Irish Tax Institute

August 2023

Pillar Two Implementation

Response to the Second Feedback Statement

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1. About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's Chartered Tax Advisers (CTA) and is the country's only professional body exclusively dedicated to tax.

The Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice. We benchmark our education programme against the very best in the world. The continued development of our syllabus, delivery model and assessment methods ensure that our CTAs have the skills and knowledge they need to meet the ever-changing needs of their workplaces.

Our membership of over 6,000 is part of the international CTA network which has more than 32,000 members. It includes the Chartered Institute of Taxation UK, the Tax Institute of Australia, the Taxation Institute of Hong Kong and the South African Institute of Taxation. The Institute is also a member of the CFE Tax Advisers Europe (CFE), the European umbrella body for tax professionals.

Our members provide tax services and business expertise to thousands of Irish owned and multinational businesses as well as to individuals in Ireland and internationally. Many also hold senior roles in professional service firms, global companies, Government, Revenue, state bodies and in the European Commission.

The Institute is, first and foremost, an educational body but since its foundation in 1967, it has played an active role in the development of tax administration and tax policy in Ireland. We are deeply committed to playing our part in building an efficient and innovative tax system that serves a successful economy and a fair society. We are also committed to the future of the tax profession, our members, and our role in serving the best interests of Ireland's taxpayers in a new international world order.

Irish Tax Institute - Leading through tax education

2. Executive Summary

The Irish Tax Institute welcomes the publication of the Second Feedback Statement on Pillar Two Implementation (Second Feedback Statement) and the opportunity to further engage with the Department of Finance on the implementation of the Pillar Two Global anti-Base Erosion Model Rules[1] (GloBE Rules) into Irish law.

In addition to responding to the Pillar Two Implementation Feedback which was published in March (March Feedback Statement), the Institute, alongside other stakeholders, has been an active participant at the TALC BEPS Sub-committee in providing feedback on technical issues relevant to the policy development of the implementation of Pillar Two into domestic legislation.

It would be of benefit to all stakeholders to understand how the feedback provided to date and the guidance on aspects of the rules included in the July 2023 OECD Administrative Guidance on the GloBE Rules[2], which are not addressed in the Second Feedback Statement, such as the Qualified Domestic Minimum Top-up Tax (QDMTT) Safe Harbour and tax credits, will be reflected in Irish law.

As work progresses on drafting the legislation which will implement Pillar Two domestically, we strongly urge the Department of Finance and Revenue to continue to engage with stakeholders directly and via the TALC BEPS Sub-committee. Such engagement should continue up to the publication of the Finance Bill and during the passage of the Bill through the Oireachtas, to ensure the legislation, when enacted, is clearly understood by taxpayers and does not give rise to any unintended consequences.

Safe harbours will have a key role to play in reducing the administrative burden for groups in-scope of the GloBE Rules. In this regard, we welcome the inclusion of the draft legislative approach for the transitional country-by country reporting safe harbour (Transitional CbCR Safe Harbour) and the transitional undertaxed profits rule safe harbour (Transitional UTPR Safe Harbour) in the Second Feedback Statement.

We also welcome the confirmed intention that the Irish qualified domestic top-up tax (QDTT) should comply with the safe harbour requirements under the EU Minimum Tax Directive[3] (Directive) and the July 2023 OECD Administrative Guidance, such that other jurisdictions would recognise a safe harbour for constituent entities subject to the Irish QDTT.

[1] OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/782bac33-en

[2] OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), July 2023, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosionrules-pillar-two-july-2023.pdf.

[3] Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

In our view, the primary concern in formulating the legislation adopting the QDTT must be to ensure that it meets the conditions to be recognised as 'qualifying' for the purposes of the QDMTT Safe Harbour as set out in the July 2023 OECD Administrative Guidance.

Furthermore, qualifying for the transitional simplified reporting framework outlined in the July 2023 OECD Administrative Guidance will also be critical for MNE groups, as it will significantly reduce the number of disclosures required on the GloBE Information Return in the cases where it applies.

We would strongly urge that in formulating the legislation for the QDTT careful consideration is given to ensure it does not automatically exclude MNE groups from applying the simplified reporting framework to its Irish constituent entities where a top-up tax liability arises. At the same time, any potential impact on the credibility of the QDTT for the purpose of Ireland's Double Tax Agreements with its key trading partners must also be contemplated.

