Follow up responses to matters raised at the TALC BEPS Sub-committee Meeting on 8 March 2024
26 April 2024

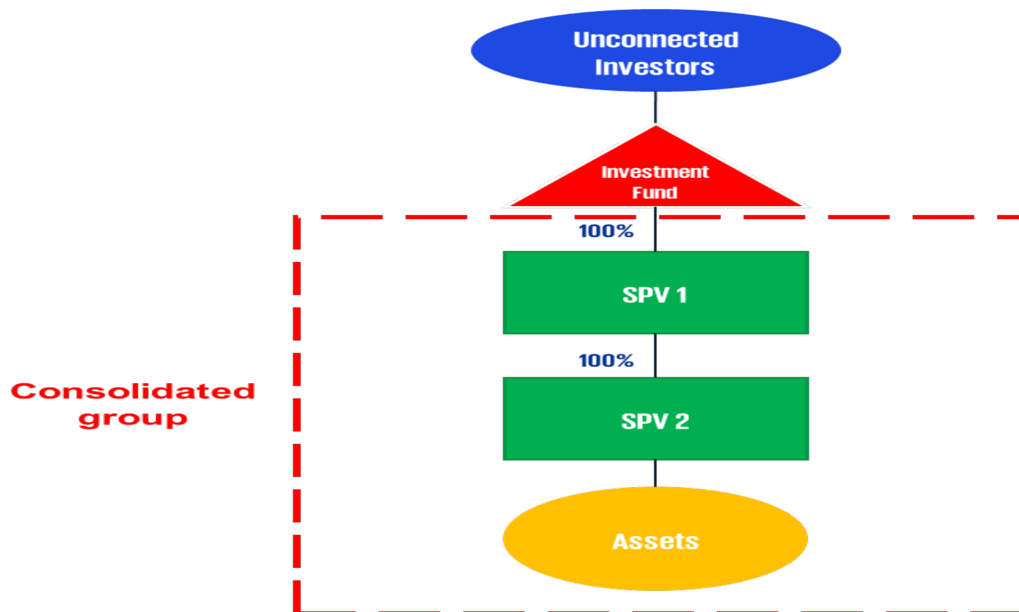
1. Excluded Entity – Section 111C TCA 1997

Section 111C(2)(b) and (c) extend the definition of an excluded entity to include certain subsidiaries of other excluded entities. In line with the equivalent GloBE Rules (Article 1.5.2) and provisions of the Directive (Article 2(3)), the Irish legislation suggests that this should only be possible where the tested entities are 95%/85% held directly or indirectly by an excluded entity as defined under Section 111C(2)(a). Therefore, for investment fund and REIT structures, the rules would suggest that this extension should only apply where the investment entity/ REIT is the UPE of the MNE Group.

However, Paragraph 45 of the OECD Commentary on Chapter 1 of the Model Rules clarifies that this extension can also be met where the tested entity and the investment fund/ REIT are not members of the same group. This means that the extension could apply, for example, where an investment entity is not required to consolidate on a line-by-line basis entities which it owns because they are an investment company under IFRS 10.

Given Section 111C determines whether entities are in scope of the GloBE Rules or otherwise in Ireland, it will be important that taxpayers have certainty that they can rely on the OECD Commentary included in Paragraph 45 on Chapter 1 of the Model Rules when interpreting this provision. In addition, this provision will be highly relevant for Ireland's investment fund and asset management sectors. As a result, we ask for this point to be confirmed in Revenue guidance.

At the TALC BEPS meeting on 8 March, Revenue requested the Institute to provide an example to illustrate the above issue. Please see below an illustrative example.



Background Facts and Assumptions

- Investment Fund owns 100% of SPV 1, which operates exclusively to hold assets for the benefit of Investment Fund.
- Investment Fund is widely held by many unconnected investors and meets the definition of an investment fund for GloBE purposes.
- SPV 1 holds 100% of SPV 2, which operates exclusively to hold assets for the benefit of Investment Fund.
- Investment Fund is treated as an investment entity under IFRS 10 with the result that it does not consolidate the results of SPV 1 and SPV 2 on a line-by-line basis in its consolidated financial statements.
- SPV 1 prepares consolidated financial statements in which the results of SPV 2 are consolidated on a line-by-line basis.
- Both SPV1 and SPV 2 are located in Ireland for GloBE purposes.

Analysis

- SPV 1 is the UPE of a group for GloBE purposes.
- Reading section 111C(2) TCA 1997 in isolation, SPV 1 and SPV 2 are not Excluded Entities. This is on the basis that although the ownership and activity conditions in section 111C(2)(b) are met by these companies, Investment Fund is not the UPE of the group and therefore, does not fall within the definition of an Excluded Entity in section 111C(2)(a).
- However, Paragraph 45 of the OECD Commentary on Chapter 1 of the Model Rules clarifies that the equivalents of section 111C(2)(b) and (c) in the Model Rules can also be met where the tested entity and the investment fund owner of these entities are not members of the same group.

- Therefore, SPV1 and SPV 2 should be Excluded Entities if the Irish legislation is to be aligned with OECD Commentary in this area.

2. Carried forward capital allowances under section 291A(6)(b) TCA 1997

Previously, we had asked if the same methodology used to identify whether a Case I loss is a qualifying loss (i.e. First In First Out (FIFO)) should be used to determine to what extent excess capital allowances carried forward under section 291A(6)(b) TCA 1997 constitute a qualifying loss.

At the TALC BEPS Meeting on 8 March, Revenue did not consider they could give any opinion generally on qualifying loss utilisation as it is a matter for the Department of Finance to consider in the context of tax policy. This resulted in the question on the treatment of a section 291A(6) TCA 1997 attribute becoming somewhat academic. However, Revenue did opine that its initial view was that a section 291A(6) carry forward may not constitute a 'qualifying loss' at all.

However, could the treatment of section 291A(6) attributes depend on the facts of the case and therefore, might some element of a section 291A(6) carry forward be attributable to a qualifying loss?

For example, take a company with specified trade income before capital allowances of €10 million, accounting amortisation/capital allowances available of €11 million and where the 80% cap applies. The accounting loss would be €1 million. Taxable profit would be €2 million. The section 291A(6) TCA 1997 carry forward would be €3 million. In this example, we would query that the €1 million of the section 291A(6) amount constitutes a qualifying loss, valued @15%.

3. Sections 111AAL and 111AAO TCA 1997

Section 111AAL(4) and section 111AAO(4) TCA 1997 provide for group relief on UTPR and QDTT group payments, respectively, such that those amounts should not be taken into account for calculating profits or losses for Irish corporation tax purposes and should not be considered a distribution or charge on income for corporation purposes. Guidance on the treatment of payments made to or from Irish constituent entities in respect of top-up taxes otherwise than within a UTPR or QDTT group is required.

For example, would a payment from a foreign constituent entity in respect of IIR/UTPR borne by an Irish constituent entity on the profits of the foreign constituent entity be subject to Irish corporation tax? This will be particularly relevant in circumstances where minority interests exist in an affected group and such payments are necessary to ensure that such parties are not unfairly impacted by the application of the rules.

Revenue stated at TALC BEPS that there is no equivalent provision to provide relief is respect of UTPR and therefore, a legislative amendment would be required. However, Revenue queried how

likely would this arise in practice given it would only apply where minority-owned interests are consolidated.

At the TALC BEPS Meeting on 8 March, Revenue asked the Institute to comment further on the likelihood of this issue and to provide examples.

Please note that payments between Constituent Entities could arise in a wide range of scenarios where the group's policy is to reimburse an entity for taxes/costs borne on behalf of others. In a Pillar Two context, this could include scenarios where:

a) an Irish UPE/IPE/POPE incurs an IIR top-up tax liability in respect of a Low-Taxed Constituent Entity and
b) an Irish Constituent Entity incurs a UTPR top-up tax liability in respect of another group entity.

