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Overview of corporate tax work over the last year

The Irish M&A market demonstrated resilience in 2023. The market registered a record number of deals, although the average deal value demonstrated an overall year-on-year decline. Ireland's market robustness defied worldwide trends that were significantly impacted by rising interest rates, geopolitical unrest and concerns about an impending recession.

Tech and Telecoms

Tech and Telecoms continued to be the most active sector in the Irish M&A market in 2023, representing approximately 22% of the market share. This is a continuation of a trend that has been evident in the Irish market for over a decade, with the Tech and Telecoms sector being the largest in the Irish M&A market since 2013. The three largest deals in the Tech and Telecoms sector in 2023 were all foreign acquisitions of home-grown Irish technology companies: €575 million acquisition of Immedis by UKG (USA); the €473 million sale of a 51% stake in Cubic Telecom to SoftBank; and Taoglas' €340 million majority stake sale to the US private equity firm Graham Partners.

The strength of the Tech and Telecoms market in Ireland is driven in no small part by Ireland's taxation regime, in particular its corporation tax rate of 12.5% and various tax incentives that enhance Ireland's attractiveness as a jurisdiction for start-ups and growth companies, including start-up relief and the Research and Development ("R&D") tax credit. With effect from 1 January 2024, the R&D tax credit increased from 25% to 30%. This maintains the net value of the existing credit for businesses within the scope of the Pillar Two GloBE Rules (discussed in further detail below) while furnishing a real increase in the credit to those smaller companies who are not in scope of Pillar Two. In addition, certain technical amendments were made to the relevant legislation to ensure that the R&D tax credit is aligned with the definition of a qualified "refundable tax credit" for the purposes of Pillar Two. Separately, a new digital gaming tax credit has been introduced (pending European State Aid approval).

Public companies

Public companies in Ireland continue to provide a significant source of M&A activity in the Irish market. The merger of Smurfit Kappa and WestRock in a deal worth €19 billion was the largest deal in 2023 and created Smurfit WestRock, a global leader in sustainable packaging, which will be headquartered in Ireland and listed on the New York Stock Exchange. CRH's €1.9 billion acquisition of the US construction aggregates supplier Martin Marietta Materials was also a significant deal in 2023.

In August 2023, the Irish-based holding company Mallinckrodt Plc (which was established in Ireland by inversion in 2013) filed for its second bankruptcy in three years in the US. The financial restructuring and Irish examinership proceedings were completed in November 2023 with Mallinckrodt Plc emerging from Chapter 11 bankruptcy. The bankruptcy resulted in a US$1.9 billion reduction in debt and the elimination of scheduled litigation payments to the value of US$1 billion and generated significant work for Irish tax and corporate lawyers.

Ireland remains an attractive jurisdiction for international organisations to locate headquarters and holding companies, for both tax and non-tax reasons. This attractiveness is likely to increase with the introduction of a participation exemption for foreign dividends with effect from 1 January 2025. The introduction of such an exemption will align Ireland with other EU countries and the majority of OECD jurisdictions and will remove a significant administrative burden for many Irish resident holding companies.

Aviation

Ireland has a long-standing reputation as a centre of excellence for leasing aircraft and is home to some of the biggest leasing companies. The sector continues to expand in Ireland, encouraged by the Irish corporation tax rate, the availability of capital allowances at a rate of 12.5% and Ireland's extensive network of double taxation agreements (76 signed, 74 in effect). After an almost four-year recovery cycle, airline capacity finally exceeded 2019 levels at the end of 2023. It is anticipated that high interest rates and manufacturing delays will lead to an increase in the rents that airlines pay lessors.

An example of the activity in this sector in 2023 was the disposal of the Standard Chartered Pembroke aircraft leasing platform to AviLease for US$2.6 billion.

Structured finance and financial services

Ireland has long been the European jurisdiction of choice for the establishment of special purpose vehicles ("SPVs") for structured finance transactions. Ireland has created a flexible legal, tax and regulatory regime for SPVs that facilitates a wide variety of transaction structures that may be governed by preferred laws, including those traditionally selected to govern cross-border financing transactions, and permits the issuance of debt instruments that can be structured to provide a total return on a broad range of underlying assets. The number of SPVs in Ireland, as measured by the Central Bank of Ireland's statistics on special purpose entities, stood at 3,391, holding total assets valued at €1,103.6 billion, as at the end of Q4 2023. The EU Anti-Tax Avoidance Directives (including anti-hybrid, reverse hybrid and interest limitation rules) have now all been fully implemented into Irish law, and, despite concerns, have not had a negative impact on the Irish structured finance sector. The sector continues to grow steadily, with growth of 3.1% in asset value and 0.9% in number of SPVs in 2023.

