PwC Ireland's response to the Department of Finance consultation on Pillar Two Minimum Tax Rate Implementation on OECD International Tax Proposals

PwC Ireland welcomes the opportunity to input to the discussion as to how Ireland will implement the Rules concerning Pillar Two and the introduction of a minimum effective tax rate.

We support an implementation process that aims to achieve certainty, stability and a pragmatic application of the rules for impacted taxpayers.

The implementation of these rules will see a fundamental shift in the way Irish businesses pay corporation tax and a marked move towards re-aligning the computation of the taxable profits with the computation of the financial accounting results. While we do not yet have full sight of when and how exactly the rules will be finalised, particularly noting the lack of an Implementation Framework, we can already see that there will be areas of the Irish tax system that need to be reconsidered in light of the Pillar Two rules. In time, we should have a clearer picture of the associated compliance, payment, auditing, reporting and dispute management requirements.

Executive summary

State of Play and known unknowns

The GloBE rules as set out in the OECD Model Rules for GloBE and in the draft EU Directive introducing a minimum tax have not yet been agreed with the required consensus support, and so we are commenting on draft rules that may be subject to further change.

We emphasise the lack of detail available with regard to detailed implementation guidance in the draft EU Directive and OECD Model Rules. The Implementation Framework should offer further guidance on related implementation, compliance and safe harbour issues. We have not offered detailed comments regarding compliance or payment matters as a result.

Using tax as a lever to attract FDI to Ireland

In order to maintain its competitiveness, Ireland must ensure that its tax system attracts and promotes international and domestic investment in the Irish economy. The below summarises our key recommendations to assist in this objective:

Proactive steps to be taken

Clarify in no uncertain terms that the statutory tax rate is not changing to 15%. There is significant confusion being caused by repeated commentary, both in Ireland and abroad, that Ireland is moving to a 15% tax rate.

The R&D tax credit regime needs to be amended to provide for a fully refundable credit payable in cash or cash equivalent to meet the requirements to be a QRTC. The headline rate of the R&D tax credit needs to be increased from 25% to 30% to cater for the taxation of the credit under Pillar Two.

The Knowledge Development Box (KDB) will lose its value in a post-Pillar Two landscape unless we re-shape it as a QRTC.

We strongly recommend that an optional participation exemption be introduced for taxpayers for foreign income sources, commencing 1 January 2023.

Reactive steps to be taken

We ask the Department of Finance to commit to a full review of the provisions of the corporate tax code to determine where simplification of the existing rules is possible.

The intended operation of Section 291A may be significantly impacted in a number of ways depending on the accounting standard of the UPE.

We propose a tax balance sheet solution to issues that will arise due to the non-recognition of temporary differences in financial accounts. The issues foreseen apply to Section 247 interest, ATAD ILR and losses.

Ireland should set up a forum for engagement on P2 implementation so that real time ongoing feedback can be achieved.

Implementing the GloBE rules is on the one hand simple, as Ireland will be required to transpose the rules already contained in a yet-to-be-finalised EU Directive. On the other hand, how the new rules will interact with the existing rules will require detailed consideration and planning to avoid any unintended consequences.

Calculation of the GloBE Qualifying Income or Loss

- The accounting standard used in calculating the Top-Up Tax liability should be the entity level financial reporting standard in line with the simplification measure provided in the draft EU Directive, where that tax is to be collected through a Qualifying Domestic Minimum Top-up Tax' ('QDMTUT').
- The existing Irish rules relating to the taxation of distributions or gains does not align with the taxation of dividends or gains under the GloBE rules. Without further changes to the taxation of portfolio dividends and gains in the domestic rules, unintended consequences will arise with negative impacts for taxpayers.
- We propose that Ireland introduces a designated tax functional currency election for businesses where a significant proportion of the assets and liabilities are in the designated currency chosen. This would allow such companies to make appropriate use of the asymmetric foreign gain or loss adjustment, and avoid large swings in tax payable or receivable for both taxpayers and the State.
- It needs to be clarified which standard we are to use in determining whether transactions or arrangements have been priced in accordance with the arm's length principle. Any domestic legislation introduced to give effect to

Pillar Two should continue to make reference to the Irish transfer pricing rules, as prescribed in Part 35A Taxes Consolidation Act 1997 ('TCA').

- Further engagement will be needed with the Department and Revenue regarding transfer pricing matters and dispute prevention and resolution matters.

Calculation of the Covered Tax Amount

- The rules relating to deferred tax attributes for assets acquired intragroup delivers a negative outcome when considered in light of the US common control rules (tax base of nil acquired).
- We ask that the Department issues a list of the taxes it would regard as 'covered taxes' to avoid any misinterpretation by businesses, and allow stakeholders to comment on this. This could be done through a feedback statement process.
- The interaction between the GloBE and GILTI rules may result in bad outcomes for Irish subsidiaries of US headquartered groups unless GILTI is either regarded as a QIIR or a covered tax. Issues will still arise surrounding allocation if GILTI is regarded as a covered tax for GloBE purposes.
- There is currently no definition of 'uncertain tax position' in the draft Directive. We ask that consideration be given to defining the term to confirm that it refers to a provision made under a relevant accounting standard (e.g. IFRIC 23 / FIN 48) or providing guidance on same.

Calculation of the GloBE Top-Up Tax

- There may be instances where a loss-making company has a GloBE Top-Up Tax payable. Loss making companies have no ability to utilise the SBIE.

Payment of any Top-Up Tax amount

- Ireland should implement a QDMTUT as the main form of collection mechanism for Top-Up Taxes of Irish tax resident entities. This will ensure we do not lose out on corporation tax receipts and will provide an easy mechanism for businesses to pay any Top-Up Taxes.
- We ask for optionality as to whether a business pays any resulting Top-Up Taxes either through a designated payor (on behalf of all Irish resident low-taxed entities) or whether they pay any Top-Up Taxes on an entity by entity approach. The same request is made with regard to reporting GloBE information.
- The Top-Up Tax should be added as an additional Top-Up Tax, applied after the domestic corporation tax, and not structured as a denial of deduction. Any GloBE Top-Up Tax should not be taken into account for preliminary tax purposes.
- Ireland should not seek to deviate from the rules provided in the draft EU Directive around the collection of the tax, to ensure that the Irish QDMTUT is regarded as a Qualifying IIR or regarded as a safe harbour regime.
- We ask that the UTPR allocations be calculated in line with an averaging regime, to minimise year-on-year fluctuations and administrative burdens associated with these calculations.
- We ask that the UTPR and SBIE formulas be aligned with regard to people and asset functions.

Scope

- We ask that the Department of Finance issue advance clarification regarding which commonly-used Irish holding vehicles would be classified as "excluded entities" for the purposes of the GloBE rules.

General comments

- We do not propose a line-by-line transposition of the Directive into the tax code given the breadth of the GloBE rules. We suggest that an approach to implementation be taken similar to what was adopted in bringing in the transfer pricing guidance into Finance Act 2019.
- Changes to the existing regime to make it more compatible with the GloBE rules should be prioritised over making the implementing Directive provisions compatible with the Irish system.

- The rules should be introduced for companies with accounting periods beginning on or after 1 January 2024 to manage the practical difficulties that would otherwise arise if the rules were effective from 31 December 2023.
- We ask for a continued stakeholder engagement process with the Department of Finance and the Revenue Commissioners throughout the implementation process, with feedback statements available as soon as possible.

Consultation on Pillar Two Minimum Tax Rate Implementation on OECD International Tax Proposals,
Tax Division,
Department of Finance,
Government Buildings,
Upper Merrion Street,
Dublin 2
D02 R583

22 July 2022

Dear Sir/Madam,

PwC response to the Consultation on Pillar Two Minimum Tax Rate Implementation on OECD International Tax Proposals

We are writing to you in response to your invitation for submissions in relation to the implementation of the Pillar Two GloBE rules in Ireland.

Firstly, PwC Ireland would like to take this opportunity to welcome this consultation process on such an important issue. We value the continued stakeholder engagement culture that the Department of Finance has fostered in recent years. We believe that it is the right decision to seek the views of the wider business community on this issue at this juncture.

As the leading advisor to a broad base of clients, ranging from indigenous entrepreneurs and Irish Plcs to foreign multinationals, we would like to take this opportunity to draw on our experience and reflect our concerns and insights with regard to the domestic implementation of the Pillar Two proposals.

We have drafted our response under thematic headings so as to fully address all of the issues and challenges that will arise from the implementation of the Pillar 2 Directive, however we also reference the specific questions posed for your reference.

We would welcome the opportunity to discuss the matters outlined below at your convenience.

Yours faithfully

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Appendix I

1. Introduction and State of Play

At the time of writing, we understand that neither of the Pillar Two proposals, being the Global Anti-Base Erosion Rule (‘GloBE’) and Subject to Tax Rule (‘STTR’), have yet been finalised either in terms of the technical detail regarding how the rules work, or from a political agreement perspective.

In terms of implementation in Ireland, the primary form of implementation of the GloBE rules will be through the transposition of the EU Directive providing for rules introducing a minimum effective tax rate. This proposed Directive has not yet been able to secure unanimous support from the 27 EU Member States. Hungary is the only country that has not pledged to support the proposal, citing reasons including the war in Ukraine, the uncertain economic landscape and the fact that implementation of the rules by the EU Member States would be the first adoption of the rules by a significant block of countries globally.

Ireland has committed to support the EU Directive, and indeed the Minister for Finance Paschal Donohoe T.D. has indicated that the EU Directive would be transposed into the Irish tax code through the Finance Bill 2023, such that it would be introduced effective from 1 January 2024.

However, notwithstanding that political support, we note that the rules may yet be subject to change either through the EU Directive (which has been amended through compromise texts on four occasions since the initial publication of the draft Directive), through the OECD model rules for GloBE, or through the Implementation Framework (albeit the latter would more than likely add to the rules in terms of safe harbours and administration details). We provide our comments to you on the basis of the draft EU Directive compromise text as published on 21 June 2022.

We do not seek to offer comments on the design or policies behind the rules, as we note that this has not been requested from you at this time. We have tried to limit our comments only to implementation issues, but on occasion we will make reference to the design of the rules to illustrate where an implementation issue is likely to arise. In the event that the OECD model rules or EU Directive change in terms of the design or specific rules, we would ask to re engage with you separately with regard to such changes.

We will not seek to offer any comment in this response regarding the STTR on the basis that the model rules have not yet been shared. When these rules are made available, we would be happy to engage with you regarding their design and implementation.

Our approach is to firstly outline the impact that the GloBE rules will have on Ireland’s key corporate tax offerings, including the Research and Development Tax Credit (‘R&D Credit’), the Knowledge Development Box regime (‘KDB’) and Section 291A writing down of specific intangible assets. We then outline our comments regarding areas which presently cause difficulty for corporate taxpayers and how we believe that the GloBE rules will exacerbate these difficulties, unless action is taken.

