Deloitte.

Pillar Two Implementation

March 2023 Feedback Statement

Deloitte response

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Pillar Two Consultation
Tax Division – Business Tax Policy
Department of Finance,
Government Buildings,
Upper Merrion Street,
Dublin 2,
D02 R583.

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 31 March 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,

L Griffin

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1. Executive Summary

The proposed legislative approach included in Appendix 1 of the 31 March 2023 Feedback Statement largely follows the structure of the EU Directive[1] 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. From an operational perspective, we would broadly agree with the inclusion of these additions. However, from an EU Law perspective, and with regard to how the Irish rules will interact with the rules of other countries, consideration will need to be given to whether it is appropriate to include these Additions in Irish primary legislation.

We would agree with the approach outlined with respect to the QDTT as it would minimise the amount of legislative drafting and also more closely align the QDTT and IIR bases. We do not envisage significant issues /challenges from an Irish perspective in treating top-up taxes (including QDTT) as separate to the main corporation tax rules. Nonetheless, it is important that the top up taxes are considered corporate taxes in order that such top up taxes may be creditable in foreign jurisdictions.

We would suggest that as part of the registration, a group should have the option to appoint a single entity (the "Responsible Entity") to be responsible for all Irish Pillar Two filing requirements including registrations, notifications, and the Globe Top-Up Tax Return. i.e., the Responsible Entity will be an agent of the Irish constituent entities for GloBE compliance purposes. It should be possible for one Constituent Entity to pay top-up tax liabilities in respect of other Constituent Entities within the group, with the same being subsequently reflected as an intra-group liability, if necessary.

It is important that Ireland continues to work on its competitiveness, and in particular to take steps to simplify its tax regime given the additional compliance burden and complexity that Pillar Two introduces. We appreciate the Department's efforts at OECD level, and we would encourage further interaction with the OECD and others to ensure that safe harbours are introduced for QDTTs. Ireland will need to be mindful of the evolution of Pillar Two and its implementation to protect against additional complexity, administration and to ensure that double taxation is avoided.

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

2. Overview of the proposed legislative approach

2.1 Transposition of the EU Minimum Tax Directive

Question 1

Comments are invited on the possible draft legislative approach as provided for in Appendix 1.

(When providing feedback on the possible draft legislative approaches (outlined in Appendix 1), stakeholders are asked to structure their responses in a similar manner to that in which the draft legislation has been structured and to reference the draft Chapter names/numbers and draft section titles, where appropriate. This will ensure an efficient review of all feedback received.)

The proposed legislative approach included in Appendix 1 of the 31 March 2023 Feedback Statement largely follows the structure of the EU Directive[2] 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. From an operational perspective, we would broadly agree with the inclusion of these additions. 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 drafted accordingly (even if the matter is not expressly cited in the EU Directive). However, if there are matters in the OECD Commentary that are 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.

Also, inclusion of these Additions could result in divergence from the laws of other Member States, given that other Member States may not legislate for these Additions or may legislate for these Additions in a different manner. To the extent that there is such a conflict, it could result in complications including residual tax liabilities arising in other Member States. This will need to be considered further.

The above points will need to be considered in the context of the Agreed Administrative Guidance issued in February 2023. Also, it should be noted that the OECD intends to issue further Administrative Guidance. The ability to include the updates in future guidance into Irish legislation will also need to be considered.

We also have a number of specific comments in respect of Appendix 1. These are included in Appendix A of this document.

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

2.2 OECD Model Rules, Commentary and Administrative Guidance

Question 2
Comments are invited on what reference, if any, should be made to the OECD Model Rules, Commentary and Administrative Guidance (and any future Guidance) in the legislation.

Recital 24 of the Directive notes the following: - "*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.*"

Further to that, in our view, consideration should be given to including provisions similar to S.835D (2) & (3) TCA 1997. S.835D (2) TCA 1997 states "….*this Part shall be construed to ensure, as far as practicable, consistency between—*

a. *the effect which is to be given to section 835C, and*
b. *the effect which, in accordance with the transfer pricing guidelines, would be given if double taxation relief arrangements incorporating Article 9(1) of the OECD Model Tax Convention applied to the computation of the profits or gains or losses, regardless of whether such double taxation relief arrangements actually apply,…………………*

S.835D (3) TCA 1997 states *"The Minister for Finance may, for the purposes of this Part, by order designate any additional guidance ……. as being comprised in the transfer pricing guidelines"*

Thus, in our view, the Irish domestic Pillar Two rules should be construed, as far as practicable, consistently with the OECD Pillar Two Model Rules and associated Commentary. That is, the OECD Commentary should be used as an interpretative guide to construing Irish domestic legislation.

The ability to rely on OECD Pillar Two Commentary as an interpretative guide, may require Irish legislation to take account of updates to the OECD Pillar Two commentary. We would suggest that such updates can be incorporated within Irish legislation using a Ministerial Order. (Again, subject to any EU considerations of same – See the response to Question 1).

In addition, it is important that the legal status of the OECD safe harbours is clarified, in particular the meaning of qualifying international agreement.

The OECD Commentary states: "*10.1.2. The GloBE Rules and Commentary also use a number of common financial accounting terms, such as "profit and loss statement," and phrases, such as "movement in an account" or "reversal of a liability", that are not defined in Article 10.1. When financial accounting terminology or concepts that are not defined in Article 10.1 are used in the GloBE Rules or Commentary in connection with a GloBE Rule or principle that relies on financial accounting, such terms and concepts should be interpreted consistent with the meaning given to them in financial accounting standards and guidance".* Consideration should be given to legislating for 10.1.2 to ensure consistency with the common implementation concept. (Subject to comments on EU Law as per the response to Question 1)

3. QDTT

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

The March 2023 Feedback statement states *"….. it is considered appropriate for Ireland to elect to introduce a QDTT as part of the Pillar Two implementation process. ……, possible approaches to applying the QDTT in legislation would be to:*

> *1. Prepare a detailed part of the legislation to set out all of the elements required to calculate and implement a QDTT, separate and stand-alone from the parts of the legislation required to implement the IIR and UTPR, or*
>
> *2. Prepare shorter provision(s) which would reference the detailed provisions relating to the IIR with any necessary modifications.*

… it is proposed that the latter option may be the most efficient. For example, one possible approach would be that a QDTT for an in-scope entity would be the amount of top-up tax calculated for that entity in accordance with section XXX [computation of the top-up tax] for each constituent entity located in Ireland (see Appendix 1). However, in performing that calculation, section XXX (2) and (4) [Specific allocation of covered taxes incurred by certain types of constituent entities] would not apply, i.e., when calculating the QDTT, the taxpayer would exclude tax paid or incurred by a constituent entity-owner under a CFC tax regime and tax paid or incurred by a head office that is allocable to a permanent establishment.

In calculating the QDTT, any elections made in the GloBE Information Return (see section 4.3) for the purposes of calculating the IIR top-up tax would apply for the purposes of the QDTT"

We would agree with the approach outlined above as it would minimise the amount of legislative drafting and also more closely align the QDTT and IIR bases.

If Ireland proceeds with the implementation of a QDTT, consideration will need to be given to whether the top-up tax as drafted in legislation will be recognised as a US foreign tax credit. If it is not recognised as a foreign tax credit in the US, then US businesses in Ireland could be subject to double taxation. This point may be relevant to other countries also.

Article 11.1 of the EU Directive states that *"Under a qualified domestic top-up tax, the domestic excess profits of the low-taxed constituent entities may be computed based on an acceptable financial accounting standard or an authorised financial accounting standard permitted by the authorised accounting body and adjusted to prevent any material competitive distortions, rather than the financial accounting standard used in the consolidated financial statements."* This Article could be read as not binding on a Member State .i.e., a Member State could choose whether to legislate for Article 11.1 in its domestic legislation. In our view, the option in Article 11.1 to apply acceptable or authorised accounting standards instead of the group accounting standard is an option of the taxpayers and the Irish legislation must provide for such an option.

4. Administration

4.1 Proposed approach to administration

Proposed Approach:
The administration of the GloBE rules and the associated top-up taxes will be kept separate to the existing corporation tax regime.

