Record of Meeting

Meeting	TALC BEPS Sub-Committee – Implementation of Pillar Two, Meeting 5		
Location	Revenue Offices, Dublin Castle	Meeting Date	22/08/2023
D/Finance Attendees	Deirdre Donaghy; Rafal Saniternik; Evan Lombard		
Revenue	Keith Noonan; John Quigley; Catherine Duffy; Brendan O'Hara; Máirín Kane^; Rory Noone;		
ITI	Anne Gunnell; David Fennell^; Tom Maguire; Gareth Bryan; Paul McKenna		
CCAB_I	Gearoid O'Sullivan^; Paschal Comerford; Enda Faughnan^; Kevin Doyle^		
Irish Law Society	Andrew Quinn; Philip Tully		
^ Attended remotely via Dial-in			

Purpose

Per the agenda to discuss issues identified and examples submitted by Sub-Committee members in relation to the Implementation of Pillar Two.

Minutes

Finance provided an update on the ongoing work at OECD level and highlighted that there is an opportunity for Inclusive Framework members to provide feedback / input for future OECD guidance on Pillar Two. Finance invited practitioners to highlight items for consideration and to focus on items that are of utmost concern.

CCABI noted that the Substance Based Income Exclusion is important in an Irish context.

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1. **Qualified Domestic Minimum Top-up Tax (QDMTT) Safe Harbour**

   Finance noted that Ireland has to make a choice, within legislation, regarding the accounting standard to be applied in the calculation of the QDMTT, in line with the QDMTT Safe Harbour (SH) guidance issued by the OECD, and that the choice cannot be at taxpayer level.

2. **Different Accounting Standards within the Same Group**

   A discussion took place on the issue of different accounting standards being used by Irish constituent entities within the same corporate group, practitioners noting issues with alignment of standards across group entities in order to meet the requirements of QDMTT SH Accounting Standard. Concerns were also raised regarding the requirement for alignment of fiscal years and accounting periods and how there would be challenges, particularly where a merger or acquisition has taken place.

Action Point:
Practitioners agreed to provide examples where there may be legal or accounting impediments to alignment of accounting periods which would mean the local accounting standard would not be available to a group for the purposes of the QDMTT.

3. QDTT & Non-Corporate Entities/Investment entities

A discussion took place on issues relating to non-corporate entities and in relation to the collection of top-up tax for investment entities.

Action Point:
Finance to arrange follow-up call with practitioners so that for practitioners can provide greater detail as to the issues discussed in relation to the application of top-up taxes to investment entities.

4. Rules where Entity not part of Consolidated Group

CCABI confirmed that these issues were addressed as part of the discussion on investment entities.

5. Compliance & Administration

Revenue and D/Finance sought further views from practitioners on whether the approach taken should be constituent entity level pay and file, or group- based pay and file. Practitioners noted that optional group-based filing would be preferable. A discussion took place regarding the possible implications of a group-based approach.

The ITI noted that the application of the transitional jurisdictional simplified reporting framework is very important to Irish taxpayers.

6. Intra-Group Financing Rules

In planning for the meeting, the ITI submitted five scenarios relating to Intra-Group Financing rules (Article 3.2.7 of the Model Rules) which they wished to discuss further.

Revenue provided its response to the scenarios contained in the submission, a summary of which is provided below:

a. What is the general application of the rule in situations where the ETR of the borrower is not impacted by the arrangement? (Guidance suggests the rule only has application where the intention is to increase the ETR of the borrowing entity so if the interest is deductible for local tax purposes in the low-tax territory, it would not be negated by this rule, as it is only interest which is non-deductible for local tax purposes that would be denied for Pillar Two purposes because such interest would have the effect of increasing the ETR).

The application of Article 3.2.7 is not dependent on there being an impact on the ETR of the borrower. It applies where the interest expense can reasonably be anticipated, over the expected duration of the arrangement to:

(a) Increase amount of expenses taken into account in calculating the GloBE Income or Loss of the Low-Tax Entity;
(b) Without resulting in a commensurate increase in the taxable income of the High-Tax Counterparty.

While acknowledging that the commentary to the rule refers to increases in ETR, top-up taxes can be reduced even where the ETR is not increased, by reducing the amount of excess profits to which the top-up tax percentage is applied. Where there is no commensurate increase in the taxable income of the high-tax counterparty then this is specifically disallowed by Article 3.2.7.

b. What is the practical application of this rule to cash-pooling arrangements? Such cash-pooling arrangements typically involve a large number of countries and involve lending / borrowing between the cash-pool leader and various counterparties. Analysing these transactions for the purposes of the high to low financing rule would be extremely burdensome.

Article 3.2.7 is intended to be an anti-avoidance rule. It would be expected that a lending arrangement would result in an increase in taxable income for the lender unless the arrangement was designed not to result in an increase in taxable income, in which case it should be readily identifiable by the MNE group.

c. One of the tests in the intra-group financing arrangements rules is whether the interest has resulted in a commensurate increase in the taxable income of the High-Tax Counterparty. There are very limited examples provided in practice of what situations would give rise to commensurate increase in taxable income of the lender. However, there are a number of scenarios that could arise in practice, such as:

The key part of the Commentary in this respect is para 127 to Article 3.2.7 where it says:

"A payment should not be treated as increasing the taxable income of a High-Tax Counterparty if it is eligible for an exclusion, exemption, deduction or credit or other tax benefit under local law and the amount of that benefit is calculated by reference to the amount of payment received."

i. Where the lender has expenses and is taxed on a net basis, i.e. interest expense from third party borrowings and interest income from intra-group lending. There has been a commensurate increase in the taxable income of the High-Tax Counterparty in this case. Agree?