We then offer more specific comments with regard to the operation of the GloBE rules as we expect they might be implemented in Ireland. These comments can be grouped into comments regarding the calculation of the Top-Up Tax, how the Top-Up Tax might be collected, comments on the scope of the rules and finally, related administration and accounting issues for consideration.

2. Analysis of the impact that the GloBE rules will have on Ireland's key corporate tax offerings

The following offers commentary in line with Questions 1, 3 and 4 posed in the consultation document.

The following are areas where the Pillar Two rules will interact with key reliefs permitted in the Irish tax code. These reliefs and regimes are some of the key selling points of the Irish tax system. They are used by a range of taxpayers both Irish and foreign, of different sizes and at different stages of the business life cycle, across a range of industries. Ensuring that these reliefs remain effective and retain their value in a post-Pillar Two landscape is critical.

Research and Development Credit as a Qualified Refundable Tax Credit

The following offers commentary in line with Question 14 posed in the consultation document.

In order to preserve the value of the R&D tax credit, it is critically important that Ireland's R&D tax credit regime satisfies the definition of a Qualified Refundable Tax Credit (QRTC) in the OECD model rules on Pillar II and the EU Commission's draft Directive "on ensuring a global minimum level of taxation for multinational groups in the Union". These rules provide that QRTCs shall not be treated as reducing the tax charge but shall be treated as income in the calculation of the GloBE income. This means that covered taxes for the purposes of assessing the top-up tax shall be the tax charge gross of a QTRC offset.

This inclusion of a QRTC carve-out in the OECD rules and the draft EU Directive is positive but it is crucial that the Irish R&D tax credit will meet the architecture of a QRTC in order to preserve its value.

A QRTC is defined in the OECD model rules and the EU Commission draft Directive as follows:

OECD Model Rules definition:

'Qualified Refundable Tax Credit means a refundable tax credit designed in a way such that it must be paid as cash or available as cash equivalents within four years from when a Constituent Entity satisfies the conditions for receiving the credit under the laws of the jurisdiction granting the credit. A tax credit that is refundable in part is a Qualified Refundable Tax Credit to the extent it must be paid as cash or available as cash equivalents within four years from when a Constituent Entity satisfies the conditions for receiving the credit under the laws of the jurisdiction granting the credit. A Qualified Refundable Tax Credit does not include any amount of tax creditable or refundable pursuant to a Qualified Imputation Tax or a Disqualified Refundable Imputation Tax'

EU Commission Draft Directive definition:

'qualified refundable tax credit' means: (a) a refundable tax credit designed in such a way that it is payable as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the refundable tax credit under the laws of the jurisdiction granting the credit; or (b) if the tax credit is refundable in part, the portion of the refundable tax credit that is payable as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the partial refundable tax credit;

Based on the definitions above, in order for the Irish R&D credit to be a QRTC, the following must be satisfied:

- The Irish R&D tax credit must be a fully refundable credit;
- that is payable as a cash payment or a cash equivalent;
- within 4 years of the date when the entity is entitled to receive the refundable credit.

It further provides that if the tax credit is refundable in part, the portion that is payable as a cash payment or cash equivalent within four years is a QRTC. Conversely, if the credit is not refundable in part, then that non refundable part is not a QRTC. Currently, the Irish R&D tax credit regime would not meet the required architecture. The Irish R&D tax is only partially refundable, as it is subject to the following:

1. It must firstly be offset against the corporation tax liability of a company (in the current and prior year), following which any remaining excess can be refunded/monetised
2. The excess that can be monetised following the offset is subject to a cap under section 766B TCA 1997. Any excess above the cap is only capable of being carried forward to future years for utilisation against corporation tax in those future periods.

As such, in order to meet the QRTC definitions, it is critically important that the Irish R&D tax credit regime is amended to provide for an R&D tax credit that is fully payable in cash or cash equivalent. The changes that would be expected to be made in order to facilitate this would be as follows:

- Amend Section 766, 766A and 766B TCA 1997 to provide for the ability for the credit to be fully payable in cash
- Amend the monetisation limits so that the amount that can be payable in cash is not capped or if a cap is still to be retained, the excess of the cap should be capable of being monetised as part of the R&D tax credit claim in the subsequent year.

In addition to making the appropriate amendments to ensure that the Irish R&D tax credit meets the requirements of a QRTC, other changes are required to made to the R&D tax credit regime to ensure that its value is not eroded given that a QRTC is taxable under the GloBe rules. This means that the R&D tax credit would be subject to tax at the 15% global minimum rate which leads to a dilution of the R&D tax credit rate to 21.25%.

The R&D tax credit has never been taxed under the Irish tax regime so this is a change that will impact the value that the R&D tax credit delivers. This effective rate reduction will be particularly harmful to large scale capital investments that are made in Ireland. An increase in the headline R&D tax credit rate would assist in managing the dilution of the credit. A rate increase from 25% to c.30% should be considered in the context of the enhancements required to ensure that the value of the credit is not eroded. There are examples of several other R&D tax credit regimes that have a higher credit rate than the Irish regime and these include the following:

- France - headline rate of the R&D tax credit is a volume based 30% rate up to a threshold of €100m (which is a significant threshold).
- Spain - The headline tax credit rate is a volume based 25% rate but there is an additional 42.5% credit available on the incremental expenditure in a current year over the average R&D expenditure in the previous 2 years. This can lead to an effective rate well above 25%.
- Canada - offers an enhanced rate of 35% for Canadian-controlled Private Corporations.

In addition to the above, some of these offer provincial assistance/credits for R&D.

Impact on the Knowledge Development Box regime ('KDB')

The KDB is a form of relief on income from qualifying assets that allows a qualifying company to receive a deduction equal to 50% of its qualifying profits. This means its remaining qualifying profits may be taxed at an effective rate of 6.25%.

While the relief afforded by this regime leads to a generous 6.25% ETR, not many businesses have actually been able to take-up this relief since it was introduced as part of Finance Act 2015, due to the complexities associated with the regime, the requirement for R&D activity and exploitation of the IP to occur within the same entity and the non-inclusion of non-patented IP. At the time of writing, we understand that less than 20 businesses use the relief.

Given that the KDB relief is a tax deduction equal to 50% of the qualifying profit from a qualifying asset, and is not an expense that is booked to the accounts of a company, it is difficult to understand the value that it will deliver to companies that will fall within the GloBE rules. It will reduce the covered taxes under the GloBE rules, thereby leading to a lower ETR and an increased top-up tax to be paid. See example below:

Financial statements		**Irish tax return**		**GloBE return**	
Income from qualifying assets	100	Profit before tax	80	Profit after tax	75
Expenses related to sales	(20)	KDB expense	(40)	Net taxes expense	5
Profit before tax	80	Taxable profits	40	GloBE qualifying income	80
Tax expense	(5)	Tax liability	5	ETR	6.25%
Profit after tax	75			Top-Up Tax %	8.75%
				Top-Up Tax	7
				Total Tax Liability	12

The Total Top-Up Tax per this example results in a 15% minimum ETR. This essentially results in the KDB delivering no value for company's claiming the relief.

One such way that the regime could remain viable is a restructure of the regime to be a tax credit regime rather than a tax deduction regime and for such a credit regime to be modified such that it would be a Qualified Refundable Tax Credit (QRTC) under GloBE rules. For example, the deduction equal to 50% of the qualifying profits from a qualifying asset could potentially be replaced with a refundable tax credit equal to 6.25% of the qualifying profits from the qualifying asset. This could be structured in a similar manner that the R&D tax credit would be structured in order to be a QRTC. Given that a QRTC is taxable under GloBE, some thought could be given to having a credit rate of 7.5% that is taxed at 15% under GloBE.

In addition, electing into the KDB regime is currently an irrevocable election. This will obviously need to be considered and amended if the regime will no longer be viable following the introduction of the GloBE rules.

Participation Exemption Regime needed to make GloBE rules work in Ireland

The GloBE rules assume that a jurisdiction uses a territorial regime to tax foreign profits.

Currently, a "worldwide" system of double taxation relief applies in Ireland (i.e. generally, to the extent that foreign income, profits or gains arise to an Irish company, the Irish company is subject to tax in Ireland on these sources of income, but may claim a credit for foreign tax suffered on those sources of income). This approach to providing relief from double taxation differs from a "territorial" system of double taxation relief (also referred to as the "participation exemption" approach). Under a territorial system (which is typical in the majority of other developed countries), foreign income is generally exempt from tax in the non-source location.

In this respect, Ireland is a conspicuous outlier. Currently, all of Ireland's main competitors for FDI offer a form of participation exemption in respect of foreign income, profits or gains.

We have previously written to you regarding the need for a participation exemption regime in Ireland.[1] We do not seek to repeat the comments raised previously, but we do wish to raise further points that relate specifically to the implementation of the GloBE rules:

- The GloBE rules pre-suppose that a jurisdiction exempts certain sources of income from tax. This is evident from Article 15(2) which requires an adjustment for "excluded dividends" and "excluded equity gains and losses" from the GloBE qualifying income. As you are aware, foreign dividends are taxable in Ireland at either 12.5% or 25%, with a credit given for the underlying tax on profits. Foreign gains are similarly taxable, unless the gain arises in a relevant territory and can be treated as exempt under Section 626B.

  Aligning the treatment of dividends and gains between the GloBE rules and the local Irish rules, so that dividends and gains generated abroad would be exempt from tax via a participation exemption, would hugely simplify the application of the rules by businesses. It would relieve the need to perform complex double tax credit calculations, and align Ireland's corporate tax offering with those of our key competitors.

- It is also evident from the allocation of GloBE income and covered taxes to a branch, rather than the head office, that the underlying assumption is that head offices would not typically apply further tax on branch profits (which is not the case in Ireland given that Ireland taxes branch income at either 12.5% or 25%, with a credit given for foreign tax suffered).

  The jurisdictional nature of the GloBE rules prevents mixing of the GloBE income and covered taxes between a branch and head office located in different countries. Any GloBE Top-Up Tax arising is allocable to the branch as a separate constituent entity and in many cases we expect that branches will pay over Top-Up Tax through a local qualifying domestic minimum top-up tax, with the result that the head office will not need to apply the IIR. An exemption for foreign branch profits under the domestic rules would support this approach, easing complexity and reinforcing the independent nature of branches when it comes to managing tax affairs and liabilities.

We are aware that investment decisions of large multinationals and private equity houses are currently influenced by the tax treatment applying to the repatriation of profits to head office locations. Critically, the complexity and administrative burden associated with the calculation of foreign tax credits under Ireland's worldwide approach to relief for foreign taxes is viewed as a significant disincentive to using Ireland as a holding company or centralised hub location. The introduction of a participation exemption in Ireland for foreign dividends and branches would remove this disincentive, making Ireland a significantly more attractive option for such investors as their head office location. Not having a participation exemption has already cost the country valuable investment opportunities. In this regard, we have seen first-hand how investment intended for Ireland has been directed to other EU member states, the UK and the US on the basis of Ireland's current worldwide approach to relief for foreign taxes.

