TAX EXECUTIVES INSTITUTE, INC.

21 July 2014

OECD BEPS Project in an Irish Context
– Public Consultation
Fiscal Division,
Department of Finance,
Government Buildings,
Upper Merrion Street,
Dublin 2.

Via Email: bepsconsultation@finance.gov.ie

RE: TEI Comments on the Public Consultation *OECD Base Erosion and Profit Shifting Project in an Irish Context*

Dear Sir or Madam:

On 27 May 2014, the Ireland Department of Finance (hereinafter, the Department) announced a public consultation regarding the Organisation for Economic Co-Operation and Development's Base Erosion and Profit Shifting (BEPS) project. The public announcement stated that "the Minister for Finance . . . wishes to consider options for Ireland's tax system to respond to a changing international tax environment" in the context of the BEPS project and in light of a desire to maintain the competitiveness of Ireland's overall corporate tax regime. In that regard, the Department released a consultation document, *OECD Base Erosion and Profit Shifting Project in an Irish Context* (hereinafter, the Consultation Document), and invited interested parties to submit their views. On behalf of Tax Executives Institute, Inc., I am pleased to respond to the Department's invitation.

TEI Background

In General

Tax Executives Institute, Inc. (hereinafter, TEI or the Institute) was founded in 1944 and is the preeminent association of in-house tax professionals worldwide. Our approximately 7,000 members represent nearly 3,000 of the leading corporations in Europe, the United States, Canada and Asia. TEI's EMEA Chapter, which includes members resident in Europe, the Middle East, and Africa, was chartered in 1999 and has grown to include over 225 members. TEI represents a cross-section of the business community, and is dedicated to developing and effectively implementing sound tax policy, to promoting the uniform and equitable enforcement of the tax laws, and to reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike. As a professional association, TEI is firmly committed to maintaining an international tax system that works — one that is administrable and with which taxpayers can comply in a cost-efficient manner.

TEI's members are responsible for managing the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises, including the anticipated changes to the international tax system that will follow on the BEPS project. We believe that the diversity and professional training of our members enable us to bring a balanced and practical perspective to certain issues raised by the Consultation Document.[1]

TEI's Participation in the OECD's BEPS Project

TEI has submitted several sets of written comments to the OECD regarding its BEPS project. These include comments on the individual BEPS discussion drafts released by the OECD to date, general comments on the BEPS action plan itself, and comments on the OECD's public consultation regarding the transfer pricing aspects of intangible assets.[2] TEI has also participated in OECD public consultations regarding the BEPS action plan. Most recently, the Institute was invited to give a short presentation as part of the 19 May 2014 public consultation regarding the OECD's discussion draft on transfer pricing documentation and country-by-country reporting. TEI will continue to participate in the BEPS project as it moves toward completion in December 2015. The Institute's efforts with respect to the BEPS project have been led primarily by members from TEI's EMEA Chapter through the activities of the Institute's European Direct Tax Committee.

Comments on the Consultation Document

TEI welcomes the opportunity to comment on the Consultation Document, and understands Ireland's concerns regarding the competitiveness of its overall tax regime and its reputation. The Institute applauds Ireland's participation in the OECD's collaborative approach to the BEPS project and the openness of this consultation.

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1 TEI is contributing to the consultation process as a representative body. Publishing this letter on the website of the Department of Finance would be welcome.

2 All of TEI's submissions on the BEPS project and related OECD consultations are available at http://www.tei.org/news/advocacy/Pages/default.aspx.

In general, TEI recommends that any changes to Ireland's tax regime that result from the public consultation and Ireland's assessment of the BEPS project be (i) applied consistently, (ii) clear, and (iii) implemented gradually. These core recommendations, along with a few others, can be found throughout the Institute's submissions to the OECD on its BEPS action plan. Consistent application of any changes to Ireland's tax regime to all taxpayers, however situated, is essential to maintain a level playing field across competitors and avoid creating winners and losers from the process. In addition, clear rules are necessary for taxpayers to properly assess the tax consequences of their multinational business operations and plan accordingly.

