

Date | 18 January 2019
Our ref | JBS TBA
Your ref |

By Email

Hybrids & Interest Limitation - Public Consultation
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

By email to: ctreview@finance.gov.ie

Responses to the Public Consultation on ATAD Implementation - Hybrids & Interest Limitation

Dear Sirs

A&L Goodbody welcomes the opportunity to provide input into the consultation exercise initiated by the Department of Finance in respect of Ireland's implementation of the anti-hybrid and interest limitation provisions of the EU Anti-Tax Avoidance Directives (**ATAD directives**).

We believe there is great value in advance consultation with relevant stakeholders in advance of enacting complex legislation such as this, so as to ensure that there is as broad as possible consideration given to the potential implications of the changes. In the context of the ATAD directives, Ireland is clearly under an obligation to implement the provisions into Irish law. However, it is important that in doing so, and to the extent there is discretion, the law is drafted in such a way that achieves the policy intent without imposing unnecessary or unduly burdensome restrictions or obligations on taxpayers in what is an uncertain business environment.

In this context, while we note the comments in the Corporation Tax Roadmap in respect of the timing of interest limitation rules, we trust that the Government will stick to its position regarding the deferral of implementation until 2024, unless there is a clear decision that our existing rules are not "equally effective". To date, the Commission has decided that certain Member States' rules as "economically equivalent" which we would suggest is not the criteria set out in the ATAD Directive.

We have provided our responses to the Consultation in tabular format in the schedule to this letter. To the extent that any of our comments are unclear or require further expansion, we would be happy to engage with department officials if this would be considered useful.

Yours faithfully


A&L Goodbody

M-43726736-1

A&L Goodbody

ATAD IMPLEMENTATION – HYBRIDS AND INTEREST LIMITATION PUBLIC CONSULTATION

RESPONSES TO CONSULTATION SUBMITTED BY A & L GOODBODY SOLICITORS

All legislative references are to the Taxes Consolidation Act, 1997 (unless otherwise specified).

No.	Subject	Question	Comments/Responses
Part A - Questions on the anti-hybrid rules			
Scope of Ireland's new anti-hybrid rules			
1.	Entities	What entities should be within scope of Ireland's anti-hybrid regime?	Entities which are taxable as a separate person and which are subject to corporation tax. Irish funds taxed as investment undertakings (and subsidiaries) should be excluded from scope. "Public" securitisations, loan origination SPVs etc. that are excluded from the s.110 specified mortgage restrictions should also be excluded. Mainstream tax arising on profits, income and capital gains. Municipal taxes etc. should be disregarded.
2.	Foreign/Local taxes	<ul style="list-style-type: none"> What foreign taxes should be considered as equivalent to Irish taxes for the purposes of establishing whether or not a mismatch outcome arises? For example how should municipal taxes, local taxes, taxes on profits under CFC regimes etc. be treated? 	
Subject to tax			
3.	Subject to tax	Taking account of the foreign taxes to be included: <ul style="list-style-type: none"> What outcomes should be included within the concept of "inclusion"? What timings should apply to that test? 	There should be an ability to trace through transparent entities but with recognition of practical difficulties in tracing amounts through such entities. As there are already such tax rules in s.110, the anti-hybrid rules should not include a different concept that would need to be satisfied in parallel with existing rules. If included, but exempt this should still be viewed as "inclusion". We recognise that inclusion cannot be indefinitely deferred but the rules should reflect realities of tax returns/taxable periods
4.	Timing of inclusion	There are a number of ways that timing mismatches can be dealt with on the implementation of ATAD2. Different methods	