Questions
4.1.1 Comments are invited on the proposed approach that the administration of the GloBE rules and the associated top-up taxes will be kept separate to the existing corporation tax regime.

4.1.2 Do stakeholders foresee any issues / challenges in treating the top-up taxes as separate to corporation tax?

With regard to 4.1.1, we would agree with this approach.

With regard to 4.1.2, we do not envisage any significant issues /challenges from an Irish perspective in treating top-up taxes as separate from the main corporation tax rules. However, this is not simply an Irish question. With regard particularly to QDTT, it is important that the top up taxes are considered corporate taxes in order that such top up taxes may be creditable in foreign jurisdictions. A QDTT constitutes a tax on the income of a company in a similar manner to corporation tax such that it would generally be expected that a foreign tax credit would be available. Nonetheless, in implementing the QDTT, we suggest that this be borne in mind when drafting the QDTT provisions (recognising that the issue will ultimately be determined by a foreign tax authority).

In addition, it is important that Ireland's top-up tax must be regarded as a corporate tax to mitigate the impact of provisions such as Australia's proposals to deny tax deductions for certain IP related payments made to jurisdictions with a corporate tax rate less than 15%.

To comply with Pillar Two, there will be a significant burden placed on groups in respect of data gathering and system changes. Therefore, additional resources will be required. Given that Pillar Two results in a very significant burden, we would ask that a flexible and lenient approach is adopted in the initial years of implementation. In particular, no interest or penalties should apply in the initial years following the implementation of the Directive provided taxpayers make best efforts.

4.2 Registration and De-Registration

Proposed Approach:

(i) All Constituents Entities located in Ireland must register within 12 months from the end of the first Fiscal Year that the group, of which it is a member, is within scope of the GloBE rules.

(ii) The registration would be a "once off" registration (i.e. it would not be required annually). However, if certain information needs to be updated, this can be done by editing the existing registration. The deadline to update a registration (or create a new one) will be 12 months after the end of the Fiscal Year in which the change (or requirement to register) occurred.

(iii) There will also be a requirement to de-register when a Constituent Entity falls out of scope of the GloBE rules. The deadline for this will be 12 months after the end of the first Fiscal Year in which the entity is no longer in scope.

(iv) The information to be provided at registration would be as follows:

- Name of the Constituent Entity.
- Tax reference number of the Constituent Entity.
- The name of the MNE group.
- The Ultimate Parent Entity of the group and its location as per the GloBE rules.
- If appropriate, the Designated Filing Entity and its location.
- A local contact person.
- The first Fiscal Year for which the group is in scope.
- The date on which the accounting period of the group normally ends.
- If appropriate, the name and tax reference number of the Designated Local Entity, including confirmation that it has been nominated by the other Constituent Entities to act as such.
- If a Designated Local Entity, the names and tax reference numbers of the Constituent Entities for which it has been appointed the Designated Local Entity and confirmation that it has been nominated by the Constituent Entities to act as such.
- Such other information as Revenue considers necessary.

Questions
4.2.1 Comments are invited on the overall approach to registration / de-registration proposed above.

The registration process should be kept as straightforward and streamlined as possible.

We would suggest that as part of the registration, a group should have the option to appoint a single entity (the "Responsible Entity") to be responsible for all Irish Pillar Two filings including registrations, notifications, and the GloBE Top-Up Tax Return, i.e., the Responsible Entity will be an agent of the Irish constituent entities. The Responsible Entity could be for example, the Designated Local Entity or indeed the UPE or Designated Filing Entity, i.e., the Responsible Entity need not be an Irish constituent entity.

Further to that a Responsible Entity should have an ability to register multiple Irish located constituent entities. We would suggest that such registrations could be done using a single registration form.

In terms of the information to be provided at "Proposed Approach (iv)", we note the comment "Such other information as Revenue considers necessary". We would ask that the legislation gives a definite list of the information required at registration stage and such information should be kept to a minimum.

4.3 Filing of GloBE Information Returns and Notifications

Proposed Approach

(i) Every Constituent Entity located in Ireland will have an obligation to file a GIR in Ireland. However, this obligation can be discharged if the GIR is filed by:

(a) A Designated Local Entity,*
*(b) The Ultimate Parent Entity**, or*
*(c) The Designated Filing Entity**.*

(ii) Where the GIR is being filed by either the Ultimate Parent Entity or the Designated Filing Entity, the Constituent Entity, must file a notification with Revenue. Such a notification must contain:

(a) Details of the entity that is filing the GIR, and
(b) The jurisdiction in which such an entity is located.

(iii) Where the GIR is filed by the Designated Local Entity it needs to outline the Constituent Entities that it is filing on behalf of.

(iv) A Designated Local Entity may file the notification(s) on behalf of another group Constituent Entity(ies).

(v) Both the GIR and associated notifications must be filed no later than 15 months after the end of the fiscal year (with an 18-month deadline for the Transition Year).

** Where a Constituent Entity has been appointed as such.*
*** Where there is a qualifying competent authority agreement for exchange in place between Ireland and the jurisdiction where the GIR is filed.*

Question
4.3.1 Comments are invited on the proposed approach for GloBE Information Returns and associated notifications.

As mentioned, we would suggest that the Responsible Entity should have an ability to make the above notification for multiple constituent entities located in Ireland using a single notification.

As part of the registration process, a group should have an option to inform Revenue of who will be responsible for filing the GIR. If this information is provided at that point, then this should be considered an appropriate notification, thereby negating the need for a separate notification.

When designing the GIR, it would be expected that this would be filed electronically in a standardised format such as CSV with the ability to submit a single or multiple files at the option of the group.

4.4 Filing of Domestic Returns/Self – Assessment

Proposed approach

(i) There should be an obligation to file an additional domestic top-up tax return and self-assessment (referred to as a 'GloBE Top-Up Tax Return') for Irish Constituent Entities. (Such a filing would be separate to the GIR and separate to existing filings in relation to Corporation Tax e.g. the Form CT1).

(ii) The deadline for filing this return would be 15 months after the end of the Fiscal Year (in line with the deadline for filing the GIR). Similar transitional provisions (an extension of the deadline to 18 months for the Transition Year) which apply for the purposes of the filing of the GIR, would also apply.

(iii) The additional GloBE Top-Up Tax Return would be supplementary to the GIR and would require limited additional information, including:

(a) Name and Tax Reference Numbers of the entity and the Designated Local Entity if appropriate.
(b) The name of the group for GloBE purposes.
(c) The top-up tax liabilities, split by charge (IIR, UTPR and QDTT).
(d) Additional items related to the specific top-up taxes (such as the allocation of UTPR between Constituent Entities in Ireland).

(Please note this proposed approach is subject to the outcome of future work at OECD level as referenced above.)

Questions

4.4.1 Comments are invited on the overall approach to domestic returns / self-assessment in relation to the GloBE rules.

4.4.2 Comments are invited in relation to the proposed approach of having an additional return, separate return to the Form CT1, which will cover all three top-up taxes arising.

4.4.3 Do stakeholders have any views on the interaction of GIR and GloBE Top-Up Tax return?

4.4.4 Do stakeholders have any views on the information to be contained in the GloBE Top-Up Tax return?

Re 4.4.1 - The proposed approach appears reasonable.

Re 4.4.4 – We agree that the information required in the Globe Top – Up Tax Return should be kept to a minimum. The approach suggested appears reasonable.

We would suggest that a group, through the Responsible Entity, should have an ability to file a single return for multiple constituent entities located in Ireland. (Discussed further below at 4.8)

4.5 Payments

Proposed approach

(i) The top-up tax liabilities should be due for payment at the same time as the filing date for the GIR / GIR notifications and the GloBE Top-Up Tax Return (i.e. 15 months after the end of the Fiscal Year). The usual transitional provisions (i.e. deadline of 18 months after the Transition Year) should also apply.

(ii) The top-up tax liabilities should not be included in the corporation tax preliminary tax payments obligations.

Questions

4.5.1 Comments are invited on the proposed approach to payments.

The proposed approach appears reasonable.