4. CBCR Safe Harbour – Effective date for anti-arbitrage provisions

Paragraph 74.31 of the December 2023 OECD Administrative Guidance on the GloBE Rules notes that anti-arbitrage provisions contained therein with respect to the CbCR Safe Harbour can have effect for arbitrage arrangements entered into after 18 December 2023, if an effective date of 15 December 2022 would not be possible on constitutional grounds or based on other superior law.

Revenue confirmed at TALC BEPS they will not include any reference to the applicable date until the matter is further considered by the Department of Finance. The Department are interested in stakeholders' views and wish to understand the circumstances in which this matter arises i.e. the types of transactions that advisers are seeing or expect to see which will be impacted. The Department is also seeking the views of the Law Society on the legal implications of the retrospectivity of the guidance.

At the TALC BEPS Meeting on 8 March, Revenue asked the Institute to provide further details on the type of scenarios which would be impacted.

We would note that the anti-arbitrage provisions in the OECD December 2023 Administrative Guidance are drafted broadly, with a wide range of arrangements potentially coming within the scope of the deduction/no inclusion provision. This provision applies where a Constituent Entity (i) directly or indirectly provides credit to another Constituent Entity, (ii) there is an expense in the accounts of a Constituent Entity and (iii) it cannot be demonstrated that there is a commensurate increase in the taxable income of the other Constituent Entity.

It is worth noting that the scope of the anti-arbitrage provisions in the December 2023 Administrative Guidance is wider than Article 3.2.7. Whereas Article 3.2.7 only applies to intra-group financing arrangements where the borrower is located in a low-taxed jurisdiction and lender is a

high-tax counterparty, the OECD December 2023 Administrative Guidance applies to arrangements between:

- A low tax CE and another low tax CE
- A low tax CE and a high tax CE
- A high tax CE and a low tax CE
- A high tax CE and a high tax CE

A commensurate increase will not be deemed to exist in a scenario where the counterparty had not recognised a DTA in respect of the losses utilised against the taxable income.

An example of an arrangement which could be captured would include the following:

An Irish entity purchases components from a related party (X Co) in Jurisdiction X on credit. The commercial terms of the arrangement were altered after 22 December 2022/ 18 December 2023. The Irish entity has an expense relating to this arrangement in its financial accounts. While the income earned by X Co is subject to corporate income tax in Jurisdiction X, X Co has losses forward which are offset against the taxable income received. As X Co had not previously recognised a DTA in respect of the losses forward, a commensurate increase in taxable income is not considered to have arisen. A hybrid arbitrage arrangement potentially arises as a result.

We also note that the UK has recently announced that it will apply the OECD December 2023 anti-arbitrage provisions to arrangements entered into/amended after 14 March 2024.

Finally, with regard to the constitutional legal point in relation to the effective date of the anti-arbitrage provisions, we understand some firms have engaged Counsel's Opinion on the matter and intend to share this with the Department of Finance in due course.

5. Section 111P TCA 1997

Section 111P TCA 1997 defines 'tax functional currency' as the functional currency used to determine the constituent entity's taxable income or loss for a covered tax in the jurisdiction in which it is located. From an Irish tax perspective, notwithstanding the fact that the tax liability is ultimately converted to Euro for the Form CT1, the Irish corporation tax computation for a trading company is prepared using the accounting functional currency.

In this regard, tax functional currency should equal accounting functional currency given how Irish taxable trading profits are determined. For example, a company with a USD accounting functional currency will calculate its trading income in USD. As a result, it follows that its 'tax functional currency' should be considered USD in this example.

In contrast, a company will calculate its non-trading taxable income in Euro and thus, it follows that the 'tax functional currency' should be considered Euro. We asked Revenue to provide examples of what is considered the tax functional currency of trading companies versus non-trading companies and also to provide examples and clarification of the tax functional currency of a company that is trading but FX arises in respect of non-trading items.

At the TALC BEPS meeting on 8 March, Revenue asked the Institute to provide examples of the above for consideration for inclusion in Revenue guidance.

Tax functional currency is defined as "*the functional currency used to determine the constituent entity's taxable income or loss for a covered tax in the jurisdiction in which it is located.*" From an Irish tax perspective, companies determine trading income under the presentation currency of the local financial statements and will determine non-trading income in Euro. As a result, a company with trading and non-trading income should be considered to have two tax functional currencies.

Example

An Irish company has a trade selling widgets. The company has an accounting functional currency of USD. The company has some sales in GBP. The excess GBP is lent to a group company. In the P&L there is an unrealised FX gain on GBP trade receivables of 50 and there is an unrealised FX gain on a non-trading GBP loan receivable of 100.

Trade receivable

From a Pillar two perspective, the tax functional currency is USD as the trading income is determined in USD and the accounting functional currency is USD. Therefore, there is no asymmetry and the provisions of section 111P(2)(f) TCA 1997 should not apply to the unrealised FX gain of 50.

Non-trade receivable

From a Pillar two perspective, the tax functional currency is considered EUR for the purposes of analysing this FX because the FX arises in respect of a non-trading receivable. As the accounting functional currency is USD, there would be asymmetry and the provisions of section 111P(2)(f) TCA 1997 should apply to the unrealised FX gain of 100.

6. Umbrella versus Sub-fund

We sought confirmation that in the case of an ICAV which prepares separate financial statements at sub-fund level, that the sub-fund itself would be viewed as the "entity" for Pillar Two purposes (rather than the umbrella fund).

We also asked, in all other cases, that guidance should clarify that the umbrella fund would be viewed as the entity for Pillar Two purposes. We requested for it to be made clear in guidance that this determination solely relates to the application of Pillar Two and not for any other purpose of the Taxes Act.

At the TALC BEPS meeting on 8 March, Revenue noted that the above query would need to be submitted to the OECD. Revenue asked the Institute to provide further details on whether the issue arises in relation to other jurisdictions and to provide any further information considered relevant in advance of this issue being discussed with the OECD.

As previously noted, where the ICAV prepares separate financial statements at the level of each sub-fund rather than at umbrella level, stakeholders view the sub-fund as meeting the definition of "entity" for Pillar Two purposes. The Irish Collective Asset-management Vehicles Act 2015 specifically provides for optionality with respect to the level at which audited financial statements can be prepared (Section 116(8) ICAV Act 2015 refers).

While other Irish fund vehicles have the concept of sub-funds, e.g. a Unit Trust, they do not have the ability to prepare sub-fund level audited financial statements. Similarly, while other jurisdictions have fund vehicles with the sub-fund concept, they cannot prepare audited financial statements at the sub-fund level.

Feedback in relation to this issue was provided by Luxembourg, France, Germany and the UK and none have the ability to prepare sub-fund level financial statements and as such guidance is not needed as to whether the "sub-fund" can be considered an entity for Pillar 2 purposes.

The ICAV is in a unique position and certainty is needed in the market as the determination of the relevant "entity" can result in two very different outcomes.

For example, in one case our Reps are aware of, an umbrella ICAV prepares its financial statements at sub-fund level. No individual sub-fund exceeds €750 million of revenue but when aggregated together, the revenue threshold would be breached. Only one of the sub-funds is actually consolidated into an MNE group whose revenue exceeds €750 million.

The definition of "entity" is therefore critical in this scenario:

a) if the "entity" is determined to be the sub-fund, as that is the level at which the financial statements are prepared, only the sub-fund that is consolidated into the MNE group whose revenue exceeds €750 million would be in scope of Pillar Two as the remaining sub-funds are not part of a group whose revenue exceeds the threshold.
b) if the "entity" is determined to be the umbrella entity, the umbrella itself will be in scope of Pillar Two on a standalone basis as its revenue exceeds €750 million.

