



Consultation on Pillar Two Minimum Tax Rate Implementation

KPMG response

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Dear Sir / Madam

Response to Consultation on Pillar Two Minimum Tax Rate Implementation

KPMG is pleased to respond to the consultation on Pillar Two Minimum Tax Rate Implementation. KPMG is the largest provider of business taxation advice in Ireland. We have drawn on our experience of providing advice to businesses and individuals, both domestic and international, to provide comments to the consultation.

In order to continue to attract and retain multinational business, Ireland's implementation of these rules must focus on maximising efficiency, simplicity, and certainty for in-scope businesses. The use of qualifying tax incentives is fully endorsed under the GloBE rules and Ireland must ensure it remains agile in adopting targeted measures to remain attractive.

We welcome the government's engagement with stakeholders to date on the adoption of these rules and endorse continued engagement as implementing legislation and guidance are drafted.

The contact point for this submission is Cillein Barry. Cillein's contact details are: Email: cillein.barry@kpmg.ie ; Direct telephone: 01 700 4108.

Should you wish to discuss any aspect of the attached submission please do not hesitate to contact us.

Yours faithfully



Tom Woods

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Glossary of Terms

BEAT	Base Erosion and Anti-abuse Tax
BEPS	Base Erosion and Profit Shifting
CE	Constituent Entity
CFC	Controlled Foreign Company
Draft EU Directive	Interinstitutional File: 2021/0433(CNS) - Version 21 June 2022
DST	Digital Services Taxes
ETR	Effective Tax Rate
EU	European Union
GAAP	General Accepted Accounting Principles
GILTI	Global Intangible Low-Taxed Income
GloBE	Global Anti-Base Erosion
IFRS	International Financial Reporting Standards
IIR	Income Inclusion Rule
KDB	Knowledge Development Box
MNE	Multinational Enterprise
OECD	Organisation for Economic Cooperation and Development.
OECD Pillar Two Commentary	Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two) - Version 11 March 2022
OECD Pillar Two proposal	Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) - Version 14 December 2021
QDTUT	Qualified Domestic Top-Up Tax
R&D	Research and Development
STTR	Subject To Tax Rule
Top-Up Tax	Calculated in accordance with Chapter 5 of the OECD Pillar Two Proposal / Article 26 of the draft EU Directive
UPE	Ultimate Parent Entity
US	United States of America
UTPR	Undertaxed Profits Rule

1. Executive Summary

In October 2021, after consulting with stakeholders, the Irish Government signed up to the OECD Inclusive Framework commitment to adopt a global minimum tax rate, as outlined in the OECD Pillar Two proposals. Ireland remains committed to being an attractive and ‘best in class’ location for multinationals to invest. Successful implementation of the Pillar Two proposals coupled with reform of the Irish corporation tax regime will be key to Ireland’s success at retaining and attracting foreign direct investment.

In light of recent international developments and the Pillar Two proposals leading businesses to assess where and how they operate, Ireland must remain an attractive location both for Irish domestic enterprises seeking to expand internationally and for foreign direct investment seeking a base in Europe.

Successful implementation of the Pillar Two framework into Irish law will present an enormous practical challenge for all stakeholders – the Irish Government, the Department of Finance, the Revenue Commissioners, businesses and tax practitioners. It will also represent a significant challenge to Ireland’s industrial policy, a central pillar of which has been our 12.5% corporation tax rate since first introduced in 1998. While it is expected that implementation of the Pillar Two framework will result in an increase in Exchequer receipts in the immediate term, the reduced significance of our 12.5% rate for the world’s largest groups puts a greater focus on the other factors behind Ireland’s economic success over the recent decades.

We welcome the government’s engagement with stakeholders to date on the adoption of these rules and endorse continued engagement as implementing legislation and guidance are drafted. Our comments are provided based on our current interpretation of the rules and ongoing engagement with businesses, however as the important aspects of the Pillar Two framework have not yet been finalised, our views may change in the future.

To achieve Ireland’s stated ambition to remain an attractive location to do business and invest, we have outlined below recommendations to domestic legislation in adopting a global minimum tax rate, as sought by the consultation, but also important wider changes that Ireland should advocate for at OECD / EU level.

- ✓ Ireland should implement the rules in a clear and consistent manner. Uniformity of interpretation with OECD / EU jurisdictions will be vital
- ✓ We welcome the commitment to 12.5% corporation tax rate, evidencing the long-term stability of the rate for the majority of taxpayers. When implementing Pillar Two, Ireland should adopt a QDTUT
- ✓ Adopt a corporation tax rate of 12.5% on profits arising from the disposal of assets used in the course of a trade
- ✓ Reform Ireland’s R&D tax credit regime to align with the GloBE definition of a ‘qualified refundable tax credit’ and in line with changes to US regulations. Increase the rate of relief to 35%

- ✓ Ensure the rules do not disadvantage US MNEs and Irish groups who are US-listed, notably where inequitable tax differences arise due to differences in accounting standards, i.e., US GAAP and IFRS
- ✓ To align with GloBE rules, Ireland should adopt a territorial regime
- ✓ Ireland should retain group relief and reorganisation reliefs, however, optionality should be given to the taxpayer as to which relief should be claimed
- ✓ Allow companies the option to choose between claiming capital allowances based on the useful economic life of the asset or eight years
- ✓ Preserve the tax neutrality of securitisation companies
- ✓ KDB should be incentivised by way of a 'qualified refundable tax credit' for in scope MNEs
- ✓ Simplify the current domestic tax regime and remove obsolete legislation
- ✓ Address concerns disincentivising potential employees from relocation to Ireland due to the housing shortage and high cost of employment in Ireland
- ✓ Operate the UTPR as a Top-Up Tax
- ✓ Ireland should advocate at the OECD and EU level for broad, robust safe harbours to be introduced to avoid increasing complexity and administrative burden on affected business
- ✓ To provide certainty for business and tax authorities alike, it will be important that these safe harbours are agreed at the OECD level and reflected in the implementing EU Directive prior to the Directive being adopted
- ✓ Ireland should provide flexibility to groups in allocating a Top-Up Tax under the IIR where minority interest exists
- ✓ Ireland should align with OECD / EU proposals that filing requirements do not fall earlier than 15 months after accounting year end. A return separate from the Form CT1 should be used
- ✓ Similar to the interest limitation regime, MNEs should have the opportunity to have a group remitter which can file and pay the liability on behalf of companies that elect to be in a filing and payment group. Group members should not be joint and severally liable for any Top-Up Tax arising
- ✓ Ireland should commit to joining and following any Pillar Two dispute resolution mechanism agreed at the OECD / EU level
- ✓ Revenue should prepare and maintain a database of tax regimes, tax measures and taxes levied in other countries which are accepted as falling within certain GloBE definitions, including; Covered Taxes, Controlled Foreign Company Tax Regimes, Qualifying IIRs, Qualifying UTPRs, Qualified Refundable Tax Credits, QDTUTs

Qualified Domestic Top-Up Tax (QDTUT) and safe harbour

- ✓ If Ireland is seeking to collect additional Top-Up Tax arising in respect of businesses operating in Ireland, Ireland should introduce a QDTUT,
- ✓ It is vital that Ireland advocates and implements a safe harbour that recognises no additional Top-Up Tax is due where an OECD / EU country introduces a QDTUT
- ✓ Ireland should allow the QDTUT be prepared under Acceptable Financial Accounting Standards. Ireland should seek that the EU Directive is amended so that the QDTUT safe harbour is available where the UPE is located in an OECD jurisdiction outside the EU and where a constituent entity prepares their QDTUT based on acceptable financial accounting standards, as opposed to the current draft which provides for Parent's accounting standard or IFRS only
- ✓ This and other safe harbours agreed at the OECD level should be reflected in the EU Directive prior to its finalisation and adoption
- ✓ Clarify that domestic tax liability is aligned with the definition of Covered Taxes and includes current tax, deferred tax and foreign CFC charge attributable to Irish based businesses (including US GILTI if not a qualified IIR)
- ✓ In line with the Directive, companies should be afforded up to four years to pay a QDTUT before the amount of the underpayment falls to be collected as jurisdictional Top-Up Tax
- ✓ A 15-month payment and filing deadline should be provided for Ireland's QDTUT, separate to the entity's corporation tax return
- ✓ Groups should be afforded the option of creating a QDTUT group for filing and payment purposes

Advocating at an international level for change or confirmation

We summarise below key changes Ireland should advocate for at both OECD and EU level which give rise to unintended and inequitable consequences for businesses.