The third recommendation – gradual implementation – is relevant to many changes that Ireland may make to its overall tax regime. Of particular concern to TEI's members is the item in the Consultation Document regarding "Company Residence Rules for the 21st Century."[3] Ireland is not unique among European jurisdictions in permitting residency based taxation. Similar structures can be found in the Netherlands, Luxembourg, Switzerland and the United Kingdom. Because analogous rules are in place elsewhere in Europe, it may not be prudent for Ireland to take the unilateral step of changing its corporate residency rules to require nonresident Irish corporations to be taxed as resident companies, as we understand may be under consideration by the Irish government. In TEI's view, a coordinated action with these and other jurisdictions, whether through the BEPS project or via some other mechanism, would be a better approach to ensure consistent taxation of multinational enterprises.

In addition, modifications to the Irish corporate residency rules would be premature as work on the BEPS project is ongoing. Until more progress is made on the BEPS action plan and final recommendations are issued, it will be difficult to understand and assess any potential collateral impacts of changes to the Irish residency rules. Uncoordinated and unilateral action in this area may lead to double taxation. Thus, TEI recommends that Ireland await final OECD recommendations with respect to the BEPS project before making any changes to its corporate residency rules.

Should Ireland change its corporate residency rules in the near future, however, it is critical for taxpayers that Ireland implement such changes in a considered manner that provides for a sufficient transition period and certainty. Multinational enterprises have structured their business activities in Ireland taking into account the current tax regime and have assumed after-tax, economic returns on their investments at a certain level for the foreseeable future. An abrupt change to those rules would disrupt these enterprises' activities and place them at a significant economic disadvantage compared to their competitors. Further, tax reform in individual jurisdictions, and particularly in the United States, will further complicate multinational enterprise tax planning.

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3 *See* Consultation Document, page 5.

Sufficient time is therefore needed for multinational enterprises to evaluate alternatives and implement required business changes from a legal, financial, and operational perspective. Unfortunately, it is difficult to forecast the amount of time that would be necessary for businesses to implement such structural changes without knowing what approach will replace the current Irish residency rules. The transition period would likely need to be significant depending on the scope and nature of the new tax regime. In addition, when restructuring their operations, businesses will need to address the potential sweeping changes that may be brought on by the BEPS project in this and other areas of the international tax system and not only the changes to the Irish regime. A substantial transition period would be in line with other major changes to the Irish tax regime. For example, when Ireland abolished its manufacturing relief regime, which allowed for a 10% effective tax rate, in 1996, it was phased out over a period of 14 years (up through 2010). In conjunction with that phase out, the transition to the corporation tax rate of 12.5% took place over a seven year period. Thus, there is precedent in the Irish tax system for a lengthy transition period for businesses to make the operational and other changes necessary to comply with any modifications to Ireland's residency rules.

Finally, to provide certainty with respect to transactions entered into as a result of any changes to the residency rules that Ireland may undertake, and in view of the large number of businesses that would be affected by these changes, it would be useful if Ireland established an expedited process for taxpayers to obtain a ruling or nonbinding opinion from the Department to confirm the tax consequences of restructurings to conform to the new rules. For example, there could be a process for companies who "onshore" intellectual property as a result of changes to the residency rule to obtain certainty of the Irish tax consequences (such as with respect to the valuation of the property for depreciation or amortization purposes). Such a process would provide taxpayers with certainty, or at least additional comfort, on the Irish tax results of the new rules for both tax planning and financial reporting purposes. Further, in contemplation of such potential restructurings, Ireland may be called upon to respond to information requests regarding transfer pricing issues from other jurisdictions, which will place stress on the exchange of information processes and mutual agreement procedures (MAP) of Ireland's tax treaty network. These mechanisms, however, can also provide certainty to taxpayers so long as there is a commitment to a robust, effective, and efficient MAP process. While an expedited formal ruling (or opinion) process and increased multilateral transfer pricing queries would likely require the government of Ireland to invest additional resources into such processes, the added certainty and support for taxpayers will help ensure the Irish tax regime remains competitive.

Conclusion

TEI appreciates the opportunity to comment on the Department's public consultation regarding *OECD Base Erosion and Profit Shifting Project in an Irish Context*. These comments were prepared under the aegis of TEI's European Direct Tax Committee. If you have any questions about the submission, please contact Benjamin R. Shreck of the Institute's legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.

Terilea J. Wielenga
International President