The OECD has confirmed that a peer review process will be used to determine whether a jurisdiction's QDMTT meets the standards required to be granted safe harbour status. In order to provide certainty to taxpayers, it would be helpful to understand the expected timeframe for the completion of this peer review process. We would urge Irish policymakers to advocate for the early completion of this peer review process as the safe harbour will play a crucial role in reducing the administrative burden for businesses in complying with the GloBE Rules.

We have set out in section 3 of this submission, our observations and recommendations in response to the specific questions raised in the Second Feedback Statement. We note that the draft legislative approaches in the Second Feedback Statement are to be read in conjunction with the March Feedback Statement.

However, as section numbers have not been used and it is unclear how both the feedback provided to date and the July 2023 OECD Administrative Guidance will be reflected in the legislative provisions outlined in the March Feedback Statement, it is difficult to fully anticipate how the draft legislative provisions in the Second Feedback Statement will interact with the previous provisions set out in the March Feedback Statement. Unless otherwise indicated, we have taken the definitions set out in the March Feedback Statement to apply to the draft legislative approach contained in the Second Feedback Statement.

The Institute would be happy to engage further in this consultation through stakeholder meetings or direct discussions. Please contact Anne Gunnell of this office at agunnell@taxinstitute.ie if you require any further information in relation to this submission.

3. Consultation Questions

3.1. Transitional CbCR Safe Harbour and Transitional UTPR Safe Harbour

The Feedback Statement sets out possible draft legislative approaches to the Transitional CbCR Safe Harbour and the Transitional UTPR Safe Harbour. We welcome the proposal to put both safe harbours on a legislative footing and we believe that the proposed legislative approach to both safe harbours aligns with the approach outlined in the OECD guidance.

Ownership Interest

The draft legislation for the Transitional CbCR Safe Harbour makes several references to an "*ownership interest*" which is a term that was defined in Chapter 1, Section XXX [Interpretation] of the March Feedback Statement.

As noted in our response to the March Feedback Statement, the proposed definition of ownership interest differs from the Directive and the GloBE Rules as it omits the word 'equity'. By not restricting the definition to equity interests, we believe that applications of the definition could vary from those arising under the GloBE Rules and the Directive.

It is clear from paragraph 85 of Chapter 10 of the OECD Commentary on the GloBE Rules that the term equity interest has been purposely used to distinguish between an ownership interest and other rights to the profits, capital or reserves of an entity.

When interpreting 'capital' for the purpose of the Anti-Tax Avoidance Directive, it was necessary to clarify that it pertained to equity capital and not debt capital. In our view, consideration should be given in legislation to ensure in this context that capital is interpreted as meaning equity capital and not debt capital.

3.2. QDTT/QDMTT and Safe Harbour Status

We welcome confirmation that it is intended that the Irish qualified domestic top-up tax (QDTT) should comply with the safe harbour requirements under both Articles 11 and 32 of the Directive and the July 2023 OECD Administrative Guidance, such that other jurisdictions would recognise a safe harbour for constituent entities subject to the Irish QDTT.

In our view, the primary concern in formulating the legislation adopting the QDTT must be to ensure that it meets the conditions to be recognised as 'qualifying' for the purposes of the QDMTT Safe Harbour as set out in the July 2023 OECD Administrative Guidance.

As detailed below, it is unclear that the proposed approach outlined in *Chapter 3, Section XXX [Determining top-up amounts of qualifying entity]* would satisfy the conditions necessary to qualify for the QDMTT Safe Harbour.

We would make the following observations regarding the draft legislation for a QDTT.

- ***Chapter 1, Section XXX [Interpretation]***

  Subsection 2 states that *"A word or expression which is used in this Part and is also used in Part XXX [IIR and UTPR] has, unless the context otherwise requires, the same meaning in this Part as it has in Part XXX [IIR and UTPR]."* As neither Feedback Statement includes Part XXX [IIR and UTPR], we assume that the intention is to refer to Chapters 1 to 10 of the draft legislation outlined in Appendix 1 of the March Feedback Statement.

- ***Chapter 1, Section XXX [Qualifying Entities]***

  The Commentary on the GloBE Rules clearly states that investment entities that are the ultimate parent entity (UPE) are excluded from the operation of the GloBE Rules because they are not constituent entities of any MNE Group.[4] This is reflected in section XXX(2) [Scope of this Part] which confirms that the rules regarding the IIR and UTPR shall not apply to 'excluded entities' which include (as defined) an investment fund that is a UPE and a real estate investment vehicle that is a UPE.

