



Feedback to the Department of Finance via the Business Tax Stakeholder Forum (BTSF) on the Tax Omnibus Directive and the Recast of the DAC

Executive Summary

On 24 June, the European Commission published a tax simplification package comprising two proposals:

- Proposal for a Council Directive amending Directives 2003/49/EC, 2009/133/EC, 2011/96/EU, (EU) 2016/1164, (EU)2017/1852, (EU) 2025/50 as regards the simplification of the Union framework on direct taxation and supporting growth and competitiveness of the EU (“Tax Omnibus Directive”)
- Proposal for a Council Directive on administrative cooperation in the field of taxation (“Recast of the DAC”)

The objective of the proposals is to simplify EU tax rules, reduce compliance burdens for businesses, and strengthen the competitiveness of the EU Internal Market. The Institute supports the objective of the Tax Omnibus Directive, together with the proposal for a Recast of the DAC, to simplify EU tax rules and reduce compliance burdens for businesses.

The EU tax framework plays a crucial role in shaping the business environment, influencing investment decisions, and driving economic growth in the EU. Simplifying the Directives and reducing the administrative burden is essential to enhancing the competitiveness of the Single Market, which has become even more important in the ever-changing global tax environment.

Tax Omnibus Directive

We welcome the Commission's efforts to enhance consistency in the application of the Anti-Tax Avoidance Directive (ATAD) Interest Limitation Rule across Member States by proposing to make mandatory the 30% EBITDA threshold, the group escape clause and the carry-forward of non-deductible interest expenses. We strongly support the proposal to exclude low-risk third-party loans from the ILR which we believe is a necessary measure to protect the competitiveness of companies operating in the Single Market. However, there are aspects of the proposed changes to the ILR, such as the amendments to the €3 million *de minimis* threshold which we consider require further clarity.

The proposed introduction of a research and development (R&D) allowance in the EU, as a minimum standard, is a welcome development. However, it is important that clarity is provided on how the proposed allowance will interact with the existing capital allowances regimes in Member States, including the R&D Tax Credit in Ireland.

In addition, any clawback provisions must be appropriately calibrated and clearly understood by taxpayers. As the R&D Tax Credit already includes clawback provisions which address incorrectly claimed credits, we do not believe that an amendment would be necessary to align with the clawback provisions in the proposed EU R&D allowance.

We believe the proposal to exclude groups within the scope of Pillar Two from the controlled foreign company (CFC) rules is an important step in removing duplicative compliance obligations and overlapping anti-avoidance measures. However, our members have expressed concern about the proposal to remove the optionality afforded to Member States to apply either the Model A or Model B approach to the design of CFC rules. We consider removing Model B as an option risks creating legal uncertainty and significantly increasing the administrative burden on multinational groups that have structured their international operations to comply with the current CFC rules.

If it is agreed that Model B can no longer be used by Member States, it will be vital that Model A includes a substantive economic-activity carve-out which is robust and clearly defined to ensure genuine activity can reliably be excluded. It will also be critical that sufficient transition time is given to Member States, like Ireland, that are impacted by the change.

Our members welcome the proposed amendments to the Parent–Subsidiary Directive (PSD) and the Interest and Royalties Directive (IRD) to extend the scope of the Directives, remove the association and holding requirements and the prior authorisation procedures. But we consider the proposed transposition date of 1 January 2037 is too long a lead time for implementation and risks creating uncertainty for businesses and investors.

Both the PSD and the IRD operate by specifying that qualifying companies must be tax resident in a Member State and be legally constituted in one of the forms specified on a country-by-country basis in the annex to the relevant directive. It is important that the list of eligible companies able to access the benefits of both the PSD and the IRD is extended to reflect the company forms currently available in Member States. We urge the Department to ensure the list includes all bodies corporate formed under Irish law and consideration should also be given to including other forms of legal entity such as industrial and provident societies.

