Record of Meeting

Meeting	TALC BEPS Sub-Committee		
Location	Revenue Offices, Dublin Castle	**Meeting Date**	8/3/2024
ITI	Anne Gunnell; David Fennell^; Paul McKenna; Kim Doyle; Colm Rogers		
CCAB_I	Enda Faughnan; Gearóid O'Sullivan^; Kevin Doyle^; Paschal Comerford^		
Law Society	Philip Tully; Aidan Fahy^; Elaine Mooney^; Niamh Caffrey^		
Dept. of Finance ('DoF')	Deirdre Donaghy^ (for item 2); Michael Cantwell^ (for item 2); Garry Hynds^ (for item 3 & 4)		
Revenue	Jeanette Doonan^ (Chairperson); John Quigley; Keith Noonan; Catherine Duffy^; George Prizeman^; Máirín, Kane^; Sarah Murphy^; Brendan O'Hara^; Rory Noone (Secretary)		
^Attended remotely via Dial-in			

Minutes

The Chairperson opened the meeting advising that there would be a change to the order of the agenda and that Pillar Two would be dealt with ahead of other items and updates as there was a number in attendance solely for Pillar Two purposes.

1. Minutes of meeting on 6 December 2023

The minutes as circulated were agreed.

2. Pillar Two

Following the meeting on 6 December 2023, a number of submissions had been made by practitioners in relation to issues arising in respect of Pillar Two. The issues raised in the various submissions were discussed:

ITI Submissions

i. Foreign Income Inclusion Rule (IIR)

Can Revenue provide examples in guidance as to how the election in Section 111AAD (6) TCA 1997, which provides that a foreign IIR election may be made for domestic purposes to the extent that such an election would affect the calculation of domestic top-up tax for a qualifying entity, would apply and in what circumstances.

Revenue explained that any elections made in the GloBE Information Return (GIR) for the purposes of calculating the IIR top-up tax will apply for the purposes of the domestic top-up tax. A definition is required for a 'foreign IIR election' as there may be elections that are made for the purposes of calculating IIR/UTPR top-up tax that are given effect for the purposes of QDMTT which are made via a GIR filed with Revenue or a foreign tax authority.

ii. Substance Based Income Exclusion (SBIE)

For the purposes of calculating the qualified domestic top-up tax (QDTT) in scenarios where financial accounting net income or loss is determined by reference to the local accounting standard, can Revenue provide clarity in guidance as to whether the SBIE should be calculated with reference to the local accounting standard or with reference to the consolidated financial statements.

Revenue confirmed that using the local accounting standard would appear reasonable. However, additional time is required to fully consider this point before confirmation could be given.

Action: Revenue to consider further and address in guidance.

iii. Excluded Entity – Section 111C TCA 1997

Can Revenue confirm in guidance that OECD Commentary provided in paragraph 45 of Chapter 1 of the Model Rules can be relied upon by taxpayers in relation to section 111C and determining whether entities are in scope of the GloBE rules. It is particularly relevant for Ireland's investment fund and asset management sectors.

Revenue confirmed that, in accordance with section 111B, reliance can generally be placed on the Commentary. However, further details would be needed on the specific request before a specific confirmation could be provided or included in guidance.

Revenue asked if the issue could be further explained and a discussion took place. It was agreed that a further submission on the issue would be provided following the meeting.

Action: ITI to provide further details as to the issue and the need for specific guidance.

iv. QDTT Safe Harbour

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

Where the Irish domestic minimum top-up tax (DMTT) achieves safe harbour status as expected (and it has been designed to achieve safe harbour status), then the effect of section 111AI(2) is that the jurisdictional top-up tax for the QDTT subgroup is nil. In other words, no IIR top-up tax will arise to a parent entity in respect of entities that are subject to an Irish DMTT with safe harbour status, and that holds true for an Irish parent entity with Irish subsidiaries. The foregoing is subject to all the conditions set out in section 111AI being met.

It was asked what the timeline is in relation to achieving safe habour status?

It is not possible to provide a timeline at this time. However, Revenue confirmed that the self-certification questionnaire has been agreed and that Ireland was in the process of completing same for submission to the OECD.

v. Deferred Tax Assets on Losses

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

  Revenue explained that as this could have a significant impact on liabilities, as it could affect the timing of when Pillar Two liabilities are paid due to the mix of losses, this would require legislative amendment as opposed to being addressed in guidance. This will be for the DoF to consider.

