Spring Tax Conference 2025

March 2025

CONTINUING PROFESSIONAL DEVELOPMENT

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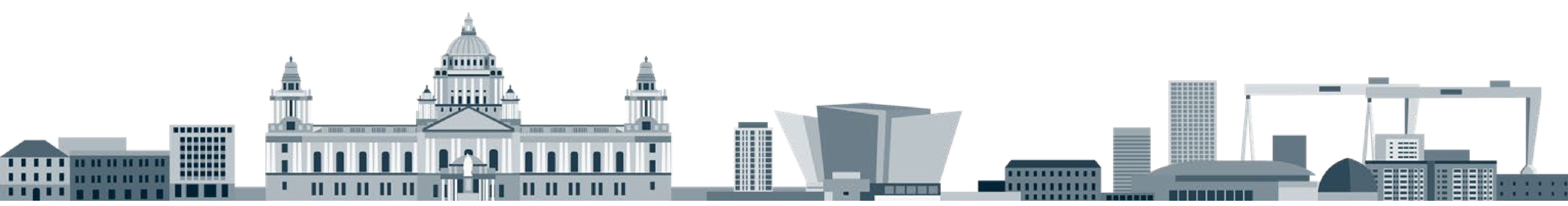
Linda, Paul, Chris, Emma, Shannon, Sonia and Ian

Participation Exemption on Certain Foreign Distributions

Méabh O’ Grady

20 March 2025



Background into the introduction of the legislation

- Ireland operates a worldwide corporate tax regime
- Pre 2025 taxing foreign distributions complex by virtue of Schedule 24 of the Taxes Consolidation Act 1997
- Appetite to simplify taxing foreign distributions and adopt a limited territorial regime specific to foreign distributions to align with countries in the EU and OECD
- New Participation Exemption drafted to simplify the taxation of foreign distributions
- Participation Exemption on Certain Foreign Distributions legislated for in Finance Act 2024
- Where the conditions of the new legislation are met – foreign distributions will be exempt from tax in Ireland

Participation Exemption on Foreign Distributions

1

Applicable for **'relevant distributions'** received on or after 01 January 2025 by a **'parent company'** from a **'relevant subsidiary'**

2

Optional exemption – current 'tax and credit' system is by default applicable unless an election to opt into the new exemption is made

3

Election to be made in the Form CT1/annual tax return to avail of the exemption

4

Careful attention should be made to the distributions which will not qualify for the exemption

Section 831B of the Taxes Consolidation Act 1997

Relevant Subsidiary

- Resident EU/EEA/DTA and not generally exempt from non-Irish tax
- Resident requirement to be met for 5 years prior distribution or since subsidiary incorporated
- Not considered a relevant subsidiary where in the 5 years preceding distribution the subsidiary merged with or acquired a trade from a company not resident in a relevant territory

Parent Company

- Resident in Ireland or resident for purposes of foreign tax in an EEA jurisdiction and not generally exempt from that foreign tax
- Owns at least 5% of the ordinary share capital of the relevant subsidiary, is beneficially entitled to not less than 5% of profits available to equity holders and beneficially entitled on windup – for an uninterrupted period of 12 months
- Ownership requirement not met if holding is via an intermediary not resident in a relevant territory i.e. EEA/DTA

Relevant Distribution

- Must be made in respect of the relevant subsidiary's share capital, be treated as income in the hands of the recipient and be made either:
  - out of the "P&L" profits; or
  - out of the assets of the relevant subsidiary so long as the cost of the distribution falls on the relevant subsidiary
- If the distribution is made out of the assets of the company, relief will only apply if conditions for Section 626B TCA are met

Relevant Territory

- EEA state other than the State
- DTA territories
- Does not include a listed territory

What distribution will not qualify under the new rules?

01 **Section 831B (1) TCA 1997**
A distribution that has been, or may be, deducted for the purposes of tax in any territory outside the State under the law of that territory

02 **Section 831B (1) TCA 1997**
A distribution made on winding up

03 **Section 831B (1) TCA 1997**
Any interest or other income from debt claims providing rights to participate in a company's profits (within the meaning of section 21B(1)(a))

04 **Section 831B (1) TCA 1997**
Any amount considered to be interest equivalent (within the meaning of section 835AY)

05 **Section 831B (1) TCA 1997**
Any dividend paid or other distribution made by an offshore fund as construed in accordance with section 743

06 **Section 831B (6)(a) TCA 1997**
A distribution made to an assurance company where the relevant distribution is taxable in accordance with the provisions of Chapters 1 and 3 of Part 26

07 **Section 831B (6)(b) TCA 1997**
A distribution made to an undertaking for collective investment (within the meaning of section 738) which is a company

08 **Section 831B (7) TCA 1997**
A distribution arising that is part of an arrangement that is considered not genuine to the extent they were not put in place for valid commercial reasons which reflect economic reality.

Over to you!

Q&A

International Tax Updates – ATAD/ ILR etc

Finnian O'Sullivan, Tax Director, Grant Thornton

March 2025

EU Tax reform - ongoing

Evolution of DAC

Increasing reporting requirements and cross border exchanges of information

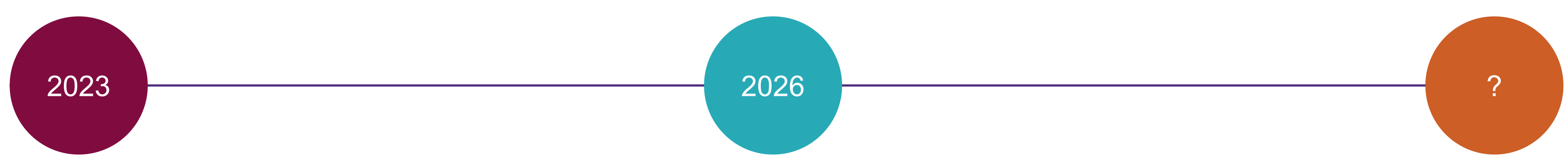
2013	2016	2016	2017	2018	2020
DAC1	**DAC2**	**DAC3**	**DAC4**	**DAC5**	**DAC6**
Exchange of Information	Exchange of financial account information (CRS)	Exchange of advance tax rulings and APAs	CbCR	Access to beneficial ownership details by tax authorities	Mandatory reporting for advisors/ certain taxpayers

OECD & EU Actions

More reporting requirements and cross border exchanges of information

Increased **transparency** is the common theme

- Penalties for non-compliance



DAC7

Exchange of information re traders from digital platforms

(e.g. Amazon, eBay)

DAC8

Exchange of information re crypto assets and e-money held via crypto exchanges/ brokers

(e.g. Coinbase, Binance)

DAC9

Exchange of top-up tax information between Member States and simplify Pillar Two compliance for multinational enterprises and large-scale domestic businesses

ATAD I,II and III

Overview of ATAD I & II

Implementation of ATAD I & II in EU and Ireland

ATAD I & II introduced of five minimum standards across EU:

1. **Exit Tax:** Finalised in Finance Act 2019 to bring in line with EU legislation
2. **General anti-abuse rules ("GAAR"):** Irish rules from 1989 were compliant with ATAD provision and required no amendments.
3. **Controlled Foreign Country ("CFC") regime:** Rules were effective from 1 January 2019 and the rules targeted the undistributed income of a CFC arising from non-genuine arrangements.
4. **Hybrid mismatch arrangements:** Anti-hybrid rules were introduced in Finance Act 2019 and Anti-Reverse Hybrid rules were introduced in Finance Act 2021. The rules are broadly targeted at preventing an outcome where there is a double deduction, a deduction with no income inclusion or an imported mismatch arising from the use of a hybrid entity or hybrid instrument.
5. **Interest limitation rules:** An ATAD compliant interest limitation rule was introduced in Finance Act 2021 and applied for accounting periods commencing on or after 1 January 2022.

NB: Increased scrutiny from Irish Revenue in relation to CFC and Hybrid Mismatch arrangements expected to ensure improved compliance.

Overview of ATAD I & II (cont.) - Hybrid mismatch arrangements

ATAD II – Hybrid mismatch arrangements

Hybrid mismatch = differences between tax systems with regard to the qualification of entities, payments of business activities in affiliated relationships.

Results in base erosion:

(i) Double deduction (DD);

(ii) Deduction no inclusion (D/NI).

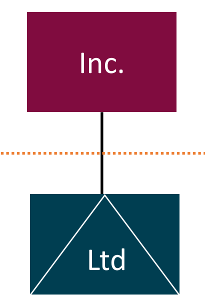
Consequence of ATAD II:

(i) Refusing the deduction (primary rule);

(ii) Tax the payment at the recipient level (secondary rules).

Potential to have huge adjustments to Corporate Tax returns and a company's overall tax position

Example of how a hybrid arrangement could easily arise:



- "Ltd Co" is an Irish subsidiary of a US parent. It has made a "check the box" election in the US.
- Due to the election, it is considered transparent from a US Tax perspective.
- As it is a limited company, it not considered transparent from an Irish perspective
- This is an example of a double deduction hybrid.