Agreed.

ii. **Where the lender is able to claim group relief in relation to losses incurred by another member of the group. There has been a commensurate increase in the taxable income of the High-Tax Counterparty in this case. Agree?**

Agreed.

iii. **Where the lender is a member of a tax consolidation group but the interest income is still taxable for the group. There has been a commensurate increase in the taxable income of the High-Tax Counterparty in this case. Agree?**

Further details would be required to provide a definitive view. Can the tax consolidation group avail of some sort of exclusion, etc. as described in the above extract from the Commentary?

iv. **Where the lender has losses carried forward which are used to shelter the interest income. There has been a commensurate increase in the taxable income of the High-Tax Counterparty in this case. Agree?**

Agreed.

d. **Interaction with Safe-harbour provisions**

i. **The application of the CbCR Safe-Harbour provision relieves MNE Groups from the requirement to carry out detailed calculations for a particular jurisdiction. The rules in relation to intra-group financing arrangements require an arrangement between a High Tax Counterparty and a Low Tax Entity but this can only be determined if detailed calculations are carried out. Where one party qualifies for a CbCR Safe-Harbour, but the other party does not, the rule would not appear to be workable. Has consideration been given to how this will operate in practice?**

It would seem more likely that the High-Tax Counterparty ("HTC") will be the one to qualify for the CbCR SH (though this is not always necessarily going to be the case).

Where a HTC does qualify for the CbCR SH and the Low-Tax Entity ("LTE") does not, then the focus in Article 3.2.7(b) is on the taxable income – not the GloBE Income or Loss – of the HTC. As such, the lack of a GloBE computation for the HTC doesn't seem to prevent the rule from applying.

Taking the reverse example, whereby the LTE does qualify for the CbCR SH and the HTC does not. In that case, the LTE's top-up tax is deemed to be zero and there's no need to compute GloBE Income or Loss, such that applying Art 3.2.7 doesn't arise.

e. Hypothetical Tests

i. The definitions of 'low-tax entity' and 'high-tax counterparty' require a focus on the ETR position of the Constituent Entity if any income or expense accrued by the entity in respect of an intra-group financing arrangement were ignored. In circumstances where there are multiple intra-group financing arrangements applicable to a jurisdiction, do all such arrangements need to be disregarded for the purposes of the hypothetical test, or is it only the expense related to the specific intra-group financing arrangement being considered, such that a specific re-calculation is required for each specific arrangement?

From Article 10.1:

"Low-Tax Entity means a Constituent Entity located in a Low Tax Jurisdiction or a jurisdiction that would be a Low-Tax Jurisdiction if the Effective Tax Rate for the jurisdiction were determined without regard to any income or expense accrued by that Entity in respect of an Intragroup Financing Arrangement."

"High-Tax Counterparty means a Constituent Entity that is located in a jurisdiction that is not a Low-Tax Jurisdiction or that is located in a jurisdiction that would not be a Low-Tax Jurisdiction if its ETR were determined without regard to any income or expense accrued by that Entity in respect of an Intragroup Financing Arrangement."

"Intragroup Financing Arrangement means any arrangement entered into between two or more members of the MNE Group whereby a High Tax Counterparty directly or indirectly provides credit or otherwise makes an investment in a Low Tax Entity."

Based on the emphasised text above, it appears to be focused on the specific arrangement. However, in the case where there are a number of entities in a jurisdiction with a number of intragroup financing arrangements, it may not be practicable to recalculate the ETR for the jurisdiction multiple times, each time excluding the effects of an arrangement and assessing if the jurisdiction is low tax where that one arrangement is excluded. For example, if the test were applied for one arrangement and it transpires that the borrower is in a low tax jurisdiction and that a restriction is to apply under 3.2.7 in respect of that arrangement, then when we are assessing the jurisdiction with respect to a second arrangement, would it be required to take into account the effect of the restriction arising under the first arrangement? Given the possible complexity, taking a more practical approach, it appears that it is possible apply the test by excluding all intragroup financing arrangements and to assess the ETR of the jurisdiction once, based on all intragroup financing arrangements being excluded.

Action Point:

Finance asked the ITI if the submission could be circulated to all members which was agreed (circulated on 24 August).

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7. Materiality Threshold

A discussion took place on the application of materiality thresholds and issues contained in the ITI submission regarding when adjustments for immaterial items are recognised. Revenue confirmed that where the effect of a correction for an immaterial item is included in the financial statements of an entity that are used for the purposes of the consolidated financial statements of the group, then that correction should only be taken into account once and in the period that it is reflected in the accounts.

8. SBIE

Finance gave an overview on the matters discussed at OECD level on mobile assets and leasing in relation to the application of the substance based income exclusion.

9. Second Feedback Statement

Finance confirmed that a number of submissions had been received and it will take time to review and consider those.

10. Consequential Amendments

A discussion took place on previously identified proposed consequential legislative amendments relating to, in particular, capital allowances and interest deductions.

AOB

N/A

Action points

As noted above:

i) Finance to follow-up with practitioners to arrange a separate call in relation to the application of top-up taxes to investment funds.

ii) ITI submission / scenarios on intra-group financing to be circulated to all members.

iii) Practitioners to provide examples where there may be legal or accounting impediments to alignment of accounting periods which would mean the local accounting standard would not be available to a group for the purposes of the QDMTT.

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Next Meeting As above, Finance to follow-up with practitioners to arrange a separate call in relation to the application of top-up taxes to investment funds.	
Signed	*Rory Noone*