  The draft legislative approach in the Second Feedback Statement provides for the QDTT to apply to a 'qualifying entity'. The definition of a qualifying entity includes constituent entities located in the State that are members of a MNE group or large-scale domestic group where the revenue of the group recorded in the group's consolidated financial statements meets the consolidated revenue threshold of €750 million. A qualifying entity also includes other entities which satisfy an entity revenue threshold of €750 million that are not 'excluded entities' within the meaning of section XXX(2) [Scope of this Part].

  Under the proposed approach to the legislation, it would appear that a standalone non-consolidating investment entity located in the State which satisfies the entity revenue threshold may be considered a qualifying entity and therefore, would be in scope of the QDTT. This is because such an investment entity, would not fall within the meaning of an excluded entity in section XXX(2) [Scope of this Part] as it is not an investment fund or a real estate investment vehicle that is a UPE.

  In many cases, investment funds such as ICAVs will not be consolidating entities and therefore, it would seem such funds would be subject to the QDTT of 15%. It is unclear whether this is the policy intention. Notably, the UK legislation explicitly

[4] OECD (2022), Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two), First Edition: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/1e0e9cd8-en at chapter 7, paragraph 73.

excludes an investment entity from the meaning of a qualifying entity for the purpose of its domestic top-up tax.[5]

More generally, the basis for including standalone entities (other than 'investment entities') which meet the entity revenue threshold of €750 million is unclear and would appear to go beyond the minimum standard required by the Directive.

- ***Chapter 3, Section XXX [Determining top-up amounts of qualifying entity]***

  Jurisdictional choice of accounting standards

  Article 32 of the Directive allows for the recognition of safe harbours at the election of the filing constituent entity, resulting in the top-up tax due by a group in a jurisdiction deemed to be zero for a fiscal year, if the effective level of taxation of the constituent entities located there *"…fulfils the conditions of a qualifying international agreement on safe harbours."*

  The July 2023 OECD Administrative Guidance provides for a QDMTT Safe Harbour and sets out three standards to be satisfied to achieve QDMTT Safe Harbour status, i.e., the QDMTT Accounting Standard, the Consistency Standard and the Administration Standard. In adopting a QDTT in Ireland, the primary concern must be to ensure that it meets the three standards necessary to be recognised as qualifying for the QDMTT Safe Harbour.

  The QDMTT Accounting Standard provides for a QDMTT to be computed based on the UPE's financial accounting standard or a local financial accounting standard subject to certain conditions.

  The local financial accounting standard of the QDMTT jurisdiction may be used where all constituent entities of the group located in that jurisdiction have financial accounts based on that standard, the fiscal year of such accounts is the same fiscal year as the consolidated financial statements of the MNE group, and they are required to use such accounting standard due to legislative requirements. The choice between these two alternatives is to be made at the jurisdictional level.

  Subsection (2)(d) of section XXX [Determining top-up amounts of qualifying entity] provides for the insertion of two new subsections, (3A) and (3B) after subsection (3) of section XXX (Determination of qualifying income or loss].

  Subsection (3A) provides that subject to certain conditions, the financial accounting net income or loss of a constituent entity for the fiscal year shall be determined in accordance with generally accepted accounting practice, where all of the constituent entities of the MNE group located in the State have financial statements prepared in accordance with generally accepted accounting practice and the fiscal year of all such statements is the same as the fiscal year of the consolidated financial statements of the MNE group. Generally accepted

[5] Section 266, Finance No. 2 Act 2023 https://www.legislation.gov.uk/ukpga/2023/30/section/266/enacted.

accounting practice (GAAP) is defined in section 4 of the Taxes Consolidation Act (TCA) 1997 and includes both IFRS and Irish generally accepted accounting practice.

Subsection (3B) includes a tie-breaker clause which applies in circumstances where any of the Irish constituent entities of a MNE group prepare financial statements under both international accounting standards and Irish generally accepted accounting practice. In those circumstances, it is the financial statements prepared under Irish generally accepted accounting practice which applies for the purposes of subsection (3A).

However, a scenario where constituent entities of an Irish group prepare their financial statements using different accounting standards in the same group does not appear to be addressed in the proposed approach to the domestic top-up tax, which is outlined in the Second Feedback Statement.

We understand that there are cases where a number of entities within an Irish group may prepare their financial statements under IFRS, while other entities in the same Irish group may prepare their financial statements under Irish GAAP (e.g. FRS 101, FRS 102 etc) meaning two different Irish local GAAPs are used to prepare financial statements in the same Irish group.