4.6 Record keeping

Proposed Approach

The provisions within section 886 TCA 1997[12], regarding the obligation to keep records, should apply, subject to appropriate modifications, to an Irish Constituent Entity in respect of:

(i) The GIR – the aspects of the GIR relating to that Irish Constituent Entity.
(ii) The GloBE Top-Up Tax Return.
(iii) Any top up tax liability payable in Ireland (regardless of whether the liability arises from the activities of an Irish or non-Irish Constituent Entity).

(Please note this is subject to the outcome of future work at OECD level regarding the GIR as referenced above.)

Question

4.6.1 Comments are invited regarding the proposed record keeping requirements.

The proposed approach appears reasonable. In recognition that most non-Irish hedquartered groups are likely to rely on centralised resources in relation to the data gathering, computation and subsequent record keeping, such groups should be permitted to rely on the information held centrally rather than requiring any separate Irish record-keeping provided such central records are within the possession or power of the relevant Irish constituent entities.

4.7 Other Administration Provisions

Proposed Approach

It is recommended that relevant provisions contained within TCA 1997 are extended, with necessary modifications, to apply to the Pillar Two GloBE related returns / assessments / liabilities. These include provisions within:

(i) Part 37 – Administration
(ii) Part 40A – Appeals to Appeals Commissioners
(iii) Chapter 5 of Part 41A – Revenue assessments and enquiries and related time limits
(iv) Part 42 – Collection and Recovery

Question

4.7.1 Comments are requested regarding the proposed approach to other administration provisions.

4.7.2 Comments are requested regarding the general approach to administration of the GloBE rules.

The proposed approach appears reasonable.

Under the current Irish corporation tax rules, Revenue has four years, from the end of the year when a corporate tax return is filed to make enquiries into a return (i.e. . a 5-year window of enquiry). If this provision is extended to the GIR or GloBE Top-Up Tax Return, as is currently proposed, the window of enquiry would widen to 6 years. We would suggest that in respect of Pillar Two, the statute of limitations period does not extend beyond the corporate tax statutue of limitations period.

Due to the multilateral aspects of Pillar Two GloBE returns, it should be recognised that an Irish taxpayer should not be unfairly penalised where domestic appeal and/or resolution mechanisms have shorter timescales than apply elsewhere. The issue of tax certainty is an aspect which continues to be worked on as part of the OECD Inclusive Framework and industry and advisers alike would benefit from a positive statement from the Department that it will ensure that internationally agreed best practices will be followed.

4.8 Group Filings/Payments

Questions

Registration

4.8.1 Should it be possible for one Constituent Entity within a group to register on behalf of other Constituent Entities within the group? If so, how should this operate in practice? How would the appropriate permissions (e.g. for an entity to act as a Designated Local Entity on behalf of another Constituent Entity) be granted?

GloBE Top-Up Tax Return

4.8.2 Should it be possible for one Constituent Entity within a group (a "group filer") to file a GloBE Top-Up Tax Return on behalf of other Constituent Entities within the group? If so, how should this operate? Should there be:

(i) One "joint return" filed by the group filer which covers numerous entities?
(ii) Separate returns for each Constituent Entity within the group but filed by the group filer?
(iii) Other "group filer" approach used? If so, please provide details of same.

4.8.3 If some form of "group filer" approach were available, how should it operate from a compliance perspective? If returns are filed late or filed incorrectly how should any surcharges / penalties be applied (e.g. which entities should be liable)? Which entity(ies) should be liable for any top-tax liabilities arising? Please provide an answer based on the possible options to group filing outlined at question 4.8.2 above.

Payments

4.8.4 Should it be possible for one Constituent Entity within a group (a "group payer") to pay top-up tax liabilities on behalf of other Constituent Entities within the group? If so, how should this operate?

4.8.5 If a group payment option were available, how should it operate from a compliance perspective? If payments are made late or incorrectly how should any interest be applied (e.g. which entities should be liable)?

<u>4.8.1</u>

- As previously mentioned, in our view, it should be possible for one Constituent Entity within a group to register other Constituent Entities.
- How does this operate in practice? As part of the registration, a group should have the option to appoint a single entity (the "Responsible Entity") to be responsible for all Irish Pillar Two filing requirements including registrations, notifications and returns etc, i.e., the Responsible Entity will act as an agent of the other constituent entities. This could be for example, the Designated Local Entity or indeed the UPE or Designated Filing Entity i.e., need not necessarily be an Irish entity.
- How would the appropriate permissions be granted? The other Constituent Entities should appoint the Responsible Entity as their agent for the purposes of Pillar Two filings etc. The Responsible Entity should then declare as part of the registration process that it has been appointed by the other Irish Constituent Entities as their agent for the purposes of Pillar Two filings etc. The Responsible Entity should keep a record of any correspondence appointing the Responsible Entity as an agent. The Responsible Entity should declare that it maintains such records and that they can be produced in the event of an inspection.

<u>4.8.2</u>

As mentioned, a group should be able to appoint a Responsible Entity, which would then file the GloBE Top-Up Tax Return for all of the Constituent Entities located in Ireland. We would favour one single return which covers all Constituent Entities within a jurisdiction. The Responsible Entity would file the GloBE Top-Up Tax Return as agent for the Constituent Entities located in Ireland. As such, each Irish located Constituent Entity should be liable for its part of the top-up tax for the jurisdiction. We anticipate that it may be important in establishing an entitlement for a foreign tax credit on payment of a dividend to a parent jurisdiction that each Constituent Entity would have responsibility for its appropriate portion of any top-up tax.

<u>4.8.3</u>

Based on our suggested approach above, the Responsible Entity would file a single Globe Top-Up Tax Return. However, as the Responsible Entity is filing as agent of the Irish located Constituent Entities, then in effect the single Globe Top-Up Tax return is a separate return filed by each Irish located Constituent Entity. Any underpaid tax, penalties, interest should be a cost of the relevant constituent entity to which the top-up tax liability relates.

<u>4.8.4</u>

It should be possible for one Constituent Entity (e.g., the Responsible Entity) to pay top-up tax liabilities in respect of other Constituent Entities within the group, with the same being reflected as an intra-group debt between the payer and the Constituent Entity whose liability it is, if necessary.

As mentioned, the Responsible Entity will file a single Globe Top-Up Tax Return as agent for the various Constituent Entities located in Ireland. This single return is for the purposes of an efficient administration process only. In effect, each Constituent Entity is filing a separate return disclosing its liability. To the extent the Responsible Entity pays the top-up tax for all of the Constituent Entities within a jurisdiction, this would amount to a payment of each of the Constituent Entities top-up tax liability for the jurisdiction.

<u>4.8.5</u>

Any underpaid tax, penalties, interest should be a cost of the relevant constituent entity that incurred the top-up tax liability. If for example, the Responsible Entity files a return late resulting in interest/penalties for another Constituent Entity, then this is an internal group matter to be addressed between the Responsible Entity and the other entity.

5. Other matters

5.1 General

Given the significant tax contributions made by MNEs in Ireland, other areas of the Irish tax system and our economy in general must be adequately served to ensure that Ireland remains a competitive location in which to invest and grow businesses both from the perspective of inward investment and also domestic indigenous growth. A number of areas that should be considered in particular are our relatively high personal taxation, streamlining and simplifying our interest deductibility and double taxation rules, and improving our Knowledge Development Box and SME regimes. We would suggest that in preparation for the introduction of the Pillar Two rules, these areas are addressed.

Existing tax legislation in Ireland is complex and multi layered. The introduction of Pillar Two rules into domestic law has the potential to add another layer of complexity. In the interests of taxpayer certainty and to ensure that the Irish tax regime remains workable and user friendly, we would recommend that serious consideration be given to streamlining and simplifying the Irish tax code.

In particular, the existing regime for the provision of double tax relief on foreign income contained in Schedule 24 TCA97 is overly complex and results in increased compliance and costs for taxpayers. The adoption of a territorial regime of taxation for foreign dividends and foreign branch income on an elective basis and the broad simplification of other areas of the Irish double tax regime would be a welcome step in reducing taxpayer compliance costs prior to the introduction of Pillar Two rules.