We believe that rolling out such a regime on an optional basis for taxpayers would achieve flexibility, simplicity and the

[1] "Public Consultation on a Territorial System of Taxation", PwC Ireland, dated 7 March 2022.

overall attractiveness of locating head office locations in Ireland. We ask the Department to consider introducing this regime in the 2022 Finance Bill to allow sufficient time for it to embed into the existing system before the introduction of the GloBE rules in the following Finance Bill. This would allow for a more seamless integration of the GloBE rules from 1 January 2024. At a minimum, a clear and unequivocal commitment should be given so that certainty is provided to investors and businesses that a participation exemption for foreign taxes will be introduced in Ireland in preparation for (and in advance of) the transposition of the Directive into Irish law.

Areas of the tax code that presently represent difficulties for taxpayers

The following are comments relating to how Pillar Two would interact with existing areas of difficulty in the Irish tax code. For many years our system of taxing foreign profits and interest deductibility rules have been excessively complex. As tax systems modernise and adapt for increasing international tax reform measures, we believe more and more that the Irish tax system is unduly restrictive in these areas and that taxpayers are increasingly unable to manage the complexities associated with the rules. We ask the Department of Finance, to commit to a 'roadmap of simplification' to address the complexities in these areas before the Pillar Two rules become effective:

Overall complexity of the Irish corporation tax code

We remind the Department of Finance of the comments made by Minister for Finance, Paschal Donohoe T.D. on 7 October 2021, following the announcement that Ireland would sign up to the OECD Two Pillar solution:

"I am confident that Ireland will remain competitive into the future, and we will remain an attractive location and 'best in class' when multinationals look to investment locations"…"At the same time, we cannot be complacent and we need to reflect on both tax and non-tax aspects of our offering ***including in respect to simplification of the tax code*** *(emphasis added by PwC). All countries, including Ireland, will need to assess the compatibility of their tax systems with new global norms. My commitment, and that of the Irish Government, remains clear – we will ensure that Ireland's corporation tax regime will remain competitive, fair and sustainable. Ireland will continue to have an attractive tax offering."*[2]

It was widely acknowledged around that time that changes, including extensive simplification, would be needed to ensure that the implementation of the Two Pillar solution into the Irish tax rules would not impinge on our ability to attract investors nor to our ability to remain flexible and agile. Indeed, simplification of the taxation of foreign sourced income through a move to limited territorial regime (via a participation exemption) has been independently called for as early as 2017 in the Coffey report[3]. PwC Ireland has been asking for this change to be made for almost two decades.

Despite the above commitment and acknowledgement, each of the intervening five years have seen significant increases in complexity in the Irish tax system. This complexity arises both from two sources:

- Firstly, the introduction of new, complex substantive rules (such as, for example, new domestic specific anti-avoidance rules, extended transfer pricing rules, various changes to Section 291A, as well as the introduction of anti-tax avoidance measures required by virtue of ATAD1 and ATAD2);
- Secondly, the addition of new administrative requirements and obligations, for example the need to file iXBRL returns.

This complexity arising from the combination of these substantive and administrative changes has had the effect of significantly complicating the taxation of corporate profits in Ireland. Although it may be easy to do business in Ireland, it is certainly not easy to manage a business' tax filing and payment obligations, and the cost - to business - of such management has increased exponentially.

A roadmap of simplification measures is needed now more than ever in the face of the Pillar Two rules, and to an equal extent the anticipated further changes that will be required to give effect to EU tax reform measures. Where possible, the Irish rules should be aligned to the GloBE rules, reflecting the overarching position that the taxation of profits should follow the accounting treatment. We ask the Department of Finance to commit to a full review of the provisions of the corporate tax code to determine where simplification is possible. We set out below two areas in particular that businesses are struggling to manage.

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[2] Statement by Minister Donohoe on decision for Ireland to enter OECD International Tax agreement, 7 October 2021, full speech available via this link.

[3] "Review of Ireland's corporation tax code presented to the Minister for Finance and Public Expenditure and Reform by Mr. Seamus Coffey", published 12 September 2017, available via this link.

Section 291A: capital allowances for specified intangible assets

Section 291A allows a company to claim capital allowances for specified intangible assets against the relevant income of that company. A company can claim a tax deduction for writing down the intangible assets either over a fixed write-down period of 15 years or, alternatively, in line with the accounting amortisation charge booked in the Profit and Loss account. We would see a mix of approaches taken on the write-down, but often companies would claim the capital allowance based on the amortisation charged in the Profit and Loss account as that allows for accelerated writing off of the asset for tax purposes. From a statutory financial statements perspective, no temporary difference arises in this case as there is no book-to-tax difference. A temporary difference would arise in the event that the tax write-off for the asset was either greater or less than than amortisation charge.

The GloBE rules will interact with Section 291A to a lesser or greater extent, depending on how quickly the tax write-off of the asset happens compared to the amortisation, what the deferred tax position is, when the intangible asset was acquired and any deviations between the recording of the asset under the local financial reporting standard and the standard used by the UPE in preparing the consolidated financial statements.

Align tax and accounting writing down of the intangible asset

In the event that the tax write-off matches the amortisation charge included in the P&L used for GloBE purposes, the GloBE measure of income should align to the local taxable income, all other items being equal in terms of the denominator. Accordingly, a 12.5% GloBE ETR should arise for Irish taxpayers. Note that no temporary timing difference occurs.

Tax write down exceeds the accounting amortisation charge

In the event that the company elects to write-down the asset over a 15 year period, but the useful life of the intangible is, say, 20 years under the accounting standard, there will be a timing difference and thus a deferred tax movement each year. Initially, a deferred tax liability will be booked in the financial statements in the amount of the temporary difference multiplied by 12.5%. The creation of a deferred tax liability will positively inflate the GloBE ETR such that a 12.5% ETR should be achieved (as the adjusted covered taxes are inflated). However, a deferred tax liability that does not unwind within five years shall be recaptured to the extent that it was taken into account in the total deferred tax adjustment amount previously in that constituent entity. Thus in the year of recapture (or in the initial year of recognition in cases where the election is made) the Globe ETR may fall below the 12.5% rate.

Consideration of the above in light of calculating the GloBE income under the UPEs financial accounting reporting standard

The accounting treatment of certain intangible assets can be significantly different depending on which financial reporting standard applies to that company.

Under the GloBE rules, the GloBE income or loss must be computed in line with the UPEs accounting standard (note that there may be some limited cases such as under Article 10(2) where this is not required) which may differ from the standard used for the entity level accounts.

Under IFRS, we generally understand that the asset will be recognised as having an opening cost equal to the consideration paid for the asset, and this amount can be amortised in full over time.

For US GAAP purposes, the accounting treatment can be more complex. In group transactions, we understand that common control rules could potentially apply such that the original carrying cost of the transferor could also be the carrying value for the transferee.. In many scenarios, in particular with internally-generated intangible assets, the carrying value may be nil.

In this scenario, we expect that under US GAAP rules a deferred tax asset would be booked in the year the asset is acquired. The booking of such a DTA would have the effect of reducing the company's GloBE ETR below 12.5% in the year of recognition. For the subsequent years, the reversal of the DTA should have the effect of smoothing the ETR to 12.5%, all other things being equal.

These differences under different accounting standards have particular impact when a company is in a statutory loss position which is driven by amortisation on IP acquired in a group transaction. Under US GAAP, there may be no basis in the IP (if it was internally generated by the group and the common control rules were to apply on the asset transfer) and as such the loss will not be recognised as there is no amortisation. For GloBE purposes, the reversal of the deferred tax asset will result in an ETR of 12.5% and then there will still be a top up tax of 2.5%. Under IFRS, the IP basis will be recognised and where the amortisation drives a loss, then for GloBE purposes a loss will also be recognised and there may not be a top up tax in respect of the same (subject to the rule in Article

20(5) applying - see Section 5 below).

Such differences which arise solely due to different accounting standards are inherently unfair. As a result, we would propose that in the implementation of the GloBE rules that the implementation framework makes it clear that group transactions can be treated as third party transactions for the purposes of the GloBE rules.

Impact of the transition period rules for IP acquired between 30 November 2021 and the transition year beginning

The following offers commentary in line with Question 14 posed in the consultation document.

The transition period rule contained in Article 45(4) states that the value of acquired assets transferring between constituent entities between 30 November 2021 and before the commencement of a transition year *"shall be based upon the transferring entity's carrying value of the transferred assets at the time of transfer."*

In many cases during the transition period, Irish companies will acquire intangible assets from associated group companies for significant consideration and claim Section 291A allowances under the local Irish rules based on the consideration paid. However, the GloBE reflection of the asset's value will be based on the transferring entity's carrying value prior to the disposal, which may be nil, particularly if the assets are internally generated IP.

Deductibility of interest expenses and losses against GloBE income

Summary

The interaction of the interest deductibility rules and loss relief rules with the GloBE rules will be very important for many taxpayers, given that the point of interaction may have a material bearing on the taxpayer's ETR.

Given that changes could be made to these rules at the time of or before the implementation of the GloBE rules, and these changes would significantly help to manage the fluctuations in ETRs that would otherwise arise, we bring this to your attention as a priority area for consideration.

We offer a suggestion that we believe would help taxpayers to manage the swings that will arise (details of how this would apply are included below). This solution involves the introduction of a "tax balance sheet" concept that would allow entities to utilise deferred tax concepts to manage these swings, in scenarios where a deferred tax attribute is not booked in the financial statements.

Introducing the tax balance sheet concept is preferable from the point of view that it solves the issues associated with Section 247 interest, ATAD ILR and loss temporary differences among others, and the underlying policy rationale is supported by a similar rule already included in the GloBE rules.

Interest rules - complexity

It is frequently commented that the rules governing a company's ability to deduct interest expenses against taxable profits are incredibly complex in Ireland in comparison to other EU and OECD countries. The extensive domestic anti-avoidance rules around deductibility of interest, coupled with the recent addition of interest limitation rules in line with Article 4 of ATAD has increased the complexity which often results in commercial financing costs being non-deductible for tax purposes.

The GloBE rules will add another layer of complexity to these rules. In calculating the GloBE income or loss of a company under Article 15(2), no adjustment is permitted to the financial accounting net income to reflect the book-to-tax difference for interest that commonly arises in computing a company's local tax liability. This lack of adjustment will impact Section 247 interest any ILR restricted interest most keenly.

