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Hybrids and Interest Limitation – Public Consultation
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
ctreview@finance.gov.ie

Grant Thornton
Financial and Taxation
Consultants Limited
13-18 City Quay
Dublin 2
D02 ED70
Ireland

T +353 (0)1 6805 805
F +353 (0)1 6805 806
E info@ie.gt.com
www.grantthornton.ie

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Ref: PV/PC

Dear Sir/Madam

PUBLIC CONSULTATION PAPER – ATAD IMPLEMENTATION HYBRIDS AND INTEREST LIMITATION

We are writing to you in relation to the consultation launched following the publication of the Consultation Paper for ATAD Implementation – Hybrids and Interest Limitation.

It should be noted that Grant Thornton has contributed comments separately through various industry / technical bodies. For the most part, we have not sought to repeat these contributions in our submission.

While the views expressed in this letter are those of Grant Thornton, they also reflect soundings taken from many of our clients in recent months.

Tax transparency is critical in formulating domestic and international tax policy, and the legislative measures already undertaken by Ireland in this regard demonstrate our commitment to greater tax transparency. Having been an international leader in the implementation of such transparency policies, Ireland needs now to ensure that this does not put us at a disadvantage, and we therefore need to carefully consider how we position Ireland for the next phase of global uncertainty and change.

Fiscal data shows that notwithstanding Ireland's low headline 12.5% corporation tax rate, corporates continue to make a substantial and growing contribution to Irish tax revenues. This has been the result of careful positioning of Ireland's tax and business offering over many decades.

At this juncture, we need to be careful to ensure that our offering remains competitive and diversified, and attractive to international and domestic corporates alike, particularly in the context of the many competing international pressures facing such groups.

The Government took a position in June 2016 that changes to the provisions on interest deductions would be deferred until 2024. Taxpayers have entered into transactions, based on this position, and therefore, if the Government intends to introduce changes to the provisions on interest deductions prior to 2024, this should be communicated without delay, along with a clear announcement on grandfathering of existing loan arrangements.

Our comments in respect of the questions raised in the Public Consultation Paper on Ireland's ATAD Implementation – Hybrids and Interest Limitation are as follows:

Hybrids

1 **(Entities) What entities should be within scope of Ireland's anti-hybrid regime?**

When seeking to implement ATAD, Ireland should not extend the scope of the anti-hybrid rules above those set out in the Directive. As such, only taxpayers subject to corporation tax in Ireland should be within the scope of the anti-hybrid rules.

2 **(Foreign/local taxes) 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?**

Foreign taxes should be defined to include any taxes on profits which a corporate taxpayer could reasonably be expected to suffer in a foreign jurisdiction.

3 **(Subject to tax) Taking account of the foreign taxes to be included, what outcomes should be included within the concept of "inclusion"? What timings should apply to that test?**

We would broadly agree with Recitals (18) and (20) and therefore, "inclusion" should cover true hybrid payments rather than mismatches arising as a result of jurisdictions having adopted divergent tax rules. Payments ultimately subject to controlled foreign company charges should also be included within the concept of "inclusion."

Similarly, Irish anti-hybrid rules should not automatically deny a deduction where payments are ultimately taxed by a corporate taxpayer other than an immediate parent.

Irish legislation should recognise that timing differences may arise as a result of different rules for recognising income and expenditure and different tax periods and therefore, should only target indefinite deferrals.

4 **(Timing of inclusion) There are a number of ways that timing mismatches can be dealt with on the implementation of ATAD2. Different methods may be more appropriate for different hybrid mismatches. What issues should be considered when deciding how to treat timing mismatches?**

Please refer to Question 3.

In addition to the above, where payments are made in respect of financial instruments, we would suggest that an arm's length test, in line with that set out in ATAD 2, should be included to provide certainty that income would not be indefinitely deferred.

5 **(Disregarded PEs) As set out in Ireland's Corporation Tax Roadmap, a public consultation on moving to a territorial regime is to be held in early 2019. If Ireland were to move to a territorial regime what are the relevant considerations to implementing a disregarded PE rule?**

Ireland does not currently have legislation in place regarding disregarded PEs. We recommend that legislating for disregarded PEs under Irish anti-hybrid rules be considered as part of the public consultation for Ireland's potential move to a territorial regime.

6 **(Disregarded PEs) Where the profits of an otherwise disregarded PE are subject to tax, e.g. under a switchover rule or a CFC charge, 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?**

Please refer to Question 5.

8 **(Charge to tax) How should these amounts of income be taxed? A number of options exist, such as including them as a Case IV amount chargeable to corporation tax, charging them to income tax, or having different treatment for different anti-hybrid rules.**

To the extent that income becomes chargeable to corporation tax in Ireland as a result of anti-hybrid rules, such income should be treated as taxable under the relevant Case of Schedule D.

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?**

Where an Irish company engages in transaction(s) with a corporation in another EU Member State, the Irish company should not be required to assess whether the foreign corporation has applied the anti-hybrid rules implemented in its jursdiction appropriately.

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?

