Deloitte.

Pillar Two Implementation

July 2023 Feedback Statement

Deloitte response

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Pillar Two Consultation
Tax Division – Business Tax Policy
Department of Finance
Government Buildings
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VIA EMAIL: businesstaxpolicy@finance.gov.ie

Dear Sirs/Mesdames:

We are pleased to submit comments on behalf of Deloitte in response to your Consultation document of 27 July 2023. We appreciate this opportunity to share our views and trust that you will find our comments valuable to the discussion.

We look forward to continued collaboration with the Department of Finance on this and other tax initiatives, and are available to discuss anything in this document, as needed. In the meantime, if you have any queries, please do not hesitate to contact us at 01-4172200.

Yours sincerely,

James Smyth
Partner

Tom Maguire
Partner

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*Section references in the above table of contents, in the executive summary and in the body of our response refer to sections of the Pillar Two Implementation Second Feedback Statement July 2023 ("**July consultation**").*

Executive Summary

In this document we set out our comments on the draft legislative approaches which aim to transpose the EU Minimum Tax Directive (Council Directive (EU) 2022/2523) ("**the Directive**") into Irish legislation, as discussed in the latest Feedback Statement published on the 27th of July 2023 ("**July consultation**").

Further details are provided in response to each question of the July consultation in the submission and Appendix 1; however, below is the executive summary of our key comments:

- The proposed legislation on the CbCR, transitional UTPR and QDTT/QDMTT safe harbours, as set out in the July consultation, appear reasonable, subject to our comments as part of this document.
- We would recommend that the legislation should follow the QDMTT safe harbour rules, set out in the July 2023 OECD Administrative Guidance ("**July OECD Guidance**").
- In addition, it would seem that a standalone investment entity, on the basis it might not meet the conditions of being an excluded entity would fall within the application of the QDTT. We strongly recommend that all investment entities are excluded from the charge to the QDMTT in order to maintain Ireland's competitiveness and attractiveness as a location for asset management and investment funds.
- Reference is made as part of the proposed QDTT legislation to *"generally accepted accounting practice"*. It is presumed that this will be defined for these purposes accordingly. Further, a new subsection 3A is proposed as part of the QDTT legislation. It deals with the position where all of the constituent entities of the MNE group or joint venture group located in Ireland have financial statements prepared in accordance with GAAP and the fiscal year of all such statements is the same as the fiscal year of the consolidated financial statements of the MNE group. Subsection 3B deals with the position where any of the constituent entities of a MNE group located in the State prepare financial statements under both IAS and Irish GAAP. The position of group entities using differing accounting standards is not dealt with and consideration should be given to addressing same.
- The proposed legislation on Pillar Two Elections appears reasonable, subject to our comments as part of this document.
- When linking the legislation with other material, as discussed in Section 6 of the July consultation, we would suggest providing that the legislation should comply with the related OECD rules, commentary, and administrative guidance "*other than where such an application of this section would be inconsistent with the EU law purpose of the Directive*". Requiring the proposed legislation to refer to consistency with the "*EU Law purposes of the Directive*" could assist, in the absence of an amendment to the Directive, in Ireland's legislation having such regard to such guidance within the confines of EU law.
- Subject to the Transitional Penalty Relief provisions, we would recommend that penalties and sanctions should not exceed those that already apply for corporation tax purposes. In our view, these penalties are suitably "effective, proportionate and dissuasive".
- Ireland already has very robust measures dealing with the collection of taxes. As such, Revenue should have sufficient avenues to recover any QDMTT within the required period without introducing new measures.
- The transitional penalty relief provisions should be applied to the fullest extent possible.
- It is important that the QDTT is creditable against taxes imposed further up the chain, otherwise double taxation may arise. Whether the QDTT is creditable will depend on the laws of the jurisdiction of the parent entity. As such, different countries could have different rules as to what

can be credited. With regard to allocating based on qualifying income, we would recommend instead that taxpayers are provided with sufficient flexibility.

Section 2: Transitional CbCR Safe Harbour

Question 1 Comments are invited on the possible approaches to legislative implementation of a CbCR safe harbour in Ireland.

The proposed legislation, as set out in the July consultation appears reasonable. There are a number of relatively minor suggested amendments included in Appendix 1 of this document.

Section 3: Transitional UTPR Safe Harbour

Question 2 Comments are invited on the possible approaches to legislative implementation of a Transitional UTPR Safe Harbour in Ireland.

The proposed legislation, as set out in the July consultation appears reasonable.

Section 4: QDTT/QDMTT and Safe Harbour status

Question 3 Comments are invited on the possible approaches to legislative implementation of a QDTT/QDMTT Safe Harbour in Ireland.

