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OECD BEPS Project in an Irish Context – Public Consultation
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Our Ref	Your Ref	22 July 2014
TJG/JDU/AF		

Dear Sirs

BEPS: A time for strategy not tactics

This submission is in response to the public consultation paper entitled "OECD Base Erosion and Profit Shifting Project in an Irish Context" issued by the Department of Finance (the **"Department"**) on 27 May 2014 (the **"Consultation Paper"**).

Matheson is an Irish law firm and our primary focus is representing international companies and financial institutions doing business in Ireland. Our clients include over half of the Fortune 100 companies. We advise seven of the top 10 global technology companies and over half of the world's 50 largest banks. We are headquartered in Dublin and also have offices in London, New York and Palo Alto. More than 600 people work across our four offices, including 75 partners and tax principals and over 350 legal and tax professionals.

We welcome the opportunity to participate in the consultation process as Matheson has been an active participant in the OECD Base Erosion and Profit Shifting (**"BEPS"**) project at a national and international level.

1 Key messages

Ireland could benefit from international reform if the opportunities that such reform presents are realised and domestic legislative changes are enacted in a measured and considered manner.

Legislative amendments of a defensive nature prior to completion of the BEPS project would be premature as there needs to be a careful evaluation of the recommendations and guidelines issued by the OECD working groups and clarity on how Ireland's treaty partners will implement any recommendations within the framework of a coordinated global response to BEPS. No unilateral action should be taken by Ireland.

A lack of certainty and clarity in the implementation of BEPS recommendations will create a dangerous situation for taxpayers. We view this as a real risk for Ireland and would caution that it is vital for Ireland that any changes arising from the BEPS project need to be clear and capable of being understood without uncertainty, by all taxpayers.

2 Key points for Ireland

2.1 **BEPS:** We recognise the significance of the BEPS project in seeking to reform the international tax landscape. As a small open economy that has traditionally relied heavily on foreign direct investment, the outcome of the BEPS project may present certain challenges for Ireland. In our view, Ireland could benefit from international reform if the opportunities that such reform presents are realised and domestic legislative changes are enacted in a measured and considered manner.

2.2 **Coordinated Response:** We note that the Department wishes to engage interested parties in a discussion on how Ireland's domestic tax system might best respond to international tax changes. The discussion process should allow the necessary time over the coming months for all interested parties to provide their feedback on how Ireland should deal with issues arising out of the BEPS negotiations and respond to possible reform arising therefrom. Legislative amendments of a defensive nature prior to completion of the BEPS project would be premature as there needs to be a careful evaluation of the recommendations and guidelines issued by the OECD working groups and clarity on how Ireland's treaty partners will implement any recommendations within the framework of a coordinated global response to BEPS.

The various initiatives put forward as part of the BEPS project are proceeding at pace and it will be important for domestic lawmakers to take measured responses to the recommendations which will ultimately be proposed by the OECD. In any case, if the project is completed on schedule we are likely to know the ultimate recommendations relatively quickly (within the next 12 months) and it would be prudent and sensible to delay making any changes until then.

The G20 and OECD have recognised the importance of a coordinated response[1]. Ireland too has recognised that international tax reform requires a coordinated response[2]. Following last year's change to the tax residency rules to address "stateless" income, the Minister for Finance was clear that Ireland would not undertake any further unilateral reforms[3]. We strongly agree with an approach based on transparent coordinated action.

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1. See page 10/11 OECD Action Plan on Base Erosion and Profit Shifting – "…the replacement of the current consensus-based framework by unilateral measures, which could lead to global tax chaos marked by the massive re-emergence of double taxation….It is therefore critical that governments achieve consensus on actions…" "The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner."

2. See page 14 "Ireland's International Tax Strategy" – "International tax challenges cannot be addressed at national level alone – we need a coordinated international response."