Section 247 - explanation of the problem

Section 247 allows a company to take a deduction for interest expenses, on a paid basis, where the underlying loan was put to a specific use, typically to invest in another trading company (there are various uses permitted for the loan but we will not go through the Section 247 rules for this purpose). What is often the case is that a company will accrue an interest charge which is deductible in the financial statements in calculating the profit or loss of the company. This interest accrual is not always paid by the company in the same year, and so there are frequently cases where, in a given year, interest paid by the company will reflect a payment for a prior year accrual, or a number of prior years worth of interest accruals. A company will take a tax deduction for this interest in the year of payment, and this typically reduces the taxable profits for that year, and accordingly the amount of tax paid.

The following offers an example of what layering Pillar Two on top of the Section 247 rules might look like:

Year 1

Company A has the following accounting results in year 1	
Turnover	1000
Interest expense	(200)
Profit before tax	800
Tax charge	(125)
Profit after tax	675

Company A prepares its tax return on the following basis:

Profit before tax	800
Interest expense addback*	200
Tax-adjusted profit	1000
Tax charge	125
Total tax payable	125

*The addback relates to an amount of interest that is accrued but unpaid in the year. While all other conditions are met for a Section 247 deduction, the deduction is not allowed because it has not been paid.

GloBE rules apply as follows to Company A:

Profit before tax	675
Net taxes expense	125
GloBE qualifying income	800
Covered taxes	125
Effective Tax rate	15.63%
Top-Up Tax payable	Nil

Year 2

Company A has the following accounting results in year 2	
Turnover	1000

Interest expense	(200)
Profit before tax	800
Tax charge	(75)
Profit after tax	725

Company A prepares its tax return on the following basis:

Profit before tax	800
Interest expense addback	(200)**
Tax-adjusted profit	600
Tax charge	75
Total tax payable	120***

** The additional deduction reflects the interest accrual relating to Year 1 that was paid in full during Year 2, along with the Year 2 interest accrual. All conditions were met for Section 247 purposes at the time that the interest was paid in Year 2.

*** This amount reflects the current tax charge under the domestic rules and the GloBE Top-Up tax payable according to the below computation

GloBE rules apply as follows to Company A:

Profit before tax	725
Net taxes expense	75
GloBE qualifying income	800
Covered taxes	75
Effective Tax rate	9.38%
Top-Up Tax payable	45

A number of points are worth flagging based on the application of the GloBE rules to this fact pattern:

- The GloBE ETR exceeds 15% in Year 1 as a direct result of the denial of the interest accrual under the local tax rules. This means that no Top-Up Tax is payable for Company A for Year 1. The Top-Up Tax % exceeding 15% (.63%) cannot be carried forward as excess capacity, and so Company A will not benefit from having paid tax of such an amount that creates an ETR greater than 15%.
- In Year 2, Company A calculates a GloBE ETR of less than 15% (9.38%), meaning that an amount of Top-Up tax will become payable for Company A for Year 2. This reduced ETR is attributable to the reduction in covered taxes that arose because of the deduction against the local taxable profits for the Year 1 interest expense on payment.
- Had the denial of the deduction due to the difference between the amount paid and accrued under Section 247

not applied to the Year 1 interest accrual, such that the treatment of the interest expense would have followed the accounting treatment, the GloBE ETR for Company A would have been 12.5% in both Year 1 and Year 2. While this scenario would have resulted in Top-Up Taxes becoming payable for both Year 1 and Year 2, it would have mitigated the large additional liability in Year 2, and reduced the fluctuating Top-Up Tax charge from year to year. The .63% excess Top-Up Tax percentage would also not have arisen.

The above shows how Section 247 relief will interact with the GloBE rules, based on a very common fact pattern. The example represents a reasonably manageable outcome, with a Top-Up tax % of ony 5.62% in Year 2.

But it is expected that much greater Top-Up Taxes will arise in the event that there is an amount of Section 247 interest paid in a given year that matches all taxable profits for that year, thereby reducing the Irish tax liability, and the GloBE covered taxes, to nil. This will result in a Top-Up Tax % of 15%, and a large amount of Top-Up Tax to pay, whereas under the domestic rules, no tax would have been payable for that year.

Example of a Year 2 scenario where Section 247 interest shelters all of the taxable profits in Year 2:

Company A has the following accounting results in year 2	
Turnover	1000
Interest expense	(500)
Profit before tax	500
Tax charge	0
Profit after tax	500

Company A prepares its tax return on the following basis:

Profit before tax	500
Interest expense deduction	(500)**
Tax-adjusted profit	0
Tax charge	0
Total tax payable	75***

** The additional deduction reflects the interest accrual relating to Year 1 that was paid in full during Year 2, along with the Year 2 interest accrual. All conditions were met for Section 247 purposes at the time that the interest was paid in Year 2.

*** This amount reflects the current tax charge under the domestic rules and the GloBE Top-Up tax payable according to the below computation

GloBE rules apply as follows to Company A:

Profit before tax	500
Net taxes expense	0

GloBE qualifying income	500
Covered taxes	0
Effective Tax rate	0%
Top-Up Tax payable	75

This outcome would negate the benefit of the Section 247 interest relief, oftentimes in its entirety. The company cannot deduct interest accruals without payment, and even once paid, a Top-Up Tax would nevertheless arise. This would have a very detrimental impact for a common financing arrangement for Irish businesses, particularly for Irish domestic businesses which are more likely to utilise Section 247 relief.

Solution to the Section 247 problem

Use of the tax balance sheet concept

Our workings suggest that where a deferred tax asset is included in the financial accounts for a temporary difference between interest accrued and paid, and then is later unwound on payment, the overall impact from a GloBE perspective is neutral in the years of the DTA creation and unwind. However, the deferred tax attribute needs to be recognised in the company's financial statements for it to offer this "smoothing" effect.

From a Section 247 perspective, we do not always see deferred tax recognised relating to temporary differences for interest expenses accrued and paid in a company's financial statements. This could be for various different reasons.

To manage this commonly occuring fact pattern, we suggest that a taxpayer with no deferred tax recognised in the financial statements would be able to leverage from a tax balance sheet which records the tax value of temporary differences. This would align with the provision of Article 21(4) where the policy is to recognise the deferred tax value of a DTA loss even where that loss is not recognised in the financial statements. The tax balance sheet should account for a wide range of DTAs and DTLs including, but not limited to, interest payments.

In the event a temporary difference arises in Year 1, but that difference is not reflected in the accounts, the taxpayer should calculate the adjusted covered taxes as if the DTA had been booked. When the DTA unwinds, in say Year 2, the taxpayer calculates the adjusted covered taxes as if the unwind had been recognised in the accounts. All other things being equal, this should result in an ETR of 12.5% across both years (in comparison to the swings noted in the examples above).

ATAD ILR interaction - explanation of the problem

Another unintended consequence in a similar vein to the above is the interaction between the ATAD interest limitation rules (ILRs) and the GloBE rules. The ILR denies a deduction for exceeding borrowing costs (typically interest expense - interest income) that exceed 30% of EBITDA. The below demonstrates how the GloBE rules interact with the ATAD ILR:

Year 1	
Company A has the following accounting results in year 1	
Turnover	1000
Interest expense	(400)
Profit before tax	600
Tax charge	(75)

Profit after tax	525

Company A prepares its tax return on the following basis:

Profit before tax	600
ILR restricted interest*	100
Tax-adjusted profit	700
Tax charge	87.5
Total tax payable	90

* The addback relates to an amount of interest that exceeds 30% of EBITDA (being 300, or 30% of 1000).

GloBE rules apply as follows to Company A:

Profit after tax	525
Net taxes expense	75
GloBE qualifying income	600
Covered taxes	87.5
Effective Tax rate	14.58%
Top-Up Tax payable	2.5

Year 2

Company A has the following accounting results in year 2	
Turnover	1000
Interest expense	(200)
Profit before tax	800
Tax charge	(100)
Profit after tax	700

Company A prepares its tax return on the following basis:

Profit before tax	800

ILR utilised in Year 2**	(100)
Tax-adjusted profit	700
Tax charge	87.5
Total tax payable	120**

** This amount reflects the current tax charge under the domestic rules and the GloBE Top-Up tax payable according to the below computation

GloBE rules apply as follows to Company A:

Profit after tax	700
Net taxes expense	100
GloBE qualifying income	800
Covered taxes	87.5
Effective Tax rate	10.94%
Top-Up Tax payable	32.5

Some points to note:

- While the collective amount of Top-Up Tax payable for Year 1 and 2 is the same, there are big swings in the payment of the tax (7% of total payable in Year 1 vs. 93% payable in Year 2).

Utilisation of the tax balance sheet concept

Similar to the above comments on Section 247, we understand that deferred tax should help with managing these kinds of fluctuating liabilities. The financial statements do not always recognise temporary book-to-tax differences for ATAD ILR, but using the tax balance sheet concept should allow the taxpayer to modify the adjusted covered taxes to get to the same result. Again, we believe that there is a policy justification for this aligned to Section 21(4). Implementation of this solution could be done effectively from 1 January 2023, giving entities the chance to have their tax balance sheets up and running in advance of the introduction of the GloBE rules.

Losses

As noted above, Section 21(4) states the following:

"Where, for a fiscal year, a loss deferred tax asset is not recognized in the financial accounts because the recognition criteria are not met, the total deferred tax adjustment amount shall be reduced by the amount that would have reduced the total deferred tax adjustment amount if a loss deferred tax asset for the fiscal year had been accrued."

We would not see any policy justification for treating deferred tax assets arising on losses as being different to deferred tax assets arising on other temporary differences. Either temporary difference could be left out of the financial statements. As such, and as noted above, we believe that this section supports the use of a tax balance sheet concept to keep track of temporary differences that are not always reflected in the accounts.

3. Calculation of the GloBE Qualifying Income or Loss

The following offers commentary in line with Questions 8, 9 and 10 posed in the consultation document.

Calculation of the GloBE Qualifying Income or Loss in line with the financial accounting reporting standard of the constituent entity's ultimate parent entity (UPE)

The primary rule for calculating the GloBE Qualifying Income or Loss is to use the accounting results for the constituent entity, according to the financial reporting standard of the UPE. This design feature of the rules makes the calculation of the GloBE income excessively difficult. While we appreciate that this is a design matter, and so we do not request to deviate from the rule in the Irish transposition, we do ask that the Department of Finance allow for any optional relaxation of this rule, such as the relaxation permitted within Article 10(1) of the draft EU Directive.

Article 10(1) notes that "*Under a qualified domestic top-up tax, the domestic excess profits of the low-taxed constituent entities **may** be computed based on an acceptable financial accounting standard or an authorised financial accounting standard permitted by the authorised accounting body and adjusted to prevent any material competitive distortions, **rather than the financial accounting standard used in the consolidated financial statements**"* (emphasis added by PwC).

