Submission on OECD Base Erosion and Profit Shifting Project in an Irish Context

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Introduction

Chambers Ireland is the largest business network in Ireland. With over 50 affiliated Chambers, we represent businesses in every sector and region of Ireland.

Chambers Ireland represents Ireland at the International Chamber of Commerce. The International Chamber of Commerce (ICC) is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization.

The ICC is a longstanding proponent of corporate transparency—dating back to work on the conduct of multinational enterprises in the 1920s. ICC members are fully committed to improved tax transparency and have welcomed key developments in many countries such as the introduction of horizontal monitoring, individual risk assessments and/or enhanced relationships between tax payers and authorities. The OECD is to be commended for its role in furthering this agenda over the past decade.

In this context, Chambers Ireland supports the Government's commitment to maintaining a clear and transparent tax system. We also support the efforts to engage proactively in multilateral initiatives to address BEPS. This paper has been informed by discussions with our colleagues on the Commission on Taxation at the International Chamber of Commerce.

We have identified two Actions within the Action Plan we feel may be particularly relevant to Ireland's tax strategy. We address a number of topics within each that we feel warrant attention.

These are Action 2 – Neutralise the Effects of Hybrid Mismatch Arrangements, and Action 13 Re-examine transfer pricing documentation.

Comments on Action 2 – Neutralise the Effects of Hybrid Mismatch Arrangements

Interaction with other Action Items: As the BEPS project continues, it becomes clearer that there is significant interaction across many of the 15 Actions. We believe that further work is required to understand those interactions, and how the full spectrum of BEPS proposals may address government concerns when considered together. This is particularly important for all of the September 2014 Actions, to ensure that proposals that might be adopted by various governments in the near-term do not result in negative consequences when future BEPS proposals are developed.

In relation to Action 2, there is a risk that acting on hybrid mismatches without acting in coordination with other BEPS Actions would result in an unlevelled playing field. We encourage the OECD to articulate the policy rationale for distinguishing between hybrid arrangements and other types of mismatches, as this would help inform decisions about the adoption and shape of the proposed rules.

In addition, hybrid mismatches are a symptom, rather than a cause of BEPS. The OECD's work on BEPS Action 4 and the development of more uniform expense deduction rules may deal more effectively with the cause, without such a significant need for the complex domestic law solutions proposed in the Discussion Draft. As the timetable cannot be changed, the emphasis should be on establishing a framework for all BEPS Actions to be reviewed and considered in 2015 to ensure that further action undertaken is coordinated and coherent.

Complexity of the Rules: The Discussion Draft does not acknowledge the significant complexity that the proposals will create. The tax treatment of particular transactions across borders can be difficult to determine, even in a related party context due to various factors (including timing issues and differences in accounting concepts). For unrelated party transactions, the complexity increases further. The proposal needs to address the complexity of implementing and managing these rules from the taxpayer and tax authority perspective.

Defining what is considered abusive (through a "bottom up" approach) could assist here to avoid targeting commercial arrangements, rather than including all hybrid arrangements (through a "top-down" approach.)

Impact on certain Market Segments: The Discussion Draft does not fully consider the effects of the proposed rules on very important segments of the economy. For example, we are concerned that given the importance of the financial Services, funds and banking sectors to Ireland, that methods used to raise capital would be significantly impacted by the proposals.

There will be many other similar issues across other sectors of the global economy; for example, non-FS corporates with in-house treasury functions (including cash pooling arrangements) would also be impacted.

Allocation of Taxing Rights: There are concerns about the impact of the proposals on the allocation of taxing rights between states. For example, as part of the proposals to address Imported Mismatches, the rules propose that a third country (that is not actually party to a hybrid transaction)

can apply rules as a 'back-stop' to deny a deduction where two other countries may have chosen not to execute their rights.

Without an enquiry into the policy rationale of the two countries that have not sought to tax (or deny a deduction for) the payment, or enquiring into the tax effects of that non-hybrid payment (e.g., as to timing, partial relief, etc.) this appears to be a "soak-up" tax. If the payment in question is objectionable, there should be a more general consideration of whether it should be dealt with under BEPS Action 4 to ensure equal treatment of hybrid and non-hybrid payments. Again, if a "bottom-up" approach is adopted, this would be clearer.

Use of hybrids to avoid double taxation:

We note that in some cases, taxpayers use hybrid entities and instruments to achieve self-help relief from double taxation (for example, resulting from non-creditable withholding taxes, application of loss expiration rules and inconsistent application of the PE concept and the arm's length principle). As the Discussion Draft stands, the proposed rules may make this form of relief impossible.

There is a heavy focus on eliminating tax arbitrage without allowing the time to fully understand the potential unintended consequences of the proposals. Decisions that could have potentially negative and unintended consequences for the wider economy should be well considered. Arbitrage is an important part of the issue, but equally important is the creation of a proportionate and workable approach that provides the stability and certainty that businesses need to invest.

