What does Finance Act 2021 mean for you and your business?

Read our insights

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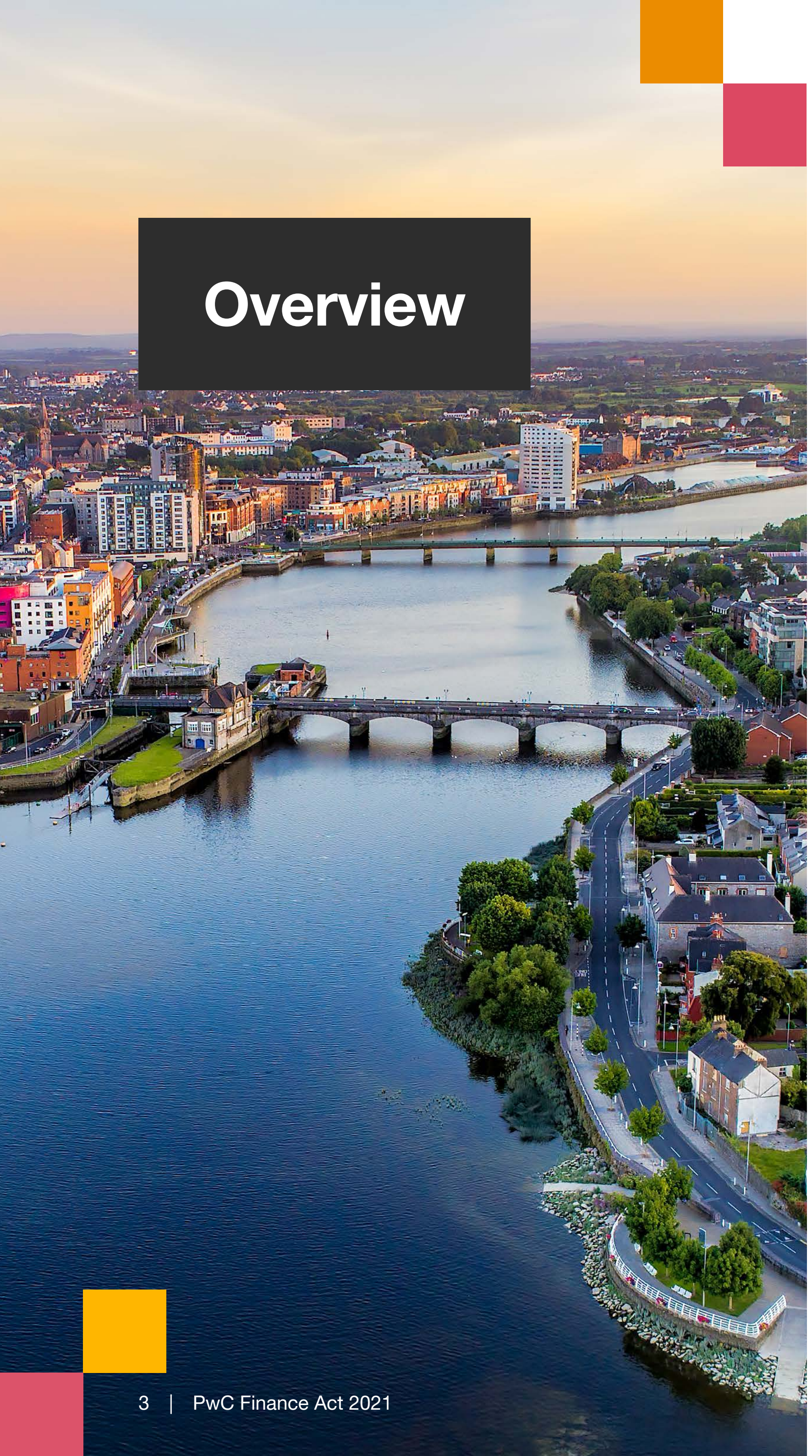

Overview

What does the Finance Act 2021 mean for you and your business?

Finance Act 2021 (the Act) sets out the legislative changes required to implement many of the Budget day announcements of 12 October last.

The Act also includes several measures which were not previously announced. These include a change to the basis of taxing non-resident corporate landlords, some amendments to the existing anti-hybrid provisions and some welcome clarifications in the context of mergers.

Finance Act 2021, which was first published on 21 October 2021, was amended in a number of respects prior to its enactment on 21 December 2021. Amendments made to the Bill as initiated are highlighted in red throughout this document.

ATAD Measures

The Act sees Ireland complete its transposition of the EU Anti-Tax-Avoidance Directive (ATAD) into Irish tax legislation, through the introduction of interest limitation rules (ILR), which are designed to limit base erosion by restricting the level of interest deductions and the completion of our anti-hybrid rules through the introduction of rules to deal with so-called “reverse hybrids”. Some technical

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amendments are also made to the existing anti-hybrid rules.

Given the widespread use of debt financing across a variety of sectors and industries, the implications of the introduction of ILR will be significant. Taxpayers will need to familiarise themselves with the new rules quickly as they apply to accounting periods commencing on or after 1 January 2022.

The new ILR provisions will operate alongside existing comprehensive rules that restrict the deductibility of interest expenses. Their introduction provided the legislature with an opportunity to consolidate and simplify existing Irish rules surrounding interest deductions. However, this opportunity has been missed. Taxpayers therefore face an increasingly complex set of rules and a greater administrative burden.

Transfer Pricing

The Act introduces a new version of s835E TCA 97, which governs the exclusion from transfer pricing of non-trading 'Ireland to Ireland' transactions. This new measure is welcomed as it is principles-based, clearer in scope than its predecessors and looks set to be fit-for-purpose in achieving the policy aim of excluding bona fide non-trading 'Ireland to Ireland' transactions from the scope of transfer pricing. It will apply to chargeable periods commencing on or after 1 January 2022.

The Act also legislates for the 'authorised OECD approach' for the attribution of income to a branch of a non-resident company operating in the State. It will apply for accounting periods commencing on or after 1 January 2022.

Climate Change

There have been some positive developments in relation to climate action incentivisation measures including increases in Carbon Tax, VRT and the extension of the relief for the purchase of qualifying electric vehicles to the end of 2023. Revenue from the Carbon Tax will be targeted towards preventing fuel poverty and other initiatives including a national retrofitting programme. The Accelerated Capital Allowance Scheme for Energy Efficient Equipment has been extended to 31 December 2024. It is amended to prohibit equipment directly operated by fossil fuels from qualifying for accelerated capital allowances. A tax exemption is introduced in respect of personal income received by households who sell residual electricity that they generate back to the grid.

Overall, the Act includes a number of positive measures to tackle climate change and reduce Ireland's overall greenhouse gas emissions. However, there are some missed opportunities. The Act could have gone further to include even more targeted measures to support climate change.

Employment and Individual Taxes

The majority of the legislative measures included in the Act from an employment and individual tax perspective mirror the announcements made on Budget Day. It was a Budget focused on easing the cost of living and the Act includes provisions relating to income tax and USC band changes, and increases to the Personal, PAYE and Earned Income Credits. For those hoping to get on the property ladder in 2022, the Help-to-buy Scheme has been extended to 31 December 2022.

COVID-19 support measures

As in Finance Act 2020, a number of the measures contained in this year's Act are targeted at providing support to businesses and individuals that have been significantly impacted by COVID-19.

The Act puts the availability of a 30% deduction from income tax for heat, electricity and broadband costs for those working from home on a statutory basis.

The temporary reduction in VAT for the hospitality and tourism sector from 13 ½ per cent to 9 per cent has been extended and will continue until 31 August 2022.

It was confirmed on Budget Day that the Employment Wage Subsidy Scheme (EWSS) will be extended to the end of April 2022, but support from the programme will have been phased out by then. It will be closed for new employers from 1 January 2022. Based on changes announced in December 2021, the scheme was reopened for certain employers who had previously availed of the scheme but who were not eligible to do so on 31 December 2021.

Digital Gaming Credit

The Act also introduces a new tax credit for the digital gaming sector. The relief will take the form of a refundable corporation tax credit available to digital games development companies for qualifying expenditure incurred on the design, production and testing of a digital game. As the credit will require EU state aid approval, it is to be introduced subject to a commencement order.

The introduction of this credit is a very welcome move and looks to support one of Ireland's fastest growing domestic and international sectors to ensure that they are positioned for success in a post COVID-19 economy.

Property Measures

The Help to Buy Incentive Scheme is extended to the end of 2022. A new Zoned Land Tax of 3% tax is introduced to encourage the use of land that is zoned residential and mixed-use to build homes. The deduction of certain pre-letting expenses incurred on vacant residential premises against rental income before first letting after a period of non-occupancy is extended to the end of 2024.

Other Measures

The Act includes a number of important changes to the Employment Investment Incentive (EII) scheme. The changes reflect some, but not all, of the feedback given to the Department of Finance on ways to improve the effectiveness of the scheme but do not represent the hoped for overhaul in the rules. The amendments made appear best suited for start-ups that use the EII as a once-off source of funding.

The relief for certain start-up companies is to be extended for a period of 5 years. The relief is also to be amended such that companies may avail of the relief within their first five years of trading, an increase from the current three-year claim window.

The Bank Levy, which was due to expire in 2021, is extended to the end of 2022. However, it will apply to a reduced number of institutions.

The Act also contains a number of measures to modernise and streamline the system for collecting stamp duty on insurance policies, financial cards, and cheques / bills of exchange. This should ease the administrative burden for financial institutions and insurers.

Two technical amendments relevant to mergers have been included in the Act. These are welcome and should remove some technical ambiguities that previously existed in the context of both cross-border and domestic mergers.

In the area of tax administration and Revenue powers, the Act introduces a number of amendments to the penalty and publication regime in Ireland, as well as to the tax appeals process.

Policy / International Outlook

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The impact and effect of Finance Act 2021 on Ireland's approach to international tax policy

International tax reform continues to shape domestic tax policy-making in Ireland. This was evident in the announcements that came from the Minister for Finance on Budget Day, through the Tax Strategy Group papers and the updated Corporate Tax Roadmap.

The impact of international tax policy on Finance Act 2021 (the Act) is primarily through the introduction of new rules to transpose Ireland's remaining EU ATAD measures; Interest Limitation Rules and Reverse Anti-Hybrid rules, as required under EU law. We also see the introduction of further EU tax transparency rules for digital platforms ('DAC7').

The Ireland-Germany double tax agreement is also updated by reference to a new protocol. The new Ireland-Kosovo Double Tax Agreement is also ratified by Ireland under the Act.

We anticipate that future Finance Acts will continue to implement changes required to give effect to internationally agreed tax reforms (for example, the OECD global tax reform and EU tax reform agenda) or in response to unilateral changes (such as the US tax reform proposals).

Global tax reform landscape in flux

- Ireland has been actively engaging with the OECD Inclusive Framework along with 139 other countries. The Inclusive Framework reached political agreement in respect of the OECD Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy whereby:

- Pillar One allocates a formulaic share of the consolidated profits of MNEs to market jurisdictions whereby MNEs have profitability of 10% or more and global turnover in excess of €20 billion; and
- Pillar Two imposes a jurisdictional level minimum tax system with a minimum effective tax rate of 15%.

- Although a significant number of questions remain unanswered with respect to both pillars, Ireland is among the 140 countries who have signed up to the political agreement and the proposed implementation plan.
- Prior to signing up, Ireland successfully sought reassurances from EU officials including the Trade, Competition, and Economy Commissioners that retention of the 12.5% rate for companies below the Pillar Two threshold (€750 million global turnover) would be possible.
- Therefore businesses with global turnovers of below €750 million can continue to avail of the 12.5% corporation tax rate.
- Businesses large and small will be keen to see how US tax reform efforts develop in the coming months. The "Build Back Better" Act, currently under consultation by US Congress, could introduce measures that will be as impactful for Irish business as the OECD proposals.
- Finally, the EU has a broad tax reform agenda for business taxes in the 21st century. This ranges from ensuring existing anti-abuse measures work to re-visiting a form of EU common corporate tax base through the new Business in Europe: Framework for Income Taxation (BEFIT) initiative.

OECD tax reform proposals

Concessions from the Inclusive Framework to cap the Pillar Two rate at 15% should be viewed as very positive for Ireland and it indicates that the Minister was correct not to sign up to the deal earlier in the year when the terms of the agreement described the rate as "at least" 15%.

Whilst a great deal of technical detail still needs to be agreed by the Inclusive Framework, we view the following as being the key details requiring clarification:

- The availability of deferred tax accounting mechanisms;
- How an alternative minimum tax could be operated;
- When unilateral digital sales taxes will be repealed; and
- Regarding Pillar One, how and from whom will Amount A be collected.

Ireland's attractiveness as an investment location remains firmly intact when compared with our European neighbours and the US, who look set to continue to apply headline and effective tax rates higher than Ireland. The Department of Finance have also signalled that they will look for ways to make Ireland's tax code more competitive.

EU tax reform agenda

Earlier this year, the European Commission released its Communication on Business Taxation for the 21st Century. This release was essentially a roadmap detailing a series of initiatives of the European Commission to align the corporate tax framework with the new realities of the globalised and digitalised economy and to ensure that Member States' tax systems are fit for significant developments to come in a fair and efficient manner.

The Communication sets a tax agenda for the next two years with five key actions:

- Action 1: Table a legislative proposal for the publication of effective tax rates paid by large companies, based on the methodology under discussion in Pillar 2 of the OECD negotiations (by 2022)
- Action 2: Table a legislative proposal setting out union rules to neutralise the misuse of shell entities for tax purposes (ATAD 3) (by Q4 2021)
- Action 3: Adopt a recommendation on the domestic treatment of losses (alongside Communication)
- Action 4: Make a legislative proposal creating a Debt Equity Bias Reduction Allowance (DEBRA) (by Q1 2022)
- Action 5: Table a proposal for BEFIT, moving towards a common tax rulebook and providing for fairer allocation of taxing rights between Member States (by 2023).

Given the timelines for some of the above measures, we can expect to see these proposals requiring transposition in Irish Finance Acts over the coming years.

Changes to Ireland's double tax treaty network in the Act

The Act amends the list of Ireland's double tax treaty partners in two sections.