  DoF asked whether the issue is material. ITI stated that provisioning is potentially an issue now but that it is a really practical issue. DoF requested that items that require legislative amendment be flagged inclusive of an indication as to the issue's materiality.

  Action: ITI to provide further details on possible legislative amendment needed. DoF to consider whether legislative amendment needed.

- ***Should the same methodology be used to determine to what extent capital allowances carried forward under section 291A(6)(b) TCA 1997 constitute a qualifying loss?***

  Revenue outlined that Article 9.1.1. of the Model Rules and section 111AW of the TCA provides that when determining the ETR for a jurisdiction in a Transition Year, and for each subsequent year, the group shall take into account all of the deferred tax assets and deferred tax liabilities reflected or disclosed in the financial accounts of all the Constituent Entities in a jurisdiction for the Transition Year. Such deferred tax assets and liabilities must be taken into account at the lower of 15% or the applicable domestic tax rate. A deferred tax asset that has been recorded at a rate lower than 15% may be taken into account at 15% if the taxpayer can demonstrate that the deferred tax asset is attributable to a GloBE / qualifying loss.

  In the case of the difference between the carrying value of an intangible asset for tax purposes (because there has been a restriction on the amount of capital allowances which could be claimed in a year) and the carrying value of the asset in the financial statements, the deductible temporary difference would not appear to be attributable to a GloBE/qualifying loss. Therefore, a deferred tax asset in respect of that temporary difference should be recognised at 12.5%.

  It was requested that practitioners explain why in their view it could be a qualifying loss.

  Action: ITI to revert and clarify.

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

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

  Revenue explained that as this could have an impact on liabilities this would require legislative amendment as opposed to being addressed in guidance. This will be for DoF to consider.

  Action: ITI to provide further details on possible legislative amendment needed. DoF to consider whether legislative amendment needed.

- ***Can Revenue provide guidance on how a taxpayer could satisfy the requirements of recalculating historical losses under the GloBE Rules for periods in which the GloBE Rules were not in force, and for periods for which the statutory requirement to retain records has elapsed?***

  In addition, can Revenue provide clarity in guidance for a scenario where a deferred tax asset that has been recast (i.e. that equates to a GloBE Loss) and how it should be unwound.

  Revenue outlined that the taxpayer should be able to demonstrate that it is reasonable to consider that the loss carried forward should be a qualifying loss. This can be done by assessing the impact of the book to tax adjustments as set out in legislation on the calculation of that loss where reasonably practicable. The taxpayer should make all best efforts to review the relevant financial information in respect of the year in which the loss arose and make adjustments to calculate the qualifying loss that would have arisen.

- ***It has previously been discussed that the recognition of deferred tax assets that have not been recognized in financial statements before the transition period and within the transition period are still relevant for Pillar Two purposes. This should be documented in guidance.***

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

Revenue outlined that, in accordance with section 111AW(2)(d), deferred tax assets that have not been recognised in financial statements either pre-transition period or within the transition period because of the impact of a valuation adjustment or accounting recognition adjustment should still be considered relevant deferred tax assets for Pillar Two purposes.

A detailed deferred tax schedule should be maintained to track all deferred tax positions (both assets and liabilities). The taxpayer should satisfy themselves that all relevant information is retained. No prescribed format will be published as it would not be possible to prepare a schedule of all temporary differences that would align to every taxpayer's chart of accounts.

In relation to what would be reasonable by way of records it may be possible to provide an example but ultimately it would be the responsibility of the taxpayer.

vi. Section 111AAL and 111AAO TCA 1997

Can Revenue provide guidance on the treatment of payments made to or from Irish constituent entities in respect of top-up taxes otherwise than within a UTPR or QDTT group? (For example, would a payment from a foreign constituent entity in respect of IIR/UTPR borne by an Irish constituent entity on the profits of the foreign constituent entity be subject to Irish corporation tax?). This is particularly relevant in circumstances where minority interests exist in an affected group and such payments are necessary to ensure that such parties are not unfairly impacted by the application of the rules.

Revenue outlined that there is no equivalent provision to provide relief from corporation tax for a payment from a foreign constituent entity in respect of IIR/UTPR borne by an Irish constituent entity on the profits of the foreign constituent entity. A legislative change would be needed, which is a matter for the DoF.

In relation to minority interest, Revenue questioned how likely is this to arise? Under the IIR, a parent entity is only subject to the top-up tax on its allocable share of the top-up tax of the minority interest. In terms of the QDTT, the top-up tax will only apply where the minority owned constituent entity is consolidated (i.e. where the entity is under the control of the in-scope group despite only holding a minority interest). Therefore, it is unlikely that there will be many instances of the QDTT applying to minority owned constituent entities.