Comments on Action 13 - Transfer Pricing Documentation and Country-by-Country Reporting (CbCR)

There are concerns that the draft CbCR template goes significantly beyond the stated aim to develop a high-level risk assessment tool to provide tax authorities with a better view of multinational groups' global activity and taxes paid. As a result, the draft instrument, if introduced, would likely entail highly disproportionate compliance costs, estimated by members of the ICC Commission on Taxation at tens of millions USD, both in terms of transitional and ongoing costs. We note that there is no indication within the commentary to suggest that the OECD working group has factored in likely compliance burdens for business—an issue which is specifically referenced in the BEPS action plan on these proposals. Further clarity on cost considerations would be appreciated in due course. We also have concerns that the proposed content of the report could encourage the application of formulary apportionment-type calculations by tax authorities to propose transfer pricing adjustments.

Entity or Country Level Reporting

The CbCR template should be compiled on a country basis. In our opinion, including a total for each country—together with columns for external sales, intercompany sales, profit before tax, cash tax paid, employee numbers and activity code—should provide sufficient information for tax authorities to conduct a robust risk assessment.

To include entity level information will impose an onerous compliance cost on multinational companies. Some groups will have thousands of entities, leading to reports running to hundreds of pages. It is unclear to us what specific purpose such additional information will serve. Do tax authorities have the time and resources to review the data in such detail? Moreover, why would a tax authority in "Country A" be interested in the detail of every company within "Country B" where

there is no connection between the two jurisdictions? In this connection, we believe that an excess of (largely irrelevant) data is likely to diminish the utility of the CbCR template as a risk assessment tool.

Taxes Incurred Methodology

Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?

The template should require one number for cash taxes paid per country as this is the basis on which multinationals pay their taxes worldwide. Apportionment of a group payment across entities based on the pre-tax profit of each is artificial and does not reflect the actual taxable profit that can be significantly different—e.g. due to the availability of tax depreciation. The tax charge in the accounts should not be used as this will include both current and deferred taxes, plus prior year adjustments and true ups. The tax charge will not enable the user of the data to see clearly and quickly what has been paid in each country in any one year.

Disclosure of Specific Types of Intra-Group Transaction

We consider cash paid to be the most appropriate measure for inclusion in the template. Does "due basis" mean the profit and loss account charge under the accruals concept or does it refer to the year-end liability shown in the balance sheet? We believe that an aggregate number for each country is needed.

The CbCR template should not include information that is already proposed to be included in transfer pricing documentation such as the Master and Local file—arguably intra group royalties, interest and service fees are included in these. The issue is that local files will show the figures but just for one jurisdiction; the proposed template shows all countries together. Such data is also potentially included in APAs and other rulings, but again disclosure of this information may be limited to the countries party to specific agreements.

If the CbCR template is to include royalties, interest and service fees there could be significant additional work required with the associated compliance costs. This is because the underlying accounting policies within groups can be different for different types of payment and charges.

Where an item is not consistently recorded in any system, the template may potentially require a change to the financial accounting policies and practices of a group globally. This will impose a disproportionate compliance cost compared to the benefit to be gained if a multinational group is to satisfy the Master and Local file requirements.

Withholding tax should be included. There are some cases where (due to the nature of the business structure) withholding tax is a significant part of corporation tax paid.

Materiality

The country-by-country template should be prepared to take account of materiality considerations from a MNE perspective—including consideration as to whether operations in a particular country are material to that country even if not material to the group. The local file should consider a potentially lower level of materiality specific to that country. What could pose a challenge to materiality is the occurrence of free-of-cost transactions (e.g. guarantee fees), or transactions such as advertising and marketing expenses that exceed, for instance, the bright-line test. These transactions will not ordinarily be reported because they are below materiality level and, therefore,

deserve special treatment for disclosure purposes.

Confidentiality

It is imperative that further consideration is given to the measures in place to safeguard the confidentiality of data provided under the CbCR. This is particularly important where disclosures may contain sensitive commercial information.

Measures to protect the information could include:

- anti-infringement procedures available to taxpayers in order to protect them from unauthorised information disclosure by tax administrations if real damage is demonstrated;

- secure channels/technological means for information exchange between taxpayers and tax administrations in order to prevent information leakage;

- limiting sharing of data between tax authorities to entities within those particular jurisdictions and their intercompany activities (i.e. rather than disclosing the full master file); and

- reviewing (rather than filing) of sensitive information at taxpayer premises.

Conclusion

Chambers Ireland supports the Government and the OECD in promoting coordinated action to address BEPS concerns whilst at the same time ensuring that cross-border trade and investment is not inhibited.