7. Definition of investment fund in master-feeder fund structures

It is common for investment funds in Ireland to be established as master-feeder structures. The master fund may have multiple feeder funds or in some cases may have a single feeder fund which, in turn, has a number of investors. The master fund itself, or the management of the master fund, may be regulated.

However, it is sometimes the case that the feeder fund may not itself be regulated, nor is its management. The master funds still raise their capital from a number of investors, albeit indirectly through the feeder fund(s) rather than directly. We asked for Revenue guidance to clarify that in the case of feeder funds, they should effectively be looked through and the activities of the master fund should be considered for the purpose of determining whether the feeder fund(s) is considered an "investment fund".

At the TALC BEPS meeting on 8 March, Revenue asked the Institute to provide further details, (for example, whether the issue arises in other jurisdictions and could industry resolve this issue by appointing a regulated manager to the fund) and the approach in other jurisdictions so that the matter could be further considered for submission to the OECD for guidance.

Please note that the Luxembourg and UK tax authorities have not expressed any view on the widely held concept required to fall within the definition of investment fund.

In Luxembourg, most fund vehicles can avail of an exemption from preparing consolidated accounts under Luxembourg GAAP, with the result that the question as to whether specific Luxembourg master and feeder funds meet the definition of an investment fund for GloBE purposes may in many cases be irrelevant. In addition, as Luxembourg GAAP is an acceptable financial accounting standard, such entities should not be deemed to prepare consolidated accounts under the deemed consolidation test.

However, even in circumstances where none of the entities in a Luxembourg master/ feeder fund structure prepare consolidated accounts for GloBE purposes, the determination as to whether a feeder fund is an investment fund may be relevant for entities in which they have directly or indirectly invested. This is because, under Paragraph 45 of the Commentary on Chapter 1 of the Model Rules, the excluded entity test under Article 1.5.2 of the rules may even be met where the tested entity and the investment fund owner of the entity are not members of the same group.

In such circumstances, the requirements that the feeder funds are (i) regulated and (ii) held by unconnected investors may preclude them from meeting the definition of an investment fund for GloBE purposes, with the result that the underlying investee asset holding vehicles are not considered excluded entities for GloBE purposes.

8. Master Fund and limb (a) of the definition of Investment Fund

In the case of Master Funds, we also sought guidance from Revenue to clarify that the feeder fund should be looked through for the purpose of limb (a) of the definition of investment fund in determining whether the master fund *"is designed to pool financial or non-financial assets from a number of investors, some of which are not connected,..."*

Regarding satisfying limb (a) of the definition of investment fund, we sought guidance from Revenue confirming that where an investment fund is held by a single investor that is itself widely held, e.g. pension fund, publicly traded insurance company, feeder fund (as per above), etc. that the investment fund should be deemed to satisfy limb (a) of the definition of investment fund - *"is designed to pool financial or non-financial assets from a number of investors, some of which are not connected,..."*

At the TALC BEPS meeting on 8 March, Revenue sought further details from the Institute to allow the issues to be considered for submission to the OECD for guidance. Similarly to the above, a Master Feeder structure is an extremely important and common structure in the funds industry.

The feeder fund is generally where the capital investing begins; capital (cash or securities) flows from investors into feeders, and these in turn invest all or a portion of that capital into the Master Fund. The Master Fund then uses that infusion of capital to invest in securities and thereby generates profits and losses.

When analysing whether the Master Fund can be considered an investment fund, limb (a) of the test may not be met where the only investor in the Master Fund is a "Feeder" as it may be considered to have only one investor and no unconnected investors. However, the reality is that either behind the Feeder directly or indirectly, the structure could be widely held, with a range of unconnected investors entering at the Feeder level or above.

The analysis of whether the investors behind the Feeders are actually unconnected (as defined) still needs to be considered. There are two lines of argument that support that such Master Funds should still be eligible to meet the investment fund definition.

As referenced previously, the OECD Commentary on Pillar Two states that the definition of Investment Fund as prescribed in Pillar Two draws on the definition as included in AIFMD regulations.

For the purposes of the AIFMD regulation, an alternative investment fund is defined to mean a collective investment undertaking, including investment compartments thereof, which:

- raises capital from a number of investors, with a view to investing in accordance with a defined investment policy for the benefit of those investors, and
- does not require authorisation under Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative

provisions relating to undertakings for collective investment in transferable securities (UCITS).

The European Securities and Markets Authority (ESMA) has issued additional guidelines in relation to key concepts defined in AIFMD. Among those clarified are "number of investors".

The Guidelines provide that:

- an undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with AIFMD. This should be the case even if it has in fact only one investor;

- an undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with AIFMD if the sole investor:

    - invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
    - consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD.

- Examples of such arrangements or structures include Master/Feeder structures where a single feeder fund invests in a master undertaking, fund of funds structures where the fund of funds is the sole investor in the underlying undertaking, and arrangements where the sole investor is a nominee acting as agent for more than once investor and aggregating their interests for administrative purposes.

In addition, the OECD issued commentary in April 2010 in relation to the granting of treaty benefits with respect to the income of collective investment vehicles (CIVs). They defined such CIVs to be funds that are widely held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established.

For the purposes of applying this CIV definition, the report provides that the term CIV also includes "Master" and "Feeder" funds that are part of "funds of funds" structures where the Master Fund holds a diversified portfolio of investments on behalf of the feeder funds that are themselves widely held.

9. Foreign QDTT only relieved under unilateral provisions

Revenue confirmed at the TALC BEPS meeting on 8 March that foreign QDTTs can only be relieved under the unilateral provision in Part 2 of Schedule 24, because they could not regard foreign QDTTs as equivalent to corporation tax for tax treaties

The Institute Reps have concerns that the interpretation being suggested could create issues for Irish companies seeking to avail of credit relief in other jurisdictions in respect of the Irish QDTT suffered on Irish low-taxed profits.

The understanding throughout the entire consultation process and as legislation was being drafted was that Irish QDTT would be designed in such a way not to preclude credibility under a DTA. If Irish Revenue considers a foreign DTA is not creditable under normal DTA provisions because it is not equivalent to corporation tax, there is a concern that treaty partners might do likewise and not treat a practically identical Irish QDTT as creditable.

After all, the QDTT represents a tax on the corporate profits of each of the entities in a jurisdiction. It effectively operates as an additional corporate tax on the profits of the entities, with the rate applied being dependent on the level of corporate tax that has already been incurred on the profits of the group in that jurisdiction. This is further reflected by the fact that the QDTT liability is expected to be included within the income tax charge line for financial accounting reporting purposes.

10. List of issues relation to fiscal year ends

At the TALC BEPS meeting on 8 March, Revenue/ DoF confirmed that issues relating to different fiscal year ends is on the agenda for OECD Administrative Guidance. It was confirmed that issues relating to non-corresponding accounting periods among group companies and companies joining/ leaving group mid year e.g. acquisition and liquidation are on the agenda. However, it was queried if there are any other scenarios/ issues that need to be addressed.

The incorporation of an entity mid-year could also potentially give rise to issues.

Issues could also arise where certain entities in a group (e.g., a retail group) operate a 52/53-week year for financial reporting purposes. This could result in certain entities in the group having a slightly different accounting period for local accounting purposes when compared to the fiscal year of the MNE Group.

11. Example of JV/ POPE

At the TALC BEPS meeting on the Finance Bill last October we sought clarity in relation to the application of 'ownership test' in the case of joint ventures. We noted that in several places throughout the EU Directive, the definition of 'ownership interest' is critical to the mechanical operation of the rules, such as establishing if there is a Partially-Owned Parent Entity, Joint Venture, excluded dividends, excluded equity gain or loss.