Overview of ATAD I & II (cont.) - Hybrid mismatch arrangements

The OECD's BEPS Action 2 report offers general guidance on hybrid mismatches, but Irish Revenue's updated guidance clarifies that the OECD's interpretation cannot override the hybrid mismatch rules in ATAD2 and is only intended to assist with their application.

The updated guidance addresses the following:

- a structured approach to hybrid mismatches, **distinguishing between primary and defensive rules**.
- **refines key definitions for clarity**. The term "deduction" now broadly includes any expense, allowance, or relief used to compute taxable profits, extending to capital allowances and other forms of relief. Additionally, a "structured arrangement" is defined as any transaction primarily designed to generate a mismatch outcome. This ensures that only genuine commercial arrangements benefit from tax deductions, preventing taxpayers from exploiting hybrid mismatches through artificial transaction structures.
- the **treatment of loss-making branches and trapped losses**. It clarifies that "trapped losses" — losses that cannot be used for tax relief due to timing differences or restrictions — must be considered when assessing hybrid mismatches. This prevents multinational groups from deferring taxable income by isolating losses in branch structures. Previously, trapped losses could have been seen as creating a double deduction.
- **Associated Enterprise Test and the 50% Threshold** – clarification that while the standard threshold for associated enterprises remains at 25%, a 50% threshold applies in cases involving hybrid mismatches. Entities will be considered associated only if one party directly or indirectly holds 50% or more of the share capital, voting rights, or profit rights in another. This ensures that hybrid mismatch rules target more integrated business structures while avoiding unintended consequences for loosely connected entities.

Overview of ATAD I & II (cont.) - Hybrid mismatch arrangements

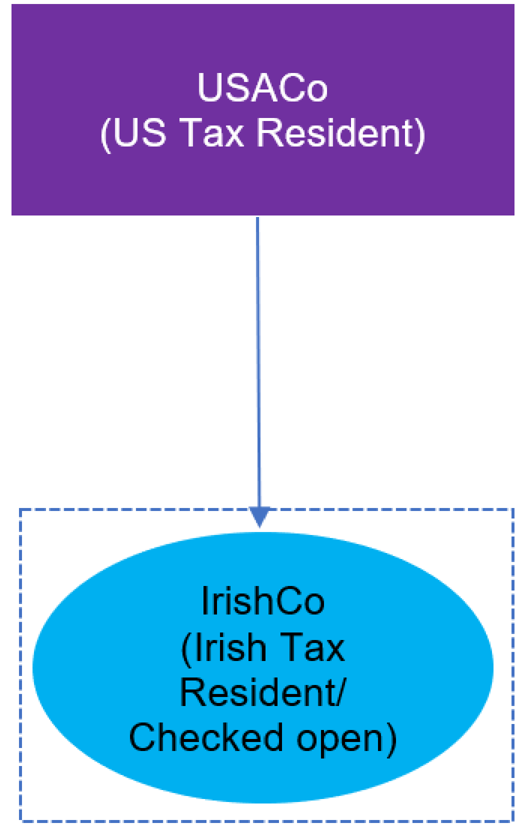
Example 2 – Dual Inclusion Income

A US tax resident company ("USACo") owns 100% of an Irish subsidiary ("IrishCo"). IrishCo is a trading company that incurs costs, such as costs of goods sold, etc. For Irish tax purposes, IrishCo is a separate legal entity and is subject to corporation tax in Ireland. For US tax purposes, IrishCo is "checked open" (a disregarded entity), meaning its income and expenses are consolidated into USACo's tax return. Because of this structure, every expense IrishCo deducts in Ireland is also deducted in the US, creating a double deduction. Under Ireland's anti-hybrid rules, the key question is whether this deduction should be denied in Ireland.

Factors to consider

The anti-hybrid rules aim to prevent deductions from being claimed in two jurisdictions without corresponding taxable income. In this case, whether Ireland denies the deduction depends on several factors:

1. If the US denies the deduction, Ireland does not need to.
2. If the deduction is offset against dual inclusion income, it is generally allowed.
3. If the Irish income is included in the US tax base, the deduction is likely permitted.
4. If the income was eliminated under US tax consolidation, we must assess whether it is still effectively included.
5. If the issue is a timing mismatch, the reasonable to consider test may need to be applied.



Overview of ATAD I & II (cont.) - Interest Limitation Rules

What is the objective of this regime?

- Aim is to limit base erosion attempts by multi-national companies (MNCs) through the use of excessive interest deductions and similar financing costs.
- Limits the maximum tax deduction for **net** borrowing costs* to **30%** of a corporate taxpayer's **EBITDA** (as defined under tax principles).

**Interest and amounts "economically equivalent to interest" (e.g. financial instruments, such as derivatives, amounts incurred in connection with raising finance, along with foreign exchange gains and losses on interest or similar amounts.discounts and certain leasing charges)*

How is the restriction applied?

- Where net borrowing costs exceed 30% of EBITDA, the taxpayer disallows that amount of a tax deduction;
- Amounts disallowed as interest deduction under the ILR can be carried forward and taken as a deduction against taxable profits in future years;
- Where net borrowing costs of the taxpayer are below the 30% of EBITDA threshold, the unused amount of capacity is carried forward as "**limitation spare capacity**". Where a taxpayer has financing income in excess of borrowing costs, this excess is carried forward as "**interest spare capacity**". In future years where the taxpayer exceeds its 30% threshold, this "**total spare capacity**" (i.e. both amounts together) must be used within a 60 month period from the end of the accounting period.

Local interest Groups

- ILR using a **single entity basis** or by using a "**group approach**" i.e. determining the interest restriction at the level of a local group of companies (i.e. an *"interest group"*). An *"interest group"* will include all companies within the charge to corporation tax in Ireland that are members of a financial consolidation group as well as any non-consolidated companies that are members of a corporate tax loss group.
- Membership of this group is to be determined on an elective basis.
- There may be benefits to opting into a group, such as pooling of interest and spare capacity, but this decision should be based on detailed tax analysis and modelling, as there is a minimum three-year period for staying within a group once the election is made.

Overview of ATAD I & II (cont.) - Interest Limitation Rules

What are the key exceptions to the regime?

– Key Exceptions

A

Where the relevant entity's net borrowing costs are less than €3 million (the de minimus threshold). If this is breached, the ILR applies to the entire amount of borrowing costs.

B

Where the relevant entity is a standalone entity – broadly meaning a company that has no associated enterprises or permanent establishments

C

Long-term public infrastructure projects – broadly meaning a project to provide, update, operate or maintain a large-scale asset in the general public interest

D

Interest on legacy debt, being debt the terms of which were agreed before the terms of the EU ILR were agreed on 17 June 2016 (this can be lost if there has been modifications to the loan following this date).

– Other worldwide relieving measures

- "**Equity Ratio rule**": ILR is not applied where the taxpayer's ratio of equity to assets is greater than 98% of the worldwide group's ratio, being scenarios where Irish equity funding is as high or higher than the group's equity funding (group meaning all those within the ultimate consolidated financial statements); and
- "**Group Ratio rule**": increased deductibility threshold where the worldwide group's exceeding borrowing costs as a percentage of EBITDA exceeds 30% - in this scenario, the taxpayer may use this higher percentage in its own calculations

Overview of ATAD I & II (cont.) - Interest Limitation Rules

Key Updates in Finance Act 2024

Interaction with Leasing Transactions

The updated guidance clarifies how the Interest Limitation Rule (ILR) applies to leasing transactions, specifically in identifying "interest equivalent" within finance leases.

- The finance element of lease payments is treated as interest equivalent for ILR purposes. To determine this, a fraction is calculated at the outset of the lease: Total expected finance income (or expense) ÷ Total expected gross rent over the lease term.
- This fraction is then applied annually to the taxable (or tax-deductible) rent reported.
- Leasing companies must carefully assess their finance lease agreements to ensure the correct portion of payments is treated as interest equivalent under ILR.

Interaction with Long Term Public Infrastructure Project Exemption

- The updated guidance confirms that interest on borrowings for long-term public infrastructure projects is exempt from the Interest Limitation Rule (ILR), recognising the public benefit and long-term nature of these investments.
- To qualify for this exemption, projects must meet specific criteria outlined in the guidance, ensuring that only genuine public infrastructure initiatives benefit. Companies engaged in such projects should carefully review their financing arrangements to confirm eligibility for the ILR exemption.