In the investment funds area, there has been an increased focus on sustainability products and Ireland has become a leading jurisdiction for ESG investments in Europe. ESG products now account for 31% of assets under management by Irish funds (approximately €1.2 trillion in ESG products).

Key developments affecting corporate tax law and practice

OECD Model GloBE Rules and the EU Minimum Tax Directive

Ireland has implemented the provisions of the OECD Global Anti-Base Erosion Rules and the EU "Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the European Union" into Irish law (the "Pillar Two Rules"). The Pillar Two Rules introduce a minimum effective tax rate ("ETR") of 15% for multinational entity ("MNE") groups and large-scale domestic groups that have annual consolidated revenues of at least €750 million in at least two of the four preceding fiscal years. The Pillar Two Rules come into effect for in-scope entities for accounting periods beginning on or after 31 December 2023.

The Pillar Two Rules include a number of interlinking concepts to ensure that in-scope entities achieve the minimum 15% ETR on a jurisdictional basis. Broadly, the rules ensure that group entities in jurisdictions that incur tax at less than the 15% ETR will incur a top-up tax either in that jurisdiction or elsewhere in the group. The main charging provisions are (i) a Qualified Domestic Top-up Tax ("QDTT"), (ii) an Income Inclusion Rule ("IIR"), and (iii) an Undertaxed Profit Rule ("UTPR").

The inclusion of the QDTT in Ireland's implementation of the Pillar Two Rules ensures that Irish-based in-scope group entities should pay any top-up tax due to the Irish exchequer under the Pillar Two Rules rather than having such undertaxed profit picked up in a group entity outside of Ireland. QDTT paid in Ireland should be creditable against any IIR or UTPR liability that may arise elsewhere in the group or otherwise place Ireland's regime into the "safe harbour" regime.

Pursuant to the IIR, the Ultimate Parent Entity ("UPE") in the group is required to determine whether or not the entities in the group have paid the ETR on a jurisdiction-by-jurisdiction basis for the relevant period. If the tax paid in a particular jurisdiction is less than the ETR, the UPE will pay additional taxes in its jurisdiction in order to meet the overall group requirement to get to the 15% ETR. Where the UPE is located in a jurisdiction that has not implemented the Pillar Two Rules, the obligation moves down the chain in the group in order to find the most senior entity in the group that is tax resident in a jurisdiction that has adopted the Pillar Two Rules.

The UTPR is a backstop to the IIR for circumstances in which the UPE does not apply an IIR, or where a low level of taxation arises in the jurisdiction of the UPE. Where applicable, the UTPR may require an adjustment (such as a denial of a deduction) that increases the tax at the level of the subsidiary.

A number of safe harbour provisions have been included within the Pillar Two Rules in order to ease the transition for in-scope entities.

The Pillar Two Rules present a significant compliance burden for in-scope taxpayers. While the first QDTT tax returns for Irish taxpayers will not be required to be filed until 2026, accounting disclosures may be required to be included in the 2023 financial statements for in-scope entities.

The trading profits of MNE groups and large-scale domestic Irish groups that do not have an annual global revenue in excess of €750 million will continue to be subject to the rate of 12.5% corporation tax. Consequently, the vast majority of Irish businesses are not impacted by the Pillar Two Rules.

Separately, the Pillar Two Rules contain a carve-out for "Investment Entities" that meet certain conditions. Consequently, the Pillar Two Rules are not expected to adversely impact Ireland's investment funds sector.

Outbound payments defensive measures

Finance (No. 2) Act 2023 introduced new defensive measures, by way of withholding taxes on outbound payments of royalties, interest and the making of distributions by Irish resident companies (or Irish branches of non-Irish resident companies) to recipients who are associated entities resident in "Specified Territories" (i.e. jurisdictions on the EU list of non-cooperative jurisdictions for tax purposes and zero-tax jurisdictions) (the "Outbound Payments Rules"). The Outbound Payments Rules came into effect on 1 April 2024, although grandfathering provisions in the implementing legislation defer the new measures to 1 January 2025 in respect of arrangements that were in place on 19 October 2023.

