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By Email: businesstaxpolicy@finance.gov.ie

Pillar Two consultation
Tax Division – Business Tax Policy
Department of Finance

Pillar Two Implementation – Second Feedback Statement July 2023
A&L Goodbody LLP Response

Dear Minister,

We welcome this opportunity to engage with this consultation process and consider the implications of this draft legislation, and the implementation of the OECD Pillar 2 Model Rules and the EU Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (together, the **Pillar 2 Rules**) more generally.

We have set out below some concerns with the draft legislation as contained in this Feedback Statement, as well as some general comments on issues we wish to highlight in light of the short period that remains before these rules come into effect at the end of this year.

We look forward to continuing to work with the Department in advance of the introduction of the Pillar 2 Rules into Irish legislation and we would encourage the Department to continue its approach of engaging with stakeholders at all stages of the legislative process.

1 Transitional CbCR Safe Harbour

1.1 The legislation is drafted referring to where the CbCR Safe Harbour applies "*in respect of a territory*" or "*to that territory*"; it would seem this should instead be where the CbCR safe harbour applies "*to an MNE Group or Large-scale domestic group in respect of a territory".*

1.2 The possible confusion that could arise is particularly apparent in subsection (13). As currently drafted, it could suggest that if the jurisdiction in question has implemented the Pillar 2 Rules, the CbCR Safe Harbour would not apply, even if the disposing entity itself is relying on the CbCR Safe Harbour, which does not seem to match with what is envisaged in the relevant OECD guidance.

1.3 In our view, subsection (13) should provide that, for the purposes of subsection (12)(d)(i), a territory shall come within the scope of the GloBE Rules on the earliest date that *the disposing entity* is subject to a qualified IIR, a qualified UTPR or a qualified domestic top-up tax in the territory concerned.

1.4 The CbCR Safe Harbour applies at the election of the relevant taxpayer (provided the conditions are satisfied). We presume that where a constituent entity elects to apply the CbCR Safe Harbour, this election will remain valid until the end of the transition period (as defined in this section of the legislation), unless the constituent entity elects out.

2 Transitional UTPR Safe Harbour

2.1 We suggest that the definition of corporate income tax rate is amended as follows:

> *'corporate income tax rate' means the nominal rate of corporate income tax (including any sub-national corporate income taxes) generally imposed on income of a body corporate in a territory*

3 Qualified Domestic Top-up Tax

3.1 Section XXX (**Chargeable entities**), subsection (3) applies specific rules to partnerships. However, it is not clear why partnerships are being specified in this manner. Rather, it would appear this provision should apply to 'flow-through entities'.

3.2 In particular, there are a number of provisions which explicitly apply to flow-through entities to determine how they should be treated under the Pillar 2 Rules, e.g. how income/losses should be computed, etc. As was noted in the responses to the earlier feedback statement, consistency in how the top-up tax should be calculated under the IIR rules and the QDTT rules is preferable as it should ease the administrative burden and complexity for taxpayers.

4 QDTT/QMDTT Safe Harbour

4.1 Ireland should implement the QDTT/QMDTT Safe Harbour (the **QDTT Safe Harbour**) as permitted under the OECD Guidelines. This will reduce the complexity and administrative burden for relevant Groups.

4.2 The simplest approach would seem to be to simply provide when computing a qualified IIR or qualified UTPR that the top-up tax is zero for any CEs located in a jurisdiction that has a qualified QDTT, i.e., the same approach as has been taken in the draft legislation included with this feedback statement in respect of the CbCR Safe Harbour and the UTPR Safe Harbour.

4.3 As Groups will need clarity as to whether a jurisdiction is considered to have implemented a qualified domestic top-up tax for this purpose, Revenue should maintain a list of jurisdictions it considers to have in place a qualified domestic top-up tax (and which jurisdictions it considers to have implemented a qualified IIR and qualified UTPR) which should be published on the Revenue website. In addition, it should be presumed that all EU Member States (other than any which avail of the transitional provisions where there are 12 or fewer UPEs of MNE Groups in that Member State) have a qualified IIR and qualified UTPR and, where they have elected to implement one, a qualified domestic top-up tax, in effect from 31 December 2023.