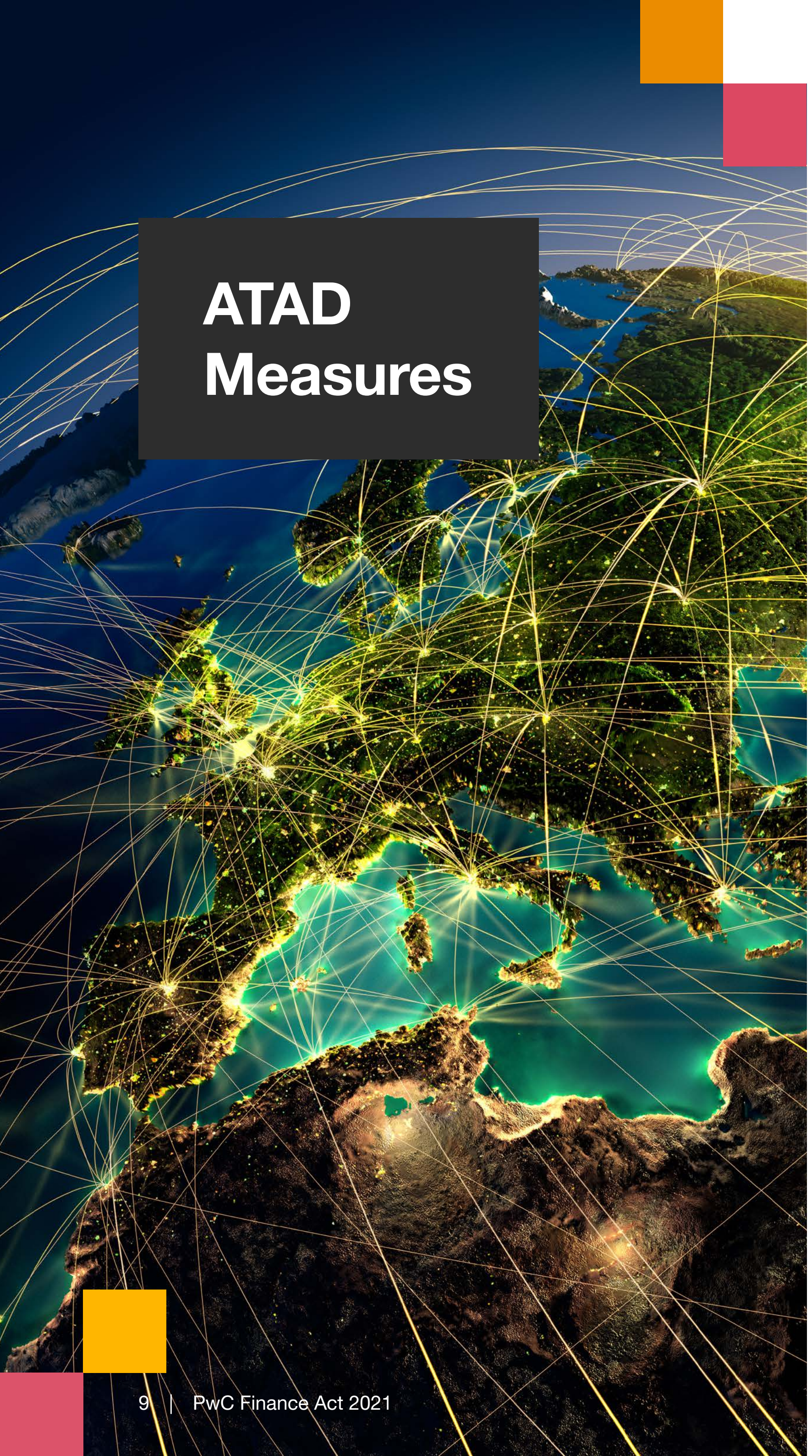
- Firstly, a new Protocol amending the 2011 Ireland-Germany Double Tax Agreement updates that agreement bilaterally to reflect changes required to prevent base erosion and profit shifting (BEPS). The existing Ireland-Germany DTA had not been updated by the OECD-led Multilateral Instrument ('MLI'). This Protocol will ensure that the minimum standards required by the MLI will be brought into force for parties looking to rely on this treaty.
- A new Double Tax Agreement had been signed between Ireland and the Republic of Kosovo earlier this year which requires ratification by both countries before it can enter into effect. The Act amends Schedule 24A of the Taxes Consolidation Act 1997 to include this agreement, thereby ratifying the agreement in Ireland.

The Minister for Finance has previously indicated that he will publish a treaty policy statement at the end of 2021 or in early 2022, to update Ireland's treaty policy in light of tax treaty changes that will be required under the OECD's global tax reform measures and also to amend the policy with respect to concluding agreements with developing countries. This follows a period of public consultation on Ireland's treaty policy held earlier this year, to which PwC provided a response, available here.

We are here to help you

As the international tax landscape continues to break new ground, PwC Ireland and the PwC international network of firms will continue to stay abreast of global tax policy developments. Businesses are set to face further years of uncertainty given the measures detailed above and will likely need multi-jurisdictional advice which PwC is well placed to offer.

We remain available to you should you wish to discuss how these changes will impact your business.



ATAD Measures

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Ireland's new interest limitation restrictions and reverse anti-hybrid rules

Finance Act 2021 sees Ireland complete its transposition of the EU Anti-Tax-Avoidance Directive (ATAD) into Irish tax legislation through the introduction of interest limitation rules (ILR) and the completion of our anti-hybrid rules through the introduction of rules to deal with so-called "reverse hybrids". Some technical amendments are also made to the existing anti-hybrid rules.

The ATAD ILR is designed to limit base erosion by restricting the level of interest deductions. Given the widespread use of debt financing across a variety of sectors and industries, the implications of the introduction of ILR will be significant. The legislation provides that the new rules will apply for accounting periods commencing on or after 1 January 2022. Taxpayers will need to understand the impact on their current structures.

Anti-hybrid rules are aimed at preventing taxpayers from engaging in tax system arbitrage, through the neutralisation of tax advantages, or mismatch outcomes, that arise due to arrangements that exploit differences in the tax treatment of an instrument or entity arising from the way in which that instrument or entity is characterised under the tax laws of two or more territories.

PwC has been at the forefront of consultations with the Department of Finance and Revenue on the introduction of these measures. We continue to advise and assist our clients on the implications of their introduction. If you have not already done so, you should discuss the rules further with your PwC contact.

Interest Limitation Rules (ILR)

The ILR is a fixed ratio rule that seeks to link a taxpayer's allowable net borrowing costs directly to its level of earnings, by limiting the maximum net deduction to 30% of tax-adjusted EBITDA. While the default rate of the fixed ratio is set at 30%, a taxpayer may in certain circumstances deduct an amount in excess of 30% of tax-adjusted EBITDA under the "group ratio" rule.

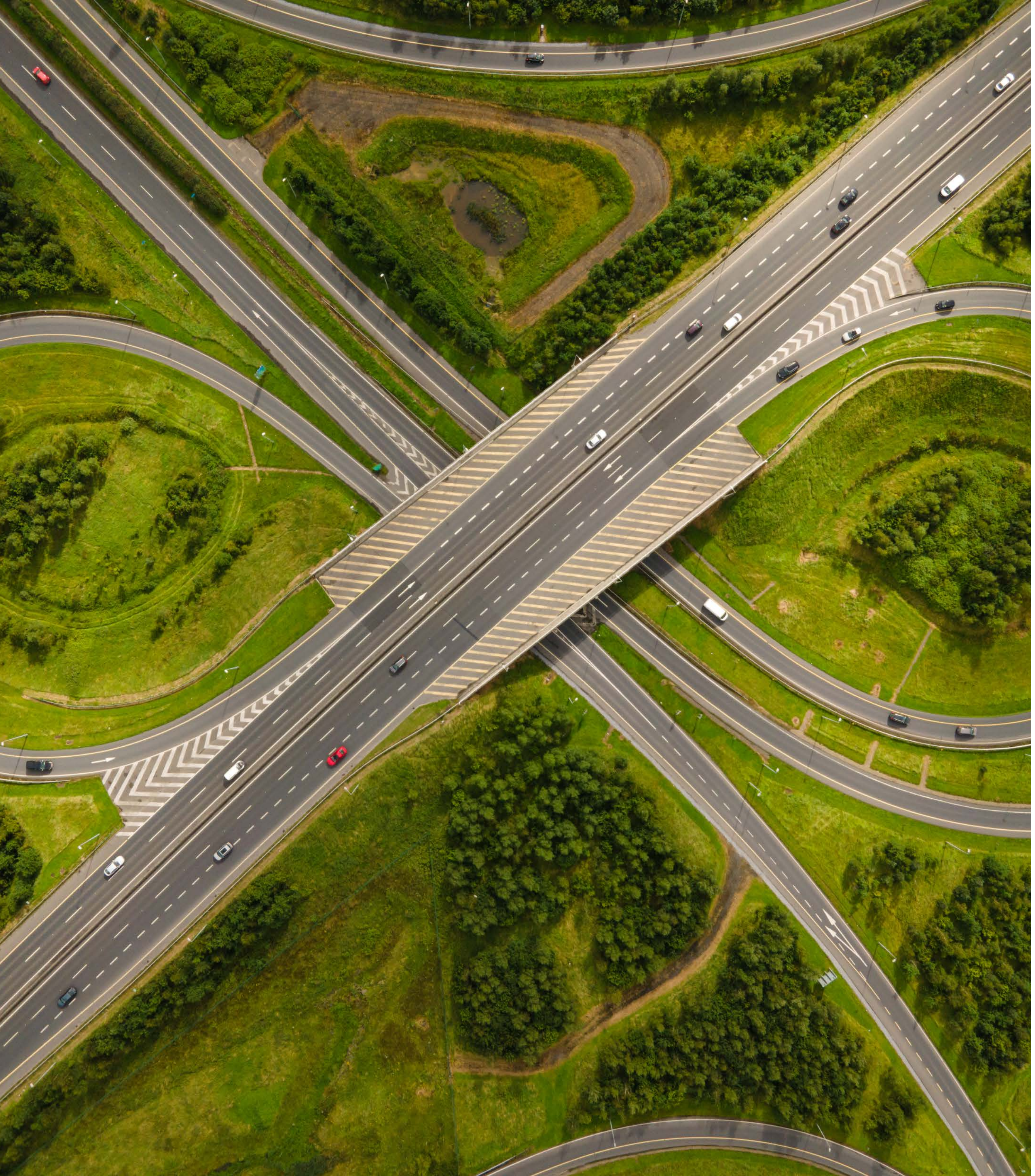
As with all EU directives, the ATAD is binding as to the results it aims to achieve, but Member States are free to choose the form and method of achieving those results. In that regard, the ATAD ILR contains a number of optional provisions, meaning a considered implementation of the ATAD was crucial, so that any optionality was exercised in a manner that was consistent with Ireland's established international tax policy. There were a series of public consultations. The iterative approach to the consultation process that was adopted is to be warmly welcomed. PwC played a very constructive and central role in shaping the new rules, and was in close and regular contact with the Department of Finance and with Revenue throughout the consultation process.

The Act provides that the new interest restriction provisions will operate alongside existing comprehensive rules that restrict the deductibility of interest expenses. The introduction of the new interest restriction rules provided the legislature with an opportunity to consolidate and simplify existing Irish rules surrounding interest deductions. However, this opportunity has been missed. Taxpayers therefore face an increasingly complex set of rules and a greater administrative burden.

The restriction is applied by reference to "EBITDA", which in turn relies on the definition of "relevant profits". The legislation provides that "relevant profits" is the amount on which corporation tax finally falls to be borne, disregarding any losses carried forward or back. "Relevant profits" are adjusted proportionally where there is income and gains taxable at different rates. Franked investment income is excluded from the tax-adjusted EBITDA amount.

A key definition within the new ILR rules is "interest equivalent", as a restriction applies only if interest equivalent expense exceeds interest equivalent income. The definition is key, both from an income and expense side. "Interest equivalent" has been defined quite widely so as to include, not just interest on all forms of debt, but also all other economic equivalents including financial instruments such as derivatives. It is unlikely that a corporate group would not have some of these which would need to be restricted.

As expected, and as provided for by ATAD, Ireland provides for the application of ILR using a "group



approach" i.e., calculating the interest restriction at the level of a local group of companies (an "interest group"). Membership is elective. The legislation provides that the "interest group" will encompass 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 tax loss group. This approach is to be welcomed and should ensure that the profits of all group members that are exposed to Irish tax are included.

The provisions provide for an equity-escape carve-out from the interest limitation rules. The legislation focuses on the ratio of equity to total assets. If the ratio of equity to total assets of the interest group is no lower than two percentage points below the worldwide group's ratio of equity to to total assets then the equity ratio rule applies and no interest restriction arises.

As alluded to above, an element of relief is also provided for under the group ratio rule. The group ratio rule calculates the group's exceeding borrowing costs as a percentage of its EBITDA (using the group's consolidated financial statements). If the group's percentage is higher than 30%, the taxpayer is permitted to use the higher figure when calculating any interest restriction amount.

The legislation provides that the restrictions do not apply to loans concluded before 17 June 2016 (before the terms of the ILR were agreed). This exemption for legacy debt has been framed more narrowly than anticipated, with strict conditions applying, particularly in relation to pre-existing loan facilities. Grandfathering may be lost where the loan is modified. However, the legislation provides that any amendments to legacy debt will only result in a limitation on the "interest equivalent in respect of legacy debt" to the extent that they increase the interest payable on such legacy debt (with the interest limitation rules applying only to the increase itself). Care should be taken when considering amending/ modifying the terms of legacy debt.

The legislation provides for a number of exemptions. One of these exemptions relates to situations where a taxpayer's net borrowing costs do not exceed €3 million. The risk of base erosion is considered low in such a situation. The de minimis threshold applies to the "interest group" as a whole, the scope of which was discussed above. The manner in which the de minimis threshold is applied accommodates taxpayers that have profits taxable at different rates.

The legislation helpfully provides for relief for amounts disallowed as an interest deduction. These amounts can be carried forward and deducted in future years. The legislation also provides for relief where there is "interest spare capacity" or "limitation spare capacity". "Interest spare capacity" arises where taxable interest equivalent exceeds deductible interest equivalent. "Limitation spare capacity" arises where exceeding borrowing costs is less than the allowable amount (i.e. 30% of tax-adjusted EBITDA or the group ratio % of tax-adjusted EBITDA). Both amounts form "total spare capacity", and must be used within a period of 60 months from the end of the accounting period in which it arose.

The wide-ranging nature of the carve-out for long term infrastructure projects is to be welcomed. The carve-out covers a wide array of assets in areas such as energy infrastructure, transport infrastructure, environmental infrastructure and health infrastructure. There is no requirement for State or public ownership of the infrastructure.

A number of positive changes were made to the Bill as initiated at Dáil Committee Stage to address some concerns raised with Revenue in relation to the practical application of the new rules.

The implications of the rules for specific sectors is discussed in more detail and can be found in their respective sections, Financial Services and Large Corporates. Please get in contact with us if you would like to discuss these rules in more detail.

Reverse Hybrid Provisions

The first and most substantial part of the anti-hybrid rules was introduced in Finance Act 2019, and entered into effect on 1 January 2020 as required by ATAD. These rules dealt with the main categories of hybrid mismatch outcomes such as "deduction without inclusion" mismatch outcomes, "double deduction" mismatch outcomes, "permanent establishment" mismatch outcomes and "imported" mismatches.

As a consequence, Irish companies are required to review and consider each tax-deductible payment made in the context of each of these independent tests to determine whether a mismatch outcome has arisen, which would need to be neutralised under the anti-hybrid legislation. The Act also includes a number of technical amendments to these rules.

ATAD also required the implementation of anti-hybrid rules targeting reverse hybrid mismatches into EU Member States' law by no later than 1 January 2022. Reverse hybrid mismatches can arise where an entity, referred to as a reverse hybrid entity, is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person by some, or all, of its investors such that some, or all, of its income goes untaxed.

Accordingly, the Act introduces new Irish legislation, effective for tax periods commencing on or after 1 January 2022, targeting reverse hybrid mismatches with the rules applicable to Irish transparent entities, impacting popular Irish transparent structures such as Irish limited partnerships (both regulated and unregulated) and Common Contractual Funds.

The Act provides that an Irish entity will be considered a reverse hybrid entity, where for Irish tax purposes, its profits or gains are seen as arising or accruing to the “relevant participators” in the hybrid entity (broadly defined as those holding, directly or indirectly, the rights to at least 50% of the profits of the entity), while, in return, the entity is seen as being a taxable person in its own right by the “relevant participators’’.

