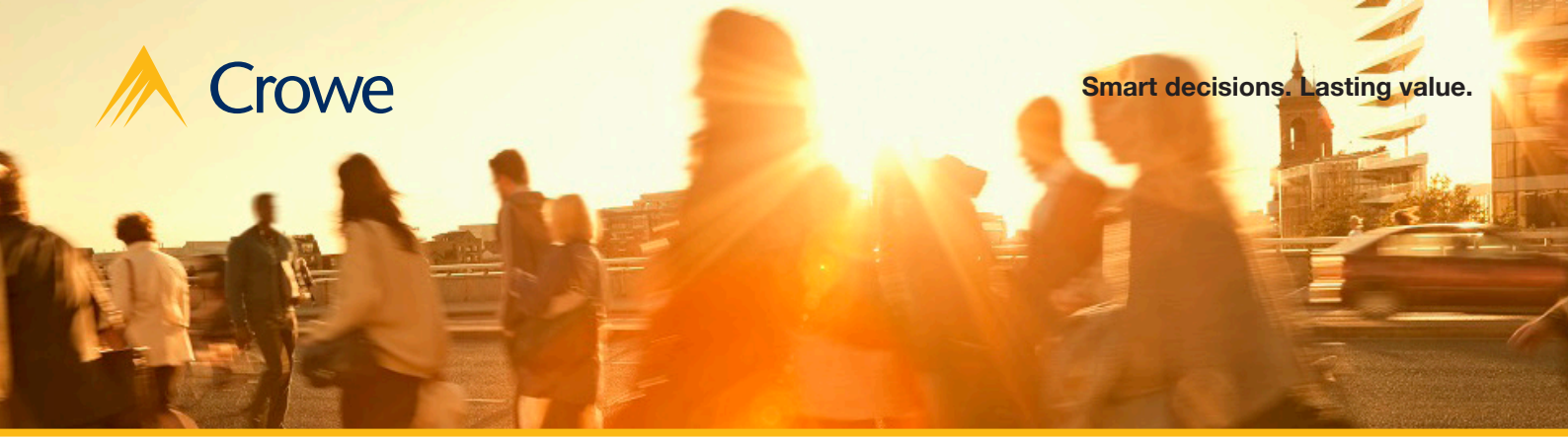

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International Tax Bulletin April 2021

There has been unprecedent change to international tax rules and guidance in recent times which has directly impacted local legislation in Ireland. As a result, all international structures in place should be reviewed and assessed to ensure that they are fit for purpose and compliant with the new regulations.

1. Tax residency rules – Changes from 1 January 2021

Legislative changes to the definition of Irish tax-resident companies that were previously introduced now apply to all Irish-incorporated companies. From 1 January 2015, newly Irish-incorporated companies are Irish tax-resident unless they are resident in another country with which Ireland has a double tax treaty. Grandfathering rules were introduced for existing companies, which disapplied this rule and allowed existing Irish-incorporated companies to remain resident in any foreign jurisdiction until the end of December 2020.

From 1 January 2021, the Irish tax residency rules will deem any Irish-incorporated company as tax-resident in Ireland unless it is managed and controlled from a country within the EU or with which Ireland has a double tax treaty. The effect of this change is that it will no longer be possible for an Irish-incorporated company to be regarded as solely tax-resident in, for example, Bermuda.

2. The Multilateral Instrument (MLI)

Dual residence

The MLI was introduced by the OECD and operates by introducing a series of tax treaty measures with the aim of updating international tax rules and lessening the opportunity for tax avoidance by multinational enterprises.

Article 4 of the MLI provides for a new form of "tie-breaker" rule where a company is considered tax-resident in Ireland and another jurisdiction under the laws of both countries. In such a case, the competent authorities of the relevant jurisdictions shall determine a sole jurisdiction of residence by mutual agreement having regard to that company's place of effective management. Ireland adopted Article 4 of the MLI in January 2019, meaning the tie-breaker rule will impact on Irish tax treaties where the corresponding treaty partner has ratified the MLI and has also opted for the same rule.

While not all of Ireland's double tax treaties have been amended for this rule, it is notable that the treaty with the United Kingdom has been amended so that it is no longer possible to automatically deem an Irish-incorporated company as tax-resident in the UK solely on the principle that the effective management of the company takes place in the UK.

When the tie-breaker rule is being considered, the taxpayer may apply to the competent authority of either jurisdiction to initiate the Mutual Agreement Procedures (MAP) request.

This process can be lengthy, and the risk of double taxation for a dual-resident company that previously relied on the standard effective place of management tie-breaker clause needs to be considered and managed as a matter of urgency.