The July 2023 OECD Administrative Guidance states that *"where the Constituent Entities located in the jurisdiction prepare financial accounts using more than one financial accounting standard, the QDMTT jurisdiction should determine in its QDMTT legislation which accounts and financial accounting standards should be used for purposes of the QDMTT computations without giving the optionality to the MNE Group (that is, the QDMTT jurisdiction must provide a tie-breaker rule to determine which financial accounting standard must be used for the purposes of applying the QDMTT)."*

Given this guidance, it is unclear that the domestic top-up tax in Ireland, as currently drafted, would satisfy the standards for the QDMTT Safe Harbour, as the tie-breaker clause only operates to mandate Irish GAAP in situations where an individual entity prepares financial statements in both international accounting standards and Irish generally accepted accounting practice, but does not apply to situations where one Irish group entity may prepare its financial statements under IFRS, while another member of the same Irish group prepares its financial statements using Irish GAAP (i.e. FRS 101, FRS 102 etc).

<u>'Financial accounting net income or loss'</u>

Subsection (3A) provides that the financial accounting net income or loss of a constituent entity for the fiscal year is determined in accordance with generally accepted accounting practice in certain circumstances. However, in the March Feedback Statement, financial accounting net income or loss is defined in Section XXX [Interpretation] as "*the net income or loss determined for a constituent entity in preparing consolidated financial statements of the ultimate*

parent entity for a fiscal year before any consolidation adjustments eliminating intra-group transactions".

Consequently, clarity is needed as to the basis upon which the financial accounting net income or loss of a constituent entity for the fiscal year is to be determined for the purpose of the domestic top-up tax.

The July 2023 OECD Administrative Guidance does not include any adjustments for differences between the constituent entity's financial accounting net income or loss as determined under the local financial accounting standard and as calculated under the UPE's financial accounting standard. However, it notes that the Inclusive Framework will consider providing further guidance on asymmetrical treatment of items of income, expense or transactions between different accounting standards and tax rules including those used with respect to the transitional and permanent GloBE Safe Harbours.

Reconciling financial statements prepared using the local financial accounting standard back to consolidated financial statements prepared under the UPE's financial accounting standard would be a very onerous task and it would be important that any reconciliations are minimised to the greatest extent possible.

Indeed, without knowing the extent of any reconciliations which may be required in the future, it is difficult to fully understand the impact of the jurisdictional choice of accounting standard for the domestic top-up tax.

Requirement for all constituent entities to have the same fiscal year

Subsection (3A) requires that for a constituent entity to determine its financial accounting net income or loss for the fiscal year in accordance with generally accepted accounting practice rather than the accounting standard under the consolidated financial statements of its UPE, it is necessary for all constituent entities in the State to have the same fiscal year as the consolidated financial statements.

Where a MNE group acquires a constituent entity during the fiscal year, it is possible that the accounting period of that constituent entity may differ from the consolidated financial statements of the MNE group. It would seem inequitable if the QDTT of all constituent entities in the State were required to be prepared using the accounting standard of the UPE's consolidated financial statements in those circumstances.

Meaning of 'fiscal year'

Subsection (3A) refers to both the 'fiscal year' of a constituent entity and the 'fiscal year' of the consolidated financial statements of the MNE group. Clarity is required as to the meaning of fiscal year in this context, as fiscal year is defined in the March Feedback Statement in *Section XXX* [*Interpretation*] as the

accounting period in respect of which the UPE of the MNE group (or large-scale domestic group) prepares its consolidated financial statements.

Subsection (1)

Subsection (1) states that *"Subject to subsections (1) to (4) and (6), Chapters 3 to 7, and 9, of Part XXX [IIR and UTPR], other than section XXX [Initial phase of exclusion from IIR and UTPR of MNE groups and large-scale domestic groups], shall apply for the purposes of determining the domestic top-up tax of a qualifying entity …"* We assume that the intention here is that subsection (1) would be subject to subsections (2) to (4) and (6) rather than subsections (1) to (4) and (6).

Subsection (2)(b)

Subsection (2)(b) provides that for the purposes of subsection (1), Part XXX [IIR and UTPR] has effect for domestic purposes as if *"any provisions contained therein which provide for a reduction of top-up tax amounts where a qualifying domestic top-up tax is payable were omitted".* To provide certainty regarding the relevant provisions policymakers are referring to, it would be preferable if they were enumerated within the subsection.

- ***Chapter 4, Section XXX [Order of Application]***

  The section provides that the legislative provisions on the QDTT will apply after all provisions of the Tax Acts and the Capital Gains Tax Acts. As outlined in our response to the March Feedback Statement, in drafting the relevant legislative provisions, it must be clear that the QDTT is an incremental corporation tax, i.e., a corporate tax on income.