A reverse hybrid mismatch outcome will arise where some or all of the profits or gains of a reverse hybrid entity that are attributable to a relevant participator are subject to neither Irish nor foreign tax. As noted above, the application of the rules is predicated on sufficient “association” between investors in these vehicles and a required aggregated holding by those associated investors in excess of 50%.

Where the reverse hybrid rules apply, such that a reverse hybrid mismatch arises, the Act provides for a neutralising mechanism whereby the income of the reverse hybrid entity will be subject to Irish corporation tax, “as if the business carried on in the State by the entity was carried on by a company resident in the State”. The Act also includes provisions to ensure that the Irish tax charged takes account of the relevant treaty as appropriate where the relevant participator is resident in a tax treaty jurisdiction, as required under Recital 11 of the Directive, which provides that “any adjustments that are required to be made under this Directive should in principle not affect the allocation of taxing rights between jurisdictions laid down under a double taxation treaty.”

As the purpose of the reverse anti-hybrid rules is to bring cross-border transactions in line with domestic transactions, thus removing any hybrid element without affecting the general features of a jurisdictions tax system or the tax-exempt status of an entity, and accordingly, the legislation provides that the rules will not apply where the “relevant participator(s)”, i.e. the investor, in the hybrid entity is an entity that:

a. is exempt from tax under the laws of the territory in which it is established,

b. is established in a territory, that does not impose a foreign tax, or

c. is established in a territory that does not impose a tax on profits or gains receivable in that territory from sources outside that territory.

From a financial services perspective, the introduction of an exemption for *“collective investment vehicles”* is welcome. The exemption has been drafted to apply to both common contractual funds (“CCFs”) and limited partnerships that are managed by a regulated fund manager. In order to avail of the exemption, the collective investment vehicles must be considered ‘widely held’ while holding a ‘diversified portfolio of assets’ which are both defined terms in the Act. Both of these conditions must be considered on a case-by-case basis and could give rise to anomalies. Helpfully, the Act provides allowances for entities both commencing activity and ceasing operations.

Where the collective investment vehicle exemption is not applicable and the reverse hybrid rules do apply, the Act appears to cater for “gross roll up” treatment for regulated transparent structures and in other cases allows for the appropriation or cancellation of units to meet the amount of tax arising.

Anti-Hybrid Legislation - Technical Amendments

Finance Act 2021 further includes a number of amendments to the existing anti-hybrid legislation. The definition of an “entity” under section 835Z TCA 1997 has been broadened and now applies to “an association of persons recognised under the laws of the territory in which it is established as having the capacity to perform legal acts”, along with “any other legal arrangement of whatever nature or form, that owns or manages assets”.

From a financial services perspective, the broadening of this definition will need to be considered in the context of investment structures containing partnerships without separate legal personality (which did not previously fall within the definition of an ‘entity’). The ability to trace-through these partnerships for anti-hybrid rules has been removed, which may necessitate a review of the application of the rules for investment structures with such partnerships within their structures.

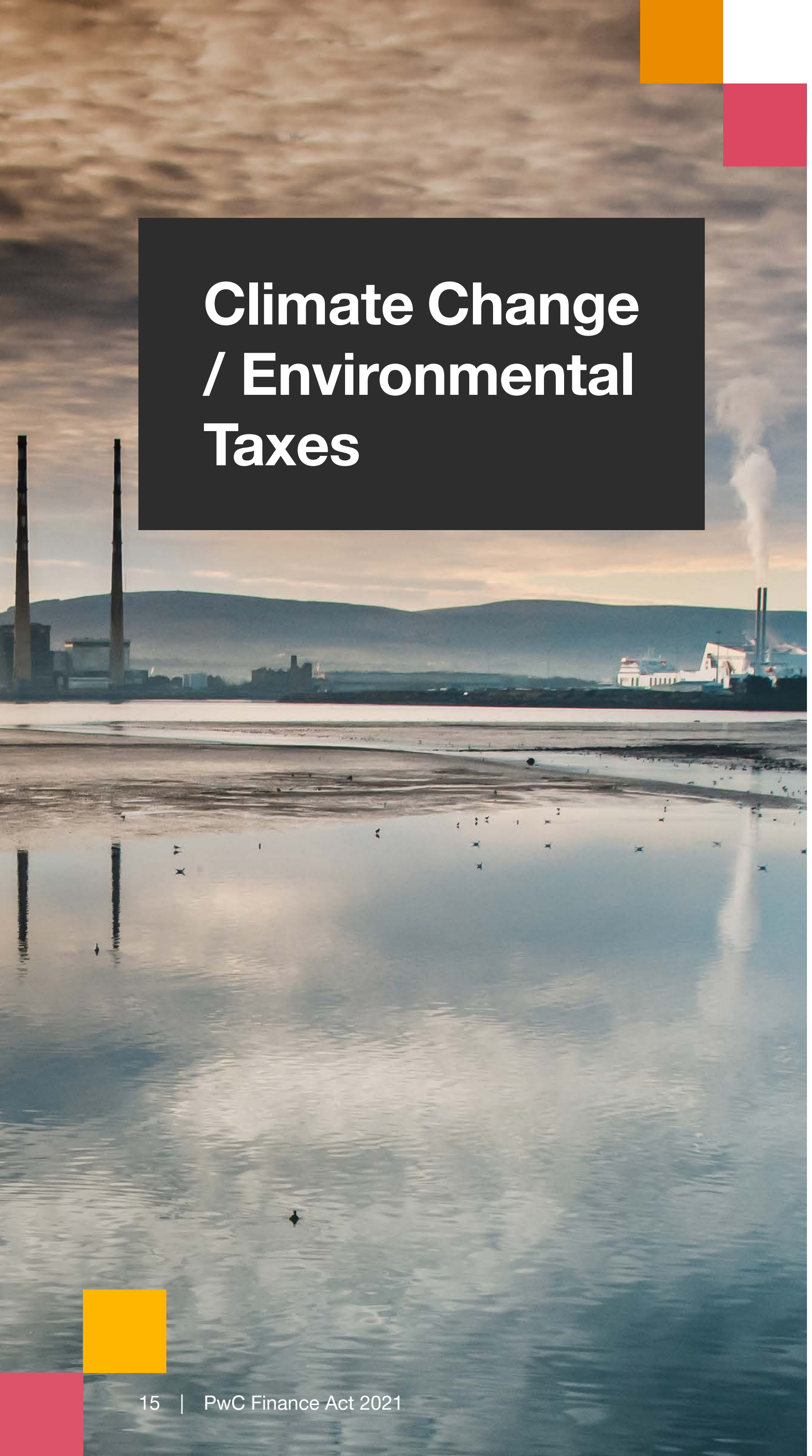
Section 835AA TCA 1997, which relates to associated companies, now includes a definition for “consolidated group for financial accounting purposes”, which provides that a group will consist of “(i) a parent entity, and (ii) all other entities, other than non-consolidating entities, which are included in the same consolidated financial statements.” A parent entity is defined as “an entity that prepares, or would prepare, consolidated financial statements under generally accepted accounting practice.”

These amended definitions are also relevant for the interest limitation rules.

A further update has been made to the deeming provisions under section 835AB TCA 1997, with the section now available to payments made between “an individual and a permanent establishment of that individual”, and “two or more permanent establishments of an individual”.

We are here to help you

Our teams have been heavily involved in the consultation process in relation to these measures and they have significant practical experience and valuable perspectives in relation to the operation of the new rules. We will continue to engage with Revenue on the development of comprehensive guidance notes. Please get in touch with us for further insights.



Climate Change / Environmental Taxes

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The impact and effect of Finance Act 2021 on Climate Change and Environmental Taxes

Finance Act 2021 (the Act) builds on the Government's commitment of achieving Net Zero by 2050. It includes a number of positive measures to tackle climate change and reduce Ireland's overall greenhouse gas emissions. However, there are some missed opportunities. The Act could have gone further to include even more targeted measures to support climate change, including acting on measures that we recommended in our recent Pre-Budget submission: Ireland's decarbonisation journey.

Below are our key insights into what the Act means for the economy, business community and individuals.

The key Climate Change and Environmental Tax measures introduced in Finance Act 2021 are as follows:

- The Act confirms a Carbon Tax increase of €7.50 up from €33.50 to €41.00 per tonne of carbon dioxide emitted. This applies from 13 October 2021 for auto fuels and 1 May 2022 for all other fuels
- The Act provides for a revision of the Vehicle Registration Tax (VRT) rates tables from 1 January 2022, for vehicles that fall into Bands 9 - 20.
- As indicated in the Budget, the Act extends the €5,000 relief for battery vehicles (BEVs) up to the end of 2023
- The Benefit-in-Kind (BIK) exemption for battery electric vehicles is extended to 2025. However, from 2023, there will be a gradual tapering off of the open market value (OMV) upon which the relief is based.
- The Act made a number of changes to the existing accelerated capital allowance regime for energy efficient equipment, extending the scheme for three years up to 31 December 2024 and tailoring the scope of the relief to remove equipment directly powered by fossil fuels and include hydrogen powered vehicles and refueling equipment.
- The Act also legislates for the introduction of a tax relief for micro-generation of electricity by households who sell residual electricity (which they generate) back to the grid.
- Finally, while not specifically legislated for in the Act, the launch of Ireland's Sustainable Finance Roadmap is another welcome development in the sustainable financing space.

Analysis of the key measures

Carbon Tax:

- The Carbon Tax increase is in line with the annual increases provided for in Finance Act 2020. This will bring the rate up to €100 per tonne of carbon dioxide emitted by 2030.
- The additional revenue generated by these increases will be targeted towards preventing fuel poverty and other initiatives including a national retrofitting programme.

Vehicles Registration Tax (VRT):

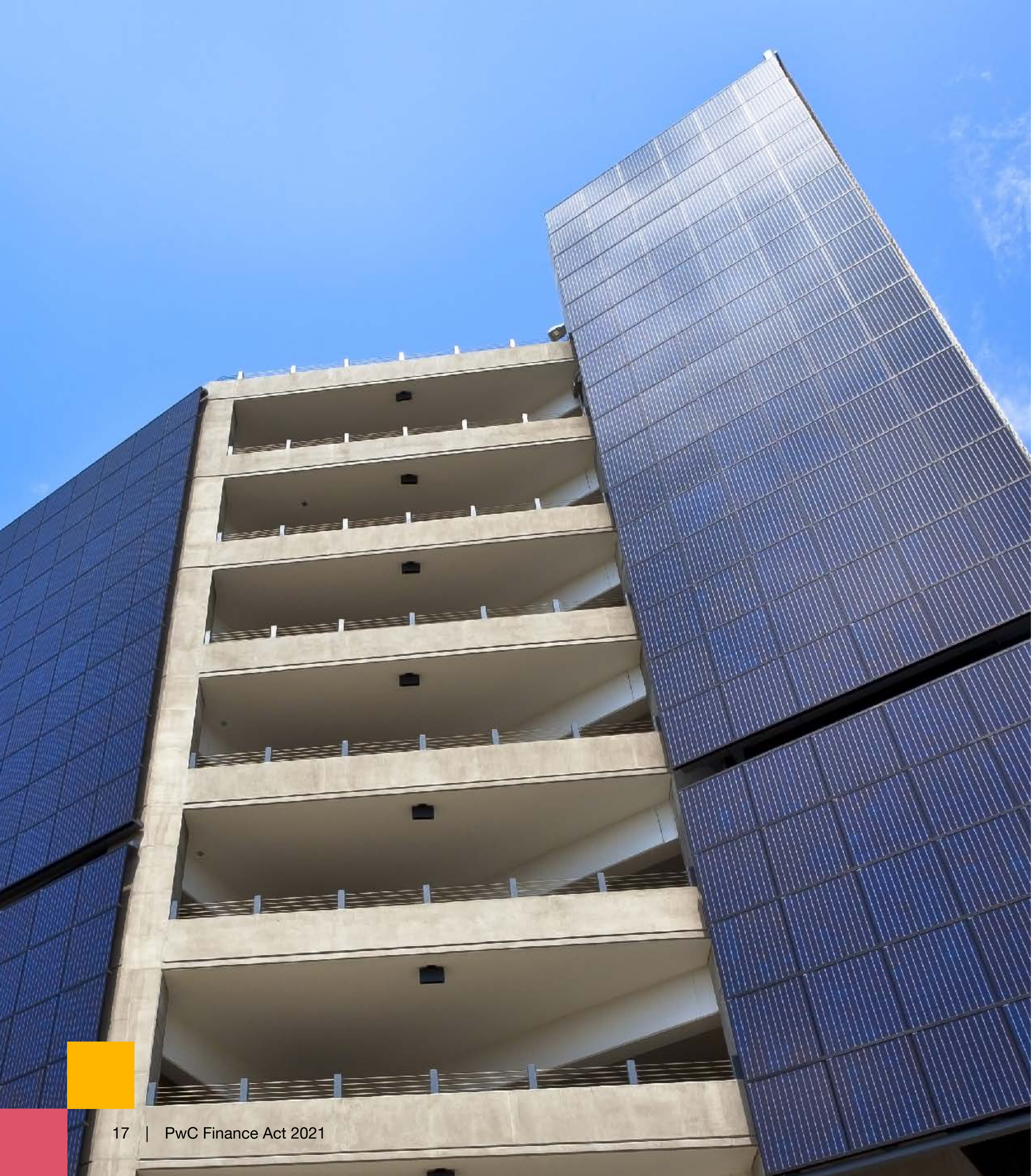
- The VRT rate increases are tiered to further incentivise purchase and registration of lower emission vehicles. The band increases are as follows:
  - Bands 16 - 20: 4% increase
  - Bands 13 - 15 - 2% increase
  - Bands 9 - 12 - 1% increase
- The €5,000 VRT relief for BEVs is extended to the end of 2023 to provide continued incentive to purchase electric vehicles

Benefit-in-Kind (BIK) for electric vehicles:

- While the BIK relief for BEVs is extended, it is being tapered off from 2023. The OMV will be reduced by €35,000 for 2023; €20,000 for 2024; and €10,000 for 2025.

Accelerated Capital Allowances:

- The existing scheme for accelerated capital allowances, included in s285A TCA 97, offers a 100% tax deduction for spending on certain energy efficient equipment. This results in an upfront cash advantage for businesses that choose the energy efficient option when purchasing equipment. A similar scheme for accelerated capital allowances is provided for under s285C TCA 97 in respect of gas vehicles and refuelling equipment which operate using lower-emission fuels.



- The Act extends the time period for claims under these schemes to 31 December 2024 and also amends the existing schemes to:
  - prohibit equipment directly operated by fossil fuels from qualifying for the accelerated capital allowance scheme for energy efficient equipment; and
  - include hydrogen powered vehicles and refuelling equipment under the accelerated capital allowance scheme for gas vehicles and refuelling equipment.
- The purpose of these amendments is to contribute to the transition towards a low carbon economy by supporting the transition to lower-emission fuels, particularly in the heavy-duty land transport sector.
- While these amendments should assist with achieving this goal, there are some broader limitations in relation to the operation of the scheme which should also be addressed. In its current format, the scheme places the administrative burden on the taxpayer to track energy savings, which has limited the use of the scheme more broadly.

Micro-generation Support Scheme

- The Act introduces a tax exemption for the first €200 of income arising to households for the domestic generation of electricity, which is supplied back to the grid.
- The scheme is provided for under the newly created s216D TCA 97 and provides that a tax exemption will be available in respect of electricity generated through the use of "renewable, sustainable or alternative forms of energy" at residential premises in the State.