A&L Goodbody

No.	Subject	Question	Comments/Responses
		<p>may be more appropriate for different hybrid mismatches.</p> <ul style="list-style-type: none"> What issues should be considered when deciding how to treat timing mismatches? 	to avoid inequitable results (one year after the end of the year in which payment is made and/or in the concept of a term loan/note maturity of that instrument).
5.	Disregarded PEs	<p>As set out in Ireland's Corporation Tax Roadmap¹, a public consultation on moving to a territorial regime is to be held in early 2019.</p> <ul style="list-style-type: none"> If Ireland were to move to a territorial regime what are the relevant considerations to implementing a disregarded PE rule? 	
6.	Disregarded PEs	<p>Where the profits of an otherwise disregarded PE are subject to tax, e.g. under a switchover rule or a CFC charge:</p> <ul style="list-style-type: none"> Is that sufficient for them to then be treated as a PE, rather than a disregarded PE? What are the relevant considerations to deciding whether or not Ireland should implement the defensive rules on disregarded PEs? 	
7.	Other defensive rules	What are the relevant considerations to deciding whether or not Ireland should implement the defensive rules in the context of these hybrid mismatches?	
8.	Charge to tax	How should an amount of income not otherwise chargeable to tax in Ireland be charged to tax under the anti-hybrid regime be taxed? ²	Perhaps additional Case IV income but the rules will need to ensure that there is no overly onerous requirement to investigate every payment made.
9.	Imported mismatches	What factors should be considered in relation to the implementation of the rules to prevent imported mismatches, specifically in relation to their application where the Irish taxpayer is transacting with a person in an EU country which has implemented ATAD2?	Important that this does not impose disproportionate burden to investigate in multi-tier structures. There should also be an awareness or knowledge qualification. Carve out for jurisdictions that have implemented anti-hybrid

¹ Ireland's Corporation Tax Roadmap, 2018, paragraph 2.1.2.

² Department of Finance Comment: A number of options exist, such as including them as a Case IV amount chargeable to corporation tax, changing them to income tax, or having different treatment for different anti-hybrid rules.

No.	Subject	Question	Comments/Responses
10.	Dual inclusion income and financial instruments	What factors should be considered in relation to the concept of dual inclusion income being incorporated into the application of the financial instrument anti-hybrid rules to avoid those rules resulting in double taxation of the same income?	Clearly the only equitable position would be to include a dual inclusion concept.
11.	Dual inclusion income and deferrals	While there is symmetry in allowing the deferral of an adjustment, the practicalities of tracking deferred adjustments must be considered. • How could such timing differences be dealt with, from a practical perspective, in the implementation of the anti-hybrid rules? ³	As stated above, while there must be some backstop to prevent indefinite deferral, if this backstop is breached and a denial of deduction arises, the deduction should then be granted if the income is subsequently recognised.
12.	Financial trader exemption	What factors should Ireland consider when determining, as permitted, whether or not to apply the deduction without inclusion rules to such trades by financial traders?	Whether the entity would be considered to be trading under Schedule D Case I principles.
Definitions			
13.	GAAP	What factors should be considered when implementing the concept of consolidated accounting groups in hybrid mismatch measures? • Should a version of section 432 Taxes Consolidation Act 1997 ("TCA") be used to define associated enterprises? ⁴ or • Rather than referring to section 432 or relevant accounting standards, should the concepts of a group under accounting principles be imported into domestic tax legislation using, for example, section 7 Companies Act 2014 as a template ⁵ ?	S.432 is not appropriate as it is too broad (e.g. loan creditor concept) and difficult to apply. It would be better to use s. 11 or a variant of this.
14.	Hybrid entities	Is the current case law clear enough to give taxpayers certainty on the treatment of an entity, when it comes to applying the anti-hybrid rules?	Yes, but more clarity could be gained in published Revenue Guidance. An alternative approach would be to consider the foreign tax status of the entity but care would need to be taken

³ Department of Finance Comment: This question is linked to the question on timing issues in Question 3 above.