Overview of ATAD I & II (cont.) - Interest Limitation Rules

Future

Interest Deductibility

- Ireland's tax regime for interest—covering interest income taxation, deductibility, and anti-avoidance measures—has evolved to address both domestic policy challenges and international standards. Recognising the need for a simpler and more resilient framework, the Department of Finance launched a public consultation in 2024 to gather stakeholder input on potential reforms.
- These may include:
  - The review examines the potential to simplify current limitations and timing rules relating to deductibility to better align with the economic realities of borrowing.
  - Revisiting the conditions for deductibility of interest expenses, particularly for companies incurring expenses related to acquisitions of shares.
  - Revisiting Exemptions and Thresholds: Proposed changes aim to clarify exemptions for standalone companies, legacy debt, and infrastructure projects, while also reviewing the group consolidation rules.
  - Policy Choices: The consultation explores whether Ireland's current implementation of ATAD, including its de minimis and standalone entity exemptions, should be adjusted to better protect the tax base.
  - Review of Anti-Avoidance Provisions and Other Restrictions (e.g. recovery of capital)
  - Leasing Companies: Proposals include reviewing the taxation of financing income and expenses to better support both rental and finance businesses. This review aims to ensure that the tax treatment aligns with the specific needs of these sectors, promoting fairness and efficiency in the taxation of leasing activities.
  - Withholding taxes etc.

Overview of ATAD I & II (cont.) - Interest Limitation Rules

Interaction with Foreign Dividend Participation Exemption

- Foreign Dividend Participation Exemption allows Irish companies to exempt dividends from foreign subsidiaries from Irish tax, provided certain conditions are met (e.g., minimum ownership).
- The Interest Limitation Rules and Foreign Dividend Participation Exemption are separate provisions, they interact in determining overall tax liability for multinational groups.
- If a company elects to avail of the foreign dividend participation exemption, the relevant foreign dividends would be excluded when calculating earnings before interest, tax, depreciation and amortisation (EBITDA) for the purposes of the interest limitation rule (ILR). A lower EBITDA would result in a lower allowable amount of interest and thus increase the ILR addback in the computation and corporation tax due.
- It would be necessary to be compare the impact if the company were able to avail of double tax relief under Schedule 24 TCA 1997 instead as this could provide a better tax result since the relevant foreign dividends would be included in the EBITDA calculation and should thus result in a higher allowable amount of interest and lower ILR addback in the computation.

Example

- On 31 January 2025 an Irish resident company received a dividend of €1,000,000 from a UK resident investment company (100% owned subsidiary). No UK withholding tax applied to this dividend but underlying UK corporation tax of €250,000 was paid on the underlying trading profits distributed to the Irish resident company.
- The Irish resident company, with a year-end of 31 December 2025, has Case I trading profits of €200,000 (ignoring any ILR restriction), including capital allowances of €500,000, interest costs of €4,000,000 (all trade related) and dividend income of €1,000,000.
- The relevant profits for the purpose of the ILR are €2,200,000, which includes the trading profits of €200,000 and the dividend income of €1,000,000 regrossed at 25% / 12.5% to reflect the higher tax rate applicable to this income in this instance. As the Irish resident company has no interest income, the net interest equivalent in this instance would be €4,000,000.
- If the Irish resident company is able to meet the conditions to avail of the foreign dividend participation exemption (as set out under Section 831B TCA 1997), before making an election to avail of this relief, it would need to consider the impact of this exemption on the ILR calculation and also whether double tax relief under Schedule 24 TCA 1997 would provide a better result.

Overview of ATAD I & II (cont.) - Interest Limitation Rules

Interaction with Foreign Dividend Participation Exemption

- If the exemption is availed of, for the purposes of computing the ILR, the EBITDA would be computed as follows:

Relevant profits	€200,000 (ex dividends)
Plus net interest equivalent	€4,000,000
Plus capital allowances	€500,000
EBITDA	**€4,700,000**

- The allowable interest deduction would be €4,700,000 * 30% or €1,410,000 and the ILR addback would thus be €2,590,000 (€4,000,000 - €1,410,000). The trading profits would increase to €2,790,000 in this instance.

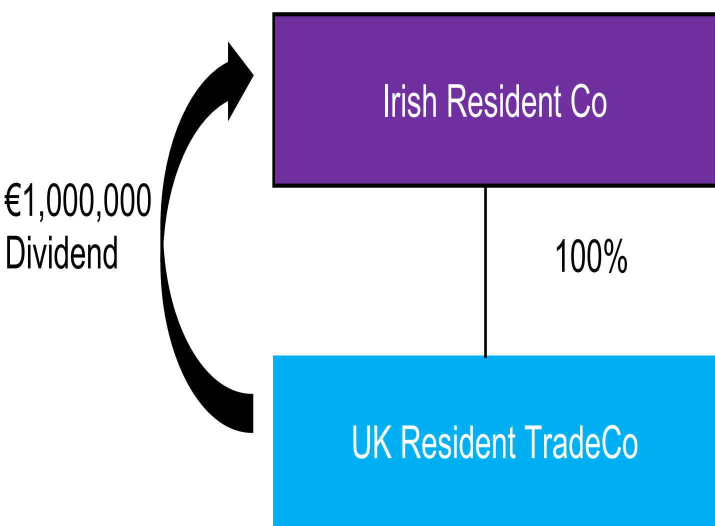
- Alternatively, the Irish resident company should be able to avail of double tax relief under Schedule 24 TCA 1997 and double tax calculations would need to be undertaken to calculate the quantum of relief.
- For the purposes of computing the ILR, the EBITDA would be computed as follows:

Relevant profits	€2,200,000 (including dividends)
Plus net interest equivalent	€4,000,000
Plus capital allowances	€500,000
EBITDA	**€6,700,000**

Overview of ATAD I & II (cont.) – Interest Limitation Rules

Interaction with Foreign Dividend Participation Exemption

- The allowable interest deduction would be €6,700,000 * 30% or €2,010,000 and the ILR addback would thus be €1,990,000 (€4,000,000 - €2,010,000). The trading profits would increase to €2,210,000 in this instance.
- Assuming sufficient double tax relief is available under Schedule 24 TCA 1997, it would be more advantageous not to claim the foreign dividend participation exemption in this case.



Overview of ATAD III

Implementation of ATAD III

On December 22, 2021 - the European Commission issued a proposal for a Directive aimed at discouraging the use of shell entities within the EU.

The minimum substances test will be focusing on the following:

(i) Cross border passive income; and

(ii) Outsourced administration.

If an entity is seen to lack minimum substance under ATAD III they will be seen as a "shell" and denied benefits of EU directives or tax treaties.

The objective of ATAD III is to improve the current tax system to ensure fair and effective taxation.

The proposal is still under negotiation and has not been finalised. Discussions are ongoing, particularly regarding the scope, reporting obligations, and how it aligns with the Directive of Administrative Cooperation (DAC).

Progress appears to have stalled.

However, the proposal may evolve, and businesses should monitor updates on its implementation and substance criteria.

Key risk factors

(a) Companies with foreign investments.

(b) Companies with passive income – interest, dividends, royalties, rental income – generated from cross-border activities

(c) Entities with outsourced Directors, administrative

Base Erosion & Profit Shifting (BEPS)

Pillar One

Focuses on profit allocation mechanisms and nexus rules to expand taxing rights of market jurisdictions to reflect the digitalised economy.

Initially proposed to apply to larger businesses with global turnover of €20 billion or more.

Pillar Two

Addresses jurisdictions competing for inbound investment through low, or no corporation tax rates. Aim to agree global anti-base erosion rules for a minimum effective tax rate - "at least" 15%.

Applies to businesses with global turnover of €750 million or more.

Global Tax Reform Project

Pillar One and Pillar Two Blueprints were agreed at a meeting of the OECD/G20 Inclusive Framework on BEPS in October 2020.

BEPS Pillar One

Implementation plan and status

- A Multilateral Convention (“MLC”) in respect of Pillar One was developed which the goal of effective implementation in 2024.
- Lots of work has been undertaken at European and OECD levels regarding Pillar One.
- There are concerns regarding the already burdensome global compliance process for multinational enterprises as well as the resource issue for relevant tax authorities.
- Work has stalled.
- US support is required.
- Digital services taxes (DST) – increased risk of unilateralism.
- DSTs could be subject to the US 'Extraterritorial Taxes' and 'Reciprocal Tariffs’.

BEPS Pillar Two

Implementation plan and status

- December 2021 published the Pillar Two Global Anti-Base Erosion (“GloBE”) Model Rules. These are intended to be the template for individual countries to translate the Pillar Two GloBE rules into their domestic law.

- In January 2025, the US pulled out of the "Global Tax Deal" signalling a shift in U.S. tax policy and its approach to international tax cooperation, and casting doubt over the future of Pillar Two.

- Increasing backlash across the globe against Pillar Two.

- Increased risk of unilateralism.

- Perception of Pillar Two being reduced to a backdoor CCCTB.

- Notwithstanding the above, it is currently the law of the land.