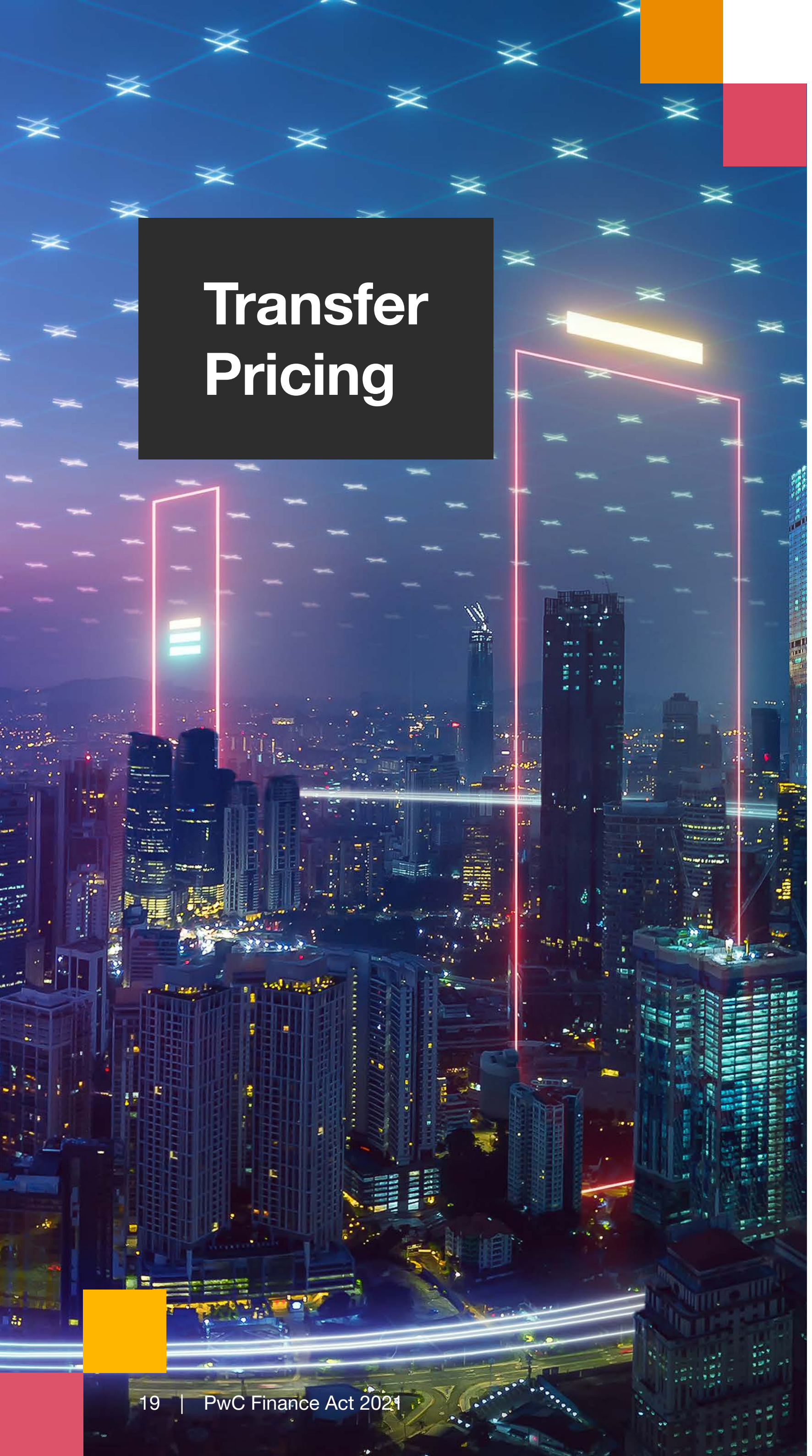
- The scheme applies from 1 January 2022 and run to 31 December 2024 and should provide further incentives to households to power their homes using renewable energy sources rather than traditional fossil fuels.

Ireland's Sustainable Finance Roadmap

- While not specifically related to the Act, the Government's commitment to further developing the area of sustainable finance, through the launch of Ireland's Sustainable Finance Roadmap, is a welcome development. It sets the scene for future, more transformative, plans in the green financing space.
- The roadmap sets ambitious but achievable targets, with a view to Ireland being a leading sustainable finance centre by 2025.
- The key commitments for the financial services sector are as follows:
  - developing the skills and knowledge of the future workforce.
  - building capacity and ensuring best practice in reporting and disclosure.
  - establishing an innovation programme and developing new sustainable finance instruments, products and services, such as green, social, sustainability and sustainability linked bonds; and
  - creating a dedicated Irish Sustainable Finance Fintech strategy.
- While the introduction of tax measures which specifically focused on the promotion of sustainable investment in the Act would have been welcome, the recognition of sustainable finance as a key pillar of economic focus for Ireland in the coming years is a positive development.

We are here to help you

Whether you are concerned about the impact of the Act changes on your business or you would like to seek tax advice around your sustainability efforts, our Energy, Utilities and Resources tax group is here to support you. Contact us today.



Transfer Pricing

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The impact and effect of Finance Act 2021 on Transfer Pricing

Finance Act 2021 (the Act) introduces changes relating to ‘Ireland to Ireland’ transactions and the ‘authorised OECD approach’ (AOA) for the attribution of profit to branches.

In relation to ‘Ireland to Ireland’ transactions, an entirely new version of section 835E TCA 1997 (s835E) is introduced. The new measure is welcomed as it is principles-based, clearer in scope than its predecessors and looks set to be fit for purpose in achieving the policy aim of excluding bona fide non-trading ‘Ireland to Ireland’ transactions from the scope of transfer pricing. The Finance Act 2021 version of s835E will apply to chargeable periods commencing on or after 1 January 2022.

The Act also introduces measures that provide for the application of the OECD developed mechanism (the AOA) for the attribution of profits to a branch of a non-resident company operating in the State. The branch measures will apply for accounting periods commencing on or after 1 January 2022.

The key aspects of the 'Ireland to Ireland' Transfer Pricing measures introduced in Finance Act 2021

- Repeal and replacement of existing s835E measure governing 'Ireland to Ireland' exclusion from transfer pricing rules on non-trading transactions.
- Principles-based approach which is clearer in scope than predecessor versions giving clarity and increased certainty to taxpayers.
- Exclusion only applies to bona fide commercial transactions.
- Application of provision to the broad range of bona fide commercial transactions that arise within groups will be more readily possible than it has been heretofore.
- Applies to chargeable periods commencing on or after 1 January 2022.

The key aspects of the AOA Transfer Pricing measures introduced in Finance Act 2021

- Introduction of the AOA for the attribution of income to a branch of a non-resident company operating in the State.
- Brings certainty to taxpayers on the basis for allocating income and expenses to branches, and aligns Irish legislation with international practice.

Analysis of changes to 'Ireland to Ireland' exclusion

Background to Finance Act 2021 change to S835E

Transfer pricing on non-trading transactions was introduced in Finance Act 2019 (FA19) and has been in force for periods which commenced on or after 1 January 2020. One of the measures introduced as part of those FA19 changes was section 835E TCA 1997 (section 835E). Section 835E in effect disapplied the transfer pricing rules for certain non-trading 'Ireland-to-Ireland' transactions. It has been an important relieving measure and is of relevance to companies that have non-arm's length transactions (e.g. where no consideration charged) between members of their Irish group and who need to rely on the domestic exclusion from transfer pricing rules to those transactions.

From the outset there have been difficulties in determining the precise scope and effect of the original FA19 version of section 835E. Efforts were made last year in Finance Act 2020 (FA20) to address some of those issues by proposing the deletion of the FA19 version of section 835E and replacing it with an entirely new version of the measure. However, the proposed replacement version of Section 835E as introduced in FA20 itself had significant shortcomings which, if introduced, would have meant that many bona fide circumstances that should in principle have been covered by the exclusion would not have been.

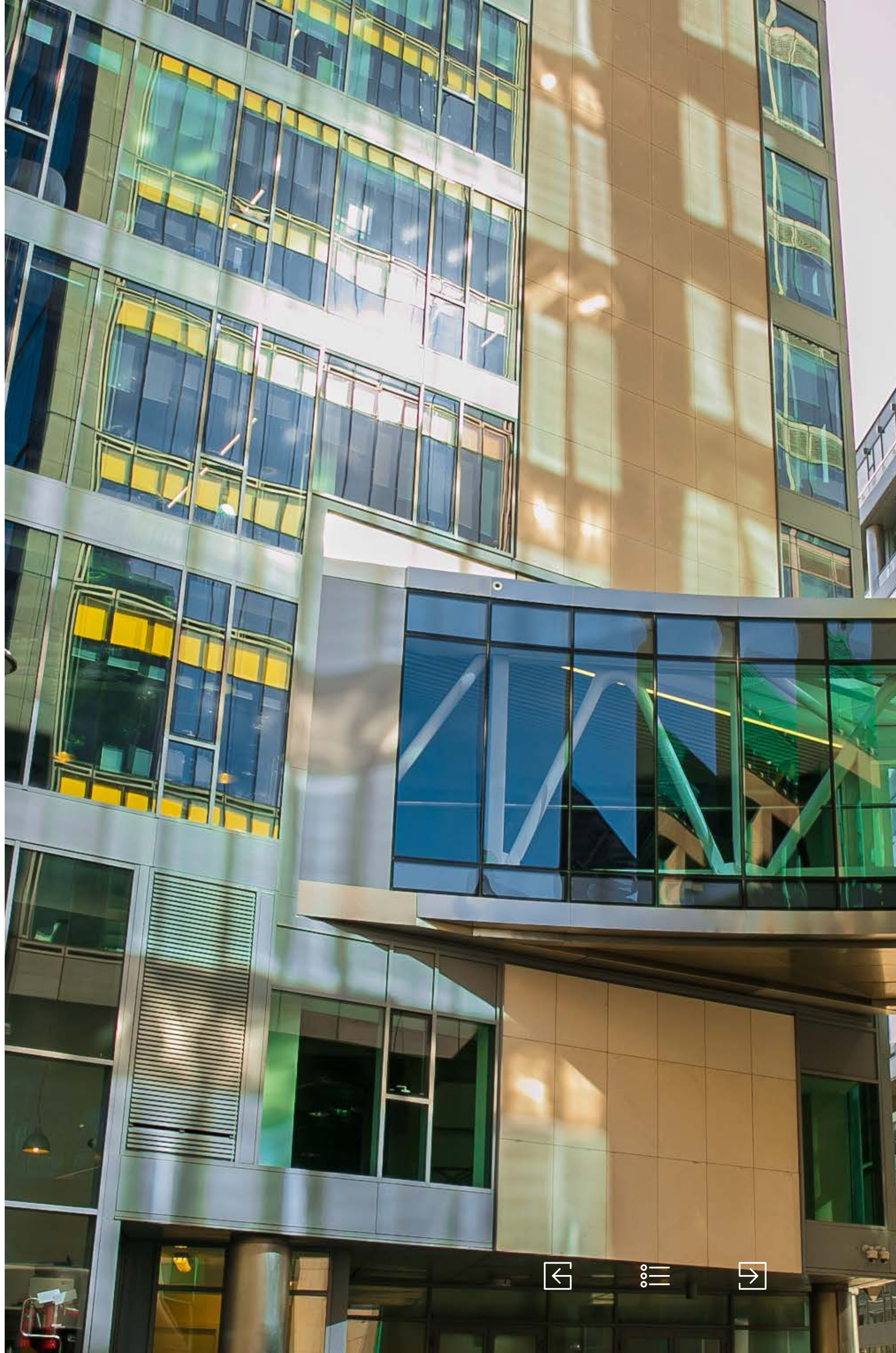
In light of this, the FA20 replacement version of section 835E was made subject to a Commencement Order. The FA20 version of section 835E was never commenced which has meant that the FA19 version of section 835E has remained in force since 1 January 2020 to present day. The reason for making the FA20 version of section 835E subject to a Commencement Order last year was to allow the Department of

Finance time to consider the effects of the FA20 measure, if introduced. Instead of commencing the FA20 version of S835E, the decision was taken to introduce a full revision of S835E in Finance Act 2021, the details of which are set out below.

Finance Act 2021 version of s835E

The replacement version of s835E introduced in the Act is welcome as it is clearer in scope than the existing version of the measure and it is capable of being applied with a greater degree of certainty to a wider range of transactions than its predecessor. The measure takes a principles-based approach in disapplying transfer pricing rules to 'Ireland to Ireland' transactions. Broadly speaking, for the measure to have scope to apply to a transaction the following circumstances should exist for both the supplier and the acquirer, as relevant:

- The **supplier** under a non-arm's length arrangement must be chargeable to tax under Schedule D (other than under Case I or Case II) or would be so chargeable on profits from the arrangement in question if consideration was receivable. Therefore, it is clear that no income needs to be receivable as the test is a hypothetical profits test that assesses the position as if consideration was receivable. Those circumstances must exist for the supplier for the duration of the chargeable period for the supplier to qualify.
- The **acquirer** can qualify in respect of an arrangement in two potential ways as follows:
  - **Route 1:** If a deduction is available in respect of the consideration (or would be available if consideration was payable under the arrangement) in computing profits of the acquirer. This route to S835E treatment would likely be used by acquirers that are acquiring the supply under the



arrangement (e.g. a loan or the use of property) for trading purposes or for Case V purposes and capable of taking a deduction for any consideration payable (e.g. interest or rent). There is no requirement for consideration to actually be payable or deducted in computing profits, it is a hypothetical test in relation to deductibility.

- **Route 2:** An acquirer that does not qualify under route 1 (e.g. an acquirer that would not get a deduction in computing profits) can still potentially qualify provided any profits, gains or losses of that acquirer arising directly or indirectly from its "relevant activities" are, or if there were any, would be chargeable to corporation tax under Schedule D for the chargeable period, or would be chargeable to corporation tax but for section 129 TCA 1997. Therefore, to qualify under route 2, there will be no need for any dividends or other income to actually be received/chargeable in a particular period by any such acquirer from its relevant activities given that this is a hypothetical profits test. This route to S835E treatment for acquirers would likely be used by acquirers that are holding companies that do not have access to route 1.
- The circumstances under either route 1 or route 2, as relevant, may need to exist for the acquirer for the duration of the chargeable period for that acquirer to qualify.

The general principle underlying the measure is that where both the supplier and acquirer are within the charge to Irish tax on their profits (or would be chargeable but for s129) then s835E treatment should be available.

There are a number of anti-avoidance safeguards built into the measure. The relieving measure will only apply to an arrangement entered into for bona fide commercial reasons. Furthermore, the relieving measure will not apply where the main purpose, or one of the main purposes, of the arrangement is the avoidance of tax.

The replacement version of s835E is a welcome revision to the design of a measure the policy intent of which is to ensure tax neutrality for transactions that do not impact on the overall Irish tax base.

Analysis of Branch Transfer Pricing changes

A new Section 25A has been introduced into TCA 1997 to provide for the application of the OECD developed mechanism known as the AOA to attributing income to a branch of a non-resident company operating in the State. Specifically, the AOA refers to the OECD's guidance on the attribution of profits to Permanent Establishments approved for publication on 22 July 2010.

Section 25A is effective for covered taxpayers, effective from 1 January 2022. Several countries have already adopted the AOA on attributing income to a branch in order to bring consistency and certainty around how income of a non-resident operating through a branch is computed and taxed in the relevant State. This is a welcome move for non-resident taxpayers, as it brings long awaited certainty for their relevant income arising in their Irish branch(es). This further confirms Ireland's endeavour to facilitate doing business in Ireland and harmonise its tax rules with global best practices. This also brings to rest any prior uncertainty amongst taxpayers on the methodology for determining the arm's length price of covered transactions of non-resident companies operating through a branch model in Ireland.