Our members are concerned with the proposal to introduce a safeguard into the IRD which would require Member States to either levy withholding tax or deny the deductibility of interest and royalty payments at source, where the recipient of the payment is established in a jurisdiction that does not levy corporate income tax or applies a zero tax rate, and the Member State of source does not levy withholding tax. We believe that the proposed safeguard could encourage investment managers to choose investment platforms in countries that do not have a similar rule, over existing EU investment hubs. Such an outcome would be contrary to the objective of the Tax Omnibus Directive of supporting the growth and competitiveness of the EU and the Savings and Investment Union.

Recast of the DAC

The proposed introduction of a single centralised notification for Country-by-Country (CbC) Reporting and the GloBE Information Return (GIR) within the EU, which would remove the need to file notifications in each relevant EU Member State, is a positive development. We believe it would be appropriate for the notification deadline to be aligned with the deadline for the filing of CbC Reports, which is within 12 months after the end of the fiscal year, rather than aligning it with the deadline that applies to CbC Reporting notifications, which is the last day of the MNE group's fiscal year.

We consider the proposed amendments to DAC6 to provide a carve-out from the reporting rules for entities within the scope of Pillar Two; to extend the deadline for making disclosures from 30 days to 90 days and to clarify the trigger point for disclosure to be very welcome measures for businesses operating in the EU. We also welcome the proposed removal of the Category A hallmarks and the special 3-monthly reporting requirement for 'marketable arrangements.' However, our members have serious concerns with any proposal to develop further substance criteria for existing hallmarks.

The proposed adjustments to the reporting obligation on platform operators under DAC7, to remove the transaction-based threshold for the sale of goods and to increase the monetary threshold from €2,000 to €3,000, are also welcome measures. We believe consideration should be given to index-linking this threshold, similar to the approach taken in the Tax Omnibus Directive in respect of the *de minimis* threshold for the ATAD Interest Limitation Rule (ILR).

We outline below in more detail the specific feedback we have received from members on the Tax Omnibus Directive and the Recast of the DAC. The Institute would welcome the opportunity to discuss the matters raised in this submission. Please contact Anne Gunnell of this office at agunnell@taxinstitute.ie if you require any further information in this regard.

Tax Omnibus Directive

Anti-Tax Avoidance Directive (ATAD)

Interest Limitation Rule (ILR)

We welcome the Commission's efforts to enhance consistency in the application of the ILR across Member States by proposing to make mandatory the 30% EBITDA threshold, the group escape clause and the carry-forward of non-deductible interest expenses. However, there are aspects of the proposed Directive that we consider require clarity and, in some instances, we believe could make the proposed changes to the ILR unworkable in practice.

Low-risk third-party loan exclusion

We strongly welcome the proposal to exclude low-risk third-party loans from the ILR. The ILR is intended to counteract groups of companies engaging in BEPS risks through excessive interest payments. It should not restrict genuine external borrowing negotiated between independent parties on an arm's-length basis. Third-party borrowing costs is a fundamental and unavoidable feature of ordinary commercial activity. Restricting the deduction of interest on third-party loans is an additional cost for companies operating in the EU which weakens their capacity to fund productive investment and expansion, and places them at a competitive disadvantage. We firmly believe that the exclusion of low-risk third-party loans from the ILR is a necessary measure to protect the competitiveness of companies operating in the EU.

However, we consider more clarity is needed on how the exception for low-risk third-party loans would apply in the context of intra-group lending between the members of an interest group. For example, if the entities within a jurisdiction have elected to form an interest group (and are therefore treated as an entity for ILR purposes), can borrowings between the interest group members be ignored for the purpose of the exception? For instance, if a treasury company obtains a third-party loan and lends to a

member of the interest group, can the carve-out still apply as the interest group is considered to be one entity and as a result, the intra-group lending between members of the interest group may be disregarded?

Many groups raise external debt through entities that perform centralised treasury functions and subsequently lend to other group companies. These centralised treasury functions are established for commercial reasons, such as operational ease, access to favourable lending rates and cash-flow management within the group. In our view, excluding such groups from the exception for low-risk third-party loans would penalise groups that structure their external financing through one group company, and departs from commercial funding realities.