In applying the 'ownership interest' test, often the weighting of the equity rights to profit/capital/reserves is necessary to assess if the ownership criteria have been met. Where a fixed-

return preference share is treated as equity under the financial accounting standard used by the UPE in the preparation of its consolidated financial statements, it is unclear how this test will operate in practice.

We noted that clarity was needed because differing interpretations/weightings applied by tax administrations could give rise to complex issues in practice. For example, an entity could be deemed to be a POPE in one year, then not a POPE in a subsequent year, then a POPE again etc.

Revenue noted they did not quite understand the concern and requested example scenarios which they could give to the OECD or consider for their own interpretation of the rules.

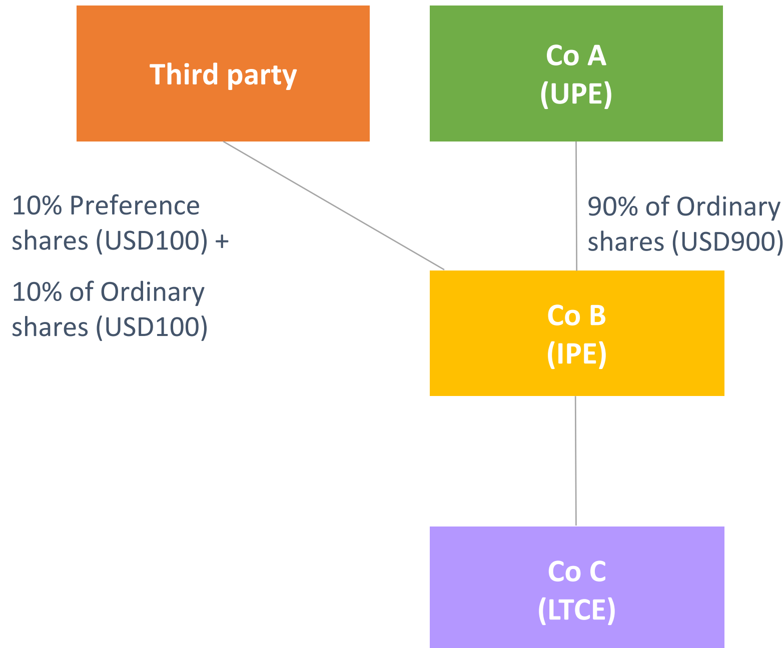
At the TALC BEPS meeting on 8 March, Revenue requested the Institute to provide such an example to consider the point further.

In the attached PowerPoint presentation, please find two illustrative examples which cover the following scenarios:

- An example where the existence of preference shares in the ownership structure potentially results in an entity being considered to be a POPE in Year 1 but not in Year 2

- An example where the existence of preference shares in the ownership structure potentially results in an entity being a JV of an MNE Group in Year 1 (but not Year 2) and potentially a JV of a different MNE Group in Year 2.

POPE rules – Preference shares



Case facts

Co A holds 90% of the issued ordinary shares in Co B (USD900 subscribed). The remaining 10% of ordinary shares are held by a third party (USD100 subscribed).

Third party holds preference shares (USD100 subscribed) which provide for a fixed dividend of 10% (USD10).

In Y1 the profits of Co B are USD100. USD10 accrues to the third party preference shareholders. USD9 accrues to the third party ordinary shareholders (USD90 x 10%). USD81 accrues to Co A as ordinary shareholder (USD90 x 90%).

In Y2 the profits of Co B fall to USD20. USD10 accrues to the third party preference shareholders. USD1 accrues to the third party ordinary shareholders (USD10 x 10%). USD9 accrues to Co A as ordinary shareholder (USD10 x 90%).

P2 analysis

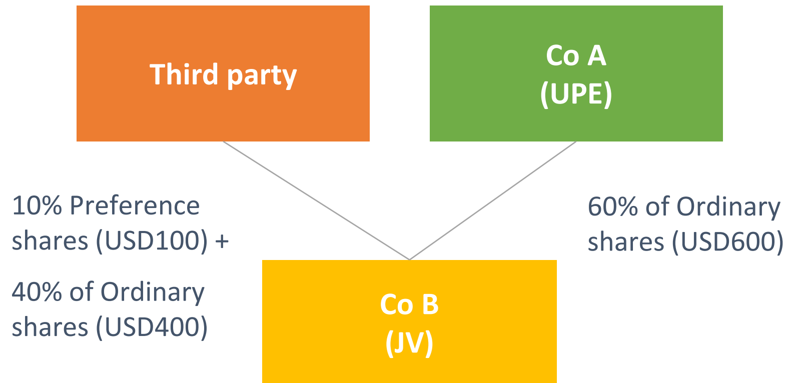
POPE determination looks at whether non-group entities have ownership interest (OI) > 20% in an intermediate parent. The Commentary directs that solely equity interest profit rights be considered for the determination.

It is assumed that the preference shares are accounted for as equity, such that they are considered as equity interests for P2 purposes. This means that profit rights relating to the preference shares will be considered as equity interest profit rights for the OI determination.

In Y1, Co A's jurisdiction would have IIR taxing rights in relation to LTCE Co C, as its OI in Co B (based on % of equity interest profit rights) exceeds 80% (81%). In Y2, Co A's OI in Co B would appear to fall to 45% (9/20), and Co B's jurisdiction would have the taxing rights as Co B is a POPE.

It is not clear that such volatility in the OI % determination was intended to arise. Further issues would arise if there are movements in the value of the shareholdings during a fiscal year.

JV rules – Preference shares



Case facts

Co A holds 60% of the issued ordinary shares in Co B (USD600 subscribed). The remaining 40% of ordinary shares are held by a third party (USD400 subscribed).

Third party holds preference shares (USD100 subscribed) which provide for a fixed dividend of 10% (USD10).

In Y1 the profits of Co B are USD100. USD10 accrues to the third party preference shareholders. USD36 accrues to the third party ordinary shareholders (USD90 x 40%). USD54 accrues to Co A as ordinary shareholder (USD90 x 60%).

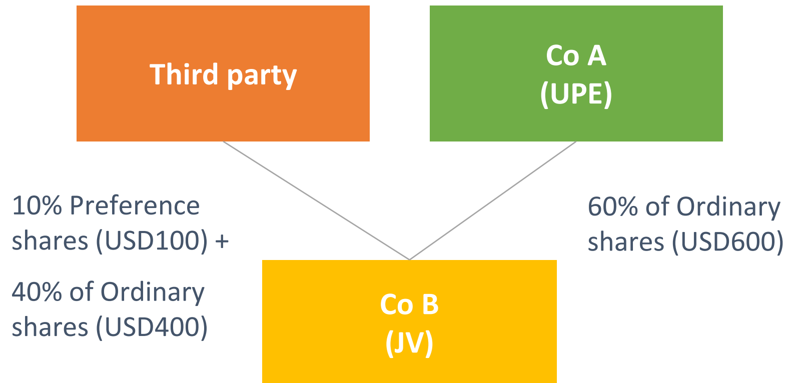
In Y2 the profits of Co B fall to USD20. USD10 accrues to the third party preference shareholders. USD4 accrues to the third party ordinary shareholders (USD10 x 40%). USD6 accrues to Co A as ordinary shareholder (USD10 x 60%).

P2 analysis

JV determination looks at whether the group holds an ownership interest (OI) > 50% in an entity that is accounted for using the equity method of accounting. The Commentary suggests that an equal weighting should be applied in terms of rights to profit, capital and reserves.

It is assumed that the preference shares are accounted for as equity, such that they are considered as equity interests for P2 purposes. This means that profit rights relating to the preference shares will be considered as equity interest profit rights for the OI determination.