- ✓ In recognition of the low risk of base erosion, the rules should include a safe harbour that recognises no Top-Up Tax is due where a jurisdiction implements a Qualified Domestic Top-Up Tax, extending across the OECD a similar provision already included in the draft EU Directive in this regard
- ✓ To provide certainty for affected businesses, Ireland should advocate for all safe harbours to be agreed at the OECD level and reflected in the EU Directive prior to the Directive being finalised and implemented
- ✓ Seek clarity on the definition of excluded entities
- ✓ In the absence of reaching international agreement to adopt

Pillar One, any taxes paid under Digital Service Taxes should be a Covered Tax

- ✓ The introduction of robust simplification measures aimed at reducing complexity in the area of deferred taxes, particularly with respect to the measurement of deferred tax liabilities that are not considered Recapture Exception Accruals
- ✓ We recommend that the Department provide clarity when drafting the Irish legislation implementing Pillar 2 and seek confirmation that assets leased as part of an active leasing trade may be regarded when calculating the

Substance-based Income

Exclusion and that they should be deemed to be located in the jurisdiction where the lessor entity is located for GloBE purposes

- ✓ Changes to the transition rules that are negatively impacting bona fide commercial transactions
- ✓ The creation of a database of tax regimes, tax measures and taxes levied in other countries which are accepted as falling within certain GloBE definitions, including; Covered Taxes, Controlled Foreign Company Tax Regimes, Qualifying IIRs, Qualifying UTPRs, Qualified Refundable Tax Credits, QDTUTs

2. General

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?
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 US corporate tax reform proposals, with particular reference to the significance of US MNEs operating in Ireland?
3. Are there other considerations of significance that should be taken into account when implementing the Rules in domestic legislation?
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?

Successful implementation of the Pillar Two framework into Irish law will present an enormous practical challenge for all stakeholders – the Irish Government, the Department of Finance, the Revenue Commissioners, businesses and tax practitioners. It will also represent a significant challenge to Ireland's industrial policy, a central pillar of which has been our 12.5% corporation tax rate since first introduced in 1998.

While it is likely that the implementation of the Pillar Two framework will result in an increase in Exchequer receipts in the immediate term, it also risks eroding a key feature of Ireland's economic success over the recent decades – our ability to distinguish ourselves from competitor locations when competing to attract substantial foreign direct investment. Therefore, it is crucial that Ireland evaluates and redoubles its efforts to create and maintain a positive tax and business environment for Irish and foreign multinational businesses.

We believe that careful implementation of the Pillar Two framework, accompanied by an ambitious programme of reform of the Irish tax environment to reflect the new

global and domestic tax landscape, is required and that the views of business and practitioners are crucial in achieving these twin goals.

Coordinated Implementation

As Pillar Two must be implemented as part of a common approach, its acknowledged that Ireland's ability to amend or redesign these rules is restricted. In addition, the rules are designed such that divergences in their interpretation or application in one jurisdiction may have an impact on the amount of Top-Up Tax collected under the IIR or UTPR mechanism in another jurisdiction in which an MNE Group has a presence. Such divergences may give rise to double taxation of in-scope groups, while imposing a higher administrative burden and cost on both the affected companies and tax authorities of the jurisdictions in question. In addition, differences in terms of interpretation or implementation of the rules in Ireland will place us at a competitive disadvantage as it will require in-scope companies to adapt their systems and policies as regards the application of the rules here.

As a result, we recommend the following with respect to the implementation of Pillar Two in Ireland:

- Careful and accurate transposition of the rules will be crucial and efforts at enhancing or “gold-plating” the rules should be avoided. When drafting legislation implementing the rules, an emphasis should be placed on ensuring the greatest levels of clarity and simplicity possible, without going beyond the provisions agreed at an OECD/EU level.
- Where key areas of concern or uncertainty are noted, Ireland’s principal efforts should be aimed at achieving clarity and consensus at the OECD/EU level.
- Ireland must implement the EU Directive correctly, relying on the OECD model rules to provide clarity where an uncertainty exists with respect to the implementation of the EU Directive’s provisions.

Simplifying the taxation of business profits

In contrast to the regime in many other competitor locations, Ireland seeks to impose tax on the disposal of some assets used in the course of the trade at the CGT rate of 33%. This tax is also imposed by reference to the movement in the value of the asset in Euro terms, hence making the tax cost dependent on movements in foreign exchange rates between the Euro and the functional currency being used by the business.

The risk of exposure to such a high tax charge as compared to the new minimum 15% rate under Pillar Two is very concerning to many potential investors considering establishing or expanding operations in Ireland. To make the position more clear-cut and fairer, we would recommend that the disposal of any asset which is used in the course of a trade should be taxed at the trading tax rate,

with any necessary Top-Up Tax applying thereafter.



Case Study

Global pharmacy group has substantial operations, manufacturing and management located in Ireland. Intangible Property (IP) is centralised in Ireland. In most jurisdictions the IP is exploited through the manufacture of pharmaceutical products. In certain jurisdictions, commercial viability and regulatory approval dictates that the IP is exploited by divesting (in whole or in part) the IP.

Where the IP is exploited through manufacture of pharmaceutical products, the profit is taxed at 12.5%. Where the IP is sold, the rate of tax could be as high as 33% on the profits. Either scenario concerns the commercial exploitation of IP to maximise the profits of the business and should be taxed at the one rate, being 12.5% (and subject to the Top-Up Tax to achieve a minimum effective tax rate of 15% under GloBE rules).

R&D Incentives

While the Pillar Two rules will constrain countries’ ability to compete based on corporation tax rate alone, they also create new potential areas of opportunity for those countries who have signed up to the agreement.

Specifically, the rules treat certain refundable tax credits, grants and subsidies as income (rather than reductions in tax) for the purposes of calculating a company’s ETR, ensuring that such incentives will become increasingly important areas for countries seeking to attract and retain investment from the world’s largest companies in the future.

In this regard, Ireland must aim to ensure that its R&D tax credit and other innovation incentives are provided in a manner that is efficient for GloBE purposes and are best-in-class at attracting and maintaining R&D operations here. We recommend the following enhancements of the R&D tax credit regime in the context of the Pillar Two framework:

- *Qualifying Refundable Tax Credit:* The R&D regime is amended to ensure it meets the definition of qualifying refundable tax credit under GloBE rules.
- *Rate of Relief:* The rate at which the R&D tax credit is provided should be increased to 35% to maintain the value of the relief for in-scope groups and its overall competitiveness in a post-BEPS 2.0 environment.

We refer to our recent submission¹ to the Department in response to a public consultation on the R&D tax credit and Knowledge Development Box regimes for further suggestions aimed at improving the attractiveness of Ireland's innovation incentives in the new global tax landscape.

In addition, Ireland must remain agile to fulfil the ambition of being best-in-class and should consider the improvement of incentives (as Qualifying Refundable Tax Credits), focusing on growing areas such as the green economy.

US MNE Groups operating in Ireland

Given the large number of US MNEs operating in Ireland and the key role they play in the Irish economy, it will be essential that the Pillar Two framework and Ireland's broader tax regime interact with US corporate tax rules in an effective and efficient manner. It is important to note that this interaction also affects non-

US headquartered groups that are listed in the US in order to access the significant capital markets available there.

Significant uncertainty remains in this regard, in particular with respect to the treatment of the US GILTI regime under the Pillar Two framework, as well as the final form and extent of any future US tax reform measures. However, we highlight below a number of areas that require particular attention from the Department of Finance when considering the impact of Pillar Two and our broader tax regime on our attractiveness as a location for US investment.

It is vital that the final GloBE rules clearly and adequately address the US tax rules on GILTI and BEAT, ensuring that double taxation does not arise. GILTI should be considered a qualifying IIR or a CFC charge, while BEAT (if not revised to be a qualifying UTPR) should be included as a Covered Tax in the GloBE ETR calculation.

GILTI as a CFC Charge for GloBE Purposes

When calculating the ETR of a constituent entity within an MNE Group, the Pillar Two rules provide that those taxes paid in another jurisdiction under a CFC charge arising with respect to the profits of the CFC entity should be allocated to that CFC jurisdiction. The effect of this provision is to increase the ETR of the CFC jurisdiction, while reducing the ETR of the jurisdiction in which the CFC charge is paid for GloBE purposes.

Many US headquartered groups operating in Ireland incur tax under the US GILTI provisions with respect to their Irish profits. On the basis that such groups incur this charge with respect to Irish profits, it is appropriate that such tax should be

¹ R&D Tax Credit and KDB – Public Consultation, 30 May 2022

allocated to Ireland when calculating jurisdictional ETR for GloBE purposes.