A branch, for the purpose of this section, has been defined as *"a* *branch or agency through which the company [not resident in the State] carries on a trade in the State"*. At face value, the Act has excluded any non-trading income of the branch for the purpose of this section, although this will become clearer on further analysis of the section.

Under the new section, companies are required to compute the 'relevant branch income' as the amount of trading income arising through or from a branch from any property or rights used or held either by or for the branch are required to be computed as if it were a separate and independent company, i.e. taking a separate entity approach which hypothesises the branch and other parts of the company as two separate and distinct entities for tax purposes. This attribution of relevant branch income shall be done in accordance with the AOA.

Exemption from this section has been extended to the trade of an overseas life assurance company under certain circumstances, any non-trading income, companies which are "small" enterprises, and companies which are "medium" enterprises but where the relevant branch income attributed by such medium enterprises in the relevant accounting period in question is less than €250,000.

Section 25A extends the transfer pricing documentation requirements introduced as part of Finance Act 2019, as applicable to companies for accounting periods commencing on or after 1 January 2020 to branches, in order to assist in ensuring relevant branch income has been computed in accordance with section 25A. This now brings branches as defined in this section somewhat to parity with the Irish resident companies, which are subject to the new transfer pricing regime introduced as part of Finance Act 2019.

The documentation that needs to be maintained by a branch must be contemporaneous and has to be prepared in the form of "relevant branch records". Such records shall be prepared no later than the specified return date for the accounting period concerned and has to be provided to the Revenue Commissioners within 30 days from the date of the request. An inclusive definition of 'relevant branch records' has been introduced in Section 25A and is similar to the Local File requirements in the Irish TP legislation, read in conjunction with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations issued in 2017 ("OECD Guidelines"). The 'relevant branch records' includes, description of the company and its branch, organisation structure, business strategy and and key competitors, a functional and factual analysis of the branch, transfer pricing methodology used in respect of the dealings between the branch and other parts of the company, accounting records, a list and description of selected uncontrolled transactions used for the purposes of benchmarking the covered transactions between the branch and other parts of the company. It is important to mention that this information includes calculations supporting the attribution of free capital to the relevant branch.

It should be noted that most of the defined terms in Section 25A originate either from the OECD Guidelines or the AOA.

Penalties can apply where there is failure to comply with a request to provide relevant branch records to the Revenue Commissioners. These penalties amount to €4,000 for medium companies which attribute income of less than €250,000 to the branch, and €25,000 to companies which do not meet the definition of either a small enterprise or a medium enterprise which attributes income less than €250,000 to the branch. The penalty shall be further extended by €100 for each day on which the failure continues. However, the relevant taxpayer, i.e. in this case the branch in the State, shall be protected from tax-geared penalties where it has maintained appropriate branch records, prepares relevant branch records which are complete and accurate and provides these records to the Revenue Commissioners on a timely basis within the stipulated period, and demonstrates that, notwithstanding the relevant branch adjustment, the company has made reasonable efforts to comply with this section in determining the relevant branch income that it attributes to its Irish branch.

What does this mean for your business?

'Ireland to Ireland' changes

The clarity afforded by the principles based approach of the replacement S835E measure means that the provision is set to become fit for purpose in achieving its policy aim as it should be more readily applicable to the wide range of bona fide non-arm's length transactions that take place between Irish resident entities within groups, including the following:

- Bona fide interest free financing between group members (e.g. parent to sub, sub to parent, sub to sub) whether the borrowing company is a trader, a holding company or a Case V company.
- Free use of property (e.g. factory or office premises) used by other group members.
- Use of brands/IP (where royalty income would be non-trading) by group members on royalty free terms.

Adoption of the AOA to branch profit attribution

The adoption of the AOA was flagged in the Minister's Budget Day speech and is another step in aligning the Irish tax code with new international norms. The measures introduced on supporting Transfer Pricing documentation and on penalties are consistent with provisions already in the legislation for intragroup transactions. There is now greater parity for enterprises operating in the State through a company or through a branch in terms of the transfer pricing legislative framework.

We are here to help you

PwC and representative bodies made significant efforts to engage with Revenue and the Department of Finance on the shortcomings of the existing s835E measures and we welcome the fact that the legitimate concerns of taxpayers have been considered in the design and approach to the replacement version of s835E. We have a lot of experience in interpreting and applying the pre-existing measures and are ready to assist you in assessing how the revised rules impact on your business.

We also engaged in the Department of Finance's public consultation on the application of the AOA to the attribution of profits to branches of non-resident companies, and are pleased to see many of our comments reflected in the legislation. If you would like to understand how the adoption of the AOA might impact your business, we would be happy to discuss.

Domestic and International Large Corporates

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The key measures introduced in Finance Act 2021 that are likely to affect domestic and international large corporations

The main legislative changes introduced in Finance Act 2021 (the Act) that are likely to affect domestic and international large corporations include reverse hybrid provisions and interest limitation rules, the introduction of which is mandated at an EU level, and further amendments to the transfer pricing rules in the context of Ireland-to-Ireland transactions. The Act also provides for the transposition of new EU tax transparency rules for digital platform operators (DAC7).

The Act introduces and extends certain reliefs, including the introduction of a digital gaming credit (subject to a commencement order), and the extension of the existing scheme for accelerated capital allowances.

There were also a number of other technical amendments and minor changes contained in the Act that may be relevant for domestic and international corporations.

The key measures impacting domestic and international corporates in Finance Act 2021 are as follows:

- the introduction of the new interest limitation rules
- the introduction of reverse hybrid provisions
- the introduction of the digital gaming credit
- an amendment to the existing transfer pricing rules in section 835E governing certain non-trading Ireland-to-Ireland transactions

- the transposition of DAC7 into Irish tax law
- the extension of the existing scheme for capital allowances and increase in carbon tax
- technical amendment to the capital gains tax legislation pertaining to domestic mergers
- an amendment to the controlled foreign company (CFC) rules
- miscellaneous changes and technical amendments as outlined below

Analysis of the key measures

Interest Limitation Rules

The Act provides for the introduction of the new Interest Limitation Rules in Irish tax law and it will apply for accounting periods commencing on or after 1 January 2022. The introduction of these rules, which provide for a 30% of EBITDA cap on interest deductions, follows significant engagement between the Department of Finance and stakeholders through a number of recent consultations. The rules should bring Ireland into line with other jurisdictions who have similar interest capping legislation.

While the rules do add complexity for many debt funded groups and the opportunity to relax existing interest deductibility anti-abuse rules in Irish tax legislation has been missed, they have broadly been introduced in a constructive manner. In particular, where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes, the indebtedness of the overall group at worldwide level may be considered for the purposes of providing additional relief. If the Irish taxpayer has debt or interest ratios lower than the worldwide group, then its interest expense may not be restricted, or a lower restriction may apply.

Due to the complexity of the rules and their interaction with existing domestic provisions, it is recommended that debt funded Domestic and International Large Corporates consider the application of these rules and the potential impact to their tax charge in Ireland as soon as possible. Please see more details in our ATAD Measures insight.

Reverse hybrid provisions

Following the introduction of anti-hybrid rules into Irish legislation by Finance Act 2019, the Act introduces rules with respect to reverse hybrid mismatches, in line with Ireland's commitments to implement the EU Anti-Avoidance Directive II (ATAD II). Broadly, a reverse hybrid mismatch arises where an entity, referred to as a reverse hybrid entity, is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person by some, or all, of its investors such that some, or all, of its income goes untaxed. Please see more details in our ATAD Measures insight.

The new reverse hybrid provisions will take effect for taxable periods commencing on or after 1 January 2022 and Domestic and International Large Corporates should review their group structures, particularly those which include Irish limited partnerships, in order to assess the potential impact of these new rules.

The Act also includes certain other technical amendments to the broader anti-hybrid regime to ensure the rules operate as intended.

Digital gaming credit

The digital gaming credit was announced as part of the Minister's Budget 2022 speech and the associated legislation has been published in the Act. Eligible expenditure incurred by a company resident in Ireland or an Irish branch of an EEA resident company in the design, production and testing stages of the development of qualifying digital games will attract a credit of 32% on the lowest of:

- eligible expenditure (i.e. the portion of qualifying expenditure that is expended on the development of the digital game in Ireland or the European Economic Area);

- 80% of total qualifying expenditure (i.e. broadly expenditure incurred by the company on the design, production and testing of a digital game); or
- €25,000,000.

The digital gaming credit is subject to a minimum project spend of €100,000. As outlined above, the maximum project spend is €25 million (i.e. a tax credit of up to €8 million per project is potentially available).

In order to qualify for relief, the digital gaming company will need to go through a certification procedure with the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, as well as meeting various other conditions, including conditions related to record keeping and ensuring that funding comes from either EU or double tax treaty partner sources.

As the credit will require EU state aid approval, it has been introduced subject to a commencement order. The relief will be provided in the form of a refundable corporation tax credit and it follows a similar approach to our existing section 481 film tax credit regime. The scheme will run until 31 December 2025 and a claim must be made within 12 months of the end of the accounting period in which the expenditure giving rise to the claim is incurred.

The digital gaming credit is a welcome move and looks to support one of Ireland's fastest growing domestic and international sectors to ensure that they are positioned for success in a post COVID-19 economy.

Transfer Pricing rules (section 835E TCA 1997)

The Act includes a complete redrafting of the existing transfer pricing rules in section 835E, which governs certain non-trading Ireland-to-Ireland transactions. The amendments included in the Act are a welcome development for Domestic and International Large Corporates and it is envisaged that the provisions will be significantly more straightforward to apply and more commercially focused than the existing rules. The general principle underlying the revised section 835E is that, where both the supplier and acquirer are Irish resident and chargeable to tax on their profits (or would be chargeable but for section 129), then the exclusion from transfer pricing should be available, subject to certain anti-avoidance measures, including a bona fide test to prevent misuse of section 835E in non-bona fide situations.

There has been significant engagement and consultation with the Department of Finance and with Revenue in relation to the application of section 835E and the new provisions are a positive development in the design and implementation of a measure to improve the tax neutrality of Ireland to Ireland transactions.

DAC 7 - Mandatory Exchange of Information for Digital Platform Operators

The Act provides for the transposition of new EU tax transparency rules for digital platform operators (DAC7) into Irish law.

The new rules aim to provide EU Member States' tax authorities with the information necessary to ensure the enforcement of tax rules regarding commercial activities performed with the intermediation of digital platforms and to introduce standardised reporting requirements that should reduce the administrative burdens on the digital platform operators.

The new reporting obligations will apply to operators of EU and non-EU digital platforms that allow certain sellers ("reportable sellers") to be connected to other users in order to perform the following

(cross-border or domestic) activities: a) the rental of immovable property; b) the provision of personal services; c) the sale of goods; and d) the rental of any mode of transport. The information to be reported will include information relevant to the correct identification of the seller and information relevant to the determination of the profits realised by the seller through the platform. DAC 7 will take effect from 2023 onwards.

Climate change

The Government's commitment to tackling climate change was emphasised in the Minister's budget speech and a number of climate change measures were introduced in the Act. Of note for Domestic and International Large Corporates, the existing scheme for accelerated capital allowances for energy efficient equipment has been extended to certain hydrogen powered vehicles and refuelling equipment and there has been an incremental increase to the current rate of carbon tax, in line with the trajectory for increases outlined in Finance Act 2020.

Mergers

There are two technical amendments relevant to mergers included in the Act which are welcome and they should remove technical ambiguity.

With respect to domestic mergers, the Act includes a new section such that a domestic merger by absorption, pursuant to the Companies Act 2014, is put on the same statutory footing as a cross-border merger. As a result of this amendment, where a company transfers all its assets and liabilities to its 100% parent as a consequence of a domestic merger, it shall not be treated as giving rise to a disposal by the parent of the share capital it holds in the company.

The Act also provides for helpful technical clarifications with respect to cross-border mergers.

CFC rules

The Act includes an amendment to the CFC rules such that a number of exemptions will be disapplied with respect to CFCs resident in a jurisdiction listed in Annex I of the EU list of non-cooperative jurisdictions for tax purposes. The disapplied exemptions are the effective tax rate, low profit margin and low accounting profit exemptions. With respect to CFCs resident in non-cooperative jurisdictions with accounting periods beginning during the period from 1 January 2021 to 31 December 2021, the EU list published in October 2020 applies. The Act provides that the list, as updated in October 2021, will apply for accounting periods beginning on or after 1 January 2022.

We recommend that all Irish resident Domestic and Large Corporate groups review the potential impact that this change might have from a CFC perspective.

Miscellaneous updates

Anti-avoidance measures

There were a number of changes to various anti-avoidance provisions, including those in respect of dividends paid out of certain profits and interest on certain loans.

The Act amends section 840A, which is an anti-avoidance provision that denies a tax deduction for interest on certain loans between connected parties used to acquire assets from connected companies. The amendment provides that the restriction applies to interest on promissory notes and other agreements or arrangements having a similar effect. The amendment also specifies that a tax deduction is denied for interest on any form of refinancing such as a loan.

The Act also includes a welcome amendment to section 129A, an anti-avoidance provision that removes distributions between Irish tax resident companies from the scope of section 129 (i.e. from being treated as exempt franked investment income). As a result of the amendment, where a company pays an interim dividend out of profits arising in an accounting period in which the company is Irish resident, a portion of such distributions will not be deemed to have been earned before the company was resident in Ireland.