JV rules – Preference shares



P2 analysis

Year 1	Profit rights	Weighting 33.33%	Capital rights	Weighting 33.33%	Reserve rights	Weighting 33.33%	Total Weighting
Third-party (pref shares)	10%	3.33%	9.09%	3.03%	9.09%	3.03%	9.39%
Third-party (ord. shares)	36%	12%	36.36%	12.12%	36.36%	12.12%	36.24%
Co A	54%	18%	54.55%	18.18%	54.55%	18.18%	54.36%
Total	100%		100%		100%		

In Y1, Co A's jurisdiction would have IIR taxing rights in relation to the JV, as its OI in Co B exceeds 50% (54.36%).

Year 2	Profit rights	Weighting 33.33%	Capital rights	Weighting 33.33%	Reserve rights	Weighting 33.33%	Total Weighting
Third-party (pref shares)	50%	16.67%	9.09%	3.03%	9.09%	3.03%	22.73%
Third-party (ord. shares)	20%	6.67%	36.36%	12.12%	36.36%	12.12%	30.91%
Co A	30%	10%	54.55%	18.18%	54.55%	18.18%	46.36%
Total	100%		100%		100%		

In Y2, Co A's OI in Co B would appear to fall to 46.36% – Co B would not be a JV of Co A as a result. In contrast, Co B may now be considered a JV of the third party investor as its OI in Co B would be 53.64%.

It is not clear that such volatility in the OI % determination was intended to arise. Further issues would arise if there are movements in the value of the shareholdings during a fiscal year.

TALC BEPS Meeting on 8 March 2024

Additional queries in relation to developing Revenue guidance on Pillar Two

1. **Foreign IIR Election**

Per section 111AAA TCA 1997, foreign IIR election means an election made in respect of a MNE group in connection with a tax equivalent to IIR top-up tax or UTPR top-up tax in another jurisdiction that is contained in a top-up tax information return submitted to—

a. a tax authority in that jurisdiction, and in relation to which information in the return about the election has been provided to the Revenue Commissioners under a qualifying competent authority agreement, or
b. the Revenue Commissioners;

Section 111AAAD (6) TCA 1997b provides that a foreign IIR election may be made for domestic purposes to the extent that such an election would affect the calculation of domestic top-up tax for a qualifying entity.

We request that Revenue provides examples in guidance on how this election might apply and in what circumstances it might apply.

2. **Substance Based Income Exclusion (SBIE)**

Section 111AAD TCA 1997 provides that financial accounting net income or loss of a qualifying entity for the fiscal year shall be determined with the local accounting standard where certain conditions are met.

Financial accounting net income or loss is the starting point for the calculation of qualifying income/ loss and Adjusted covered taxes. However, under section 111AE TCA 1997, the SBIE is applied by reference to the payroll carve out and the tangible asset carve out.

For the purposes of calculating the QDTT in scenarios where financial accounting net income or loss is determined by reference to the local accounting standard, we request Revenue to provide clarity in guidance in respect of whether the SBIE should be calculated with reference to the local accounting standard or with reference to the consolidated financial statements.

3. **Excluded Entity – Section 111C TCA 1997** (Submitted 26 February 2024)

- Section 111C(2)(b) and (c) extend the definition of an excluded entity to include certain subsidiaries of other excluded entities. In line with the equivalent GloBE Rules (Article 1.5.2) and provisions of the Directive (Article 2(3)), the Irish legislation suggests that this should only be possible where the tested entities are 95%/85% held directly or indirectly by an excluded entity as defined under Section 111C(2)(a). Therefore, for investment fund and REIT structures, the rules would suggest that this extension should only apply where the investment entity/ REIT is the UPE of the MNE Group.

- However, Paragraph 45 of the OECD Commentary on Chapter 1 of the Model Rules clarifies that this extension can also be met where the tested entity and the investment fund/ REIT are not members of the same group. This means that the extension could apply, for example, where an investment entity is not required to consolidate on a line-by-line basis entities which it owns because they are an investment company under IFRS 10.

- Given Section 111C determines whether entities are in scope of the GloBE Rules or otherwise in Ireland, it will be important that taxpayers have certainty that they can rely on the OECD Commentary included in Paragraph 45 on Chapter 1 of the Model Rules when interpreting this provision. In addition, this provision will be highly relevant for Ireland's investment fund and asset management sectors. As a result, we ask for this point to be confirmed in Revenue guidance.

4. **QDTT safe harbour and whether Irish parent entities will be required to operate the IIR domestically if they have low-taxed Irish subsidiaries.** (Submitted 29 February 2024)

We request confirmation in Revenue guidance that, subject to section 111AI(3) to (6) TCA 1997, Irish parent entities should not be required to operate the IIR with respect to their Irish subsidiaries.

The reason for this request is two-fold:

(i) Revenue would be stating in guidance its view that Ireland has a QDTT that meets the safe harbour conditions, and

(ii) it is not specifically stated in section 111AI TCA 1997 (nor in any other provision identified) that the Irish IIR should not apply domestically due to the operation of the QDTT safe harbour (again, subject to section 111AI(3) to (6) TCA 1997).

Further Information on Suggested Areas for Revenue Guidance on Pillar Two
31 January 2024

At the TALC BEPS Sub-committee meeting on 6 December 2023, Revenue requested examples and further information from practitioners to assist with the development of Revenue guidance on the Pillar Two legislative provisions.

We have outlined below additional information gathered by the Irish Tax Institute's TALC BEPS Reps since the December meeting. We have also attached the Institute's previous submissions on suggested areas for guidance and supplemental queries in respect of Pillar Two, in the appendices to this document, for completeness.

In addition, it is clear that the OECD Administrative Guidance on the Pillar Two Rules remains subject to change and may be supplemented throughout 2024. Therefore, we would ask that a forum for discussion on the interpretation of the rules would remain open throughout the year.

We would also reiterate our request that all confirmations provided in previous discussions at TALC BEPS meetings in 2023 are documented in Revenue guidance, as appropriate. The Minutes of the relevant TALC BEPS meetings should be of assistance in this regard.

Pillar Two

Deferred Tax Assets on Losses

1. With respect to deferred tax assets on losses brought into a Transition Year under section 111AW(2)(c) TCA 1997, we ask Revenue to provide guidance as to how taxpayers should identify what portion of the Irish tax losses are attributable to a qualifying loss. For example, can taxpayers apply a First In First Out (FIFO) approach in this regard, focusing their analysis on the most recent losses first when seeking to analyse whether this is attributable to a qualifying loss?

2. Should the same methodology [as used to identify whether a Case I loss is a qualifying loss] be used to determine to what extent excess capital allowances carried forward under s291A(6)(b) TCA 1997 constitute a qualifying loss?

3. Where a deferred tax asset is recognised on transition in respect of amounts attributable to a qualifying loss (i.e., brought into GloBE at 15%), as well as other tax losses forward (e.g., brought into GloBE at 12.5% with respect to Irish trading losses), what is the order of use in future years when these losses forward are utilised?

   This will be relevant where the losses attributable to qualifying income and other losses form a single pool for domestic tax purposes and are recognised as a single asset in the taxpayer's financial accounts. In these circumstances, we believe that the taxpayer should be afforded the flexibility to elect which loss is used for GloBE purposes.

4. Pillar Two Rules state that historical Loss DTAs can be uplifted from 12.5% to the 15% rate where the loss is equivalent to a GloBE loss. As the Irish loss carry forward rules do not impose a time limit, in many cases, due to the age of the loss, the information required to recompute the loss under the GloBE Rules may not be available.

   Indeed, even where the relevant information may be available, there will be a significant administrative burden on companies to recalculate losses which have arisen over a number of financial years. Where the relevant DTA cannot be recast to 15%, this may result in a top up tax arising, notwithstanding the availability of significant losses carried forward.