To the extent that US GILTI is not treated as a qualifying IIR for GloBE purposes, it would be important that tax incurred in the US under GILTI is allocated to Ireland as a CFC charge to the extent incurred with respect to Irish profits. In this regard, we recommend that:

- The Department should seek confirmation at the OECD and EU level that tax arising under US GILTI provisions in their current form should be treated as a CFC charge for GloBE purposes.
- Specific guidance should be included in the OECD's Implementation Framework which would include US GILTI as a qualifying CFC charge for GloBE purposes and outline the method of allocation of the charge to each jurisdiction.

US Foreign Tax Credits

It is important that tax collected under an Irish IIR, UTPR, or QDTUT (to the extent implemented) is capable of being treated as a foreign income tax paid or accrued for US foreign tax credit purposes. This will require further analysis once the likelihood of US tax reform is known.

US GAAP Considerations

Under the GloBE rules, the income, expenses, and taxes of an in-scope entity should typically be determined using the accounting standard used in preparing the consolidated financial statements of the group's ultimate parent. Therefore, US headquartered groups should typically be required to calculate their Irish jurisdictional Top-Up Tax liability using the income, expenses and taxes paid of their Irish operations as determined under US GAAP, even where the Irish subsidiaries prepare their statutory accounts under FRS101 or FRS102 and file their Irish

corporation tax return on the basis of these figures.

This is the case for non-US headquartered groups that are listed in the US in order to access the significant capital markets available there. Such groups will also prepare their consolidated financial statements under US GAAP.

The treatment of arrangements and transactions under US GAAP may differ from that applied under IFRS / FRS101 / FRS102. As a result, the tax base on which the Irish jurisdictional Top-Up Tax is calculated for US MNC's may differ materially from that on which the same Irish subsidiaries are subject to Irish corporation tax. These differences between US GAAP and IFRS / FRS101 / FRS102 can produce significant adverse results for the MNE Group, including double taxation applying under GloBE at 15% and Irish domestic law at 12.5% on the same income in the same period.

We do not believe that the GloBE rules intended for such differences to arise merely due to the accounting standard of the UPE and recommend that Ireland advocate for an effective resolution to this issue to be agreed at the OECD / EU level.

Broader Simplification Matters

There is no doubt that the Irish tax rules have become increasingly complex in recent years and materially increased the burden on taxpayers. It is acknowledged that many of these provisions were a result of wider OECD and EU initiatives (e.g. ATAD). However, existing Irish legislation has not been adequately adapted in light of these changes. The potential introduction of the GloBE rules will exacerbate these issues.

In light of this increasing complexity, and in addition to the previous comments, areas which we believe would benefit the attractiveness of our overall regime through simplification include:

- *Interest deductibility* – these rules can be simplified following the introduction of interest limitation rules
- *Close company rules* – the definition of close company does not take into account the nature of ownership of many foreign groups resulting in the close company rules technically applying
- *Capital Allowances* - similar to the approach adopted in Section 291A(3) and (4), update Section 284 TCA 1997 to allow taxpayers the option to claim wear and tear allowances in line with the accounting treatment. This will reduce deferred tax considerations under GloBE and align tax deductibility with the economic cost of the asset
- *Case and rates* - Simplify the use of different Cases and tax rates on income earned by companies
- *Offshore fund rules* - applicability of Irish offshore fund rules to normal commercial arrangements of international groups (e.g. money market funds)
- *Section 79* - given the narrow interpretation of Section 79 TCA 1997 to assets held by trading companies, the scope of the section should be broadened to include trade debtors and other assets equivalent to money or money's worth
- *Simplification and removal of obsolete measures* - this is an area of particular concern with respect to our interest deduction and anti-avoidance rules
- *Consider establishing an Office for Tax Simplification* - the Office would act as an independent adviser to the Government on simplifying the Irish tax system

Broader Policy Matters

The convergence of the tax burden for the world's largest companies on a minimum

rate of 15% on a country-by-country basis will certainly diminish the relative attractiveness of Ireland's 12.5% corporation tax rate. Consequently, other factors taken into account in location decision making will assume greater relative importance than they have previously. We outline below recommended Irish tax reform which would ensure our continued attractiveness for in-scope groups while also supporting the Irish SME sector:

Territorial regime

Adopting a territorial regime for the taxation of foreign branch profits and foreign dividends would provide a significant benefit in terms of greater simplicity in the application of the corporation tax regime. In addition, implementation of such a territorial regime would align Ireland's corporation tax rules with Pillar Two principles. An elective foreign dividend exemption should be introduced at the earliest possible opportunity.

For groups within the scope of Pillar Two, we believe that the jurisdiction-by-jurisdiction minimum ETR of 15% means that any dividends paid within such groups should automatically qualify for the territorial regime.

Securitisation

In-scope securitisation companies will have their GloBE profits calculated using the accounting standard used in preparing the group ultimate parent's consolidated financial statements, resulting in a mismatch between the 2004 GAAP standard used to calculate their Irish taxable profits and their GloBE profits on which a minimum tax rate of 15% should apply. Action should be taken in order to preserve the tax neutrality of Section 110 companies within in-scope MNE Groups as part of the implementation of the GloBE rules.

Housing

An extremely important non-tax factor which affects the attractiveness of a location for businesses is the availability of accommodation for employees. Urgent action is needed to resolve this, both with respect to the immediate impact that the crisis is having on our communities but also with respect to the risk the crisis continues to place on our future prosperity as a result of disincentivising the migration and retention of skilled labour here.

Cost of employment

Given the importance of Ireland being able to successfully attract global talent and substantial business here, any long-term strategy aimed at attracting and retaining FDI and domestic multinationals must include reform of the taxation system

aimed at reducing the marginal cost of employment in Ireland for both businesses and individuals. We recommend²:

- SARP should be enhanced so it is sufficiently attractive as compared to regimes in other countries
- Our system of taxation for stock compensation should be simplified and improved in order to continue to attract executives and mobile talent and to allow ambitious indigenous companies to scale
- The marginal cost of employment for both employees and employers should be reduced in order to counteract our current lack of competitiveness in this regard in comparison with other EU and non-EU competitor locations

² We refer to our submission to the Commission on Taxation and Welfare for further details regarding our recommendations in this regard.

3. 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 concept of a €750m consolidated revenue threshold for MNE Groups is well understood from Ireland's Country-by-Country Reporting legislation.

A number of definitions used in Irish tax legislation will not align with the definitions under the GloBE rules and as such, clarity should be provided that these existing domestic definitions are not imported into the GloBE rules. In particular this includes "group" (Section 410 TCA 1997, Section 616 TCA 1997, etc.), "control" (Section 11 TCA 1997, Section 432 TCA 1997, etc.), and "connected" (Section 10 TCA 1997).

Excluded Entities

Regarding the definition of an Excluded Entity in Article 2 of the draft Directive and 1.5.1 – 1.5.2 of the OECD model rules, we recommend:

- **Governmental Entity:** Irish legislation should clarify that carrying on a business of the activities outlined in (b)(ii) of the OECD model rules & Directive definition on behalf of the government or State should not preclude an entity from being considered a Governmental Entity.
- **Non-profit Organisation:** Irish legislation should confirm that the carrying on of ancillary business (e.g., the lease of rental property) should not prevent a non-profit from falling within the definition so long as the funds raised from such activities are used by the non-profit for the purposes for which it was established. Confirmation should be provided that an entity which carries on a trade or business which raises funds used to finance its

principal purpose may be considered a Non-profit Organisation where all other conditions within the OECD model rules definition are met.

- **Investment Fund:** For the purposes of determining whether an Investment Fund is held by unconnected persons, the meaning of connected should follow that outlined in OECD Commentary in this area – specifically that the definition used as part of Article 5(8) of the OECD's Model Treaty Convention should apply, extended to include spouses/civil partners, siblings, and lineal ancestors and descendants. Specifically, the definition of "connected" under Section 10 TCA 1997 should not be used in this regard, given its significantly broader application which is not consistent with the GloBE rules.

Maintaining a common approach with other implementing jurisdictions with respect to the meaning of "connected" in this regard will be crucial to maintain Ireland's competitiveness in the funds industry and avoid dispute.

- **Real Estate Investment Vehicles:** Ireland's transposition of this definition should closely follow the OECD definition, with a confirmation included that the definition includes REITs and principal companies of Group REITs as defined in Part 25A TCA 1997. Confirmation should be sought at the OECD / EU level that Ireland's REIT regime is aligned with the GloBE definition of a Real Estate Investment Vehicle.

4. 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?
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?