The proposed legislation, as set out in the July consultation appears reasonable, subject to our comments below. Further, there are a number of relatively minor suggested amendments included in Appendix 1 of this document.

We would recommend that the legislation should follow the QDMTT safe harbour rules set out in the July OECD Guidance[1].

Question 4 Comments are invited on jurisdictional choice of accounting standards to be required for the QDTT/QDMTT (see also 7.2 and 7.5).

The OECD Standards for a QDMTT Safe Harbour state[2]:

> *2. A QDMTT meets the QDMTT Accounting Standard if the QDMTT legislation adopts one of the following:*
>
> *(a) provisions that are equivalent to Articles 3.1.2 and 3.1.3 of the GloBE Model Rules; or*
>
> *(b) the Local Financial Accounting Standard Rule.*

Paras. 14 -16 on pp. 80-81 of the July 2023 Administrative guidance state:

> *"14. … While recognizing that the option of using a Local Financial Accounting Standard is available for purposes of the QDMTT, Inclusive Framework members have noted that this creates an additional administrative burden for MNE Groups if they were required to apply the QDMTT based on the local standard in cases in which they do not prepare accounts based on such standards.*

[1] 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.

[2] Ibid., p. 80.

15. In these cases, requiring the use of a local accounting standard has the potential to undermine the main objective of the QDMTT Safe Harbour which is to reduce the administrative burden of MNE Groups. It also creates an integrity risk because if the accounts are prepared solely for purposes of computing the income or loss under the QDMTT, such accounts may not be consistent with the accounting standards applied by the MNE Group as a whole and may not be subject to an external audit.
16. To address this concern, the QDMTT Accounting Standard limits the application of the Local Financial Accounting Standard by replicating the requirement of Articles 3.1.2 and 3.1.3 of the GloBE Rules. This means that the QDMTT calculations would need to be based on the accounts and the financial accounting standard used for purposes of the Consolidated Financial Statements of the UPE, except where it is not reasonably practicable to use such accounts."

In respect of computing the QDMTT, the proposed Irish legislation states[3]:

"(3A) … subject to section (3B), 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 or joint venture group, as the case may be, 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, and -

i. all such constituent entities are required to prepare or use such statements for the purposes of determining their liability to tax in the State or to comply with any other law of the State, or

ii. such financial statements are subject to an external financial audit.

(3B) Where any of the constituent entities of a MNE group located in the State prepare financial statements under both international accounting standards and Irish generally accepted accounting practice then, for the purposes of subsection (3A), generally accepted accounting practice shall mean Irish generally accepted accounting practice."

It would appear that the intent of the current proposed subsection 3A, as set out above, is to adopt a similar definition as included in S.4(1) TCA 1997, and if this is the case, then it is presumed that *"generally accepted accounting practice"* will be defined for these purposes accordingly. The proposed inserted subsection 3A deals with the position where all of the constituent entities of the MNE group or joint venture group located in Ireland have financial statements prepared in accordance with GAAP and the fiscal year of all such statements is the same as the fiscal year of the consolidated financial statements of the MNE group. Subsection 3B deals with the position where any of the constituent entities of a MNE group located in the State prepare financial statements under both IAS and Irish GAAP. The position of group entities using different accounting standards is not dealt with as outlined in Section 3 on p.80 of the July 2023 Administrative Guidance and consideration should be given to addressing same.

The OECD Standards for a QDMTT Safe Harbour state,[4] *inter alia*:

"3. Under the Local Financial Accounting Standard Rule

[3] Page 25, July consultation, Pillar Two Implementation Second Feedback Statement July 2023, www.finance.gov.ie.
[4] Page 80, 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.

(a) the QDMTT shall be computed based on the Local Financial Accounting Standard of the QDMTT jurisdiction where all of the Constituent Entities located in that jurisdiction have financial accounts based on that standard and:

i. are required to keep or use such accounts under a domestic corporate or tax law; or

ii. such financial accounts are subject to an external financial audit;

(b) the Local Financial Accounting Standard is a financial accounting standard permitted or required in the QDMTT jurisdiction by the Authorised Accounting Body or pursuant to the relevant domestic legislation that is an: i. Acceptable Financial Accounting Standard; or ii. Authorised Financial Accounting Standard adjusted to prevent Material Competitive Distortions; …"

Our reading of 3(a) above is that it refers to a singular local accounting standard rule, whereas in Ireland, accounting standards that apply include the FRC's standards (FRS etc.) and the IASB's standards (IFRS's and IAS's). It is presumed that such multiple standards will not conflict with the OECD requirement above.