For the purpose of the Outbound Payments Rules, two entities will be considered associated where one entity is directly or indirectly entitled to more than 50% of the ownership rights, voting rights, assets or profits of the other entity, or has definite influence in the management of the other entity. "Definite influence" is defined in the legislation as the ability of an entity to participate, on the board of directors or equivalent governing body of another entity, in the financial and operating policy decisions of that other entity, where that ability causes, or could cause, the affairs of the second-mentioned entity to be conducted in accordance with the wishes of the first-mentioned entity. This is a higher bar than the "significant influence" test that is used in other areas of Irish tax legislation as the "definite influence" test requires the ability to effectively control the affairs of the other entity.

It should be noted that, for the purposes of the definition of "zero-tax territory", territories that have, as a feature of their tax regime, either a remittance basis of taxation, a territorial system of taxation or a participation exemption for foreign dividends will not, solely by reason of those facts, be a zero-tax territory.

In a financial services context, many outbound payments will be made by widely held flow-through structures. In this regard, it is significant that the Outbound Payments Rules exclude certain payments where it is "reasonable to consider", on the part of the payer, that double non-taxation does not arise. In particular, the published guidance of the Revenue Commissioners confirms that the exclusions from interest withholding tax on payments of interest on a quoted Eurobond or wholesale debt instrument held in a recognised clearing system will continue to apply where it is reasonable to consider that the company is not, and should not be, aware that any portion of the relevant payment of interest is made to an associated entity.

Proposed introduction of a participation exemption

Ireland has committed to introducing a participation exemption for foreign dividends with effect from 1 January 2025. A public consultation process began in 2023 and, as part of this consultation, the Department of Finance has now issued an outline proposal in relation to the new legislation.

Ireland's existing legislation includes a tax credit system for the foreign dividends received by a company, i.e. dividends received are subject to corporation tax in Ireland, but a credit is given for tax paid overseas. While the existing legislation often gives rise to no additional Irish tax, the rules are complex and in some circumstances are a significant administrative burden for Irish holding companies. Provided that certain qualifying criteria are satisfied, the new proposed participation exemption would exempt qualifying dividends from corporation tax in the hands of the recipient. It is currently anticipated that the proposed participation exemption will only apply to dividends from companies that are resident in the EU/EEA or a jurisdiction with which Ireland has a double taxation agreement. It is anticipated that the existing tax credit system would continue to apply for foreign dividends that do not qualify for the exemption. This will be of particular relevance to companies receiving dividends from non-EU/EEA jurisdictions or jurisdictions with which Ireland does not have a double taxation agreement.

The introduction of the participation exemption will align Ireland with other EU countries and the majority of OECD jurisdictions and will remove a significant administrative burden for many Irish resident holding companies. The consultation process should continue to be monitored closely for the coming months. It is anticipated that the draft legislation will be included in Finance Bill 2024 (to be published in October 2024) and will come into effect on 1 January 2025.

Separately, it is worth noting that Ireland's tax legislation already includes a participation exemption from capital gains, provided certain criteria are met.

Funds Industry Review

A significant review of the Funds Industry in Ireland is currently under way by the Department of Finance and a significant public consultation process has been completed. There was substantial engagement from various industry stakeholders with the consultation process – 193 responses to the consultation were provided and there was additional significant engagement with industry participants. It is anticipated that the draft report will be presented to the Minister for Finance in summer 2024.

The review is to focus on the asset management and funds servicing sector (both regulated and unregulated) in Ireland and to consider international comparisons. The output of the review is intended to inform and refresh Ireland's policy and legislative framework for the years ahead. The Minister for Finance has acknowledged the importance of the Irish funds sector to the Irish economy and the review will be carried out in that context.

From an Irish tax perspective, the review will include (i) an examination of the taxation regime for funds, life assurance policies and other related investment products, with the goal of simplification and harmonisation where possible with a net revenue-raising or neutral mandate, (ii) an examination of the regimes for Real Estate Investment Trusts ("REITs") and Irish Real Estate Funds ("IREFs") and their role in the property sector, including how they support housing policy objectives, and (iii) the use and scope of the section 110 regime, both in the context of the property sector and more generally so as to ensure that the regime is fit for purpose and meeting agreed policy objectives.

Any proposed taxation measures arising as a result of the final report should be carefully monitored with regard to their potential impact on entities within the investment funds sector and the wider financial services sector going forward.

Separately, the Minister for Finance has also indicated that a separate consultation process on interest deductibility will also commence in the coming months. Any proposed taxation measures arising therefrom should also be monitored carefully.