According, if a QDMTUT is introduced in Ireland - which we propose should be introduced, see comments further below - then the financial reporting standard used to calculate the Irish excess profits of entities should be permitted to be the local financial reporting standard that the constituent entity used to prepare its local accounts, insofar as that reporting standard is an acceptable reporting standard. Generally, the local accounts for Irish entities will be prepared under IFRS, FRS101, FRS102 or local Irish GAAP, all of which should be regarded as an acceptable financial accounting standard under the definition set out in Article 3(22).

Allowing this simplification measure would greatly reduce the administrative burden associated with re-computing the financial results in line with the UPEs financial reporting standard and eliminates the need for book-to-book adjustments, in addition to subsequent book-to-tax adjustments in calculating the GloBE qualifying income or loss, and the covered taxes.

In the event that the simplification cannot be used, can the Department clarify whether the starting point in calculating the financial accounting net income is to start with the consolidated measure of the financial accounting net income relevant to the constituent entity, and then reverse any consolidation adjustments that had been applied. Or is the starting point to begin with the local accounts and reverse-engineer the accounts so that they align to the financial reporting standard of the UPE?

Financial accounting net income

The starting point for the calculation of the GloBE income or loss is the 'financial accounting net income'. Although not defined in the OECD rules or commentary as being the 'profit after tax' measure in a Profit and Loss account, we do anticipate that the starting point is profit after tax (and not profit before tax). We, and many of our clients, would appreciate clarity regarding whether this is also the view taken by the Department of Finance.

Excluded Dividends and Excluded Equity Gains or Losses

We refer to our earlier comments regarding the need for a participation exemption for all dividend income and foreign sourced branch profits to ensure that, as much as possible, the Irish rules can mirror the worldwide norms that are assumed in the Pillar Two architecture.

Regarding Ireland-Ireland dividends or distributions, such distributions are treated as Franked Investment Income ('FII') under the domestic rules and exempt from tax. Typically these dividends are booked as income in the Profit and Loss account, but in computing the tax adjusted profit amount we deduct them from the taxable profits and there is only a reporting requirement associated with such income sources. This is the case irrespective of the percentage of shares held in the distributing entity. An Ireland-Ireland dividend from a shareholding of less than 10% (a portfolio shareholding dividend) would be taxable under the GloBE rules at the minimum rate of 15%.

Interaction with Section 626B

We point out that the exemption from corporate tax for gains on the sale of shares in a subsidiary company as provided in Section 626B requires the disponer to have held at least 5% of the ordinary share capital in specific types of subsidiaries for a two year period.

Under the GloBE rules, an adjustment is required in calculating the GloBE income or loss in respect of an "excluded equity gain or loss' which specifically relates to shareholdings of at least 10%. If there is a realised gain or loss, a revaluation gain or loss or an equity method gain or loss on shareholdings of at least 10% (i.e not a 'portfolio shareholding' as defined in the draft Directive), such gains/losses are excluded from the measure of the GloBE qualifying income or loss. A portfolio shareholding equity gain or loss will be included in the GloBE Top-Up Tax calculation.

As a result of the mismatch between the 5% shareholding requirement under the domestic rules, and the 10% requirement for the GloBE rules, we may see scenarios whereby, for example, a gain resulting from a 7.5% shareholding would be exempt from corporation tax under the domestic rules but the gain would be taxed at the GloBE 15% minimum effective tax rate. This negates the benefits allowed under Section 626B.

We do not propose that Section 626B is fundamentally changed, given that businesses not in scope for the GloBE rules should be able to continue to benefit from the exemption for a 5% shareholding.

However, it is worth considering whether Section 626B should be altered so that it would only apply to entities that are not in-scope constituent entities for Pillar Two purposes. This would retain the existing Section 626B rules for SMEs and scale ups. However, for in-scope entities it would dispense with the requirement to satisfy the shareholding, trading and length of ownership requirements (creating administrative headaches for taxpayers) for disposals that will be exempt from taxation under the GloBE rules in any regard.

Portfolio gains (disposals between 5% and 10%) of an in-scope constituent entity would be taxable under the domestic rules at a rate of 33% as a result. However given that the number of instances of shareholders making disposals of shareholdings of between 5% and 10% should not be significant, this is a manageable outcome.

Interaction with the interest limitation rules in the Irish tax code

Please see our comments in the previous section of this Appendix and the proposed solutions included therein around Section 247 relief.

Asymmetric foreign exchange gains or losses

Functional currency election

The taxation of foreign exchange gains and losses arising to Irish tax resident companies that are not regarded as carrying on a trade in Ireland may in certain circumstances produce unintended consequences in the calculation of

potential top-up tax liabilities where the Irish company prepares its accounts in euro. This is because such companies may reflect untaxed foreign exchange gains or losses in their income statement (arising from matters such as unrealised gains or losses, exempt gains on asset disposals, or gains or losses on settlement of liabilities) that are included in the computation of GloBE income or loss.

Under Article 15 of the draft directive, a constituent entity is only allowed to exclude from its GloBE income 'asymmetric foreign currency gain or loss' which is defined as, inter alia "*foreign currency gains or losses of an entity whose accounting and tax functional currencies are different*".

As mentioned above, Ireland does not have extensive rules concerning the taxation of foreign exchange differences. Generally, trading companies are unlikely to meet the definition of asymmetric foreign currency gain or loss in the draft Directive because they are unlikely to have different accounting and tax functional currencies. Such companies will be able to include trade related foreign exchange differences in their computation of trading profits and therefore a difference between their "normal" Irish tax basis and their GlobE income should not arise, at least with respect to foreign exchange gains or losses.

For non-trading companies, the position on functional currency is less clear. For some companies, their accounting functional currency may be driven by the functional currency of their parent, or other factors relating to their overall group position. For such companies, provided their accounting functional currency is not euro, they should be able to avail of the treatment under the asymmetric rules to exclude such amounts from their GloBE income which would be the same treatment as they are generally getting in their Irish tax computations.

However, some companies that have euro functional currency for both tax and accounting purposes risk exposure to tax volatility in respect of foreign currency gains and losses amounts that are not within the charge to tax in Ireland, but are included in GloBE income. In our view, this presents a significant risk for companies that have significant assets and liabilities in a currency other than euro.

The position is further complicated by the requirement that the starting point for GloBE income is generally the consolidated financial statements of the worldwide group. Thus, for companies established as a European hub by non-European groups a mismatch can arise even when, for Irish tax purposes, both tax and accounting functional currencies are aligned. This is illustrated in the following table:

Entity/functional currency for local accounts	EU Parent - IFRS	US Parent - US GAAP
Trader USD functional	Functional/Tax currency matched where parent prepares consolidated accounts in USD, otherwise asymmetric	Functional/Tax currency matched
Trader EUR functional	Functional/Tax currency matched where parent prepares consolidated accounts in EUR, otherwise asymmetric	Asymmetric
Non-trader EUR functional	Functional/Tax currency matched where parent prepares consolidated accounts in EUR, otherwise asymmetric	Asymmetric
Non-trader USD functional	Functional/Tax currency matched where parent prepares consolidated accounts in EUR, otherwise asymmetric	Asymmetric

We would propose that Ireland introduces a designated currency election for investment companies where a significant proportion of its assets and liabilities are in the designated currency chosen. In this way, companies can effectively elect into the asymmetric foregn currency rules for GloBE purposes and manage their tax exposures arising from foreign exchange exposures in a more efficient way. Such an election, which is a feature in countries with extensive foreign exchange tax rules, would put affected Irish companies in the same position as before the introduction of Pillar two in Ireland and should not expose either the affected companies or the State to volatility in tax receipts arising simply from foreign exchange movements. Given the potential for different treatment for certain trading companies arising solely from the functional currency of their ultimate parent, we would also suggest that consideration should be given to the election also being made available to affected trading companies.

Accounting functional currency

The draft EU Directive defines the accounting functional currency as: “The accounting functional currency is the functional currency used to determine the constituent entity’s financial accounting net income or loss.” We understand that this is to be read as the accounting functional currency used by the UPE in preparing the consolidated financial statements.This is on the basis that the financial accounting net income or loss is to be calculated under the UPE’s financial reporting standard, and so it follows that using the UPE’s financial reporting standard, and currency used therein is what was intended from the rules. Can the Department please confirm that this is the intended interpretation of this definition?

Adjustments required to reflect the arm's length principle (‘ALP’)

Article 15(4) of the draft EU Directive specifies that *“Any transaction between constituent entities located in different jurisdictions that is not recorded in the same amount in the financial accounts of both constituent entities or that is not consistent with the arm’s length principle must be adjusted so as to be in the same amount and consistent with the arm’s length principle.”*

Standard for measuring the ALP

In implementing this rule into the Irish tax code, it will be necessary to specify which measure of ALP we are to make adjustments against. We expect that the Irish transfer pricing rules, as set out in Part 35A of TCA, is the standard against which we should measure transactions for GloBE purposes. It is important that clarity is given as to which measure should be used for Irish purposes as there may be instances where certain transactions or arrangements (booked in the financial accounts of both constituent entities) are priced in line with domestic / local transfer pricing rules. For example, in certain territories, the use of simplified transfer pricing measures[4] or safe harbours[5] can be

[4] Under the US transfer pricing rules, a specified method known as the SCM allows taxpayers to recharge certain costs at cost when determining appropriate remuneration for certain service arrangements.
[5] Safe harbour interest rates can be observed in certain jurisdictions including the US and Switzerland.

observed.

We ask that the Department include a clarification in the Irish implementation of the rules that a transaction should be priced in accordance with the Irish transfer pricing rules (Part 35A of TCA). In some instances, this would help to mitigate the possibility of disputes arising from the additional booking of notional income to satisfy one or other standard.

Dispute resolution and prevention measures

On a related note, dispute mitigation measures should be sought wherever possible to avoid drawn-out disputes. In particular, we note the lack of dispute prevention or resolution mechanisms in the framework for Pillar Two at a global and/or EU level (although we would hope that this would be acknowledged and a solution proposed in the Implementation Framework to be issued later this year). Once a solution is proposed at a cross jurisdictional level, we would welcome an opportunity to give feedback on the proposed solution prior to local implementation.

[6]In this context, it will also be important to consider the treatment of tax adjustments initiated on foot of a tax authority adjustment after the statutory financial statements have closed in the calculation of GLoBE income.

GloBE treatment of QRTC/ N-QRTC

We refer to our earlier comments regarding the R&D credit in section 1, which relate to the calculation of the GloBE qualifying income or loss.

We ask the Department to clarify that only tax incentives or reductions in tax liabilities would be regarded as a QRTC/N-QRTC. We would seek clarity that not all grants and incentives would be regarded as a tax credit. For example SEAI grants or grants specified under Section 226 are typically disregarded for tax purposes and so it would require clarification on implementation that this treatment follows through to the application of the GloBE rules.

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[6] We refer here to post-close tax adjustments that arise for a variety of reasons, for example, initiated on foot of a tax authority adjustment, identified through self-review or a tax audit, etc.