Section 5: Pillar Two Elections

Question 5 Comments are invited on the possible approaches to an elections section.

The proposed legislation, as set out in the July consultation appears reasonable. There are a number of relatively minor suggested amendments included in Appendix 1 of this document.

Section 6: OECD Model Rules, Commentary, Administrative Guidance

Question 6 Comments are invited on the intention to align with the OECD Model Rules, Commentary and Administrative Guidance.

General

There are a number of matters included in the OECD Commentary that do seem to be also included in the Directive ("**the Additions**"). In our response to the March consultation,[5] we stated the following:

"From an operational perspective, we would broadly agree with the inclusion of these additions (OECD Model Rules/Commentary/Guidance). However, from an EU Law perspective, consideration will need to be given to whether it is appropriate to include these Additions in Irish primary legislation. With regard to Irish primary legislation, the EU Directive is our principal source of law. While recital 6 thereto recognises the necessity to "implement the OECD Model Rules … in a way that remains as close to the global agreement…", the inclusion in Irish statute of matters which are not expressly cited in the EU Directive may be in conflict with the limitation in recital 24 that such guidance is "consistent with this Directive and Union law". Therefore, if matters included in the OECD Commentary are consistent with the Directive, then presumably Irish legislation can be updated accordingly (even if the matter is not expressly cited in the EU Directive. However, if there are matters in the OECD Commentary that are

[5] Page 3, *Pillar Two Implementation March 2023 Feedback Statement Deloitte response*, ie-tax-deloitte-pillar-two-feedback-statement-response.pdf.

> *clearly not addressed by the EU Directive, then further consideration will need to be given as to whether such matters can be included in Irish legislation."*

This is a matter where considerable uncertainty remains.

It is key that jurisdictions implement the Pillar Two rules consistently. Further to that, we welcome Ireland's continued engagement at EU and OECD level.

Interpretation

As mentioned, the proposed Irish legislative approach largely follows the structure of the Directive, albeit with the addition of certain provisions included in the OECD Model Rules, OECD Commentary and Agreed Administrative Guidance ("**Additions**") that are not in the Directive. Further to that, the proposed Irish legislation states: -

> *"(2) For the purpose of computing, in respect of any fiscal year, the IIR top-up tax, UTPR top-up tax or domestic top-up tax for a constituent entity or qualifying entity, as the case may be, this Part shall be construed so as to ensure, as far as practicable, consistency between the following: -*
>
> *a. the effect which is to be given to this Part;*
> *b. the effect which would be given if the OECD model rules were to be applied, in accordance with the OECD Pillar Two guidance, to the computation of those taxes, for a constituent entity or qualifying entity, as the case may be, for a fiscal year,*
>
> *other than where such an application of this section would be inconsistent with the Directive.*"[6]

The use of the words *"[f]or the purpose of computing"* would seem to limit the use of the OECD Pillar Two Guidance to construing provisions associated with computing the top up tax. However, the OECD Pillar Two Guidance provides commentary on many matters, other than "computing," e.g., scope, safe harbours, charging sections, Global Information Returns etc. Consideration should be given to expanding the application of this section.

We would make a similar comment in respect of *"b. the effect which would be given if the OECD model rules were to be applied, in accordance with the OECD Pillar Two guidance, to the <u>computation of those taxes</u> …"*

With regard to (2): "… *this Part shall be construed so as to ensure, as far as practicable, consistency between the following: a. the effect which is to be given to this Part; b. the effect which would be given if the OECD model rules were to be applied, in accordance with the OECD Pillar Two guidance, to the computation of those taxes*", as currently drafted, arguably, the effect of the words *"other than where such an application of this section would be inconsistent with the Directive"* could result in subsequent amendments to or additional OECD Pillar Two Guidance not being available to be construed with Irish domestic law.

For example, a constituent entity may in certain circumstances elect to have loan release credits excluded from the computation of Qualifying Income. The debt release provisions were first introduced by the February 2023 Agreed Administrative Guidance[7] as an amendment to the originally issued OECD's Commentary. As such, they were not specifically included in the Directive of 14

[6] Pages 35-6, July consultation.

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

December 2022[8]. Such provisions are however included in the proposed Irish legislation. However, as the loan release provisions are not included in the Directive, the question arises as to whether such application of the effect of the loan release provisions set out in the OECD Pillar Two Guidance is inconsistent with the Directive.

We suggest consideration be given to amending the proposed legislation[9] to provide that "*other than where such an application of this section would be inconsistent with the EU law purpose of the Directive*".

