Record of Meeting

Meeting	TALC BEPS Sub-Committee		
Location	Revenue Offices, Dublin Castle	Meeting Date	16 October 2024
ITI	Anne Gunnell; David Fennell; Gareth Bryan; Paul McKenna; Emma Arlow.		
CCAB_I	Enda Faughnan^; Gearóid O'Sullivan^; Paschal Comerford^		
Law Society	Andrew Quinn; Amelia O'Beirne; Aidan Fahy^; Elaine Mooney^;		
Dept. of Finance	Ciaran Conroy^; Michael Cantwell^		
Revenue	Jeanette Doonan (Chairperson); John Quigley; Keith Noonan; Alan Carey, Deirdre Ní Alluráin, Maresa Hempenstall, Catherine Duffy^; Máirín Kane^; Diarmúid Kelly^; Rory Noone (Secretary)		
^Attended remotely via Dial-in			

Minutes

The Chairperson welcomed attendees and explained that the main focus of the meeting in line with the agenda would be discussing relevant items from the Finance Bill and the submissions received in relation to same.

As the minutes of the last meeting on 15 July 2024 had, in advance of this meeting, already been agreed and published the first item on the agenda was the international tax updates.

1. International Tax Updates

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

i. Transfer Pricing Proposal

Recent discussions on the TP proposal, including the recent meeting in October, have largely focused on the possible implementation of a new Transfer Pricing platform within the European Union as a potential alternative to the Directive.

Action: A question was asked as to whether further details regarding the platform and distinction from the Directive could be provided. This matter was referred to International Tax Division and the following is the response provided:

A transfer pricing platform, if established, would allow Member States to discuss various transfer pricing issues and produce non-legislative reports or recommendations on such issues, as opposed to agreeing a hard-law instrument (i.e. a Directive). The discussions remain ongoing regarding the possible structure and operation of any such platform, including its possible mandate. A previous transfer pricing platform, known as the EU Joint Transfer Pricing Forum ("JTPF"), operated from 2002 until 2019. It is not expected that a new platform, if established, would follow the same structure as the JTPF but there could be some similarities between the two.

ii. **Head Office Taxation**

Since the last update in March there have been two technical Working Party meetings. In addition, an ad hoc workgroup of certain Member State tax officials was created to discuss the operational implications of the proposal. Revenue officials participated in the workgroup which involved five online meetings.

Whilst Member States support the general objective a range of high-level issues have been raised as well as technical issues.

A further meeting is scheduled in October.

iii. **FASTER**

Following work under the Spanish and Belgian Presidencies on the FASTER proposal, ECOFIN Council reached a political agreement on a compromise text in May 2024. Due to the extent of changes from the original proposal the file is to be referred back to the European Parliament.

Formal agreement on the compromise text is expected in early 2025.

In advance of the meeting submissions had been received from all three representative bodies relating to the items from the Finance Bill that had been included on the agenda.

2. <u>Finance Bill 2024 – Participation Exemption</u>

ITI

i. <u>Definition of Relevant Subsidiary – Section 831B(1)</u>

The ITI proposed that an amendment is required to the definition of 'relevant subsidiary' in Section 831B(1) to deal with the fact that the definition of relevant territory excludes the State. Otherwise the definition will have adverse consequences for Irish business combinations and mergers, including transfers of businesses from Ireland to an intermediate EU holding company.

Revenue stated that Ireland was excluded from the definition of a relevant territory, reflecting a policy decision from the Department of Finance.

In addition, whilst the ITI acknowledged the purpose of the anti-avoidance provisions with respect to preventing reserves falling within the provision that originate from 'bad' jurisdictions, the ITI noted that the provision makes no reference to such reserves. It is entirely possible that a company in a relevant territory with significant reserves could acquire a business from a 'bad' jurisdiction with minimal impact on reserves and be excluded from the participation exemption for a period of 5 years. The ITI sought clarification on the policy rationale.

Similarly, Revenue stated that the approach taken follows the policy decision made.