Ireland's interest deductibility rules are complex, cumbersome and are in need of urgent reform. As previously outlined in our pre-Budget 2023 submission, tax relief for interest is subject to a range of conditions which has resulted in significant taxpayer uncertainty and additional compliance costs. Simplification measures such as allowing relief for interest expenses as incurred, streamlining S.247/S.249 TCA97 rules and reviewing the distribution rules in S130(2)(d) TCA97 would, in our view, be beneficial.

5.2 UTPR mechanism

Under the Directive, the mechanism for collecting any top up tax under the UTPR appears to be left open to jurisdictions as to whether to do this by disallowing expenses for GloBE purposes or simply imposing an additional tax. The draft legislation on the other hand collects the top up tax using the additional tax method. Consideration should be given to allowing a taxpayer to elect between a (i) a top-up tax or (ii) a denial of deduction against taxable income.

5.3 Knowledge Development Box ("KDB")

The attractiveness of the KDB regime will be eroded as a result of the proposed Pillar Two rules. In particular, there is no specific carve out in the EU Directive on Pillar Two for patent boxes. While patent boxes are not restricted, if there is no carve-out, any income taxed at less than the 15% minimum rate by the country of the patent box would be subject to a GloBE tax liability.

To achieve the 6.25% effective rate[3], the KDB gives a downward adjustment to taxable profits. In a Pillar Two context, and in particular with regard to the ETR calculations, this reduces the "Covered taxes" element of the calculations but the "GLoBE income" taken from the financial statements stays the same. As top up tax is paid on the difference between the GLoBE 15% rate and the KDB rate of 6.25%, this means the KDB company will receive no KDB relief when considered at a holistic level. This potentially negates any benefit that a group within the Pillar Two rules (broadly, an MNE with €750m plus turnover) would obtain by using the KDB. It should be

[3] Per S40(1) Finance Act 2022, the effective rate of tax on qualifying profits under the KDB was amended to 10%. However, as at the date of the submission S40(1) FA22 remains subject to a Ministerial commencement order.

noted that this is arguably at odds with the conclusions reached in Action 5 of the BEPS project at para 26 that a preferential tax regime, like the KDB, had a role to play in the tax system.

In the absence of a carve out, consideration should be given to amending the Irish KDB regime. Consideration could be given to changing the method of granting the relief from giving a downward adjustment to giving the taxpayer a tax credit ("IP Tax Credit") calculated as a percentage of qualifying profits. Such credit should be drafted consistently with the "*qualified refundable credit*" definition in the EU Directive on Pillar Two with a view to making the KDB "Pillar Two neutral". Any changes to the existing regime would require its reassessment under Action 5 and this should be considered in due course.

5.4 Digital Games Tax Credit

Per Article 3 of the Pillar 2 Directive[4], a "qualified refundable tax credit" means:

"(a) a refundable tax credit designed in such a way that it must be paid as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the refundable tax credit under the laws of the jurisdiction granting the credit; or

(b) if the tax credit is refundable in part, the portion of the refundable tax credit that is payable as a cash payment or a cash equivalent to a constituent entity within four years from the date when the constituent entity is entitled to receive the partial refundable tax credit"

The digital games relief provided for in S481A TCA97[5] allows for a refundable corporation tax credit for expenditure incurred on the design, production and testing of a qualifying game. Where a claim for relief is made[6], the corporation tax liability of the company is to be reduced by the amount equal to the credit, while any excess may be repaid to the taxpayer. The excess is treated as an overpayment of corporation tax for the purposes of S960H (2) TCA97.

Recitals 19a of the draft Directive allows Member States implementing the Directive to have regard to the OECD Pillar Two documentation. In that regard, para 135 of the OECD commentary makes the points: -

"… Refundable means that the amount of the credit that has not been applied already to reduce Covered Taxes is either payable as cash or cash equivalent. For this purpose, cash equivalent includes checks, short-term government debt instruments… as well as the ability to use the credit to discharge liabilities other than a Covered Tax liability. If the credit is only available to reduce Covered Taxes, i.e., it cannot be refunded in cash or credited against another tax, it is not refundable for this purpose. If the tax credit regime provides for an election by the taxpayer to receive the credit in a manner that is refundable, the tax credit regime is considered refundable to the extent of the refundable portion, regardless of whether any particular taxpayer elects refundability."

It is questionable therefore whether the digital games tax credit may regarded as a "qualified refundable tax credit" for Pillar Two purposes, given the meaning of "refundable" is limited solely to the credit not applied in reducing Covered Taxes. Consideration should be given to the mechanism by which taxpayers may claim relief for the digital games tax credit and whether the relief will be treated as a qualifying refundable tax credit. An assessment of same is in our view vital if Ireland is to be successful in incentivising and attracting inward investment in the growing digital games space.

Appendix A – Deloitte comments on the proposed legislative approach

Chapter 1 – Interpretation and general

[4] Per the Department of Finance Feedback Statement on Pillar Two Implementation (31 March 2023), the definition of a "qualified refundable tax credit" mirrors that contained within the Pillar Two Directive.
[5] Introduced by Finance Act 2021
[6] Whether via a claim for an interim or a final credit

Interpretation	Deloitte comments
Draft Irish legislation states "consolidated financial statements' means—….. (d) where an ultimate parent entity does not prepare financial statements under paragraph (a), (b) or (c), the financial statements that would have been prepared if the ultimate parent entity was required to prepare such financial statement in accordance with, (i) an acceptable financial accounting standard, or (ii) another financial accounting standard, provided such financial statements have been adjusted to prevent any material competitive distortions"	The draft legislation is drafted in such a way that the words "provided such financial statements have been adjusted to prevent any material competitive distortions" applies to both (i) and (ii). The EU Directive, uses the words "provided such financial statements have been adjusted to prevent any material competitive distortions" apply only to (ii) and our law should be amended accordingly
entity' means— (a) any legal arrangement of whatever nature or form that prepares separate financial accounts, or (b) any legal person, but does not include central, state or local government, or their administration or agencies that carry out government functions[7];	The underlined words are not in the Directive but can be sourced to the Agreed Administrative Guidance. As mentioned in the response to Question 1, consideration should be given as to whether the inclusion of such language is appropriate.
The draft legislation in various provisions makes reference to a "filing constituent entity"	Per Article 2(8) of the Directive, a "filing constituent entity" means an entity filing a top-up tax information return in accordance with Article 44. However, no corresponding definition has yet been imported into the draft domestic legislation.
The draft Irish legislation states "*group' means—* *(a) all entities which are related through ownership or control for the purpose of the preparation of consolidated financial statements by the ultimate parent entity..*" The EU Directive states "(3) 'group' means: (a) a collection of entities which are related through ownership or control as defined by the acceptable financial accounting standard for the preparation of consolidated financial statements by the ultimate parent entity, …."	The definition of "group" in both the draft Irish legislation and the EU Directive would not seem to be in line with the OECD Model Rules. The Model Rules state "1.2.2 A Group means a collection of Entities that are related through ownership or control such that the assets, liabilities, income, expenses and cash flows of those Entities (a) are included in the Consolidated Financial Statements of the Ultimate Parent Entity; ….." Article 1.2.2, para 22 of the OECD Commentary states *"Paragraph (a) refers to a collection of Entities that are included in the Consolidated Financial Statements of the UPE. This means that the assets, liabilities, income, expenses, and cash flows (i.e. the financial results) of the Entity (including the ones of its PEs) are consolidated on a line-by-line basis in the Consolidated Financial Statements that the UPE prepares for the MNE Group"* Thus, under the Model Rules whether an entity is a member of a group depends on not only whether it is related through ownership or control but also whether the entities results are consolidated on a line-by-line basis as a result of such ownership/control. There seems to be an inconsistency between the Irish draft legislation/EU Directive and the OECD Model Rules.

[7] Administrative Guidance section 1.2 provides for the exclusion of local or national government from the definition of entity.

