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Roadmap to Introduction of Participation Exemption
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Re: NFTC Comments on Ireland's Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax

Thank you for the opportunity to submit comments on the Republic of Ireland's ("Ireland's") consultation on introduction of a participation exemption to the Irish corporation tax system (the "Consultation Document") released in September 2023.

The National Foreign Trade Council ("NFTC"), organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the Organization for Economic Cooperation and Development ("OECD") and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

The Consultation Document seeks input as to whether Ireland should adopt a participation exemption for foreign-sourced dividends as a double taxation relief measure. It further discusses adopting a Branch Participation regime as well. Under current law, most OECD countries as well as all other EU countries provide for such an exemption, with Ireland being the outlier. Instead, Ireland operates a "tax and credit" system, that taxes dividends received under Irish corporation tax, and then provides a credit in Ireland for tax paid in other jurisdictions, up to the amount of Irish tax payable on the income. Under the status quo there is often limited benefit due to Ireland's tax rate. The implementation of the Pillar Two minimum effective tax rate in 2024 will further negate any potential for incremental tax in Ireland on foreign dividend income received. NFTC is fully supportive of adopting such a regime. We appreciate the opportunity to provide our views in response to the Consultation Document.

General Comments

As identified in the Consultation Document, prior consultations and engagements demonstrate a strong preference in favor of optionality and flexibility for taxpayers in relation to an exemption for foreign subsidiaries ("Participation Exemption") and foreign branches (the "Branch Exemption"). The need for optionality and flexibility in this context is particularly important in light of the extent of recent and ongoing changes to international tax rules and standards. NFTC urges that such an exemption should apply to all genuine business activities including trading, passive income and capital gains associated with such activities. The scope of qualifying jurisdictions should be as broad as possible, not aligned with the scope of existing Irish reliefs relating to foreign subsidiaries (e.g., all countries should be included except those on the EU's list of non-cooperative jurisdictions). We also request a full exemption is provided, as opposed to a partial exemption. Furthermore, the exemption should not be fashioned as a deduction against taxed income.

By way of example, the full impact of the OECD's Pillar Two GloBE rules (the "**GloBE Rules**"), which will be implemented in Ireland with effect from 31 December 2023, will be impossible to accurately predict until domestic legislation is implemented in all relevant jurisdictions and adequate additional guidance is released to deal with issues that will inevitably arise in practice as the new rules become operational. As such, it is very difficult at this stage for taxpayers to comprehensively determine how the introduction of such an exemption could impact on their Irish and international positions.

In light of these difficulties, the inclusion of the following features in the design of the Participation Exemption and Branch Exemption are particularly important to ensure sufficient optionality and flexibility are provided for taxpayers to manage their businesses and adapt with certainty to the ever-changing international tax environment:

(a) Taxpayers should have the option to opt-in to any Participation Exemption and Branch Exemption. Thus, either exemption should not apply automatically for Irish companies or those with a foreign branch in Ireland. Instead, Irish companies should be entitled to elect to remain within the existing worldwide system and apply the credit approach outlined in Schedule 24 of the Taxes Consolidation Act 1997 in respect of foreign branch profits.

(b) Taxpayers' ability to opt-in to the Participation Exemption and Branch Exemption should be revocable at the discretion of the taxpayer. In particular, taxpayers should have the ability to elect on a year-by-year basis. The election should also be possible on an entity-by-entity basis, given that different conditions apply to foreign subsidiaries and branches depending on the jurisdiction and business activities involved.

Response to Specific Questions

We include responses to the specific questions posed in the Consultation Document below. In particular, we highlight that the Consultation Document (at section 2.6) confirms that Ireland intends to investigate the form and use of a Branch Exemption over the coming months. In this regard, we expect industry will have further opportunity to provide more detailed responses once further details on the parameters of the potential Branch Exemption are made available.