   As an example of the complexity involved here, when recomputing the GloBE Loss, a MNE group must consider historical financing arrangements under the intra-group financing arrangement provisions included in section 111P TCA 1997. In order to determine whether an adjustment is required under these provisions, a MNE group needs to determine whether or not the counterparty is located in a low-tax jurisdiction. As a result, not only will the taxpayer need the required historical information for the Irish entity that has booked the losses but the taxpayer would also need the appropriate financial information for other entities, which may not be available due to the retention policies for information. Indeed, in certain cases, such an entity may no longer even be in the same MNE group.

   Businesses attempting to piece together the historical computation of losses may also have to rely on the records of entities in foreign locations or unrelated business units in such a scenario.

Practical and pragmatic guidance on how a taxpayer could satisfy the requirements of recalculating historical losses under the GloBE Rules for periods in which the GloBE Rules were not in force, and for periods for which the statutory requirement to retain records has elapsed, would be welcomed.

We would suggest that the loss would only be recomputed for known material and readily identifiable items, and taxpayers recalculating the historical component of the loss on a "best efforts" basis.

A secondary issue in this regard arises in scenarios where companies determine that a portion of the losses brought forward equate to a GloBE loss and are subsequently recast and that a portion does not and as such, is not recast. From an Irish tax perspective, the losses are fungible and it cannot be determined which are used against future taxable income. In this regard, we suggest that Revenue provides clarity that in such scenarios the DTA that has been recast (i.e. that equates to a GloBE Loss) should be unwound in the first instance.

5. It has previously been discussed that the recognition of DTAs that have not been recognised in financial statements before the transition period and within the transition period are still relevant for Pillar Two purposes. This should be documented in guidance.

   Given this fact and owing to the complexity of the rules, the Pillar Two deferred tax ledger may be substantially different to deferred taxes recorded in the financial statement. As a result, we would ask Revenue to provide guidance on what books and records companies are expected to keep. We would suggest that Revenue could consider developing a prescribed format for tracking Pillar Two deferred tax attributes. Such a schedule could be updated on a yearly basis to track such deferred tax attributes.

Sections 111AAL and 111AAO TCA 1997

6. Section 111AAL(4) and section 111AAO(4) TCA 1997 provide for group relief on UTPR and QDTT group payments, respectively, such that those amounts should not be taken into account for calculating profits or losses for Irish corporation tax purposes and should not be considered a distribution or charge on income for corporation purposes. We would ask Revenue to provide guidance on the treatment of payments made to or from Irish constituent entities in respect of top-up taxes otherwise than within a UTPR or QDTT group.

For example, would a payment from a foreign constituent entity in respect of IIR/UTPR borne by an Irish constituent entity on the profits of the foreign constituent entity be subject to Irish corporation tax?

This will be particularly relevant in circumstances where minority interests exist in an affected group and such payments are necessary to ensure that such parties are not unfairly impacted by the application of the rules.

CBCR Safe Harbour

7. Paragraph 74.31 of the December 2023 OECD Administrative Guidance on the GloBE Rules notes that anti-arbitrage provisions contained therein with respect to the CbCR Safe Harbour can have effect for arbitrage arrangements entered into after 18 December 2023, if an effective date of 15 December 2022 would not be possible on constitutional grounds or based on other superior law. We would ask Revenue please to confirm which date should apply under Irish law.

Section 111AAAB TCA 1997

8. It would be very helpful if practical examples could be provided of what would constitute "reasonable care" as used in section 111AAAB(5) TCA 1997 as it relates to the GloBE transitional penalty relief regime. For example, we suggest that guidance could confirm that an entity should be considered to have take reasonable care to ensure the correct application of the GloBE Rules where it can be demonstrated that any of the following conditions are met:

    - The group/taxpayer engaged the services of an adviser competent to assist with GloBE compliance,
    - The group/taxpayer established clear internal policies and processes for managing GloBE compliance,
    - The group/taxpayer used a reporting package specifically designed for GloBE compliance,
    - The group/taxpayer made a reasonable attempt to calculate the GloBE liability (including the preparation of supporting workpapers), and
    - The group/taxpayer is able to otherwise evidence that it made a *bona fide* attempt to comply with the GloBE Rules and file a full and true GIR/ GloBE Top-Up Tax Return.

Transition Year

9. Paragraph 10.2.1 of the OECD Commentary on Article 9.1.3 (inserted in the OECD's July 2023 Administrative Guidance) notes that for the purposes of Article 9.1.3, the relevant Transition Year is the Transition Year of the disposing Constituent Entity. As a result, the provisions of Article 9.1.3 may apply in circumstances where the acquirer is in-scope of the GloBE Rules but the disponer is not (for example, as a result of the disponer not having a parent subject to the IIR in 2024 or being entitled to avail of the transitional CBCR Safe Harbour).

   A concern arises where the disponer paid tax on the disposal, meaning the acquirer is entitled to recognise a DTA for GloBE purposes on the amount of these taxes. Specifically, the initial recognition of the GloBE DTA in the acquirer in a year which is in-scope of the GloBE Rules could in fact reduce the Adjusted Covered Taxes paid by the acquirer in that year, reducing its GloBE ETR and giving rise to a GloBE tax charge (i.e., tax would be paid by the disponer on the disposal and then GloBE taxes would also be paid by the acquirer on the recognition of the GloBE DTA in respect of that amount).

   We understand that it was not the intention for such double taxation to arise. Confirmation that the initial recognition of a DTA under Article 9.1.3 in respect of taxes paid by the disponer should not reduce the Adjusted Covered Taxes or GloBE ETR in the acquirer in the year of initial recognition would be welcomed.

Foreign QDTT

10. Does Ireland treat foreign QDTTs as equivalent to corporate income tax for DTA relief purposes, with the result that relief for foreign QDTTs is available:

    - Under Part 1 of Schedule 24 in respect of DTA branches, dividends, etc., and
    - Under Part 2 of Schedule 24 only in respect of non-DTA branches, dividends, etc.?

    Or, in the alternative, are foreign QDTTs only relieved under the unilateral provision in Part 2 of Schedule 24? Clarity on this point will be relevant for Irish companies when filing their corporation tax return for affected periods.

Section 111AAD TCA 1997

11. Section 111AAD(2)(e) TCA 1997 provides that the local financial accounting may be used to calculate a constituent entity's QDTT liability where various condition are met, including that *"the accounting period of all such accounts is the same as the fiscal year of the consolidated financial statements of the MNE group, large-scale domestic group or joint venture group as the case may be".*

    We would ask Revenue to confirm please that this condition should be met in circumstances where the accounting period of the constituent entity in question falls entirely within the fiscal year of the relevant consolidated financial statements.

    This may arise, for example, in circumstances where a constituent entity came into existence during the year or was dissolved during the year, with the effect in both instances that there is no overlap of the constituent entity's accounting period into the preceding or subsequent fiscal year of the relevant consolidated financial statements.

12. In computing the domestic top-up tax of a constituent entity, section 111AAD(3A) TCA 1997 provides that the local accounting standard can be used where a company prepares financial accounts and such financial accounts have an accounting period that is the same as the fiscal year of the consolidated financial statements of the MNE group.

    In other words, the accounting period of each qualifying entity must align with the fiscal period of the ultimate parent entity. This means not just having the same year-end, but rather accounting periods must be of exact same length. This will create many practical issues for taxpayers, for instance where new entities are incorporated during a fiscal year or acquisitions/ liquidations of entities take place. Taxpayers will need guidance on how these practical issues, such as the incorporation/disposal of entities during a fiscal period, should be dealt with.