€3 million *de minimis*

The proposed methodology for calculating the *de minimis* amount could result in the threshold reducing year-on-year. We do not believe that this is the policy intention. Groups require certainty that the indexed *de minimis* threshold will not fall below €3 million. As a result, we consider that the *de minimis* should be the higher of either €3 million, or the indexed amount calculated using the formula. Adopting this approach would provide certainty for taxpayers incurring fluctuating financing costs where inflation in individual Member States differs from the EU average.

Treatment of capitalised interest

Recital 25 of the proposed Directive acknowledges that the ILR may disproportionately affect capital-intensive sectors, such as real estate, infrastructure, and innovative start-ups that rely on long-term debt financing. This disproportionate impact is evidenced in the practical application of the €3 million *de minimis* threshold to capitalised interest. For example, property developers typically capitalise interest incurred on building projects on their balance sheet throughout the course of the project, with the capitalised interest subsequently unwound to the income statement when the project is completed.

Under the ILR, where the unwind of the interest expense exceeds €3 million in that accounting period, a restriction may apply to the amount of deductible interest expense, notwithstanding that not all the interest was incurred in that accounting period. We believe that consideration should be given to amending the rules to provide that the deduction of such interest would not be restricted by the ILR in the year of unwind to the extent that the restriction would not have applied in the accounting period during which the interest was capitalised.

Rules that diverge from the ILR

Article 4(5)(j) of the proposed Directive provides that for the purposes of the ILR *“Member States shall not maintain or introduce, in their national law, any provisions with a subject-matter that falls within the scope of this Article if they lay down rules that diverge from those laid down in this Article.”* In our view, clarity is needed on the intended scope of this article. It is unclear how this provision would interact with Article 3 of ATAD which provides that the Directive shall not preclude the application of domestic provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases? For example, how would the proposed provision interact with the 80% cap on interest deductions under section 291A TCA 1997?

EU R&D Allowance

The Tax Omnibus Directive proposes to amend ATAD by introducing a research and development (R&D) allowance in the EU, as a minimum standard. The allowance provides for full deductibility of R&D qualifying expenditure (i.e., capital expenditure on plant, machinery and tangible assets used directly for R&D or to support R&D facilities). The Pillar Two Side-by-Side Package’s SBTI highlights the importance of tax incentives in attracting investment and there is a growing focus among jurisdictions to strengthen their offerings. Therefore, it is critical that Ireland maintains and continues to enhance its incentive offerings to companies. We highlight below a number of significant differences between the proposed R&D allowance and the Irish R&D Tax Credit.

Method of relief

We note that it is intended that the proposed relief will be provided by means of an allowance, whereas a tax credit is provided under the Irish regime. The R&D Tax Credit is a vital relief for Irish companies, and it is essential that it is retained as a refundable tax credit.

Balancing charges

The proposal includes recapture rules for scenarios where assets are disposed of, demolished or cease to be owned, leading to a balancing charge where the disposal value or deemed disposal value exceeds any unclaimed allowance. The Irish R&D Tax Credit does not include balancing charges.

It is important to consider how the proposed allowance will interact with Ireland's capital allowances regime. Currently, companies can claim capital allowances and the R&D Tax Credit on the same expenditure where the relevant qualifying conditions are met. It is crucial that this continues to be the case.

As the Irish capital allowances regime already contains provisions for balancing charges, we consider that similar provisions are not needed in the R&D Tax Credit. We recommend that the imposition of a balancing charge / recapture mechanism should be made optional for Member States and not mandatory.

Clawback of the relief

It is proposed that there will be a clawback of the R&D allowance where the qualifying expenditure is not used wholly and exclusively for R&D purposes for a continuous period of at least three years, or where the allowance is incorrectly claimed. This clawback provision, as currently drafted, will apply to recapture the allowance claimed in scenarios where the expenditure is used up before the end of the three-year period, or where the plant or equipment becomes obsolete within that period. It would be

helpful to understand the policy intention for excluding assets with a useful life of less than three years from the new R&D allowance.