'large-scale domestic group' means a group of which all constituent entities are located in the same Member State;	An MNE group is defined similarly but specifies that "member of an MNE group" is be construed accordingly. For consistency, we would suggest that wording to a similar effect is included with regard to a large-scale domestic group i.e., "member of a large-scale group should be construed accordingly.
Ownership interest means any interest that carries right to profit, capital or reserves of an entity, or a permanent establishment	Per the EU Directive, 'ownership interest' means any equity interest that carries rights to the profits, capital or reserves of an entity or of a permanent establishment We note that the word "equity" has been excluded from the Irish definition. The appropriateness of this exclusion should be considered further.
Partially-owned parent entity' means a constituent entity— (a) that owns, directly or indirectly, an ownership interest in another constituent entity of the same MNE group or large-scale domestic group, (b) with more than 20 per cent of the ownership interest in its profits held, directly or indirectly, by one or several persons that are not constituent entities of that MNE group or large-scale domestic group, and (c) that is not an ultimate parent entity, a permanent establishment, an insurance investment entity or an investment entity[8];	Per the Directive, a partially-owned parent entity' means a constituent entity that owns, directly or indirectly, an ownership interest in another constituent entity of the same MNE group or large-scale domestic group, and for which more than 20 % of the ownership interest in its profits is held, directly or indirectly, by one or several persons that are not constituent entities of that MNE group or large-scale domestic group and that does not qualify as an ultimate parent entity, a permanent establishment or an investment entity. We would note that the reference to an insurance investment entity in subparagraph (c) is taken from Administrative Guidance. We would refer the Department to our comments in response to Question 1 in this regard.
'real estate investment vehicle' means a widely held entity that— (a) holds predominantly immovable property, and (b) is subject to a tax system which is designed to achieve a single level of taxation on the income gains or profits of the entity, either at the level of the entity or at the level of its interest holders, with the deferral of taxation on such income, gains or profits either at the level of the entity or at the level of its interest holders being no more than one year from the end of the accounting period in which the income, profits or gains arise;	It should be noted that Irish REITs may be subject to Irish tax on its residual income and therefore potentially subject to a second layer of tax .i.e., at REIT and shareholder level. This could affect an Irish REIT's ability to rely on the excluded entity definition. Thus, it may be necessary to exempt all of a REIT's income from tax. It should be noted that there are already provisions within the REIT rules, such as the 75% income and asset tests that would limit a taxpayer's ability to abuse the REIT regime by say using the REIT to carry on a property development trade. In addition, under the Irish REIT regime, the 85% distribution requirement does not apply to reinvested capital gains. As such, prima facie, the one-year maximum deferral of the distribution requirement may not be met unless, arguably the one-year deferral requirement applies to income

[8] Administrative Guidance section 3.2 provides for the exclusion of an insurance investment entity from the definition of a partially owned parent entity.

	only and not gains. Para 146 of Chapter 10 of the OECD commentary states that "[*o*]*ne of the conditions set out in the definition is that Real Estate Investment Vehicle achieves a single level of taxation (with at most one year of deferral). The intention of this language is to deal with tax neutral vehicles which are designed to ensure that a single level of taxation is achieved either in the hands of the vehicle or its equity-interests holders. This could be the case of an exempt entity provided that it distributes its* <u>*income*</u> *within a time period*." Consideration should be given to defining "real estate investment vehicle" in the Irish Pillar Two legislation accordingly. It should be noted that in an international context, similar to Ireland, many REIT regimes only apply the distribution requirement to rental profits (and not gains), for example the UK, the Netherlands, the US, and Belgium.
(5) A word or expression which is used in this Part and is also used in the Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Directive.	Should ss.5 read "Unless otherwise defined in this Part, a word or expression which is used in this Part and is defined in the Directive should have, unless the context otherwise requires, the same meaning in this Part as it has in the Directive"

Scope of this Part	**Deloitte comments**
XXX. (1) Subject to subsection (2), subsection (3) and section XXX [Application of consolidated revenue threshold to group mergers and demergers], this Part shall apply…..	As subsection (2) is also subject to subsection (3), the reference to "(1) subject to …. subsection (3) in subsection 1 would appear unnecessary.

Location of a constituent entity	**Deloitte comments**
(2) Where it is not possible to determine the location of an entity other than a flow-through entity based on where it is considered to be a tax resident, or where the entity is considered to be tax resident in more than one territory, the entity shall be located where it was created.	Re "or where the entity is considered to be tax resident in more than one territory". This wording should be removed i.e., where an entity is considered tax resident in more than one territory, the provisions of ss5 and ss6 should apply.
(6) (a) Subject to paragraph (b), where a constituent entity is regarded as located in more than one territory, and those territories do not have a tax treaty or subsection 5(b) or 5(c) apply, the constituent entity shall be regarded as located in the territory <u>where the greater part of its covered taxes are charged to corporate income taxes for the fiscal year.</u>	The words "where the greater part of its covered taxes are charged to corporate income taxes for the fiscal year" do not make sense in the context of the Directive. The EU Directive states "Where a constituent entity is located in two jurisdictions and those jurisdictions do not have an applicable tax treaty, the constituent entity shall be deemed to be located in the jurisdiction which charged the higher amount of covered taxes for the fiscal year".

Chapter 2 - IIR and UTPR

Effect of a qualified domestic top-up tax	**Deloitte comments**
XXX. (1) Where a qualifying domestic top-up tax that is due in respect of the directly or indirectly held constituent entities of a parent entity for a fiscal	Reference is made in paragraph 1 to a "qualifying" domestic top up tax, while the definition contained on page 41 of the Feedback Statement refers to a

year has been computed in accordance with— (a) the ultimate parent entity's acceptable accounting standard, or (b) with International Financial Reporting Standards, then no top-up tax shall be computed in accordance with section XXX [Computation of the top-up tax] for that fiscal year in respect of those constituent entities.	"qualified" domestic top-up tax. We assume that the reference to "qualifying" in this instance will be amended to align with the previous definition, and with the Directive.
(2) Where the amount of qualified domestic top-up tax in respect of a constituent entity 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 domestic top-up tax that was not paid, and cannot be collected anymore, shall be added to the territorial top-up tax in respect of the territory where the constituent entity is located computed in accordance with section XXX(3) [Computation of the top-up tax].	We would note that the stipulation that the QDTT "cannot be collected anymore" is not present in Article 11(3) of the Directive. It is unclear to us as to what is envisaged by this phrase, as it suggests that the parent entity is required to assess the relative recoverability of the QDTT by the competent authorities of the jurisdictions in which the constituent entity is located. Such an assessment would, in our view, go beyond the remit of the Directive and should therefore be removed.
(3) Where a qualified domestic top-up tax is applied by a Member State or a third country territory, the financial accounting net income or loss of the constituent entities located in that Member State or third country territory may be determined in accordance with an acceptable financial accounting standard or an authorised financial accounting standard that is different than the financial accounting standard used in the consolidated financial statements, provided that such financial accounting net income or loss is adjusted to prevent any material competitive distortion.	EUD Article 11.1 states "Under a qualified domestic top-up tax, the domestic excess profits of the low-taxed constituent entities may be computed based on an acceptable financial accounting standard or an authorised financial accounting standard permitted by the authorised accounting body and adjusted to prevent any material competitive distortions, rather than the financial accounting standard used in the consolidated financial statements" Per the EU Directive, the adjustment to prevent any material competitive distortions only applies where the financial accounting net income or loss is determined using an authorised financial accounting standard, i.e. the "material competitive distortion" is not a factor where an **acceptable** financial accounting standard is applied. We see no reason why the draft Irish legislation would diverge from the Directive on this point.
Application of the UTPR in the territory of an ultimate parent entity **XXX.** (1) Subject to subsection (1) and (2), where during a fiscal year, the ultimate parent entity of an MNE group is located in a third country territory that is a low-tax territory, a constituent entity of that MNE group that is located in the State shall be subject to a top-up tax (referred to as the "UTPR top-up tax") calculated in accordance with section XXX [Computation and allocation of the UTPR top-up tax amount].	This should read subject to subsection (2) and (3), ….