  A key concern for taxpayers is that any tax payable under a QDTT will be considered a creditable tax for the purposes of Ireland's Double Tax Agreements with its key trading partners. In particular, care must be taken to ensure that any tax payable under a QDTT is considered foreign tax paid or accrued for foreign tax relief purposes under US Foreign Tax Credit Regulations.

3.3. Pillar Two Elections

Subsection 10 of section XXX [Elections] incorporates Article 8.2.2 of the GloBE Rules and provides for a 36-month period after the top-up tax information return is filed within which Revenue can challenge the use of a GloBE Safe Harbour (namely, the Transitional CbCR Safe Harbour, the Transitional UTPR Safe Harbour or the QDMTT Safe Harbour) and a 6-month period for the constituent entity to respond to such a challenge.

It would be helpful if the interaction of this provision with existing provisions in the Taxes Acts dealing with enquiries and assessments could be clarified. In our view, the approach to be adopted in respect of enquiries and assessments must take into

account any potential developments at OECD level in relation to dispute prevention and dispute resolution mechanisms.

3.4. OECD Model Rules, Commentary, Administrative Guidance

We welcome the proposed approach to the legislation outlined in the Second Feedback Statement which makes direct reference to the GloBE Rules, the Commentary on the GloBE Rules and the Administrative Guidance, which has been published by the OECD. The draft legislation envisages that any additional subsequent guidance published by the OECD would be incorporated into Irish legislation by means of statutory instrument. Such an approach provides certainty to taxpayers by ensuring that any future guidance will have prospective application only.

It is possible that there will be a lacuna between the publication of updated guidance by the OECD and its incorporation into Irish legislation by means of statutory instrument. Where the updated OECD guidance aligns with the GloBE Rules and provides clarity to the taxpayer regarding the application of the GloBE Rules, then in those circumstances, it should be possible for the taxpayer to rely on the updated guidance by administrative practice until such time as the updated guidance can be formally adopted.

Subsection (2) of the draft legislation provides that the legislation implementing Pillar Two is to be construed in accordance with the OECD Model Rules and related OECD Commentary and Administrative Guidance *"other than where such an application of this section would be inconsistent with the Directive."* We believe that this terminology is subjective and could lead to uncertainty among taxpayers. A preferable approach would be for the legislation to be construed in accordance with the OECD Model Rules, Commentary and Administrative Guidance other than where such an application would be inconsistent with the objective of the Directive.

Subsection (3) of the draft legislation refers to any additional subsequent guidance mentioned in "*paragraph (e) of the definition of OECD Pillar Two guidance in subsection (1)*". We assume it is intended that reference should be to paragraph (f) (rather than paragraph (e)) of the definition of 'OECD Pillar Two guidance' in subsection (1).

3.5. Administration

The Second Feedback Statement notes that Irish policymakers currently propose that obligations for registration, filing of the GloBE Top-up Tax return and making payments will need to be satisfied on a constituent entity basis.[6] We believe that Ireland would be an outlier if an option is not provided to taxpayers in Ireland to file and pay on a group basis.

[6] Second Feedback Statement, page 39.

As highlighted in our response to the March Feedback Statement, many groups will endeavour to streamline the administration of GloBE tax returns and payments to the greatest extent possible. To facilitate groups who wish to streamline their compliance processes, it is essential that there is flexibility to elect a group filer who would be responsible for registration and filing the GloBE Top-Up Tax Return on behalf of other constituent entities in the filing group.

In respect of the obligation to file the GloBE Information Return, we assume policymakers intend that the filing obligations of Irish constituent entities would align with Article 44 of the Directive, which envisages that a constituent entity would have the option to appoint a 'designated local entity' and that the obligation of a constituent entity in Ireland to file a GloBE Information Return may be discharged by such a designated local entity.

However, paragraph 83 of Article 6.4 of the OECD's Commentary on the GloBE Rules states that joint ventures "*do not meet the definition of a Constituent Entity under Article 1.3*". Consequently, how the administrative obligations will apply to joint ventures is unclear and needs to be clarified.

3.5.1. Penalties

Transitional Penalty Relief Regime

As set out in our response to the March Feedback Statement, in line with the objective of the Transitional Penalty Relief Regime, we would strongly urge that a pragmatic approach is taken by Revenue in respect of penalties in the initial period following the implementation of the Directive into Irish law.

It must be recognised that in-scope businesses operating in Ireland are less likely to qualify for the safe harbours, such as the permanent Simplified Calculations Safe Harbour, with the result that they are more likely to be required to complete complex GloBE computations than businesses operating in other jurisdictions.

