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REPORT

From: General Secretariat of the Council
To: Delegations
Subject: Code of Conduct Group (Business Taxation)
- Report to the Council

Ireland's Digital Games Relief (IE017) – Assessment

1. General Description of the Measure

The measure concerns a tax relief for the digital gaming sector introduced in Ireland's Finance Act 2021. The standstill procedure under the Code of Conduct has awaited completion of a state aid procedure.

The relief provided by the measure consists of a tax credit for expenditure incurred by digital game development companies on the development of digital games which support the promotion of Irish or European culture. The relief is a corporation tax credit claimed through the corporation tax return. Where the relief is greater than the corporation tax due, the excess amount of the relief is paid to the company.

The assessment has been carried out under paragraph B.1, subparagraphs 1-4, of the Code of Conduct on the basis of the agreed description¹ that was adopted by the Code of Conduct Group on 26 April 2023.

¹ Agreed Description – IE017 – Digital Games Relief. Document: WK 2490/2023 INIT.

2. Assessment of the Measure

B.1 Significantly lower level of taxation:

“Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code”

The measure provides for a tax credit for expenditure incurred by digital game development companies on the development of digital games which support the promotion of Irish or European culture. The relief is a corporation tax credit claimed through the corporation tax return. Where the relief is greater than the corporation tax due, the excess amount of the relief is paid to the company.

The tax credit per digital game is 32% of the lowest of:

- eligible expenditure,
- 80% of total qualifying expenditure, or
- EUR 25 000 000.

On this basis, the tax credit is capped at EUR 8 000 000 per digital game (32% of EUR 25 000 000).

The measure, thus, provides for a tax credit that could lead to a significantly lower effective level of taxation which is potentially harmful within the meaning of paragraph A of the Code.

Criterion 1:

“Whether advantages are ringfenced de facto or de jure from the domestic market, e.g., they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base”

Criterion 1 contains two elements. The first element is whether the measure is only or mainly available to non-residents or transactions with non-residents (criterion 1a). The second element is whether it is only or mainly used by non-residents or for transactions with non-residents (criterion 1b).

1a) Criterion 1a concerns the *de jure* application of the measure. The Digital Games Relief is applicable to companies that are primarily responsible for the design, production, and testing of a digital game. The company must be resident for tax purposes in Ireland or be resident for tax purposes in an EU/EEA Member State and, at the time of payment of the relief, carry on business in Ireland through a branch or agency.

On this basis, the measure does not only grant advantages to non-residents or in respect of transactions with non-residents. It is, thus, proposed to mark this criterion with “X”.

1b) Criterion 1b is used to complement the assessment under criterion 1a which only looks at the literal interpretation of the measure. It takes account of the *de facto* effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents the measure will fall foul of criterion 1b.

The Digital Games Relief entered into force in 2022 and, therefore, it is unlikely that any representative data is available at this stage to reflect the actual effects of the measure.

As the assessment is based on currently available information, it is suggested that the Group reserves the possibility of reassessing the effects of the measure when reliable data becomes available. It is, thus, proposed to mark this criterion with “?”.

Criterion 2:

“Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages”

According to the established practice for the assessment of a measure against criterion 2, a measure is found harmful under this criterion if there are no specific requirements with regard to real economic activities, such as premises, employment and expenditure.

With regard to the Digital Games Relief, it is a pre-condition to be eligible for a tax credit that the company has obtained a “cultural certificate”. The certificate is issued on the basis of a “cultural test” related to a number of elements, such as whether a substantial part of the creative work is carried out in Ireland or another EU/EEA Member State. The test is expected to ensure, at least to a certain extent, substantial ties to Ireland or another EU/EEA Member State.

For eligible companies, the tax credit is computed on the basis of expenditure, which is one of the substance requirements. “Qualifying expenditure” is defined as the total expenditure incurred by the company on the design, production and testing of a digital game, including certain subcontractor payments. The portion of the qualifying expenditure that is expended in the EU/EEA is referred to as “eligible expenditure”.

For example, an eligible company has eligible expenditure of EUR 8 000 000 and qualifying expenditure of EUR 12 000 000. The tax credit would be calculated as 32% of the lowest of:

(i) 8 000 000, (ii) 9 600 000 (80% of 12 000 000), or (iii) 25 000 000.

Thus, the tax credit would be calculated on the basis of the eligible expenditure and amount to EUR 2 560 000 (32% of 8 000 000).

Subcontracting may qualify for a tax credit when the activities are carried out by another party (a third party or a related party) and when the nature of the activities would fall within the definition of “qualifying expenditure” had the activities been carried out directly by the company. The subcontracting is limited to the development of the digital game and does not include the management and general administration of the development of the digital game.

As the qualifying subcontractor payments are capped at EUR 2 000 000, a company may benefit from a tax credit of maximum EUR 512 000 (32% of 80% of EUR 2 000 000) per digital game based on expenditure paid to a sub-contractor in a third country. The tax credit may amount to a maximum of EUR 640 000 (32% of EUR 2 000 000) based on expenditure paid to a subcontractor in an EU/EEA Member State.

The development of a digital game may be considered as a highly mobile activity and the possibility of outsourcing activities to subcontractors gives rise to some concern.