Computation and allocation of the UTPR top up tax amount	Deloitte comments
XXX. [(1) A provision is required to allocate an amount of UTPR top-up tax to constituent entities. Comments are invited on how such a provision may operate.]	It is unclear whether subsection 1 was intended to be included in the Feedback Statement as the methodology for the provision is included from subsection 2 onwards.

Chapter 3 – Computation of the qualifying income or loss

Adjustments to determine the qualifying income or loss	**Deloitte comments**
(2) To determine the qualifying income or loss of a constituent entity in respect of a fiscal year, the financial accounting net income or loss of that constituent entity shall be adjusted by the following— (a) net taxes expenses, (b) excluded dividends, (c) excluded equity gains or losses, (d) included revaluation method gains or losses, (e) gains or losses from the disposal of assets and liabilities excluded pursuant to section XXX [Transfer of assets and liabilities], (f) asymmetric foreign currency gains or losses, (g) policy disallowed expenses, (h) prior period errors and changes in accounting principles, (i) accrued pension expenses, and (j) the net amount of the additions and reductions to qualifying income for the fiscal year as set out in section XXX [Equity investment inclusion election and qualified flow-through tax benefits of qualified ownership interests][9]	We would note that a portion of this section is taken from Administrative Guidance. We would refer the Department to our comments in response to Question 1 in this regard.
(3) (a) On the making of an election by a filing constituent entity, a constituent entity may, in the calculation of qualifying income or loss of the constituent entity in respect of a fiscal year, substitute the amount allowed as a deduction in the computation of its taxable income in the territory where it is located for the amount expensed in its financial accounts for a cost or expense of such constituent entity that was paid with stock-based compensation.	Reference is made in this subparagraph (and in later section) to a "filing constituent entity", but no specific definition yet is provided or this term. We note that Article 3 of the Directive defines the term as "an entity filing a top up tax information return in accordance with Article 42 of this Directive", and accordingly would expect that any definition introduced into domestic law should align with that in the Directive.
(4) (a) Any transaction between constituent entities located in different territories that is not— (i) recorded in the same amount in the financial accounts of both constituent entities <u>**in the calculation of financial accounting net income or loss**</u>, or (ii) consistent with the arm's length principle, shall be adjusted <u>**in the calculation of qualifying income or loss of the constituent entities**</u> so as to be in the same amount and <u>constituent</u> with the arm's length principle.	Article 16.4 of the EU Directive states, "Any transaction between constituent entities located in different jurisdictions that is not recorded in the same amount in the financial accounts of both constituent entities or that is not consistent with the arm's length principle shall be adjusted so as to be in the same amount and consistent with the arm's length principle" (3.2.3 of the OCED Model) The language which is underlined and in bold is not in the EU Directive. Its inclusion would only serve to create additional divergence. Article 35 requires a seller and a buyer of assets to determine its Qualifying Income using the amounts included in accounting standards. This provision presumed that the amount included under accounting standards would be at fair value. (2.1.1.1 of the February 2023 Agreed Administrative Guidance). However, this is not the case under US GAAP. Where US GAAP is used the sale and acquisition are both recorded at cost. The February 2023 Agreed Administrative Guidance stated that

[9] Section 2.9 of the Administrative Guidance

	Article 16.4 would apply in respect of the seller. However, the February 2023 guidance stated that the buyer's position would need to be considered further. It is possible that the OECD will leverage Article 16.4/3.2.3 to resolve this difficulty. For that reason, we would recommend that the Irish draft legislation uses the language in Article 16.4 and does not add to it. The underlined "constituent" should read "consistent"
(6) (e) Where the election referred to in paragraph (a) is withdrawn in respect of a fiscal year, an amount equal to the difference between— (i) the fair value of the asset or liability, and (ii) the carrying value of the asset or liability on the first day of the fiscal year in respect of which the withdrawal is made, shall be— (I) included, if the fair value exceeds the carrying value, or (II) deducted, if the carrying value exceeds the fair value, in the calculation of qualifying income or loss of the constituent entity in respect of that fiscal year.	This subparagraph corresponds with Article 16(6) of the Directive, which states "In the fiscal year in which the election is revoked, an amount equal to the difference between the fair value of the asset or liability and the carrying value of the asset or liability on the first day of the fiscal year in which the revocation is made, determined pursuant to the election, shall be included, if the fair value exceeds the carrying value, or deducted, if the carrying value exceeds the fair value, for the computation of the qualifying income or loss of the constituent entities" The reference to "on the first day of the fiscal year in respect of which the withdrawal is made, shall be" should be applicable to both I & II of the draft Irish legislation and not just II.
(7) (a) On the making of an election by the filing constituent entity, the qualifying income or loss of a constituent entity arising from the disposal of local tangible assets by that constituent entity to entities other than entities who are members of the same group in respect of a fiscal year, shall be adjusted in accordance with this subsection.	Subparagraph 7 corresponds with Article 16(7) of the Directive, which specifies that the election is to be made annually in accordance with Article 43(2). However, we note that subparagraph 7 does not contain a cross reference to Chapter 8 (Administrative provisions) and accordingly may require amendment to provide greater clarity on the manner in which elections are to be made by the filing constituent entity.
(9) (a) On the making of an election by a constituent filing entity, an ultimate parent entity may elect to apply its consolidated accounting treatment to eliminate income, expense, gains or losses from transactions between constituent entities that are— (i) located in the same territory, and (ii) included in a tax consolidation group, for the purpose of computing the net qualifying income or loss of those constituent entities for a fiscal year.	Subparagraph 9 corresponds with Article 16(9) of the Directive, which specifies that the election is to be made in accordance with Article 43(1). However, we note that subparagraph 9 does not contain a cross reference to Chapter 8 (Administrative provisions) and accordingly may require amendment to provide greater clarity on the manner in which elections are to be made. Subgraph 9(a) refers to a "constituent filing entity" which we note is not defined.

	We would also note the reference to a "tax consolidation group" in 9(a)(ii), which remains undefined in both the Directive and the draft legislative approach contained in the Feedback Statement. Clarity on what is meant by a tax consolidation group is required both to allow Irish ultimate parents to identify whether a tax consolidation group exists in a foreign jurisdiction in which the parent company has subsidiaries, but also in assessing whether a tax consolidation group exists for GloBE purposes in Ireland, given that currently no concept of tax consolidation exists in Irish law.
(13) On the making of an election by a filing constituent entity, foreign exchange gains or losses included in a constituent entity's financial accounting net income or loss shall be treated as an excluded equity gain or loss to the extent that— (a) such foreign exchange gains or losses are attributable to hedging instruments that hedge the currency risk in ownership interests other than portfolio shareholdings, (b) such foreign exchange gains or losses are recognised in other comprehensive income in the consolidated financial statements, and (c) the hedging instrument is considered an effective hedge under the acceptable or authorised financial accounting standard used in the preparation of the consolidated financial statements[10].	The addition is sourced from the February 2023 Agreed Administrative Guidance. Further consideration will need to be given as to whether it is appropriate to include. Subparagraph 13 does not contain a cross reference to Chapter 8 (Administrative provisions) to identify the manner in which the election is to be made and accordingly may require amendment to provide greater clarity. We would note that Subparagraph 13 aligns with Section 2.2 of the Administrative Guidance which in turns provides that *"Therefore, a Filing Constituent Entity may make a Five-Year Election to treat foreign exchange gains or losses reflected in a Constituent Entity's Financial Accounting Net Income or Loss as also an Excluded Equity Gain or Loss….".*
(14) On the making of an election by a filing constituent entity, a constituent entity may include in the computation of its qualifying income or loss for a fiscal year any dividend or other distribution received by the constituent entity with respect to a portfolio shareholding[11].	The addition is sourced from the February 2023 Agreed Administrative Guidance. Further consideration will need to be given as to whether it is appropriate to include. Subparagraph 14 does not contain a cross reference to Chapter 8 (Administrative provisions) to identify the manner in which the election is to be made and accordingly may require amendment to provide greater clarity. We would note that Subparagraph 14 aligns with Section 3.5 of the Administrative Guidance which in turns provides that *"This election would be a Five-Year Election and should be made at the level of the Constituent Entity."*
(16) On the making of an election by a filing constituent entity, the amount of a debt release included in the financial accounting net income or loss of a constituent entity shall be excluded from the computation of the constituent entity's	Subparagraph 16 does not contain a cross reference to Chapter 8 (Administrative provisions) to identify the manner in which the election is to be made

[10] Section 2.2 of the Administrative Guidance
[11] Section 3.5 of the Administrative Guidance

qualifying income or loss, where the debt release— ……….	

