STEP Silicon Valley
Ireland: Gateway to Accessing the EU Market

Mark O’Sullivan and Pat English
August 17, 2016
Overview

• Irish Corporate Tax regime – overview
• Legal Framework and Business Environment
• Corporate Compliance Environment
• Intangibles planning
• Impact of OECD BEPS project
• EU developments
• Brexit
• Structuring
Irish Corporate Tax Regime

- 12.5% rate of corporate income tax for trading activities
- 25% rate for passive income
- Amortization regime for intangibles
- IP Box (knowledge development box) for qualifying R&D expenditure – 6.25% effective rate
- R&D Tax Credit for qualifying R&D carried on in Ireland
- Holding company regime
  - Dividends received from treaty resident subs and subs with a listed parent company taxed at 12.5%
  - Foreign tax credits can typically ensue no list tax is paid on dividends (using onshore pooling)
  - Substantial shareholding exemption for gains on qualifying shares
Irish Corporate Tax Regime

- Good treaty network (72 treaties in place)
- Withholding tax exemptions
  - Interest: payments to EU/treaty jurisdictions
  - Dividends: payments to treaty residents and listed entities
  - Royalties: exemption for payments to treaty residents
- No CFC rules – until EU Anti-Tax Avoidance Directive (EU ATAD) regime comes into force in 2019
- No thin capitalisation rules
- Exit taxes can be avoided (until EU ATAD is effective from January 1, 2020)
- Rulings from tax authorities are not generally required
Non-tax Considerations / Attractions

- EU Membership
  - Free movement of workers and capital
  - Single conformed approach to customs, duties and VAT
  - Regulated businesses can passport across over 27 member states
- Physical and time zone proximity to Europe
- English speaking, similar legal systems and work culture
- Ability to build real businesses using human infrastructure
Legal Framework and Business Environment

- Common law, concepts and principles very similar
- Corporate law regime similar to US
- Employment laws derived from EU law, no employment “at will”
- EU Data privacy rules
- Pro-business interpretation of rules, eg employment and data privacy laws vs other EU jurisdictions
Corporate Compliance Environment – in a nut shell

- Straightforward business-friendly regime
- Companies Act 2014 the key legislation – effective from June 1, 2015
- New company types & resulting practical changes – transition period
- Reform of directors’ disclosure rules
- Codification of directors’ duties
- Directors’ Compliance Statements
- Audit Committees
- Summary Approval Procedure (SAP)
- Domestic statutory merger regime
- New distribution rules
- Unlimited companies / flexible capital maintenance rules
Practical implications post June 1, 2015

- **Summary Approval Procedure (SAP)**
  - one general application to a number of restricted activities, subject to certain conditions – NB possibility of share capital reduction using the SAP

- **Domestic statutory merger regime for the first time**
  - based largely on the EU cross-border merger regime
  - NB must involve at least one limited company

- **New distribution rules / dividends**
  - finally, confirmation that it’s a book value test

- **Unlimited companies / flexible capital maintenance rules**
  - distribution rules and other restrictions no longer apply – significant change
Corporate Compliance – Hot Topics

- Company conversions under CA 2014
- Name changes under CA 2014
  - Watch out for DACs and ULCs!
- Changes to non-filing structure for ULCs
  - Companies (Accounting) Bill 2016
- Continued use of ULCs to avoid Directors’ Compliance Statements and avail of increased flexibility afforded to ULCs generally, in particular from a cash / asset repatriation perspective
### Intangibles Planning - Amortisation Regime