The relevant recitals of the Directive include: -

> *"(2) In a continued effort to put an end to tax practices of MNEs that allow them to shift profits to jurisdictions where they are subject to no or very low taxation, the OECD has further developed a set of international tax rules to ensure that MNEs pay a fair share of tax wherever they operate. That major reform aims to put a floor on competition over corporate income tax rates through the establishment of a global minimum level of taxation. By removing a substantial part of the advantages of shifting profits to jurisdictions with no or very low taxation, the global minimum tax reform will level the playing field for businesses worldwide and allow jurisdictions to better protect their tax bases.*
>
> *(3) That political objective has been translated into the Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) ('OECD Model Rules') approved on 14 December 2021 by the OECD/G20 Inclusive Framework on BEPS to which Member States have committed. In its report to the European Council on tax issues approved by the Council on 7 December 2021, the Council reiterated its firm support of the global minimum tax reform and committed to a swift implementation of that reform by means of Union law. In that context, it is essential that Member States effectively implement their commitment to achieve a global minimum level of taxation.*
>
> *(4) In a Union of closely integrated economies, it is crucial that the global minimum tax reform be implemented in a sufficiently coherent and coordinated fashion. Considering the scale, detail, and technicalities of those new international tax rules, only a common Union framework would prevent a fragmentation of the internal market in the implementation of them. Moreover, a common Union framework, designed to be compatible with the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union, would provide taxpayers with legal certainty when implementing such rules.*
>
> *…*
>
> *(6) It is necessary to implement the OECD Model Rules agreed by the Member States in a way that remains as close as possible to the global agreement, in order to ensure that the rules implemented by the Member States pursuant to this Directive are qualified within the meaning of the OECD Model Rules. This Directive closely follows the content and structure of the OECD Model Rules. To ensure compatibility with primary Union law, and in particular with the principle of freedom of establishment, the rules of this Directive should apply to entities resident in a Member State as well as to non-resident entities of a parent entity located in that Member State. This Directive should also apply to large-scale purely domestic groups. In that way, the legal framework would be designed to avoid any risk of discrimination between cross-*

[8] 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.
[9] Page 36, July consultation.

border and domestic situations. All entities located in a Member State that is low- taxed, including the parent entity that applies the IIR, should be subject to the top-up tax. Equally, constituent entities of the same parent entity that are located in another Member State that is low-taxed should be subject to the top-up tax.

…

(24) In implementing this Directive, Member States should use the OECD Model Rules and the explanations and examples in the Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti- Base Erosion Model Rules (Pillar Two) released by the OECD/G20 Inclusive Framework on BEPS, as well as the GloBE Implementation Framework, including its safe harbour rules, as a source of illustration or interpretation in order to ensure consistency in application across Member States to the extent that those sources are consistent with this Directive and Union law. Such safe harbour rules should be of relevance as regards MNE groups as well as large- scale domestic groups.

…

(26) It will also be vital that all major trading partners of the Union apply either a qualified IIR or an equivalent set of rules on minimum taxation. As regards the question of whether an IIR implemented by a third-country jurisdiction that adheres to the global agreement is a qualified IIR within the meaning of the global agreement, it is appropriate to refer to the assessment to be carried out at OECD level. …

(27) It is essential to ensure a consistent application of the rules set out in this Directive with respect to any third-country jurisdiction which does not transpose the rules of the global agreement and is not granted equivalence of its domestic rules to a qualified IIR. …"

Recital (3) above refers to the political objective mentioned in recital (2) i.e., "… *the OECD has further developed a set of international tax rules to ensure that MNEs pay a fair share of tax wherever they operate. That major reform aims to put a floor on competition over corporate income tax rates through the establishment of a global minimum level of taxation."* Recital (3) explains that the objective is "translated" into OECD Model Rules approved on 14 December 2021, however, we know that the intended application of the Pillar Two rules continued to be developed by the OECD through additional rules and safe harbours, with the additional rules updating the previously published commentary. Further, Art. 32 of the Directive in dealing with safe harbours reads as follows:

"By way of derogation from Articles 26 to 31, Member States shall ensure that, at the election of the filing constituent entity, the top-up tax due by a group in a jurisdiction shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities located in that jurisdiction fulfils the conditions of a qualifying international agreement on safe harbours.

For the purposes of the first paragraph, 'qualifying international agreement on safe harbours' means an international set of rules and conditions which all Member States have consented to and which grants groups in the scope of this Directive the possibility of electing to benefit from one or more safe harbours for a jurisdiction."