⁴ [S.432\(1\) Taxes Consolidation Act 1997](#)

⁵ [S.432\(1\) Taxes Consolidation Act 1997](#)

ASL Goodbody

No.	Subject	Question	Comments/Responses
15.	Investor / payee jurisdiction	Should a single concept be used to encompass both investor and payee when determining both if a payment has been deducted and included in income?	In introducing a formulaic analysis given the myriad of foreign law entities. Yes, this would be preferable.
16.	Payment / deemed payment	The Irish tax regime does not have deemed payments, as such, but under the accruals basis can there be events (e.g. forgiveness of debt) which could come within the scope of these provisions?	
17.	Financial instruments	<p>What rules could be described as Ireland's rules for taxing debt, equity or derivative returns?</p> <ul style="list-style-type: none"> Is it sufficient to describe them as debt, equity or derivative instruments? <p>There are a number of definitions of "financial assets" in the TCA:</p> <ul style="list-style-type: none"> Should they be used as a basis for this definition? Alternatively, could financial instruments be defined in line with IAS 39? 	Use the s.110 definition.
Transactional knowledge			
18.	Structured arrangements	<p>Recital (12) recognises that to ensure proportionality, ATAD2 should only apply to cases where there is a substantial risk of avoiding taxation through the use of hybrid mismatches.</p> <ul style="list-style-type: none"> What factors should be considered in implementing the awareness test and the value test? What practical difficulties may be encountered in establishing whether or not a structured arrangement exists? 	<p>No comments on the legislation, other than that it will need to be workable. It is important that examples of how it should work in practice are provided in Revenue guidance.</p> <p>This should be an objective test.</p> <p>The value needs to be directly "shared" economically rather than just being an aspect that improves marketability of a transaction.</p>

A&L Goodbody

No.	Subject	Question	Comments/Responses
19.	Capital market transactions	<p>Taking account of recital (12):</p> <ul style="list-style-type: none"> Should provision be made such that the anti-hybrid rules only apply where it would be reasonable to consider that the Irish taxpayer was aware it was party to a hybrid transaction? What are the relevant considerations? 	Yes.
20.	What is tested for hybridity?	<ul style="list-style-type: none"> Should regard be had to the transaction, to the actual circumstances of the taxpayer or to the laws of the foreign jurisdiction? Should this vary depending on the type of hybridity being neutralised? 	Depends on the circumstances but primarily the law of the foreign jurisdiction.
Interaction with domestic provisions			
21.	Existing domestic provisions	Bearing in mind both the interest limitation and anti-hybrid requirements of ATAD, what amendments, if any, should be made to these domestic provisions? (see also, Question 44)	Amendments would need to be made to ensure no double taxation outcomes arise where domestic Irish rules deny deductibility but foreign rules may impose tax in foreign jurisdictions (e.g. s130, s247 and s817A and C).
22.	Existing domestic anti-hybrid provisions	Should the domestic anti-hybrid rules be maintained in their current form or should they be amended and replaced with a single anti-hybrid rule which applies to both cross border and domestic transactions?	See above – question 21.
23.	Treatment of disallowed payments	Should adjustments under the anti-hybrid rules cause payments to be treated as distributions or simply as non-deductible expenses?	The consequence should be a loss of deduction rather than recharacterisation of the payment as a distribution so as to avoid other tax or corporate law consequences of such a recharacterisation (e.g. DWT etc.).
24.	Order of application	<ul style="list-style-type: none"> In what order should the rules in ATAD and ATAD2 apply? Are there any other order of applications issues which should be considered in the implementation of ATAD and ATAD2? 	Perhaps follow UK priorities?
25.	Removing domestic hybridity	Are there any domestic tax provisions which should be amended to ensure that they are not regarded as hybrid entities, for example, by foreign jurisdictions?	See question 21.

