EVERSHEDS SUTHERLAND

The US/Ireland dimension

Global tax reform

This article has been created exclusively for members of IoD Ireland.

Earlier this year, US President Joe Biden announced a multi-trillion dollar investment plan with a view to improving US infrastructure and boosting the post-Covid US economy. In order to fund the proposed spending, a '*Made in America*' tax plan proposes to bring about a number of significant changes to the current US tax regime, including an increased US federal corporation tax rate and an overhaul of the current global intangible low taxed income ("**GILTI**") regime.

The tax plan and the corresponding renewed interest of the US in the OECD's Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS 2.0**") has given a push to negotiations, which had stalled under the previous US administration. BEPS 2.0 is broken into two pillars with Pillar I seeking to reform the current profit allocation and nexus rules, and Pillar II seeking to introduce a global minimum tax rate for multinational enterprises on a country-by-country basis.

Proposed changes and G7 agreement

Under the '*Made in America*' tax plan, Biden proposes increasing the US federal corporation tax rate from 21% to 28%. In addition, and in order to maintain competitiveness, changes to the current GILTI regime have also been put forward. In simple terms, GILTI seeks to tax income derived from intangible assets located outside the US and owned by US controlled foreign corporations. The current GILTI rate is set at 10.5%. A credit is available for tax paid in other jurisdictions and, importantly, the current regime allows for '*blending*' of tax paid in other jurisdictions so that companies can use taxes paid in high-tax jurisdictions to reduce the tax liability under GILTI on income earned in lower-tax jurisdictions. Biden's current proposal is to double the current GILTI rate from 10.5% to 21% and also to scrap the current blending rules and to instead introduce a country-by-country method of calculation, which would dovetail with the current proposals for a country-by-country minimum tax under BEPS 2.0 Pillar II.

In making these proposals, the **Biden administration** has urged that a global minimum rate of tax be adopted and reportedly made submissions to the OECD/G20 Inclusive Framework to that effect. It was speculated that Biden would be seeking a global minimum tax rate in and around the 21% GILTI rate, much higher than the 12.5% initially floated by the OECD[1]. In response, concern was expressed by some countries that a 21% minimum rate would be too high and not sustainable long term. On 5 June 2021, the G7 (of which the US is a member) announced that they have reached an agreement in relation to a number of key elements of the global tax reform agenda set out in the OECD BEPS 2.0 plan. As well as expressing strong support for the OECD/G20 Inclusive Framework, the Communiqué published by the G7 sets out that an agreement has been reached on a global minimum tax rate of 15%, to be calculated on a country-by-country basis. US Treasury Secretary Janet Yellen described the G7 agreement as '*a significant, unprecedented commitment*' that '*provides tremendous momentum towards achieving a robust global minimum tax at a rate of at least 15%*'.

[1] See https://vimeo.com/472536510 for Pascal Saint-Amans in conversation with Alan Connell, Managing Partner and Head of Tax, Eversheds Sutherland Ireland, on 22 October 2020.

Potential impact on Ireland

Ireland's corporate tax regime continues to evolve in line with international best practice, with the recommendations from BEPS '*1.0*' and the requirements of the EU Anti-Tax Avoidance Directive having been legislated for in recent years, together with an overhaul of the Irish corporate tax residence rules. While BEPS '*1.0*' led to increased tax revenues for the Irish Exchequer, a global minimum tax is likely, according to Department of Finance estimates, to cause a significant dent in Irish corporation tax receipts. At present, corporation tax accounts for roughly 20% of Irish tax revenue, with 65% of this sum being attributable to foreign multinationals. Figures from the American Chamber of Commerce Ireland show that collectively, US investment in Ireland amounts to $444 billion. The Department of Finance has already estimated that tax changes proposed under BEPS could cost the Exchequer c. €500 million a year, increasing to up to c. €2 billion a year by 2025, if these changes act as a disincentive for companies to invest in Ireland.

The timescale of these changes largely depends on whether the reform comes first from the US or the OECD. While the G7 announcement is an important step towards agreement, it is, nonetheless, only one step along the road towards global consensus and the implementation of any framework. The OECD is hoping that significant progress, if not an agreement, will be reached by the next G20 meetings, with the OECD Inclusive Framework due to next meet on 30 June and 1 July 2021 and the G20 on 9/10 July 2021. The Communiqué will likely form the basis of those upcoming negotiations. The goal of the Biden administration is to pass the legislation before Congress breaks in August. If the Biden administration succeeds in passing the Bill through both houses, then it is more likely that the process will happen quickly. OECD reform, however, will take longer, with potentially a two to four year window before the entire changes are implemented, notwithstanding the fact that agreement is likely by the end of this year.