Permanent Establishment (PE)

The MLI includes optional changes to the PE definition. Ireland has adopted the following provisions:

Article 13	Ireland adopted Option B, which sets out anti-fragmentation measures which can operate to aggregate presence and activities in a jurisdiction to meet the threshold for creation of a taxable PE in that jurisdiction.
Article 15	Ireland adopted an anti-avoidance rule against contractual arrangements that artificially seek (using the PE exceptions) to prevent certain building sites from being classified as PEs.

3. COVID-19

Revenue confirmed in March 2020 that where a departure from the State is prevented due to COVID-19, they consider this force majeure, and the individual will not be regarded as being present in Ireland for tax residence purposes for the day after the intended day of departure. Revenue have since released new guidance outlining a list of acceptable reasons that they will consider to have prevented an individual's planned departure from the State, and they have confirmed that this concession will only apply in circumstances where the individual maintains their foreign tax residence position.

Revenue have also confirmed that they would not seek to enforce Irish payroll obligations for foreign employers in genuine cases where an employee was working abroad for a foreign entity prior to COVID-19, but relocated temporarily to Ireland during the COVID-19 period in 2020 and performed duties for his or her foreign employer while in the State. This concessionary measure ceased to apply on 31 December 2020 and only provided for a temporary relaxation on the employer's obligation to operate PAYE. It did not provide any concession regarding the underlying income tax liability that the individual may have, or the filing obligations of the individual.

Revenue have yet to issue any guidance in relation to the impact that the force majeure residence concession may have on the taxation of stock options, where, as a result of COVID-19, a taxpayer relocated from one jurisdiction to another during the grant-to-vest period of the stock option.

Any situation where your company has mobile employees who have relocated or spent longer than planned in a jurisdiction should be reviewed to establish any potential tax impact.

4. Brexit

If your business involves the movement of goods through the UK, you should review your supply chain model and processes to establish if any additional cost or administration has arisen and if a reorganisation of your supply chain could save costs.

- The EU-UK Trade and Cooperation Agreement covers customs charges when importing goods from the UK to the EU, including Ireland. However, the deal only applies to products coming into Ireland that are manufactured or originate in the UK and comply with the rules of origin. This means that you may still have to pay customs duty on some items bought in the UK and delivered to Ireland.
- This trade deal does affect VAT, and the VAT position of moving goods from the UK to Ireland now mirrors that of importing goods from non-EU jurisdictions. You may therefore have to pay VAT on imports from the UK from 1 January 2021. However, if you are approved to use the postponed VAT accounting provisions then VAT will not be due at the point of importation and you can self-account for such VAT on your VAT return, eliminating any cash flow impact of paying the VAT at the point of importation. This approval must be applied for as part of any new VAT registration application. The postponed VAT accounting needs to be recorded and tracked on the VAT returns filed by the Irish company.
- Depending on your terms of sale with customers, you may be required to register for VAT in Ireland when previously the sale was treated as an intra-community acquisition. For example, a UK-based supplier selling on Delivered Duty Paid (DDP) terms to Irish customers will now have to register for Irish VAT and charge VAT on the sale in Ireland.
- If your business was registered for MOSS (Mini One Stop Shop) in the UK to account for VAT on your EU B2C sales, this registration needs to be cancelled and a new registration put in place in an EU country. You may also need a new UK registration to account for UK domestic B2C sales.
- The Northern Ireland Protocol agreement sets out the specific terms of trade between Ireland, Northern Ireland and Great Britain. In broad terms, the result is that Northern Ireland remains part of the EU for VAT purposes in relation to the movement of goods from Ireland to Northern Ireland and vice versa. Note however that complex rules can apply where goods are moved from Great Britain to Ireland through Northern Ireland. The EU VAT rules for services supplied between Ireland and Northern Ireland no longer apply, and Northern Ireland is treated as being outside the EU. This is an ever-changing environment and any trade with the UK, including Northern Ireland, should be kept under constant review.

5. Mandatory reporting

Revenue confirmed in March 2020 that where a Council Directive 2011/16/EU, as amended by Council Directive 2018/822 (DAC 6) provides for the sharing of taxpayer information between the tax administrations of EU member states and aims at transparency and fairness in taxation. The EU mandatory disclosure regime requires "intermediaries" to provide information regarding "reportable cross-border arrangements" to the tax authorities of member states. A cross-border arrangement becomes reportable where the arrangement satisfies at least one characteristic or feature of a cross-border arrangement which, according to the Directive, presents an indication of a potential risk of tax avoidance.