The ITI outlined that they understood the issue would arise in practice but would consider further.

Action: ITI to revert with further details.

vii. Country-by-Country Reporting (CbCR) Safe Harbour

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

A brief discussion took place between DoF and the Law Society on the issue. The Law Society highlighted its view that the earlier date may be unconstitutional on the basis of its retrospectivity. They also outlined that the guidance also provides for optionality and they are aware of other jurisdictions considering the 2023 date. DoF clarified that there isn't any optionality as it requires application from 15 December 2022 unless there is a constitutional barrier to same.

DoF requested further details and examples of the issues arising if the earlier date were to apply.

Action: Practitioners to revert with further details.

viii. Section 111AAAB – Reasonable Care

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

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

Revenue explained that the "blanket confirmation" sought cannot be provided.

This issue was also addressed at the December meeting at which it was confirmed that consideration would be given to providing an example but that such an example would be led by the OECD guidance.

ix. Transition Year

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

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

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

Revenue noted that the issue being raised here is understood and recognised. However, further consideration is needed as to how it can be addressed.

Action: Revenue to consider whether the issue can be addressed in guidance or requires a submission to the OECD. Following the meeting Revenue wrote to the ITI referring to OECD Administrative Guidance released in February 2023 which inserted new Commentary in relation to Article 9.1.3. In particular, page 92 paragraph 10.9 provides that the acquiring entity may take into account a deferred tax asset to the extent that the disposing entity paid tax in respect of the transaction, but that the creation of a deferred tax asset under this paragraph shall not reduce the adjusted covered taxes of a constituent entity.

x. Foreign QDTT

Can Revenue clarify if foreign QDTTs are treated as equivalent to corporate income tax for double-tax agreement / treaty relief or are foreign QDTTs only relieved under the unilateral provision in Part 2 of Schedule 24?

Revenue outlined that the treatment of foreign QDTTs under double tax agreements is uncertain and still subject to ongoing consideration. At the time of the meeting, it was therefore not possible to provide a confirmation that foreign QDTTs are equivalent to corporate income tax and creditable under all of Ireland's double tax treaties. Until the matter could be clarified, foreign QDTTs should be relieved under the unilateral provision.

Action: Revenue to consider the matter further and include guidance in the TDM as appropriate.

Following the meeting Revenue have clarified that it is their view that that QDMTTs are domestic taxes on income and are, therefore, covered taxes for the purposes of Ireland's treaties. Therefore, foreign QDMTTs should be relievable in Ireland under Ireland's treaties. It is important to note that although this is the Revenue position, it doesn't necessarily reflect the position of all of Ireland's treaty partners. The treatment of foreign QDMTTs would need to be checked in each relevant jurisdiction.

xi. <u>Section 111AAD(2)(e)</u>

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

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

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

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

Revenue explained that this item has been sent to the OECD secretariat for future administrative guidance.

DoF further explained that they have put forward Ireland's position regarding priority of accounting year end guidance. However, there are tranches of items to be dealt with in guidance and it does not appear that it is in the first tranche.

DoF noted the importance of ensuring that OECD discussions can be comprehensive when the matter arises and asked practitioners to provide information on any further events that can give rise to year-end alignment issues, as and when they are identified.

xii. <u>Section 111P – Tax Functional Currency</u>

Can Revenue provide examples of what is considered the tax functional currency of trading companies versus non-trading companies.

Additionally, can Revenue provide examples and clarification of the tax functional currency of a company that is trading but FX arises in respect of non-trading items.

On the request for examples, Revenue asked the ITI to provide examples for consideration.

Section 111P provides that 'tax functional currency' means the functional currency used to determine the constituent entity's taxable income or loss for a covered tax in the jurisdiction in which it is located. Taxpayers should identify the currency which is used to determine their taxable income. For non-trading transactions this is euro. For trading transactions this is expected to be the accounting functional currency.

Action: ITI to prepare examples.

xiii. Section 111U(3)(a) – Covered Taxes

Can Revenue provide clarity in guidance that the excluded items referenced in section 111U(3)(a) (adjusted covered taxes), section 111X(5)(a) (total deferred tax adjustment amount) and section 111AW(3) (deferred tax assets/liabilities…) include all of the adjustments to determine qualifying income or loss that are specifically listed in sections 111P and 111Q TCA 1997.