Record of Meeting

ii. Distributions made out of Assets – Section 831B(5)

The ITI proposed that an amendment be made to clarify the requirement under section 831B(5)(b) to satisfy the requirements of section 626B in respect of a distribution made out of assets will not apply to the extent that a distribution is also made out of the profits of the relevant subsidiary.

Revenue stated that the provision linked to section 626B only applies to distributions made out of assets that are not distributions made out of profits and that the intention is clear and it will be reflected in guidance.

iii. Definition of Parent Company

The ITI noted that the definition of parent company refers to "not generally exempt from foreign tax". In that regard it is unclear as to what is envisaged by "generally" and whether this generality is to be read in an objective or subjective manner.

Revenue confirmed that the term 'generally' is to be construed in an objective manner.

iv. Definition of Relevant Distribution

ITI sought clarity on limb (b)(ii) of the definition of relevant distribution, which states "out of the assets of the relevant subsidiary where the cost of the distribution, or part of the distribution, as the case may be, falls on the relevant subsidiary. ITI are of the view "cost…falls on the relevant subsidiary" is unclear, as arguably the cost of all distributions would fall on the company if it comes out of its assets.

Revenue stated that it is not an additional test and the words used were intended to provide clarification.

ITI also recommended an amendment to the definition of relevant distribution to include "for Chapter 2 of Part 27 purposes" after the text "section 743". As section 743 TCA 1997 deals with a material interest in offshore funds, accordingly it is the ITI's suggestion it would be preferable for clarity that this provision is amended so that it refers to an offshore fund within the meaning assigned to it by section 743(1).

Revenue stated that there is no need to include the amendment as specified as it is already implied by virtue of the fact that section 743(1) provides for the meaning of offshore fund in section 743 to apply to Chapter 2 of Part 27 (*"In this Chapter,…")*.

The ITI stated that where other provisions rely on the meaning of offshore fund a narrow meaning is given.

v. Commencement Provision – Section 831B(2)

Section 831B(2) outlines that the participation exemption will apply in respect of a relevant distribution made on or after 1 January 2025. The use of the word "made" is unclear. Does this mean when the distribution is declared or payable? ITI recommends that the text is changed to "received".

Revenue stated that whilst 'made' is undefined it is the terminology that is used in many other provisions relating to distributions, including certain withholding tax provisions. Distributions do not only encompass cash dividends that are 'paid' and so it requires a broader term. 'Made' in this regard would mean an obligation on the relevant subsidiary and an entitlement to receive for the company.

Law Society: There is a difference between declared and made and noted section (4) is somewhat helpful, further there was a UK Upper Tribunal case[1] on when dividends should be treated as paid.

Further, there is a difference between when a dividend is declared.

Revenue stated that flexibility is needed and the wording used is consistent with other similar commencement provisions.

Action: Revenue committed to take the matter away and to consider same for guidance.

vi. Geographic Scope

The ITI welcomed the Minister's commitment that work will continue in the coming year on further consideration of the geographic scope of the exemption. In this regard consideration could be given to include text, for example, which provides if the relevant subsidiary is subject to a foreign QDTT or foreign IIR regime or if it would have been so subject were it not for the application of Irish IIR rules.

Revenue stated that this is a policy matter for the Department of Finance.

vii. Relevant Claim

The ITI members expressed concern in relation to the policy rationale for an opt in rather than an opt out for companies in relation to claiming the exemption. Accordingly, ITI members would welcome clarification in relation to the possibility of amending returns.

Revenue stated that, in its view, it is neither an opt in nor an opt out approach. As regards amending returns there is no initial issue with this.

[1] Case referred to: THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS v PETER GOULD [2024] UKUT 00285 (TCC)

viii. Period to Elect

ITI noted that the period within which the parent company must elect is very short when one considers the complexity of the issues to be considered in making such a decision. Consideration should be given to affording a 2-year window (similar to group/396B claims) within which a taxpayer can decide to elect.

Revenue stated that there is a sufficiently long period between when a distribution may be made and when the tax return for the accounting period must be filed and there is an ability to amend the tax return, as such the timeframe is considered reasonable.

ITI said that it depends on complexity of the group. ITI also noted a recent TAC case[2] on close company surcharges, arising from which there is some concern and unease regarding the consequences for late returns.