    While we note this has been raised previously, and indeed, it has been raised with the OECD, we would welcome a period of transition such that where defined events occur (for example, acquisitions, liquidations, mergers, new incorporations), the local financial accounting standard should continue to apply provided the accounting periods are aligned with the fiscal year of the consolidated financial statements within a defined period of time.

Section 111P TCA 1997

13. Section 111P TCA 1997 defines ‘tax functional currency’ as the functional currency used to determine the constituent entity’s taxable income or loss for a covered tax in the jurisdiction in which it is located. From an Irish tax perspective, notwithstanding the fact that the tax liability is ultimately converted to Euro for the Form CT1, the Irish corporation tax computation for a trading company is prepared using the accounting functional currency.

    In this regard, tax functional currency should equal accounting functional currency given how Irish taxable trading profits are determined. For example, a company with a USD accounting functional currency will calculate its trading income in USD. As a result, it follows that its ‘tax functional currency’ should be considered USD in this example.

    In contrast, a company will calculate its non-trading taxable income in Euro and thus, it follows that the ‘tax functional currency’ should be considered Euro. We would ask Revenue to provide examples of what is considered the tax functional currency of trading companies versus non-trading companies.

    We would also ask Revenue to provide examples and clarification of the tax functional currency of a company that is trading but FX arises in respect of non-trading items.

14. Section 111U(3)(a) TCA 1997 provides that there should be a reduction in the covered taxes of a constituent entity for “the amount of current tax expense with respect to income excluded from the calculation of qualifying income or loss of the constituent entity under Chapter 3. There is also a corresponding provision in Section 111X(5)(a) TCA 1997 which states that the total deferred tax adjustment amount shall not include an amount of deferred tax expense with respect to items excluded from the calculation of qualifying income or loss of the constituent entity under Chapter 3.

    Similarly, Section 111AW(3) TCA 1997 provides that deferred tax assets that are generated in a transaction that takes place in the transition period arising from items excluded from the calculation of qualifying income or loss in accordance with Chapter 3 shall not be taken into account when determining the effective rate for a jurisdiction.

    We would ask Revenue to provide clarity that the excluded items referenced in the abovementioned sections include all of the adjustments to determine qualifying income or loss that are specifically listed in sections 111P and 111Q TCA 1997.

Supplemental queries regarding areas for Revenue Guidance on Pillar Two
8 December 2023

Securitisation

Some orphan securitisation vehicles (which may not be considered investment entities) will be consolidated by the originator or manager (e.g. a bank). These consolidating entities will have no 'ownership interest' as defined (which refers to equity) in an orphan securitisation entity and therefore, no IIR arises. However, there is uncertainty as to whether it is intended that the securitisation entity will be regarded as a constituent entity of a UPE.

A constituent entity is defined by reference to membership of a 'group' which is defined as all entities which are related through ownership or control for the purpose of the preparation of consolidated financial statements <u>by the ultimate parent entity</u>.

Whilst 'controlling interest' is defined by reference to an ownership interest in an entity, the banks/ managers etc. will likely have a controlling interest (ownership interest) in some other entity and thus will be a UPE, just not by reference to the securitisation entity.

Can 'for the purpose of the preparation of consolidated financial statements by the ultimate parent entity' be interpreted as meaning that an ownership interest is required and that if an entity is consolidated without an ownership interest, it will not be regarded as a constituent entity of a UPE?

There is a concern that if an entity is a constituent entity, then it might be a qualifying entity for QDTT purposes.

We would request that Revenue consider the above scenario further when developing Revenue guidance.

TALC BEPS Meeting on 6 December 2023
Feedback on Suggested Areas for Revenue Guidance

Pillar Two

General

- We would ask that all confirmations provided in previous discussions are documented in Revenue guidance as appropriate.
- We would request guidance on the meaning of “material competitive distortion”, with detailed examples.
- We would request guidance on the interaction of “Ownership Interest” and POPE / JV rules (particularly in the context of preference shares).
- We would request guidance on the meaning of “consolidated revenue” for the revenue threshold test and de minimis exclusion.
- We would welcome confirmation that groups with Irish Parent Entities that are applying the IIR can rely on the QDMTT safe harbour outlined in the Directive (i.e., if prepared under IFRS).
- We would welcome an example of the ETR calculation be provided in guidance and how the tax would be collected under the IIR for an investment entity is section 111AT TCA 1997 applies.
- We would welcome examples which demonstrate that the taxpayer “has taken reasonable care” in the context of the transitional penalty relief provisions (section 111AAAB(5) TCA 1997).

- <u>Treatment of historical losses and the DTAs thereon</u>: The Pillar Two rules state that Loss DTAs can be uplifted from 12.5% to the 15% rate where the loss is equivalent to a GLoBE loss. As the Irish loss carry forward regime does not impose a time limit, in many cases, due to the age of the loss, the information required to recompute the loss under GLoBE rules may not be available. Where the relevant DTA cannot be recast to 15%, this may result in a top up tax arising, notwithstanding the availability of significant loss carryforwards.

  It would be useful if practical and pragmatic guidance could be issued detailing how a taxpayer could satisfy the requirements of recalculating historical losses under the GLoBE rules, for periods in which the GLoBE rules were not in force, and for periods for which the statutory requirement to retain records has elapsed. For example, this could include adjusting for only known material and readily identifiable items, and recalculating the historical component of the loss on a "best efforts" basis.

- What books and records are Irish Revenue expecting companies to keep? Will they need a Pillar Two Deferred Tax Schedule i.e. a prescribed format for tracking deferred tax assets/liabilities?

- Previously, it was discussed that the recognition of DTAs that have not been recognised in financial statements pre-transition period and within the transition period are still relevant for Pillar Two purposes. This should be documented in guidance.

- The concept of "tax functional currency" should be defined for the purposes of the asymmetric FX provisions.

- In computing the domestic top-up tax of a constituent entity, section 111AAD TCA 1997, as proposed, provides that the local accounting standard can be used where the accounting period "corresponds to the fiscal period". Therefore as currently drafted, it would appear that the accounting period of each qualifying entity must align with the fiscal period of the ultimate parent entity. This means not just having the same year-end, but rather accounting periods must be of exact same length. This will create many practical issues for taxpayers. For instance, where new entities are incorporated during a fiscal year or acquisitions/ liquidations of entities take place.

  While we note this has been raised previously, and indeed it has been raised with the OECD, we would welcome a period of transition such that accounting periods can be aligned across groups to allow the local accounting standard to be used. Taxpayers will need guidance on

how these practical issues, such as the incorporation/disposal of entities during a fiscal period, should be dealt with.

- The transitional simplified reporting framework does not apply to constituent entities that do not form a QDTT group. We would ask that this would be reconsidered. Also, we would ask what is the rationale for excluding investment entities?

CbCR Safe Harbour

- Would the use of non-qualified financial statements to prepare a CbC report for a jurisdiction adversely impact the availability of the CbCR safe harbour for other jurisdictions in respect of which qualified financial statements are used to prepare the CbC report? Similarly, would an error with the CbCR data for a single jurisdiction prohibit the application of the safe harbour for other jurisdictions?

- Would the definition of a qualified CbC report be met in the following circumstances:

  a) A CbC report is prepared using different qualified financial statements for separate jurisdictions? For example, Country A's CbCR figures are prepared using IFRS single entity accounts, whereas Country B's figures in the same CbCR are prepared using the UPE's consolidated financial statements figures (in line with Article 3.1.2 of the Model Rules).

  b) A CbC report is prepared using different qualified financial statements for constituent entities within the same jurisdiction? For example, Country A comprises two constituent entities - A Co and B Co. A Co's figures in the CbC report are prepared using IFRS single entity accounts, whereas B Co's figures in the same CbCR are prepared using the UPE's consolidated financial statements figures (in line with Article 3.1.2 of the Model Rules).

  c) A CbC report is prepared using different qualified financial statements for certain specified items within a jurisdiction? For example, specified items for jurisdictions A, B and C were obtained from entity financial statements prepared in accordance with local GAAP, whereas other specified items for these jurisdictions were obtained from the UPE's consolidated financial statements figures (in line with Article 3.1.2 of the Model Rules).

