SPV taxation

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Agenda

- Section 110 audits
- VAT issues
- Revenue On-Line Service (ROS) payments
- directors expenses
- Base Erosion and Profit Shifting (BEPS)

Typical orphaned section 110 structures

Charity

Share Trustee

100% of the issued share capital (equity) of SPV is held on trust for a charity

Investor(s)/distressed asset fund

SPV is financed **with debt** (usually profit participating)***** with a return/coupon to noteholder(s) being linked to yield on Qualifying Assets held by the SPV net of expenses.

Irish structure can greatly reduces tax leakage / increases efficiencies. 0% Irish WHT on interest paid to Investors.

Irish SPV
(Section 110 company)

Qualifying assets

- Securities
- Non performing loans
- Financial assets/ receivables
- Commodities
- Aircraft/rolling stock

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Irish taxation issues

- the tax analysis in a securitisation is crucial. If the company is a "qualifying company" as defined in Section 110 of the Taxes Consolidation Act 1997 (TCA) it will be taxed under the S110 regime

- key provision is Section 110(4) which permits a Section 110 company to take a deduction for profit participating interest provided certain conditions are satisfied.

Irish taxation issues

- virtually all transactions are structured to ensure:
  - the securitisation vehicle itself (a Section 110 company) is tax neutral (i.e. that payments out match payments in)
  - no Irish withholding tax is imposed on interest payments made by the securitisation vehicle.

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Taxation issues

- s130 TCA: definition of dividend for Irish tax purposes includes:
- “securities under which -
  - the consideration given by the company for the use of the principal secured is to any extent dependant on the results of the company’s business or any part of the company's business.”
  - i.e. no deduction for profit participating interest
- however Section 110(4) TCA suspends this re-characterisation rule for Section 110 companies provided certain conditions are satisfied.

Conditions for deductibility

- interest is paid to an Irish resident or a non-resident company with a branch/agency in Ireland
- interest is paid to a tax exempt person such as a pension fund or government body resident in a relevant territory (EU member state or double tax treaty partner)
- interest is subject to tax in a relevant territory
- interest has been subject to withholding tax in Ireland

Conditions for deductibility

- interest is paid on a quoted Eurobond (listed note) or a wholesale debt instrument (e.g. commercial paper) and is not paid to a "specified person" in circumstances where the S110 company knows that the interest income will not be subject to tax in a relevant territory
- one of the main benefits must not be to secure an Irish tax advantage for a specified person

Requirements to qualify under Section 110 TCA

- company must be Irish tax resident
- company must hold or manage “qualifying assets”
- company cannot carry on any other activities (unless ancillary to holding/managing qualifying assets)
- first transaction must have a value of at least €10 million
- all transactions (save for profit participating debt) must be entered into on arm’s length terms
- must notify the Irish Revenue Commissioners of its intention to be a qualifying company for the purposes of Section 110 TCA

Requirements to qualify under Section 110 TCA (continued)

- meaning of qualifying assets for purposes of Section 110
  - financial assets
  - commodities
  - plant and machinery
- meaning of financial assets for purposes of Section 110
  - shares, bonds and other securities
  - futures, options, swaps, derivatives and similar instruments
  - invoices and all types of receivables
  - obligations evidencing debt (including loans and deposits)
  - leases and loan and lease portfolios
  - hire purchase contracts.

Requirements to qualify under Section 110 TCA (continued)

  - acceptance credits and all other documents of title relating to the movement of goods
  - bills of exchange, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments
  - carbon offsets
  - contracts for insurance and contracts for re-insurance
- commodities means tangible assets (other than currency, securities, debts or other assets of a financial nature) which are dealt in on a recognised commodity exchange
- plant and machinery includes ships, aircraft, rolling stock and other equipment.

Withholding tax

- 20% withholding tax chargeable on interest payments made by Irish companies
- withholding tax is imposed on the payer but suffered by the recipient (it reduces the amount they are entitled to receive)
- exemptions apply:
  - quoted Eurobond
  - EU/DTT exemption
  - commercial paper.