<table>
<thead>
<tr>
<th><strong>Effective Tax Rate</strong></th>
<th>0% - 12.5% (deduction of up to 100% of trading income)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Qualifying IP</strong></td>
<td>Very broad: includes patents, trademarks, brands, copyrights, software, secret information, know-how, licenses, goodwill related to intangibles etc.</td>
</tr>
<tr>
<td><strong>Qualifying Income</strong></td>
<td>Trading income from (a) sale of goods/services that derive greater part of their value from IP or (b) managing, developing or exploiting the IP</td>
</tr>
<tr>
<td><strong>Capital Gains</strong></td>
<td>Not covered. But alternative exit strategies are available.</td>
</tr>
<tr>
<td><strong>Acquired IP</strong></td>
<td>Regime applies to either (i) self-developed IP or (ii) IP acquired from group company or third party</td>
</tr>
<tr>
<td><strong>Onshore R&amp;D</strong></td>
<td>Not required</td>
</tr>
<tr>
<td><strong>Interest</strong></td>
<td>Interest on intragroup borrowings to acquire IP is deductible.</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>No stamp duty, net wealth tax or other taxes</td>
</tr>
</tbody>
</table>
Knowledge Development Box

The Good

- 6.25% rate
- Inclusion of copyrighted software
- R&D outsourced to third party providers is qualifying spend
- Valuable relief for taxpayers with right fact profile

The Bad

- Limitation on qualifying expenditure
- R&D expenditure incurred by EU branches non-qualifying
- 31 December 2020 review date (though extension likely)

The Ugly

- Tracking and tracing (Revenue guidelines due shortly)
- Acquisition of IP dilutes potential benefit
Knowledge Development Box

- Effective from 1 January 2016
- OECD / EU compliant – i.e. Modified Nexus
- Applicable tax rate 6.25%

<table>
<thead>
<tr>
<th>Qualifying Expenditure + Uplift</th>
<th>Qualifying Profit</th>
<th>Income Taxable @ 6.25%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Expenditure</td>
<td>×</td>
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</table>

- **Qualifying IP Assets:** Patents and assets functionally equivalent to patents. Includes patents and software copyrights but excludes trademarks and marketing intangibles.
- **Qualifying Profit:** Profit attributable to Qualifying IP Assets
- **Qualifying Expenditure:** R&D performed in Ireland + Third Party Outsourcing
- **Uplift:** for Acquisition Costs and Group Outsourcing (limited to 30% of Qualifying Expenditure).
- **Overall expenditure:** Qualifying expenditure + Acquisition Costs + Group Outsourcing
R&D tax credit

- 25% tax credit on Qualifying R&D expenditure, in addition to corporate tax deduction (at 12.5%)
- Up to 15% of R&D expenditure may be subcontracted
- Expenditure anywhere in EEA (as long as not deductible elsewhere)
- Using R&D tax credits
  - Against current year corporation tax
  - Against prior year corporation tax
  - Cash refund over three years
  - Carry forward indefinitely
  - Offset against income tax liability of key R&D employees
## BEPS Implementation in Ireland

<table>
<thead>
<tr>
<th>Action</th>
<th>Direction</th>
<th>Result</th>
</tr>
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<tbody>
<tr>
<td>1. Digital Economy</td>
<td>n/a</td>
<td>No action</td>
</tr>
<tr>
<td>2. Hybrids</td>
<td>Common Approach</td>
<td>Ireland nothing but EU ATA Directive #5</td>
</tr>
<tr>
<td>3. CFC Rules</td>
<td>Best Practice</td>
<td>Ireland nothing but EU ATA Directive # 1</td>
</tr>
<tr>
<td>4. Interest</td>
<td>Common Approach</td>
<td>Ireland nothing but EU ATA Directive # 4</td>
</tr>
<tr>
<td>5. Harmful Tax Practices</td>
<td>Minimum Standard</td>
<td>(i) KDB; (ii) Exchange of Rulings</td>
</tr>
<tr>
<td>7. PE</td>
<td>Minimum Standard</td>
<td>Treaty update through MLI</td>
</tr>
<tr>
<td>8/9/10. Transfer Pricing</td>
<td>Minimum Standard</td>
<td>OECD vs non-OECD</td>
</tr>
<tr>
<td>11. Measuring BEPS</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>12. Mandatory Disclosure</td>
<td>Best Practice</td>
<td>Ireland has mandatory disclosure rules</td>
</tr>
<tr>
<td>13. TP Documentation</td>
<td>Minimum Standard</td>
<td>CbC rules adopted wef 01/01/16</td>
</tr>
<tr>
<td>14. Dispute Resolution</td>
<td>Minimum Standard</td>
<td>Treaty update through MLI</td>
</tr>
<tr>
<td>15. Multilateral Instrument</td>
<td>n/a</td>
<td>Ireland actively participating</td>
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EU Tax Update