Articles 26 to 31 mentioned above relate to the *computation* of the effective tax rate and the top-up tax. The qualifying international agreement mentioned above came about *after* the OECD Model Rules which were approved on 14 December 2021. Further, recital (24) which deals with "*implementing this Directive", and notes that "Member States should use the OECD Model Rules …including its safe harbour rules",* as a source of illustration or interpretation in order to *"ensure consistency in application* *across Member States*" to the extent consistent with the Directive and EU law. The safe harbours are consistent with the Directive, given Art. 32 above.

It is arguable from the above that the Directive's purpose is to adhere to the OECD rules and commentary and subsequent arrangements subject to the requirement that those provisions adhere to EU law. Therefore, requiring the proposed legislation to refer to consistency with the "*EU Law purposes of the Directive*" could assist, in the absence of an amendment to the Directive, in Ireland's legislation adhering to the OECD rules and commentary with the provision that such guidance does not breach EU law. The matter would be put beyond doubt by amending the Directive and in that regard, we note the Department's July consultation explaining *"…while the Directive states in Recital 24 that its provisions should be interpreted in light of guidance provided by the OECD, the OECD Commentary and Administrative Guidance were agreed subsequent to the main negotiations on the Directive and there is potential for some divergence in interpretation. Therefore, earlier this year, the European Commission organised a number of coordination meetings for Member States to discuss the potential divergences and come to an agreed interpretation of relevant provisions. As the GloBE rules are an interlocking multi-national framework, it is important that there is a consistent application of the Pillar Two rules across all jurisdictions*".

Other

We have also included some minor comments in respect of this section in Appendix 1.

In addition, it would seem that a standalone investment entity, on the basis it might not meet the conditions of being an excluded entity would fall within the application of the QDTT. We strongly recommend that all investment entities are excluded from the charge to the QDMTT in order to maintain Ireland's competitiveness and attractiveness as a location for asset management and investment funds.

Section 7: Administration and Globe Information Return (GIR)

Question 7 Comments are invited on the general approach that should be taken regarding penalties in respect of non-compliance with the GloBE rules (e.g., when they should apply, the size of the penalty). Stakeholders should outline how any suggested approach would satisfy the requirements of the Directive outlined above.

Question 8 Are there aspects of the existing penalty regime that should apply, with suitable modifications, in respect of non-compliance with the GloBE rules? For example, should tax-geared penalties apply where an incorrect GloBE Top-Up Tax Return is filed? What fixed penalties should apply?

In respect of Q.7 and Q.8, subject to the Transitional Penalty Relief provisions, we would recommend that penalties and sanctions should not exceed those that already apply for corporation tax purposes. In our view, these penalties and sanctions are suitably "*effective, proportionate and dissuasive*".

Question 9 Comments are invited on whether transitional penalty provisions should apply? If so, what conditions should be satisfied in order for such provisions to apply? What should be regarded as "reasonable measures" taken?

In our view, transitional penalty relief provisions should be applied to the fullest extent possible.

We are also of the view that it would be difficult to provide a bright line test with regard to "*reasonable measures*" and a fact specific case by case approach would be required.

Question 10 Comments are invited on the possible need for additional provisions to ensure the qualified domestic top-up tax is collected within the permitted timeframe.

Question 11 Comments are invited on (i) the "joint and severally liable" approach and (ii) the "group notice" approach outlined above. If either of these types of provisions were to be introduced in respect of Irish GloBE liabilities are there any specific issues that would need to be considered in the design of such measures?

Taking question 10 and question 11 together, we refer to page 41 of the July consultation which states:

> *"Article 11(3) of the Directive states:*
>
> *"Where the amount of qualified domestic top-up tax for a fiscal year has not been paid within the four fiscal years following the fiscal year in which it was due, the amount of qualified domestic top-up tax that was not paid shall be added to the jurisdictional top-up tax computed in accordance with Article 27(3) and shall not be collected by the Member State which made the election pursuant to paragraph 1 of this Article."*
>
> *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. Given this provision within the Directive, there may be a need for additional provisions to ensure the qualified domestic top-up tax is collected within the permitted timeframe. Such a measure could involve:*
>
> 1. *Making Irish constituent entities joint and severally liable for any Irish GloBE liabilities of the Irish constituent entities of the same MNE group or a large-scale domestic group, or*
> 2. *Where an Irish constituent entity hasn't paid its Irish GloBE liabilities within a set timeframe, Revenue may issue a notice to another Irish constituent entity of the same MNE group or a large-scale domestic group which requires that member to pay the outstanding amount."*

As such, given the relevant timelines for filing the GloBE Information Return for the first and subsequent years, Ireland would have 4.5 years (to collect the top up tax). For the second QDMTT onwards, Ireland would have 4.75 years to collect the top up tax.[10]