The three-year clawback is not applicable in cases of either force majeure or circumstances beyond the reasonable control of the taxpayer. We consider that this is too high of a standard in practice. We believe it is inappropriate for the relief to be clawed back in scenarios where it is partly outside the control of the taxpayer. Certainly, guidance would be needed on what might be considered “beyond the reasonable control” of the taxpayer.

As the R&D Tax Credit already includes clawback provisions which address incorrectly claimed credits, we do not believe that an amendment would be necessary to align with the clawback provisions in the proposed EU R&D allowance.

Entity bearing the cost

Under the R&D Tax Credit, the expenditure is typically incurred by the company claiming the credit. Under the proposed R&D allowance, the expenditure can be incurred on behalf of the taxpayer but must be used in the taxpayer’s direct business interest. Consideration could be given to amending the R&D Tax Credit to allow R&D expenditure to be incurred by a connected company.

Controlled Foreign Company (CFC)

Exclusion for SMEs and groups in scope of Pillar Two

We welcome the proposal to exclude SMEs and groups within the scope of Pillar Two from the CFC rules. We believe the proposed exemption for Pillar Two groups is an important step in removing duplicative compliance obligations and overlapping anti-avoidance measures.

The Pillar Two carve-out, does not apply where the ultimate parent entity (UPE) is located in a jurisdiction with a “*qualified side-by-side regime*” and the controlled foreign company is not subject to qualified domestic top-up tax (QDMTT) or, where it is subject to a QDMTT, a refund or direct or indirect financial benefit is granted in relation to that tax. It is unclear how a UPE in a qualified Side-by-Side regime could obtain certainty over the requirement that the controlled foreign company is subject to a QDMTT with no related refund or benefit. As the qualified Side-by-Side regime concept is defined by reference to the OECD Central Record, we consider it would also be important to have clarity on the date at which a taxpayer must assess if this condition is satisfied.

This approach could be considered contrary to the politically accepted equivalence of Side-by-Side regimes and Pillar Two and as a result, it could bring uncertainty and complexity to the EU tax framework. Consideration should be given to respecting the politically agreed equivalence of the two regimes and extending the carve-out to groups in-scope of the Side-by-Side Safe Harbour on the same basis as it applies to Pillar Two groups.

Further guidance would be welcome on the treatment of low-taxed entities residing in Member States which have elected for delayed application of the IIR and UTPR in accordance with Article 50 of the Minimum Tax Directive, to ensure that such entities do not trigger a CFC charge.

Proposal to remove the Model B approach

The proposed Directive would remove the optionality afforded to Member States to apply either the Model A or Model B approach. Under the proposal, Model B, which considers whether the CFC carries on genuine economic activities, would be withdrawn as an option. If the Directive is adopted in its current form, Member States that have adopted the Model B approach would be required to move to Model A, which examines specific categories of passive income.

The BEPS Action 3 – 2015 Final Report *Designing Effective Controlled Foreign Company Rules*¹ highlights that the substance-based analysis “*generally increase the accuracy of CFC rules, but this increased accuracy must be weighed against the increased complexity and expense of more fact-intensive substance analyses.*” Due to the widespread application of transfer pricing to internationally operated groups since this report was published in 2015, the additional administration burden associated with implementing a substance-based CFC regime has reduced.

Model B is also consistent with the case law of the CJEU, which has established the principle that anti-abuse measures included in the direct tax systems of Member States should apply only to “*a wholly artificial arrangement which does not reflect economic reality*”². We believe removing Model B as an option, despite its alignment with the principles laid down by the CJEU, risks creating legal uncertainty and significantly increases the administrative burden of multinational groups that have structured their international operations to comply with the current CFC rules.

In our view, certain elements of the Model A approach are ambiguous and may result in differing interpretations being applied by Member States. For example, one category of income in scope is “*income from insurance, banking and other financial activities*” but no clarity is given on what should be included or excluded from “*other financial activities*”. In addition, there is an exception to the rules applying where “*the controlled foreign company carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances*” but no guidance is provided on how this should be assessed. We consider such ambiguities could potentially give rise to significant disagreement between the tax authorities in different Member States.

