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22 July 2022

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Response to Consultation on Pillar Two

Dear Sir / Madam

EY is pleased to respond to the Consultation on the implementation of the Minimum Tax Rate as set out in Pillar Two of the OECD's Inclusive Framework ("the Consultation") by the Department of Finance. This is an important step for Ireland in this journey toward radically different international tax framework, and the Government's consultative approach is very much appreciated.

As with our previous submission of 10 September 2021, we welcome the opportunity to share our insights from discussions with clients and with colleagues in other EY member firms.

We would like to commend the Government's leadership and balanced approach in its engagement with the Pillar Two process, particularly in securing consensus that the Minimum Rate would be no higher than 15%. Clearly that engagement continues to be active, through the various ongoing OECD and EU processes. We welcome the willingness to continue dialogue with business throughout these processes.

The questions in the Consultation document are the right ones. However, our responses must be seen in the context that considerable uncertainty remains about some quite fundamental matters, such as the linkage between Pillars One and Two[1], GILTI coexistence, the scope of safe harbours, dispute resolution, the implementation framework as well as some important matters in the Model Rules themselves. For this reason, it is not necessarily possible for us to make clear recommendations on the policy choices facing Ireland.

Ireland's competitiveness must remain a key priority, as implementation of Pillar Two may result in a limitation in Ireland's relative competitiveness on tax. Wider measures on competitiveness should be considered, including through the personal tax system.

It is extremely important to guard against unintended consequences, including unintended interactions with Ireland's existing compliance framework for corporation tax, including surcharges, interest, penalties

[1] Itself the subject of some political differences between countries

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etc. Every effort should be made to ensure that the Pillar Two compliance framework is as simple as possible, to minimise compliance costs for business.

Background

Significant developments in the Pillar Two process have taken place since our submission of 10 September 2021, notably:

- Publication by the OECD of the Pillar Two Model Rules on 20 December 2021
- Publication by the EU Commission of a Draft Minimum Tax Directive on 22 December 2021[2]
- Publication by the OECD of a Commentary to the Model Rules, on 14 March 2022
- Ongoing technical dialogue on the operation of the Model Rules
- Ongoing political dialogue as to the linkage between Pillars One and Two and what this means for the implementation timeline

Meanwhile, there has been some slippage in the contemplated timeline for introduction of Pillar Two. Although the OECD merely said it would become effective "in 2023", the original draft Minimum Tax Directive set an implementation date of 1 January 2023. The latest draft Minimum Tax Directive would revise that target to 31 December 2023. Nonetheless, that remains an ambitious timeline given the remaining uncertainties as well as the scale of the challenge presented to legislators, administrators, taxpayers, tax professionals, auditors and other advisers.

It continues to be the case that:

- Implementation is complex, requiring translation into legislative language of participating jurisdictions according to their own constitutional requirements. This Consultation parallels similar processes that are getting under way in other jurisdictions, and it remains unclear whether full consistency of implementation can be secured.
- The work of the Inclusive Framework continues, but important aspects have still to be addressed, notably the Implementation Framework, which includes GILTI coexistence.

As indicated in the Consultation document, it is important for Ireland to get this right because of the impacts on Ireland's fiscal, budgetary and industrial policies. The Consultation document also rightly stresses the importance of "*support[ing] economic growth and prosperity, while safeguarding our competitive tax regime for real and substantive activities*."

We note that it is highly likely that Ireland will introduce a QDTUT[3] as part of the Pillar Two implementation process. This is particularly important in the context of the anticipated status of the QDTUT as a "safe

[2] There have been subsequent drafts, the most recent of which is dated 16 June 2022. References in this document are to the most recent draft.
[3] Qualified Domestic Minimum Top-up Tax

harbour" for the purposes of Pillar Two. The implementation of the IIR[4] and QDTUT, in contrast to an adjustment to the nominal tax rate, also aligns with Ireland's stated objectives on competitiveness.