Compliance Challenges

- Both ILR and Pillar II require compliance with new documentation and reporting requirements. MNEs will need to carefully navigate how interest deductions interact with the global minimum tax rules.

- The interaction between ILR and Pillar II can lead to more complex calculations of effective tax rates, especially for groups with significant financing arrangements that could be impacted by ILR.

- Deductible DSTs can lower the effective tax rate (ETR), potentially affecting compliance with Pillar II's minimum tax.

BEPS Pillar Two

Scope of BEPS Pillar Two

- €750m global turnover test based on two of the last 4 years
- Exclusion for government entities, non-profit organisations, pension, investment & real estate funds
- Substance based carve-outs and de minimis exclusion for companies in a jurisdiction where average annual revenue < €10m and profit/loss < €1m
- Expected to apply to circa 1,600 Irish businesses.
- Ireland to levy additional corporation tax on in-scope companies to ensure minimum effective tax rate of 15% under GloBE rules

Experiences to date

- Lots of dialogue.
- Safe harbours based on CBCR data – higher quality data now being produced.
- Lots of complexity.
- Time consuming and costly to in-scope groups.
- Lots of questions still arising.
- Early engagement is strongly recommended.

BEPS Pillar Two – Flowchart showing application of GloBE rules

Determine GloBE income on a jurisdictional basis

Determine Covered Taxes on a jurisdictional basis

Calculate jurisdictional ETR = Covered Taxes / GloBE Income

Calculate Top-up tax % = Minimum ETR – jurisdictional ETR

Determine Excess Profit = GloBE Income – Substance Carve-out

Jurisdictional Top-up Tax = Top-up Tax%

* Excess profit

Ways to absorb jurisdictional Top-up Tax: Qualified Domestic Top-up Tax / IIR charged to parent entity / UTPR

International tax and Ireland “on a page”

Global tax reform and impact on Ireland

International Tax

1 Transfer Pricing.

- Part of BEFIT package to harmonise transfer pricing across the EU in line with OECD arm's-length principle and 2022 guidelines
- Aims to enhance tax certainty and reduce double taxation.
- Calls for the establishment of a European Forum on Transfer Pricing (EFTP).
- Limited support from Member States.

2 Business in Europe: Framework for Income Taxation (BEFIT)

- Mandatory for groups with €750m+ global revenue and 75% ownership.
- Applies to EU-based groups and EU subgroups of non-EU groups meeting certain thresholds (€50m revenue in 2 out of 4 years or 5% of group revenue).
- Discretionary for smaller groups with consolidated financial statements.
- Ongoing technical discussions required before moving forward.

3 Securing the Activity Framework of Enablers (SAFE)

- Prevent "enablers" from creating non-EU tax avoidance structures.
- Mandatory due diligence for all enablers. Prohibition on facilitating evasion/ aggressive tax planning, with due diligence and EU registration.
- Establishment of a Code of Conduct for enablers.
- Progress depends on the ATAD3 Directive agreement.
- No formal wording or timeline announced yet.

4 ATAD 3

- Timeline unclear
- EU Directive introducing reporting requirements for "shell" entities
- Entities within scope may be unable to benefit from tax treaty benefits
- Penalties for non-compliance

5 Debt Equity Bias Reduction Allowance (DEBRA)

- EU proposal introducing the concept of a tax deductible equity allowance and a further restriction on interest deductibility.
- Aims to address a perceived asymmetric tax treatment between debt and equity financing.
- Requires approval from all 27 EU Member States.

6 Faster and Safer Tax Excess Refund for Withholding Taxes (FASTER)

- Simplifies the EU withholding tax (WHT) system for dividend and interest payments while enhancing anti-abuse measures.
- Standardised EU digital tax residence certificates (eTRC)
- Fast-track WHT refund procedures (Relief at source & quick refund system)
- Standardised reporting for financial intermediaries
- 1 Jan 2030: Member States must apply national rules, transposed by 31 Dec 2028.

Over to you!

Q&A

Tax considerations for start-up companies

Maura Ginty

Tax adviser

20 March 2025

gintax

To talk about today

Key tax agenda points for Founders of start-ups

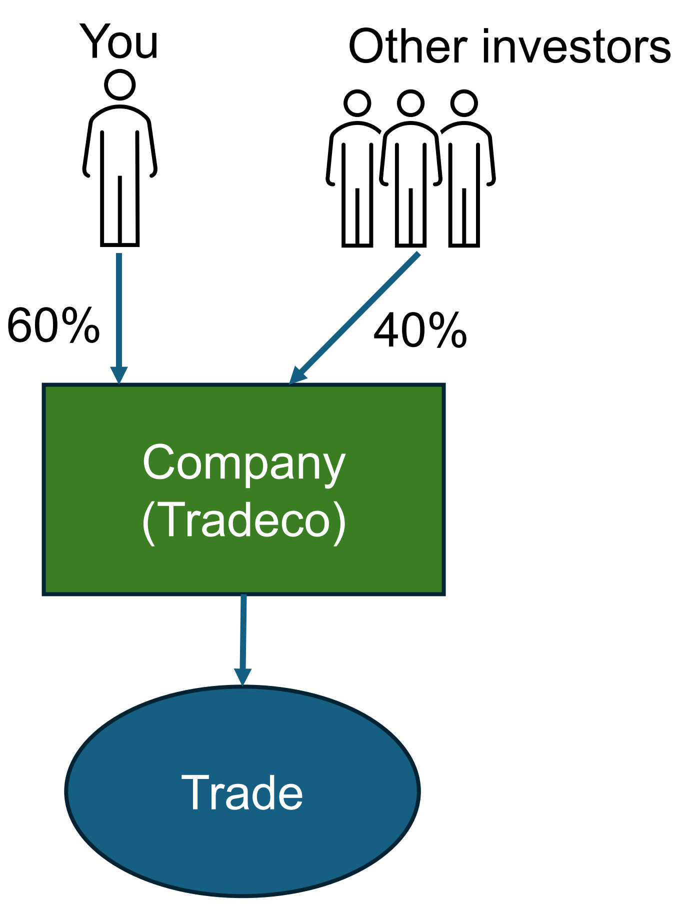
1. The Founders structure
    - Planning for exit / holding company
2. Tax reliefs for startups
    - Investment tax reliefs
    - Other

General overview of topics

Structuring your company

- Planning for exit
- Holding company or not

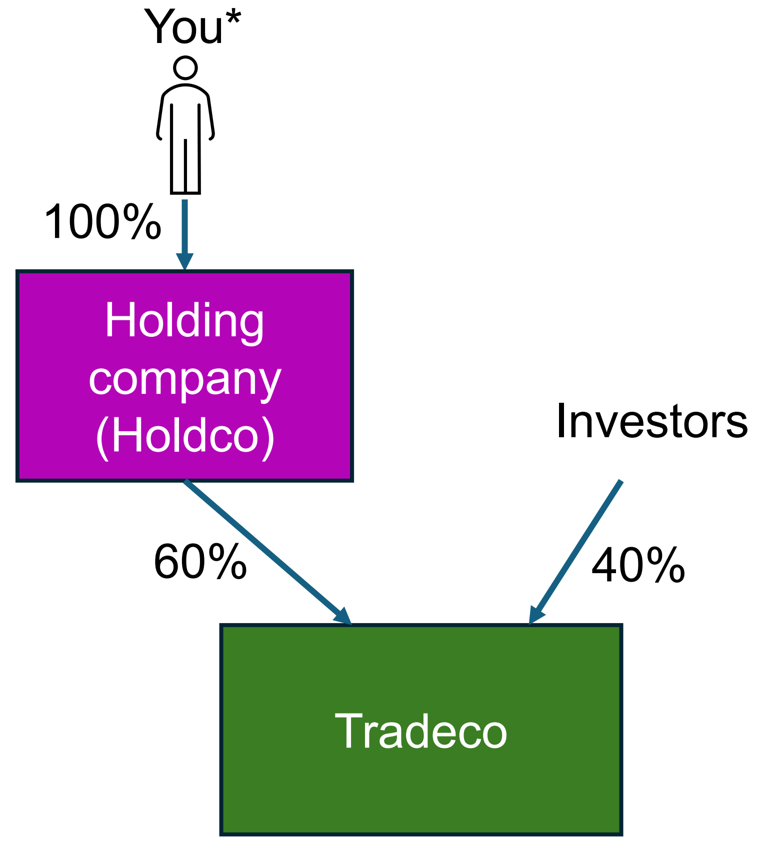
The Founder’s structure – basics



Think about the endgame

- Irish Capital Gains Tax (CGT) is 33%
- Entrepreneur Relief – first €1m @ 10%
  - Conditions / working time test
- Spouse shareholder – if working for company (they could also qualify)
- Other family members?

Structure – holding company?