The Directive requires reportable cross-border arrangements to be reported within 30 days after such arrangement is made available for implementation/ready for implementation, or the first step in the implementation has been made. The disclosure regime became effective in all member states on 1 July 2020, with a "look-back" reporting period for reportable cross-border arrangements where the first step was implemented between 25 June 2018 and 30 June 2020. However, due to COVID-19, Ireland exercised an option given in DAC 6 to defer the first disclosures of information until 28 February 2021.

6. The EU Anti-Tax Avoidance Directive (ATAD)

Anti-hybrid rules

The anti-hybrid rules apply to all corporate taxpayers in relation to payments in respect of cross-border transactions made after 1 January 2020. The anti-hybrid provisions were introduced to prevent taxpayers from engaging in tax system arbitrage by identifying differences in the tax systems of countries which can give rise to either double deduction mismatch outcomes (where an expense is deductible for tax purposes twice) or deduction without inclusion mismatch outcomes (where a payment is deductible but the person who receives the payment does not see it as taxable).

The rules focus on transactions between "associated entities" whereby generally one entity makes a payment for which a deduction is available, giving rise to a "hybrid" outcome. The rules are intended to neutralise a mismatch outcome where a deductible payment has been made without a corresponding amount of income being included for tax by the payee. The rules aim to capture instances where a deduction for the same payment is allowed in more than one territory, but the "double deduction" is not set against "dual inclusion" income.

To apply the correct tax treatment to cross-border transactions, taxpayers will need to be aware of both the Irish tax treatment of the transaction and the potential tax treatment of the relevant instruments and/or entities in the other jurisdictions involved.

Interest limitation rules

ATAD will restrict the deductibility of interest in certain cases. Article 4 provides that exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30% of the taxpayer's EBITDA. Companies that would be considered heavily leveraged may need to rethink their financing arrangements. "Exceeding borrowing costs" are defined as the amount by which the deductible borrowing costs of a taxpayer exceeds taxable interest receipts and other economically equivalent taxable revenues.

Several options are available to each member state:

- A taxpayer may be given the right to fully deduct exceeding borrowing costs if the taxpayer is a "standalone entity"
- Taxpayers may be allowed to deduct exceeding borrowing costs up to €3m; the limit of €3m shall be considered for the entire group
- Excess borrowing costs may also be available to be carried forward to future years and potentially carried back for a period of three years
- Where the taxpayer is a member of a group, further derogations are allowed by way of an equity/total assets ratio test or a group EBIDTA test

The interest limitation rules were due to have been transposed into Irish law by 1 January 2019 but have been deferred. As many domestic and multinational companies claim interest relief in Ireland, the new changes could have significant ramifications for many companies. All financial services industries will need to analyse the impact of the new rules, including the banking, insurance, investment management, leasing and securitisation sectors.

7. BEPS 2.0

In late 2020, the OECD released blueprint documents in connection with the project titled "Addressing the Tax Challenges of the Digitalisation of the Economy" (the BEPS 2.0 project).

Pillar One looks at the attribution of revenues to market jurisdictions and advocates the creation of a new taxing right and new nexus rules that move away from the traditional "physical presence" requirements.

Pillar Two deals with the imposition of global minimum tax and rules to minimise global tax competition.

The OECD/G20 Inclusive Framework on BEPS noted that political agreement on the scope and quantum of the Pillars still needs to be resolved, and the OECD will continue intensive discussions with the various dedicated working groups in the upcoming weeks and months in order to deliver a solution by mid-2021.

The Irish authorities have indicated that they will not take any unilateral action in respect of the digital tax review and will follow OECD guidance and recommendations. Again, this is a developing area which should continue to be monitored.

For additional information or help with any international tax or global mobility issues, please contact a member of our tax team.

About us

Established in 1941, Crowe is a leading accountancy and business advisory firm in Ireland. Throughout our 75-year history, we have developed an unrivalled understanding of the Irish business environment and built a national reputation in auditing, tax and business consultancy.

We work with a variety of clients across commercial and public sectors. Our services include Audit & Assurance, Tax, Corporate Insolvency & Recovery, Corporate Finance, Consultancy, and Outsourcing.

We are also independent members of the eighth-largest accountancy network in the world, with colleagues in over 750 offices across 130 countries. Through this global reach we are able to offer clients a seamless service when trading internationally.

Our success is the result of our exceptional client service.Together with our clients, we work to optimise the present and maximise the future, tirelessly exploring all possibilities until we find the right solution. We help clients make smarter decisions today that create lasting value for tomorrow.

Smart decisions. Lasting value.

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