However, we recommend that Ireland defer committing itself on this point until there is greater clarity on key issues under discussion in the context of the implementation framework, including, without limitation, GILTI coexistence, safe harbours, and any further developments arising from the ongoing uncertainty as regards the detail and timing of implementation by key countries (including the current open issues necessary to secure approval of the draft Minimum Tax Directive and the detail of US implementation).

From a competitiveness standpoint, the additional Exchequer protection offered by Pillar Two – particularly if a QDTUT is implemented – offers a wider opportunity to revisit some policy choices. A full discussion of these is outside the scope of this submission.

We have set out our responses to each of the Consultation questions in the Appendix. Although not dealt with in detail here, we would like to this opportunity to stress the importance in terms of certainty of enactment in Finance Act 2022 of the necessary adjustments to Ireland's R&D credit so as to confirm its status as a Qualified Refundable Tax Credit.

We look forward to continued dialogue as the process evolves.

We are at your disposal to discuss the matters raised in this submission in further detail.

Yours faithfully,

EY

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[4] Income Inclusion Rule

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Appendix - Responses to Questions in the Consultation

General points

As discussed in the cover letter, remaining uncertainties limit our ability to make clear recommendations on policy choices. However, it is critical that those choices are designed to maximise Ireland's competitiveness, provide long term stability and certainty of tax treatment and that the rules are implemented in a way which minimises the administrative burden for in-scope companies.

Throughout this submission capitalised terms and abbreviations have the meaning set out in the Model Rules ("the Rules") published by the OECD, unless the context requires otherwise. References to the Directive refer to the draft dated 16 June 2022.[5]

1. Are there any specific features of the Rules that warrant particular attention with regard to their implications for Ireland's tax code and tax policy?

The Rules contain a complex mechanical formulation to calculate an Effective Tax Rate ("ETR"). The formulation is intended to effectively set a floor for tax competition, but in practice the mechanism is agnostic as to the underlying cause(s) of a Constituent Entity ("CE") having a low ETR.

A wide variety of issues have arisen in our discussions with clients. As well as specific features of the Rules, they are concerned with affected features of the Irish tax system or affected issues with Ireland's role in international business. Some of those topics are set out below:

i. The importance of Ireland's R&D credit meeting the conditions to be a Qualified Refundable Tax Credit ("QRTC"). We would welcome an explicit statement of the Government's intention to make the necessary changes in Finance Act 2022.

ii. The overall design of the rules does not easily fit with Ireland's credit system for dealing with foreign branches and dividends from foreign subsidiaries. Such profits do not form part of the GloBE Income or Loss ("GIOL") of an Irish CE. Any Irish taxes paid on them would not be part of the Irish CE's Covered Taxes[6], but would be allocated to the branch or subsidiary. This procedure would to some extent undo the advantages of the QDTUT in affected cases. We recommend that the Government accelerate its consideration of the issue with a view to introduction of an elective participation exemption, as previously recommended by EY and others.

iii. On a related note, the definition of Excluded Equity Gain or Loss does not align with the conditions for substantial shareholding exemption under section 626B TCA 1997. This means there will be cases where a gain that is exempt under section 626B still gives rise to GIOL; conversely there will be cases where a gain that fails the s626B conditions results in a tax liability that is not a Covered Tax. This merits close consideration.

[5] EU Presidency compromise text of 16 June 2022 8779/22, not yet a formal Commission Proposal
[6] In contrast, withholding taxes (other than those applicable to Excluded Dividends etc.) suffered by a CE will generally qualify as Covered Taxes of an Irish CE regardless of whether a credit is actually available under Schedule 24 of the Taxes Consolidation Act, 1997 ("TCA 1997").