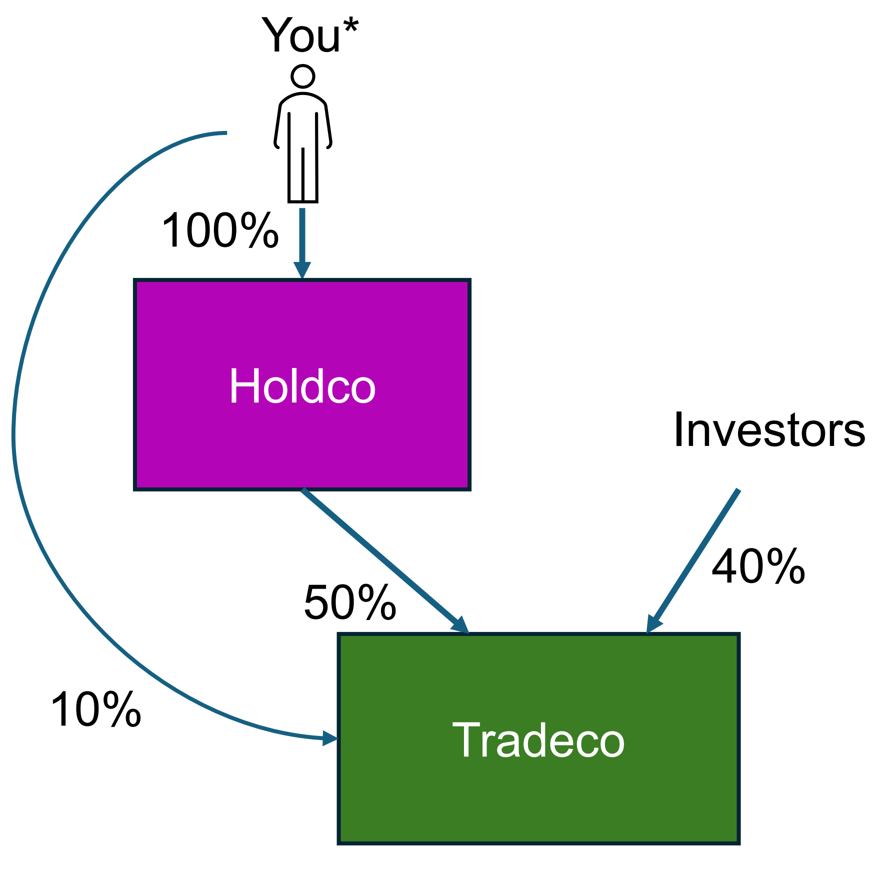


Future sale of Tradeco

- Holdco/Investors receives proceeds
- MAY qualify for exemption (s626B) so no CGT in Holdco
  - Conditions!
- But no cash proceeds for Founder – money “stuck” in Holdco*
- Holding company structure – easiest to put in place at the very start, when no value. A lot more complicated later on

**See over*

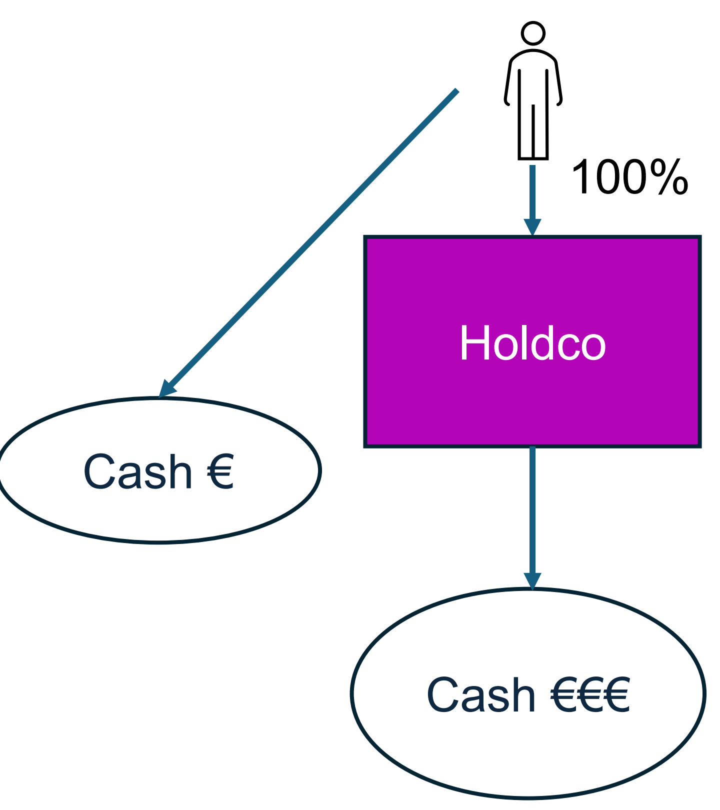
Structure – hybrid ownership



Founder shares

- Held via:
  - Holding company and
  - Direct
- Need to plan for dilution and watch the conditions

Structure – after exit

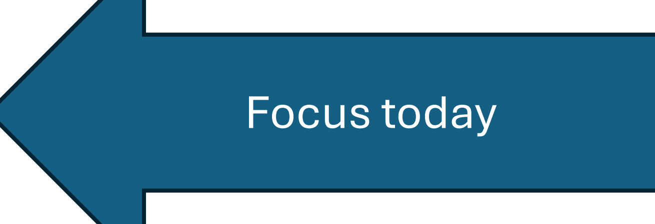


- Use cash to reinvest e.g. Angel investments / new business etc
- Personal access to proceeds:
  - Assume marginal income tax rate
    - Up to ~55% now
  - Liquidate the company – 33%
  - Founder unlikely to qualify for 10% rate in this fact pattern (fine if mega deal, but if not?)

Part 2

Key Irish tax reliefs for startups

- Investment tax reliefs
  - EIIS/Angel
- Share schemes
- R&D credit
- Startup tax relief
- Niche
  - Digital gaming credit
  - Acquisition of IP – tax allowances
  - Knowledge Development Box



Investment reliefs for startup capital

Focus is on:

- Irish individual investors

- These individuals either:
  - Invest directly (direct raise / crowdfund)
  - Invest via partnership
  - Via a Fund (Elkstone / Quintas / Goodbody Azets / Davy BDO / BVP etc)

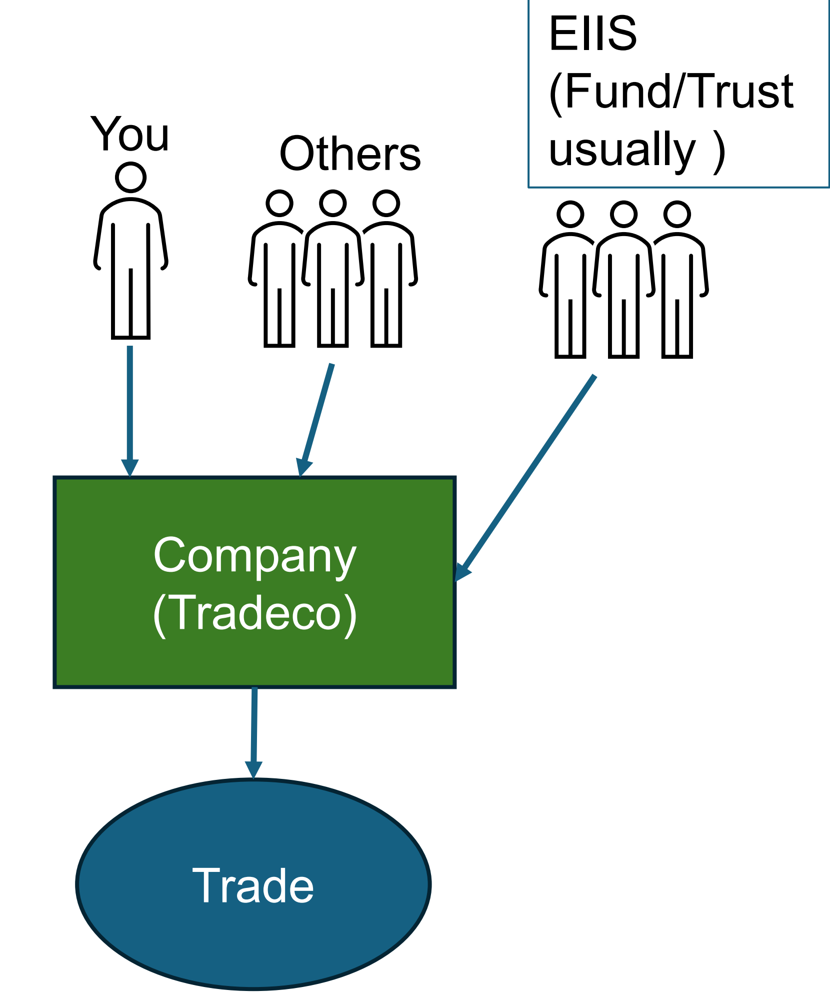
Investment reliefs for startup capital

Scheme	Relief for individuals
1. EIIS • EIIS • SCI (EIIS but with additional rules for family members) • SURE (type of EIIS for founders – can lookback up to 7 years)	• Up to 50% of investment tax refund (mostly its 35%) Income tax – tax relief when invest
2. Angel Investor Effective from 1 March 2025	• Up to 34% of investment as CGT saving Capital Gains – tax relief only if gain

