MAPLES GROUP

UPDATE

# EU Global Minimum Tax Directive and Investment Fund Structures

The Council of the EU adopted the "*Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the European Union*" (the Directive) on 15 December 2022.

The Directive implements the OECD Pillar Two Global Minimum Tax (GloBE) Model Rules across the EU ("Model Rules"). These Model Rules were agreed by the G20/OECD Inclusive Framework on BEPS and certain other countries outside the EU are also in the process of implementing the Model Rules.

EU Member States must enact the Directive into national law with effect for fiscal years starting on or after 31 December 2023 (with certain rules to be applicable from 31 December 2024). The Irish Department of Finance has published a Feedback Statement on the transposition of the Directive into Irish law in the Irish Finance Bill 2023 and the Feedback Statement contains proposed draft legislation for consideration.

## How will the Directive work to impose a 15% global minimum tax?

The Directive will apply to cross-border and EU domestic groups of entities with an EU connection and an annual turnover of at least €750 million per annum.

The objective is to ensure those groups pay a minimum 'effective tax rate' ("ETR") of 15% on the income arising in each of the countries across the world in which they operate.

The Directive does not of course and could not require every country in the world to charge a tax rate of 15%. However, the Directive has a series of rules to achieve that end result by charging additional tax on any 'constituent entity' of the group located in the EU in respect of undertaxed profits of the group arising anywhere in the world.

An 'entity' is any legal person, or a legal arrangement in certain cases. A constituent entity is deemed to be located in the EU if it is tax resident in the EU, or 'created' in the EU in certain cases, or has a 'permanent establishment' in the EU.

The EU rules to achieve the global minimum tax of 15% operate by way of the relevant EU Member State charging an additional 'top-up tax' on any EU entity in the group based in that country where the ETR of the group in another country is below 15%. The main rules to achieve this are the income inclusion rule ("IIR"), the undertaxed profits rule ("UTPR") and the qualified domestic minimum top-up tax ("QDMTT").

For example, if an Irish company in a group structure had a wholly-owned subsidiary in a zero-tax country earning profits of €100, under the IIR rule at a 15% tax rate, Ireland could tax the Irish company on those profits of the zero-tax subsidiary and the Irish company would have an additional Irish tax liability of €15.

If instead, the Irish company was a subsidiary of a parent company in a zero-tax country, and that parent earned profits of €100, Ireland could tax the Irish company under the UTPR rule at a 15% tax rate on those profits of the zero-tax parent, where again the Irish company would again have an additional Irish tax liability of €15.

Finally, the same result would apply under UTPR if the Irish company had a group affiliate (a 'sibling company') in a zero-tax country

earning profits of €100. Again, the Irish company would have an additional Irish tax liability of €15 in respect of the profits of the group affiliate.

## How could the Directive affect an international investment fund structure?

An international investment fund structure will typically have a range of entities in a number of jurisdictions.

Those jurisdictions will often include investment fund entities at investor level established in a low-tax or zero-tax country, and EU-based investment fund entities and asset holding entities.

If the investment fund structure has an entity in an EU Member State such as Ireland or Luxembourg, then as explained the Directive could mean that the Irish or Luxembourg entity is charged to tax on the profits arising in group entities in those zero-tax countries.

## What investment fund structures could be within scope of the Directive?

As noted, the Directive will only apply to cross-border and EU domestic groups of entities with an EU connection and an annual turnover of at least €750 million.

A group for these purposes is generally tested by reference to whether it is a consolidated group for accounting purposes, although in some cases a group will exist where entities are related through ownership or control and are not consolidated for accounting purposes.

In many cases in practice, the investment fund structure may fall below the threshold, or the entities in the structure may not be regarded as a 'group' under the test in the Directive, and so is not in scope. However, there are cases where the investment fund structure is in scope because it is consolidated, or otherwise regarded as a group, and it exceeds, or will exceed, the threshold.

If the investment fund structure is in scope of the Directive, then the next question is whether any entity in the structure is located in the EU.

Assuming there is an EU-based entity in the structure such as an Irish company (for example, an Irish ICAV fund or an Irish section 110 company), then it would be necessary to examine whether any exemption or 'safe harbour' in the Directive is available to prevent tax being charged in the EU in respect of the profits arising in any group entities located in a low-tax or zero-tax country.

## What are the safe harbours available for investment fund structures otherwise in scope of the Directive?

The Directive provides for a safe harbour generally for certain 'excluded entities'.

This includes an "investment fund" that is an 'ultimate parent entity' and also, broadly, asset holding entities held 95% by excluded entities (or 85% in certain cases).

An investment fund must meet several conditions to qualify for the safe harbour, but broadly must be an entity or arrangement that is designed to pool assets from a number of investors, some of which are non-connected, and the fund, or its management, must be subject to a suitable regulatory regime.

It should also be noted that the investment fund must be an ultimate parent entity to qualify for the safe harbour – broadly this means that it should be the controlling entity in the group. By way of example, if an Irish ICAV fund or a Cayman Islands fund was a 'middle-tier entity' in a fund structure, it may not be an ultimate parent entity and would not be an excluded entity despite meeting the investment fund definition.

The Directive also provides for relieving treatment for a 'flow-through entity' that is an entity that is fiscally transparent in the jurisdiction where it was created unless it is tax resident and subject to tax in another jurisdiction and for dividends and capital gain.

## "I have an Irish or Luxembourg legal entity in my investment fund structure, what action should I take?"

The Maples Group is working with investment managers and their advisers ahead of the 31 December 2023 deadline to review international investment fund structures with an Irish or Luxembourg legal entity.

The object of the review is to assess whether the structure is in scope of the Directive and so exposed to a tax liability in Ireland or Luxembourg.

Our approach is to work through a checklist with the client to make this assessment.

We are then in a positon to prepare a report that can be presented to the investment manager and the directors in the fund structure.

The report can be used to assess the potential impact of the Directive ahead of 31 December 2023, and in engagement by the client with its stakeholders like the board of directors of the fund, the auditors to the fund and existing and potential investors.

We can also advise on any filings that need to be made in Ireland or Luxembourg where the Directive applies, even where there is no additional tax liability.

Our teams in the Cayman Islands, the British Virgin Islands and Jersey can also advise on the Model Rules from a local perspective.

Please contact your usual contact in the Maples Group or any of the individuals listed below to discuss this further.


### Dublin

**Andrew Quinn**
+353 86 804 7336
andrew.quinn@maples.com

**Will Fogarty**
+353 86 609 3256
william.fogarty@maples.com

**Lynn Cramer**
+353 86 041 2621
lynn.cramer@maples.com

**David Burke**
+353 86 043 5606
david.burke@maples.com

### Luxembourg

**James O'Neal**
+352 621 253 283
james.o'neal@maples.com

**Jean-Dominique Morelli**
+352 661 371 627
jean-dominique.morelli@maples.com

### Cayman Islands

**Chris Capewell**
+345 814 5666
chris.capewell@maples.com

### Jersey

**Nick Evans**
+44 1534 671 327
nick.evans@maples.com

### British Virgin Islands

**Joanna Russell**
+44 20 7466 1678
joanna.russell@maples.com


**April 2023**
**© MAPLES GROUP**

This update is intended to provide only general information for the clients and professional contacts of

the Maples Group. It does not purport to be
comprehensive or to render legal advice.