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iv. Ireland is the international headquarters for many multinationals with US multinationals alone employing approximately 190,000 people here. Those companies invest in significant assets, and many engage in significant R&D activity. The Irish tax system contains effective "ring fences" for various deductions including various capital allowances and tax losses. The interaction of those provisions with the Model Rules adds additional complexity increasing the case to consider simplification of those domestic provisions.

v. Section 21B TCA 1997 provides an exemption for dividend income on certain portfolio investments. This was one of Ireland's responses to the FII GLO litigation required to ensure Irish law complies with EU treaty fundamental freedoms. The benefit of the Excluded Dividends exemption in the model rules is narrower, and some evaluation will be required as to whether Ireland's system continues to be compliant with the EU treaty fundamental freedoms given this overlay.

vi. The model rules provide that tax charged on the income of a CE under a Controlled Foreign Company Tax Regime ("CFC regime") is to be treated as Covered Tax of the CE rather than of the parent company that paid the tax[7]. This may have a significant impact on the ETR of an Irish CE.

vii. Some parts of the Rules provide special treatments where CEs form part of a tax consolidation in the country in which they are located. Ireland does not have a system of tax consolidation. Instead, it has group relief rules whereby losses and similar attributes may be shared between group members and capital assets may be transferred on a tax neutral basis. Some adaptation to the Rules will be required to deal with local conditions unless Ireland is to move to a system of tax consolidation

viii. The Rules and Directive envisage safe harbours but details in that respect are awaited. It will be important to ensure that it is straightforward for Irish CEs to access safe harbours, so that they achieve their intended objective of reducing administrative burden in low-risk scenarios. This should be kept under review as details emerge.

ix. Benefits provided by Ireland's Knowledge Development Box ("KDB") may be eroded through the minimum tax – at least for in-scope companies. It may therefore be appropriate to consider whether the knowledge economy can be incentivised in other ways that do not face the same problem – for example by replacing the KDB with some form of QRTC for in-scope companies. Furthermore, for in-scope beneficiaries of the KDB the Subject-to-tax Rule ("STTR") would also be in point, and taxes due under the STTR would be creditable against any top-up tax, including a QDTUT. We do not believe increasing the effective rate under the KDB is the appropriate response to this as it would clearly reduce the attractiveness of the regime. Reframing the KDB as a QRTC should be considered to better achieve its objectives in driving innovation activity in a manner which future proofs those objectives in a Pillar 2 environment.

x. Unused deficits give rise to deferred tax assets, which are taken account of in computation of Adjusted Covered Taxes, whether or not they are recognised in the financial accounts. The manner of taking into account depends on whether the item is a GloBE Loss. The wide variety of such types of deficit means there is risk of inconsistent application of the

[7] The rules are framed so that this outcome also applies in computation of a QDTUT, although we understand that some countries have reservations as to whether this outcome is intended.

definition of GloBE Loss. Some clarification of the application of the GloBE Loss concept to Irish tax attributes would be helpful.

xi. Ireland's schedular system may result in some kinds of deficit being completely unused or carried forward whilst for the purposes of the Rules they are either deductions from GIOL or result in a benefit through the temporary differences mechanism

xii. Unlike many countries, Ireland does not have a concept of functional currency for tax purposes – other than for the specific purpose of computing trading profits. This comes into sharp focus when considered in the context of Asymmetric Foreign Currency Gains or Losses. There is a risk of significant differences between the treatment of foreign exchange differences in a domestic context and Pillar 2.

As a possible policy response to items x, xi and xii above, some investors have suggested more fundamental reforms to align the computation of Irish taxable income with accounting profits, for example by simplifying or removing the schedular system, computing all taxable profits in functional currency, and possibly even reviewing the rate structure. We also believe these issues are worthy of examination in the medium term, but we accept their complexity militates against any short-term action.

2. When implementing the Rules, are there any specific issues which should be considered with respect to implications for the Irish tax code arising from United States (US) corporate tax reform proposals, with particular reference to the significance of US multinational enterprises (MNEs) operating in Ireland?

i. The profits of many Irish subsidiaries of US MNEs, in addition to being subject to Irish corporation tax, are subject to additional tax in the US under the GILTI regime. It has yet to be determined how GILTI will interact with Pillar Two (i.e. whether it will be amended, whether it is regarded as an IIR, a CFC regime, or perhaps is the subject of some safe harbour). Until this interaction is agreed, and its consequential impacts for the Minimum Rate and the Directive understood, it remains too early to make recommendations for the Irish tax code.