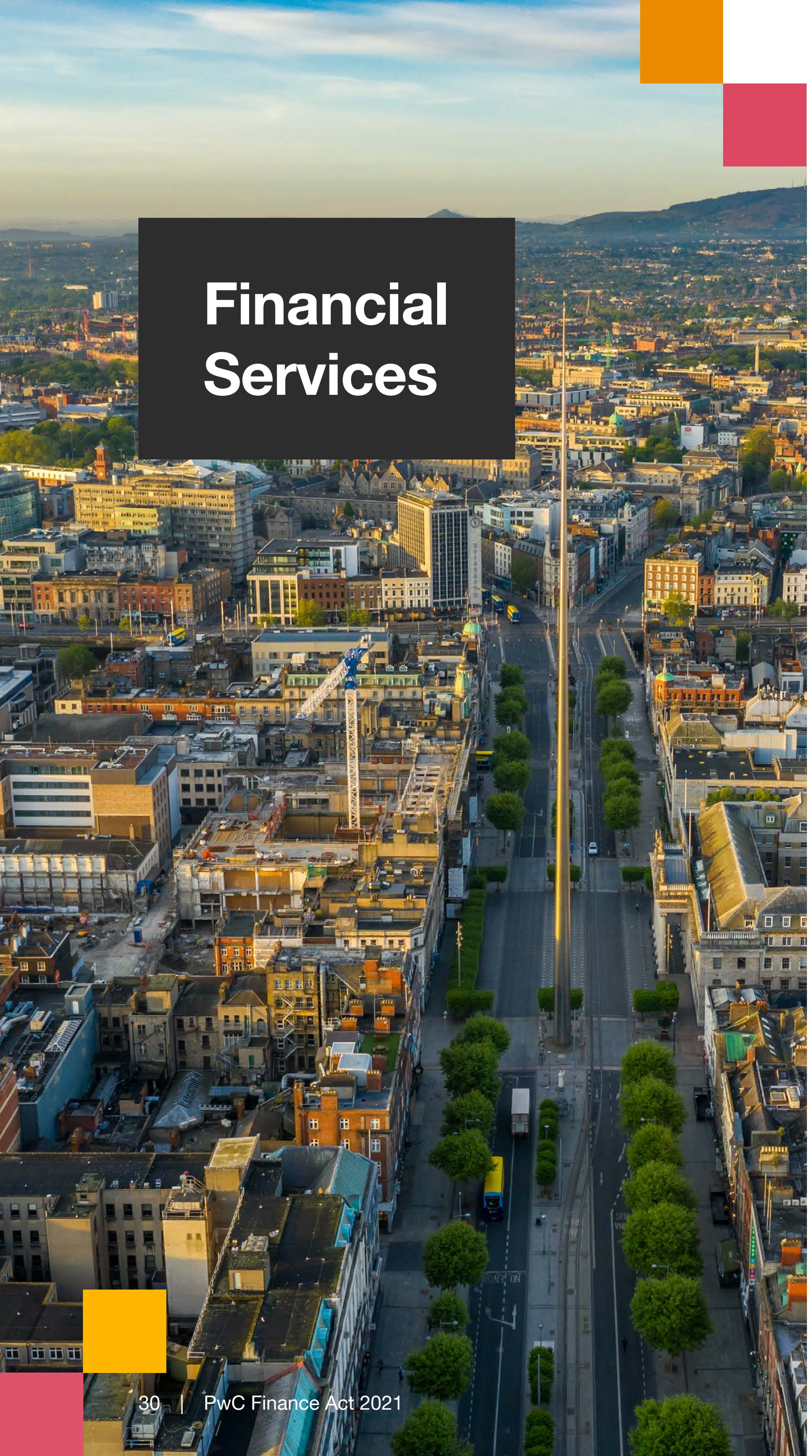
Directive on Administrative Cooperation (DAC6) and Directive (EU) 2016/2258 (DAC5)

The Act includes certain amendments to the legislation transposing DAC6 which provides Irish Revenue with powers of enquiry into compliance by intermediaries and taxpayers with respect to their obligations under DAC6.

The Act also provides for the final transposition of DAC5, which requires that Irish Revenue have access to certain data collected for anti-money laundering and terrorist financing activity.

We are here to help you

Finance Act 2021 contains many important changes that will have implications for large domestic and international corporations. We are available to assist you with any queries you have on how they could impact your business.



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The impact and effect of Finance Act 2021 on Financial Services

Finance Act 2021 introduces a number of provisions that will have a direct impact on the Financial Services (FS) industry, presenting a number of opportunities and challenges. While the key amendments had been well-flagged in advance, in particular those mandated by the EU Anti-Tax Avoidance Directive (ATAD), now that the detail of the legislation is available it is important that those within the sector consider how the rules will really impact on their business.

Interest Limitation Rules (ILR)

The implementation of the ILR is a fundamental change to the Irish tax system and has the ability to restrict deductions for interest expenses. Please see more details in our ATAD Measures insight. There are a number of provisions included which are of particular importance to the FS sector:

Definition of interest equivalent

A pivotal definition within the ILR rules is ‘interest equivalent’, as a restriction applies only if interest equivalent expense exceeds interest equivalent income. The Finance Act definition includes not only interest itself but also amounts under derivative instruments connected with the raising of finance, the interest elements of foreign exchange gains and losses and the finance element of finance lease payments.

Also specifically included are the interest equivalent elements of the profit and loss movements on financial assets and liabilities. This is potentially very wide for all industries within FS as it could sweep in all or some of the unrealised fair value movements on a range of financial instruments which might not otherwise be considered as interest or interest equivalent. As there is potential for interpretational differences in this area, it is important that clarifications are provided by way of Revenue guidance, in order to provide a degree of certainty for taxpayers. It is worth noting that these definitions apply to both income and expense amounts.

From an aviation finance perspective, following ongoing engagement with the industry, it is positive that the interest limitation legislation recognises the commercial reality that an element of an aircraft operating lease rental is equivalent to interest income, thereby allowing a lessor to reduce its net interest expense. The rules now allow for a transparent and consistent determination of that interest equivalent. While there are a number of issues that will need to be dealt with in guidance, this critical clarity is to be welcomed.

Inclusion of financial undertakings within the scope of the rules

A carve out for financial undertakings has not been introduced, which is understandable as these entities often generate net interest equivalent income.

Application of the de minimis

The legislation provides for a number of exemptions. One of these exemptions relates to situations where a taxpayer’s net borrowing costs do not exceed €3 million. The risk of base erosion is considered low in such a situation. The de minimis threshold applies to the “interest group” as a whole.

While the introduction of this exemption is welcomed, the narrow manner in which it has been introduced is disappointing. Rather than providing for a base exemption of €3 million for taxpayers, it has been introduced as a cliff edge, such that once the €3 million has been exceeded, all net borrowing costs are brought back within scope of the rules where there is no other allowable amount available based on the EBITDA calculation. There is also no marginal relief in such cases.

Single company worldwide group

Bankruptcy remote vehicles, which are common within FS, could potentially have been at a disadvantage as they generally do not meet the definition of a “stand alone entity” nor do they meet the consolidation tests for the group carve outs.

The legislation has therefore introduced the concept of “the single company worldwide group”, being a company that is not (1) a member of a worldwide group, (2) a member of an interest group or, (3) a standalone entity.

Where a taxpayer meets the definition above, it can avail of the group carve outs by calculating the relevant ratios as if it was a member of a consolidated group and then adjusting for transactions with associated enterprises (as defined in anti-hybrid legislation).

This is welcome to help ensure such entities are not unfairly disadvantaged, however, analysis of potential associated enterprise transactions will be key in applying these rules.

Reverse Hybrids

Further to the implementation of the anti-hybrid rules in 2020, Finance Act 2021 outlines the reverse-hybrid provisions (as required under ATAD II), targeting mismatch outcomes typically arising as a result of an entity being considered transparent in Ireland, but opaque in another jurisdiction, resulting in the double non-taxation of a payment. These rules will need to be considered for popular Irish transparent structures such as Irish limited partnerships (both regulated and unregulated) and Common Contractual Funds. Please see more details on the reverse anti-hybrid rules in our ATAD Measures insight.

Ireland's Sustainable Finance Roadmap

In a Finance Act which did not include any specific sustainable finance measures, it was at least welcome to see the exemption for long-term infrastructure projects being introduced in the interest limitation rules. See our Climate Change / Environmental Taxes insight for detail on other green measures included.

Overhaul of stamp duties on insurance policies and bank products

The Act contains a number of measures to modernise and streamline the system for collecting stamp duty on insurance policies, financial cards, and cheques / bills of exchange. This should ease the administrative burden for financial institutions / insurers. The Act also brings these stamp duties within the general stamp duty penalty and enforcement provisions as well as imposing a surcharge where a stamp duty return is delivered late.

Other points to consider

The introduction of the 'authorised OECD approach' for the attribution of income to branches in Ireland will be particularly relevant for financial services groups with branches, such as insurers and MiFID firms (see our Transfer Pricing insight for more details).

Changes have been made to remove a double tax charge on deposit interest earned by a trust. At present, a trust earning interest on a deposit from which DIRT has been deducted at source is also liable to pay income tax at the standard rate of 20% on such interest. This has now been amended to ensure that a credit is available for the amount withheld in the calculation of the trust's income tax liability.

The bank levy has been extended for a further year, with a review of the scheme to be completed in the next year.

We are here to help you

We are happy to discuss the implications of Finance Act 2021 for your business. Please reach out to the PwC FS Tax team for any help you require. Contact us today.

Private Business / Individuals

The impact and effect of Finance Act 2021 on Private Businesses

A core theme in our [Private Business and SME Pre-Budget 2022 Submission] was the real sense of confidence and hope generated by the rollout of the vaccine programme tempered with the feeling that the economy was in need of a period of healing, recovery and renewal. The measures included within Finance Act 2021 (the Act) are broadly in keeping with these themes. Yet, there are missed opportunities across a range of areas that are currently impacting on a number of SMEs.

The key private business measures introduced in Finance Act 2021 are as follows:

- The extension, on a graduated basis, of the Employment Wage Subsidy Scheme (EWSS) to April 2022.
- Further changes to the Employment Investment Incentive (EII) scheme to encourage the flow of much needed seed/early stage investment capital.
- Enhancements to the corporation tax exemption for start-ups.
- Some changes to capital taxes but unfortunately none related

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to the transfer of business assets.

- Some amended agricultural measures.
- A change to allow charities to be re-organised and retain the charitable tax exemption.

Analysis of the key measures

Employment Wage Subsidy Scheme

The Act addresses our pre-Budget 2021 recommendation of avoiding a "cliff edge" on the EWSS through an amendment of the Emergency Measures in the Public Interest (COVID-19) Act 2020. The broad parameters for the extension is that businesses availing of the EWSS at the end of this year will continue to be supported until 30 April 2022. However, it will be closed for new employers from 1 January 2022. The following summarises the position over the period from October 2021 to April 2022:

- Oct/Nov/Dec/Jan: no change to rates
- Feb: two-rate structure (€151.50 per week and €203 per week).
- Mar/April: flat rate of €100 per week. The reduced employer PRSI rate will no longer be available in this period.

On 21 December 2021, in light of the new public health restrictions announced that month, the EWSS was re-opened for certain employers who had previously availed of the scheme at any time between 1 September 2020 and 31 December 2021, but who were not eligible on 31 December 2021. Subject to certain conditions, employers can re-enter the scheme if their business is expected to experience a 30% reduction in turnover or customer orders in the period from 1 December 2021 to 31 January 2022 compared to the period from 1 December 2019 to 31 January 2020. (The comparator period differs where the business commenced trading on or after 1 May 2019). Applications to re-enter the scheme must be made to Revenue by 15 January 2022.

Employment Investment Incentive

The Act includes a number of important changes to the Employment Investment Incentive (EII) scheme. The changes reflect some, but not all, of the feedback given on ways to improve the effectiveness of the scheme during a stakeholder event hosted by the Department of Finance over a two day period last March.

The most significant change is the opening up of the scheme to a wider range of investment funds. By way of context, it is possible for investors to make eligible EII investments by either directly investing into the qualifying company or by doing so indirectly via a "designated fund". A designated fund needs to be ".. established under irrevocable trusts for the sole purpose of investing in qualifying companies''. This was viewed as a relic of the old Business Expansion Scheme rules and not in keeping with the types of private equity investment structures that have become the norm in the Irish market.

The Act opens up EII to include `qualifying investment funds' which capture limited partnerships established either under the Limited Partnership Act 1907 or the Investment Limited Partnership Act 1994. We hope this change will lead to greater participation in the market and result in a "win-win" for companies seeking finance and for investors looking for diversification that they can most easily get when investing under the umbrella of a fund.

Further positive changes include the extension of the EII by a further three years to the end of 2024, the removal of the rule that 30% of an investment must be spent before relief can be claimed and making it easier to redeem investor share capital without incurring a clawback

of tax relief. The clawback provisions were, however, extended for shares issued on or after 1 January 2022 by the introduction of a new rule that part of the tax relief (ten fortieths) will be withdrawn if neither of the incremental jobs or R&D expenditure tests are achieved within the investee company. This clawback is charged on the investee company (rather than the investor) by way of an additional corporation tax assessment.

Overall, the above measures are more of a tweak than an overhaul of the EII legislation. The real question is whether there will be an improvement in uptake from the low levels seen over recent years. At the moment, "cautious optimism" is how we would assess it as we know from practical experience that EII will probably remain quite challenging for companies whose scaling journey will involve multiple funding rounds. The amendments introduced in the Act appear best suited for start-ups that use the EII as a once-off source of funding.

Relief from Corporation Tax for Start-Up Companies

The sunset date for the corporation tax exemption for start-ups has been extended by five years to 31 December 2026. In addition, the exemption can now be claimed for a period of five years where the company commenced to carry on the qualifying trade on or after 1 January 2018. The existing three year period applies in all other cases. This exemption (which is linked to employer PRSI contributions) grants a full exemption where the corporation tax otherwise payable by the company is less than €40,000 and marginal relief applies where it falls between €40,000 and €60,000.

Uptake on this exemption when viewed in terms of its cost to the Exchequer has been low as many start-ups are not profit making in the early years, so hopefully the extension by way of an additional two years will see a slight uptake in use as companies transition from initial startup to profitability stages in their lifecycle.

Digital Gaming

The introduction of a new tax credit for digital gaming will be of interest to SMEs that operate in that sector - see more commentary on this in Domestic and International Large Corporates.

Capital Acquisitions Tax

On Capital Acquisitions Tax (CAT), the Finance Bill as initiated proposed a change to the way a gift or inheritance comprising the free use of money is to be calculated. The amendment provides that the value of that gift or inheritance is to be determined by reference to the best price obtainable of borrowing an equivalent sum in the open market rather than the opportunity cost (demand deposit interest) foregone, which over recent years has been negligible. This amendment was subsequently removed at Dáil Committee Stage with Minister Donohoe confirming that greater consideration would need to be given to the proposed measures.

There was also an amendment to allow Revenue to seek the delivery of a tax return from a disponer in respect of gifts which comprise property (irrespective of value) subject to agricultural property relief or business property relief claims.

Finally an amendment has been made to ensure that CAT does not arise on non-cash prizes won in raffles and draws conducted in a bona fide manner.

Agriculture Measures

On the Agricultural side, there were a number of existing reliefs extended, these include:

- General stock relief extended to 31 December 2024,
- The enhanced stock relief for young trained farmers and registered farm partnerships and the stamp duty exemption for young trained farmers have all been extended and are now due to expire on 31 December 2022.