EIIS tax relief overview

- Irish income tax relief for individual investors who invest in company
- Aimed at new business or those expanding (new economic activity)
- Creation of employment
- Now varying rates of relief for investor (20% - 50%)
- Tax risk on company – clawback usually on company if conditions not met
- Large exposure if do not get it right

Watch! Company can not be controlled by another



EIIS tax relief – new regime 2024

Max tax refund (2024 onwards)	Applicable where …
50%	• Company not operating in any market (needs also to be 'Initial risk finance')
35%	• Initial risk finance: • Company which is within 7 years of first commercial sale/10 years of incorporation
30%	• Investment via specified Fund (Elkstone)
20%	• Expansion risk finance (new economic activity) or • Follow on risk finance (outside of 7 year/10 year window)

EIIS tax relief – overview 1 of 2

- 4 year holding period
- Strict limitations re investor past/future connection (can only be an EIIS shareholder with limited exceptions)
- Full risk ordinary shares
- “New” / expanding businesses
- Certain businesses are excluded e.g. professional services, Land development, financial services
- Company can not be controlled by another (holding company)
- If subsidiaries, then very defined activities only

EIIS tax relief – overview 2 of 2

EIIS policy limitations (matters have well flagged to Government)

- For founder, EIIS company can not be controlled by another company

--→no holding company

- For investor, if loss on EIIS investment then loss can not be sheltered [ordinarily this would be 33% value]

EIIS -key sensitivities for startups

- Founders have/had other businesses
  - “RICT Group” test
- Money raised previously
- Undertaking in Difficulty test
  - Balance Sheet test
  - Not relevant if very new (< 3 years)
- Excluded activity test
  - Generally standalone tech will qualify
- Commercial decision – holding company vs EIIS

Completely new business with one founder who was previously employee then EIIS should be on simpler side

EIIS tax relief – practical points

- Admin is light in theory #tick box to confirm conditions satisfied
- Company provides certificate to individual (SOQ) to enable relief to be claimed (can be immediate)
- Submit an RICT form to Revenue – system generates certificates, zero assurance from Revenue

- What due diligence does company need to do?
- What do investors require?

EIIS tax relief – limitations

- State Aid - EU law based
- May seek opinion on EU issues from Irish Revenue BUT no timeframe for response
- Tax risk for the company
- Irish Revenue guidance (Manual) very cumbersome – on agenda for change

Other investor reliefs – SURE

SURE relief

Tax relief for Founder who invests in their own company

Completely new business

Relief against prior EMPLOYMENT income only

Similar to EIIS and lots of conditions

Must invest in company shares

Tight timeframe – within ~2 years of incorporation (31 December after second year)

SCI Additional EIIS conditions for family investors

Other investor reliefs – Angel

CGT Relief for individuals

Choice between Angel or EIIS – not both

“Bird in hand” for EIIS, relief available on investment versus Angel where need a gain

Angel relief – when might investor consider

- **No income to shelter**
- CGT loss relief available
- Investor connection rules - point in time test
- Cannot be employee/director
- 3 year hold

Other investor reliefs – Angel

General points

Company needs to obtain 2 certificate from Irish Revenue

- Certificate of Going Concern – SME/UID test
- Certificate of Commercial Innovation
  - “Innovation” requirement (R&D test can satisfy this)
- Revenue can consult with Enterprise Ireland / 3rd party

Company tax risk

RIIE Form 1 application – detailed, checklists, template Business Plan

Share schemes – a refresh

Award Shares v Share Options

Options – usually preferrable from commercial perspective

ESOP – Employee Share Option Plan

- When employee exercise (usually on exit) then full gain subject to marginal income taxes up to 52.1%
- KEEP relief – gain on exercise subject to CGT (33% on exercise)

Share award

- Usually more efficient for tax if company value to increase
- Lockin period (Restricted Shares) with forfeit if bad leaver …
- Growth shares

Share schemes - KEEP

KEEP

- Aimed at Irish SMEs / startups
- CGT (33%) treatment versus Income tax (52.1% marginal) on gain
- Options granted at market value
- Employees not connected / relatives
- Limit on value of options
- Underlying shares can not exceed 50% of salary
- Conditions re company activity

R&D tax credit – a refresh

- R&D credit – 30% ‘cashback’ on qualifying spend
- For 2025, refund of up to €75,000 on filing CT1 corporate tax return (previously was €50k)
  - Above this, refund spread over 3 year
- New requirement to notify Revenue for first time claims - 90 days before claim
- Absolute deadline for claim is 1 year after the company’s year end

R&D tax credit – a refresh

Must seek to either:

- Make a technological/scientific advancement, OR
- Resolve a scientific/technological uncertainty.

It is the spend on the ‘process’ that attracts the credit, so it is vital that the ‘process’ is documented.

Two tests to be met:

- Science test: the activity must be qualifying R&D.
- Accounting test: ensure that the costs incurred have been properly tracked, accounted for and clearly linked to the R&D activity.

Detailed records must be maintained to satisfy both tests.

Startup up company relief

Normally pay 12.5% on trading profits

Further relief for first 5 years on profits

Linked to PRSI (employment)

Claim relief in annual corporate tax return (Form CT1)

Can carry forward

Conditions

- Trade can not have been carried on elsewhere (e.g. in your name)
- Service (profession) companies do not apply
- etc

Thank you!

- Questions

Contact details

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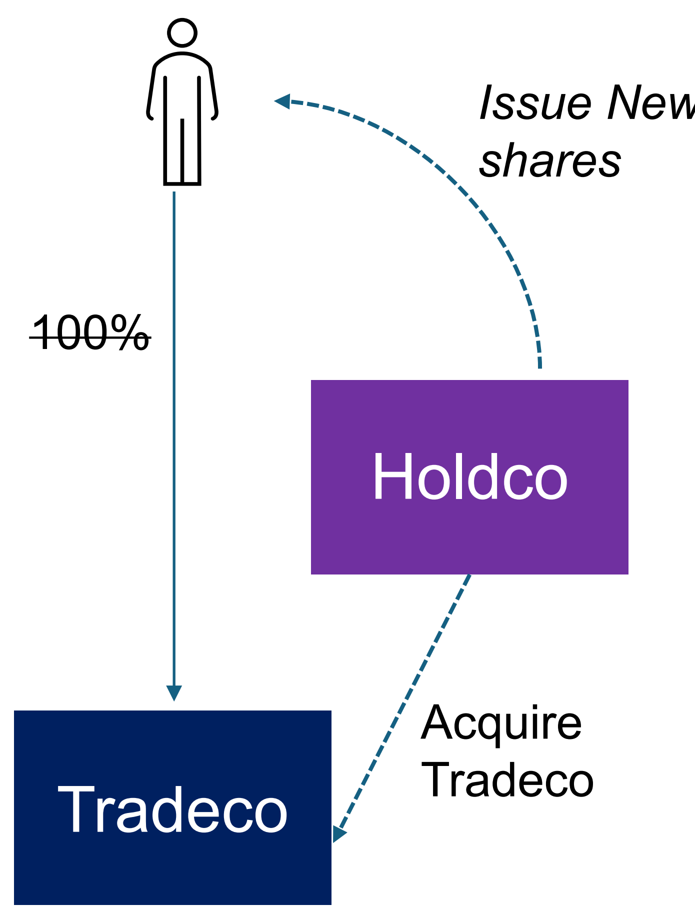
My profile here

Holding company

Putting in place a Holding Company
Pre-existing valuable Tradeco

- Holdco acquires shares in Tradeco and in exchange issues shares in itself to Tradeco owners
  - Capital Gains Tax – s586 relief
    - Bona fide commercial & tax not main purpose
    - Control requirement
  - Stamp duty – s80 relief
    - 90% ownership requirement for Holdco
    - Bona fide & tax not main purpose

Tax reliefs not guaranteed – easiest to put in place at start when no need for tax relief (no value)



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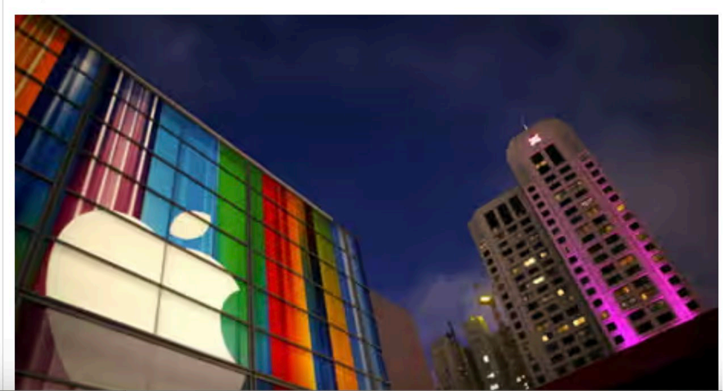
Let’s go back to 2012/2013