Revenue confirmed that the excluded items referenced in section 111U(3)(a), section 111X(5)(a) and section 111AW(3) include all of the adjustments to determine qualifying income or loss specifically listed in sections 111P and 111Q.

xiv. Securitisation – Orphan Entities

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

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

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

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

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

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

Revenue outlined that there is a draft paper with the OECD's Working Party 11 delegates in relation to securitisation vehicles and the paper seeks to address the concerns raised by stakeholders.

DoF outlined that it is on the agenda for the first tranche of OECD guidance in 2024.

xv. General / Ownership Interest / Partially Owned Parent Entities (POPE) & Joint Ventures (JV)

- **We would request guidance on the interaction of "Ownership Interest" and POPE / JV rules (particularly in the context of preference shares).**

As discussed at TALC at 6 Dec meeting, stakeholders were requested to consider whether there is a potential solution to the issues regarding ownership interest and preference shares, that may be provided to the OECD Secretariat for consideration. Nothing has been received so far.

Action: Stakeholders to propose a solution(s) at which point further consideration to be given by DoF/Revenue about reverting the matter to the OECD.

xvi. CbCR Safe Harbour

In relation to the various points raised regarding the CbCR Safe Harbour these should have been addressed in the OECD's December 2023 Administrative Guidance.

xvii. Financial Services

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

Revenue asked stakeholders to confirm that where separate accounts are maintained at the sub-fund level, then all sub-funds will maintain such accounts? CCAB_I confirmed that all sub-funds would have accounts.

The GloBE rules have specific provisions dealing with allocation of income, taxes, SBIE between a Main Entity and its PEs. It is unclear whether such rules should apply in a fund-sub-fund structure. To provide certainty on this issue it will be necessary to consult with the OECD.

Revenue asked stakeholders whether they were aware of this issue arising in other jurisdictions and the approach being adopted? The ITI said that they would need to check.

Action: ITI to confirm whether the issue arises in relation to other jurisdictions and the approach that has been adopted. DoF/Revenue to consider submission of issue to OECD for guidance.

xviii. Definition of Investment Fund in Master-Feeder Fund Structures

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

Revenue outlined that further details, (for example, whether the issue arises in other jurisdictions and could industry resolve this issue by appointing a regulated manager to the fund) would need to be provided, at which point it would be further considered for submission to the OECD for guidance.

Action: Practitioners to provide further details. Subsequent to receipt of further details DoF/Revenue to consider submission to the OECD for guidance.

xix. Master Funds

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

While it is not specifically addressed by the OECD Commentary or administrative Guidance, where

- a master fund is designed to pool financial or non-financial assets from a number of investors, and
- it does so via a single feeder fund (which itself is widely held), or a number of feeder funds, where the beneficial owners of the feeder funds are not connected,

then it would appear reasonable to conclude that the master fund meets the requirement of condition (a). However, as this is an issue which should not be unique to Ireland, the views of the OECD Secretariat would be needed on this point and in this regard further details would be required in order to make a submission to the OECD on this point.

Action: Subsequent to receipt of further details, DoF/Revenue to consider referring the matter to the OECD for guidance.

xx. Limb (a) of the definition of Investment Fund

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

While it is not specifically addressed by the OECD Commentary or administrative Guidance, where:

- a fund is designed to pool financial or non-financial assets from a number of investors, and
- it does so via a single investor that is itself widely held, i.e. where the beneficial owners of the investor are not connected,

then it would appear reasonable to conclude that the master fund meets the requirement of condition (a). However, as this is an issue which should not be unique to Ireland, the views of the OECD Secretariat would be needed on this point and in this regard further details would be required in order to make a submission to the OECD on this point.

Action: Subsequent to receipt of further details, DoF/Revenue to consider referring the matter to the OECD for guidance.

xxi. Asset Management – Section 111S

Revenue noted that, in relation to the various points for suggested areas for guidance regarding asset management; the interpretation of Article 3.5.4 set out in the query contained in the submission appears to have merit, in that it would result in the financial accounting net income or loss of a flow-through entity that is allocable to a non-group entity being removed from the top-up tax calculations. However, it would be prudent to await any discussion of the topic at Working Party 11 and the publication of agreed Administrative Guidance, so as to not pre-empt a process which appears to have already begun.