4. Calculation of the Covered Tax Amount

The following offers commentary in line with Questions 11, 12 and 13 posed in the consultation document.

Expanding the definitions used in the GloBE rules

Can you please clarify whether we should interpret references to deferred tax assets as also including deferred tax liabilities, whether deferred tax expense also includes deferred tax credits and also whether references to current tax expenses should also be interpreted to mean current tax credits? There are various areas in the GloBE rules where it would be logical to apply such interpretations.

Definition of 'covered tax'

We ask that the Department share a list of the taxes applied under the Irish Tax Acts that would be regarded as covered taxes' for GloBE purposes. We ask for this in respect of 'above-the-line' taxes and 'below-the-line' taxes. Such a list would help us to understand if we are right to regard, for example, withholding taxes as a covered tax, in line with Article 19(1)(c). There are other similar levies such as gaming or betting duties that we would like clarity on. We would appreciate the opportunity to engage with the Department on such a list once it was available.

We suggest that this list be released as part of a feedback statement, with the ability for stakeholders to comment on the 'covered taxes' included, and excluded.

Transition period rules

We refer to our earlier comments regarding "Impact of the transition period rules for IP acquired between 30 November 2021 and the transition year beginning". Given that these transition rules will have a significant impact on deferred tax attributes of assets acquired in the transition period, we remind the Department of this issue in light of calculating adjusted covered taxes and the deferred tax adjustment amount.

Consideration of GILTI top-up tax as a CFC charge

Given that the US Global Intangible Low-Taxed Income ('GILTI') is calculated based on a worldwide blending system, it is unlikely that the current GILTI regime would be regarded as a Qualifying IIR ('QIIR') for GloBE purposes. We understand that there are ongoing efforts in the US to have the GILTI regime modified such that it would be regarded as a QIIR.

The benefit of the GILTI regime being classified as a QIIR is that the process whereby undertaxed profits of low-taxed entities collected in the US through GILTI would be regarded as akin to an IIR, and therefore no further GloBE Top-Up Tax would be applicable where GILTI had already collected the top-up tax. For Irish subsidiaries of US headquartered groups, this would ensure that if the Irish entity was a low-taxed entity under the GILTI and GloBE rules, that payments would not become due under both sets of rules.

However, we acknowledge that it may not be possible to have the GILTI regime amended to be regarded as a QIIR by the EU and other countries. In such a scenario, Irish low-taxed entities of US groups would be subject to a GILTI top-up tax (payable in the US by the US parent), while also being subject to the GloBE Top-Up Tax (payable in Ireland under the QDMTUT - see comments below). This would result in double taxation.

A workaround to this result is that GILTI would be regarded as akin to a CFC top-up tax for the purpose of the GloBE adjusted covered taxes. This would allow an Irish low-taxed entity a credit for taxes paid by the US parent entity on its behalf. This would increase the covered tax amount. While it may not result in the low-taxed entity reaching an ETR of 15% (thereby resulting in further GloBE Top-Up Tax), it would nevertheless bridge the gap between the Irish ETR and the GloBE minimum ETR.

This workaround comes with its own set of challenges however. Given that GILTI is calculated on a worldwide blending system (with a combination of profits subject to both low and high taxes being aggregated and averaged before a single amount is paid over the IRS - the GILTI charge, it may not be possible to identify what element of the overall GILTI charge relates specifically to Ireland, and to Irish specific entities. In other words, it will not be a simple exercise to 'push down' GILTI so that it is allocated to the entities in the overall group for GloBE purposes.

Uncertain tax positions

While not provided in the draft Directive, we would ask that consideration be given to including a definition of uncertain tax position' to confirm that it refers to a provision made under a relevant accounting standard (e.g. IFRIC 23 / FIN 48).

The adjustments to covered taxes include the addition of the amount of covered taxes relating to an uncertain tax position previously excluded under point (d) of paragraph 3 that are paid for the fiscal year. Confirmation is sought that this is a reference to the fiscal year for which a tax return incorporating the covered taxes previously excluded is filed (this recognises the fact that the tax payment for the fiscal year may be made in a number of tranches across two fiscal years based on the preliminary tax / balance of tax due dates).

The condition as to whether taxes are paid in a fiscal year is also relevant to a number of other aspects of the calculation of covered taxes including in computing an increase to the deferred tax adjustment amount for a disallowed accrual or an unclaimed accrual paid during the fiscal year. Similar confirmation would be welcome that this refers to the fiscal year for which the tax return incorporating the covered taxes is filed.

Insurance companies

Covered taxes do not include taxes paid by insurance companies in respect of returns to policyholders. We agree this is a sensible approach in theory, as such taxes are not based on the profits of the insurance company itself. Similarly, amounts charged to policyholders for such taxes are excluded from the calculation of GLoBE income. The area of policyholder taxation for life insurance companies is complex and the rules in Ireland are unique. Without further detailed guidance on implementing this aspect of the rules, there is a risk of unintended consequences or differing interpretations by taxpayers.

We would recommend that consultation with the industry is undertaken to ensure the implementation of this aspect of the rules in Ireland is aligned with our existing regime.

5. Calculation of the GloBE Top-Up Tax

The following offers commentary in line with Question 15 posed in the consultation document.

As a result of Article 20(5) of the draft EU Directive, a company resident in a high tax country having permanent differences (i.e. differences between domestic taxable result and the GloBE result, due for instance to exempt income) will be treated differently depending on whether it is in a loss situation (in this case it would be subject to Top-Up Tax) or in a profit situation (in this case it will not necessarily be subject to Top-Up Tax). This result is due to the mechanical application of the rules.

Similarly, Article 20(5) might result in the following anomaly in Ireland:

Company A has the following accounting results:

Loss before tax	100*
Tax charge	(12.5)**
Loss after tax	100

Company A prepares its tax return on the following basis:

Loss before tax	100
Tax-adjusted loss	100
Loss after tax	0

*The loss includes a non-portfolio shareholding equity loss of 20

**A deferred tax asset is recognised for the loss, being 12.5 (12.5% of the loss of 100). This deferred tax asset is reflected in the Profit and Loss Account as a credit to the tax line, resulting in negative adjusted covered taxes.

GloBE rules apply as follows to Company A:

Loss after tax	100
Net taxes expense	(12.5)
Loss on non-portfolio shareholding	(20)
GloBE qualifying loss	67.5
Adjusted Covered taxes	(12.5)
Net qualifying loss x minimum GloBE tax rate	67.5 x 15% = 10.125
Expected adjusted covered taxes	10.125

As the adjusted covered taxes is more than the expected adjusted covered taxes, an amount of .625 is treated as an additional Top-Up Tax for that year under Article 20(5).

Top-Up Tax payable	.625

In addition, companies in a loss situation and suffering Top-Up Tax have no access to the substance based carve out. We believe there is no obvious reason for such differences in treatment and indeed could lead to a breach of the principle of equality provided for by Article 20 of the EU Charter of Fundamental Rights.

Application of the substance based income exclusion (‘SBIE’)

Please see our comment below regarding the mismatch between the SBIE and the UTPR in approach to the formulas reflecting substance based on employment and tangible assets.

6. Payment of any Top-Up Tax amount

The following offers commentary in line with Questions 6, 7, 17, 18, 19, 20, 21 and 22 posed in the consultation document.

1. QDMTUT

General approach

We support the idea to introduce a QDMTUT in Ireland, and we believe that this should be the primary mechanism for collecting any Top-Up Tax amounts from low-taxed constituent entities that are resident here. This will protect the Irish exchequer from losing out on additional tax revenues on foreign-based subsidiaries that are located here. The IIR will further support the corporation tax receipts whereby Irish-headquartered UPEs pay Top-Up Taxes on behalf of their foreign subsidiaries (assuming a QDMTUT is not applicable to the subsidiary's location). This should help to mitigate the expected negative impact of the Pillar One proposals in Ireland, but to what extent we do not yet know.

As noted in the consultation document, a QDMTUT should also minimise the administrative burden on Irish taxpayers and foreign UPEs, particularly where the Irish QDMTUT can be considered to be a "safe harbour" regime.

In terms of the recognition of other countries' QDMTUT, in the main we expect that the EU Member States will transpose the EU Directive, or at least the minimum standards, such that an Irish UPE, IPE or POPE should be able to rely that any QDMTUT collected and paid by a subsidiary of the MNE Group in an EU Member State would not result in any further payment obligations in Ireland over that subsidiary from a GloBE perspective. There may still be reporting requirements and we refer to this in the following section on the IIR.

QDMTUT: application of the collection mechanism

Once the policy decision is made to introduce a QDMTUT, the question then turns to how to mechanically collect the Top-Up Tax amount, noting that the GloBE rules prescribe that the amount should be determined on a jurisdictional basis, and not on an entity-by-entity basis. We believe that the Top-Up Tax will almost always have to be calculated on an entity basis, given the adjustments required to determine both the GloBE income and the covered taxes, and also the SBIE.

However, we ask that in reporting and paying any Top-Up Taxes, that the Department allow taxpayers flexibility as to how they report and pay the tax. In some instances, it will be easier for taxpayers to include all reporting information in one return and have a designated payor of the jurisdictional Top-Up Tax on behalf of the Irish entities. For other businesses, reporting and paying the Top-Up Tax will make sense on if the amount of Top-Up Tax specific to each entity should be reported as part of the entity's annual corporation tax return and the liability paid at the same time as the annual corporation tax liability falls due to be paid.

Designated reporter and filer approach

If a business wanted to report the details and pay the jurisdictional Top-Up Tax through a designated filer, we would expect that a new section would need to be added to the Form CT1 requesting details of:

• Jurisdictional GloBE income	X
• Jurisdictional GloBE Adjusted Covered Taxes	X
• Jurisdictional Effective Tax Rate	X
• Jurisdictional SBIE amount	X
• Jurisdictional Excess Profits	X
• Jurisdictional Top-Up Tax	X

A supporting computation of the resulting numbers could be provided to Revenue on request.

We refer you to our comments on the below section "Issues relevant to the payment of Top-Up Taxes via the IIR or UTPR" regarding the accounting and tax implications of ensuring the designated payor for the Irish entities is remunerated for the tax paid. These comments apply equally to a QDMTUT scenario.

Entity-by-entity reporting and payment approach

An entity-by entity approach to reporting might result in the tax computation looking as follows:

Taxable profits taxed at 12.5%	100	x 12.5% = 12.5	
Taxable profits taxed at 25%	10	x 25% = 2.5	
Total taxable profits	110		
Total Irish tax liability			**14.5**
GloBE ETR (14.5 covered tax / 110 GloBE income)	13%		
Top-Up Tax % Amount	2%		
GloBE Top-Up Tax			**2.2**

In terms of collecting the Top-Up Tax amount, we believe that the most straightforward way to collect the tax is by adding the additional GloBE tax liability to the Irish domestic corporation tax liability. This avoids the need to make adjustments to bring in imputed income or by denying deductions of otherwise deductible payments. It also prevents circularity in terms of GloBE taxes having to be considered or rather not, as part of the company's covered taxes. The covered tax and the GloBE Top-Up Tax should be easily identifiable and distinct under this approach, as set out in the example above.