It is curious to us that even if Ireland is making best efforts to collect the QDMTT from an Irish Constituent Entity, it would lose its collection rights after the 4.5/4.75-year period is up. We suspect

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[10] The deadline for filing the information return is 15 months after the year end, extended to 18 months for the first year in which a group is in scope. For example:

Year 1 example

- *Financial year end: 31 December 2024*
- *Pillar Two file and pay deadline (Art. 51): 30 June 2026 (i.e., 18 months after year end – first year of implementation concession)*
- *Article 11(3) limit: 31 December 2030 (i.e., 4 years after the financial year in which it was due)*
- *As a result, there are 4.5 years for the Member State to collect the top-up tax (after the due date).*

Year 2 (and subsequent years) example

- *Financial year end: 31 December 2025*
- *Pillar Two file and pay deadline (Art. 44(7): 31 March 2027 (i.e., 15 months after year end)*
- *Article 11(3) limit: 31 December 2031 (i.e., 4 years after the financial year in which it was due)*
- *As a result, there are 4.75 years for the Member State to collect the top-up tax (after the due date).*

that Art. 11(3) of the Directive deals with a situation where a country that has legislated for a QDMTT, is prevented for legal or contractual reasons from collecting the QDMTT or maybe, makes no or limited effort to collect the QDMTT. In the event of such a scenario, the top up tax would instead become payable by any EU UPE or EU Intermediary Parent Entity ("**IPE**") under an IIR regime and the QDMTT jurisdiction would lose its right to collect the top up tax. Further to that, p. 75, para. 80 of the July 2023 OECD Administrative Guidance states that [t]*the Inclusive Framework will provide further Administrative Guidance in relation to the interaction between this provision [Article 11.3 of the Directive] and the GloBE Rules in order to provide for consistent and coordinated outcomes."* This statement is included under the heading "QDMTT Payable" which discusses tax expenses booked by Constituent Entities ("**CEs**"), in cases where such CEs are challenging the QDMTT on constitutional or other legal grounds.

That been said, based on the drafting of the Directive, there is an argument that where a CE does not pay the tax within the 4.5/4.75-year period, then Ireland loses its taxing rights, and such tax is collected elsewhere, regardless of whether Ireland has made best efforts or not.

However, in our view Ireland already has very robust measures dealing with the collection of taxes. As such, Revenue should have sufficient avenues to recover any QDMTT within the 4.5/4.75-year period without introducing new measures.

In our view, it is also necessary to take into account, the profile of the constituent entities, that is, members of significant multinational groups that would generally be considered a low collection risk.

Question 12 Comments are invited on the allocation of top-up tax on a CE-by-CE basis under the possible legislative approach to implementing a QDTT in Ireland, in light of the transitional simplified jurisdictional reporting framework as set out by the July 2023 OECD Administrative Guidance on the GIR.

The July 2023 GLoBE Information Return[11] ("**GLoBE Information Return**") includes a "transitional simplified jurisdictional reporting framework" that will apply to the first five reporting years of the regime (i.e., returns for fiscal years beginning on or before 31 December 2028). Where the conditions are met, a group can elect to report the majority of the required data for a country on a net/aggregated basis, rather than for each CE. This transitional simplification is available for countries where no top-up tax liability arises, or where a top-up tax liability does arise, but does not need to be allocated to individual CEs (e.g., because all top-up tax arising with respect to that country would be payable under the IIR of the UPE country). Tax authorities will be able to make follow-up information requests, including requesting CE data. Countries have the option in certain circumstances not to apply simplified jurisdictional reporting in their QDMTTs.

The July OECD Guidance provides that a QDMTT return may follow a different format than the GloBE Information Return.

However, as a QDMTT would use equivalent datapoints to those provided in the GloBE Information Return, the July OECD Guidance provides that a QDMTT jurisdiction could choose to use the GloBE Information Return or rely on the information included on it. The July consultation states:[12] "*It is*

[11] Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two) (oecd.org).

[12] Page 42, July consultation.

intended that the jurisdictional sections of the GIR would be used for the purposes of reporting the calculations undertaken under a QDTT to be implemented in Ireland."

To prevent double taxation, it is important that any Irish QDTT is available as a credit against taxes imposed further up the chain. Whether a tax is creditable will depend on the foreign tax credit rules in the country of the parent entity. Conditions may include, among other conditions (i) that such tax is considered a corporate tax; (ii) that such tax is considered a tax on income; (iii) that such tax is attributable to the profits of a company.