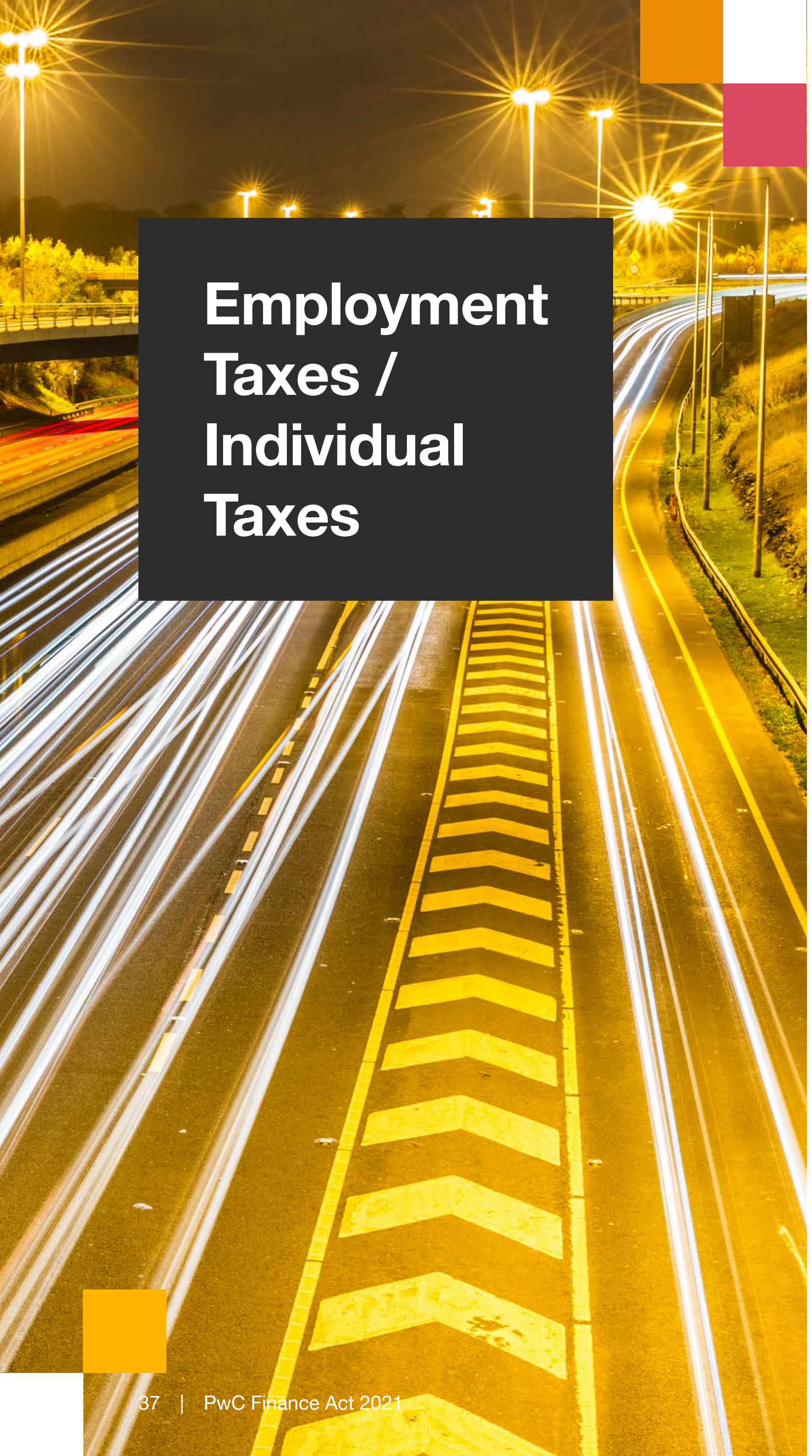
In addition, the farmers' flat rate VAT addition will be reduced from the current 5.6% to 5.5% for the year 2022.

Charities

For charities, there was an amendment to allow, subject to certain conditions, the successor body that emerges from a re-organisation to retain the charitable tax exemption. A similar provision for amalgamating charities was also included in Finance Act 2020.

We are here to help you

We work with a wide variety of privately owned businesses across numerous industries to deliver practical and effective tax solutions that combine industry insight with first-class technical expertise. We have led the way with the thought leadership contained in our pre-Budget submissions. We can help to contextualise the Finance Act 2021 measures in terms of what it means for you and/or your business. Please do not hesitate to get in contact with us to find out more.



Employment Taxes / Individual Taxes

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The impact and effect of Finance Act 2021 from a personal and employment tax perspective

The majority of the legislative measures included in Finance Act 2021 from an employment and individual tax perspective mirror the announcements made on Budget Day. It was a budget focused on easing the cost of living and the Act includes provisions relating to income tax and USC band changes, and increases to the Personal, PAYE and Earned Income Credits. For those hoping to get on the property ladder in 2022, the Help-to-buy Scheme has been extended to 31 December 2022. The Act also puts the availability of a 30% deduction from income tax for heat, electricity and broadband costs for those working from home on a statutory basis. For employers, the Act extends the Employment Wage Subsidy Scheme (EWSS) to 30 April 2022, albeit on a tapered basis.

The key employment and individual tax measures introduced in Finance Act 2021 are as follows:

- Finance Act 2021 includes legislation to enact Budget day announcements including changes to income tax and USC bands, the Personal, PAYE and Earned Income Credits.
- As announced on Budget Day, the Help to Buy Scheme in its current enhanced format has been extended to the end of 2022. A new zoned land tax has also been introduced which it is hoped will generate increased housing supply over the coming years.
- In a measure that was not announced on Budget Day, the Act has put the Revenue concession in relation to the BIK

exemption for employer-provided Covid-19 tests and flu vaccines on a statutory footing.

- The Act puts the availability of a 30% deduction from income tax for heat, electricity and broadband costs for employees working from home on a legislative footing.
- The Act includes the changes announced on Budget Day in relation to the extension of the Employment Wage Subsidy Scheme to 30 April 2022 and the changes to the subsidies that will apply from February 2022 onwards.
- The tax debt warehousing scheme has been expanded to allow self-assessed income taxpayers with employment income, who have a material interest in their employer company, to warehouse income tax liabilities relating to their Schedule E income from that employer company.

Analysis of the key measures

Personal tax thresholds, exemptions and credits

Finance Act 2021 is focused on easing the cost of living and is released against a backdrop of increased inflation and a winter of rising energy prices.

The Act includes the increase of €1,500 to the Standard Rate Cut Off Point announced in Budget 2022, and also the change to the 2nd USC rate band to reflect the increase to the minimum wage. The Personal, PAYE, and Earned Income Credit for the self-employed all increased to €1,700. For higher rate taxpayers, this will result in an annual reduction in income tax and USC of €412 in 2022.

The Help to Buy scheme in its current enhanced format has also been extended to the end of 2022. Under the enhanced relief individuals can claim the lower of 10% of purchase price or €30,000.

The recent Pensions Commission report and the Tax Strategy Papers 2021 both recommended PRSI increases to help fund the deficit in Ireland's Social Insurance Fund (SIF). We keenly await the report from the Cabinet Committee on Economic Recovery and Investment which is due to bring a recommended response and implementation plan to Government by the end of March 2022.

Remote Working

Employees will welcome the increase in the deduction from income tax from 10% to 30% available in relation to light and heat costs which can be claimed for days working from home, and the fact that these tax deductions will now be set out in legislation. This will result in an extra €48 for a higher rate taxpayer who works from home for c.100 days per year and has a heat and electricity costs of €2,250 per annum.

Unfortunately, there is no change in the process for claiming the deduction which is quite burdensome. There is also no provision to allow workers to claim a tax deduction for expenditure on equipment used for remote work purposes.

A wider review of the tax treatment of travel and subsistence reimbursements to employees and how these should apply to hybrid working arrangements would be welcome.

COVID-19 measures

Finance Act 2021 confirms the extension of the Employment Wage Subsidy Scheme to 30 April 2022.

- There is no change to the eligibility criteria for the scheme which continues to be a 30% reduction in turnover or customer orders in the period from 1 January to 31 December 2021 compared to 1 January to 31 December 2019.
- There is no change to the subsidy rates for October 2021 to January 2022.

- For February 2022, a two-rate structure of €151.50 and €203 will apply
- A flat rate subsidy will apply in March and April 2022 and the reduced employer PRSI rate will no longer be available in this period.
- The scheme will close to new entrants from 1 January 2022.
- Based on changes made in December 2021, the EWSS was re-opened for certain employers who had previously availed of the scheme at any time between 1 September 2020 and 31 December 2021, but who were not eligible on 31 December 2021. See our Private Business / Individuals insight for further details.

The Act also includes a provision to permit self-assessed individuals who have a “material interest” in their employer company to participate in the Tax Debt Warehousing Scheme in respect of income tax liabilities relating to their Schedule E income from that employer. This is an important amendment as otherwise these individuals, who have paid PAYE on their employment income, could have an income tax liability solely arising from the fact that their employer has availed of the Tax Debt Warehousing Scheme.

Other Measures

Finance Act 2021 introduces an exemption from a BIK charged in respect of employer provided Covid-19 tests where the test is necessary for the performance of the duties of employment. It also introduces an exemption for employer provided flu vaccines, where the vaccines are made available to all employees. While this BIK exemption was previously available by way of Revenue concession, we welcome the introduction of the exemption into legislation.

We are here to help you

Finance Act 2021 comes at a time when the business community is focused on restoring workforces, attracting and retaining talent and upskilling for the future. We are ready to help you as you plan for the long term.

Property

The impact and effect of Finance Act 2021 on Property

Property measures announced in Finance Act 2021 evidence the Government's continued focus on increasing housing supply. No amendments to the Irish Real Estate Fund (IREF) regime or Real Estate Investment Trust regime (REIT) have been included.

A measure in relation to the taxation of non-resident corporate landlords has been introduced which will see non-resident corporate landlords who are currently within the scope of income tax brought within the scope of the Irish corporation tax regime. The rationale for the change is to ensure that such taxpayers will be subject to the new ATAD interest limitation rules as opposed to generating additional tax revenue.

The Act contains some changes to the legislation passed in summer 2021 which introduced a 10% stamp duty charge on the bulk purchase of houses and duplexes ("relevant residential units"). None of the amendments change the substance of the existing legislation, they are merely intended to clarify certain areas of doubt, and rectify some unintended consequences of the legislation as originally drafted.

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The key Property measures introduced in Finance Act 2021

- Non-resident corporate landlords will be subject to Irish corporation tax (as opposed to income tax) on Irish sourced rental profits and gains accruing on or after 1 January 2022.
- A new zoned land tax will replace the vacant site levy. An annual 3% tax (based on the market value of the land) will apply to serviced land which is zoned for residential development. There will be a two year lead-in time for land zoned before January 2022 (three years for land zoned after January 2022).
- Certain clarifications in relation to the recent 10% stamp duty charge on the bulk purchase of houses and duplexes have been included in the Act.
- The Help To Buy scheme has been extended, in its current form, for another year to the end of 2022.
- The relief for pre-letting expenses incurred by residential landlords has been extended for a further 3 years.

Analysis of the key measures

Taxation of non-resident landlords (section 18)

A change to the taxation of non-resident corporate landlords has been introduced. It will see such taxpayers, who are currently subject to income tax, brought within the corporate tax regime. Currently, where Irish property assets are held by a non-resident company which does not carry on a trade in the State through a branch or agency, the related net rental profits earned by the company are subject to Irish income tax at a rate of 20%. Under the measures announced in the Act, non-resident landlords will be subject to Irish corporation tax at a rate of 25% on profits and gains accruing on or after 1 January 2022.

Provisions have been included to ensure that capital allowances and rental losses carried forward are not lost as a result of the transition from the income tax to corporation tax basis of taxation. For companies coming within the charge of corporation tax as a result of the transition from income tax, the due date for preliminary corporation tax has also been amended where their accounting period ends between 1 January 2022 and 30 June 2022. Under the measures introduced, preliminary tax will be payable on or before 23 June 2022 where the payment is made by electronic means.

Furthermore, as is already the case for Irish companies, non-resident landlords will now be subject to corporation tax rather than capital gains tax on the disposal of their property assets, with the effective rate remaining at 33%.

The rationale for the change is to ensure that non-resident corporate landlords will also be subject to the ATAD interest limitation rules introduced in the Act as opposed to generating additional tax revenue.

Zoned Land Tax

On Budget Day, the Minister announced the introduction of a new zoned land tax (ZLT) which will apply to owners of serviced, undeveloped land which has been zoned for residential use. The ZLT replaces the 'vacant site levy' which was first introduced under the Urban Regeneration & Housing Act 2015. The vacant site levy is currently administered by local authorities. However, the ZLT will be self-assessed and will be administered by the Revenue Commissioners.

Under the measures included in the Act, an annual 3% tax will apply and the tax will be based on the market value of the land that is within the scope of the regime. A two year lead-in time will apply to lands zoned prior to 1 January 2022 and a three year lead-in time will apply to lands zoned after 1 January 2022. No minimum site exclusion will be imposed (unlike the vacant site levy which excluded sites below 0.05 hectares).

The purpose of the ZLT, similar to its predecessor the vacant site levy, is not to generate tax revenue. Rather it is aimed at incentivising those who own serviced and undeveloped sites, that are zoned for residential use, to make them available and bolster supply. The Minister for Finance has committed to engaging with stakeholders over the course of 2022 in relation to the operation of the new regime which is welcome.

There are a number of exclusions from the ZLT, such as land that:

- is subject to commercial rates,
- is being used for the purposes of a trade / profession that it is reasonable to consider is being used to provide services to residents of adjacent residential areas and is not an unauthorised development (within the meaning of the Planning and Development Act 2000),
- is required for, or is integral to, occupation by, a number of infrastructure facilities (including education, healthcare, transport, energy, telecommunications, water / wastewater, waste management / disposal, recreational),
- is subject to a statutory designation that may preclude development, or
- is subject to the derelict sites levy.

Stamp duty on certain acquisitions of residential property (section 58)

The Act contains some changes to the legislation passed in summer 2021 which introduced a 10% stamp duty charge on the bulk purchase of houses and duplexes ("relevant residential units"). The key changes are:

- The acquisition of a relevant residential unit with an existing housing authority lease in place does not qualify for the exception from the 10% rate for relevant residential units that are acquired and, on the acquisition date, are leased to a housing authority;
- The rebate (80%-90% of the duty) that is available where the 10% duty is initially paid on the acquisition of a relevant residential unit, but the unit is subsequently leased to a housing authority or approved housing body is not available in respect of houses / duplexes

acquired with existing leases in place;

- An unintended charge to stamp duty on certain contracts or agreements for the purchase of shares to the extent that they derive their value from apartments has been removed; and
- An unintended denial of certain exemptions for transfers of shares to the extent that they derive their value from apartments has been removed, i.e. these exemptions will continue to apply to the value derived from apartments.

None of the amendments change the substance of the existing legislation, they are merely intended to clarify certain areas of doubt and rectify some unintended consequences of the legislation as originally drafted.

Help to Buy Scheme (section 5)

The Help to Buy Scheme (introduced in Finance Act 2016) has been further extended, in its current form, to 31 December 2022. The scheme is aimed at bolstering the supply of first-time buyer homes.

The scheme provides relief to first-time buyers in the form of a rebate of income tax, including DIRT, paid over the previous 4 tax years. The maximum rebate available is the lower of:

- €30,000, or
- the amount of income tax and DIRT paid in the previous 4 years, or
- 10% of the purchase price or valuation of a self-build.

Relief is capped at €30,000, a maximum house price of €500,000 and a minimum Loan-To-Value of 70%. The Minister has committed to a full review of the scheme during the course of 2022.

Pre-letting expenditure on rented residential property (section 16)

Finance Act 2017 introduced a deduction for certain pre-letting expenditure incurred in respect of previously vacant residential premises. Under the provisions of section 97A TCA 1997, a tax deduction (up to a maximum of €5,000 per vacant premises) is available in respect of expenses incurred on a residential premises that has been vacant for at least 12 months and is rented to tenants during the period from the passing of the 2017 Finance Act to 31 December 2021. Section 16 of the Act provides for the relief to be extended for a further three years to 31 December 2024.

The extension is aimed at encouraging landlords in the residential rental sector to return empty residential properties to the market as soon as possible. The number of private residential landlords has been decreasing over the past number of years.

Principal Private Residence

An amendment was made to the Bill as initiated at Dáil Committee Stage relating to the capital gains tax relief available to individuals on the disposal of a principal private residence. The amendment ensures that, where a qualifying residence is disposed of through a raffle or draw, relief is limited to any gain made up to the market value of the property. If the proceeds raised exceed market value, any gain over market value is thus not eligible for relief.

We are here to help you

PwC continues to be at the forefront of consultations with the Department of Finance and Revenue on key tax issues affecting the Irish real estate sector, both directly and through relevant representative bodies.

Please get in touch with us for further insights. We would welcome feedback from you on issues that are impacting your business and on matters that may help in continuing to shape the policy agenda for the Irish real estate sector.