CCAB_I Submission

i. Section 111AU – Article 7.5 of the Model Rules

Example:
An Irish tax resident (re)insurance company holds units in a French FCP, being the group's internal investment fund. The French FCP is not viewed as transparent in France for Pillar Two purposes. The Irish (re)insurance entity is taxed on a Case I basis on the fair value movements in the fund in line with the accounting treatment. Pillar Two top up tax under the Irish QDMTT may also arise in line with the accounting treatment where an Equity Investment Inclusion election is made under Section 111W[1] . In France, the French FCP will be subject to Pillar Two taxation as it is not viewed as transparent for Pillar Two purposes. Therefore, double taxation arises.

[1] Section 111W Finance (No. 2) Act 2023 (OECD Article 3.2.1)

The purpose of the election under Article 7.5 / s111AU is to address this potential double taxation. Where the election is made by the Constituent Entity owner, the Investment Entity or Insurance Investment Entity should be treated as a Transparent Entity for Pillar Two purposes in the location in which it is located thereby eliminating the risk of double taxation.

The election is only permissible where the owner is subject to tax on a mark to market basis at a rate of tax that equals or exceeds 15%. "Tax" is not defined for the purposes of Section 111AU and therefore confirmation is sought that the Irish constituent entity should be viewed as being subject to tax at the minimum rate of 15% where it is subject to both Irish domestic tax and QDTT on mark-to-market movements. If this is not the case, an election cannot be made by an Irish Constituent Entity under Section 111AU and double taxation may arise.

Please confirm that an Irish Constituent Entity, subject to Irish corporation tax and the Irish QDTT on mark-to-market movements in its ownership held in an Investment or Insurance investment entity is eligible to make the election under Section 111AU.

On the tax rate point, Revenue outlined that it understood that this only relates to the domestic CIT rate and would not include a domestic top-up tax amount. It would be difficult to interpret "the tax rate" to mean QDMTT because that is, strictly, not a tax rate being applied but rather a minimum tax/Top-up Tax Percentage. However, input would be needed from the OECD on this to form a definitive view.

Regarding the example and the treatment of the FCP, Revenue asked for further details as to why is that the case.

It is not understood why, in the example, the French FCP will be subject to Pillar Two tax in France and not be treated as tax transparent entity with income and taxes allocated to its owners without the need for the transparency election.

Revenue noted that if this is a significant issue it will need to be raised at OECD level as it involves another jurisdiction. CCAB_I confirmed that this a real issue.

Action: CCAB_I to revert with further details at which point DoF/Revenue to consider referring the matter to the OECD for guidance.

ii. Section 111AN (Transfer of Assets and Liabilities) and Interaction with Section 617 (Group Relief) & Share for Undertaking Two Party Swap

An additional point was raised by the CCAB_I at the meeting. Clarity was requested from Revenue as to whether group relief under section 617 for a share for undertaking two party swap fits with the strict reading of section 111AN.

Action: CCAB_I to send in a submission with further detail so that the issue can be considered further.

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The Chairperson addressed the matter of the Tax & Duty Manual (TDM) and circulating the first draft of same. The TDM will be a living document the first draft of which is expected to issue in the coming weeks (estimated between 2 – 6 weeks) and will initially contain just the correlation table.

3. Outbound Payments

Following the meeting on 6 December 2023, practitioners submitted additional feedback in January 2024 in relation to issues for guidance in respect of the outbound payment defensive measures inserted as chapter 5 of Part 33 TCA 1997. Revenue provided a draft copy of the proposed TDM on this topic to TALC sub-committee participants on 22 February 2024 addressing issues raised during both the meeting in December 2023 and the feedback received in January 2024.

Stakeholders welcomed the TDM and guidance and examples set out therein.

During the course of discussion, the following issues were raised:

i. TDM Page 6 – Zero Tax Territory

ITI requested clarification on how the rules would apply if a particular territory taxes income and profits only but not gains as the draft TDM refers to income, profits or gains.

Action: Revenue to consider wording of TDM and update where appropriate, in line with the legislation which refers to income, profits and gains, i.e. a territory would not be considered a zero-tax territory where it has a tax which generally applies to income and profits but not gains.

ii. TDM Page 6 – Zero Tax Territory & Interaction with Pillar Two – Safe Harbour

ITI enquired whether a payment to company which was in scope of a qualifying Pillar Two top-up tax, but which could avail of a safe harbour in its territory in respect of that top-up tax, would be considered to be an excluded payment. In addition, would there be any impact if no top-up tax were to apply due to the substance based income exclusion (SBIE).

