided by the Department to limit the geographic scope of the regime, it should be tested by reference to the immediate payor only - similar to the Luxembourg participation exemption, for example.

Optionality

AmCham welcomes the proposed optionality between the participation exemption and Schedule 24. However, AmCham proposes that the exemption be the default position, with

[1] Participation Exemption for Foreign Dividends Feedback Statement: Strawman Proposal pg. 11

the option to elect out, and into Schedule 24, if desired. AmCham also recommends the removal of the minimum 3-year election period. A 3-year timeframe would limit flexibility and therefore reduce the attractiveness of the regime. Further, the Strawman Proposal contains no clear policy purpose for imposing this restriction.

As a reference point, the UK operates its qualification on a dividend-by-dividend basis because some of the UK's treaties require a dividend to be subject to tax in order to access reduced rates of WHT under the treaty. In order to align with international best practices and provide businesses with the flexibility needed to navigate complex tax treaty obligations efficiently and accurately, AmCham advocates that, similar to the UK regime, any election should be on a dividend-by-dividend basis.

Shareholding Requirement

AmCham welcomes the test of a direct or indirect holding of 5% of ordinary share capital, consistent with the existing position in Schedule 24. However, the rationale for adding the further requirements in s626B is not clear, as this would involve including 5% of profits in a notional full distribution, and 5% of assets in a notional winding up. Further, AmCham would question the need to add the criterion of voting power, which is not currently a feature of the Irish tax system. Any restrictions on the exemption should be justified by a specific policy purpose.

The proposal to require an uninterrupted shareholding period of twelve months, in addition to the 5% holding, goes beyond what is required in the participation exemption in the Pillar Two rules ("Excluded Dividends") which does not require a minimum holding period, provided there is a minimum ownership interest. AmCham advocates for a less rigorous shareholding requirement to ensure Ireland's participation exemption is aligned with the latest international tax rules and competitor jurisdictions.

Administration

AmCham advocates that relief should be available in respect of dividends received from 1 January 2025 as opposed to dividends received in accounting periods commencing on or after 1 January 2025. Dividends are taxed when received, and therefore there is no policy imperative to consider the exemption on the basis of an accounting period.

As noted above, the default system should be the participation exemption regime, with the option to elect into Schedule 24. AmCham believes that this would ease the administrative burden on the taxpayer and minimise the significance of overlooked time limits.

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Types of Distributions – Capital and Revenue

For the purposes of the participation exemption, AmCham suggests that the definition in the treaty in question should be used, with default to the OECD Model where no treaty exists, and other conditions are met. According to the OECD Model Convention;

'the term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.'[2]

Balancing clarity and flexibility in these definitions is crucial to promote compliance and facilitate cross-border business operations effectively.

The distinction between capital and revenue currently presents complexity when dealing with other jurisdictions. AmCham would highlight the importance of considering that US MNCs in Ireland have subsidiaries in many jurisdictions, each with its own distinct corporate law framework, which rarely maps easily against the Irish tax concept of 'capital' or 'revenue' distribution. This nuance often presents complexity in analysing the tax treatment of a distribution under current Irish tax law, which can hinder businesses' normal process for repatriating profits.

For example, a dividend paid out of a legal reserve or share premium account may need to be analysed as to whether it may have a local corporate law treatment that aligns to 'capital' for Irish tax purposes. Another example is that laws in some jurisdictions dictate that a company only needs to be solvent to distribute dividends. AmCham advocates that neither of these situations should be an obstacle to qualification, provided the dividend aligns with the definition outlined in relevant tax treaties.

A capital/revenue distinction is a detail which does not feature in treaty definitions of 'dividends', nor does the Parent Subsidiary Directive appear to authorise such a distinction.[3] Therefore, a streamlined approach that eliminates the complexity of distinguishing between capital and revenue is recommended to facilitate smoother cross-border transactions and ensure adherence to international tax standards. As such, the exemption should apply to all dividends and distributions received by Irish resident companies and branches.

[2] https://www.oecd.org/tax/treaties/1914467.pdf

[3] For completeness, we note that when the UK originally legislated for its distribution exemption in 2009 a capital/revenue distinction was made but was eliminated the following year.

Anti-Avoidance

AmCham is in agreement with certain proposals outlined in section 5.3 of the Strawman Proposal and in particular, that the dividend must not be deductible for tax purposes in any other jurisdiction and that dividends received from jurisdictions on the EU list of non-cooperative jurisdictions for tax purposes would not qualify for relief by way of exemption. However, AmCham believes that an exception should be made for cases where there is a clear safeguard against double non-taxation (e.g. Pillar 2).

However, AmCham believes that any other restrictions must be weighed carefully against the need for maintaining competitiveness as well as Ireland's obligations under its tax treaties and the EU Parent Subsidiary Directive. Most treaties now contain a 'principal purpose' test to prevent abuse, while the Parent Subsidiary Directive requires relief to be given except in very specific circumstances, for which Ireland has legislated for in s831(7) TCA 1997. It is not appropriate to test each dividend in the manner suggested by the Strawman Proposal. AmCham's view is that any anti-avoidance provision should not go beyond what is required to address a specific identified form of tax avoidance.

Transitional Arrangements

AmCham advises that Ireland limits transitional arrangements as much as possible. AmCham acknowledges that allowing existing arrangements to carry forward could be helpful in certain cases but there should not be other limitations on transition.

On this basis, where a dividend is paid after the effective date (i.e. 1 January 2025) and it meets the necessary conditions of the participation exemption, no transitional rules should apply. AmCham is of the view that no other transitional rules would be needed in this instance, or appropriate, and any decision to introduce them would give rise to administrative difficulties and impact on the intended overall benefit of the regime.

Consequential matters

In relation to interest deductibility on borrowings used to acquire foreign shareholdings, AmCham understands that this is a broad topic, and the Department intends to have a consultation on this matter in Q3. AmCham advocates that in order to remain competitive for US FDI, there should be no further restriction on interest deductibility, and that this matter should not delay the introduction of the participation exemption.

AmCham believes that any changes to the CFC rules should be limited to those required by the Anti-Tax Avoidance Directive. There are interdependencies between CFC rules and participation exemption, and balance must be maintained. If a dividend qualifies for exemption from CFC rules, then it should not be necessary to analyse further for a participation exemption and therefore need not be taxed here when remitted as dividends.

AmCham continues to be of the view that simplification of Schedule 24 double tax relief provisions should still be considered, as it will continue to be of relevance for dividends not within scope of the exemption.

Key Recommendations

AmCham recommends:

- Expanding the geographic scope beyond EU/EEA treaty jurisdictions to minimise complexities and align with evolving business interactions, especially in the context of Pillar Two rules.
- Adopting an effective date of 1 January 2025 by reference to date of receipt of dividend rather than an accounting period basis.
- Removing the minimum 3-year election period, as it limits flexibility and reduces the attractiveness of the regime. Instead, AmCham advocates for a dividend-by-dividend basis election.
- Streamlining / removing the distinction between capital and revenue distributions to facilitate smoother cross-border transactions and ensure compliance with international tax standards.
- Ensuring any anti-avoidance provisions are drafted based on clear policy intent and rationale and are used to target specific areas of potential abuse.
- Limiting transitional arrangements to ease administrative burden while allowing existing arrangements to carry forward where helpful in certain cases.
- Schedule 24 will remain of relevance for non-exempt dividends. Whilst there are no doubt good historic reasons for the current shape of Schedule 24, it is complex and occasionally produces anomalous results. Its simplification at the earliest opportunity would be welcomed.