Revenue stated that, in its view, the claims for the participation exemption should not be burdensome, particularly within the context of associated claims for double tax relief that would be required in tax returns.

ix. Section 110 Exclusion

ITI stated that it is apparent from the wording in section 831B(3) that is aimed exclusively at excluding section 110 companies from eligibility to the participation exemption regime. There would not appear to be a policy justification for excluding section 110 companies of a profile of the type that would otherwise satisfy the "parent company" and other requirements of the regime. The regime already excludes from the calculation of a qualifying participation any share capital in the relevant subsidiary in respect of which a sale would factually be treated as a trading receipt of the company owning those shares. In this regard the regime, as designed, is not available to section 110 companies of the type for whom their shareholding is factually held in a trading capacity.

Revenue stated that it was a policy decision. The provision excludes section 110 companies and resident companies with foreign trades carried on wholly abroad and charged to tax in accordance with section 77(5).

2 The TAC case reference was not provided.

Record of Meeting

Law Society

i. Relevant Distribution

Subparagraph (b)(ii) of definition of 'relevant distribution', the requirement that the distribution is made "out of the assets of the relevant subsidiary where the cost of the distribution, as the case may be, falls on the relevant subsidiary". The second requirement that the cost of the distribution falls on the subsidiary seems superfluous if the distribution is made out of the assets of the subsidiary. What is the purpose of the dual requirement? In the Law Society's experience, in tax disputes, Revenue are putting taxpayers on proof of every aspect of the provisions they rely on. It is therefore important that every requirement imposed on taxpayers has an independent and clear meaning. That is not the case with this requirement and it is recommended it be deleted.

Revenue confirmed that the approach taken was in line with the policy decision. Revenue stated that it is not an additional test and the words used were intended to provide clarification.

ii. Commencement Provision

The commencement provision applies in respect of relevant distributions "made on or after 1 January 2025". We're not aware of a definition of when a distribution is treated as "made". Section 4 has helpful language explaining when a dividend is treated as paid.

This point was dealt with when responding to the ITI's query on the same point, see above (item v. of the ITI's queries).

iii. Definition of Relevant Subsidiary

In the definition of 'relevant subsidiary', subparagraph (a)(i) as drafted could be read as requiring that for entities resident in jurisdictions with which Ireland enters into a new DTA will not qualify for (potentially) a five year period. Law Society expect this is unintentional, and suggest that (a)(i) be amended to read "is, on the date on which it makes the relevant distribution, by virtue of the law of a relevant territory, resident for the purposes of foreign tax in the relevant territory, and was so resident in that jurisdiction throughout the relevant period."

Revenue confirmed this understanding is correct, a relevant subsidiary must be tax resident in a jurisdiction with a new DTA for a five-year period. No amendment is required as this treatment reflects the policy intention.

CCAB-I

i. <u>Section 110 Exclusion – Section 831B(3)</u>

CCAB-I believe it is apparent that the wording in Section 831B(3) is aimed exclusively at excluding s110 companies from eligibility to the participation regime. There would not appear to be a policy justification for excluding section 110 companies of a profile of the type that would otherwise satisfy the "parent company" and all other requirements of the regime (i.e. have 5% or more OSC shareholdings). Such s110 companies should be treated no differently to other companies with the same factual profile.

This point was dealt with when responding to the ITI's query on s110 companies, see above (item ix. of the ITI's queries).

ii. <u>Period to Elect</u>

The period within which the parent company must elect is very short when one considers the complexity of the issues to be considered in making such a decision, particularly in circumstances where it is a blanket election impacting all relevant distributions received by a holding company with potentially multiple shareholdings. In part-recognition of this, the Tax Acts already provide for longer time-frames for certain claims or elections to be made (e.g. 2 years for group relief etc.). Consideration should be given to affording a 2 year window (similar to group/396B claims) within which a taxpayer can decide to elect.

This point was dealt with when responding to the ITI's query on the same point, see above (item viii. of the ITI's queries).

iii. <u>Alignment of Participation Exemption & Section 21B</u>

With the extension of the availability of the Participation Exemption to distributions out of assets (subject to section 626B applicability) there is a mismatch with the provisions of section 21B which only deals with distributions from trading profits. Consideration should be given to aligning these provisions.