An appropriate lead-in time should be provided to allow MNE groups to familiarise themselves with these very complex rules in practice and to develop the data collection and the reporting and compliance systems to comply with the new obligations, without the risk of being penalised for making reasonable errors.

The Transitional Penalty Relief Regime set out in the OECD guidance on Safe Harbours and Penalty Relief[7] provides that during the transition period, no penalties or sanctions should apply in connection with the filing of a GloBE Information Return where a tax administration considers that an MNE has taken *"reasonable measures"* to ensure the correct application of the GloBE Rules.

[7] OECD (2022), *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/safe-harbours-and-penalty-relief-global-anti-base-erosion-rules-pillar-two.pdf.

The guidance specifies that a MNE can demonstrate it has taken reasonable measures if it can show it has, in good faith, put in place the appropriate systems to understand and comply with the GloBE Rules. It also states that whether a taxpayer has met the standard of taking reasonable measures must be assessed by a tax administration based on the facts and circumstances of the case.

The objective of the Transitional Penalty Relief Regime is to provide MNEs with a "soft-landing" during the initial years of implementation of the rules. In our view, in considering whether a taxpayer has taken reasonable measures, it would be appropriate to focus on the internal procedures and processes which a taxpayer has put in place to ensure the correct application of the GloBE Rules.

No penalties should apply during the transition period where it can be shown that a taxpayer has devoted appropriate resources (whether internal or outsourced) to develop the necessary data collection, reporting and compliance procedures; has maintained appropriate supporting documentation; and has made a genuine effort to correctly calculate any GloBE top-up tax liability.

We consider such an approach would be in line with the objective of the Transitional Penalty Relief Regime to provide MNEs with a "soft-landing" during the initial years in which the rules are being introduced.

General approach to penalties after the transition period

When penalties begin to be imposed after the transition period, we believe they should be in line with existing penalties which already apply in Ireland for corporation tax purposes. In our view, the existing fixed penalty and late filing surcharge provisions which apply where a company fails to file or pay its corporation tax on time are effective, proportionate, and dissuasive. It will also be important that the penalties applying in Ireland do not exceed the level of penalties adopted in other Member States.

Code of Practice for Revenue Compliance Interventions

The Code of Practice for Revenue Compliance Interventions (Code of Practice) sets out various ways that taxpayers can regularise their tax compliance position. No penalty will apply to an underpayment of tax where the conditions for self-correction, innocent error and technical adjustment are satisfied.

In our view, the self-correction provisions in the Code of Practice should apply to the GloBE Top-Up Tax Return. However, some of the conditions applying to innocent error and technical adjustment would not be appropriate in a GloBE context and would need to be modified to take account of the complexity of the GloBE Rules and the likely materiality of any tax liability, if there is an error in the application of the GloBE Rules.

For example, the Code of Practice provides that where a tax default is not deliberate and is not attributable to a taxpayer's failure to take reasonable care in complying

with his or her tax obligations, a correction can be made without penalty (referred to as correcting an innocent error). In determining whether a taxpayer has taken reasonable care to comply with his or her tax obligations, the Code of Practice specifies that the materiality of the error being corrected and the frequency of any error will be taken into consideration.

However, the quantum of a GloBE top-up tax liability could be significant given the revenue threshold which applies for MNE groups in scope of the GloBE Rules. It is also likely that any underpayment arising from an error may have been replicated across several data points. As a consequence, it would be difficult for a Pillar Two taxpayer to satisfy the existing criteria in the Code of Practice relating to materiality and frequency of the error, to claim innocent error.

In determining whether a taxpayer may make a 'technical adjustment', Revenue will consider whether or not 'due care' has been taken by the taxpayer. In doing so, Revenue will take into account whether there is published Revenue guidance on the issue; whether there is published legal precedent available; and the magnitude of the tax consequences.

Although a taxpayer will be able to rely on published OECD guidance, it is not anticipated that Revenue will issue detailed technical guidance on the interpretation of the GloBE Rules. Furthermore, as the GloBE Rules have not yet come into operation, taxpayers and their advisers, will not be able to seek direction from case law and precedent where questions of interpretation arise in practice.

We firmly believe the existing mechanisms within the Code of Practice for regularising tax defaults can be adapted and need to be modified to take into account the novel circumstances of taxpayers in scope of the GloBE Rules. To ensure that the provisions regarding innocent error and technical adjustment are fully understood and are applied consistently in practice, it would be helpful if Revenue could provide further guidance (including examples) on instances where innocent error and technical adjustment would apply in the context of the GloBE Rules.