Withholding tax exemptions

1. quoted Eurobond exemption (listed notes)

- a “quoted Eurobond” is defined by Section 64 TCA as:
  - a security which is issued by a company
  - is quoted on a recognised stock exchange
  - carries a right interest
- no withholding tax imposed on quoted Eurobonds provided
  - the paying agent is not located in Ireland
  - the quoted Eurobond is held in a recognised clearing system
  - the recipient is the beneficial owner of the quoted Eurobond, is not resident in Ireland and has made a declaration to that effect.

Withholding tax exemptions (continued)

2. EU/double taxation treaty exemption

- Section 246(3)(ccc) TCA
- no obligation to withhold tax in respect of interest payments made by a qualifying SPV in the ordinary course of trade or business carried on by it, to any person who is resident in an EU member state (other than Ireland) or in a double taxation treaty jurisdiction
- in order to obtain this exemption, noteholders must be identifiable by the SPV.

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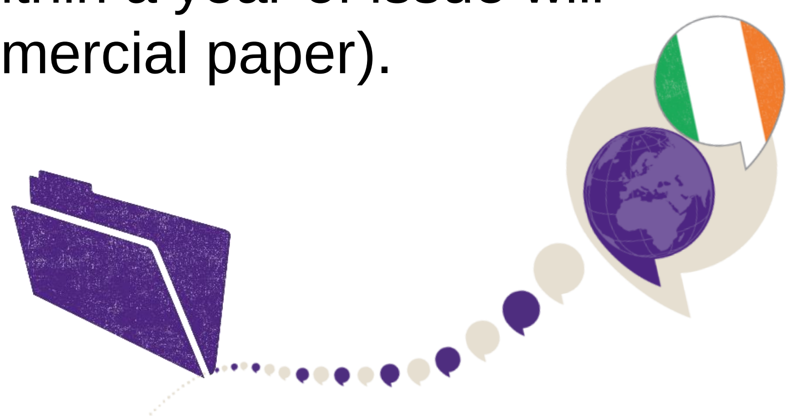
Withholding tax exemptions (continued)

3. commercial paper exemption

- commercial paper is short term paper that matures either:
  - within a year of issue (such that the interest is not “yearly” interest and not within the withholding provision at S246(2) TCA)
  - within two years of issue and qualifies as a wholesale debt instrument as defined in Section 246A TCA (note only commercial paper that matures within a year of issue will satisfy the COBI definition of commercial paper).



Special Purpose Vehicles (SPVs)

VAT considerations

- activities of an SPV are generally exempt from VAT
- EU VAT legislation provides for an exemption in respect to the management of certain qualifying funds
- first schedule to Irish Consolidated VAT Act 2010 exempts from VAT the management of certain undertakings including a qualifying company for the purposes of Section 110 of the Taxes Consolidation Act
- Irish Revenue has broadly interpreted the meaning of management in line with European Court of Justice (ECJ) case law including SDC (C-2/95) and Abbey National (C-169/04).