The concept of dual inclusion income should be included when legislating for anti-hybrid rules applying to financial instruments. Irish anti-hybrid legislation should provide certainty that a double deduction should not arise in such cases.

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?

Irish anti-hybrid legislation should include the financial trader exemption as set out in ATAD2, and the definition of financial trader should be interpreted as widely as possible.

13 (GAAP – Associated enterprises) 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? 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?

If a version of section 432 TCA were used to define associate enterprises, it could unintentionally broaden the scope of the Directive to include concepts such as participators and associated persons. An introduction of these concepts would not be appropriate in the context of anti-hybrid rules.

Section 7 Companies Act 2014, which refers to the ability to control board composition and dominant influence, would be more aligned with the objectives of ATAD2.

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?

Case law is currently used to determine whether an entity should be treated as transparent for Irish tax purposes. However, when implementing the Irish anti-hybrid rules, there should be certainty on the treatment of certain entities. This could be achieved by either legislating for the principles set out in case law or alternatively, Revenue could operate a list of opaque and transparent entities, possibly as an interim solution. If Revenue were to operate a list of opaque and transparent entities, taxpayers could apply for an entity to be included on the list. HMRC in the UK have issued guidance on this in the past, with a broad range of foreign entities covered.

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?

A single concept encompassing both investor and payee when determining whether a payment has been deducted and included in income would be beneficial from an administrative perspective. However, as noted in Question 3, Irish tax rules should include provisions for circumstances where a payment is ultimately taxed by a corporate taxpayer other than an immediate parent. This would cover payments made to US check-the-box entities for example.

17 (Financial instruments) What rules could be described as Ireland's rules for taxing debt, equity or derivative returns? Is it sufficient to describe them as debt, equity or derivative instruments? There are a number of definitions of "financial assets" in the TCA: should they be used as a basis for this definition? Alternatively, could financial instruments be defined in line with IAS 39?

We recommend that the definition of "financial assets" included in Ireland's anti-hybrid rules should be aligned to the definition under section 110 TCA.

18 (Structured arrangements) 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. 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?

A structured arrangement should not give rise to an adjustment under the anti-hybrid rules where the Irish taxpayer could not reasonably have been aware of the hybrid mismatch (the awareness test) and did not share in the value of the tax benefit (the value test).

The key issue for Irish taxpayers when defining the awareness test is what should be considered as "reasonable awareness". We would recommend that Irish taxpayers not be required to review transactions for hybrid mismatches above what would be expected of a reasonable and prudent person.

Taxpayers should be protected in circumstances where they do not have the relevant information to determine whether they are entering into a hybrid arrangement. This lack of information is quite common with securitisation transactions for example.

We would recommend that Irish legislation for anti-hybrids include an awareness test which considers whether a transaction or arrangement is a "structured arrangement" at the time the transaction or arrangement is entered into. A similar approach is taken in section 110 TCA.

19 (Capital market transactions) Taking account of recital (12), 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?

Please refer to Question 18.

20 (What is tested for hybridity) 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?

When testing for hybridity, regard should be had for the laws of foreign jurisdictions in which payees/investors are resident or subject to tax in order for there to be certainty of the application of the anti-hybrid rules, but any test should be limited to the extent of that the payee/investor is entitled to a deduction for a payment under local tax law.

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?

In order for Ireland to continue to be an attractive location for investment, the anti-hybrid rules introduced must be clear, concise and must not result in double taxation. It is essential that all stakeholders be given the opportunity to examine the draft legislation to ensure no unexpected and unintended consequences arise from its interaction with existing tax law.

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?

Where an Irish taxpayer is required to make an adjustment under Irish anti-hybrid rules, the adjustment should be treated as non-deductible expenditure.

24 (Order of application) 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?

We would recommend when implementing the anti-hybrid rules that Ireland follow the order of application as outlined in the BEPS Action 2 2015 Report.

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?

In our view, certain regulated fund vehicle tax provisions would need to be reviewed in this regard.

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?

In our view, the most fundamental issue to be reviewed in respect of leases is IFRS16 and how accounting changes arising from this are treated for tax purposes.

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?

In certain cases, the treatment of stock lending and repo transactions in Revenue guidance is not reflected in the relevant tax legislation.

28 (Islamic financing) 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?

Unless sharia compliant financing arrangements are used for the purposes of artificially producing a mismatch outcome which is not aligned to the commercial purpose of a transaction, they should not be considered structured arrangements for the purposes of Irish anti-hybrid rules.

29 (Reverse hybrid rule) 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, would it be reasonable to use the same "subject to tax" definition for reverse hybrids as for all other hybrid mismatches?

We would recommend that further consultation be sought in respect of this matter as it is not clear why a separate "subject to tax" definition is required.

30 (Collective Investment Vehicles) Should Ireland choose, as permitted, not to apply the reverse hybrid rule to these vehicles?

Ireland should not choose to apply the reverse hybrid rule to Collective Investment Vehicles.

Interest Limitation

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 rules on a local group basis.**

We would recommend that Ireland implement Article 4 to allow application of the interest limitation rules on a local basis. However in order to maintain Ireland's competitiveness as a location to do business in, we believe the taxpayer should be granted the flexibility to choose to apply the interest limitation rules on either a local group basis or a company-by-company basis, at their discretion.