Revenue confirmed that whether there would be an alignment is a matter of policy for the Department of Finance.

<u>Additional Questions re- Participation Exemption:</u>

i. Law Society – what if there are movements between relevant territories?

Revenue confirmed that it is possible for a relevant subsidiary to move tax residence between relevant territories in the 5-year period prior to the distribution and for the exemption to still apply.

Action: To clarify in guidance.

ii. CCAB-I – how do Revenue view the interaction with the wording of section 110s and FII exemption?

Subsection (3) contains a requirement for the distribution to be otherwise chargeable to tax under Case III of Schedule D and this amount cannot be computed in accordance with the provisions applicable to Case I of Schedule D. This refers to circumstances where, for example, section 77(5), relating to certain foreign trades, and section 110 applies. Revenue confirmed that the inclusion of this requirement in the participation exemption does not alter the position whereby section 110 companies cannot avail of the exemption under section 129 for franked investment income.

iii. ITI – where in the legislation does it allow for movements?

The definition of a relevant subsidiary requires the company to be "*by virtue of the law of a relevant territory, resident for the purposes of foreign tax in the relevant territory".* The use of the word "the" in the latter half of the requirement reflects the fact that a company could only be tax resident in a territory under the laws of the same territory. Revenue clarified that it is possible for a relevant subsidiary to move tax residence between relevant territories in the 5-year period prior to the distribution.

iv. ITI – will the section 835YA amendment reflect the October update to the EU list of non-cooperative jurisdictions?

Revenue confirmed that it is intended to reflect the update when the Official Journal citation becomes available.

3. Section 45 of Finance Bill – OECD Pillar One – Amount B

i. ITI Query

Section 835DA(5)(b) amends the documentation requirements in section 835G to allow for instances where the arm's length amount is determined in line with Amount B. As part of this, the local file means a report containing confirmation that in respect of each arrangement to which section 835DA applies that the conditions in section 835DA(3)(b) and (c) are satisfied.

These refer to the treatment of the consideration and profits in the covered jurisdiction and are required to be satisfied for section 835DA to apply to the arrangement. It is unclear why the local file requires further confirmation of a condition that must necessarily be already be met in order for the local file requirements relevant to Amount B to be required in the first place.

Revenue confirmed that it was included for risk assessment purposes so that the auditor (Revenue official) can see that the conditions were considered by the taxpayer and an explicit confirmation has been included that they have been satisfied.

4. Section 115 of the Finance Bill – OECD Pillar Two

ITI

i. Section 111AI – Qualified Domestic Top-Up Tax Safe Harbour

The Bill contains an amendment to section 111AI to the effect that the jurisdictional top-up tax amount in respect of a QDTT subgroup will not be deemed to be zero insofar as it relates to additional top-up tax as computed under section 111AF(1)(b).

The ITI expressed a view that this carve-out may be inappropriate in the context of the QDMTT Safe Harbour noting para. 9 of the OECD Consolidated Commentary on the QDMTT Safe Harbour. The ITI suggested that the safe harbour appears to reduce all IIR/UTPR top-up tax, including additional top-up tax, for a QDMTT safe harbour jurisdiction to nil as such the ITI are of the view that this amendment should be removed from the Bill.

Revenue stated that it does not agree with the point being made. Where the QDMTT Safe Harbour applies to the year that there was an error, additional top-up tax will arise. The amendment to Section 111AI will ensure that where there is an error in a fiscal year in respect of which the Safe Harbour did not apply then any additional top-up up tax will be collected.

Revenue is of the view that it is inappropriate for the benefit of the Safe Harbour to apply for a fiscal year in respect of which the Safe Harbour didn't apply.

ii. Loss Deferred Tax Assets (DTAs)

The ITI advised that in their view there are a number of issues that remain unanswered in relation to loss DTAs and the order of application of qualifying and non-qualifying losses. These are as follows:

- ***What is the correct treatment if in a single fiscal year both a qualifying (15%) and a non-qualifying (12.5%) loss DTA arises?***

  Revenue noted that an apportionment approach would appear to be the most reasonable allocation method.
  Stakeholders agreed this would seem reasonable.