Participation Exemption

Questions 11 and 12: *Should a participation exemption apply to both income and capital distributions and, if so, how should a capital distribution be defined? Is there a rationale for extending a participation exemption to other classes of shares beyond distributions in respect of ordinary share capital?*

Yes, we support a participation exemption that would also apply to capital distributions. This would provide maximum flexibility for taxpayers. Extending the participation exemption beyond ordinary shares would also provide maximum flexibility for taxpayers.

Question 16: *Should a participation be determined by reference to a percentage of ownership, voting rights and/or other criteria? What is the appropriate percentage of participation that should apply and why?*

We recommend an ownership requirement no higher than 5%, which is the existing requirement for certain provisions in current law (e.g., Section 626B).

Question 17: *Are you in favor of allowing businesses to choose whether to apply an exemption or to retain the current system of taxing foreign dividends and claiming a foreign tax credit? Please outline the key reasons in support of your answer.*

We recommend either a (1) mandatory exemption or an (2) optional exemption whereby taxpayers can easily opt-in to the regime.

Question 27-31: *What are your views on a potential condition of exemption whereby relief only applies to certain trading companies? Should there be a lead-in period before a participation exemption regime is introduced? If so, what is an appropriate length of lead-in time that should apply? Would you still be in favour of introducing a participation exemption if unutilised foreign tax credits were lost? Are there other transitional arrangements that should be considered?*

We believe that there should be no condition that requires the income to be "trading" income or for the dividend paying company to be a "trading" company per e.g., Section 626B TCA. We recommend that a participation exemption should apply to payments on or after 1 January 2025 (not to payments in accounting periods starting on or after 1 January 2025). We further recommend that unutilized foreign tax credits are not lost, but instead are the credits retained and available to be utilized where applicable or that the effective date is such that time is provided to allow taxpayers to retain unutilized foreign tax credits. We recommend that transitional rules exempt dividends to be paid out of income sourced from pre-1 January 2025 profits.

Question 41: *What are the considerations in support of or against allowing a deduction for expenses related to exempt foreign dividend income?*

We recommend that any definition of non-deductible expenses (related to the shareholding and/or dividends) is drafted narrowly.

<u>Branch Exemption</u>

Questions 54 and 55*: Are foreign branches currently used by Irish companies? If so, in what jurisdictions are those branches located? What are the current advantages of or reasons for using a branch structure? What activity is carried out in the foreign branch structures? Responses should include, for example, sectoral information, whether activity is trading or passive, etc.*

It is difficult to identify specific trends in foreign branch operations and establishment considering that the reasons for the use of branches vary depending on the jurisdiction involved and the specific industry in question. Despite this, some common themes surface when considering the establishment of a foreign branch. Regarding administrative burdens, a foreign branch can provide administrative simplicity and convenience in the relevant jurisdiction when compared with establishing a subsidiary. However, regulatory factors are essential when considering the establishment of foreign branch structure by Irish companies.

In specific jurisdictions considerable operational efficiencies can be provided for Irish companies once the simplicity of a branch structure is established. The establishment of a foreign branch structure will allow Irish companies to expand their geographical and market reach, gaining access to a wider pool of talent and resources while eliminating the burden of substantive compliance obligations. For example, an Irish financial firm with authorization from the Central Bank of Ireland can utilize its Irish authorization to operate through a foreign branch in another EU jurisdiction. This approach would not necessarily apply when considering the establishment of a subsidiary in the same EU jurisdiction.

Question 56*: If foreign branch structures are not currently used, are there specific features of the Irish tax code that influence this decision? If so, please provide detailed information.*

The inherent administrative and operational complexity of Ireland's global system deters the use of foreign branch structures by Irish companies. Specifically, the absence of a Branch Exemption discourages Irish companies from establishing foreign branch structures. The effects of this position extend even further into inward investment and operations as Ireland's attractiveness to foreign companies dwindles, particularly in light of the introduction of the GloBE Rules, placing Ireland at a competitive global disadvantage.

