# Record of Meeting

| Meeting | TALC BEPS Sub-Committee | | |
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| Location | Revenue Offices, Dublin Castle | Meeting Date | 06/12/2023 |
| ITI | Anne Gunnell; David Fennell; Gareth Bryan; Paul McKenna; Tom Maguire; | | |
| CCAB_I | Enda Faughnan^; Gearóid O'Sullivan^; Finnian O'Sullivan^ | | |
| Law Society | Andrew Quinn; Aidan Fahy^; Elaine Mooney^; Niamh Caffrey^ | | |
| Dept. of Finance | Rafal Saniternik | | |
| Revenue | Jeanette Doonan (Chairperson); John Quigley; Keith Noonan; Áine Hollingsworth^; Catherine Duffy; George Prizeman; Lauren Carroll; Máirín, Kane; Diarmúid Kelly; Brendan O'Hara; Dave Brennan; Rory Noone | | |
| ^Attended remotely via Dial-in | | | |

**Minutes**

The Chairperson welcomed attendees and speakers, and explained that whilst the meetings to-date in 2023 focused on matters of policy relating to Pillar Two, that was outside of the normal remit of the Sub-Committee. The work of the Sub-Committee going forward is reverting back to discussing issues around tax administration and development of guidance, as well as periodic updates on other items relevant to the work of the Sub-Committee.

1. **Minutes**

The minutes which were circulated in advance of the meeting (minutes of meetings on 4 September, 25 September and 24 October) were agreed.

One change had been notified by ITI in advance of the meeting. The change was to add an attendee to the minutes of 24 October.

2. **Updates**

*FASTER – EU Proposal on Withholding Tax Procedures*

Lauren Carroll from International Tax Division, Revenue, provided an update on the EU Commission's proposal on withholding taxes (FASTER).

- The purpose of the proposal is to make withholding tax procedures (e.g. repayment / refund) faster and more secure.
- In relation to processing of repayments / refunds, this can take years in some Member States.
- In relation to security, the intention is to reduce fraud, noting the Cum/Ex and Cum/Cum scandals.
- In relation to dividend withholding tax (DWT), the proposal only relates to DWT on publicly traded shares.
- The EU proposal includes a common EU digital tax residency certificate and a register of financial intermediaries.

- There are two fast track methods for relief; (1) relief at source where the rules and tax rate in the relevant treaty are applied at the time of payment, and (2) 'quick refund' where a refund is to be processed within a certain amount of time.
- Certified financial intermediaries (CFIs) will be required to claim on behalf of the client but there will be a due diligence process.
- The benefit from the perspective of revenue authorities is that they will have increased visibility of the financial chain.

The ITI had a question regarding the scope of the proposal as it is narrower in scope than expected. In response it was considered doubtful that it would be expanded further at this point.

*DAC-7 – Platform Operators*

Dave Brennan from Business Taxes Policy and Legislation, Revenue, gave an update on DAC 7,

It was explained that the DAC 7 working group has been in operation for the last two years and the main priority of agreeing the IT infrastructure with Platform Operators had been achieved and the system is now operational.

An update was given in relation to the following Finance (No. 2) Bill 2023 measures:

- new information requirements for non-union platform operators;
- new legislation to prevent 'country hopping', meaning platform operators cannot register in another Member State until they have satisfied all reporting obligations in the country where they were most recently registered;
- provision that a non-union platform operator does not have to provide information to Revenue regarding sellers in a Member State if the information will also be exchanged by the non-union platform operator under an agreement between that Member State and the country in which the non-union platform operator is resident.

It was acknowledged that the DAC 7 sub-group had worked very well had provided important feedback in connection with the transposition.

The following updates were provided In relation to guidance and other IT matters:

- guidance on the registration process has been published;
- the DAC 7 schema has been published;
- the registration portal is available and there is a dedicated team for issues as well as the facility to submit questions via MyEnquiries;
- the test site is not available yet.

It was noted that so far 28 platform operators had registered and 49 foreign platform operators registrations had been received. Returns are required by 31 January 2024 and the 1st exchange is expected by 28 February.

There was a question from the Law Society regarding the adoption of the OECD Model Rules. Revenue confirmed that this is a policy matter and not for TALC BEPS.

It was agreed that because the DAC 7 platform reporting obligations are now operational, DAC 7 would no longer be a standing item on the TALC BEPS Sub-Committee work items/agenda. The ITI suggested, notwithstanding that DAC 7 is no longer a standing item, that possibly a further update could be given when filings are made. This was agreed.