  The ITI also noted that other jurisdictions may have a prescribed method of utilising losses and that this needs to be considered further.

  Action: Revenue to consider further and to address in guidance.

- ***While ITI indicated that some impacts of the LIFO rules might be regarded as implicit in the legislation, ITI suggested some further clarification from Revenue on the extent of the application of the LIFO approach might be appropriate (e.g. regarding pre-transition periods). This will be relevant for measuring the amount of 15% versus 12.5% loss DTAs brought in on transition into the rules.***

  Revenue acknowledged the issue raised and will consider providing further clarification in guidance.

iii. Principles for construing rules in accordance with OECD Pillar Two guidance – Section 111B

- ***The ITI noted that the definition of "OECD Pillar Two guidance" outlined in section 111B(1) has been updated to replace the OECD Examples document with the updated OECD Examples document that was released in April 2024. The OECD also released Consolidated Commentary to the Model Rules in April 2024. Will section 111B(1)(a) be updated to reflect this document?***

  This is a policy decision for the Department.

  However, Revenue's recommendation would be to continue to refer to the various items of Administrative Guidance as they provide further detail (for example, in terms of background information) than that provided for in the consolidated commentary.

- ***Whilst elements of the December 2023 and June 2024 OECD Administrative Guidance have been legislated for we note that other aspects have not. Is Revenue's interpretation of the rules in line with the additional guidance that has not been legislated for?***

  Revenue confirmed that the December 2023 guidance was legislated for by way of Ministerial Order.

  In relation to the June 2024 guidance; Revenue confirmed that the Department of Finance are working on the Ministerial Order (update: since published - 25 Oct; S.I. 551/2024).

  As regards interpretation; yes, in accordance with section 111B, Part 4A is construed so as to ensure consistency, as far as possible between Part 4A and the Model Rules.

- ***ITI noted that additional provisions regarding the treatment of hybrid arbitrage arrangements under the Transitional CbCR Safe Harbour have been legislated for with effect from 31 December 2024. Can Revenue confirm that this is not applicable for accounting periods beginning before 31 December 2024?***

  Revenue confirmed that, per the legislation in the Finance Bill, these provisions should not apply to fiscal periods beginning before 31 December 2024.

  Action: Revenue to provide clarification in guidance.

- ***Section 115(2) and (3) refer to the effective date of the amendments listed in section 115(1). There's a number of amendments that allow constituent entities to use local accounts when preparing the QDTTT calculation (see section 115(1)(s)(iv) of the Finance Act 2024). The effective date per section 115(2) is accounting periods on or after 31 December 2024.***

  Can Revenue clarify how the above changes interact with the legislation for 2024 as accounting standard mismatches will arise for QDTT calculations.

  Revenue stated that as there was uncertainty as to whether the amendments could increase the liability of some taxpayers the amendments were made to apply prospectively.

  Action: Revenue to consider the possible application to earlier periods and will also consider whether it should be included in guidance and / or whether a legislative amendment would be required.

- ***ITI would welcome clarification as to why the June 2024 OECD Administrative Guidance was not added to the "OECD Pillar Two guidance" referred to in section 111B.***

  Revenue confirmed that in relation to the June 2024 guidance that the Department of Finance are working on the Ministerial Order (update: since published - 25 Oct; S.I. 551/2024).

Law Society

i. <u>Section 115(1)(j)</u>

   It was noted by the Law Society that a number of submissions have been made to the Department of Finance on the date from which the anti-avoidance concepts in respect of the hybrid arbitrage arrangements in December 2023 Administrative Guidance apply as a matter of Irish law. The Law Society welcome the introduction of primary legislation to achieve this but, as above, would like the position for 2024 to be clarified. Stakeholders were disappointed that the Department had not been in touch with those who made submissions in advance of publication of the Bill.

<u>Additional Questions re-Finance Bill – Pillar Two legislation:</u>

i. **The ITI queried whether there was any update on guidance on the application of the local accounting standard where the fiscal year of the local entities was different to the fiscal year of the UPE.**

   Revenue stated that there was no further update but is still on the OECD agenda.