ii. Tax paid by an Irish subsidiary of a US MNE is generally available as a credit against US tax whenever the profits are taxed in the US, i.e., whether by dividend, via GILTI, or otherwise. It is important to Ireland's competitiveness that those credits are not accidentally lost by framing the Irish tax code in a way that ignore the US Foreign Tax Credit Regulations. This is particularly relevant in the context of Ireland's R&D tax credit rules. It is important to Ireland's competitive standing that the relevant legislation be brought forward in Finance Bill 2022. EY has communicated thoughts on this points to relevant stakeholders. Our response to Question 4 is also relevant in this context.

iii. Some Irish businesses have income that is indirectly subject to the US Base Erosion and Anti-Inversion Tax (BEAT). Because this tax is levied on the US payer rather than the Irish recipient of the income, it is not a Covered Tax of the Irish Constituent Entity for the purposes of the Model Rules. We suggest the status of BEAT be kept under review pending ongoing discussions on rollback of certain taxes through the Pillar One forum.

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3. Are there other considerations of significance that should be taken into account when implementing the Rules in domestic legislation?

On 7 October 2021 Minister Paschal Donohoe made a speech confirming Ireland's decision to approve the Two-Pillar solution on international tax. At the end of the speech, he confirmed that:

> *"We will continue to be highly competitive, keep and create many good jobs. This agreement is a balance between our tax competitiveness and our broader place in the world."*

We submit that in this context Ireland should not lose sight of the need for its tax regime to be competitive within the bounds of what is internationally permissible. Stability and certainty are key features of Ireland's competitiveness proposition. To this end, we believe that Ireland should implement the Directive in good faith, but should go no further than the Directive requires. For similar reasons, we believe that Ireland should not implement any earlier than required, except to the extent of any clarifications/enhancements to the Irish tax code in preparation for Pillar Two[8].

There is one other general matter, which is that while the body text of the draft Minimum Tax Directive does not make reference to the OECD's guidance on Pillar Two, the Recitals to the Directive contemplate that some of the content of such guidance might be incorporated into Member States' legislation. For now, our recommendation is only that the possibility should be borne in mind of doing exactly as the Recitals suggest – at least to the extent that Commentary does in fact add clarity.

Given that many Irish businesses are routinely exposed to accounting practices under both US GAAP and IFRS, it is important that there is consistency of application of the Model Rules to both sets of standards. Our response to Question 8 deals with a significant area of potential difficulty.

More specifically, the Irish tax code has some distinctive features, which will need to be addressed in Ireland's implementation, including:

i. Multiple tax rates

ii. Schedular system

iii. Credit regime for taxing foreign branch profits and dividends from foreign subsidiaries

iv. Group relief system rather than tax consolidation, including the treatment of a payment/receipt for group relief

An effective dispute resolution mechanism is critical to achieving the stated objectives of Pillar 2. It is however inevitable that increased tax disputes will arise as Pillar 2 will introduce an additional set of international tax rules which will sit alongside the existing rules. It is critical that the Competent Authority division of the Revenue Commissioners is appropriately resourced in this context.

[8] Such as the amendments required to ensure R&D credits are a QRTC

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4. Are there any amendments needed to Ireland's existing tax code to ensure that existing legislation does not result in any unintended outcomes under the Rules when they are implemented in domestic legislation?

Reference has already been made to the importance of Irish R&D credits in supporting continued growth in Irish innovation, leveraging the deep local experience across key sectors to the Irish and global economy. In this context it is critical for the Minister to introduce legislation in Finance Bill 2022 to ensure that Ireland's R&D credit is treated as a QRTC under the Rules. Otherwise, the benefit of the credit is at risk of being undone by the top-up tax under Pillar Two. We would also note that there is merit in increasing the rate of credit to offset the dilution of the benefit of the credit due to Pillar Two.

We recommend that the Minister should also prioritise bringing forward legislation to make the R&D credit refundable within one year, also in Finance Bill 2022. This will allow research to proceed which might otherwise be delayed pending availability of funds. It will also have some technical advantages from the perspective of the US Foreign Tax Credit Regulations, as we have discussed elsewhere.