Accounting for the global nature of the Irish taxation system, and as set out in Schedule 24, foreign tax credit rules ("FTC Rules") must be upheld by companies establishing branches in Ireland. Companies establishing foreign branches continue to experience administrative burdens and risk excessive taxation when adhering to the FTC Rules, despite the FTC Rules being less complex than those applicable to other sources of foreign income (e.g., dividends). Implementing simple and predictable tax regimes will present an attractive force for inward investment in Ireland, whereas the complexity inherent in the FTC Rules presents a clear disincentive.

Question 59: *What features of tax exemptions in other jurisdictions that operate both participation and branch exemption should Ireland consider? Please include: a. the name of the relevant jurisdiction; b. details of the features; and c. why those features should be considered.*

Ireland differs from other jurisdictions due to the absence of both a Branch Exemption and a Participation Exemption for foreign dividends (the "Dividend Exemption"). Since many jurisdictions currently employ such a system, these models are available to inform Ireland's approach to creating both a Participation exemption and Branch exemption. Furthermore, international tax policy such as the GloBE Rules which are designed with an innate focus on territorial features like a Branch Exemption and a Dividend Exemption, can provide additional guidance to Ireland's approach.

For example, companies operating in the UK can elect into both a Dividend Exemption and a Branch Exemption, allowing for the election into the Branch Exemption to take place on a company-by-company basis. In contrast to this approach, we recommend that the election into a Branch Exemption be rescindable and that Irish companies are permitted the discretion to revert to the credit system. The retention of optionality for taxpayers is paramount considering the level of commotion in the international tax environment over the last few years. In addition, Ireland should follow the broad scope of the UK Branch Exemption in encompassing an exemption for chargeable gain, and not limiting the Exemption to trading income of foreign branches.

Question 60: *Please outline the potential consequential considerations you envisage would be required should a foreign branch exemption be introduced, including the potential impact on: a. transfer-pricing provisions; b. anti-avoidance measures, including but not limited to ATAD/anti-BEPS measures; c.*

special tax regimes for particular sectors or structures (for example, Part 26 TCA 1997 which deals with Life Assurance Companies); and d. any other Irish tax code provisions.

Identifying specific consequential considerations required at this stage proves difficult in the absence of specific proposals on the Branch Exemption. However, Ireland's tax code has undergone significant changes in recent years with the introduction of various measures driven by the OECD and the EU. Therefore, the Irish tax code must be considered comprehensively to ensure that there are no unintended consequences in the interaction of various provisions once further detail on the parameters of the Branch Exemption is available. For example, provisions such as Ireland's exit tax must be considered to ensure that the potential Branch Exemption does not trigger unintended tax charges for taxpayers opting into the Branch Exemption. Unintended and/or burdensome taxation would significantly undermine the appeal of the Branch Exemption for taxpayers with existing branch structures.

Question 61: *The international corporate tax landscape has undergone and is continuing to undergo significant reform. What impact do current and proposed future reforms have on your rationale for a transition to a foreign branch exemption?*

International corporate tax rules, such as the aforementioned GloBE Rules, present an unprecedented level of change for taxpayers who still face challenges in determining the impact of these rules on their business. In particular, Irish companies with foreign branches must navigate the added complications emerging from the interaction of the Irish global tax regime, the FTC Rules, and the calculation provisions required under the GloBE Rules.

A Branch Exemption in Ireland must be carefully formulated to align domestic rules with the system anticipated by the GloBE Rules as much as practicable to introduce a level of certainty to taxpayers. It is critical to ensure that the interaction between the Irish Branch Exemption and international corporate tax rules, such as the GloBE Rules, does not produce unanticipated consequences and burdens for taxpayers (i.e., double taxation). Retaining sufficient flexibility and optionality in the design of the Branch Exemption will be crucial in this regard.

Conclusion

We appreciate the opportunity to provide feedback on the Consultation Document and reiterate our support for adopting such a regime. We value Ireland's continued engagement with the business community and look forward to further dialogue on this matter.