SPVs

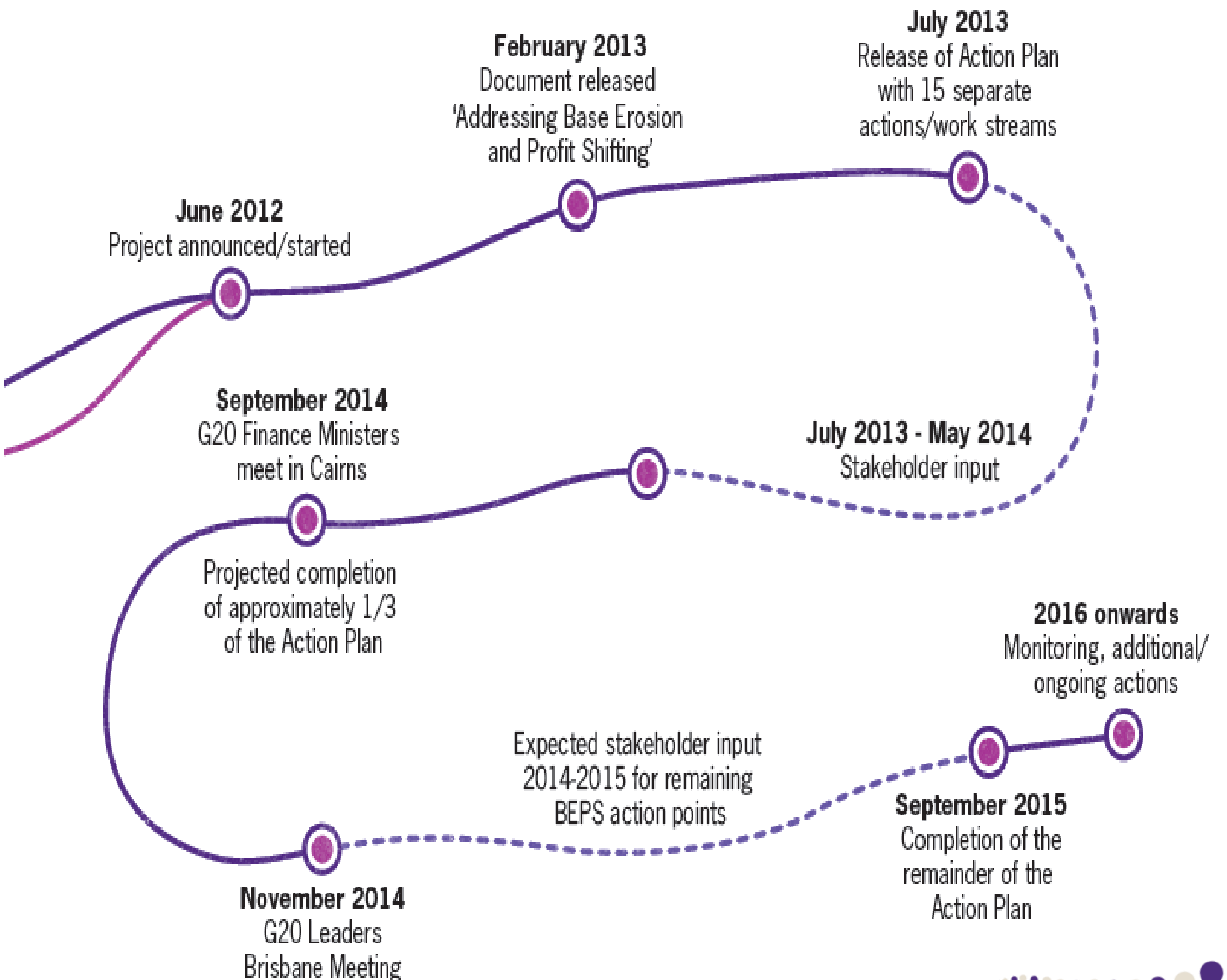
VAT considerations

- as the activities of an SPV are regarded as VAT exempt the SPV will not have VAT recovery in its own right.
- most of the costs (management/custodian) incurred by the SPV should be VAT exempt
- however, certain local costs such as legal/tax fees charged to the SPV are likely to include VAT. Some services received from outside Ireland will also be subject to VAT
- there is limited potential to recover the VAT on such costs based on EU/non EU split
- potential advantage to set up a VAT group with any related entities to maximise recovery of VAT.