Significant resources will be needed to adapt to the change for both taxpayers and tax administration. For Member States, like Ireland, that transposed CFC rules into their

¹ OECD (2015), *Designing Effective Controlled Foreign Company Rules*, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241152-en>

² This principle was established in the leading case of *Cadbury Schweppes*, C-196/04, and has been endorsed in recent judgments on anti-abuse measures in EU Member States.

national laws based on Model B, changing to the categorical-income approach of Model A will require a fundamental redesign of the existing regime. It will also mean moving away from an approach closely aligned with the arm's-length principle, which, in some cases, will alter the scope of the charge.

While the carve-outs for Pillar Two companies and SME reduces the practical impact of this change, affected companies will still face a significant alteration in approach with a move to Model A, resulting in substantial uncertainty, greater complexity and increased compliance obligations.

As recognised in the BEPS Action 3 Report, Model B produces more accurate CFC outcomes. Therefore, we recommend that Ireland along with other impacted Members States advocate for optionality to be retained. Notably, both Model A and Model B were presented as alternatives when ATAD was adopted and neither model was put forward as the more effective in countering avoidance. Indeed, Recital 12 of ATAD suggested that the choice of Model A or Model B would depend *“on the policy priorities of that State”*.

If it is agreed that the Model B approach can no longer be used by Member States, policymakers must ensure that Model A includes a substantive economic-activity carve-out, which is robust and clearly defined, to make sure that genuine activity can be reliably excluded. It will also be important that sufficient transition time is given to Member States impacted by the proposed change.

Parent–Subsidiary Directive (PSD) and Interest and Royalties Directive (IRD)

Our members welcome the proposed amendments to the PSD and the IRD to extend the scope of the Directives; remove the association and holding requirements and the prior authorisation procedures. However, the Institute considers the proposed transposition date of 1 January 2037 to be too long a lead-in time for implementation, which risks creating uncertainty for businesses and investors.

Both the PSD and the IRD operate by specifying that qualifying companies have to be tax resident in a Member State and be legally constituted in one of the forms specified on a country-by-country basis in the annex to the relevant directive. We believe the list of eligible companies able to access the benefits of both the PSD and the IRD should be extended to reflect all existing company forms available in Member States.

Currently, the list of Irish legal entities in the two Directives is different and this should be addressed. The list should include all bodies corporate formed under Irish law. Consideration should also be given to including other forms of legal entity, such as industrial and provident societies. A key practical issue is the treatment of partnerships and other non-corporate entities. Clarity is needed on whether relief will be available at source for such entities or whether they will instead be required to use a refund mechanism.

New safeguard to prevent double non-taxation

The proposed Directive introduces a safeguard in the IRD which is intended to prevent situations of double non-taxation. Member States would be required either to levy withholding tax or deny the deductibility of interest and royalty payments at source, where the recipient of the payment is established in a jurisdiction that does not levy corporate income tax or applies a zero tax rate to income flows of interests and royalties, where the Member State of source does not levy withholding tax either.

It is proposed that an exclusion from the safeguard would apply where the recipient of the payment is subject to a QDMTT and does not receive any refund or direct or indirect financial benefits in relation to that tax or is part of an MNE group which is part of an MNE group within the scope of the Pillar Two Directive, or as regards third-country jurisdictions, the OECD Model Rules. In this context, the Explanatory Memorandum notes the protective measure may still apply if the ultimate parent entity of the MNE group is located in a jurisdiction with a qualified Side-by-Side regime for the tax period.

Our members are concerned that the proposed safeguard could make new and existing debt instruments and investments inefficient tools for capital markets. Established and regulated investment fund jurisdictions, such as the Cayman Islands, are often used by non-EU investors including sovereign funds and exempt pension funds, for commercial, legal, and regulatory reasons to make investments.