While ensuring full alignment with OECD model rules and the EU Directive, Irish legislation and associated guidance implementing the Pillar Two rules should be drafted to be as clear as possible regarding the intended outcome of the rules. In particular, Revenue guidance on the Pillar Two charging provisions should provide practical examples to guide businesses and practitioners as to the correct application of these complex provisions.

UTPR

We recommend that the UTPR should operate as a Top-Up Tax, rather than a denial of deduction. This will minimise the risk of insufficient profits within the Irish entities of an MNE Group preventing the collection of the full Top-Up Tax Amount in any given year. This is particularly important in the context of Article 13(8) of the draft Directive and Article 2.6.3 of the model rules, which would reduce to nil Ireland's UTPR Percentage where less than the full UTPR Top-Up Tax Amount for the prior year has been collected.

Notwithstanding the above comments, any changes to US tax law will need to be considered to seek to ensure that the approach adopted to UTPR is creditable in the US (to the extent possible).

Safe Harbours

Given the wide scope and complexity of the GloBE rules, safe harbours and other simplification measures provided for under the OECD Implementation Framework and EU Directive will play an essential role in minimising complexity and improving certainty for businesses and tax authorities alike. In this regard, we recommend that Ireland implement permitted safe harbours agreed at the OECD / EU level.

As a small, open economy, Ireland will need the certainty offered by safe harbours given the crucial role such measures will play in reducing both the administrative burden on in-scope groups and the likelihood of disputes between taxing authorities. In this regard, we recommend that Ireland advocate for the introduction of broad safe harbours which would remove the need to calculate a jurisdiction's ETR and Top-up Tax where it is likely that an effective tax rate of greater than 15% already applies under domestic provisions.

For example, Country-by-Country Reporting data may provide a reasonable basis for determining whether a >15% ETR exists for a jurisdiction, and consideration should be given to this and other options to arrive at a meaningful and effective safe harbour. In addition, the creation of an approved list of jurisdictions

and taxing regimes that will be eligible for the safe harbour should be considered.

In addition, as outlined in greater details in Sections 9 and 10 below, it will be of particular importance that Ireland advocate at an international level for a safe harbour that deems the Top-Up Tax due by a parent entity under the GloBE rules to be nil where an OECD / EU country introduces a QDTUT computed under an Acceptable Financial Accounting Standard (including FRS101/102), building on a similar provision already included in the draft EU Directive and extending this across all OECD countries.

All safe harbours referred to above should be agreed at the OECD level and reflected in the EU Directive prior to the Directive being finalised and adopted.

5. 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?
9. Are there any aspects of the Computation of GloBE Income or Loss provisions that require further clarification in domestic legislation?
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?

Accounting Standards

Initial indications are that material differences in the computation of GloBE Income or Loss can arise depending upon which accounting standard applies. We do not believe that the GloBE rules intended for such differences to arise, and the position should be remedied. This is discussed in further detail in Section 1 above.

Territorial Regime

We summarise below our recommendations for amendments to the Substantial shareholding exemption, a participation exemption and a foreign branch exemption. KPMG's response to the Consultation on the Adoption of a Territorial Regime³ outlines in detail our proposed recommendations to these regimes. In light of recent international tax developments, Ireland must remain an attractive location both for Irish domestic enterprises seeking to expand

internationally and for foreign direct investment seeking a base in the EU.

The worldwide taxation regime with credit given for underlying foreign taxes is administratively burdensome to comply with. The greatest benefit received from adopting a territorial regime for the taxation of foreign branch profits and foreign dividends is one of greater simplicity in the application of the corporation tax regime. Businesses and Revenue alike can benefit from reduced administrative complexity and greater certainty arising on the amount of Irish tax payable on these profits.

In addition, where an item of income is excluded from the GloBE tax base, a corresponding adjustment must be made to exclude any Covered Tax paid in a jurisdiction on that same item of income when calculating Adjusted Covered Taxes. The practical effect of this is that where an item of income is excluded from the GloBE measure of profits, but taxable under Irish corporation tax principles, the amount of any corporation tax paid on this item of

³ Territorial System of Taxation – Public Consultation, 7 March 2022

income is disregarded when calculating the Irish operation's ETR, potentially resulting in an effective rate of tax greater than 15%.

We recommend that the territorial scope of Ireland's domestic corporation tax base is aligned with the GloBE tax base in order to mitigate against the above risk. We note:

Substantial shareholding exemption under Section 626B – Under the OECD proposals, GloBE income is defined as not including an 'Excluded equity gain or loss'. This is defined as gains, profit or loss from: (a) gains and losses from changes in fair value of an Ownership Interest, except for a Portfolio Shareholding (i.e. less than a 10% shareholding); (b) profit or loss in respect of an Ownership Interest included under the equity method of accounting; and (c) gains and losses from disposition of an Ownership Interest, except for a disposition of a Portfolio Shareholding.

Whilst Section 626B provides for a 5% ownership requirement, any gain on disposal of shares will be out of scope for GloBE purposes where the requisite 10% ownership test is met. It is important to note that no further criteria, such as the trading test or source jurisdiction is required under GloBE for the disposal of shares to be considered an 'excluded equity gain or loss'.

In KPMG's response to the Territorial Regime consultation, we recommended various changes to the substantial shareholding exemption in Section 626B, including the removal of the trading test and expansion of the qualifying jurisdictions to all jurisdictions except those included on the EU non-cooperative list. If implemented, these recommendations would better align the taxation of disposal of shares under the current Irish tax regime with those under the GloBE rules contained in Pillar Two, while still retaining the value of a 5% shareholding test for business outside the scope of the Pillar Two rules. These

changes would have a significant positive impact on Ireland's attractiveness as a location to carry on business.

Foreign dividends taxable under

Section 70 – Under the OECD proposals, 'Excluded dividends' are defined as dividends or other distributions received or accrued in respect of an Ownership Interest, except for: (a) a Short-term Portfolio Shareholding (i.e. a shareholder of less than 10% held for less than 1 year), and (b) an Ownership Interest in an Investment Entity that is subject to an election under Article 7.6. [taxable distribution method – not relevant in Ireland].

A participation exemption aligned with the definition of 'excluded dividends' for GloBE will simplify the calculations under both domestic tax and under GloBE rules, while mitigating against the risk of a >15% ETR arising due to mismatches between GloBE and domestic tax bases.

Foreign branch profits taxable under

section 25 – Under the GloBE income rules, the income of the branch is attributed to the jurisdiction in which the branch is located. Therefore, any Top-Up Tax due in respect of the branch is payable in the jurisdiction in which it is located. The income of the branch is not included in the jurisdiction of the head office under the GloBE rules.

We recommend a foreign branch exemption that aligns the Irish corporate tax rules with the GloBE rules, providing that the tax should arise in the jurisdiction in which the branch is located.

Securitisation under Section 110

By default, Section 110 securitisation vehicles calculate their taxable profits using Irish generally accepted accounting practice as it applied for a period of account ending on 31 December 2004 ("2004 GAAP"). This provision was introduced in Finance Act 2005 in order to retain the tax neutrality of securitisation

vehicles on Irish companies' transition to the IFRS accounting standard.

However, in-scope securitisation companies will have their GloBE profits calculated using the accounting standard used in preparing the group ultimate parent's consolidated financial statements, resulting in a mismatch between the 2004 GAAP standard used to calculate their Irish taxable profits and their GloBE profits on which a minimum tax rate of 15% should apply. Action should be taken in order to preserve the tax neutrality of affected Section 110 companies within in-scope MNE Groups as part of the implementation of the GloBE rules.

Group relief under Section 617

Where an asset is transferred between group members under Section 617, the asset transfers at no gain/no loss. Where the transaction does not fall within scope of a GloBE reorganisation (requiring consideration in the form of shares), and where a profit is recognised in the accounts of the constituent entity, it may be within scope of GloBE income and taxable at 15%, negating the benefit of group relief.

We continue to recommend that group relief remains within Irish legislation. However, it will be imperative that the recommendations we outline in this response are introduced so that Ireland continues to be an attractive place to do business.

Reorganisation relief under Section 584, Section 587 and Section 615

Under the GloBE rules, a GloBE reorganisation is not subject to the Top-Up Tax and the asset transfers at the carrying value of the disponent. We consider that the current reorganisation provisions in Irish domestic legislation are generally compatible with the GloBE reorganisation provisions. However, group relief under Section 617 takes priority to relief under Section 615. To better align with the GloBE rules, we recommend that the taxpayer has the option to apply relief under Section 615 in priority to Section 617.