In our view, the reporting of data on an aggregated basis per jurisdiction should not impact the allocation of the QDMTT on a CE-by-CE basis. This allocation would be done pursuant to the section (5) on p. 104 of the March consultation.[13] This provision is applied to the QDMTT rules by virtue of Chapter 3 Determining top-up amounts of qualifying entity, (1).[14] This allocates the QDMTT based on the qualifying income of a constituent entity over the aggregate qualifying income of the jurisdiction.

As mentioned, it is important that the QDMTT is creditable against taxes imposed further up the chain, otherwise double taxation may arise. Whether the QDMTT is creditable will depend on the laws of the jurisdiction of the parent entity. As such, different countries could have different rules as to what can be credited. With regard to allocating based on qualifying income, we would recommend instead that taxpayers are provided with flexibility. For example:

- Prescribe a multiple of different approaches in the legislation and allow groups to decide which option to use.
- Do not prescribe a method of allocation and thereby allow the group to decide how to allocate the QDMTT among constituent entities provided such allocation is just and reasonable. A similar approach is adopted elsewhere in the Irish Tax Code, e.g., S.291A(5)(b) TCA1997.

The July OECD Administrative Guidance states*:*

> *"118.12 In designing the charging provisions of a QDMTT, jurisdictions must ensure that the legal liability for the tax is allocated on a basis that complies with their legal framework and enforceable against at least one Constituent Entity. For example, a jurisdiction could impose joint and several liability for QDMTT tax on all the domestic Constituent Entities and collect it from any of the Constituent Entities without affecting the outcome under the GloBE Rules. In the case of a QDMTT that applies on a CE-by-CE basis, the QDMTT jurisdiction could allocate the QDMTT tax charge only to Constituent Entities that have an ETR lower than the Minimum Rate. If jurisdictional blending applies, on the other hand, the QDMTT tax charge could be allocated pursuant to the formula in Article 5.2.4 of the GloBE Rules or based on the ratio of the Excess Profits of the Constituent Entity to the Excess Profit of all Constituent Entities located in the jurisdiction. To avoid that minority investors bear the QDMTT tax charge, jurisdictions could also decide to allocate it exclusively to wholly-owned Constituent Entities. These examples are only intended to provide possible design options and do not limit the ability for jurisdictions to allocate the QDMTT tax charge in any manner they deem appropriate. Moreover, the allocation of the QDMTT tax charge among Constituent Entities is not binding on another jurisdiction for purposes of applying its local tax rules, including CFC Tax Regimes."*[15]

[13] March consultation.
[14] Page 25, July consultation.
[15] Page 59, 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.

Appendix 1

Section 2 - Transitional CbCR Safe Harbour	Deloitte comments
The proposed Irish legislation states at subsection (2): *"Qualified financial statements means –* *…* *(ii) prepared in accordance with an authorised financial accounting standard, and* *(I) the information contained in the financial statements is reliable, <u>and</u>* *<u>(II) there are appropriate mechanisms applied to ensure that the information is recorded accurately in accordance with that accounting standard, or …"</u>*	Page 8 of the 2022 OECD Commentary[16] on the Safe Harbour Rules states ("**Safe Harbour Commentary**"): *"Qualified Financial Statements means:* *…* *b) separate financial statements of each Constituent Entity provided they are prepared in accordance with either an Acceptable Financial Accounting Standard or an Authorised Financial Accounting Standard if the information contained in such statements is maintained based on that accounting standard and it is reliable; or …"* Page 9, para. 17 of the same Safe Harbour Commentary states: *"17. Qualified Financial Statements are defined as the accounts used to prepare the Consolidated Financial Statements of the UPE (which mirror the requirement under Article 3.1.2), or separate financial statements of each Constituent Entity provided they are prepared in accordance with either an Acceptable Financial Accounting Standard, or if the information contained in such statements is reliable, another Authorised Financial Accounting Standard. …"* The underlined words in the proposed Irish legislation seem to add an additional condition which is not in the Safe Harbour Commentary. We would recommend that the underlined words are deleted.
The proposed Irish legislation states at subsection (2): *"…* *(c) subject to subsection (6), the MNE group reports profit or loss before income tax in that territory that is equal to, or less than, the substance-based income exclusion amount in respect of constituent entities resident in that territory <u>for the purposes of the qualified CbC</u>*	The underlined part would not seem necessary given the definition of "profit or loss before income tax."