Revenue confirmed that such a payment would be considered to be within the charge to supplemental tax and therefore would be an excluded payment and that there would be no impact due to the application of the SBIE.

In relation to the same example, stakeholders asked what the result would be if the company in question was part of a US owned group, which is a country that has not implemented Pillar Two, and therefore no IIR top-up tax would apply.

Revenue replied that it would be likely that the profits of such a company to be within the charge to GILTI, in which case the payment would also be an excluded payment.

Action: Revenue to consider wording of TDM and update where appropriate in relation to payments in scope of Pillar Two taxes.

iii. Page 7 – Definite influence

ITI noted that the draft TDM uses the word 'control' and it was suggested that this should be clarified as users may consider the word 'control' as referring to a general test of control for tax purposes.

Action: Revenue to consider wording of TDM and update where appropriate.

The TDM uses the word 'influence' and it is suggested it should be replaced with 'authority', for example.

Action: Revenue to consider wording of TDM and update where appropriate.

ITI requested a further basic example to be included in the TDM on the meaning of definite influence.

Action: Revenue to consider examples in TDM and update where appropriate.

iv. Page 8 – Section 817U – Example 3.5.1

Practitioners queried the application of the association test in relation to examples involving partnerships. Specifically, practitioners queried whether the test applied in this example should be the test in section 817U(3)(a)(i) TCA97. Practitioners stated that as section 817U(3)(a)(i) does not make reference to "an interest in" and a partner can only have a limited interest in each of the shares of a company via the partnership, then the partner cannot meet the test for association in 817U(3)(a)(i).

Action: Revenue agreed to consider the point further.

v. Page 22 – Quoted Eurobonds

Practitioners queried the reference a Eurobond being an international bond that is denominated in a currency not native to the country where it is issued, as this was not in line with section 64 TCA 1997.

Action: Revenue to consider wording of TDM and update where appropriate.

vi. Page 33 – Example 5.7.1. – Exclusions Relevant to Dividend Payments

Clarification was sought on whether taxpayers could specify the source of funds/reserves from which dividends were derived for the purposes of section 817X(1)(c).

Action: Revenue agreed to consider and update the TDM as appropriate.

There was an issue raised in relation to the mechanics of the example and the treatment of paid up share capital in calculating the portion of a gain which would have been indirectly charged to tax.

Action: Revenue agreed to consider and update the TDM as appropriate.

vii. Section 817V(6) – Payment of Interest

Stakeholders queried if section 817V(6) could be extended to publicly listed debt of an entity located in a specified territory.

DoF said that the current policy is not to extend the provisions of section 817V(6).

4. International Tax - Update

The following updates were provided on behalf of International Tax Division by the Secretary to the Sub-Committee:

Transfer Pricing Proposal
The Transfer Pricing proposal, which was launched on 12 September 2023, seeks to harmonise the implementation and application of TP rules within the EU and ensure a common approach to transfer pricing.

Three technical Working Party meetings regarding the proposal have been held: October 2023, January 2024, and February 2024. These meetings have focused on overarching policy considerations, legal implications, and the technical details of such a Directive. The next Council Working Party meeting to discuss the proposal is tentatively scheduled for late April 2024.

Head Office Taxation (HOT)
The HOT proposal was launched on 12 September as part of a broader "SME Relief Communication". The proposal aims to reduce tax compliance costs for SMEs operating cross-border by allowing them to apply the tax rules of their head office state to calculate the taxable income of their permanent establishments in other Member States. The proposal would also allow the tax return to be filed in, and the associated tax liability paid to, the head office state which would share the return and transfer the tax collected to the host state.

Although the proposal could bring benefits for SMEs, it could also represent a considerable administrative burden for tax administrations. The proposal also raises policy considerations.

One introductory technical Working Party of the Council was held in Brussels on 29th September 2023. The Belgian Presidency has said that Council discussions will resume in the second half of its Presidency (April – June '24). The operational implications of the HOT proposal will also be discussed in an ad hoc workgroup of Member State tax officials being organised by the Commission. No dates have yet been set for meetings of that workgroup.

DoF: By way of additional update DoF that there had been push back at EU level on these proposals.

AOB

Sharing of Submissions

It was agreed, instead of requiring agreement in each instance, that going forward submissions received from the representative bodies (ITI, CCAB_I and the Law Society) are for circulation to all other members of the Sub-Committee unless otherwise marked as confidential / not for circulation.

Next Meeting

It was suggested that the next meeting would take place in June 2024, but an earlier meeting would be considered if the need arose.