The importance of bringing certainty to the foregoing issues in Finance Bill 2022 cannot be overstated. Innovation planning often involves long term decision making. Delaying investment and/or location decisions in that respect is generally not feasible in practice.

The layering of the Rules over the existing framework of s291A(5) and carry-forward attributes (including certain losses, capital allowances, excess R&D credits, attributes under the interest limitation rules) as well as the related deferred tax accounting outcomes leads to complex and sometimes counter-intuitive outcomes. We believe these interactions merit further study so as to identify whether any anomalies might be resolved by minor adaptations of Irish legislation, and whether clarity can be brought in identifying which attributes can constitute a GloBE Loss.

GIOL and Schedule D Case I income are both computed using accounting income as starting point, and unforeseen results can still arise, some of which are referred to herein. We are concerned that there is even greater potential for unpredictable outcomes for items which are further removed from accounting treatment, such as certain types of non-trading income, capital gains on asset, and indeed capital gains on liabilities (which are generally outside the scope of capital gains tax). The incidence of taxation on foreign currency movements is an example of this – see our earlier comments on the Asymmetric Foreign Currency Gains or Losses concept, and our response to Question 8.

Scope

5. Are there any aspects concerning the scope of the Rules, for example the definitions of a Group, a Constituent Entity or an Excluded Entity, that require further clarification in domestic legislation?

The Rules, and consequently the Minimum Tax Directive, are written at quite a conceptual level. As mentioned in our response to Question 3, the Irish corporate tax code contains a number of distinctive features which are not specifically addressed in the Rules..

It is important to achieve maximum clarity and certainty in application of the Rules as enacted in Ireland. Accordingly, it would seem appropriate to use every opportunity to incorporate the clarifications contained in the Commentary on the Rules – at least to the extent that they add clarity – into Irish legislation as well.

Conversely, care should be taken to ensure that implementation of Pillar Two does not result in unintentional change in the meaning of well understood expressions for the purposes of domestic tax. For example, a wider reframing of domestic definitions of group etc. to align with the Rules should be viewed with extreme caution due to the high risk of unintended consequences.

Charging provisions

6. Do you have any views on how (i) the Income Inclusion Rule (IIR) and (ii) the Undertaxed Profits Rule (UTPR) provisions should be reflected in domestic legislation?

We see this as implementing the EU's Minimum Tax Directive, without going further, into a format that is recognizable and comprehensible to an Irish tax practitioner.

We refer to earlier comments on the various aspects of the Pillar 2 rules and implementation which are subject to significant uncertainty (technical and/or political).

Detailed evaluation of this question in the context of that uncertainty is premature. The approach chosen should be aligned with the aims of providing certainty including unambiguous access to safe harbours, minimising administrative burden and aligning with the fundamental goal of maximising Ireland's competitiveness.

We recommend implementation in line with the minimum standard of international consensus and nothing more other than to bring clarity to Irish rules where they enhance competitiveness and/or preserve the intended benefits of existing incentives (please see earlier comments on the R&D tax credit and KDB in particular). Similarly, the timing of implementation should not precede what is necessary to align with that consensus other than those referenced in the previous sentence.

7. In relation to the UTPR, should this take the form of either (i) a top-up tax or (ii) a denial of deduction against taxable income resulting in an amount of tax liability necessary to collect Ireland's portion of the UTPR top-up tax amount?

There is no consistent preference emerging in our discussions with clients on this point.

A top-up tax has the advantage of simplicity, whilst the denial of deduction offers flexibility, particularly for unprofitable businesses. However, that flexibility also brings some complexity, at least for Ireland's tax system with its multiple tax rates and categories of deductions.

A denial of deduction solution would need to accommodate these complications.

The Commentary makes it clear that the "equivalence" of any method other than denial of deduction is entirely a matter for implementation by jurisdictions that adopt the UTPR. We see nothing in the Rules, Commentary or draft Directive that would preclude Ireland from giving taxpayers some level of optionality, so long as all of the options achieved equivalence. It is worth noting that UTPR is to be brought into effect from 31 December 2024, so there is a little more time to examine the detail on this point.