In most countries, funds are normally tax exempt to ensure their tax neutrality, but their income and gains are generally subject to appropriate tax under the tax regime in the country of residence of the ultimate investor. We consider the exclusion from the safeguard will have limited application as investment funds are only exceptionally consolidated and therefore, the exclusion does not take into consideration scenarios where the income of the fund is taxed in the hands of the ultimate investor, typically under the US Net CFC Tested Income (NCTI) Rule for groups or QDMTT under Pillar Two Rules. At a minimum, the rules need to recognise that the exclusion should apply where the ultimate investor is within the charge to tax on payments from the investment funds.

Where investment funds use special purpose vehicles or investment platforms for commercial or legal reasons, any debt used to finance those vehicles could, under the proposal, as drafted, give rise to withholding tax on interest or result in the interest being non-deductible. Consequently, there is a concern that the proposal could encourage investment managers to choose non-EU investment platforms over existing EU investment hubs. Such an outcome would appear contrary to the objective of the Savings and Investment Union (SIU).

The proposal could result in common capital markets instruments becoming more expensive for companies that require financing due to the costs and administrative burden of applying withholding tax, or no deduction for the cost of interest incurred. For instance, there may be a significant administrative burden associated with; identifying the recipient; verifying whether the new rules apply; putting appropriate documentation in place; applying withholding tax or denying a deduction; and going through a refund process if the holder is identified as based in a country that is not a zero rate country.

To the extent that withholding tax applies to pre-existing debt, it is likely that the debtor would be required under the terms and conditions for many bonds to gross up the payment, meaning the financing would become substantially more expensive.

We understand that the proposal seeks EU-wide adoption of an ‘outbound payments’ rule similar to the rules in Ireland, which has been approved by the European Commission. Consideration should be given to amending the proposed change to include similar features to those in the Irish regime that already address the above commercial issues.

We consider that the policy rationale for the application of the safeguard is unclear in circumstances where the ultimate investor is subject to appropriate taxation or is a pension fund. The interaction of the provision with Double Taxation Agreements (DTA), which may provide for withholding tax to be applied at a specified rate, must also be clarified. Overall, the proposed safeguard would appear to be contrary to the objective of the Tax Omnibus Directive of simplifying the EU framework on direct taxation and supporting growth and competitiveness of the EU.

Tax Merger Directive

We welcome the proposed alignment of the Tax Merger Directive with recent developments in EU company law, including the extension of tax neutrality to cross-border conversions. In our view, these changes should facilitate cross-border reorganisations and provide greater legal certainty for taxpayers operating across multiple jurisdictions.

Recast of the DAC

DAC4 and DAC 9

We welcome the proposed introduction of a single centralised notification for Country-by-Country (CbC) Reporting and the GloBE Information Return (GIR) within the EU, which would remove the need to file notifications in each relevant EU Member State.

Currently, an MNE Group must file its CbC Report no later than 12 months after the last day of the fiscal year to which the CbC Report relates. CbC Reporting notifications must be filed no later than the last day of the fiscal year to which the report relates. Most EU Member States require Pillar Two notifications to be made by the same deadline as the GIR, i.e., within 15 months of the end of the relevant financial year and 18 months for the first filings.

It is proposed that the deadline for the combined notification would be aligned with the deadline that currently applies to CbC Reporting notifications which is the last day of the MNE group's fiscal year. As MNE groups have only recently begun making the required GIR notifications and filings, in our view, they should be given as much time as possible to comply. Accordingly, we consider it would be more appropriate for the notification deadline to be aligned with the deadline for the filing of CbC Reports which is within 12 months after the end of the fiscal year.

DAC6

We welcome the proposed amendments to the Directive to provide a carve-out from the rules for entities within the scope of Pillar Two; to extend the deadline for making disclosures from 30 days to 90 days and to clarify the trigger point for disclosure. The proposed removal of the Category A hallmarks and the special 3-monthly reporting requirement for 'marketable arrangements' are also positive measures.

While we welcome the carve-out from the reporting provisions for entities within the scope of Pillar Two, equivalent treatment is not extended to groups within scope of the Side-by-Side Safe Harbour. This approach could be considered contrary to the politically accepted equivalence of Side-by-Side regimes and Pillar Two and as a result, it could bring uncertainty and complexity to the EU tax framework. Consideration should be given to respecting the politically agreed equivalence of the two regimes and extending the carve-out to groups in-scope of the Side-by-Side Safe Harbour on the same basis as it applies to Pillar Two groups.