32 **(Application to groups) As Ireland does not have consolidation for groups, what are the practical issues that might arise in applying the interest limitation rules on a group basis? For example, 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 requirements should each member of the local group have?**

The group should be treated for ATAD purposes as a single taxpayer. The interest limitation rule should be applied on the basis of the local group's EBITDA where an entity chooses to operate Article 4 on a group basis, so that the interest restriction is calculated by reference to this group's EBITDA number. We believe there should not be the imposition of further conditions regarding the allocation of allowable interest between group members once the total deductible interest has been calculated. Instead, the group should have flexibility as to how the allowable interest is allocated between its members.

33 **(Application to groups) Ireland has a number of different definitions of 'group' within our national tax law. Taking account of paragraph 4.4.1 above, how should a '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?**

"Group" should be defined in line with a standard corporation tax group, by reference to section 410 TCA and it should also include companies that are part of the same consolidated group under accounting principles as in some circumstances, they may not fall under the "group" definition of S.410 TCA.

34 **(*De Minimis* threshold) Are there any reasons why Ireland should not make provisions for a de minimis threshold?**

Ireland should make provisions for the highest de minimis threshold of €3 million under ATAD.

35 (Standalone entities) What are the relevant factors which should be taken into account in defining a "standalone entity"?

The term "standalone entity" should be implemented broadly to take account of "orphan" vehicles and those which are not consolidated with another entity for accounting purposes (including but not limited to IFRS).

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?

Firstly, all loans entered into prior to that date should be excluded. Loans made before that date and where no significant adjustments are subsequently made, should also be excluded.

Given that it was originally understood based on guidance from the Department, that the interest limitation provisions of the ATAD would not come into effect until 2024, many companies have entered into agreements since 17 June 2016 on good faith that the restriction would not come into effect until 2024.

Consequently, we recommend that grandfathering provisions should include situations where a taxpayer draws funds from facilities or arrangements existing prior to 17 June 2016 and the withdrawal takes place after 17 June 2016.

Additionally, the Government should provide certainty as soon as possible on whether the provisions will be introduced sooner and the extent of "grandfathering" provisions to ensure that taxpayers may plan accordingly.

37 (Long term infrastructure) 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 definition?

The definition of long-term infrastructure loan should be broad, flexible and forward thinking. The key point is that the loan is for the purpose of a public benefit, whether or not there is any State or public ownership. Furthermore, the definition of long-term infrastructure projects should not be limited to Ireland but to the EU in general.

38 (Consolidated group ratio rule) 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?

Rather than choosing one rule or the other, Ireland should provide for both consolidated group ratio rules (i.e. the equity to assets rule and the group ratio rule) and allow flexibility for the taxpayer to choose which rule to adopt.

39 **(Financial undertakings) 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?**

The interest limitation restriction should not apply to regulated financial undertakings or groups containing financial undertakings. Non-regulated undertakings carrying on the same activities as regulated undertakings should also be exempt, such as securitisation and leasing companies.

40 **(Carry forward) What are the key considerations in deciding which of the three policy options should be implemented in Ireland?**

If a choice must be made between the three policy options, we believe that option C grants the greatest flexibility for taxpayers.

41 **(Borrowing costs and exceeding borrowing costs) 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? Issues raised in the anti-hybrid portion of this document should also be considered in this context.**

We would recommend that the definition of "borrowing costs" is drafted as narrowly as possible to ensure that it only encompasses costs such as interest and economically equivalent costs which are directly related to borrowed money. Ancillary costs, such as professional fees, which are not funding costs but which are related to raising debt financing, should not be included in the definition of "borrowing costs".

To the extent that the interest limitations apply to securisation companies, securitisation company income and gains should be considered to be economically equivalent to interest, such that there is no exceeding borrowing cost.

42 **(EBITDA) 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? 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?**

EBITDA should be defined by reference to generally accepted accounting principles.

The negative EBITDA of a local group member should be treated as nil in calculating overall group EBITDA.

43 (Exempt income) 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, 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?

No, they should not be excluded as such foreign dividends are part of a company's taxable income.

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 ATAD provisions should simply replace the existing Irish tax provisions. Ireland's position has been that our existing interest restriction and anti-avoidance rules relating to interest costs are such that there was no need to implement the ATAD interest restriction early. To now implement the ATAD interest restriction earlier than otherwise thought necessary and to also maintain the existing interest restriction and anti-avoidance rules will lead to an overly restrictive regime for taxpayers so there should be no delay between such changes.

In conclusion, an early implementation of such interest restrictions should, if possible, continue to be resisted on the basis that it has heretofore been deemed unnecessary given the existing regime. Therefore, Ireland should use all means possible to extend the implementation date to 2024.

We trust that you find our response to the questions posed in relation to the implementation of the anti-hybrid and interest limitation rules helpful.

Yours sincerely

Peter Vale
Tax Partner
Grant Thornton
13-18 City Quay
Dublin 2
T (direct) +353 1 680 5952
T (office) +353 1 680 5805