It is not a precondition for subcontractor payments to qualify for a tax credit that the subcontractor payments are income taxed in the state of the subcontractor. Certain other anti-abuse provisions have, however, been put in place.

Firstly, there are limitations on the activities qualifying as “qualifying expenditure” and the activities qualifying for subcontracting. Secondly, the design of the measure ensures that a tax credit will not be granted on the basis of the qualifying expenditure (i.e. total expenditure defrayed worldwide) if the main part of the expenditure is defrayed outside of the EU/EEA as the measure will only ever provide relief on expenditure up to the level of expenditure within the EEA. In other words, the expenditure defrayed outside the EEA on which relief is given cannot exceed 25% of the expenditure defrayed inside the EEA. If the eligible expenditure (i.e., expenditure defrayed in the EU/EEA) is 0, the tax credit will be 0 as well, irrespective of the qualifying expenditure (i.e. total expenditure defrayed worldwide). This means that an eligible company cannot defray all expenses outside the EU/EEA and still benefit from a tax credit in Ireland.

These anti-abuse provisions should ensure a direct link between activities carried out by a subcontractor and the subcontractor payments that may qualify for a tax credit.

Tax credit claims made by a company will also be subject to verification by the Irish tax authorities that may, inter alia, control whether any particular item of expenditure in the claim is inflated. The Irish tax authorities may also request the company to provide records that demonstrate breakdown of expenditure, i.e., a breakdown of expenditure to show qualifying expenditure.

On the basis of the above, it is proposed to mark this criterion with “X”.

Criterion 3:

“Whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD”

The measure allows for certain intra-group transactions as “qualifying expenditure” covers payments to related parties, e.g., in relation to the use of tangible and intangible assets owned/hold by a related party in the development of a digital game. In these cases, the general Irish Transfer Pricing rules apply to ensure that the transactions are priced in accordance with the arm’s length principle.

In addition, it is possible to outsource certain activities that would qualify as “qualifying expenditure” to related parties as Ireland has explained that “a third party”, in this sense, refers to any legal or physical person that is not the company carrying out the development of the digital game.

The measure does not depart from internationally accepted principles. It is, thus, proposed to mark this criterion with “X”.

Criterion 4:

“whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”

All preconditions necessary for the granting of a tax benefit should be clearly laid down in publicly available laws, decrees, regulations *etc.* before a measure can be considered transparent.

The Digital Games Relief is regulated by Section 481A Taxes Consolidation Act 1997(TCA). Further details are adopted by way of Regulation². Information on the measure and on individual tax credits (state aid grants) will be made available on www.revenue.ie.

The measure can, therefore, be considered transparent, and it is proposed to mark this criterion with “X”.

3. Overall Assessment

	1a	1b	2	3	4
IE017 - Digital Games Relief	X	?	X	X	X

The Digital Games Relief provides for a tax credit that could lead to a significantly lower effective level of taxation which is potentially harmful within the meaning of paragraph A of the Code.

Based on the assessment, the measure meets the requirements provided by criterion 1a, 2, 3 and 4.

With regard to criterion 1b, it cannot be determined whether the measure meets this criterion as there is no available data at this point. It is, thus, suggested that the Group reserves the possibility of reassessing the effects of the measure when reliable data becomes available.

With regard to criterion 2, it gives rise to concern that the measure allows for a (refundable) tax credit in Ireland based on subcontractor payments, i.e., payments expended outside Ireland. It is acknowledged that there are certain anti-abuse provisions in place, such as limitations on activities subject to subcontracting and limitations on the amount of expenditure qualifying for a tax credit, which should establish a direct link between activities carried out by a subcontractor and the subcontractor payments that may qualify for a tax credit.

² [Digital Games Regulations 2022, Statutory Instruments S.I. No. 593 of 2022.](#)

As the development of a digital game is considered a highly mobile activity, it should be ensured that the subcontractor payments which qualify for a tax credit would be income taxed in the state of the subcontractor. This would diminish the risk of subcontractor payments leading to a situation of double benefits.

However, the identified risks are limited by (i) the restrictions (activity and expenditure ceiling) on subcontractor payments qualifying for a tax credit, (ii) the temporary application of the measure which is due to run only until 31 December 2025, and (iii) the Irish Department of Finance's estimations on the cost of the measure anticipating that it will only amount to EUR 6 000 000 annually.

On the basis of the findings above, the measure should not be considered harmful within the meaning of paragraph B.1 but the effects of the use of subcontractors should be monitored. To carry out the monitoring, Ireland should provide sufficient information to the Group.

In a first step, the information should cover:

- number of beneficiaries,
- overall amount of tax benefits granted under the regime,
- how many of the beneficiaries are resident, non-resident or (directly or indirectly) foreign owned companies,
- the amount of tax benefits per category of company (resident, non-resident and foreign owned),
- the amount of qualifying (worldwide) expenditure,
- the amount of eligible (intra EEA) expenditure, and
- where the qualifying expenditure significantly exceeds the eligible expenditure, the amount of subcontractor payments to non-EEA jurisdictions.

Based on the data above, a second step could require further detail on subcontractor payments to non-EEA jurisdictions, like the countries in which the subcontractors are based.

4. Follow-up

- The Group agreed that the measure should be considered not harmful and that the effects of the use of subcontractors should be monitored.