This approach also avoids the need to collect Top-Up Taxes on behalf of other low-taxed entities, unless the Under-Taxed Profits Rule ('UTPR') applies.

QDMTUT: Preliminary Tax

Given the uncertainties that will arise from year to year in terms of the Top-Up Tax amount payable, and the reliance that will need to be placed on the consolidated and entity level financial accounts (when are typically prepared a few weeks or months after the end of the fiscal period) to calculate such Top-Up Tax, the GloBE Top-Up Tax should not feature as an element of the local preliminary corporation tax liability.

In the above example, the preliminary tax liability would only be concerned with the 14.5 measure of Irish corporation tax profits, and this should remain the case (i.e. ignore the 2.2 GloBE Top-Up Tax). This approach would not deviate from the GloBE rules in terms of design, and would bring greater certainty and ease of administration to all parties involved in the preparation and payment of the corporation tax liability.

2. Income Inclusion Rule ('IIR')

IIR: Collection of the Top-Up Taxes of other constituent entities

Assuming that the primary method of collecting the Top-Up Tax amount would be the QDMTUT, the IIR as a collection mechanism would only apply where an Irish UPE, an Irish Intermediate Parent Entity ('IPE') or an Irish Partially-Owned Parent Entity ('POPE') was mandated to collect a Top-Up Tax on behalf of a low-taxed constituent entity.

As most countries would likely introduce some form of QDMTUT to protect their tax base, the IIR should not frequently result in an amount of tax payable. Rather it will more likely be used by the UPE, IPE or POPE as a

check to ensure that any low-taxed constituent entity subsidiaries have paid over a sufficient amount of tax under their respective country's QDMTUT (although to the extent that QDMTUTs can be regarded as a safe harbour, such that confirmation that the regime applied is sufficient to prevent any further investigation by the UPE, IPE or POPE, that would be preferable).

The QDMTUT should be fully aligned to the EU Directive rules in order to avoid any additional tax being collected by IIR. Applying a QDMTUT makes sense in terms of managing tax payments for a large business, but this is only to the extent that the regime is a fully compliant safe harbour regime

Similar to the manner of computing and reporting the GloBE Top-Up Tax liability, we advocate that any GloBE tax that is payable on behalf of another entity be reported as an additional liability after the reporting entity's domestic and own GloBE taxes have already been computed. Referring to the earlier example, the result might look as follows:

Taxable profits taxed at 12.5%	100	x 12.5% = 12.5
Taxable profits taxed at 25%	10	x 25% = 2.5
Total taxable profits	110	
Total Irish tax liability		**14.5**
GloBE ETR (14.5 covered tax / 110 GloBE income)	13%	
Top-Up Tax % Amount	2%	
GloBE Top-Up Tax		**2.2**
GloBE Top-Up Tax collected via IIR		**X**

Similar to the comments above relating to preliminary tax obligations, a company should not have to factor in an IIR Top-Up Tax into its preliminary tax payment. This is particularly important in light of the mismatch in payment deadlines between different countries.

Reporting requirements under the IIR

It is too early to comment on the reporting requirements that are likely to be required given that the Implementation Framework ('IF') has not yet been agreed. We await confirmation through the IF regarding whether one global GloBE return will be required to be prepared, who will be tasked with preparing and filing that, will it be shared amongst countries where there are members of the MNE Group, how will the Top-Up Tax amounts be verified and audited and related matters. As noted above, we have proposed that taxpayers have the option to report details of their liability either on a group basis or an entity level basis. We understand that an additional GloBE return will need to be filed and that this is likely to be separate to the reporting requirements in the Form CT1.

Issues relevant to the payment of Top-Up Taxes via the IIR or UTPR

The following comments have relevance to collections of Top-Up Taxes under both the IIR and UTPR.

Where one company is obligated to pay a Top-Up Tax on behalf of another MNE Group member, financing and recompensation issues may arise. For example, many UPEs, IPEs, POPEs may exist as part of a structure for legal or regulatory reasons. They may not hold any tangible or intangible assets, other than an investment in subsidiaries. They may have no ability to generate income or cash other than by the receipt of profits distributed back up to the parent from a subsidiary. Accordingly, when they are obliged to pay over Top-Up Taxes on behalf of other group members, they may not have the capital to meet these payments. In a similar scenario, the parent may have regulatory requirements to hold certain amounts of capital at all times and does not have the excess cash to meet the GloBE liability or may be prohibited by the Central Bank of Ireland or the ECB from doing so.

It may not be possible in these scenarios (for a range of reasons including recovery of capital issues or lack of distributable reserves) to repatriate cash from the low-taxed entity to the parent entity to meet the liability.

In addition, it is not clear how the payment of a tax liability by one entity on behalf of another is to be treated for accounting or tax reasons.

An Irish solution to this problem may lie with the rules that are already in place for group relief. Under the Irish rules, it is possible for one group member to make a tax-free payment to a fellow group member for group relief in respect of a loss or a charge on income. If the low-taxed constituent entity could make a payment tax-free under these rules to the entity responsible for paying the GloBE Top-Up Tax, that would alleviate a range of cash repatriation issues (for example, not being able to pay a dividend because of negative reserves). It would also allow greater flexibility for the MNE Group to determine its own financing affairs. The accounting treatment currently applied to payments for group relief of losses or charges would not present an obstacle to this approach as it generally seeks to reconcile the payments.

This solution would sit easily with the booking of the Top-Up Tax as a one-line entry to the tax computation, as per the earlier example. There would be no need to make reference in the tax return to who actually paid the liability (again in keeping with the existing Irish rules and common practice). This would assist in the position where so-called 'Chinese walls' exist between different sub-groups or sectors of the same MNE Group.

We do not believe that it should be needed to make Irish constituent entities joint and severally liable for any Irish GloBE liabilities of the Irish constituent entities of the same MNE Group if the above approach is adopted (indeed this course of action should be avoided if at all possible). This comment applies both to liabilities to be collected under a QDMTUT, the IIR or the UTPR.

3. Under-Taxed Profits Rule ('UTPR')

UTPR: a general comment

Our initial comment regarding the UTPR has to be that we do not expect this mechanism to have widespread application, given that QDMTUTs should be commonplace in a matter of years, with IIRs collecting the remainder of Top-Up Taxes in the main. However, assuming that not all countries will introduce either a QDMTUT or an IIR, and noting that the draft EU Directive essentially requires this backstop to be introduced in the EU Member States, we have provided comments on this rule.

UTPR: collection via a Top-Up Tax or through denial of deduction

The draft EU Directive under Article 11(1) allows the EU Member State a choice as to how the UTPR is applied. The choice is either:

(i) "*a top-up tax due by those constituent entities*" (we understand that those constituent entities are the constituent entities in 'UTPR jurisdictions' as defined in the GloBE model rules), or

(ii) "*a denial of deduction against the taxable income of those constituent entities resulting in an amount of tax liability necessary to collect the UTPR top-up tax amount allocated to that Member State*".

In determining which approach would be preferable for Ireland we refer back to our comments on the QDMTUT and IIR that a one-line Top-Up Tax charge is the simplest solution. Although the UTPR Top-Up Tax amount will be more difficult to calculate because of the formulaic nature of allocating UTPR taxes between UTPR jurisdictions, the constituent entity's allocation should nonetheless be reported in this matching fashion. We include an adapted earlier example for reference:

Taxable profits taxed at 12.5%	100	x 12.5% = 12.5	
Taxable profits taxed at 25%	10	x 25% = 2.5	
Total taxable profits	110		
Total Irish tax liability			**14.5**
GloBE ETR (14.5 covered tax / 110 GloBE income)	13%		
Top-Up Tax % Amount	2%		
GloBE Top-Up Tax			**2.2**
GloBE Top-Up Tax collected via IIR			**X**
UTPR Top-Up Tax liability for the UTPR entity			**Y**

UTPR: Calculation of the UTPR Top-Up Tax

Suggested simplification proposals

The draft EU Directive prescribes that the UTPR amount for a jurisdiction be calculated in respect of each fiscal year. However, this is very burdensome for MNE Groups and will have a heavy compliance burden. It may result in a relatively small UPTR payment (after the application of the QDMTUT and IIR have already been applied) that could be spread over a number of entities / jurisdictions for little gain. It appears to us that the compliance burden outweighs the benefits from the tax collected.

Noting that these comments are comments on the overall design of the rule, and cannot be altered in substance, we do raise a question regarding the implementation of one particular element of this requirement. This is the requirement to calculate a UTPR allocation on a year-by-year basis. We ask the Department to consider whether an optional simplification could be included such that an average UTPR allocation (based on the allocation calculated for the fiscal year prior to the UTPR coming into effect) could apply for a three or five year period. This would probably not differ greatly from a similar allocation of the UTPR amounts on a year-by-year basis, but it would minimise the extent of the compliance burden.

A further simplification which might be considered is to align the metrics for the UTPR with those used for the SBIE in terms of employees and payroll costs. Both the UTPR and SBIE are driven by formulas that look at assets and people functions. In terms of people functions, the UTPR percentage formula looks at the total number of employees (including independent contractors) in a given jurisdiction compared to the total equivalent number for all UTPR jurisdictions. This differs from the SBIE approach which looks at the ‘eligible payroll costs’. We do not see a policy justification for this difference. As such, we suggest considering whether Ireland would implement both the SBIE and UTPR using the one metric, to minimise confusion and the risk of incorrectly applying the rules. This would also minimise the extent of data collection that is needed in the event of an audit.

7. Scoping issues

The following offers commentary in line with Question 5 posed in the consultation document.

Given the importance of the financial services and wealth management industries to the Irish economy, we ask that the Department of Finance issue advance clarification regarding which commonly-used Irish holding vehicles would be classified as “excluded entities” for the purposes of the GloBE rules. For example, can the Department clarify that all registered and regulated funds with the Central Bank, such as ICAVs, AIFs, UCITs funds (and their subsidiaries to the extent that they meet the requirements prescribed by the draft Directive) be considered to be “excluded entities”. This clarification would provide certainty to businesses who do not currently know whether they would be regarded as excluded.

We understand from the OECD Model Rules commentary that constituent entities will only be regarded as being an entity of the “MNE Group” to the extent that constituent entity’s income, expenses, assets and liabilities will be consolidated on a **line-by-line** basis with the equivalent income, expenses, assets and liabilities of all other consolidated entities. Where results of a constituent entity, or its value at year end is only reported as a one-line item on the balance sheet, this will not be regarded as consolidated fully, and such entities would not be considered to be part of the MNE Group. There are specific exceptions to this rule, including where entities are not fully consolidated on the basis that they are held for sale, or because they are immaterial. Can the Department please clarify that this is also the general approach that will be taken in applying the rules in Ireland?