Capital allowances under Section 284

Under the GloBE rules, a deduction for depreciation is allowed in arriving at GloBE Income. The rate of depreciation is determined by the useful economic life (UEL) of the asset. Under tax rules, save Section 291A, companies claim capital allowances over eight years. This creates a timing difference between the tax deductibility under domestic rules and under GloBE rules. Whilst the inclusion of deferred tax as a Covered Tax will eliminate any permanent tax difference, an option to claim capital allowances based on the UEL of the asset will, for certain groups, make it easier to administer and comply with the GloBE rules.

We recommend that the taxpayer is given the option to choose to claim capital allowances either over eight years or in line with the UEL of the asset.

6. 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?
12. Are there any aspects of the Computation of Adjusted Covered Taxes provisions that require further clarification in domestic legislation?
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?

Substantial shareholding exemption under Section 626B

As outlined in the previous section, the qualifying criteria under Section 626B and under the GloBE rules to exempt disposals of equity differ.

Importantly, where the gain is exempt under the GloBE rules but does not qualify for Section 626B (e.g. where the company does not meet the trading test or the 12 month holding period test), the corporation tax payable in Ireland must be removed from Covered Taxes under the GloBE rules. The result of this is that Irish CGT paid at 33% on the share disposal should not be taken into account for the purposes of calculating Ireland ETR. This could give rise to the Irish entity incurring both domestic tax and GloBE Top-up Tax in the period of disposal, despite incurring a jurisdictional ETR of substantially above 15% for the same period.

In order resolve this issue, we reiterate our recommendations noted above with respect to the amendment of Section 626B, including the removal of the trading test and expansion of the qualifying jurisdictions to all jurisdictions except

those included on the EU non-cooperative list.

Foreign dividends taxable under Section 70

As noted above, under the OECD proposals, 'Excluded dividends' are excluded from GloBE income and hence, not subject to the global minimum tax rate.

Where domestic corporation tax, being Covered Taxes, arise in respect of 'excluded dividends', they must be removed from the ETR calculation. As such, providing an exemption for these will simplify the calculation of the GloBE rules for in scope MNEs by removing the necessity to identify and remove any Covered Taxes in respect of foreign dividend income and remove the requirement to prepare complex foreign tax credit calculations.

Foreign branch profits taxable under Section 25

Under the GloBE income rules, the income of the branch is attributed to the jurisdiction in which the branch is located. We recommend a foreign branch exemption that aligns the Irish corporate

tax rules with the GloBE rules, providing that the tax should arise in the jurisdiction in which the branch is located. Providing an exemption at the option of the taxpayer for these will simplify the calculation of the GloBE rules for in scope MNEs by removing the necessity to identify and remove any Covered Taxes in respect of foreign branch income and remove the requirement to prepare complex foreign tax credit calculations.

Withholding tax

Many businesses in Ireland incur foreign withholding tax on certain foreign income earned as part of their business. The Irish tax treatment of such withholding tax has been uncertain for some time and has been the subject of numerous changes in law and tax appeals. The current approach under Irish tax law can often deny not just a tax credit but also a tax deduction for foreign withholding tax. This does not align with the GloBE rules, which recognise such withholding tax as a Covered Tax.

Ideally the Irish tax rules on withholding tax would be simplified. We recommend that, notwithstanding the position under Irish law, clarity is provided that withholding tax is a Covered Tax.

Digital Service Taxes

The GloBE rules do not address the treatment of taxes such as DSTs, however the OECD commentary suggests that such taxes should not be a Covered Tax.

While such a comment is appropriate where both Pillar One and Pillar Two are successfully implemented, we believe that the Pillar Two rules must address the situation where Pillar Two proceeds in advance of Pillar One, or indeed the absence of reaching a global agreement to adopt Pillar One. In such scenarios, there is an increasing risk of a proliferation of DST's or similar taxes or levies on a global basis. In order to ensure that double taxation does not arise, any taxes

paid under Digital Service Taxes should be a Covered Tax.

Measurement of deferred tax attributes

While an entity's Adjusted Covered Taxes figure will have regard to its accounting measure of current and deferred tax, the rules for the measurement of deferred tax attributes under GloBE are fundamentally different to accounting principles in many areas. As a result, in-scope MNE Groups will likely need to prepare and maintain new schedules and records to measure deferred tax attributes for GloBE purposes; this will present a very significant administrative burden for many affected groups.

As a result, we recommend that Ireland strongly advocate at the OECD / EU level for the introduction of robust simplification measures aimed at reducing complexity in this area.

This will be particularly important with respect to the measurement of deferred tax liabilities that are not considered Recapture Exception Accruals. OECD Commentary suggests that such deferred tax liabilities should be tracked on an item-by-item basis. Large groups may have millions of separate items in respect of which deferred tax arises. It is infeasible for such groups to track the deferred tax arising on all such items on an individual basis.

Agreement of robust simplification measures are needed at the OECD level to make these provisions workable. This should be achieved prior to the finalisation and adoption of the EU minimum tax Directive and should be reflected therein.

7. 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”?

Research and Development Tax Credit (RDTTC) and ‘qualified refundable tax credit’

As outlined in our response to the Research and Development Consultation earlier this year, to ensure the Irish RDTTC regime remains competitive at attracting and retaining investment into Ireland, it is vital that the RDTTC meets the criteria of a ‘qualified refundable tax credit’ under Pillar Two.

A qualified refundable tax credit is treated as income for GloBE purposes. Failing to meet the criteria of a qualified refundable tax credit, the RDTTC is instead treated as reducing Covered Taxes. A non-qualifying refundable tax credit will therefore result in a lower effective tax rate (as Covered Taxes are reduced) for the company in comparison to a credit that meets the definition of a qualifying refundable tax credit, resulting in potentially higher top up tax payable under the Pillar Two rules. As a result, jurisdictions which offer qualified refundable tax credits will naturally be more attractive to groups within the scope of Pillar Two than those with non-qualified refundable tax credits.

The definition of a ‘qualified refundable tax credit’ requires the credit to be designed in such a way that it must be paid as cash or available as a cash equivalent within four years of satisfying the condition to receive the relief. ‘Available in cash’ includes the

ability to offset the refundable amount against other tax liabilities owing to the tax authority. The current Irish RDTTC regime provides in most instances that the tax credit will be refundable within four years. For certain companies that are loss making with insufficient payroll liabilities (rarely seen in practice), in accordance with the application of Section 766B Taxes Consolidation Act 1997, they will not be eligible to obtain the refund within four years.

The OECD commentary on Pillar Two provided further detail on the criteria necessary to be a ‘qualifying refundable tax credit’. This included the requirement that the refund amount is not limited to any ‘tax liability’. The term ‘tax liability’ is not defined in the commentary. A broad interpretation of the term tax liability could include payroll taxes (although should not include a limit based on payroll costs). The refund amount eligible under Section 766(4B) Taxes Consolidation Act 1997 is limited by the amount of corporation tax or payroll liabilities in accordance with Section 766B. Clarity should be sought as to whether the definition of tax liability is limited to taxes on profits or whether the definition could also include payroll taxes.

At present, there is a risk that the current RDTTC will not be considered a ‘qualified refundable tax credit’ under Pillar Two. To address this concern, we recommend that both restrictions (i.e., payroll and

corporation tax) contained in Section 766B be removed.

Value of the current R&D tax credit regime

As currently provided for under Irish domestic tax legislation, any amount payable under the RDTC regime is not considered income for any tax purposes. Under the Pillar Two rules, a 'qualified refundable tax credit' will be considered income under the GloBE rules and would therefore potentially be subject to a Top-Up Tax. For taxpayers in scope of GloBE, this could result in the RDTC being taxed at 15%, substantially eroding the economic benefit arising from the RDTC regime and reducing the incentive to

invest in research and development activities (e.g. €25 of tax credits results could result in a net benefit of €21.25, with €3.75 returned to the Exchequer via a Top-Up Tax). For Ireland to remain competitive and an attractive location to carry out research it's necessary to increase the value of the R&D credit from 25% to at least 30% to ensure the value of the RDTC remains the same post adoption of the Pillar Two rules.

As other countries may also seek to adjust the value of the RDTC post adoption of the Pillar Two rules, in order for Ireland to remain internationally competitive, we recommend the RDTC is increased to 35%.



US changes to foreign tax credit eligibility

Under new US Regulations released in 2021, the tax consequences of the Irish RDTC regime for companies seeking to claim a foreign tax credit in the United States has changed. These changes disincentivise US parented groups from carrying out research and development activities in Ireland.