Hot topics

- ROS payments online
- directors expenses
- notification letters

BEPS action plan timeline



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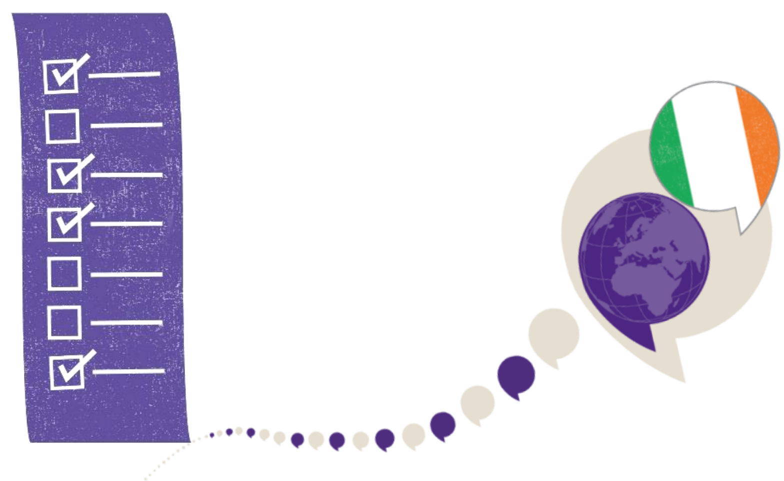
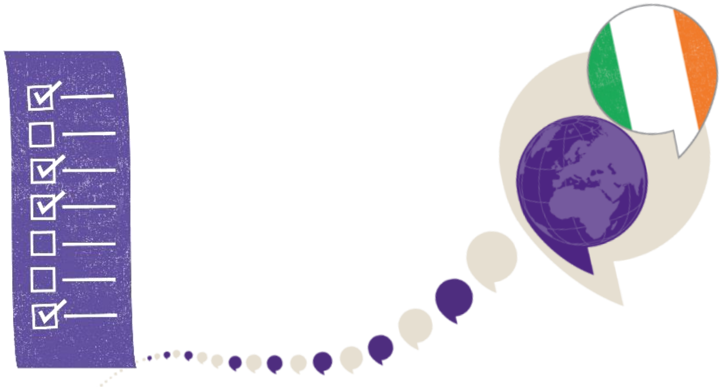
BEPS progress so far – draft reports

- **action 3:** strengthening of CFC rules
- **action 4:** limitation of interest deductibility – part 1
- **action 5:** revised nexus approach (development of IP)
- **action 6:** Limitation-on-Benefits (LOB) clauses in DTTs
- **action 7:** prevent the artificial avoidance of PE status



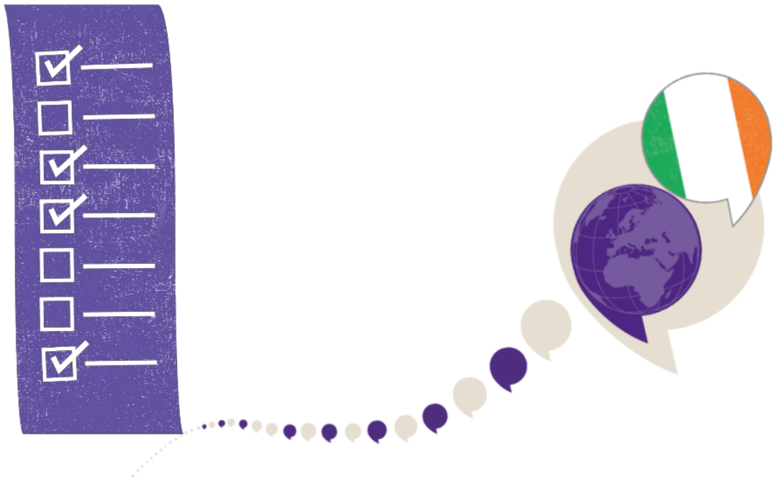
BEPS progress so far – draft reports

- **actions 8 - 10**: transfer pricing
  - commodity transactions
  - profit splits
  - risk re-characterisation
  - low value adding services
  - cost contribution arrangements
  - intangibles: ownership and valuation



BEPS progress so far – draft reports

- **action 11:** establish methodologies to collect and analyse data on BEPS and actions to address it
- **action 12:** mandatory disclosure rules
- **action 13:** TP documentation
- **action 14**: dispute resolution



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EU parent subsidiary directive (2011/96/EU)

- binding **anti-abuse** clause
- formulated as a ‘**De Minimis**’ rule

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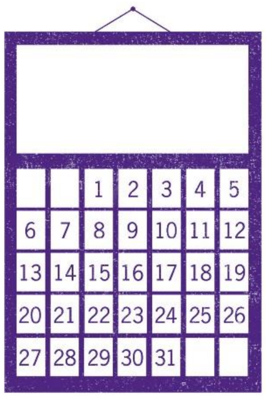
OECD modified nexus approach for IP

- no new applications under current regimes – 30 June 2016
- grand fathering of current regimes - 30 June 2021
- modified nexus-compatible regimes - July 2016



Beneficial ownership register

- Fourth Anti Money Laundering Directive (AMLD4)
- will affect all legal entities
- international and domestic opportunities

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Questions & feedback