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Computation of GloBE Income or Loss

8. Do you have any comments on the Computation of GloBE Income or Loss provisions contained within the Rules and how these could be implemented in domestic legislation? In particular, do you have any comments on i. the determination of the Financial Accounting Net Income or Loss, and ii. the adjustments to determine the GloBE Income or Loss?

According to the Model Rules, Financial Accounting Net Income or Loss (FANIL) is defined as:

> *"… the net income or loss determined for a Constituent Entity (before any consolidation adjustments eliminating intra-group transactions) in preparing Consolidated Financial Statements of the Ultimate Parent Entity."*[9]

There is an important aspect of the Rules that is the cause of significant debate internationally, which has to do with the computation of FANIL where intra-group transfers are concerned. Our understanding is that the intention of the Rules is that asset[10] transfers generally occur at arm's length[11], with GIOL for both parties computed accordingly. Confirmation of that position for UPEs in a US GAAP environment is key. Asymmetry would result in competitive disadvantages for UPEs in a US GAAP environment compared to those in an IFRS environment. This has significant relevance in an Irish context to guard against differential application of the Rules to businesses with otherwise identical facts, but using different GAAP and/or a different method of keeping accounting records and preparing consolidated financial statements. It would be useful for the clarity to be provided, e.g. in the implementation framework to the effect that the Rules will apply uniformly on this issue, irrespective of the accounting standards a company follows, respecting the arm's length standard and avoiding unintended competitive distortion. It will be helpful if Ireland can assist in pushing through this clarification

As to the specific adjustments to FANIL to arrive at GIOL, we refer you to our response to Question 1, and to reiterate our concerns as to the interaction of existing domestic rules and Asymmetric Foreign Currency Gains or Losses in the case of an Irish entity which has both trading profits and other income and gains. This is because such an entity uses its accounting functional currency to compute its trading profits, but in other respects computes tax using the euro as its functional currency. This divergence between book and tax computations can result in ETR volatility, and the risk of such volatility may lead businesses to divert capital away from Ireland due to that volatility and the risk of top-up tax.

9. Are there any aspects of the Computation of GloBE Income or Loss provisions that require further clarification in domestic legislation?

Please refer to our response to question 8 above.

10. Do you have any views on the rules regarding the allocation of Income or Loss to entities/jurisdictions as they could apply to domestic legislation?

Please refer to our response to Question 1 above as it applies to Ireland's credit system.

[9] Article 14 of the draft Minimum Tax Directive contains a substantially identical formulation
[10] Other than assets transferred after 30 November 2021 and before a Transition Year, and other than in GloBE Reorganizations
[11] In accordance with the Arm's Length Principle as set out in Article 3.2.3

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Computation of Adjusted Covered Taxes

11. Do you have any comments on the Computation of Adjusted Covered Taxes provisions and how these could be implemented in domestic legislation?

We recommend implementation in line with the minimum standard of international consensus and nothing more other than to bring clarity to Irish rules where they enhance competitiveness and/or preserve the intended benefits of existing incentives. Our earlier comments on timing of implementation refer.

Many commentators have observed that the provisions dealing with deferred tax are unclear. We submit that part of the reason for that is the way that some of the terminology is used.

Thus the expression "deferred tax liability" in the Rules is sometimes used interchangeably to denote either a balance sheet item arising from the difference between the book and tax bases of an asset, or a taxable temporary difference arising during a year (the latter of which most accountants would refer to as a deferred tax expense – an expression also used in the Rules – or deferred tax charge, and which on the balance sheet might either increase a deferred tax liability or decrease a deferred tax asset).

There is similar difficulty with the use of the expression "deferred tax asset", and at one point the Rules even suggest there may be a point in time that a deferred tax liability might be "paid" rather than "reversing".

For most companies the definition of Covered Taxes will be straightforward to apply, but there may be exceptions for unusual taxes. We suggest that some effort be made to identify those that are most likely to arise. Of course, the Pillar One process may result in repeal of certain elements of the tax systems in key trading partners, thereby removing the need to consider their Covered Tax status. There is merit in bringing clarity in that regard through the maintenance of a list by OECD of aspects of regimes that are not Covered Tax.