3. http://www.independent.ie/business/irish/noonan-defends-tightening-up-of-stateless-firm-tax-loophole-29793468.html

2.3 **Stakeholders:** In determining Ireland's response to international tax changes, there are a range of stakeholders. First and foremost, Ireland's priority must be the creation and maintenance of employment to further drive sustainable growth in our economy. Ireland also has a responsibility to protect the significant investment made in this country by multinationals, which create employment on the basis of a stable, transparent and competitive tax environment. At the same time, we clearly need to be cognisant of the views expressed by representatives of EU member states, tax treaty partners and other BEPS participant countries. However, in addressing any perceived concerns, Ireland's tax regime must retain its relative advantages in the face of increasing competition for mobile investment from within and outside the EU.

2.4 **Transparency:** The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner. The OECD has a track record of delivering considered, broad based consensus outcomes that work in practice. However, the BEPS project is being undertaken at breakneck speed against a backdrop of tremendous political pressure and unprecedented media coverage (often partisan and misinformed) of multinational tax practices. It is important that external political and media attention does not compromise the transparency of the BEPS project, the outcomes thereof and most importantly, Ireland's response.

2.5 **Credibility:** Integrity and credibility to our key stakeholders should shape Ireland's response. In this context we recommend that Ireland should seek to adhere to the key principles outlined in 3 below.

3 Key Principles to guide the Irish approach

Ireland's international tax strategy is built around three key elements "Rate, Regime and Reputation"[4]. While the 12.5% tax rate is clearly understood and has been staunchly defended, it is imperative that in seeking to protect Ireland's reputation among political stakeholders, its reputation within the international business community and the competitiveness of its regime are not compromised. We believe Ireland should adhere to the following key principles:

3.1 **Tax sovereignty:** Ireland should remain ready and prepared to determine and shape its own tax policy, subject to EU law and keeping with the spirit of the BEPS project. This means that Ireland should be free to make considered and informed decisions on overall corporate tax strategy in the context of fully formed and agreed reports and recommendations resulting from the BEPS project. More specifically:

(i) ***12.5% tax rate:*** The 12.5% corporation tax rate is often equated with tax sovereignty. The ability to determine corporate tax rates is certainly a key aspect of tax sovereignty. However, a competitive regime requires more than a low standard rate of corporation tax.

(ii) ***Arm's length standard:*** Ireland needs to support and defend its tax base. Critical to this is that Ireland needs to stand firm on the importance of the arm's length standard. A rigorous application of the arm's length standard by tax

4. See page 3 Consultation Paper – "As the Minister for Finance stated in last October's Budget speech, Ireland's corporate tax strategy has three key elements: rate, regime and reputation."

authorities should provide a reasonable expectation of outcome and stability for taxpayers and tax authorities.

Proposals that move away from the arm's length standard lack clarity and are open to subjective interpretation. Such proposals are likely to favour larger market countries and create uncertainty which will inevitably give rise to instances of double taxation thereby putting significant pressure on the competent authority resources of Ireland and other small countries.

(iii) ***Competitive tax incentives:*** Ireland needs to introduce further (EU compliant) tax incentives that encourage and support investment, economic growth and job creation. Ireland cannot afford to adopt a defensive posture and become paralysed by the current debate. For over sixty years, Ireland has pursued tax policies focussed on attracting and retaining foreign direct investment across a broad range of industry sectors and has shown the necessary conviction to enact the required policy measures. Unless Ireland continues to innovate, we can expect that our market share of global foreign direct investment will diminish as other countries continue to enhance their regimes even against the backdrop of the BEPS project. Other EU member states that compete with Ireland for international investment already have tax regimes which are at least as competitive as the current Irish tax regime. It is not the case that Ireland has a clear advantage and equally Ireland must not rest on its laurels in the face of increased competition for investment.

Within BEPS there is a clear desire to link profit attribution with substance. This could prove to be advantageous for Ireland but only if it enacts the necessary legislative tax measures which will encourage businesses to locate assets and key people functions to Ireland.

(iv) ***Tax treaties:*** Ireland needs to steadfastly support the terms of its existing tax treaties and to negotiate new tax treaties that reflect the specific trading relationships it has with different countries being cognisant of that fact that it is a small open economy. The purpose of a tax treaty is to facilitate trade and investment. A tax treaty is not a "one size fits all" solution.