A specific question arises when considering a situation whereby an entity is required to consolidate for accounting purposes, but because of a specific provision such as IFRS 10, the consolidation requirements on a line-by-line basis are dispensed with. The entity only reflects the value of the investment in its balance sheet at year end. However, if the investment is itself an in-scope MNE Group with revenues >€750m, should the parent consider the investment as consolidated sufficiently for the purpose of the GloBE rules, thereby potentially bringing the parent and its fully consolidated subsidiaries into scope for the GloBE rules. Or, alternatively, is it expected that the parent would not consider the investment to be consolidated, and investment remains in-scope for Pillar Two, but the parent and its subsidiaries do not form part of the same MNE Group.

Under the GloBE rules, the residence of a constituent entity is determined based on the place of management, where the entity was created or similar criteria. Where the residence of the entity is not able to be determined by reference to the place of management, it is deemed to be resident where the constituent entity was created. The draft EU Directive is not clear regarding who decides that residence can't be determined based on place of management. This will need to be considered as an implementation matter, although we note that it is probably only relevant for non-treaty situations.

8. Technical transposition matters

Practical implementation points

As a general comment, we ask that the Department introduce the measures of an adopted EU Directive with as little change to the EU rules as possible. Care should be taken to ensure that any changes that are made are necessary in order to either meet the minimum standards or to implement decisions relating to available policy options. Any changes beyond this would likely result in a lengthy implementation process, create deviations from the basic rules that need to be considered by other non-EU stakeholders in determining whether Ireland has a Qualifying IIR, open up the possibility of challenge by the EU Commission around implementation or indeed limit our competitiveness.

We do not propose a line-by-line transposition of the Directive into the tax code given the breadth of the GloBE rules. We suggest that an approach to implementation be taken similar to what was adopted in bringing in the transfer pricing guidance into Finance Act 2019.

It would be preferable to make changes to the existing parts of our tax code to modernise them in advance of Pillar Two and the GloBE rules. Numerous examples have been provided throughout this document of such areas for change, and indeed there are likely to be others that we have not included in this instance. The implementation of the GloBE rules offers an opportunity to critically reengage with our tax code, to simplify existing areas where possible and adapt international best practices.

Timing

In terms of timing, we note Article 55 of the draft EU Directive provides that “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2023” …”They shall apply those provisions in respect of the fiscal years beginning as from 31 December 2023”.
Can the Department ensure that the rules are introduced for companies with accounting periods beginning on or after 1 January 2024 to manage the practical difficulties that would otherwise arise if the rules were effective from 31 December 2023. Companies with a 30 December year end would otherwise potentially face applying the GloBE rules for a 1 day period. This would also be burdensome for retail businesses who typically end their accounting period on the final Saturday of the year, and so the date that they are likely to finish their accounting year end for 2023 will be Saturday 30 December 2023.

Continued stakeholder engagement

We also advocate for a continued stakeholder engagement process with the Department of Finance and the Revenue Commissioners throughout the implementation process. We ask that draft implementing legislation be shared for consultation with the business community and industry groups as soon as possible. It would make sense that the earliest rules to be discussed would be the scoping rules given the certainty that this would give to businesses who are not certain whether they will or won’t be in scope under an Irish implementation.

Adjustments that will be needed for future re-alignment to the Model Rules

There is a discussion to be had regarding the procedure for amending the Model Rules, if and when changes become necessary. We provide some comments below to give some context for this discussion. The following points are made in recognition that not all issues may have been foreseen in advance – and, as a matter of fact, a large number of issues were identified as a part of the Public Consultation on the Implementation Framework.

The directional indication provided during the Working Party 11 (‘WP11’) meetings seemed to rely on the role of the Administrative Guidance to address any issues that may arise. As a part of this approach, it would even be possible to develop and adopt model legislation deemed necessary to incorporate the Administrative Guidance into domestic systems. Moreover, the peer review mechanism would ensure that the appropriate level of consistency remains in place.

Overall, this would accommodate the necessary changes while respecting the political agreement represented by the Model Rules, i.e. recognising that changes in parts of the Model Rules could jeopardise the balance reached.

Challenges

The proposed approach, while having the advantage of preserving the integrity of the political compromise represented by the Model Rules, could give rise to significant uncertainty in its application.

Conflict between Model Rules and Administrative Guidance

- It is possible to imagine situations in which an express provision of the Model Rules would need to be overridden. For instance, Delegates at WP11 discussed during the meetings whether the transition rule denying the step-up in asset carrying value in the case of intra-group transfers (Article 9.1.3 of the Model Rules) would lead to unfair outcomes in case such transfer leads to taxation above the minimum level (in recognition that there may be business reasons to undertake the transaction). Should a decision be reached to recognise the step-up in basis in these cases, it would be in direct contradiction to the wording of Article 9.1.3.
- To enact this change in policy, the current approach would suggest that the issuance of Administrative Guidance would be appropriate. The effect would be a later-in-time Commentary in effect overriding the Model Rule it refers to.
  - Model Rules and Commentaries are political agreements reached at the level of the Inclusive Framework. Both mechanisms have the ability of committing jurisdictions to implement them through domestic legislation. Therefore, given their equivalent nature, nothing would prevent a Commentary from overriding its respective Model Rule.
  - This formal analysis, however, does not take into account the system developed so far, which is based on Model Rules that are *interpreted and operationalised* by the Commentary. In other words, changing the Model Rules through the Commentary would undermine the intended central role of the Model Rules. It would also create uncertainty, to the extent that two contradictory rules would co-exist.

- While both approaches are possible from a legal perspective, it seems that pursuing Model Rules changes through the Commentaries would be less transparent, would create uncertainty and would be inconsistent with the system developed so far. Besides, it would not effectively protect the integrity of the political compromise of the Model Rules, since the Commentary would in effect override the Model Rules (i.e the political compromise would be tilted to the same extent).
- Once the Model Rules are transposed into domestic law, interpretation issues and conflicts will be decided by the domestic courts. A Supreme Court will most likely decide that the wording of the Model Rules is decisive for the interpretation in most countries.
- Therefore, a mechanism should be developed to change the Model Rules when necessary. This mechanism should include political participation to preserve the compromise character of the Model Rules.

Clarifications vs. retroactive interpretation

In other cases, it is possible that a new interpretation included in the Commentary is not directly conflicting with the Model Rules, but also does not follow immediately from their wording. For instance, the calculation of the jurisdictional ETR under Article 5 considers all Constituent Entities of an MNE Group, i.e. all entities consolidated by an UPE. In principle, this rule remains valid in case the UPE is an Excluded Entity. However, in the case of pension funds and sovereign investment funds, this could lead to the joint ETR calculation of entities that belong to separate operational groups (since these funds may consolidate their investments). This seems to be an unintended effect and, therefore, it would be conceivable to imagine an interpretation according to which, in the case of these funds, jurisdictional blending should respect the segregation of operational groups.

In case such an interpretation were to be adopted, the question arises regarding the moment from which it should be valid - would it only be a clarification of a rule that had always been in place, or would it be a new interpretation that should be valid from the moment it was issued?

- From a policy perspective, it may be desirable to endow the interpretation with retroactive effects, to ensure the desirable outcome from the outset. This may be possible in cases of mere clarifications (i.e. the interpretation provided would already follow from the rules).
- On the other hand, countries may have different degrees of flexibility to implement actual changes in interpretation with retroactive effects. Moreover, there is no bright line between clarifications and changes in interpretation. Therefore, it may be prudent to restrict the effect of the interpretation to future events (*ex nunc*).
- Even in case only future effects are intended, countries may be required to ignore the interpretation altogether, on the grounds that their domestic rules must be interpreted in the light of the context in which they were enacted (static interpretation).
- To prevent uncoordinated outcomes, endowing interpretation with retroactive (*ex tunc*) effects should be avoided. Moreover, a solution to prevent jurisdictions from acknowledging static interpretation only should be considered – e.g. requiring periodic legislative endorsement of the Commentary.

Update of the Model Rules ahead of domestic implementation

The discussion above suggests major limitations of the Administrative Guidance (and Commentary):

- The interpretation provided for in Administrative Guidance may not override the wording of the Model Rules. Such a modification should be undertaken by the modification of the Model Rules themselves;
- It is not recommended to endow Administrative Guidance with retroactive effects. Rather, they should have future (*ex nunc*) effects;
- Even if the Administrative Guidance has only future effects, its application may be called into question in constitutional systems that require static interpretation (i.e. interpretation according to the context in which the law was enacted).

This background clarifies that the issuance of Administrative Guidance may not be regarded as a panacea to address all challenges of implementation. In particular, considering the large number of guidance requests submitted during the Public Consultation on the Implementation Framework, it would be advisable to address them before the implementation of the Model Rules into domestic law (through adaptation of the Model Rules themselves, rather than through Administrative Guidance).

Proposal

- The development of a political mechanism to modify the Model Rules when necessary would significantly contribute to the long term stability of GloBE.
- To reduce the scope for uncoordinated outcomes, it would be important to recognise that the interpretation provided for in Administrative Guidance will only have retroactive (ex tunc) effect in exceptional cases. Moreover, a mechanism to incorporate the new (ex nunc) interpretation into domestic systems should be devised.

Given that the adoption of Administrative Guidance may require incorporation into domestic law to prevent uncertainty, the comments already received in the Public Consultation should be incorporated into the Model Rules ahead of their implementation in domestic legislation.

9. US tax Reform comments

The following relates to Question 2 posed in the consultation document.

Given that the stated purpose of this consultation is to discuss issues relevant to the implementation of the minimum tax rules in Ireland, we do not propose to offer substantive commentary relating to US tax reform measures at this time for the following reasons:

- We do not yet know what, if any, further tax reform is politically achievable in the US given the current state of play with regards to support for Democratic tax reforms;
- Only when we would have sight over such reforms could we offer comments on how such changes would impact US MNEs operating in Ireland;
- It is not clear that there is anything that could be done in Ireland to manage the resulting impact of US tax reform changes, particularly regarding implementation of the GloBE rules.

We would be pleased to send you something under separate cover relating to the proposed changes that would have a big impact on US MNEs operating in Ireland, including:

- Whether GILTI will regard the Irish QDMTT as a QDMTT or CFC tax
- 163n - US interest limitation rules
- Recasting of GILTI on a country-by-country basis
- SHIELD proposals
- Associated compliance matters

As a final point, we would suggest that the Department look beyond the US, to other countries that might also be a source of FDI investment into Ireland in the future. We should consider the compatibility of our rules (including with the GloBE rules layered on) to the tax systems offered by other countries with whom we compete for FDI, or countries that could be a source of investment to see where our competitive advantages and disadvantages lie.