Domestic tax court cases

Revenue Commissioners v Karshan Midlands Ltd t/a Domino's Pizza [2023] IESC 24

In October 2023, the Supreme Court delivered its unanimous judgment in *The Revenue Commissioners v Karshan Midlands Ltd t/a Domino's Pizza ("Karshan")* [2023] IESC 24 holding that delivery drivers, engaged by Karshan as independent contractors, were in fact working as employees, and as a result Karshan was deemed liable for Pay As You Earn ("PAYE") and Pay Related Social Insurance ("PRSI") contributions in respect of those drivers. The Supreme Court found that the lower courts had incorrectly premised their analysis on whether there was an ongoing relationship between the delivery drivers and the company for which the drivers agreed to perform work. The Supreme Court found that this ongoing obligation was not an essential feature of the employment relationship and that the term "mutuality of obligation" should be discontinued. The Supreme Court set out a New Five Factor Test to be considered in cases of this nature.

In this case, the Supreme Court noted that there were binding legal relations between the parties involving the exchange of consideration, that the right of substitution or delegation was limited such that personal service was required, and that Karshan exercised significant control over the operation of rosters, allocation of work, etc. In relation to all circumstances of working arrangements, the court noted that drivers did not employ their own labour, took no economic risk, worked exclusively from Karshan's premises, had limited ability to maximise profits, were required to wear branded uniforms and deliver as instructed by managers. The Supreme Court found that the Tax Appeals Commission was correct to determine that the drivers were employees of Karshan.

It is recommended that Irish organisations review current and future arrangements with service providers in light of this decision by the Supreme Court. There have been several recent high-profile cases, involving the media, construction sector, food delivery services and motor industry, with organisations targeted by the Revenue Commissioners of Ireland for misclassification.

European – court cases and EU law developments

Advocate General opinion in Case C-465/20P concerning State Aid

On 19 November 2016, the European Commission determined that "two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991", thereby giving rise to a competitive advantage for Apple that breached EU State Aid rules. Ireland was instructed to collect €13 billion in unpaid taxes, plus interest from Apple.

Ireland and Apple appealed this decision to the General Court of the European Union, which upheld its appeal on 15 July 2020. The Commission appealed the General Court's decision in February 2021. The Advocate General ("AG") delivered his opinion on the European Commission appeal from the General Court on 9 November 2023. AG Pitruzzella concluded that the General Court made a legal error when determining that the European Commission had not adequately proven the attribution of intellectual property to the Irish branches and that the General Court had erred in finding that the European Commission had failed to prove the presence of errors in the tax methodology computed by Ireland and Apple. If the Court of Justice affirms the AG's opinion, the case will be remitted to the General Court for reconsideration.

Proposed EU Directives

There are a number of proposed EU tax reforms currently working their way through the EU institutions. The current European Commission administration concludes its five-year term on 31 October 2024. Following this, it may be possible that the newly appointed Commission will pursue a new package of tax reforms. However, some of the current EU tax reforms that are intended to be implemented in the near future are as follows.

FASTER Directive

On 14 May 2024, the Council of Europe reached agreement on the compromise text of the Faster and Safer Relief of Excess Withholding Taxes Directive ("FASTER"). The FASTER Directive is intended to increase certainty and efficiency in certain withholding tax procedures in the EU. It is anticipated that Member States will be required to introduce either a relief at source system resulting in withholding the correct amount of tax or a refund system resulting in the refund of excess withholding tax within 50 calendar days. A common EU digital tax residence certificate ("eTRC") may also be introduced that investors can use in order to benefit from the FASTER relief procedures. Member States will be required to provide a quick and automated process to issue eTRCs to investors resident in the respective jurisdiction.

If the Directive is approved by the Council, it is anticipated that Member States will be required to implement the Directive into domestic legislation on or before 31 December 2028 to take effect on or before 1 January 2030. The introduction of the proposed measures would be a further step towards a more integrated and efficient EU capital market and tax environment.

DEBRA

The debt-equity bias reduction allowance ("DEBRA") proposal (first published in May 2022) seeks to amend the differential tax treatment of debt and equity. In most EU Member States, debt is treated more favourably than equity, with interest payments on loans generally being tax deductible, while equity costs, like dividends, are normally not deductible. The proposed DEBRA Directive proposes to introduce both a tax allowance on increases in company equity and a limitation of the tax deductibility of interest payments. It is understood that the DEBRA proposal is not high in priority and it is not expected that the Directive will be advanced in 2024. If introduced, the DEBRA Directive and its interaction with the already implemented interest limitation rules will require careful consideration by Irish taxpayers.