We note that the proposal, as published on 26 June, included a new Article 52, which would require the EU Council, within five years of the date of entry into force of the Directive, to adopt implementing acts establishing applicable substance criteria for Hallmark D.2(a) and (b). The Explanatory Memorandum notes that the implementing acts should provide taxpayers and tax administrations with detailed and clear rules on the criteria for the requirements set out in Part II, points D.2(a) and (b) of Annex IV, to ensure uniform application of the Directive, reduce the compliance burden and level the playing field. We understand that an Irish Presidency compromise text of 26 August amends Article 52 to provide that the Commission would report on the feasibility of developing the criteria further, instead of a Council Implementing Act. If the evidence gathered in the report suggests a tax risk gap, the Commission should first evaluate the data already collected, identify specific abusive patterns and issue targeted guidance or amend the relevant substantive anti-abuse legislation.

The Commission has previously indicated that it would explore the feasibility of integrating the principles and concepts extensively examined by Council under the former Unshell proposal³ into the simplified DAC framework. Our members have serious concerns with any proposal to integrate the principles of Unshell into DAC6, in particular, the economic substance indicators. As we outlined in the Institute's

³ Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU

response to the consultation by the Commission on the Unshell proposal in April 2022⁴, the economic substance indicators contemplated in Unshell, which included an undertaking having their own premises or premises of which they have exclusive use in their Member State of residence; having full-time employees resident in, or near, the Member State where the undertaking is resident; and having an active EU bank account, are arbitrary and do not consider the facts and circumstances of the businesses or industries concerned.

Low substance is not, by itself, evidence of tax avoidance. Many entities legitimately rely on group resources and outsourced administrators. Any reporting test should require a clearly defined tax-risk nexus, preferably a main-benefit test, rather than making ordinary commercial structures reportable solely because their operational footprint is limited.

We urge Member States and the Commission to be cautious about setting a minimum level of substance for a company. It is not unusual for some groups to split their activities between many entities. For example, it may be the case that all employees in a group are employed in a single undertaking with a separate entity holding premises or other property.

Indeed, in certain sectors, where the group borrows to fund the acquisition of a substantial capital asset, it is common for the financial institution to require that the asset be held in a separate entity for security purposes. In fact, it is common practice for investment fund documentation to include strict prohibitions on investment vehicles owning or leasing premises or having any employees. Instead, this is outsourced to third party asset managers who are responsible for the management of the assets owned by the investment fund.

Imposing such arbitrary factors could disproportionately impact smaller and commercially outsourced businesses as a substance test based on directly employed

⁴ <https://taxinstitute.ie/wp-content/uploads/2022/04/2022-04-06-ITI-Response-to-the-European-Commission-on-the-Proposed-Directive-on-Rule-to-Prevent-the-Misuse-of-Shell-Entities-for.pdf>

staff or owned premises may favour large groups over SMEs, investment platforms and groups using legitimate shared-service or outsourcing models. That would create an uneven compliance burden unrelated to tax risk.

Given the significant volume of relevant data already available to tax authorities, we do not believe that further substance criteria should be developed for existing hallmarks. In addition, Member States already apply domestic GAARs, transfer-pricing rules, CFC rules, beneficial-ownership principles and treaty anti-abuse provisions. A new DAC6 substance hallmark could create inconsistent classifications of common terms. If policymakers have concerns with the adequacy of anti-money laundering legislation, they should be addressed through that legislation rather than through DAC6.

DAC7

We welcome the proposed adjustments to the reporting obligation on platform operators under DAC7 to remove the transaction-based threshold for the sale of goods and to increase the monetary threshold from €2,000 to €3,000. We believe consideration should also be given to index-linking this threshold, similar to the position that has been taken in the Tax Omnibus Directive in respect of the *de minimis* threshold under ILR.