No	Subject	Question	Comments/Responses
26.	Leases	What domestic legislative changes may be required to the taxation of leases to clarify how they will be treated under both the anti-hybrid and interest limitation rules in ATAD and ATAD2?	Treat manufactured payments as interest equivalents.
27.	Stock lending and repo transactions	What domestic legislative changes may be required to the taxation of stock lending and repo transactions to clarify how they will be treated under both the anti-hybrid and interest limitation rules in ATAD and ATAD2?	Legislate the current Revenue practice.
28.	Part 8A TCA	<ul style="list-style-type: none"> Are any domestic law changes necessary to Part 8A TCA, or Any special considerations necessary to the implementation of the anti-hybrid and interest limitation rules to ensure that those measures apply to Part 8A TCA equivalent transactions? 	The same restrictions etc. should apply to Part 8A transactions – this could be included by cross reference in the anti-hybrid legislation.
Reverse Hybrids (for implementation by 31 December 2021)			
29.	The reverse hybrid rule	<p>The language used in Article 9a is that the profits are taxed, which is different to the language used in relation to income being included. In keeping with the objective of ATAD2 which is to neutralise hybrid mismatches:</p> <ul style="list-style-type: none"> Would it be reasonable to use the same "subject to tax" definition for reverse hybrids as for all other hybrid mismatches? 	Should be the same, no reason not to be. To do so would introduce unnecessary complexities.
30.	Collective Investment Vehicles	Should Ireland choose, as permitted, not to apply the reverse hybrid rule to these vehicles?	Yes.

No.	Subject	Question	Comments/Responses
-----	---------	----------	--------------------

Part B - Questions on the Interest Limitation Rules

Scope of Ireland's new interest limitation rules

31.	Application to groups	What are the relevant considerations in determining whether Ireland should implement Article 4 in such a manner as would allow application of the interest limitation rule on a local group basis?	Taxpayers should be given discretion to apply the interest limitation rules on a local group basis.
32.	Application to groups	<p>As Ireland does not have tax consolidation for groups, what are the practical issues that might arise in applying the interest limitation rule on a group basis? For example:</p> <ul style="list-style-type: none"> • How should the allowable quantum of interest deductions, after the application of the interest restriction, be allocated to the group members? • How should companies joining and leaving groups during an accounting period be dealt with? • What happens if members of the local group do not have corresponding tax periods? • What filing obligations should each member of the local group have? 	Apply to local group's EBITDA and have discretion within that local group to allocate.
33.	Application to groups	<ul style="list-style-type: none"> • Ireland has a number of different definitions of 'group' within our national tax law. Taking account of [Associated enterprises section in Questions on Hybrid Rules Section] above, how should 'group' be defined for the purposes of implementing Article 4? • Should a local group include those members of a consolidated group that are within the charge to Irish corporation tax or should other criteria apply for determining the existence of a group? 	S.410 definition as for standard Irish corporation tax groups.

ASL Goodbody

No	Subject	Question	Comments/Responses
34.	De Minimis threshold	Are there any reasons why Ireland should not make provision for a de minimis threshold?	No. Full de minimis threshold should be applied.
35.	Standalone entities	What are the relevant factors that should be taken into account in defining a "standalone entity"?	Broad implementation (i.e. "standalone entity" should be defined as broadly as permitted under ATAD). The rules should ensure that orphan structures are recognised as stand-alone even where there is technical risk that it of being an associated enterprise through a single share trustee (i.e. track beneficial ownership rather than mere legal ownership).
36.	Pre-existing loans	What factors should be taken into account in determining whether or not to apply the interest restriction to loans entered into prior to 17 June 2016?	Loans entered into before 17 June 2016 and not materially modified since that time should be grandfathered.
37.	Long term infrastructure	<ul style="list-style-type: none"> What factors should be taken into account in determining whether or not to apply the interest restriction to long term infrastructure loans? If the exemption was to apply, how should long term infrastructure projects be defined, in Irish legislation, for the purposes of this exemption? 	<p>The exemption for long term infrastructure projects should be implemented in the Irish law given that privately funded infrastructure projects reduce the burden on the State to provide infrastructure.</p> <p>Long term infrastructure project should be broadly defined as those that:</p> <ul style="list-style-type: none"> facilitate services/facilities to the general public; and are longer than 5-7 years in duration. <p>The exemption should not be limited to Irish infrastructure.</p>
38.	Consolidated group ratio rule	<ul style="list-style-type: none"> What are the relevant considerations in determining whether Ireland should make provision for a consolidated group ratio rule? What are the key factors to consider in determining which consolidated group ratio rule should be implemented in Ireland? 	<p>The Irish rules should grant a choice as enabled by ATAD.</p>