[16] 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-andpenalty-relief-global-anti-base-erosion-rules-pillar-two.pdf.

report, as computed in accordance with section XXX [Substance based income exclusion] (in this section referred to as the routine profits test) …” In the definitions in subsection (1) it states: *“In this section –* *…* *“profit or loss before income tax” means an MNE group’s profit or loss before income tax in respect of a territory for a fiscal year as reported in its qualified CbC report; …”*	
The proposed Irish legislation states at subsection (7): *“Subsection (2) shall apply to a joint venture group as if it were a separate MNE group, subject to the profit or loss before income tax and total revenue of the joint venture group in respect of the fiscal year, and territory, concerned being the profit or loss before income tax and total revenue reported in its qualified financial statements.”*	Should "and territory, concerned” read "and territory concerned", i.e., is comma in a wrong place? Section 7 speaks of a joint venture group, but there is no definition of “*joint venture group*” in the proposed CbCR legislation. The March consultation on p. 123 defines a joint venture group for the purposes of that section as “*a joint venture and its joint venture affiliates*.” Should the proposed CbCR legislation include a definition of joint venture group, i.e., have it cross-referenced?
The proposed Irish legislation states subsection (9): *“Where an ultimate parent entity is a flow-through entity, subsection (2) shall not apply in respect of a territory where that ultimate parent entity is located unless all the ownership interests in the ultimate parent entity are held by qualified persons.”*	The Safe Harbour Commentary states at para. 58: *“It is not necessary to exclude the jurisdiction of the Flow-through UPE from the Transitional CbCR Safe Harbour where all the income (loss) of the Flow-through UPE is attributable to a Permanent Establishment, (irrespective of whether such PE is located in the jurisdiction of the Flow-through UPE or a third jurisdiction) where the conditions of Article 7.1.1 of the Model Rules are met. This is consistent with Article 7.1.4 of the GloBE Rules.”* It may be necessary to update the proposed Irish legislation in this regard.
Subsection 14 (c) and (d) of the proposed Irish legislation.	Should reference to para. (a) in both sections be a reference to para. (b).

Section 4 - QDTT/QDMTT and Safe Harbour status	**Deloitte comments**
Definition of "*qualifying financial statements*"	Regarding the legislative reference to "*generally accepted accounting practice*", should this be defined within the GLoBE rules?
"The proposed legislation defines "Qualifying Entities" as including *"(b) an entity, other than an individual not included in paragraph (a), that—* *(i) has revenue that exceeds the entity revenue threshold for an accounting period in at least two previous accounting periods of the immediately previous four accounting periods determined by reference to its qualifying financial statements, and …"*	We understand that this refers to a standalone entity with no permanent establishment and would therefore would not come within the scope of the Directive. This goes beyond the Directive. We would recommend that Ireland goes no further than the Directive.
Per the proposed Irish legislation, under "Determining top-up amounts of qualifying entity" on p. 24 of the July consultation, Ireland has opted not to adopt the initial phase exclusion.	This would put Ireland at a competitive disadvantage in comparison with countries that do adopt the initial phase exclusion. We recommend that this is reconsidered.

Section 5 - Pillar Two Elections	**Deloitte comments**
The proposed Irish legislation states in Elections, subsection (2)(b): *"The withdrawal of an election referred to in paragraph (a) shall be valid for a period of five years commencing on the first day of the fiscal year (referred to in this paragraph as the "withdrawal year") falling immediately after the last day of the fiscal year in respect of which a previous election was made, and a constituent entity shall not make a new election of the type withdrawn in respect of any of the four fiscal years immediately succeeding the withdrawal year."*	If an election is made in Year 1, then this is valid until year 5. If the election is withdrawn in year 6, then the CE cannot make a new election until year 10. In respect of "first day of the fiscal year (referred to in this paragraph as the "withdrawal year") falling immediately after the last day of the fiscal year in respect of which a previous election was made" – would this suggest that the withdrawal year is Year 2? We would recommend that the subsection (2)(b) is reworded and suggest the following wording: "*Where a constituent entity withdraws the election referred to in paragraph (a), the constituent entity shall not make a new election of the type withdrawn in respect of any of the four fiscal years immediately succeeding the withdrawal year, the withdrawal year being the year in which the election referred to in paragraph (a) is withdrawn."*

Section 6 - OECD Model Rules, Commentary, Administrative Guidance	**Deloitte comments**
Definition of "OECD Pillar Two Guidance" in subsection (1).	(i) The definition should include a reference to the July 2023 OECD guidance in respect of Global Information Returns. (ii) The definition should be updated for any OECD guidance released between now and the Finance Act.
The subsection (3) states that: *"The Minister for Finance may, for the purposes of this Part, by order designate any additional subsequent guidance, mentioned in paragraph (e) of the definition of OECD Pillar Two guidance in subsection (1), as being comprised in the OECD Pillar Two guidance."*	The reference to (e) should be to (f).