2015
- Proposals on Tax Rulings
- Action Plan for Fair and Effective Corporate Taxation
- Review of Interest and Royalties Directive
- New Rules on Patent Boxes
- Code of Conduct Reform

2016
- ATA Directive
- Recommendations on Tax Treaties
- External strategy for Effective Taxation
- Public Country by Country Reporting
- Relaunch of CCCTB

2017
- Proposal on list of third countries
- Transfer pricing
- Tax rulings
EU Anti-Tax Avoidance Directive

- CFC Rules
- Exit Taxation
- Interest Limitation
- Hybrids
- General Anti-Abuse Rule
Brexit

- UK decision to leave the EU impacting on investment decisions
- Ireland the only English speaking jurisdiction remaining
- Uncertainty going forward in context of key EU membership benefits (free movement of workers, VAT, customs duties, regulatory passports)
- Future UK corporate tax measures – more of the carrot and less of the stick?
Structuring: What’s happening in practice?

Onshoring IP

- Some early movers 2014-2016
- For existing Irish operations, onshoring aligns taxable profits with substance
- Headline rate of 12.5% is very competitive
- IP amortisation regime for IP buy-in means low effective rate
- Irish grandfathering provisions extend to 31 December 2020:
  - Changes to TP guidelines, TP audits may accelerate decision
  - NB: Plan to onshore IP should be socialised with senior management at early stage as there are significant commercial and legal diligence matters to be addressed
Structuring: What’s happening in practice?

Onshoring: traps for unwary

- Is IP jurisdiction future-proof?
  - Stability of jurisdiction and tax regime
  - Robust position on TP – where are the DEMPE functions?
  - Impact on CBCR
- Accessing Ireland’s amortisation regime – must incur expenditure
- Where current structure is offshore IP holding company with Irish branch, risk of residual charge to tax if any IP is branch asset
Irish Onshoring of IP

- Irish registered non-resident company transfers IP to OpCo for cash or a note
- OpCo utilises the acquired IP for the purposes of its trade in Ireland and claims amortisation relief on the acquisition cost
- Capital cost deductible in line with the amortisation in OpCo's accounts - deduction also available for interest paid by OpCo (if IP acquisition debt financed)
- Deductions previously limited to 80% of trading income from exploitation and management of acquired IP, but this restriction does not apply for accounting periods commencing on or after 1 January 2015 – tax rate of between 0% and 12.5% possible
- Applies to self developed or acquired IP
- No claw-back where IP is held for 5 years
- Unutilised relief may be carried forward as NOL on unrestricted basis
Mark O’Sullivan is a partner in Matheson’s Tax Department and advises on all aspects of Irish corporate taxation. His primary focus is advising US clients establishing operations and doing business in and through Ireland. Mark also advises extensively on all aspects of international tax planning, including IP planning, cross-border reorganizations, transfer pricing and financing transactions. Mark has been based in the firm’s Palo Alto office in Silicon Valley since 2007.

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<thead>
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<td>E: <a href="mailto:mark.osullivan@matheson.com">mark.osullivan@matheson.com</a></td>
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### Pat English

Pat English is a partner and senior member of the US Business and Inward Investment Groups at Matheson. Pat practises corporate law focusing primarily on advising overseas clients on establishing operations and doing business in and from Ireland.

In addition to advising on establishment projects, Pat advises a broad range of international, and in particular US, clients on international corporate reorganisations, pre and post-integration transactions, cross border mergers and general commercial contracts, corporate governance and compliance issues and strategies.

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