No.	Subject	Question	Comments/Responses
39.	Financial undertakings	<ul style="list-style-type: none"> What factors should be taken into account in determining whether or not to apply the interest restriction to financial undertakings? If the exemption is to apply, should it apply only to regulated financial undertakings or should it apply also to non-regulated undertakings which carry on the same activities? 	<p>Should cover subsidiaries of regulated entities as well as the regulated entity itself. For example SPVs owned by investment undertakings are practically subject to the same regulation as the parent fund so should be able to benefit from the financial undertaking concept.</p> <p>Securitisation companies by reference to the STS regulation or equivalent should be included as carrying on equivalent activities to regulated entities.</p> <p>Ireland should not impose any greater regulatory requirement than the directive does itself. So for example, if in Ireland an AIF does not need to be regulated under Irish rules it should be able to be treated as a financial undertaking because ATAD permits this.</p>
40.	Carry forward	What are the key considerations in deciding which of the three policy options should be implemented in Ireland?	Give taxpayer choice of all 3.
Definitions			
41.	Borrowing costs and exceeding borrowing costs	<ul style="list-style-type: none"> What are the factors that should be taken into account in defining borrowing costs in Irish legislation? What practical difficulties may arise in applying such a wide definition and what can be done to ameliorate them? What types of income / expenses should fall to be treated as economically equivalent to interest for the purposes of the application of the interest limitation rule? 	<p><u>Borrowing Costs.</u> Narrow interpretation limited to direct costs of financing. Interest (or disguised interest) but not costs that are not attributable to the borrowings.</p> <p><u>Interest equivalent.</u> At least everything that would be considered a borrowing cost. Also equivalents, such as stock lending fees, TRS receipts, risk sharing payments where funds advanced or collateral placed, principal accretions where in the loans acquired at a discount, and, in the context of s.110 SPVs, all receipts received from qualifying assets.</p> <p>UK loan relationship rules may be a useful precedent.</p>
42.	EBITDA	<ul style="list-style-type: none"> What are the key considerations in defining EBITDA in Irish tax legislation, particularly in relation to the application of the interest restriction on a group basis? 	Use GAAP concepts as in s.76A.

⁷ Department of Finance Comment: Issues raised in the anti-hybrid portion of this document should also be considered in this context.

No.	Subject	Question	Comments/Responses
		<ul style="list-style-type: none"> For example, where a company within the local group has a negative EBITDA how should this be treated when calculating the EBITDA of the local group? 	Negative EBITDA should be excluded from the local group interest limitation calculation.
43.	Exempt income	<p>Irish companies are exempt from tax on dividends received from Irish companies. As the scheme of double tax relief for certain foreign dividends is designed to effectively mirror that exemption through the availability of credits and additional credits,</p> <ul style="list-style-type: none"> If Irish dividends are treated as 'exempt income' should foreign dividends that are fully sheltered from Irish corporation tax by double tax relief also be treated as 'exempt' and therefore excluded from EBITDA? 	Foreign source dividends should not be excluded from EBITDA even where tax credits available. These dividends are not exempt from tax.
44.	Scheme of relief or interest	How should the provisions of Article 4 of ATAD interact with existing provisions in Irish tax legislation dealing with qualification for interest relief and with the anti-avoidance provisions relating to interest?	The relevance of the existing provisions should be reconsidered in light of the ATAD Article 4 changes. To the extent that an existing domestic rule already limits a deduction then clearly this should be excluded in the calculation of any ATAD restriction.