- Does the simplified covered taxes figure need to be prepared using the same qualified financial statements as are used to prepare the qualified CbC report for that constituent entity?

Financial Services

Funds

- Umbrella versus sub-fund: We would suggest that guidance is issued to confirm that in the case of an ICAV that prepares separate financial statements at sub-fund level, that the sub-fund itself is viewed as the "entity" for Pillar Two purposes (rather than the umbrella fund). In all other cases, guidance should clarify that the umbrella fund is viewed as the entity for Pillar Two purposes. It should be made clear in guidance that this determination solely relates to the application of Pillar Two and not for any other purpose of the Taxes Act.

- Definition of investment fund in master-feeder fund structures: It is common for investment funds in Ireland to be established as master-feeder structures. The master fund may have multiple feeder funds or in some cases may have a single feeder fund which, in turn, has a number of investors. The master fund itself, or the management of the master fund, may be regulated. However, it is sometimes the case that the feeder fund may not itself be regulated, nor is its management. The master funds still raise their capital from a number of investors, albeit indirectly through the feeder fund(s) rather than directly. We would suggest that guidance is issued to clarify that in the case of feeder funds, they should effectively be looked through and the activities of the master fund should be considered for the purpose of determining whether the feeder fund(s) is considered an "investment fund".

  In addition, in the case of master funds, guidance should be issued to clarify that the feeder fund should be looked through for the purpose of limb (a) of the definition of investment fund in determining whether the master fund "*is designed to pool financial or non-financial assets from a number of investors, some of which are not connected,...*"

- Satisfying limb (a) of the definition of investment fund: More generally, we would welcome guidance confirming that where an investment fund is held by a single investor that is itself widely held, e.g. pension fund, publicly traded insurance company, feeder fund (as per above), etc. that the investment fund should be deemed to satisfy limb (a) of the definition of investment fund - "*is designed to pool financial or non-financial assets from a number of investors, some of which are not connected,...*"

The OECD Pillar Two Commentary states that the definition of Investment Fund as prescribed in Pillar Two draws on the definition as included in AIFMD regulations. For the purposes of the AIFMD regulation, an alternative investment fund is defined to mean a collective investment undertaking, including investment compartments thereof, which -

- raises capital from a number of investors, with a view to investing in accordance with a defined investment policy for the benefit of those investors, and
- does not require authorisation under Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

The European Securities and Markets Authority ("ESMA") has issued additional guidelines in relation to key concepts defined in AIFMD. Among those clarified are "number of investors". The Guidelines provide that:

- an undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with AIFMD. This should be the case even if it has in fact only one investor;
- an undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with AIFMD if the sole investor:
  - invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
  - consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD.
- Examples of such arrangements or structures include master/feeder structure where a single feeder fund invests in a master undertaking, fund of funds structures where the fund of funds is the sole investor in the underlying undertaking, and arrangements where the sole investor is a nominee acting as agent for more than once investor and aggregating their interests for administrative purposes.

In addition, the OECD issued commentary in April 2010 in relation to the granting of treaty benefits with respect to the income of collective investment vehicles (CIVs). They defined such CIVs to be funds that are widely-held, hold a diversified portfolio of securities and are

subject to investor-protection regulation in the country in which they are established. For the purposes of applying this CIV definition, the report provides that the term CIV also includes "master" and "feeder" funds that are part of "funds of funds" structures where the master fund holds a diversified portfolio of investments on behalf of the feeder funds that are themselves widely held.

Asset Management

- Section 111S TCA 1997 provides for the allocation of income or loss of a flow-through entity. This brings into Irish legislation the provisions of Article 3.5 of the OECD rules and Article 18 of the EU Directive.

  Specifically section 111S(1) TCA 1997 provides that the financial accounting net income or loss of a constituent entity that is a flow-through entity shall firstly be reduced by the amount allocable to its owners that are not members of an MNE group or large-scale domestic group and that hold their ownership interest in that flow-through entity directly or indirectly through one or more tax transparent entities unless:

  - The flow-through entity is an ultimate parent entity, or
  - The flow-through entity is held, directly or indirectly, through one or more tax transparent entities by an ultimate parent entity that is a flow-through entity.

  Article 3.5.4 of the OECD rules specifically states that the reduction does not apply in respect of the above ownership interest as the treatment of those entities is addressed in Article 7.1. of the OECD rules.

  Under the OECD rules Article 3.5.1(b) and Article 7.1, taken together, provide a mechanism by which GloBE Income of a lower-tier Constituent Entity (CE) may be reduced to zero if the holders of an interest in a CE which is the Ultimate Parent Entity (UPE) of a MNE Group are subject to sufficient current taxation on the UPE's GloBE Income or the holder is a natural person located in the jurisdiction of the UPE which owns less than 5% of the UPE. However, if income of a lower-tier CE is not ultimately owned by a UPE, such income may not be reduced under Article 7.1.

  Instead, Article 3.5.3 provides a mechanism by which GloBE Income attributable to a minority owner (that is not owned by the UPE, directly or indirectly) is reduced to zero. However, Article 3.5.4 (S111S(1)(a) and (b) TCA 1997) limits the application of Article 3.5.3 when the interest is ultimately owned by the UPE of the MNE Group.

The general rule of Article 3.5.2 is that Article 3.5.1 is to be applied to each ownership interest separately and this interpretation should extend to Article 3.5.3. If such was not the case, then Article 3.5.3 would generally be rendered meaningless for funds as an interest in a lower-tier CE is always going to be owned in part by a UPE when the UPE is a fund consisting of tiers of tax transparent entities.

However Article 3.5.4 is not sufficiently clear as to whether the limitation applies to all income of a lower-tier CE when any interest in a CE is ultimately owned by the UPE (a "cliff effect") or only to the extent of the share of GloBE Income of such lower-tier CE that is ultimately attributable to the UPE.

As the EU Directive and Irish rules replicate the OECD position, this uncertainty has therefore also been transcribed into Irish legislation.

The issue is being considered across the asset management industry and is creating significant concern, as the current interpretation is that the cliff effect applies such that non-group income may get "trapped" at the flow-through entity level and be subject to a full 15% top-up tax given no Covered Taxes are allocated to the flow-through entity.
We are aware that a Big 4 in the US approached the OECD to clarify their thinking and they confirmed that the OECD belief was that the limitation in Article 3.5.4 (S111S(1)(a) and (b) TCA 1997 equivalent) should only apply "to the extent" the ultimate ownership interest was indirectly owned by the UPE.

The OECD agreed to include clarification in subsequent Administrative Guidance however the timeline for such clarification is uncertain and they stated that some Inclusive Framework members may already find the wording to be sufficiently clear.

The recommended clarification was that the OECD language be updated to include the wording, such that it reads:

- Article 3.5.3 does not apply to:
    a. an Ultimate Parent Entity that is a Flow-through Entity; or
    b. the Ownership Interest in any Flow-through Entity owned by such an Ultimate Parent Entity (directly or through a Tax Transparent Structure)

Revenue guidance should therefore be drafted to clarify the position. The UK legislation was amended so that non-group amounts are allocated out of the flow-through entity.

Leasing

- We note that discussions are continuing with the OECD on the substance based income exclusion (SBIE) rule, with respect to the location of aircraft under the rules. To the extent changes are made at OECD level, local guidance from Irish Revenue would be needed.