Whilst it is now likely that there will be a consensus agreement on OECD proposals, it remains to be seen what form exactly any legislation coming out of the US will take. The current legislative environment in the US is very politically sensitive and complex, and reform may be difficult to implement. Biden's party holds a very narrow majority in Congress and an even slimmer majority in the Senate of just the tie-breaker vote held by the Vice-President. Either a bi-partisan approach or consensus from all fifty Democratic Senators is required to pass Biden's proposed legislation. Political negotiations between the House and the Senate, as well as between the Republicans, lobby groups and even certain Democrats could see the proposals modified before finding their way onto the statute books. This could mean for example that the final GILTI rate is lower than the proposed 21%. However, there are some indications coming from the US that Biden will be willing to forego the corporation tax hike from 21% to 28% if he can reach an agreement on the 15% global minimum tax rate in return for Republicans agreeing to increase spending under the investment plan. If this is so, agreement from Republicans may be more forthcoming.

Global reform, now backed by the US and the G7, will lead to a more cohesive international tax structure, giving certainty to companies, allowing them to better evaluate investment decisions, and ultimately should reduce the possibility of tax wars between jurisdictions.

The introduction of a global minimum tax, together with the proposed Biden reforms will lead to suggestions that Ireland should increase its corporation tax rate. While this initially may seem like a logical step, particularly given the challenging state of the public finances arising from the pandemic, such suggestions may not be fully thought through in our view. The significant advantages of the stability offered by the current 12.5% regime must be considered, particularly in the context of the current uncertain global corporate tax environment. The fact that rate has remained unchanged, even through several years of significant economic downturn, demonstrates to multinationals the political stability of the 12.5% rate. The certainty of this tax rate is inherently valuable itself and its worth to corporations and to the nation cannot be underestimated. Volatility of corporation tax rates, as seen in countries such as Cyprus, and more recently the UK, or fluctuating with politics as seen in changing US administrations for example, will often act as a disincentive for investment, most especially for small economies such as Ireland. Moreover, an argument has been made that a global minimum tax rate addresses not aggressive tax practices, but rather is a step towards tax harmonisation.

The future of FDI in Ireland

While the G7 finance ministers have reached an agreement in relation to a number of key elements of the global tax reform agenda, this is by no means determinative and any agreement will not be binding unless consensus is achieved among the wider G20 group and the remaining 139 OECD countries. A key focus for Ireland in any negotiations will be the proposed 15% minimum rate of tax. Ireland will remain committed to working towards agreement at OECD level, however Ireland's position remains that any agreement must be sustainable, ambitious and equitable, and must cater for all countries, small and large, developed and developing.

Ireland has adopted an outward looking, business friendly, low corporate tax policy since the mid-1950s. Selective or preferential regimes, such as export sales relief and manufacturing relief were phased out decades ago on EU competition grounds, and the regime has evolved to the stable, transparent regime in force today. In attracting foreign investment, the focus has always been on jobs, with '*boots on the ground*' being a key requirement to benefit from the 12.5% rate, as well as other incentives.

Ireland has, over the last 50 years, built an infrastructure to facilitate multinational investment. Infrastructure such as education, which has ensured that Ireland can offer a highly skilled and highly educated workforce, and connectivity to Europe and the US, which has meant that executives can easily travel to Ireland, have continued to attract global business to Ireland. A recent global survey indicates that factors such as data regulation, language and culture, and political and regulatory stability are also becoming increasingly important to businesses making the decision to locate in Ireland. EU membership and the ability to serve global markets as an EU jurisdiction, common law framework, English language and a business friendly environment have also been critical in Ireland's success. This infrastructure, along with the 12.5% corporation tax rate, amounts to a powerful combination of benefits and has ensured that Ireland is a major location for pharmaceutical production, for component and medical device manufacturing, for technology companies, for financial services, and so on. As a result, many multinationals (not just those headquartered in the US) continue to choose to base operations in Ireland, following from the success of those who have been located here for many years. The 12.5% Irish corporation tax rate, while only one part of the overarching package which Ireland has to offer, has become a significant and integral feature of Ireland's international brand. As the global tax landscape has shifted and evolved, and as other jurisdictions have raised and lowered tax rates, the 12.5% rate has endured, representing stability, certainty and transparency for multinationals. Regardless of a global minimum rate, Ireland's offering will remain stable and certain, with a modern, efficient, sustainable and transparent tax regime, which together with the overarching business infrastructure, will ensure that Ireland will remain at the forefront of investment decisions on a global basis.

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