For accounting periods commencing on or after 28 December 2021 (i.e. these new regulations are currently effective for most companies), where an RDTC regime does not meet the 'exclusion' criteria contained in the regulation, any reduction in Irish corporation tax due to relief under the RDTC regime will not be available as a foreign tax credit in the United States. Prior to this change, the amount of Irish corporation tax creditable in the US was the liability payable before RDTC relief. In order to ensure that the RDTC is treated as not reducing corporation tax for the purposes of US foreign tax credit rules, the RDTC regime must provide the taxpayer the option to claim the RDTC relief as a cash refund in the year of claim. We outline below possible amendments to the RDTC regime that will ensure it complies with the new US regulations;

Option 1: The RDTC regime is updated to include a taxpayer option to have the amount of the credit fully refundable in cash in the year of claim. The amount of the refund would not be limited by reference to the corporation tax or payroll tax liabilities of the claimant company/ group. An acceptable variation of this would be to allow the refund in the year of claim, but make the refund payment in instalments over three years. These options would align with the changes necessary to ensure the RDTC is a 'qualified refundable tax credit' under BEPS Pillar Two rules.

Option 2: The RDTC would be directly offset against a claimant company's payroll tax liability in the year of claim or at the option of the taxpayer would be refundable against a claimant company's total payroll liabilities (including salaries, bonuses etc). The credit would not be available for offset against corporation tax payable by the claimant and would not be calculable by reference to the claimant's corporation tax liability. This would effectively sever the link between the credit and Irish corporation tax, with the

result that it should not result in it having an impact on the foreign tax creditable in the US. It would also incentivise employment in the area of research and development.

However, as discussed above, the RDTC should not be limited to the amount of payroll tax liabilities, as is currently provided for in Section 766B Taxes Consolidation Act 1997, to ensure it is also a 'qualified refundable tax credit' under the Pillar Two rules.

Given that the US Regulations as they stand are not compatible with the RDTC, it is critical that the above amendments are telegraphed as soon as possible. While any amendment will not be effective until the Finance Act 2022 is signed, investment decisions are being made now and the uncertainty is unhelpful.

Knowledge Development Box (KDB)

The Pillar Two rules will constrain countries' ability to compete based on corporation tax rate alone. Specifically, the rules treat certain refundable tax credits, grants and subsidies as income (rather than reductions in tax) for the purposes of calculating a company's effective tax rate, ensuring that such incentives will become increasingly important areas of competition for countries seeking to attract investment from the world's largest companies in the future.

Whilst the Irish KDB is an OECD compliant preferential regime, the benefit of the KDB will be substantially reduced for multinational groups within the scope of the Pillar Two global minimum effective tax rate rules and for groups within the scope of the Pillar Two Subject To Tax Rules (STTR). If the KDB is to be considered a viable investment incentive, changes to the regime will be necessary.

The Pillar Two rules will impact the value of the KDB regime for in-scope Multinational Companies on the basis that profits taxable under the Irish KDB regime will be included as GloBE income in line with accounting principles and subject to the minimum effective tax rate. Despite the deemed tax deduction under Irish domestic rules resulting in the KDB profits effectively being taxable at 6.25%, these profits will be within scope of GloBE and will be subject to the minimum effective tax rate of 15%. This may give rise to

additional Top-Up Tax payable on these profits, thus entirely negating the benefit of the KDB regime for in scope multinational companies.

We recommend that consideration is given to adjusting the KDB regime so that it falls within the definition of a 'qualified refundable tax credit' under Pillar Two rules. This would help ensure that the KDB remains viable as an incentive regime.

8. 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?
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?

Irish domestic legislation for computing the ETR and Top-Up Tax should follow the mechanism and steps as outlined in the OECD model rules and EU Directive.

The Irish rules should follow the formulaic approach taken in the model rules and draft Directive transcribing equations with defined terms, such as calculating ETR and Top-Up Tax, directly into legislation rather than a description of the steps to be taken. All defined terms used in these equations should closely follow those in the model rules and draft Directive.

As noted in previous sections, appropriate safe harbours will be important. Calculations of ETR and Top-Up Tax in Ireland or any other jurisdiction that has implemented a QDTUT should be accepted by other implementing jurisdictions in which an MNE Group has a presence. In addition, jurisdictions where there is a low risk of entities incurring an ETR of less than 15% should be able to rely on robust safe harbours agreed at the OECD / EU level. This is discussed further in Sections 9 and 10 below.

Substance-based Income Exclusion

Assets held for investment, sale, or lease are specifically excluded from the tangible asset carve-out computation for the purposes of calculating the Substance-based Income Exclusion (Article 5.3.4 of the model rules⁴). OECD Commentary on the rule suggests that this exclusion is to ensure that an MNE Group cannot generate a larger carve-out by purchasing investment property in a jurisdiction.

However, the wording of the EU Directive and the OECD model rules would appear to draw a distinction between property (including land and buildings) held for lease as an investment and the active lease of plant and equipment.

The OECD model rules and the Directive define “eligible tangible assets” as (among other things) “**property, plant and equipment** located in the jurisdiction”. At Article 27(4), the Directive sets out certain exclusions from the definition of eligible tangible assets, as follows:

The tangible asset carve-out of a constituent entity located in a jurisdiction

⁴ Article 27(4) of the draft EU Directive

shall be equal to 5% of the carrying value of the eligible tangible assets located in the jurisdiction, with the exception of:

- a) *the carrying value of **property**, including land and buildings, that is held for sale, for lease or for investment;*
- b) *the carrying value of tangible assets used to derive income that is excluded in accordance with Article 16.*

In this regard, we note the following:

- Actively leased moveable assets, such as leased aircraft, leased trucks and leased rail cars, clearly will qualify as being “equipment” for the purposes of the substance based carve-out.
- The exclusion in (a) is very specific and refers only to “property”. Equipment is not excluded from the substance-based carve-out.
- The exclusion in (b) refers to the general exclusion for international shipping income and is not relevant to aircraft leasing. However, we do note that the drafting of (b) refers to “tangible assets” – which would include all equipment. By using two different terms in (a) and (b) to define which assets are to be excluded under each clause, it is clear that a distinction is being made.

In Article 5.3.4 of OECD model rules similarly carve out the carrying value of property, but do not carve out the carrying value of plant and equipment.

The draft UK legislation on Pillar 2 published on 20 July 2022 contains similar wording (see Section 62 of the draft UK legislation).

The OECD commentary does not directly acknowledge that the definition of “*Eligible Tangible Assets*” set down at 5.3.4 refers to “*property, plant and equipment*”, whereas the carve-out is limited to property only. While certain elements of

the OECD commentary could be considered unhelpful, it appears from both the drafting of the OECD model rules and the draft Directive, and the overall thrust of the commentary, that plant and equipment held for lease as part of a *bona fide* leasing trade is intended to be within the scope of the substance based carve-out. We consider this interpretation in line with the overall aim of the Substance-Based Income Exclusion for tangible assets, which per the commentary is to incentivise “substantive activities in a jurisdiction”.

We recommend that the Department provide clarity when drafting the Irish legislation implementing the Pillar Two rules and seek confirmation as part of the OECD Implementation Framework that assets leased as part of an active leasing trade may be regarded when calculating the Substance-based Income Exclusion and that they should be deemed to be located in the jurisdiction where the lessor entity is located for GloBE purposes.

Minority Interests and allocation of Top-Up Tax

Article 5.2.4 of the OECD model rules requires that Top-Up Tax should be allocated within a jurisdiction based on the GloBE profits of each Constituent Entity in that jurisdiction. Equivalent provisions are included in Article 26(5) of the draft EU Directive.

This allocation can produce unfair results where there are minority interests within the group, as Top-Up Tax for a jurisdiction is allocated to entities based on their profits, rather than the amount of tax already paid in that entity. This can arise in Ireland as, unlike many other countries, we have three different corporation tax rates that can apply to business profits. In this regard, we would recommend flexibility for groups to elect a different allocation where the default allocation would lead to inequitable outcomes.

9. 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 is not mandatory under the GloBE rules and it remains to be seen what approach other jurisdictions will adopt. The options for Ireland would appear to be to leave the current rules in place (i.e. 12.5% tax rate applies) or introduce a QDTUT.

From a fiscal perspective, Ireland must certainly consider introducing a QDTUT. Our current expectation is that the introduction of a QDTUT should not adversely impact in-scope groups, on the basis that the Top-Up Tax would otherwise be payable under an IIR or UTPR. This should be fully vetted when the rules/guidance from the OECD and EU are finalised, and we recommend that the Department of Finance undertake some modelling on the impact introducing a QDTUT will have on the Exchequer.