5. Update on Pillar Two TDM

i. Intra-group Financing Arrangements

The CCAB-I, ITI and Law Society suggested that the approach contained in draft guidance shared with TALC BEPS in relation to intra-group financing arrangements and the use of losses (which are unrecognised for accounts purposes) goes beyond OECD guidance.

Revenue stated that at the August 2023 TALC BEPS meeting it was confirmed that where the lender in an intra-group financing transaction has losses carried forward which are used to shelter the interest income there has been a commensurate increase in the taxable income of the lender. That confirmation did not contemplate the losses not being recognised for accounting purposes.

It is Revenue's understanding that the intention of the guidance agreed to date by WP11 is to not agree that there has been a commensurate increase in the taxable income of the lender where there is a tax attribute that shelters the income and that tax attribute was only utilised because of the receipt of the income from the intra-group financing transaction. This is based on Example 3.2.7-2 to the Commentary, where the heading is "Special Rule for Intra-Group Financing Arrangements and use of tax attributes that would not otherwise be used to increase the ETR of a Low-Tax Entity". Although the example is excess interest otherwise unusable, the principles would appear to equally apply to other tax attributes (i.e. losses) that would otherwise be unusable.

In addition, the December 2023 guidance in relation to CbCR Safe Harbour anti-arbitrage provisions at pg20 states that a Constituent Entity will not be considered to have a commensurate increase in its taxable income to the extent that the amount included in taxable income is offset by a tax attribute, such as a loss carryforward or an unused interest carryforward, with respect to which a valuation adjustment or accounting recognition adjustment has been made or would have been made if the adjustment determination were made without regard to the ability of a Constituent Entity to use the tax attribute with respect to any Hybrid Arbitrage Arrangement entered into after 15 December 2022.

Both of the above pieces of guidance informed the draft TDM guidance as circulated. Revenue acknowledges the concerns raised by stakeholders and that guidance on this specific point has not been provided by the OECD to date via agreed administrative guidance. Therefore, Revenue suggests that this issue be referred to the OECD secretariat for their view, which may mean that the question is put to Working Party 11. In the interim, Revenue will publish the TDM so that all stakeholders are aware of the position that Revenue have taken based on Revenue's interpretation of the rule and the OECD guidance available.

Action: Revenue to publish the draft guidance in the next iteration of the TDM.

ii. Intra-group financing arrangements, low-tax jurisdiction and CbCR Safe Harbour

Revenue had suggested including in guidance that where a group qualifies for the CbCR Safe Harbour for a jurisdiction then an entity located in that jurisdiction will be considered to be located in a high-tax jurisdiction for the purposes of section 111P(8). ITI queried this approach.

Revenue stated that draft guidance was included to provide for a simplifying administrative practice. It had been commented that, in order to assess if an entity was in a high-tax jurisdiction then the detailed Pillar Two calculations would need to be performed and those calculations may not have been necessary where the CBcR Safe Harbour was applied to that jurisdiction.

A 'low-tax jurisdiction' means, in respect of an MNE group or of a large-scale domestic group in any fiscal year, a Member State or a third country jurisdiction in which the MNE group or the large-scale domestic group has qualifying income and is subject to an effective tax rate which is lower than the minimum tax rate. It is expected that a jurisdiction which meets the conditions to avail of the CbCR Safe Harbour should not be a low-tax jurisdiction and therefore must be a high-tax jurisdiction. Therefore, Revenue is prepared to apply this administrative practice. It was agreed that the guidance will refer to Revenue being prepared to accept the above practice rather than it being compulsory, i.e. a taxpayer may still apply the detailed calculations to determine the status (i.e. high-tax v low-tax) if they so wish.

iii. Hybrid Entity

ITI noted an error included in the draft TDM updates regarding the issuance of a debt instrument by a lender.

Revenue agreed and confirmed that it will be updated in the next iteration.

Law Society noted that newly proposed draft US regulations could potentially result in negative tax consequences for groups where a borrower's income is included in the taxable income of the borrower's owner (due to hybridity) and there is deemed to be a commensurate increase in the taxable income of the owner relating to an intra-group financing arrangement for the purposes of section 111P(8).