Unshell Directive

The draft Unshell Directive is intended to neutralise the misuse of shell entities for tax purposes by standardising the assessment criteria and processes to identify shell entities through a substance test, and by coordinating their tax treatment among Member States. The draft Directive is still under discussion and the timeline for its implementation is unclear. It is possible that the draft Directive will be amended to relate only to an exchange of information whereby Member States exchange details of "shell entities" (rather than a denial of tax benefits).

SAFE

The Securing Activity Framework of Enablers ("SAFE") Directive aims to prevent tax evasion and aggressive tax planning by preventing certain entities from setting up complex and non-transparent structures outside the EU. The European Commission has expressed its view that Member States should reach agreement on the Unshell Directive before considering proposals in relation to SAFE.

Industry sector focus

Securitisation

Companies that are established as qualifying companies for the purposes of section 110 of the Taxes Consolidation Act 1997 of Ireland (as amended) ("TCA") can avail of a specific Irish corporate tax treatment, which, if the applicable conditions are satisfied, will ensure that the activities of the company are effectively tax neutral in Ireland by permitting the company to deduct all its expenses (including all interest expense) from its income for the purposes of determining its taxable profit. The section 110 regime is expansive and applicable to companies involved in the holding or management of a wide variety of "qualifying assets". For this purpose, a "qualifying asset" means an asset that consists of, or of an interest (including a partnership interest) in a financial asset, commodities or plant and machinery.

Such qualifying companies are widely used in a range of international finance transactions including securitisation, corporate debt issuances, repackaging structures and collateralised loan obligations ("CLOs"). Certain anti-avoidance provisions are included in the relevant legislation that may affect the deductibility of financing costs where interest is paid to certain persons.

The outcome of the ongoing Funds Sector Review may have relevance to this sector.

Investment funds

Ireland offers an attractive tax regime for investment funds regulated by the Central Bank of Ireland. As a general rule, investment funds (which fall within the definition of an "investment undertaking" for the purposes of section 739B of the TCA) are broadly exempt from tax in Ireland on any income or gains, save that they are required to withhold tax on the happening of a chargeable event in respect of certain investors. No withholding is required by the fund in respect of chargeable events for non-Irish resident investors, provided that the investor has provided a declaration in the prescribed form of the Revenue Commissioners of Ireland to the fund. In addition, generally no stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of units in a regulated Irish fund.

There are particular provisions that apply to IREFs where at least 25% of the value of the assets held by the fund is derived from Irish real estate assets (subject to certain exclusions).

The outcome of the ongoing Funds Sector Review should be carefully monitored as it may have implications for this sector.

Aircraft leasing and aviation finance

Ireland continues to be a global hub for aviation finance with over 50 aircraft leasing companies based in Ireland, including 14 of the world's top 15 lessors. It is the leading centre for aircraft leasing globally and represents approximately US$100 billion of assets.

It is anticipated that the Pillar Two Rules (see above) will be particularly relevant to this sector. Aircraft leasing entities would also have had to carefully consider the interest limitation rules to establish whether these rules would have given rise to a tax restriction on the deductibility of any interest payments such entities were to make.

The year ahead

Ireland continues to be a highly regarded jurisdiction from a tax perspective, demonstrating stability and progressiveness in the wake of the vast number of international tax reforms in recent years. It is fully compliant with the EU Anti-Tax Avoidance Directives and the OECD BEPS Project and remains committed to international global tax reform.

We anticipate that Ireland's stable competitive tax environment will continue to bring further international investment to Ireland in the coming years.

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Alan has an extensive practice, working on the tax aspects of mergers and acquisitions, reorganisations, restructurings and migrations. He advises domestic and international clients on the tax implications of setting up operations in Ireland to exploit and develop intellectual property. He has a keen interest in structuring executive remuneration and manages a rapidly growing tax disputes practice. Alan also heads up our Betting and Gaming Group. Head of Tax in a FTSE 50 multinational organisation, Alan has first-hand experience of managing tax in a global environment and the regulatory and taxation aspects of the betting and gaming sector.

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James has lectured in tax law at Trinity College Dublin and at the Law Society of Ireland and has written on Irish tax issues for the *Irish Tax Review*.

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- Key developments affecting corporate tax law and practice – domestic, European, BEPS, mandatory disclosure rules update
- Tax climate
- Developments affecting holding companies
- Industry sector focus
- The year ahead