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The impact and effect of Finance Act 2021 on VAT

The main legislative changes introduced in Finance Act 2021 that impact on VAT include a requirement to notify Revenue of certain changes to a VAT group, the deletion of a provision which may result in VAT becoming chargeable on cancellation fees, and the application of the zero-rate of VAT on the supply of COVID-19 on the supply of COVID-19 vaccines, COVID-19 in-vitro diagnostic medical devices and services closely linked to them.

The key measures impacting on VAT in Finance Act 2021 are as follows:

- The Act introduces a requirement to notify Revenue if there have been certain changes to a VAT group and, if not so notified, a penalty of €4,000 will apply for each taxable period in which they were not notified. The changes in a VAT group which require notification are as follows:
  - There has been a significant change in the financial, economic and organisational links between the persons in a VAT group; or
  - A person in a VAT group ceases to be established in the State; or
  - The requirement that at least one of the persons in the VAT group is an accountable person is no longer met.
- The Act deletes a provision of the Act which provides that an amount received by way of deposit from a customer for a supply that does not take place is not subject to VAT. The rationale for this deletion is to give effect to certain judgments of the Court of Justice of the European Communities which

provide that cancellation fees are subject to VAT as they constitute a payment for either a service or a right to access a service.

- As flagged in the Budget, the farmer's flat-rate addition is being reduced from 5.6% to 5.5% with effect from 1 January 2022.
- There are a number of refunds available under VAT legislation by way of Ministerial Order for persons who would ordinarily not be entitled to deduct VAT including, for example, refunds of VAT for donated medical equipment, VAT on touring coaches and VAT on unregistered farmers for certain farm buildings. The Act introduces a provision under which a taxpayer who has received a refund of VAT under a Ministerial Order is obliged to repay all or part of that refund if Revenue have reasonable grounds to believe that details of the claim giving rise to the refund were incorrect and that the person was not entitled to all or part of the refund.
- The Act puts on a statutory footing a concession which zero-rates the supply of COVID-19 vaccines, COVID-19 in-vitro diagnostic medical devices and services closely linked to them. This zero-rate will apply up to 31 December 2022.
- The Act introduces a zero-rating (with effect from 1 January 2021) which provides for a VAT zero-rating on the importation of goods by, and the supply of goods and services to, the EU Commission and bodies established under EU law, in the execution of tasks conferred by EU law in responding to the COVID-19 pandemic.

Analysis of the key measures

Changes in a VAT group

Finance Act 2021 introduces a requirement to notify Revenue if there have been certain changes to a VAT group. If not so notified, a penalty of €4,000 will apply for each taxable period in which they were not notified. The changes in a VAT group which require notification are as follows:

- there has been a significant change in the financial, economic and organisational links between the persons in a VAT group; or
- a person in a VAT group ceases to be established in the State; or
- the requirement that at least one of the persons in the VAT group is an accountable person is no longer met

The requirement to notify Revenue of changes to a VAT group is an additional compliance burden for business. Group reorganisations, mergers and acquisitions could all result in changes in the financial, economic and organisational links between persons in a VAT group. Businesses will now need to monitor such changes to assess whether notification is necessary.

Cancellation deposits

Finance Act 2021 deletes a provision of the Act which provides that an amount received by way of deposit from a customer for a supply that does not take place is not subject to VAT. The rationale for this deletion is to give effect to certain judgments of the Court of Justice of the European Communities which provide that cancellation fees are subject to VAT as they constitute a payment for either a service or a right to access a service.

This provision is consistent with recent European Court of Justice case law which determined that deposits received from a customer for supplies that do not take place are subject to VAT. There is earlier case law which held that deposits kept by a hotel for cancelled bookings had no direct connection with the supply of any service but should be viewed as compensation outside the scope of VAT.

Depending on the exact fact pattern, there may still be arguments to treat deposits retained as compensation as not subject to VAT. However, the removal of this statutory provision substantially increases the risk that such deposits would be subject to VAT.

Refunds of VAT under a Ministerial Order

There are a number of refunds available under VAT legislation by way of Ministerial Order for persons who would ordinarily not be entitled to deduct VAT including for example refunds of VAT for donated medical equipment, VAT on touring coaches and VAT on unregistered farmers for certain farm buildings. The Act introduces a provision under which a taxpayer who has received a refund of VAT under a Ministerial Order is obliged to repay all or part of that refund if Revenue have reasonable grounds to believe that details of the claim giving rise to the refund were incorrect and that the person was not entitled to all or part of the refund.

While it is reasonable to introduce a provision enabling Revenue to obtain repayment of a refund of VAT incorrectly obtained, it is notable that the threshold for disallowing the refund is if Revenue have "reasonable grounds" to believe that the details are incorrect.

Other VAT measures

- The Act puts on a statutory footing a concession which zero-rates the supply of COVID-19 vaccines, COVID-19 in-vitro diagnostic medical devices and services closely linked to them. This zero-rate will apply up to 31 December 2022
- The Act introduces a zero-rating (with effect from 1 January 2021) which provides for a VAT zero-rating on the importation of goods by, and the supply of goods and services to, the EU Commission and bodies established under EU law, in the execution of tasks conferred by EU law in responding to the COVID-19 pandemic.
- As flagged in the Budget the farmer's flat-rate addition is reduced from 5.6% to 5.5% with effect from 1 January 2022

Trade and Customs

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The impact and effect of Finance Act 2021 on general excise provisions

Finance Act 2021 (the Act) introduces a number of new provisions transposing the new EU General Excise Directive, which will enter into effect on 13 February 2023 (but must be transposed by Member States by 31 December 2021). In particular, it gives legislative effect to a new electronic system for monitoring and controlling duty-paid commercial movements of excisable goods.

In addition, the Act clarifies the treatment of partially denatured alcohol and its entitlement to excise relief.

The Act also confirms the increases to Tobacco Products Tax introduced in the Budget.

The key general excise measures introduced in Finance Act 2021 are as follows:

The Act transposes Council Directive 2020/262 (general arrangements for excise duty) into Irish law. These provisions enter into effect on 13 February 2023 and include in particular:

- Creation of an electronic system for intra-EU duty-paid movements and the creation of two new categories: "certified consignors" and "certified consignees" as the only persons that can send/receive duty-paid goods for commercial purposes
- New requirement on importers of excisable goods (to be moved under duty suspension within the state) to provide the SEED numbers of the registered consignor and consignee

- New provisions on treatment of excisable goods lost/destroyed in Ireland under duty suspension or where duty-paid in another Member State
- Other amendments to reflect the wording of the new Directive

Other alcohol points

- Clarification on the conditions for mutual recognition of partially denatured alcohol and confirmation of the availability of excise relief for partially denatured alcohol where used for maintenance and cleaning of manufacturing equipment
- The 50% excise relief for beer produced by small, independent breweries is extended to cover qualifying beer/breweries outside the EU
- Waiver of excise duty this year on the renewal of certain liquor licences

Tobacco points

- Confirmation of the Budget excise duty increase of 50c on a pack of 20 cigarettes (with pro-rata increase for other tobacco products)

Analysis of the key measures

Directive 2020/262 replaces the old EU legislative basis on general arrangements for excise duty. It enters into force on 13 February 2023 but must be transposed by Member States by 31 December 2021.

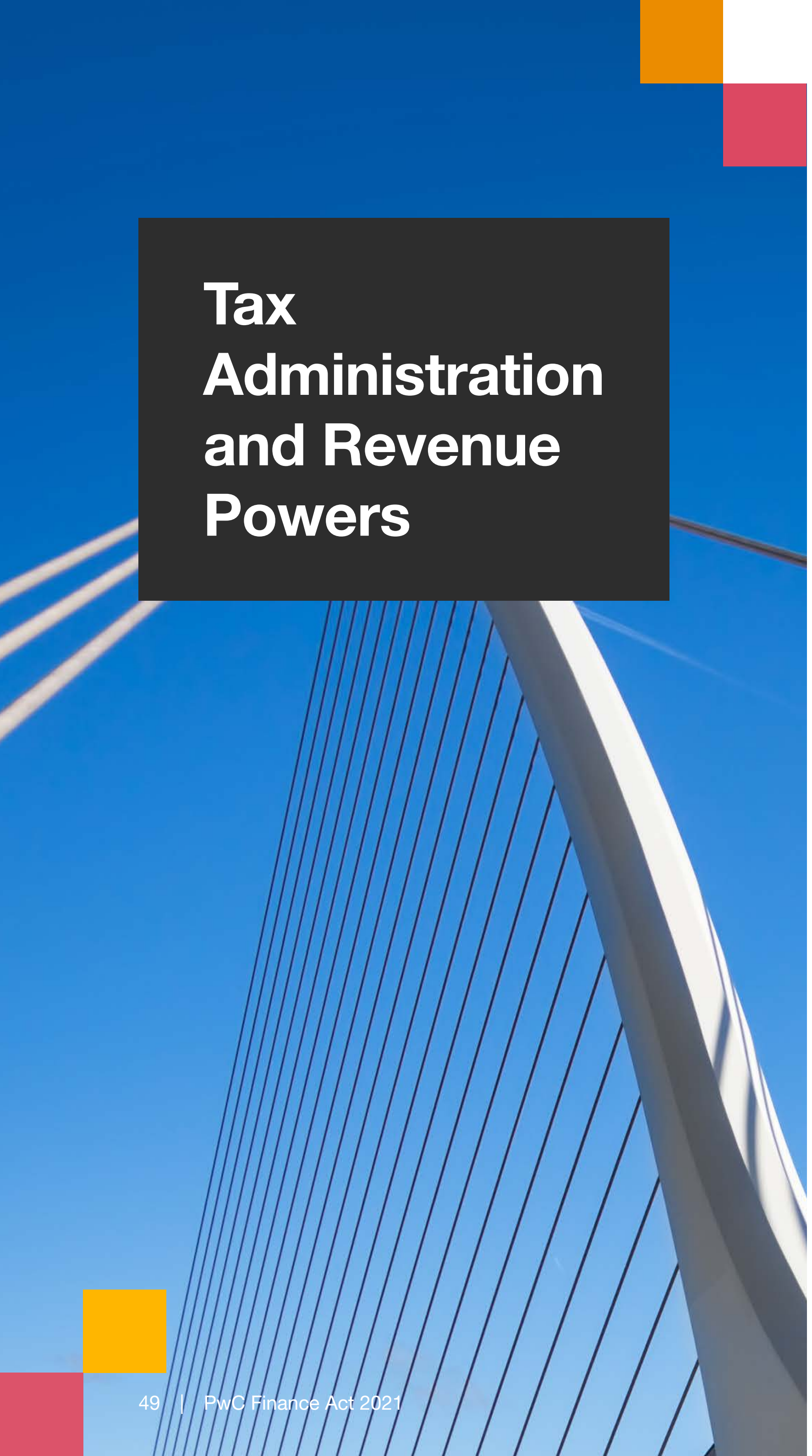
- Commercial intra-EU movements of duty paid excisable goods will now be subject to an electronic system of monitoring and control (similar to that already in place for duty suspended movements). This includes the creation of new categories of certified persons and new electronic documents.
- New requirements on importers to help excisable goods imported for onward duty suspended movements
- Provisions on the treatment of excisable goods destroyed or irreparably lost under duty suspension or where duty paid in another Member State to that where the destruction/loss took place.

Other general excise highlights include:

- Clarification on the treatment of partially denatured alcohol from a mutual recognition and relief perspective.
- The 50% excise relief for qualifying "craft" beer breweries is extended to include qualifying breweries outside the EU
- To support the drinks and hospitality industry, the excise duty on renewals of certain liquor licences is waived (as was the case last year)
- The increases in excise duty on tobacco products set out in the Budget are confirmed.

We are here to help you

Due to the unconsolidated nature of Irish excise law, the excise provisions in the Act and their implications for your business can take time to unravel. We in the PwC Global Trade and Customs team are here to support you by identifying how they impact you and what measures can be taken to minimise business disruption and maximise potential opportunities.



Tax Administration and Revenue Powers

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The impact and effect of Finance Act 2021 on tax administration and appeal cases

The Finance Act contains a number of amendments to the penalty and publication regime in Ireland and also to the tax appeals process. Please read our insights below.

The key tax administration measures introduced in Finance Act 2021 are as follows:

Publication

The Finance Act has introduced a number of changes in relation to the publication regime.

- A settlement will now only be publishable when it exceeds €50,000, which is an increase from the current publication threshold of €35,000. The legislation has also been updated to clarify that tax repayments that have been overstated by more than €50,000 will be publishable. It is important to note that the €50,000 threshold introduced by the Act relates only to tax (and not to tax, interest and penalties, which had previously been the case).

- A settlement need only contain tax and a penalty to be publishable (currently it must feature tax, interest and a penalty) but where the settlement is publishable, the tax, interest, surcharge and penalty will be published.
- The details in respect of a tax defaulter's name have also been expanded to ensure that a defaulter cannot avoid recognition by using an alternate name.

Penalties

The Act has introduced some positive changes in relation to the statutory penalties which apply in cases where tax has been underpaid.

- The penalty mitigation provisions of Technical Adjustments and Innocent Error have now been put on a statutory footing. These mechanisms had previously only been referenced in Revenue's Code of Practice.
- Similarly, the Act also provides a legislative basis for the non-imposition of a tax-geared penalty in cases where the total tax default is careless and below EUR 6,000.

Retention of records

- The Finance Act inserts a provision which clarifies that records and linking documents must be kept where they relate to any allowance, deduction, relief or credit taken into account in computing the amount of tax payable. Furthermore, records should be kept for the six-year period from the end of the year of assessment or accounting period in which the return has been delivered.

Tax appeals

- In respect of tax appeals, the Finance Act has extended the timeline for Appeal Commissioners to draft a case stated for the High Court where a decision of the Tax Appeals Commission has been appealed. Appeal Commissioners now have three months to complete their draft of the case stated before inviting representations from both parties, rather than the three month timeline incorporating the time to allow input from the parties involved. This is an acknowledgement of how tight the timeline is for submitting an appeal of a Tax Appeals Commission decision to the High Court.
- It is noteworthy that both parties still only have 21 days to make representations on the case stated and this timeline was not extended. A further 21 days has been added for the case stated to be finalised after the parties have made their representations.

Analysis of the key measures

The amendments introduced in the Finance Act signal Revenue's renewed focus on compliance interventions, particularly in the context of the proposed changes to its Compliance Intervention Framework which will be implemented next year.

The increase in the publication threshold to tax settlements in excess of €50,000 is welcome and a move in the right direction. However, this threshold is still low in relative terms in the context of the tax liabilities arising to most medium and large businesses. The expansion of provisions relating to the tax defaulters name (so they cannot avoid recognition by using an alternative name) is evidence of Revenue's continued commitment to publishing the (proper) names of non-compliant taxpayers.

The introduction of the penalty mitigation provisions into legislation is positive and ensures greater alignment with Revenue's Code of Practice for Revenue Audits and Other Compliance Interventions.

While overall we have seen some positive amendments in respect of penalties and publication, businesses still face serious monetary and reputational risks where they underpay tax. It is important that businesses proactively manage these risks, particularly with Revenue audit activity expected to ramp back up to pre-Covid levels.

We are here to help you

Our Tax Risk and Controversy team help companies deal with all aspects of Revenue interventions and appeals. Our focus is on helping you to manage your tax risk, both prior to intervention or audit, as well as when Revenue formally intervenes.

To talk to us about Revenue audits, tax appeals and any concerns that you might have around risks in your business, please contact any member of our team.

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