Revenue noted the issue raised but expressed the view that the draft guidance was the correct interpretation of the intra-group financing arrangement rule as it applied to hybrid entities.

The Law Society noted the explanation and were of the view the guidance is reasonable but feel it is important to flag the issue.

iv. <u>Section 111P(8) – Low Tax Jurisdiction (LTJ)</u>

ITI & CCAB-I sought clarification on section 111P and specifically section 111P(8)(a). It was requested that guidance be updated to provide that, when applying the hypothetical LTJ test to the borrower, where the expense related to the intra-group financing transaction is excluded., then the reduction to the corresponding cover taxes as a result of the local deduction for such an interest expense is also to be excluded. It was expressed that it would also be helpful if guidance could cover application of the test where there are multiple intra-group financing arrangements.

Revenue agrees that the draft LTJ guidance can be adapted to also apply to section 111P(8)(a) and (c) and will update for same. Revenue noted that guidance has been requested from the OECD Secretariat on the application of the LTJ test where there are multiple intra-group financing arrangements in a fiscal year and a response is pending.

v. <u>Umbrella Sub-Fund Structures</u>

The ITI requested additional guidance on what 'entity' means.

The ITI also sought clarity on the meaning of "separate financial accounts".

The ITI and Law Society also had proposed examples which they thought would be helpful in guidance.

Revenue stated that an entity is defined for the purposes of Part 4A as any legal arrangement of whatever nature or form that prepares separate financial accounts. In chapter 1 of the OECD commentary at paragraph 2 on pg14 it states that

> *"A broad definition of Entity in Chapter 10 ensures that the term captures separate legal persons as well as arrangements such as partnerships and trusts."*

No further discussion of the definition of entity is included in the commentary or administrative guidance.

While a sub-fund cannot be considered to be a separate legal person, it may be considered to be a legal arrangement. Therefore, where a sub-fund is a legal arrangement that prepares separate financial accounts, it should meet the definition of an "entity" for the purposes of Part 4A TCA.

Record of Meeting

“Separate financial accounts” are not defined in the EU Minimum Tax Directive or the OECD Pillar Two Model Rules. However, Article 3.4.1 refers to a permanent establishment (PE) having "separate financial accounts". This is an indicator that separate financial accounts does not mean financial statements but rather accounts, or statements of accounts, showing the debits and credits making up the income/expenses/assets/liabilities of the arrangement. The OECD commentary notes that in some cases the PE will not have separate financial accounts. In that scenario, the second sentence of Article 3.4.1 provides that the Financial Accounting Net Income or Loss is the amount that would have been reflected in its separate financial accounts if they existed. Therefore, accounts or reports will need to be prepared in such a scenario to compute the amount that would have been reflected in the financial accounts. Article 3.4.1 requires this determination to be based on the accounting standard used in preparation of the Consolidated Financial Statements of the UPE.

Therefore, it appears reasonable to conclude that a sub-fund of an umbrella fund that prepares a separate P&L account and balance sheet should be considered to have “separate financial accounts”. Revenue notes the confirmation from the Law Society that even where financial statements are prepared at the umbrella level, if there are multiple sub-funds, there is never a situation where all assets/liabilities of the umbrella, and all income/expenditure of the umbrella, are simply presented in a single balance sheet and single P&L. It will always be broken out per sub-fund.

The draft guidance was drafted with simplification in mind, i.e. where an entire umbrella fund was consolidated then the umbrella fund could be considered to be the entity for the purposes for Part 4A. However, the views of stakeholders are noted that the most practical approach is to treat each sub-fund which prepares separate financial accounts as an entity.

Revenue asked two questions in this regard:

- Where Umbrella Fund prepares a single financial statement, covering the assets and liabilities of all the sub-funds in the Umbrella Fund (an “Umbrella FS”), and in this single financial statement, there is a separate balance sheet and a separate profit and loss account for each sub-fund, are the separate balance sheets and profit and loss accounts subject to audit sign -off?
- Further, will the separate balance sheets and profit and loss accounts be prepared in accordance with the same accounting standard as the accounting standard applied to the umbrella fund?