We would welcome engagement with Revenue through the TALC Audit Sub-committee regarding such potential modifications to the Code of Practice, possibly through the inclusion of a new dedicated chapter, to ensure that taxpayers in scope of the GloBE Rules are afforded the same opportunity to regularise their tax compliance position where necessary, without the application of penalties in appropriate circumstances.

<u>Tax-geared penalties</u>

Section 1077F TCA 1997 sets out tax-geared penalties which apply for deliberately or carelessly making incorrect returns. Where the taxpayer does not act either carelessly or with deliberate intent, a tax-geared penalty does not apply.

Notably, where a transfer pricing adjustment results in additional tax due, a relevant person will be protected from a tax-geared penalty that may otherwise apply under

section 1077F TCA 1997, in the careless behaviour category, where a taxpayer prepares transfer pricing documentation on time and provides it on a timely basis to Revenue when requested by a Revenue officer and the documentation demonstrates reasonable efforts to comply with the transfer pricing rules in Part 35A TCA 1997.

Where any additional tax due relates to the deliberate behaviour category of default, the relevant tax-geared penalty will apply even where transfer pricing documentation is provided within 30 days of a written request from a Revenue officer.[8]

Similar to the position that exists for transfer pricing adjustments, where there is an underpayment of a GloBE top-up tax liability, we believe that consideration should be given to protecting taxpayers from a tax-geared penalty in the careless behaviour category where the taxpayer provides the relevant documentation on a timely basis to Revenue when requested to do so and the documentation demonstrates reasonable efforts have been made to comply with the GloBE Rules.

3.5.2. Additional provisions to ensure collection

Article 11(3) of the Directive provides that where an amount of qualified domestic top-up tax has not been paid within four years after the fiscal year in which it was due, it can no longer be collected by the Member State. The Second Feedback Statement notes that given this provision within the Directive, there may be a need for additional provisions to ensure the Irish QDTT is collected within the permitted timeframe.

It suggests that these additional measures could involve making Irish constituent entities joint and severally liable for any Irish GloBE liabilities of the Irish constituent entities of the same MNE group, or, where an Irish constituent entity has not paid its Irish GloBE liabilities within a set timeframe, Revenue may issue a notice to another Irish constituent entity of the same MNE group requiring them to pay the outstanding amount.

In our view, rather than introducing new measures to ensure collection, the existing extensive debt collection procedures available to Revenue should be used to ensure a GloBE top-up tax liability is collected within the timeframe permitted by the Directive.

We do not consider it would be appropriate for Irish constituent entities to be made jointly and severally liable for any Irish GloBE liabilities of the Irish constituent entities of the same MNE group. As we highlighted in our response to the March Feedback Statement, adopting joint and several liability with respect to GloBE liabilities is likely to significantly complicate the due diligence process for M&A transactions where a single constituent entity or a number of constituent entities in a group are being sold.

In our view, in most cases, constituent entities will be seeking to comply with the GloBE Rules and pay any GloBE top-up tax due promptly, as any tax not paid in Ireland may be collected in another jurisdiction. The most likely reason why a GloBE

[8] Transfer Pricing, Part 35A-01-01, Tax and Duty Manual, Revenue Commissioners, December 2022, at page 66.

top-up tax liability may not be paid promptly will be because it is disputed by a taxpayer and is the subject of an appeal to the Tax Appeal Commission or the courts. In those circumstances, we do not believe that the existence of joint and several liability would result in the disputed tax being collected any earlier.

We consider that it would be more appropriate to focus on ensuring that there is comprehensive guidance available to taxpayers to reduce disputes arising and where disputes do arise, there should be robust dispute resolution mechanisms in place so that they can be resolved in a timely manner. Given the potential loss of revenue to the Exchequer if appeals in such cases are not resolved within the four-year time limit set out in the Directive, the possibility of establishing an expedited appeal process for such cases should be explored.

3.5.3. Transitional simplified reporting

The transitional simplified reporting framework (the Framework) would allow MNE groups to apply the Framework in jurisdictions in respect of which either no top-up tax liability arises for the MNE group, or, a top-up tax liability arises but it does not need to be allocated on a constituent entity-by-constituent entity basis.

For those jurisdictions where the MNE group qualifies, and has elected for the Framework, the MNE group is not required to report all adjustments to the Financial Accounts Net Income or Loss (FANIL), current tax expense or deferred tax expense on a constituent entity-by-constituent entity basis.