**3. Outbound Payments Defensive Measures**

The points contained in the submission from the ITI and CCAB_I on items to be included within guidance were addressed (see appendix for full submissions):

***ITI Submission:***

***i.*** *Confirmation in guidance that Hong Kong and Singapore would not be considered specified territories from an outbound payment defensive measures perspective.*

Confirmation provided that guidance will confirm that a territory will not be considered to be a zero tax territory solely on the grounds of having a territorial or remittance based tax regime.

***ii. Confirmation in guidance that the legislation would not apply to a payment made to an entity located in a free-zone within a jurisdiction that imposes a corporate tax.***

Confirmed that guidance will provide this confirmation.

***iii. ITI request confirmation in guidance that in the definition of 'zero-tax territory' the phrase "…other than in respect of an entity whose income, profits or gains are treated by that territory, or would be so treated but for an insufficiency of income, profits or gains, as arising or accruing to another entity…" refers to the tax treatment in that territory (rather than its legal treatment).***

Confirmed that this is the intention of the wording.

A question was then raised as to situations where there is an absence of tax law in a territory to identify a transparent entity / partnership and whether that could be addressed in guidance. Revenue to consider further.

***iv. Clarification in guidance that a jurisdiction will not be considered to be a zero-tax territory if a participation exemption applies in that jurisdiction.***

Confirmation provided that guidance will confirm that a territory will not be considered to be a zero tax territory solely on the grounds of having a participation exemption.

***v. Examples in guidance of when the anti-avoidance provisions in sections 817V, 817W and 817X TCA 1997 would apply.***

Revenue agreed to provide examples.

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vi. ***Examples in guidance of the different scenarios when section 817X(1)(c) TCA 1997 would apply.***

It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

vii. ***Examples in guidance of the interaction of section 817X TCA 1997 with participation exemptions.***

It was agreed that representative bodies will provide examples where uncertainties as to the interaction arise.

viii. ***Examples in guidance of the different scenarios where section 817V(7) TCA 1997 would apply (including the meaning of where the payor company and the payee have overlapping accounting periods).***

It was agreed that representative bodies will provide examples where uncertainties as to the interaction arise.

ix. ***Examples in guidance of when two entities shall be considered "associated entities" (re-s817U).***

It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

x. ***Examples in guidance of the meaning of definite influence (re-s817U).***

It was agreed that guidance would be required as it is a new term. It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

xi. ***Confirmation in guidance that a distribution would still be considered an excluded payment (subject to a supplemental tax) where the distribution is treated as an Excluded Dividend for Pillar Two purposes.***

Confirmation will be provided in guidance.

xii. ***Guidance on how "arrangements are in place on or before 19 October 2023" should be assessed in the context of distributions made after that date (re-s817Z).***

Agreed, the clearest example would be in relation to dividends declared. It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

xiii. ***Confirmation in guidance that interest which is non-deductible is excluded from the scope of the outbound payment measures (i.e. the distribution provisions do not need to be considered) (re-s817V).***

Revenue confirmed that where an amount is recharacterised as a relevant distribution, the application of section 817X to that amount must be considered. It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

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***CCAB_I Submission:***

i. ***Section 817U(1) - Definition of "excluded payment" Clarification is sought on the scope and intent of part (b) of the definition of excluded payments. As drafted, it appears that it would only apply in a scenario where an Irish entity was checked into a US entity such that the US ignores Ireland for tax purposes and the recipient entity to which Ireland makes the payment is also checked into the same US entity such that the US does not see the payment in computing profits within the US.***

   Revenue confirmed that where a payment is made by an Irish company out of an amount of income, profits or gains that are within the charge to US tax, and no account is taken of that payment in calculating the amount that is within the charge to US tax, then the payment should be considered to be an excluded payment.

ii. ***Section 817U(3) - Confirmation would be welcome that two enterprises will not be considered to be associated solely by the fact that their shares are held on trust by the same nominee or trustee.***

   Revenue confirmed that two enterprises will not be considered to be associated soley by reason of the fact that their shares are held on trust by the same nominee or trustee, there is no other association, as defined, between the enterprises.

iii. ***Section 817U(6) – Guidance on the intention of this subsection and the ability to look through transparent entities (which are akin to an Irish partnership) for the purpose of testing inclusion/recognition in the jurisdiction in which the payments is treated as accruing.***

   It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

iv. ***Section 817V(7) - Guidance would be welcomed confirming that it is possible to encompass multiple layers of payment within these provisions to cater for circumstances where multi-tiered investment structures are being used.***

   Revenue confirmed that the legislation does not apply to multi-tiered investment structures, as such the guidance sought cannot be provided.