Ireland should legislate for a QDTUT that is compliant with both the EU Directive and the OECD Pillar Two GloBE rules. If a QDTUT is in place, consideration should be given as to whether the current corporation tax rules in Ireland are required to apply to such in-scope groups,

given they will now pay tax based on an ETR of 15%.

It is important that Ireland advocates at an international level for a safe harbour that deems the Top-Up Tax due by the parent entity under the GloBE rules to be nil where an OECD / EU jurisdiction introduces a QDTUT. The benefits of a safe harbour that recognises a QDTUT include:

- Certainty for the taxpayer and the State regarding tax due under the GloBE rules
- Reduced compliance for groups that operate in multiple jurisdictions
- Reduced audit risk and dispute resolution from multiple jurisdictions regarding additional tax due

Ireland should seek for a list of jurisdictions with compliant QDTUTs to be agreed between by all jurisdictions in the OECD / EU.

Features of an Irish QDTUT

Within the definition of QDTUT, both the Directive and the OECD rules require the QDTUT be implemented and administered in a way that is consistent with the outcomes provided for under the GloBE rules. Whilst detailed guidance on the implementation of a QDTUT may come in late 2022 with the OECD GloBE Implementation Framework, any QDTUT introduced in Irish legislation should have the following features:

- **Accounting Standards** – In line with the Directive and the OECD rules, the QDTUT should provide that domestic Excess Profits can be calculated based on an Acceptable Financial Accounting Standard permitted by the Authorised Accounting Body or an Authorised Financial Accounting Standard adjusted to prevent any Material Competitive Distortions, rather than the financial accounting standard used in the Consolidated Financial Statements.
- **Safe Harbour** – Article 10(2) of the draft EU Directive provides for a safe harbour such that no Top-Up Tax should be collected under the IIR or UTPR mechanisms where a country applies a QDTUT calculated in accordance with the accounting standard used to prepare the ultimate parent entity's consolidated financial statements or IFRS. Ireland should advocate that a similar safe harbour provision is implemented at the OECD level as part of the Implementation Framework.

Further, we recommend that Ireland advocates for the safe harbour for QDTUTs to be computed under any Acceptable Financial Accounting Standard, which would include FRS101 / FRS102. This is an important clarification which could mitigate the potential negative results which arise when calculating a Top-Up Tax under US GAAP (as discussed above) and reduce the administrative burden on companies.

The terms of any such safe harbour agreed at the OECD level should be mirrored in the EU's implementing Directive.

- **Domestic Tax Liability** – Clarify that domestic tax liability is aligned with the definition of Covered Taxes and includes current tax, deferred tax and foreign CFC charge attributable to Irish based businesses.
- **Payment of QDTUT** – In line with the Directive, companies should be afforded up to four years to pay a QDTUT before the amount of the underpayment falls to be collected as jurisdictional Top-Up Tax. Under the Directive, the ultimate parent has 15 months from the end of the fiscal period to file the GloBE information return.

As outlined in later in Section 10, calculating the Top-up Tax due for all companies in a jurisdiction will be complicated and require a substantial amount of information and coordination within a group. We do not recommend that the payment dates for the Irish QDTUT should be aligned with the current corporation tax payment and filing dates. It should not be included as part of an in-scope company's preliminary tax liability, final amount payable or CT1 Form return.

Groups require at least 15 months from the end of their fiscal period to prepare and calculate a QDTUT. This is aligned with the Top-Up Tax informational return filing requirements under GloBE rules. A 15-month filing deadline should be provided for Ireland's QDTUT, separate to the entity's corporation tax return.

Article 10(3) of the draft EU Directive provides that QDTUT amounts which remain unpaid 4 years following the fiscal year in respect of which they arose should be added to the jurisdictional Top-Up Tax collectible under the IIR and UTPR mechanisms and no longer collectible by the country which imposed the QDTUT.

Therefore, it will be important that the QDTUT amounts should be collected within four years of the end of the fiscal period in respect of which they arose.

- **Group administration** – As outlined in more detail in Section 10 below, groups should be afforded the option of creating a QDTUT group for filing and payment purposes. Whilst the quantum of QDTUT is the same regardless of whether a company is in a QDTUT group, such a mechanism would allow groups to organise their Irish tax affairs in a way that is consistent with how they currently operate their business. Companies not in the QDTUT group will be responsible for paying and filing a separate QDTUT return.

When in a QDTUT group, the nominated company can file the QDTUT return providing for the allocation of the liability to each company in the QDTUT group. The group will have the option to allow the nominated company to pay the liability or each member of the QDTUT group to pay its QDTUT liability. Like corporation tax, companies in the group should not be jointly and severally liable to the QDTUT.

10. 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?
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?
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?
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?
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?

Reporting

The deadline for filing GloBE Information Returns should fall 15 months after the end of the accounting period in respect of which the filing is required. Similarly, where an Irish entity is not required to file a GloBE Information Return under Article 8.1.2 of the model rules⁵, the deadline for submitting the necessary notification in this regard should fall not less than 15 months from the end of the accounting period in question.

The GloBE Information Return should be a separate filing from the Form CT1.

With respect to QDTUT returns, we recommend a “group filer” approach, akin to that in place for ILR purposes, applies. Specifically, in-scope entities should be

entitled to elect into a filing group. Flexibility regarding membership of a filing group will be important to accommodate groups which operate with a siloed structure where coordination between silos is not feasible.

Payment Dates

Top-Up Tax, UTPR, and QDTUT payments should be made separately to existing corporation tax, income tax, or preliminary tax payments.

We recommend that the greatest degree of flexibility is made available to in-scope groups with respect to the payments under the IIR, UTPR and QDTUT mechanisms. To the extent possible under the OECD Implementation Framework, we recommend that Top-Up Tax payable

⁵ Article 42(3) of the draft EU Directive

under the IIR and UTPR mechanism should fall due for payment no earlier than the GloBE Information Return filing deadline. In addition, the deadline for payment should be extended for the first three years that a group falls within scope of the rules in order to allow impacted businesses adapt to the new charge. Such a deadline would ensure that amounts payable in respect of a particular fiscal year would be collected prior to the submission of the MNE Group's GloBE Information Return for any subsequent fiscal year, while also providing flexibility for in-scope business as they adapt to the new Pillar Two framework. Importantly, it would also ensure that Ireland's UTPR Percentage would not be reduced to nil under Article 2.6.3 of the GloBE model rules⁶.

Article 10(3) of the draft EU Directive provides that QDTUT amounts which remain unpaid 4 years following the fiscal year in respect of which they arose should be added to the jurisdictional Top-Up Tax collectible under the IIR and UTPR mechanisms and no longer collectible by the country which imposed the QDTUT. Therefore, it will be important that the QDTUT amounts should be collected within four years of the end of the fiscal period in respect of which they arose.

Allocation of Payments

Each Constituent Entity should be responsible for the payment of their allocated share of Top-Up Tax and QDTUT, unless an election is made for a designated remitter to pay the Top-Up Tax liabilities of some or all of the group's entities located in Ireland.

Joint and Several Liability

We strongly recommend that Irish constituent entities should not be made joint and severally liable for any Irish GloBE liabilities of the Irish constituent

entities of the same MNE Group, in line with Irish corporation tax.

Adopting joint and several liability with respect to GloBE liabilities would risk adding significant complication to areas such as:

- Determining credit risk as part of securing external finance and transfer pricing group transactions for in-scope businesses, and
- M&A transactions where a single company or subset of companies in a group are being sold.

While this complication would impact all in-scope groups, it would be particularly damaging for groups which operate business lines as separate silos as information necessary to overcome the challenges caused by joint and several liability may not be freely available to all entities within a jurisdiction.

Lead-in Period

It will be crucial that Revenue adopt a pragmatic approach to the administration of the GloBE rules (including the use of interest, penalties, and Revenue interventions) during a reasonable "lead-in" period as businesses adapt their systems and up-skill their teams as required to apply the GloBE rules. Article 44 of the draft EU Directive does not prescribe the penalties which must apply and instead allows each member state to set the level of penalties. We recommend that no penalties would apply to genuine late filings or late payments for at least the first year of application of the rules. When penalties do apply, these should not exceed the current penalty regime applying to corporation tax.

⁶ Article 13(8) of the draft EU Directive

Safe Harbours

Given the wide scope and complexity of the GloBE rules, safe harbours and other simplification measures provided for under the OECD Implementation Framework and EU Directive will play an essential role in minimising complexity, improving certainty for businesses and tax authorities alike, and reducing disputes between tax authorities. In this regard, we recommend that Ireland implement permitted safe harbours agreed at the OECD / EU level.