This article is more than **11 years old**

Senators accuse Apple of 'highly questionable' billion-dollar tax avoidance scheme

Senators claim Apple has avoided paying billions in US tax by creating offshore entities that are not tax resident anywhere



Let's go back to 2012/2013

Addressing Base Erosion and Profit Shifting

Report

More info ℹ

12 February 2013

This article is more than **11 years old**

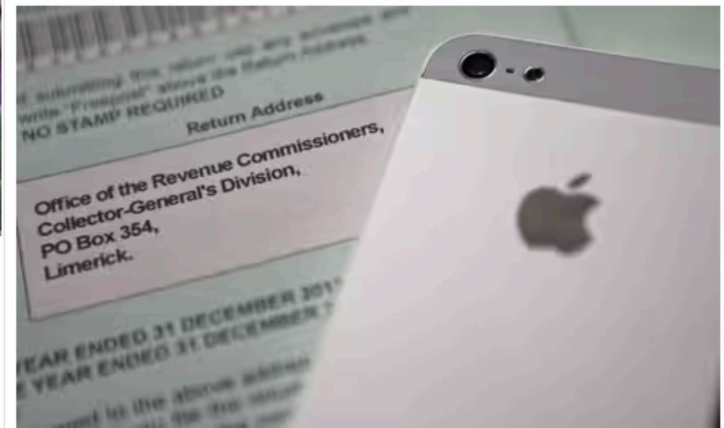
Amazon, Google and Starbucks accused of diverting UK profits

Committee of MPs described a director from Amazon as being 'deliberately evasive' and displaying 'outrageous' ignorance

Engie owes Lux €120m in unpaid tax, says Brussels

Apple, Starbucks and Fiat's tax affairs examined by European commission

Brussels says large multinationals should pay their fair share of taxes – but why have these three companies been singled out?



POLITICO

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Margrethe Vestager slams Apple with €13 billion tax bill

Apple paid an effective corporate tax rate of 0.005 percent on European profits in 2014, Commission says.

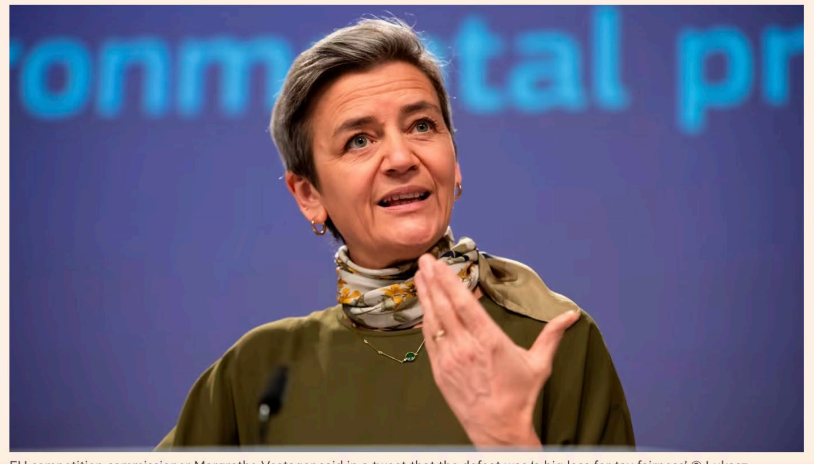
Then came the losses for the Commission

Starbucks wins €30m case over disputed Dutch tax bill

European Commission In A "Reflection Mode" Following CJEU Loss In The Engie State Aid Case

Fiat wins legal battle over €30mn Luxembourg tax break

ECJ ruling deals a blow to European Commission's crackdown on aggressive tax planning



Reuters

World | US Election | Business | Markets | Sustainability | Legal | Breakingviews | Technology

Technology | Antitrust | Regulatory Oversight | Tax | Litigation

Amazon wins $270 mln tax fight in blow to EU's Vestager

"Tuesday 10 September, the European Court of Justice will hand down its long-awaited decision in the €13bn Apple case – the largest tax case in history! The European Commission has accused Apple and Ireland of perpetrating a cosy tax deal which helped Apple shelter billions of euros of profits from taxation. There are many reasons to suspect that the Comm's intuition was correct. And yet, I predict, the ECJ will dismiss the Comm's case. And this will be the right outcome."

(Stephen Daly, 9 September 2024)

The next day…

FINANCIAL TIMES

COMPANIES TECH MARKETS CLIMATE OPINION LEX WORK & CAREERS LIFE & ARTS HTSI

Apple Inc + Add to myFT

Apple must pay €13bn in back taxes, top EU court rules

European Court of Justice confirms Ireland provided 'unlawful aid' via tax deal and overturns a lower court decision

Structure of the talk

1. Case against Ireland/Apple
2. Intervening Case law
3. ECJ Judgment
4. Problems with the decision
5. What next?

Part 1: The case against Ireland/Apple

The case against Ireland/Apple

Article 107(1)

- *Intervention*
  - by the State or through State resources;
  - liable to affect trade between Member States
  - **confer a selective advantage on an undertaking and,**
  - distort or threaten to distort competition.

The case against Ireland/Apple

Article 107(1)

- Centrality of selective advantage test:
  - *"In matters of tax law in particular, however, the **decisive criterion** is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied"* [AG Kokott in Case C-66/14 *Finanzamt Linz* at [114] emphasis added]

The case against Ireland/Apple

Article 107(1)

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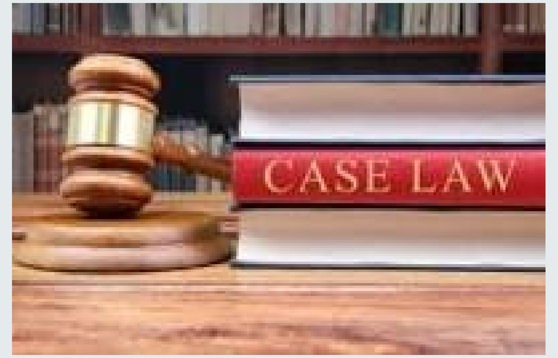
The case against Ireland/Apple

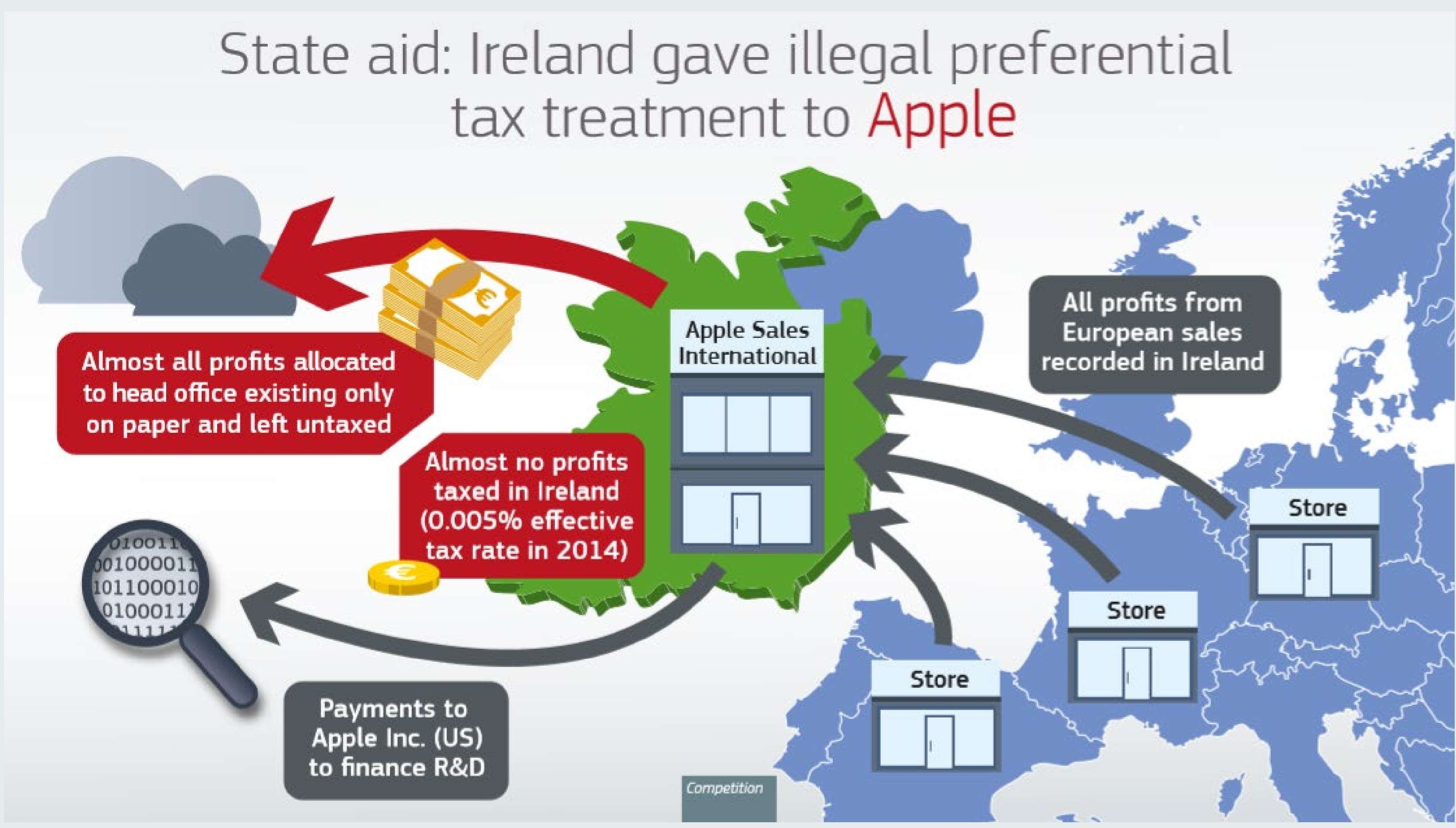
Article 107(1)