International Shipping Income Exclusion	Deloitte comments
5) (a) The costs incurred by a constituent entity that are directly attributable to its international shipping activities and qualified ancillary international shipping activities shall be allocated to such activities for the purpose of computing the international shipping income and the qualified ancillary international shipping income of the constituent entity. (b) The costs incurred by a constituent entity that indirectly result from its international shipping activities and qualified ancillary international shipping activities shall be deducted from the constituent entity's revenues from such activities to compute its international shipping income and qualified ancillary international shipping income of the constituent entity on the basis of its revenues from such activities in proportion to its total revenues.	We would note a difference in how the treatment of direct and indirect costs are phrased in Subparagraph 5. In particular, costs that are directly "attributable" are treated as being "allocated" to the activities in question, while costs that "indirectly result" from the activities shall be "deducted". We would note that Article 17(5) of the Directive refer to "result" and "allocated" in addressing the treatment of both direct and indirect costs; the difference in phraseology in subparagraph 5 therefore remains unclear to us.

Chapter 4 : Computation of adjusted covered taxes

Adjusted covered taxes	Deloitte comments
2………..(d) any amount of credit or refund in respect of a qualified refundable tax credit <u>tax was accrued</u> as a reduction to the current tax expense in the financial accounts of the constituent entity.	Should "tax was accrued" read "that was accrued"
XXX. (1) The adjusted covered taxes of a constituent entity for a fiscal year shall be determined by adjusting the sum of the current tax expense accrued in the financial accounting net income or loss with respect to covered taxes for the fiscal year by— (a) the net amount of the additions and reductions to covered taxes for the fiscal year as set out in subsection (2) and (3), (b) the total deferred tax adjustment amount as set out in section XXX [Total deferred tax adjustment amount], (c) any increase or decrease in covered taxes recorded in equity or other comprehensive income relating to amounts included in the computation of qualifying income or loss that will be subject to tax under local tax rules, and (d) the net amount of the additions and reductions to covered taxes for the fiscal year as set out in section XXX [Equity investment inclusion election and	Para (d) is sourced from the Agreed Administrative Guidance. We would refer you to our comments in Question 1. Consideration should be given as to whether such addition is appropriate.

qualified flow-through tax benefits of qualified ownership interests][12].	
(9) On the making of an election [13] by a filing constituent entity, or where the top-up tax percentage for a territory for a fiscal year as calculated in section XXX (2) [Computation of the top-up tax] exceeds the minimum tax rate, an MNE Group or large-scale domestic group shall exclude the excess negative tax expense from its adjusted covered taxes for a territory in respect of the fiscal year and establish an excess negative tax expense carry-forward.	Subparagraph 9 does not contain a cross reference to Chapter 8 (Administrative provisions) to identify the manner in which the election is to be made and accordingly may require amendment to provide greater clarity. This legislates for the OECD Administrative guidance. See our responses to Question 1.

Equity investment inclusion election and qualified flow through tax benefits of qualified ownership interests[14]	**Deloitte comments**
XXX. (1) In this section— 'qualified flow-through tax benefit' means any amount of (a) tax credits, other than qualified refundable tax credits, and (b) tax-deductible losses multiplied by the statutory tax rate applicable to the owner of a qualified ownership interest, that flows through a qualified ownership interest in a tax transparent entity to the extent it reduces the owner's investment in the qualified ownership interest pursuant to subsection (6); 'qualified ownership interest' means an ownership interest in a tax transparent entity where the assets, liabilities, income, expenses, and cash flows of the tax transparent entity are not consolidated on a line-by-line basis in the consolidated financial statements of the MNE group and the total return with respect to that ownership interest, excluding tax credits other than qualified refundable tax credits, is, at the time the investment is entered into, expected to be less than the total amount invested by the owner of the ownership interest such that a portion of the investment will be returned in the form of tax credits other than qualified refundable tax credits. (2) On the making of an election by a filing constituent entity, a constituent entity which holds an ownership interest other than a qualified ownership interest shall— (a) include in its qualifying income or loss the accounting gain, profit, or loss, adjusted as required by the section XXX [Adjustments to determine the qualifying income or loss] other than subsection 2(c) of that section, with respect to any—	We would note that a portion of this section is taken from Administrative Guidance. We would refer the Department to our comments in response to Question 1 in this regard.

[12] Section 2.9 of the Administrative Guidance
[13] Section 2.7 of the Administrative Guidance
[14] Section 2.9 of the Administrative Guidance

(i) fair value gains and losses and impairments on that ownership interest, where the owner is taxable on a mark-to-market basis or on the impairment on the ownership interest, and the tax consequences of the mark-to-market movements or impairments on ownership interest are reflected in income tax expense, (ii) fair value gains and losses and impairments on that ownership interest, where the owner is taxable on a realisation basis and its income tax expense includes deferred tax expense on the mark-to-market movement or impairments on the ownership interest, (iii) profit and loss attributable to that ownership interest, where the interest is in a tax transparent entity and the owner accounts for the interest using the equity method, and (iv) dispositions of that ownership interest which give rise to gains or losses that are included in the owner's domestic taxable income, excluding any gain fully offset, and the proportionate share of any gain partially offset, by any deduction or other similar relief on that gain, and (b) notwithstanding section XXX(3)(a) [Adjusted covered taxes] and section XXX(5)(a) [Total deferred tax adjustment amount], include all current and deferred tax expense in respect of the amounts referred to in paragraph (a) in the computation of its adjusted covered taxes, subject to the provisions of this Part. (3) The election referred to in subsection (2) shall apply to all ownership interests, other than a portfolio shareholding, owned by constituent entities located in the territory with respect to which the election is made. (4) Subsection (5) shall apply to the qualified flow-through tax benefits that flow through a qualified ownership interest to a constituent entity to which an election under subsection (2) applies. (5) Where this subsection applies, qualified flow-through tax benefits shall be added to the adjusted covered taxes of a constituent entity that is the direct owner of a qualified ownership interest, or an indirect owner of such an interest held via tax transparent entities that are not constituent entities of the MNE Group, to the extent the qualified flow-through tax benefit was treated as reducing tax expense accrued in the financial accounting net income or loss of the constituent entity.	

(6) A constituents entity's investment in a qualified ownership interest shall be treated as being reduced by receipts with respect to the qualified ownership interest in respect of— (a) the amount of tax credits that have flowed through to the constituent entity, (b) the amount of any tax-deductible losses that have flowed through to the constituent entity multiplied by the statutory tax rate applicable to the constituent entity, (c) the amount of any distributions to the constituent entity, including returns of capital, or (d) the amount of proceeds from a sale of all or part of the qualified ownership interest, but no amount shall be treated as reducing the investment to the extent it would reduce the investment below zero. (7) (a) Subject to paragraph (b), any amount referred to in subsection (6)(a), (b), (c), or (d) that flows through, or are received in respect of, a qualified ownership interest, after the constituent entity's investment has been reduced to zero pursuant to that subsection, shall be subtracted in the calculation of that constituent entity's adjusted covered taxes. (b) An amount referred to in subsection (6)(c) or (d) or a qualified refundable tax credit, shall be subtracted in the calculation of a constituent entity's adjusted covered taxes only to the extent of the amount of any qualified flow-through tax benefits that flowed through the qualified ownership interest and that were treated as an addition in the calculation of that a constituent entity's adjusted covered taxes.	