3.2 **Stability:** In times of great change, the international business community places a premium on stability. As Ireland participates in the BEPS process it is more important than ever that Ireland maintains a stable, thoughtful approach to taxation and tax policy. This means making policy decisions that are well informed and purposeful having regard to all stakeholders interests.

3.3 **Reputation:** Ireland needs to consider its reputation having regard to all stakeholders and ultimately what is best for the Irish economy in terms of sustainable long term growth. Key to this is giving due consideration to the reputation established over many decades with the multinational investment community, which in recent years have proved a vital part of Ireland's economic recovery.

The timing of any possible further changes to Ireland's corporate residence rules impacts directly on the perceived stability of the Irish tax regime and Ireland's reputation amongst investors. There is evidently concern at OECD level with international corporate structures where profits are earned by companies resident in jurisdictions where no corporate tax is levied. This is an issue however that will be addressed through Actions 8, 9 and 10 of the Action Plan on BEPS.

It may well be appropriate for Ireland to review its corporate tax residence rules in due course once the post-BEPS landscape becomes clearer. Any unilateral move by Ireland would be premature until the position can be assessed at the completion of the BEPS project when there will be more clarity on how reform measures impact other EU member states in particular. Further changes to our residence rules would inevitably raise concerns with international investors that Ireland no longer retains full sovereignty with respect to our own tax affairs, and therefore would create further concerns about Ireland's long-term stability and viability in the face of external pressure. Acceding to perceived pressure in a very public manner and contrary to the stated position of the Minister for Finance would be viewed as a sign of weakness and uncertainity. We would further add that the concept of management and control is well established and understood by businesses and tax authorities generally.

3.4 **Credibility:** In order to maintain credibility it is important that stated policy position and actions are aligned. Therefore when the Taoiseach and government ministers state that Ireland will not change the 12.5% tax rate everyone recognises that the rate is settled policy. Equally, when the Minister for Finance says there would be "no unilateral action" in response to BEPS, it is important that any changes required to our tax legislation to address BEPS related matters are only made as part of a coordinated international response.

3.5 **Certainty:** While it may help in reaching consensus for the BEPS proposals to be drafted in a somewhat subjective manner, ultimately subjective language will be interpreted in a manner that favours larger countries. A lack of certainty and clarity in the implementation of BEPS recommendations will create a dangerous situation for taxpayers. We view this as a real risk for Ireland and would caution that it is vital for Ireland that any changes arising from the BEPS project need to be clear and capable of being understood without uncertainty, by all taxpayers.

3.6 **Proportionality:** There should not be a presumption that every cross-border transaction by multinationals is an attempt at BEPS. Ultimately, measures proposed or introduced to tackle BEPS should be targeted and must be proportionate.

3.7 **Confidentiality:** Information sharing between tax authorities is an important tool in combatting BEPS, but the confidential nature of that information must be respected by all tax authorities. Transparency and the sharing of information should be encouraged as part of the BEPS project, however transparency should also be applied both ways so that taxpayers are also notified when information relating to their tax affairs is shared with other tax authorities.

3.8 **Defence of established principles:** Ireland as a member of the OECD is fully entitled to participate in discussions and put forward its own views as part of the consensus forming process. The OECD acts by consensus and Ireland's perspective must be articulated clearly to help shape that consensus going forward. Investors and citizens alike expect the Irish government and its representatives to protect our national interests to the highest degree possible. Ireland's interests can continue to be safeguarded by ensuring that we continue to have a strong and well-resourced competent authority, adhering to the overall goal of having a stable legal system and tax environment, and importantly through appropriate advocacy and participation in international bodies, such as the OECD.

The current international tax principles of source and residence country taxation were formulated nearly 100 years ago. Now, large market economies, with the exception of the US, are seeking to amend these principles in a way that favours their position in the current globalised economy. Ireland is a capital exporting jurisdiction due mainly to the significant investment by multinationals it has attracted over many years so it is important that it defends established taxation principles and resists proposals which unduly favour large consumer economies. In so doing, it will be adhering to taxation principles which are fair and balanced to all economies.

We look forward to having the opportunity to further expand upon the issues noted in our submission with you in due course.

Yours faithfully

Sent by email, bears no signature

MATHESON