- First it must be demonstrated that there has been an "advantage". This requires an assessment as to whether the tax provision at issue (or its application) provides an economic benefit i.e. the taxpayer is placed in a better position than they would have been but for the tax provision.
- Secondly, it must be demonstrated that this advantage is "selective". To figure out whether this is the case, there is a three-stage approach adopted.

1. The first step is the need to determine the appropriate "reference framework" – this is the normal taxation system that applies.
2. The second step involves determining if the measure derogates from that system insofar as it differentiates between economic operators in a comparable factual and legal situation, in light of the objectives intrinsic to the system.
3. The third step is to ask if the derogation is justified by the nature or the general scheme of the (reference) system.



The case against Ireland/Apple



The case against Ireland/Apple

ALP??

AOA??

The case against Ireland/Apple

General Court decision

- GC accepted that the Commission could use ALP/AOA
- But Commission ought to have assessed the "actual activities" in Ireland
- Allocation by exclusion vs need for affirmative proof

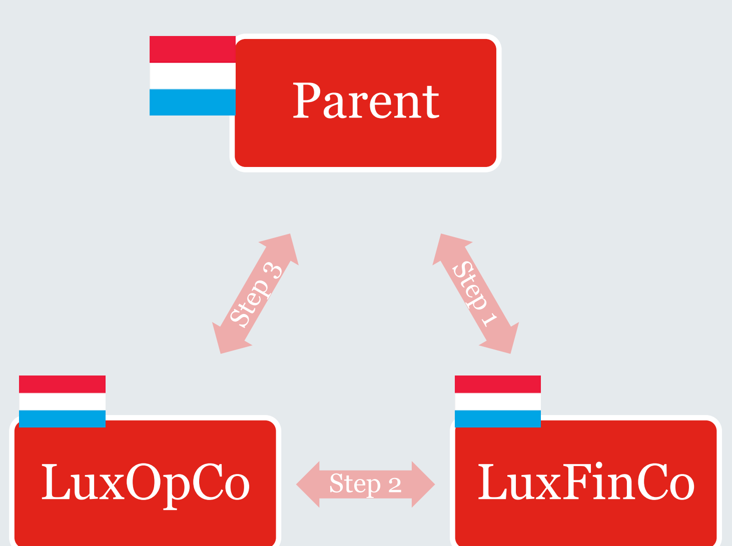
Part 2: Intervening Case Law

Intervening Case Law

- *Fiat* (Nov. 2022)
- ECJ annuls GC and EC decisions
- Reference framework = MS domestic law
- OECD materials irrelevant unless “explicit[ly]” incorporated into MS law (even if MS law broadly required arm’s length treatment)
- Otherwise breach of:
  - Principle of Legality
  - Autonomy of MS in field of taxation
  - TFEU rules on approximation of MS laws
- *Amazon* (Dec. 2023)

Intervening Case Law

- *Engie* (Nov. 2023)
- EC says Lux misapplied domestic law
- ECJ finds that EC's arguments about how to interpret domestic law were misconceived
  - MS analysis unless there is consistent and reliable evidence to the contrary (case law/administrative practice)



Part 3: ECJ Judgment

ECJ Judgment

- Apple owes €13bn in back taxes to Ireland.
- ECJ and AG essential reasoning almost identical.
- Irish law (TCA 97, s. 25) requires comparative analysis in line with ALP/AOA
- Commission applied this correctly

ECJ Judgment

- General Court understood the law correctly but did not apply it correctly
  - General Court misconstrued Commission approach as ‘by exclusion’.
  - GC took into account Apple Inc. This was not relevant as Irish Law, AOA/ALP require you to look only at activities within the company

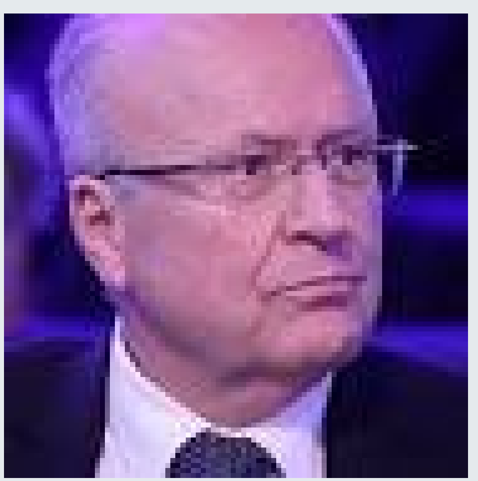
ECJ Judgment

- The ECJ squared its reasoning with *FIAT* by accepting Commission's interpretation of Irish Law = ALP/AOA
  - "Full-fat" *Fiat* = res judicata
- ECJ did not accept Irish interpretation of Irish Law.
  - *Engie* = res judicata

Part 4: Problems?

Precedent?

- Lip service to FIAT (para 120)
- No engagement with *Engie*. Said Ireland should have cross appealed against GC decision (paras 124 and 144)
  1. But GC decision was inconsistent (paras 195-196)
  2. *Engie* decision postdated appeal
  3. ECJ *did* have opportunity to reopen reference framework issues
  4. Rationale of Res judicata?
  5. C-555/22 P, C-556/22 P, and C-564/22 P UK CFC??



Misconstruing Irish law?

- Per AG Opinion
  - Irish law = AOA, requiring comparative analysis
  - AOA postdates 1991 ruling by 17 years
  - Case law (*Dataproducts*) does not provide comparative analysis
- ECJ agrees with AG

Why not remand?

- AG and Commission argue for remand
- Factual findings of GC of Cork's 'routine' role.
- Running through the Commission's decision, we don't find references to the activities in Cork commensurate with control and ownership of the IP central to Apple's business model
- Instead, we find David O'Connell…

Why not remand?

- “David O'Connell facilities manager of Apple Cork had been in negotiation on behalf of the Company [AOE] in conjunction with the local conveyancing solicitors for the Company [AOE], […], in relation to leasing additional warehouse space convenient to the facility at Apple Cork […] to facilitate an expansion in production” (recital 286, fn. 214)

Part 5: What now?

Impact on ongoing investigations

- Applying *FIAT*, *Amazon*, *Engie* to Huhtamaki, IKEA and Nike means Commission will (likely) lose…*Apple* means they win (particularly Nike)?
- More investigations?

Role of EU institutions

- Commission's role as tax collector/CJEU as tax courts?

Solange III: Ireland?

- Irish Stateless Companies
  - 13 rulings
  - Limitation rules
- Who gets to determine the content of Irish law?
- SC v ECJ?

Conclusion

- Apple wrongly decided
  - Fiat/Amazon and Engie
  - Irish law misconstrued
  - €13bn tax wrongly attributable to routine activities in Cork
- Impact
  - Law = less clear now than before
  - EC/CJEU not tax specialists
  - Solange III?

Thank you for listening – questions???

PS:

- Forthcoming lengthy two part case note by Ruth Mason and Stephen Daly in the Virginia Tax Review
- Ruth Mason and Stephen Daly, "Rotten to the Core" (2024) Tax Notes International
- Stephen Daly, 'United Kingdom and ITV Plc v European Commission: comparing apples with apples?' [2024] 5 British Tax Review 725
- Stephen Daly, 'Commission v Luxembourg and Engie – (another?) mortal wound in the Commission's campaign' [2024] 1 British Tax Review 91
- Stephen Daly, 'Fiat v Commission: a misconceived approach' [2023] 86(6) Modern Law Review 1489

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Thank you