The certainty and ease of administration offered by safe harbours will play a crucial role in ensuring the Pillar Two framework operates in a clear and efficient manner, with a minimum of dispute between taxing authorities. We strongly recommend that Ireland advocate for the introduction of broad safe harbours which would act to remove the obligation on jurisdictions to calculate and operate Top-up Tax, for example where there is a low risk of an ETR of less than 15% arising in the jurisdiction.

In addition, it will also be of particular importance that Ireland advocate at an international level for a safe harbour that deems the Top-Up Tax due by a parent entity under the GloBE rules to be nil where an OECD / EU country introduces a QDTUT.

All such safe harbours agreed at the OECD level should be reflected in the EU Directive prior to its being finalised and adopted.

We refer to our detailed comments in Section 9 in this regard.

Minimising Compliance Burden and Cost

The Department of Finance and Revenue should undertake regular reviews of the compliance burden faced by in-scope groups in Ireland. In this regard, input should be sought from businesses and practitioners, with an aim of minimising the compliance costs and administrative

burden of the new measures. Such reviews will be particularly important in the initial years after implementation of the rules, as businesses, practitioners and Revenue gain practical experience of the rules.

Dispute Resolution

While dispute resolution and tax certainty are core principles of the Pillar One Amount A rule design process, a mechanism for resolving disputes between taxing authorities and providing tax certainty for businesses will also be essential for the successful implementation of the Pillar Two framework.

We believe that the implementation of broad and robust safe harbours is the best available method of achieving this, and we refer to our earlier comments in this section, as well as Sections 4 and 9, in this regard.

However, it is likely that safe harbours will not be able to resolve all possible areas of dispute and uncertainty within the Pillar Two framework. Therefore, Ireland should commit to joining and following any Pillar Two dispute resolution mechanism agreed at the OECD / EU level.

Coordination

The global nature of the Pillar Two rules will require Irish businesses to refer to tax regimes and measures in place in other countries and consider the treatment of such regimes in the context of the GloBE rules. An example of this would be the requirement to consider whether foreign regimes are Controlled Foreign Company Tax Regimes for GloBE purposes and correctly allocate tax paid under such regimes as appropriate.

Certainty for businesses in this regard is essential, in particular for the largest groups which may operate in many countries. Revenue should prepare and maintain a database of tax regimes, tax measures and taxes levied in other

countries which are accepted as falling within certain GloBE definitions, including:

- Covered Taxes
- Controlled Foreign Company Tax Regimes
- Qualifying IIRs
- Qualifying UTPRs
- Qualified Refundable Tax Credits
- QDTUTs

To the extent that similar lists are maintained at the OECD/EU level, our list should be aligned in order to allow a coordinate global approach.

11. Transition Rules

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

Tax Attributes on Transition

It will be important that practical guidance and clarification is provided to businesses and practitioners regarding the measurement of deferred tax assets that comprise both GloBE Loss and non-GloBE Loss elements (e.g., deferred tax assets that comprise both GloBE losses and restricted s291A allowances). Clarification in this regard will be important from a transition perspective as Article 9.1.1 of the OECD model rules⁷ allows for deferred tax assets attributable to GloBE Losses to be recast upwards to 15% for GloBE purposes where recorded at a lower rate in the entity's accounts.

Intragroup transaction before transition year

In addition, Article 9.1.3 of the OECD model rules⁸ poses a number of immediate issues for businesses:

- The rule is causing businesses to defer *bona fide* intra-group transfers of assets during this transition period, as the treatment of the same transfer (including taxation of the profits of the disposing entity at a minimum rate of 15%) is favourable to the transition period treatment provided for under Article 9.1.3. In many cases, this is causing a delay in the centralisation of key assets and functions in Ireland.
- Groups which engaged in intra-group transfers of assets in the period after 30 November 2021 but before the

publication of the GloBE model rules in late December 2021 will be subject to the provision retrospectively, without the opportunity to consider its application prior to entering into the transaction.

- Based on the original timeline, for groups immediately within the scope of GloBE, the transition rules would have applied from 30 November 2021 to 31 December 2022 (i.e., a period of 13 months). However, given the updated timelines, this period is now much longer than envisaged and will be at least 25 months.
- Groups not presently in scope of the GloBE rules will be subject to this transition provision for all intra-group transactions from 30 November 2021 until such time as they fall within scope of the rules, possibly requiring years' of intra-group transactions to be re-characterised and remeasured on transition in the future.

⁷ Article 45(2) of the draft EU Directive

⁸ Article 45(4) of the draft EU Directive



Case Study

A start-up fintech group with operations in Ireland and the UK has an annual turnover of €50m. Established in 2019, the group secures Series B funding in 2024, with an aim of expanding its operations to major EU markets and the US.

Over a period of ten years, the group successfully expands its market share and turnover such that it falls within scope of the Pillar Two framework. Its Transition Year commences on 1 January 2035.

Under Article 9.1.3, the group is required to review all intra-group asset transfers in the period starting 30 November 2021 to 31 December 2034 when determining its deferred tax assets and liabilities on transition, re-characterising and remeasuring all transactions and associated figures (e.g. depreciation, amortisation, losses, etc.) to reflect the deemed transfer of these assets at the carrying value of the assets in the disponer entity.



Case Study

An in-scope Irish headquartered pharmaceutical group with significant US operations acquires a German target in December 2021. The German target is the owner of a valuable patent for a new drug developed by the target.

Typically, the group centralises all patent and other IP rights in Ireland, where it has a substantial manufacturing presence.

Even though the accounting profit arising on the disposal of the IP by the German target would be fully subject to tax in Germany at a >15% rate, the Irish acquirer would be deemed to acquire the assets at their book value for GloBE purposes where this intra-group transfer occurs before the GloBE rules are implemented, essentially resulting in double taxation of the gain.

We recommend that Ireland advocates at the OECD / EU level for changes to the transition rules that are negatively impacting *bona fide* commercial transactions. An option in this regard would be to insert an exception to the transition rule that would apply where the profit arising on the intra-group disposal was subject to tax at a minimum rate of 15%. In our view such an approach remains true to the policy intention behind the transition rule.

12. Subject to Tax Rule ('STTR')

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

The STTR regime is still being developed at the OECD and a final version of these rules is not yet available. Based on the OECD Pillar Two blueprint report, released in October 2020, developing countries may apply a withholding tax on interest, royalties and defined payments where the recipient jurisdiction applies a nominal corporate tax rate of less than 9% to the payment.

As the stated aim of the STTR is to protect developing countries, we do not believe that Ireland should actively pursue the introduction of a STTR in its treaties, unless treaty counterparties request such changes. Given Ireland's stated policy on tax treaties this may not arise.

Whilst the 12.5% corporate tax rate applies to eligible Knowledge Development Box (KDB) profits in Ireland, based on the 2020 blueprint, it was envisaged that the entitlement to a

deemed expenditure deduction from taxable profits, as provided for in Irish legislation, would be in scope of the STTR.

Based on the statement released by the Inclusive Framework in October 2021, our understanding is that the additional withholding tax chargeable on in-scope payments taxed under the Irish KDB regime would be 2.75%, being the difference between the 9% minimum rate and 6.25% KDB rate.

We recommend that further consideration and stakeholder engagement is sought on the implications of the STTR on the KDB regime when the final mechanics of the STTR are agreed by the Inclusive Framework. Consideration should be given to amending the KDB so that it becomes a qualified refundable tax credit, as outlined in Section 7, for claimants in scope of the GloBE rules.

13. 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?

While much attention may be focused on how Ireland might best continue to attract international investment and support Irish multinationals, increasing challenges in the international tax landscape also act to reemphasise the importance of driving and supporting our indigenous businesses.

In this regard, we support the provisions included in Article 47(1)(b) of the draft EU Directive, which would delay the application of the GloBE rules for the first five years upon a Large-Scale Domestic Group falling within scope of the Pillar Two framework. Ireland should ensure that this provision is included in Ireland's transposition of the EU Directive once finalised.

To the extent that Ireland introduces a QDTUT, the above deferral for Large Scale Domestic Groups should equally apply for QDTUT purposes.

Finally, we recommend that Ireland advocate at the EU level for a simplified compliance process for Large Scale Domestic Groups for both GloBE and QDTUT purposes. This should include:

- An exclusion from the obligation to file a GloBE Information Return where a QDTUT return is filed by an affected group, and
- A simplified GloBE Information / QDTUT Return to reflect the reduced risk of base erosion or profit shifting for wholly domestic groups.

Such simplification measures would play an important role in reducing the administrative burden and cost for indigenous businesses within scope of the GloBE rules.



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