Following the meeting the ITI confirmed the following having consulted with a member with an auditing practice:

> ***For an umbrella set of accounts, while there is no separate audit report for each sub-fund, all the sub-funds making up the whole are audited such that the totality of the results is signed off.***

In addition, in ICAVs and Unit Trusts different GAAPS (e.g. US, Japan, Canada) are permitted to be used and can be applied at different sub-fund levels. Where this happens, auditors have noted that one would not in practice use the umbrella accounts approach because it would be too difficult to get the right sign off on each GAAP. Therefore, while perhaps it might theoretically be possible under the law (albeit it is not clear that the CBI would accept it), in practice where this occurs, separate audited financial statements are prepared for each sub-fund.

vi. <u>Investment Funds – Non-Financial Assets – Widely Held Condition</u>

ITI raised a point and sought guidance on a scenario with a number of connected investors that are themselves widely held ultimately with unconnected investors.

The Law Society also suggested that references to insurance entities should be removed and that the guidance is needed primarily to address feeder funds which are themselves widely held and highlighted an issue in practice where an Irish fund has two feeder funds constituted as partnerships where both feeder funds have the same entity acting as general partner.

Revenue stated that it agrees that the reference to an insurance company should be deleted as a fund held by an insurance company should be an insurance investment entity and therefore the guidance is not required in relation to insurance investment entities.

Revenue also stated that it is prepared to accept the changes suggested by the Law Society to the draft TDM, subject to a clarification that the 'widely held' condition will not be met where the connected investors are ultimately owned by persons that are connected. This will be clarified in guidance.

vii. <u>Location of Constituent Entity</u>

ITI noted the proposed guidance in relation to the location of an entity that is created in a jurisdiction during a fiscal year but that establishes residence in another location during that fiscal year and queried if the guidance was consistent with 10.3.6. of the OECD Model Rules which states "Where an entity has changed its location during a Fiscal Year, it shall be located in the jurisdiction where it was located at the beginning of that year."

Revenue clarified that this guidance was intended to deal with a situation where an entity that is created in one jurisdiction during a fiscal year, i.e. before the start of a fiscal year, could be considered to be located in two jurisdictions during that fiscal year because it becomes tax resident in a different jurisdiction during the year.

An entity that is not a flow through entity is located for Pillar Two purposes where it is tax resident based on its place of management, place of creation or similar criteria, or in other cases, it is located in the jurisdiction in which it was created.

- Article 10.3.4 deals with dual resident entities – this article is applicable where an entity is located (for Pillar Two purposes) in two locations at the same time during a fiscal year. Article 10.3.4 does not apply where an entity is located in one jurisdiction for one part of the fiscal year and another location for the other part of the fiscal year.
- Article 10.3.6 provides that where an entity has changed its location during the fiscal year, it shall be located in the jurisdiction where it was located at the beginning of that fiscal year.
- Generally, a fiscal year means an accounting period with respect to which the UPE of the MNE Group prepares its consolidated financial statements.
- Therefore, in the case of an entity that was not in existence at the beginning of the group's fiscal year, and which changes its location during the fiscal year, there does not appear to be a rule which tells you how to determine the location of that entity for the fiscal year.

Therefore, it was Revenue's view that a reasonable approach to take, based on the priority given in the location rules to tax residence, is to consider the entity located in the jurisdiction where it is resident for tax during the fiscal year.

It was agreed that is was a reasonable interpretation of the rules.

<u>Additional Questions re-Pillar Two TDM:</u>

i. **ITI asked when the updated TDM may be available?**

Revenue stated that it would be likely to be available after the Finance Bill process had concluded.

ii. **ITI raised the point that in certain scenarios in the GloBE rules investment entities and insurance investment entities are subject to differing treatment and that this might cause consistency issues in the Irish legislation.**

Revenue stated that they were not aware of any consistency issues in the legislation and asked if a note could be provided outlining what the potential issue may be.

Action: ITI agreed to submit details.

Any other business:

No other matters were raised or discussed.

No date was proposed for the next meeting.