As drafted in the Model Rules a payment for group relief[12] appears not to fall within the definition of Covered Taxes. It is not just a theoretical issue that nets out within Ireland, because if it is a Covered Tax, then it is susceptible to being Allocated to another CE under Article 4.3. And if it is not a Covered Tax then it is an item in computing GIOL, which in turn determines how any top-up tax is allocated between Irish CEs. It would be useful if Irish legislation were to bring clarity to this.

12. Are there any aspects of the Computation of Adjusted Covered Taxes provisions that require further clarification in domestic legislation?

Please refer to our response to Question 11.

[12] In accordance with s410(5) TCA 1997

13. Do you have any views on the rules on (i) the allocation of covered taxed between entities, (ii) the mechanism to address temporary differences, and (iii) post-filing adjustments as they could apply to domestic legislation?

Please refer to our response to Question 11. In addition, we strongly recommend that interaction between existing domestic tax compliance obligations, and Pillar Two compliance obligations be kept to a minimum. Otherwise, there is a risk of iterative calculations being needed on amendment of tax returns etc. rather than a single entry. Similarly, the design of the system for payment of Pillar Two taxes should be quite different from the system which applies to corporation tax including timing of payments and the interest and surcharge rules etc.

Qualified Refundable Tax Credits

14. Do you have any comments on the potential interaction of tax credit provisions, as currently set out in the corporation tax code, with the definition of "Qualified Refundable Tax Credit"?

We refer you to our comments above which also deal with the wider interaction between Ireland's R&D credits and the US Foreign Tax Credit Regulations.

Computation of ETR and Top-up Tax

15. Do you have any views on the Computation of Effective Tax Rate (ETR) and Top-up Tax provisions? In particular, do you have any views on the process to calculate ETR and Top-up Tax and how these could be implemented in domestic legislation?

The calculations are largely mechanical. We look forward to engaging in the context of future Feedback Statements when greater clarity on the outstanding issues with the design and implementation of Pillar Two emerges.

16. Are there any aspects of the calculation of the ETR and Top-up Tax of investment entities, joint ventures or minority-owned constituent entities that require further clarification in domestic legislation?

Please see our response to Question 15.

Qualified Domestic Top-up Tax (QDTUT)

17. In your view, should a QDTUT be implemented by Ireland? If so, what should be the features of such a QDTUT and how should it operate? In particular, please provide your view on the charging and administrative rules that should apply.
For example, could a QDTUT form part of the corporation tax liability of a company and be returned as part of the corporation tax return? How should the jurisdictional calculation of the QDTUT be addressed in return filings, particularly where entities in an MNE group in scope in Ireland might have different intermediate parents?

The introduction of a QDTUT certainly has some attractions for Ireland, notably the following:

- It is aligned with the policy objective of complying with the minimum standard.

- The proposed safe harbour for countries with a QDTUT would mean that top-up tax for Irish CEs would be computed within Ireland by practitioners with an understanding of the Irish tax system, including its more unusual features.

- Unlike an increase in Ireland's 12.5% rate, a QDTUT would not result in Ireland collecting more tax than required by Pillar Two.

- On the face of it there is a potential benefit to the Exchequer to offset the cost of the Pillar One proposals but subject to clarity on the treatment of CFC charges in that context and the outstanding question of GILTI coexistence.

Furthermore, the benefit of the QDTUT safe harbour will be far more valuable if it applies more generally across the OECD Inclusive Framework, and not just within the EU.

Therefore, we submit that a final decision on this point should be deferred until the shape of GILTI coexistence is clearer.

If a QDTUT is to be implemented, we suggested that it should be no more onerous than the IIR requirements of the Directive. Ireland's compliance timelines are already very tight, and entangling Pillar Two work in that process would complicate matters significantly, particularly given that the final Pillar Two position cannot be known until the domestic tax position is final. We therefore recommend that the payment and filing deadlines for QDTUT be aligned with the 15-month IIR filing deadline.