   It was agreed that representative bodies will provide examples where uncertainties as to the application arise.

**Timing of Guidance**

Revenue confirmed that a first draft of guidance will be provided to stakeholders for discussion in advance of the next TALC BEPS sub-committee meeting. In that regard any examples practitioners/stakeholders have to address the discussed items would need to be submitted by the latest on Wednesday 24th of January.

4. **Pillar Two – Revenue Guidance / TDM**

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**ITI Submission**

i. ***Confirmations provided in previous discussions are documented in Revenue guidance as appropriate.***

Revenue agreed to review minutes and see what confirmations were given that do not relate to items already contained in OECD guidance and consider whether they should be included in Revenue guidance.

ii. ***Guidance on the meaning of "material competitive distortion", with detailed examples.***

Page 203, Section 10.1 of the OECD Commentary para 58 to 60 provides guidance on this term.

ITI to revert on any additional guidance thought necessary.

iii. ***Guidance on the interaction of "Ownership Interest" and POPE / JV rules (particularly in the context of preference shares).***

Revenue is aware of another jurisdiction requesting clarity on this point from the OECD Secretariat. It is understood that the Secretariat's initial view is that the rules are clear in how they operate.

Revenue requested that stakeholders consider whether this is an issue that needs to be addressed and if so, what possible solutions may be implemented as this would be the most effective way of requesting a response from the OECD Secretariat.

iv. ***Guidance on the meaning of "consolidated revenue" for the revenue threshold test and de minimis exclusion.***

Revenue confirmed that further guidance on the revenue threshold test will be published by the OECD very shortly. The ITI queried when such guidance may issue and Revenue clarified that there was no confirmed date at that time. [Guidance subsequently published on 18 December 2023]

v. ***Confirmation that groups with Irish Parent Entities that are applying the IIR can rely on the QDMTT safe harbour outlined in the Directive (i.e., if prepared under IFRS).***

The Commission will be providing confirmation that the QDTT safe harbour provided in the Directive should be read and interpreted in line with the OECD safe harbour guidance. Only where a territory is granted QDTT safe harbour status will the safe harbour apply. The QDTT safe harbour in Part 4A TCA 1997is in line with the OECD safe harbour guidance.

vi. ***An example of the ETR calculation be provided in guidance and how the tax would be collected under the IIR for an investment entity is section 111AT TCA 1997 applies.***

Inclusion of an example will be considered.

vii. ***Examples which demonstrate that the taxpayer "has taken reasonable care" in the context of the transitional penalty relief provisions (section 111AAAB(5) TCA 1997).***

Revenue confirmed that consideration will be given to including an example. However, any example will be led by the OECD guidance which refers to:

- An MNE can demonstrate it has taken reasonable measures if it can demonstrate it has, in good faith, put in place the appropriate systems to understand and comply with the rule.
- Examples referenced include:
    - where there is a mistake of fact that is reasonable in the circumstances;
    - the errors can be reasonably attributed to unfamiliarity with the rules in the initial implementation years (e.g., isolated mathematical or transposition errors);
    - the requirements of the rule are unclear and the MNE's actions are based on a reasonable interpretation of the rule.

viii. ***Guidance on the treatment of historical losses and the DTAs thereon.***

Revenue queried what is being proposed as "practical and pragmatic" guidance and it is important to note that no guidance or confirmations could be given which conflict with the Directive, Model Rules, OECD Commentary and Administrative Guidance as any such conflict could lead to a failure during the peer review process.

The ITI asked would it be a reasonable approach to deem that historical losses have been used on a LIFO basis. Revenue said that they would consider this.

The ITI also asked if this had been considered at OECD level. Revenue said that it was not aware that it had.

The ITI asked whether there will be anything in guidance on the comparability of the Model Rules and Directive. Revenue said that there would be a destination table enabling taxpayers and agents to identify the source of the legislation.

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

Revenue confirmed that a deferred tax schedule will be required at a minimum which will track adjustments from underling financial data. It is understood that the OECD are considering guidance with regard to the deferred tax liability recapture rule and classification/categorisation of assets.

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

Revenue confirmed that guidance can be provided on the operation of section 111AW(2)(a) TCA97 which will reflect that 111X(4) TCA97 applies to pre-implementation DTAs.

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

Revenue sought clarity on this as there is a definition in s111P(1).