5 Administration and GloBE Information Return

Questions 7-9

5.1 As permitted by OECD Guidance, no penalties should apply during the Transition Period (for this purpose, up to any fiscal year beginning on or before 31 December 2026, but not including a fiscal year that ends after 30 June 2028) where the Group has taken "reasonable measures" to ensure the correct application of the Pillar 2 Rules.

5.2 "Reasonable measures" should encompass any circumstance other than where deliberate failure can be identified and should be aligned with the circumstances provided for in the OECD published guidance. Revenue should also publish guidance as to Revenue's view of the application of term.

5.3 Following the Transition Period:

5.3.1 Regarding the types of penalties that may imposed for non-compliance with the Pillar 2 Rules, while it may not always be the case, a Constituent Entity should generally also have corporation tax obligations to meet for which there are existing penalties and sanctions for non-compliance. On the basis that such existing penalty and sanction are considered adequate to achieve appropriate compliance, it seems appropriate that any penalties introduced should generally not exceed any equivalent direct tax penalties or sanctions.

5.3.2 With regards to any penalty for failure to register, consideration should be given to expressly providing certain mitigation where the failure was due to reasonable excuse and the Constituent Entity registered without unreasonable delay after the event giving rise to the excuse had ceased.

5.3.3 Revenue has the general power, under s.1065 TCA, to mitigate penalties that relate to specified taxes, including corporation tax. Given the involved nature of the Pillar 2 Rules, it is important that Revenue should have the discretion to mitigate any Pillar 2 penalties. Depending on how the Pillar 2 Rules are to be implemented, s.1065 TCA may require amendment to ensure that there is no doubt as to the application of Revenue's general power of mitigation to Pillar 2 penalties.

5.3.4 To the extent there is a correction to a top-up tax due to a correction or amendment in another jurisdiction or under another domestic tax head, a Group should have the ability to correct its return and make any associated payment without triggering a liability to any interest or penalties, provided such correction to the top-up tax is made in good time.

Questions 10 & 11

5.4 It is only in very limited circumstances that Irish tax law allows for joint and several liability or for secondary liability, and we consider that neither the joint and several liability approach nor the group notice approach should be adopted. The adoption of either approach should lead to an increase in compliance for a Constituent Entity, and potentially other non-tax related consequences. The objective of the implementing rules should be to minimise the compliance burden as far as possible. There are various instances, especially in the case of regulated financial entities, where the ringfencing of liabilities to specific entities is particularly important.

6 Other Issues

6.1 The definition of "entity" included in the draft legislation included with the first feedback statement, appears to include individuals (as is apparent by the exclusion of individuals from section XXX [**Qualifying Entities**] subsection(1)(b). However, it is clear from the OECD Model Rules that individuals should not be 'entities'. The definition should be amended in the final legislation to explicitly exclude individuals.

Dispute Resolution

6.2 In light of the complexity of these rules and the potential for uncertainty and additional cost arising from inconsistent application of them, it is imperative that a comprehensive dispute resolution framework is implemented which appropriately caters for matters of incorrect taxation providing much-needed certainty to multinational groups.

6.3 While we await details, Ireland should ensure it partakes appropriately in the design of any such multilateral dispute resolution mechanism framework at an OECD or EU level and partakes in the implementation of that framework (with appropriate regard to how the rules are adopted in light of domestic provisions around assessments, enquiries and interventions).

6.4 As we would expect that a number of cross-jurisdictional issues will arise in the coming years by virtue of the implementation of these rules, this will also require additional resources within Revenue to deal with any such enquiries or disputes.

We would be happy to discuss any of the issues referred to above in more detail, or any other aspect of the implementation of the Pillar 2 Rules.

Yours faithfully

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