Again, it feels a little premature for considered comment on the mechanism for filing, but our preliminary view is that the Irish CEs could consent for a single CE to file on behalf of them all.

Administration – Payment and Filing

18. Do you have any views on how the reporting obligations of entities that are in scope of the Rules, should be satisfied?

The practical administrability of the Rules for taxpayers and minimising the cost of that compliance is key. A single filing on behalf of all Irish CEs should be considered. That filing should be limited to the information required in the final Directive.

Our earlier comment regarding the benefit of an OECD maintained list of taxes not considered Covered Taxes refers. We would make a similar recommendation as to the classification of regimes as a Qualified IIR or CFC regime.

As things stand, the Directive provides that the Rules are to apply "from 31 December 2023". We understand that in an Irish context this will mean application for accounting periods beginning on or after that date. This should be confirmed for the avoidance of doubt.

19. How should liabilities arising under the IIR or UTPR be reported and paid/collected? Do you have any views on the frequency of such payments and the deadlines that should apply?

Please refer to our answers to Question 13 and 18.

In addition to recommending a separate payment regime for top-up taxes which provides maximum time to compute and remit those taxes we submit that CEs should not be jointly and severally liable for those taxes.

20. Do you have any views on whether Irish constituent entities should be made joint and severally liable for any Irish GloBE liabilities of the Irish constituent entities of the same MNE Group? In this regard, would you differentiate between IIR liabilities and UTPR liabilities?

Please refer to our answer to Question 19.

21. Do you have any views on whether Irish constituent entities should be made joint and severally liable for the QDTUT (if Ireland were to adopt such a provision) of the Irish constituent entities of the same MNE Group?

Please refer to our answer to Question 19.

22. What group entity should be made initially liable for paying UTPR tax? Is your answer dependent on whether UTPR tax is collected by way of denial of deduction or direct charge?

Please refer to our answer to Question 18, 19 and 20. For administrative convenience it may be appropriate to consider a mechanism similar to (but distinct from) the use of a group for preliminary tax purposes.

Transition Rules

23. Are there any aspects of the Transition Rules that require further clarification in domestic legislation?

"A deferred tax asset that has been recorded at a rate lower than the Minimum Rate can be taken into account at the Minimum Rate if the taxpayer can demonstrate that the deferred tax asset is attributable to a GloBE Loss."[13]

It would be helpful to amplify the application of this rule in an Irish context, including details of what is required to demonstrate that a deferred tax asset relates to a GloBE Loss.

Subject to Tax Rule (STTR)

24. Should amendments to any domestic legislation be considered to address potential application of, or interactions with, the STTR?

Significant details of the STTR have yet to be agreed and published. Pending these details, the potential applicability to the income of an Irish resident company would seem unusual given the broad base of tax and the nominal rate of 12.5% (as compared with the STTR rate of 9%). Therefore, we recommend that any wholesale consideration of STTR be deferred until those rules are known.

Meanwhile, there is one exception to the above, which is that the KDB provides an effective tax rate of 6.25% of qualifying profits. Clearly the STTR would have the potential to erode at least part of the benefits

[13] Model Rules, Article 9.1.1

of this regime. We therefore recommend that consideration be given to restructuring the benefit of the regime for in-scope companies, perhaps so that it is given in the form of a QRTC.

Large Scale Domestic Groups

25. The proposed Directive on Pillar Two will also apply to large-scale domestic groups. Are there any aspects of the application of the Rules to large-scale domestic groups that require further clarification in domestic legislation?

Clearly, the Rules themselves do not apply to large-scale domestic groups ("LSDGs"), although the Directive does, and Ireland is required to implement the Directive. The Directive states that Member States are required to apply the IIR to the CEs of a LSDG, but if the Member State of a LSDG elects to enact a QDTUT then this takes precedence over the IIR and no IIR is required.

In almost every respect, the Directive applies the same way to a LSDG as it does to an MNE Group. A notable exception is that a LSDG is effectively exempt from top-up tax for the first five fiscal years. That aside a LSDG faces the same issues as identified above.