The transitional simplified jurisdictional reporting framework is not available in jurisdictions where a top-up tax liability arises and the liability needs to be allocated on a constituent entity-by-constituent entity basis. In such jurisdictions, MNE groups would be required to report on a constituent entity-by-constituent entity basis, all the relevant adjustments made to determine each constituent entity's GloBE Income or Loss and Adjusted Covered Taxes, as provided in the GloBE Information Return.

Without doubt, qualifying for the Framework is critical for MNE groups because it would significantly reduce the number of disclosures required on the GloBE Information Return, in cases where it applies. An inordinate administrative burden would arise if a MNE group cannot elect to apply the Framework to its Irish constituent entities. Therefore, it is important to fully understand the conditions to avail of the Framework.

It is unclear whether the 'top-up tax liability' referred to in the Framework is the top-up tax liability calculated under Chapter 5 of the GloBE Rules (i.e., the IIR or UTPR top-up tax liability) only, or whether it also includes a liability arising under a QDMTT. Under Chapter 5 of the GloBE Rules, the IIR or UTPR top-up tax liability is arrived at after taking a deduction for the QDMTT imposed in a jurisdiction. In our view, it would be important that clarification is sought from the OECD on the meaning of 'top-up tax liability' for the purpose of the Framework as it may have an impact on the manner in which the Irish QDTT is structured.

As Ireland's headline corporation tax rate is less than the minimum effective tax rate of 15%, in most cases a QDTT liability will arise for in-scope constituent entities. If the reference to a 'top-up tax liability' in the Framework is a reference to the 'jurisdictional top-up tax' as outlined in Article 5.2.3 of the OECD GloBE Rules, it would mean the 'jurisdictional top-up tax' for Ireland would be net of the QDTT. Therefore, it would seem that any mandatory or optional allocation of the Irish QDTT on a constituent entity-by-constituent entity basis should not impact on whether a group could elect to apply the Framework for Ireland.

Indeed, where a MNE group has a 'jurisdictional top-up tax' liability in Ireland, it should be entitled to elect to apply the Framework for Ireland where one of the two requirements contained in section 3.4.1 of Annex 2 of the July 2023 OECD Administrative Guidance on the GloBE Information Return[9] applies.

On the other hand, if it is determined that the top-up tax liability referred to in the Framework includes any QDMTT/ QDTT liability, then it would appear the only basis on which a MNE group may be able to elect to apply the Framework to its Irish constituent entities would be if the Irish QDTT liability does not need to be allocated on a constituent entity-by-constituent entity basis.

If this is the case, we would strongly urge that in formulating the legislation for the Irish QDTT that careful consideration is given to ensure it does not automatically exclude MNE groups from applying the Framework to its Irish constituent entities where a QDTT liability arises. For example, consideration could be given to allow MNE groups to have the option to elect to allocate the QDTT to its Irish constituent entities.[10]

However, due consideration would also need to be given to any potential implications of such an approach to the credibility of the QDTT for the purposes of Ireland's Double Tax Agreements. Preliminary feedback we have received from members suggests that providing an option to allocate the Irish QDTT among constituent entities in the Irish group should not impugn the credibility of the QDTT for the purposes of US Foreign Tax Credit Regulations, but further analysis may be necessary to fully confirm the position.

If a MNE group elects to allocate the QDTT to its Irish constituent entities, Revenue should collect any late or underpaid top-up tax liability from the relevant constituent entity as well as any interest and penalties accruing in respect of same. Where the MNE group elects to allocate the top up tax liabilities and, the overall liability for the Irish group is correct but the allocation to two or more Irish entities is incorrect, the principle of "no loss of revenue" under the Code of Practice should apply in such cases.

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[9] OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris, www.oecd.org/tax/beps/globe-information-return-pillar-two.pdf, at page 38.

[10] We note that this would necessitate an option to adopt a group-based approach to filing and payment of GloBE Top-up Tax returns and liabilities.

If the option is not exercised, Revenue should collect any late payment /or underpayment of top-up tax liability (and related interest and penalties) from the group payer only. There should be no requirement for joint and several liability.

In addition, it is currently envisaged that the Framework will apply to all fiscal years beginning on or before 31 December 2028 but ending no later than 30 June 2030 (known as the transition period). As outlined above, the Framework will play a critical role in reducing the considerable administrative burden associated with the implementation of the GloBE Rules for MNE groups that can avail of it. Therefore, we would strongly urge Irish policymakers to advocate at the OECD level for the Framework to be extended beyond the transition period and be made a permanent feature of the operation of the GloBE Rules.