ITI stated that it would be helpful to have clarity as to the definition of tax functional currency in Ireland between trading and non-trading amounts. Revenue agreed to consider this further.

xii. ***ITI would welcome a period of transition such that accounting periods can be aligned across groups to allow the local accounting standard to be used. Taxpayers will need guidance on how these practical issues, such as the incorporation/disposal of entities during a fiscal period, should be dealt with.***

Revenue confirmed that the issue has been submitted this to the OECD for their consideration and feedback is pending. Revenue cannot provide any domestic guidance that would be in conflict with OECD published guidance.

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

In relation to the first question, Revenue confirmed that it would not be possible as the SJRF only applies where the liability does not need to be allocated on a CE by CE basis. In relation to the second question, as the QDTT is not applied to investment entities it follows that the SJRF cannot apply.

*CbCR Safe Harbour*

The ITI had a number of points in relation to the CbCR Safe Harbour in the submission however, rather than addressing each at the meeting, Revenue confirmed that updated guidance on CbCR safe harbour is to be issued shortly at which point the matter can be revisited, if necessary, as the draft guidance addresses many of these questions. [OECD guidance subsequently published on 18 December 2023]

*Financial Services*

xiv. ***Umbrella versus sub-fund: ITI 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 agreed to consider this in guidance and asked if there were any additional points in relation to this.

The ITI asked whether the OECD were looking at this, Revenue said that they were not aware that they were.

The ITI stated that in absence of the OECD position it would in their view be important to know Revenue's.

Revenue asked whether the Funds Industry had looked to raise this at OECD level? The CCAB_I said that it was not aware it had been.

Revenue said that it would further consider guidance in this area.

xv. ***Definition of investment fund in master-feeder fund structures***

xvi. ***Satisfying limb (a) of the definition of investment fund***

Points (xv) & (xvi) were taken together and Revenue confirmed that it would consider guidance in this area but it may require clarification from the OECD.

*Asset Management*

xvii. ***Section 111S (see appendix for full submission)***

Revenue stated that it was not possible in advance of the meeting to consider this point in full and therefore will require further time to consider.

Separately, the CCAB_I asked whether the reference to 'tax rate applicable' in section 111AU(1)(b) included Pillar Two top-up taxes (such that the tax transparency election can be made). Revenue requested the CCAB_I to provide a written submission on this point.

*Leasing*

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

Revenue confirmed it will adopt any published OECD guidance on this matter if that guidance is approved by the Minister for Finance and included in s111B by Ministerial order.

**Other Pillar Two Questions:**

- The ITI and the Law Society noted that they have further questions on whether a securitisation vehicle maybe considered to be a constituent entity for the purposes of domestic top-up tax and noted that a submission(s) would be provided on same.

**Timing of Guidance**

Revenue confirmed that provisionally the aim is to have a first draft of guidance / TDM by the end of Q1 but noted that it will be a live document.

The intention is to share a draft with the Sub-Committee in advance of the next meeting. In that regard Revenue requested that examples/submissions on the points discussed be submitted by the end of January.

The ITI asked if there would be a dedicated team to deal with queries. Revenue confirmed that there would be a dedicated compliance team within LCD but that queries would likely be via the Sub-Committee for now.

| **AOB** |
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| <u>Pillar Two Sub-Group</u><br><br>CCAB_I stated that at Main TALC there was a point that possibly a Sub-Group to the TALC BEPS Sub-Committee would be established to address Pillar Two specifically. The ITI said that there are both technical and operational issues and that a Sub-Group may be necessary.<br><br>The Chairperson said that at this stage it was just an idea but that it will be considered further.<br><br><u>Next Meeting</u><br><br>It was suggested that the next meeting would take place in the early part of March 2024. |

**<u>Appendix</u>**

# TALC BEPS Meeting on 6 December 2023

# ITI Feedback on suggested areas for Revenue guidance

## <u>Pillar Two</u>

### General

- We would ask that all confirmations provided in previous discussions are documented in Revenue guidance as appropriate.

- We would request guidance on the meaning of “material competitive distortion”, with detailed examples.

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

- We would request guidance on the meaning of “consolidated revenue” for the revenue threshold test and de minimis exclusion.

- We would welcome confirmation that groups with Irish Parent Entities that are applying the IIR can rely on the QDMTT safe harbour outlined in the Directive (i.e., if prepared under IFRS).

- We would welcome an example of the ETR calculation be provided in guidance and how the tax would be collected under the IIR for an investment entity is section 111AT TCA 1997 applies.

- We would welcome examples which demonstrate that the taxpayer “has taken reasonable care” in the context of the transitional penalty relief provisions (section 111AAAB(5) TCA 1997).

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

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

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

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

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

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

  While we note this has been raised previously, and indeed it has been raised with the OECD, we would welcome a period of transition such that accounting periods can be aligned across groups to allow the local accounting standard to be used. Taxpayers will need guidance on how these practical issues, such as the incorporation/disposal of entities during a fiscal period, should be dealt with.