Total deferred tax adjustment amount	**Deloitte comments**
'unclaimed accrual' means any increase in a deferred tax liability recorded in the financial accounts of a constituent entity for a fiscal year that is not expected to be paid within the time period referenced in subsection (7), and for which the filing constituent entity elects not to include in total deferred tax adjustment amount for that fiscal year.	The definition of an unclaimed accrual makes reference to an election to be made by the filing constituent entity. However, no corresponding cross reference or detail as to how the election is to be made has yet to be included in the draft legislation.
(3) The total deferred tax adjustment amount of a constituent entity for a fiscal year shall be increased by— (a) any amount of disallowed accrual or unclaimed accrual paid during the fiscal year, and (b) any amount of recaptured deferred tax liability determined in a preceding fiscal year, which has been paid during the fiscal year	Paragraph 9 indirectly informs us what a recaptured deferred tax liability is, for clarity we would envisage some form of cross reference in paragraph 3.
(6) Paragraph (e) of subsection (5) shall not apply to an amount of deferred tax expense where all of the following conditions are met— (a) the tax laws of a territory requires that foreign source income offset	Legislates for OECD guidance rather than the Directive? See our response to Question 1.

domestic source losses before foreign tax credits may be applied against tax imposed on foreign source income, (b) the constituent entity has a domestic tax loss in that territory that is fully or partially offset by foreign source income, and (c) the tax laws in that territory allows foreign tax credits to be used to offset a tax liability in a subsequent year in relation to income that is included in the computation of the constituent entity's qualifying income or loss[15].	

Post filing adjustments and tax rate changes	Deloitte comments
XXX. (1) (d) On the making of an election by the filing constituent entity, where there is an aggregate decrease of less than €1,000,000 in the adjusted covered taxes determined for a territory for the fiscal year in accordance with paragraph (b), the decrease in covered taxes may be treated as an adjustment to covered taxes in the fiscal year in which the adjustment is made.	Directive Article 25(1) notes that the annual election is to be made in accordance with Article 45(2) but the draft domestic provisions have no corresponding cross refence to chapter 8 administrative provisions.

(3) (a) Where a deferred tax expense was recorded in the financial accounts of a constituent entity at a rate lower than the minimum tax rate, and the applicable tax rate is increased in a subsequent fiscal year, the amount of deferred tax expense that results from such increase shall be treated, upon payment of the related tax, as an adjustment to a constituent entity's liability for covered taxes claimed for the previous fiscal year in which the deferred tax expense was recorded <u>in accordance with subsection (1).</u>	Re underlined. Should this read "in accordance with section XXX [Adjusted covered taxes], for a previous fiscal year"? Note Article 25.3 of the EU Directive does not cross reference Article 25.1.

Chapter 5 – Computation of the effective tax rate and the top up tax

Substance based income inclusion	Deloitte comments
Substance-based income exclusion – (4)(b)	Substance-based income exclusion – (4)(b) has adopted the language of the Directive with respect to "the carrying value of property, including land and buildings, that is held for sale, for lease or for investment…". It should be noted that the language used in the German/Dutch versions of the EU Directive limits this exclusion from the substance-based income exclusion rule to leased real estate/immovable property. The English version of the EU Directive and further to that the draft Irish legislation, which use the words "property, including land and buildings" might indicate that the exclusion is wider than real estate/immovable property. In

[15] Section 2.8 of the Administrative Guidance

	order to avoid confusion and to ensure consistency with other interpretations we would suggest that the draft Irish legislation aligns to the other implementations of the EU Directive.

De Minimis Exclusion	**Deloitte comments**
XXX. (1) Notwithstanding anything in this Chapter, at the election of the filing constituent entity, the top-up tax due for the constituent entities of an MNE group or large-scale domestic group located in a territory, other than stateless constituent entities or investment entities, shall be equal to zero for a fiscal year, if for that fiscal year— (a) the average qualifying revenue of all constituent entities of an MNE group or large-scale domestic group located in that territory is less than €10,000,000, and (b) the average qualifying income or loss of all constituent entities of an MNE group or large-scale domestic group in that territory is a loss or is less than €1,000,000	Per Article 30(1) of the Directive, the election referred to must be made in accordance with Article 45(2). Cross reference required.

Chapter 6 – Corporate restructuring and holding structures

Transfer of assets and liabilities	**Deloitte comments**
(6) On the making of an election by a filing constituent entity, where a constituent entity is required or permitted to adjust the basis of its assets and the amount of its liabilities to fair value for tax purposes under the tax law in the territory where it is located (hereinafter referred to as the 'tax adjustment") then such constituent entity may— (a) subject to subsection (7), include in the computation of its qualifying income or loss for a fiscal year an amount of gain or loss in respect of each of its assets and liabilities, which shall be: (i) equal to the difference between the carrying value for financial accounting purposes of the asset or liability immediately before the date of the event that triggered the tax adjustment (hereinafter referred to as the "triggering event") and the fair value of the asset or liability immediately after the triggering event as determined under the tax law in the territory where it is located, and (ii) decreased, or increased as the case may be, by the non-qualifying gain or loss, if any, arising in connection with the triggering event, and (b) use the fair value for financial accounting purposes of the asset or liability immediately after the triggering event to compute qualifying income or loss in the fiscal years ending after the triggering event	No detail as to how the election is to be made.

Chapter 7: Tax neutrality and distribution regimes

Eligible Distribution Tax Systems	**Deloitte comments**
XXX. (1) On the making of an election by a filing constituent entity, a constituent entity that is subject to an eligible distribution tax system may include the amount of deemed distribution tax, determined in accordance with subsection (2), in the adjusted covered taxes of that constituent entity for the fiscal year.	Per Article 40(1) of the Directive, the election in question is to be made annually in accordance with Article 45(2) however the domestic provisions give no such detail. More clarity is required as to the manner in which the election is to be made.
Determination of the effective tax rate and top-up tax of an investment entity	**Deloitte comments**
(3) The adjusted covered taxes of an investment entity as referred to in subsection (1) shall be the sum of the adjusted covered taxes that are attributable to the allocable share of the MNE group or large-scale domestic group in the qualifying income of the investment entity and the covered taxes allocated to the investment entity in accordance with section XXX [Specific allocation of covered taxes incurred by certain types of constituent entities], but shall not include any covered taxes accrued by the investment entity attributable to income that is not part of the MNE group or large-scale domestic group's allocable share of the investment entity's income.	"in accordance with section XXX [Specific allocation of covered taxes incurred by certain types of constituent entities]" – Cross reference to be checked as unclear whether section XXX applies to these circumstances.

Election to treat an investment entity as a tax transparent entity	**Deloitte comments**
XXX. (1) On the making of an election by a filing constituent entity, a constituent entity that is an investment entity or an insurance investment entity may be treated as a tax transparent entity for the purposes of this Part if— (a) the constituent entity-owner is subject to tax in the territory in which it is located under a fair market value or a similar regime based on the annual changes in the fair value of its ownership interest in such entity, and (b) the tax rate applicable to the constituent entity-owner on such income equals or exceeds the minimum tax rate.	Per Article 42(4) of the Directive, the election is to be made in accordance with article 45(1). A cross reference is required to the relevant section to provide greater clarity on how the election is to be made.

Election to apply a taxable distribution method	**Deloitte comments**
XXX. (1) On the making of an election by a filing constituent entity, a constituent entity owner of an investment entity may apply a taxable distribution method with respect to its ownership interest in the investment entity where— (a) the constituent entity-owner is not an investment entity, and (a) the constituent entity-owner can be reasonably expected to be subject to tax on distributions from the investment entity at a tax rate that equals or exceeds the minimum tax rate.	Per Article 43(5) of the Directive, the election is to be made in accordance with Article 45(1). A cross reference is required to the relevant section to provide greater clarity on how the election is to be made

Chapter 9: Transition Rules

Tax treatment of deferred tax assets, deferred tax liabilities and transferred assets upon transition	**Deloitte comments**
XXX(2)(d) - For the purpose of paragraph (a), any valuation adjustment or accounting recognition adjustment, with respect to a deferred tax asset, shall be disregarded.	Ch9 Transitional rules XXX(2)(d) – consider whether this would benefit from an additional statement "For the avoidance of doubt, a deferred tax asset shall be deemed to have been included in financial accounts even where one is not recognised on the grounds of immateriality or some other criterion."

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