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

## CbCR Safe Harbour

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

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

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

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

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

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

## Financial Services

### Funds

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

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

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

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

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

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

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

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

In addition, the OECD issued commentary in April 2010 in relation to the granting of treaty benefits with respect to the income of collective investment vehicles (CIVs). They defined such CIVs to be funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established. For the purposes of applying this CIV definition, the report provides that the term CIV also includes "master" and "feeder" funds that are part of "funds of funds" structures where the master fund holds a diversified portfolio of investments on behalf of the feeder funds that are themselves widely held.

## Asset Management

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

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

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

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

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

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

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

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

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

The issue is being considered across the asset management industry and is creating significant concern, as the current interpretation is that the cliff effect applies such that non-group income may get "trapped" at the flow-through entity level and be subject to a full 15% top-up tax given no Covered Taxes are allocated to the flow-through entity.

We are aware that a Big 4 in the US approached the OECD to clarify their thinking and they confirmed that the OECD belief was that the limitation in Article 3.5.4 (S111S(1)(a) and (b) TCA 1997 equivalent) should only apply "to the extent" the ultimate ownership interest was indirectly owned by the UPE.

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

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

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

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

Leasing

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

## Outbound Payments

- We would request confirmation in guidance that Hong Kong and Singapore would not be considered specified territories from an outbound payment defensive measures perspective (i.e., that the existing WHT treatment as outlined in TDM 08-03-06 would continue to apply for payments made to these jurisdictions).

- We would request confirmation in guidance that the legislation would not apply to a payment made to an entity located in a free-zone within a jurisdiction that imposes a corporate tax.

- We would request confirmation in guidance that in the definition of 'zero-tax territory' the phrase *"…other than in respect of an entity whose income, profits or gains are treated by that territory, or would be so treated but for an insufficiency of income, profits or gains, as arising or accruing to another entity…"* refers to the tax treatment in that territory (rather than its legal treatment).

- We would request clarification in guidance that a jurisdiction will not be considered to be a zero-tax territory if a participation exemption applies in that jurisdiction.

- We would request examples in guidance of when the anti-avoidance provisions in sections 817V, 817W and 817X TCA 1997 would apply.

- We would request examples in guidance of the different scenarios when section 817X(1)(c) TCA 1997 would apply.

- We would request examples in guidance of the interaction of section 817X TCA 1997 with participation exemptions

- We would request examples in guidance of the different scenarios where section 817V(7) TCA 1997 would apply (including the meaning of  where the payor company and the payee have overlapping accounting periods).

- Section 817U TCA 1997: We would request examples in guidance of when two entities shall be considered "associated entities"

- Section 817U TCA 1997: We would request examples in guidance of the meaning of definite influence.

- Section 817U TCA 1997: We would request confirmation in guidance that a distribution would still be considered an excluded payment (subject to a supplemental tax) where the distribution is treated as an Excluded Dividend for Pillar Two purposes.

- Section 817Z TCA 1997: We would request in guidance on how *"arrangements are in place on or before 19 October 2023"* should be assessed in the context of distributions made after that date.

- Section 817V TCA 1997: We would request confirmation in guidance that interest which is non-deductible is excluded from the scope of the outbound payment measures (i.e., the distribution provisions do not need to be considered as the payment remains an interest payment from an accounting / legal perspective).

**<u>CCAB-I – Items for Discussion re-Outbound Payments</u>**

- *Section 817U(1) - Definition of "excluded payment"* Clarification is sought on the scope and intent of part (b) of the definition of excluded payments. As drafted, it appears that it would only apply in a scenario where an Irish entity was checked into a US entity such that the US ignores Ireland for tax purposes and the recipient entity to which Ireland makes the payment is also checked into the same US entity such that the US does not see the payment in computing profits within the US.

- *Section 817U(3) - Definition of Associated Entities* Confirmation would be welcome that two enterprises will not be considered to be associated solely by the fact that their shares are held on trust by the same nominee or trustee.

- *Section 817U(6)* We would request that guidance is issued which clearly reflects the intention of this subsection and confirms that the ability to look through transparent entities (which are akin to an Irish partnership) for the purpose of testing inclusion/recognition in the jurisdiction in which the payments is treated as accruing.

- *Section 817V(7) - Multi Tier Investment Structures* Guidance would be welcomed confirming that it is possible to encompass multiple layers of payment within these provisions to cater for circumstances where multi-tiered investment structures are being used.