INTEREST LIMITATION FEEDBACK STATEMENT

A&L GOODBODY RESPONSES TO SELECTED QUESTIONS.

	Question	ALG Comments
3.2. INTERACTION BETWEEN EXISTING RULES AND ATAD ILR:		
1	What, if any, limited adaptations of the existing legislation could be introduced in Finance Bill 2021, to assist in effectively integrating the ATAD ILR with existing domestic rules?	We believe that it would be difficult to make limited adaptations, or potentially counterproductive to do so when the introduction of ATAD ILR requires a more fundamental overhaul of the existing piecemeal and complex interest deductibility framework.
2	What, if any, further adaptations of the existing legislation could be considered in later Finance Bills?	The tax deductibility rules urgently need simplification. There should be a single deductibility code for all finance costs incurred in the course of a business. At the very least a future Finance Bill should (i) extend deductibility for interest costs to companies taxable under Case III where incurred wholly and exclusively for the purpose of earning Case III income and (ii) repeal/significantly modify sections 130 and section 247 given the added complexity in the application of the interest limitation rule when dealing with charges on income.
4.1. INTEREST EQUIVALENT INCOME AND EXPENSES (Step 2): *Potential definition:* "Interest equivalent" includes any amount of — (a) interest, (b) amounts economically equivalent to interest including — (i) discounts, and (ii) amounts referred to in paragraphs (c) of the definition of financing return in section 835AH, (c) expenses incurred in connection with raising finance, including — (i) guarantee fees, and (ii) arrangement fees, and shall also include any amount arising from an arrangement, or part of an arrangement, which could reasonably be considered, when the arrangement is considered in the whole, to be economically equivalent to interest.		
4	Comments are invited on this possible definition of 'interest equivalent'.	There should be symmetry between the definition of 'interest equivalent' and the definition of 'borrowing costs' under the Directive. In other words an interest and/or interest equivalent income receipt should be a mirror of the definition of 'borrowing costs' such that there is symmetry between what a paying taxpayer is required to include as a borrowing cost and a receiving taxpayer can include as a taxable interest equivalent receipt. At present the 'interest equivalent' definition specifically references only parts of the 'borrowing costs' definition e.g. guarantee fees and arrangement fees. The definition should be expanded to mirror the whole of the definition of 'borrowing costs' in the Directive.

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		In addition the definition should be either expanded with more examples of what constitutes 'interest equivalent' or supported by Revenue guidance e.g. noting that (i) Gains/losses and fair value movements on portfolios of loans (both performing and non-performing), (ii) the income and gains of a section 110 company should be included as being 'interest equivalent' for ATAD purposes given a section 110 company is essentially a financing/investment company financed by debt, and (iii) the finance element of leasing income (both finance and operating leases) should be treated as 'interest equivalent to avoid disproportionately impacting equipment lessors.
4.3. DEDUCTIBLE INTEREST EQUIVALENT (Step 3 & 4): *Potential definitions:* "Taxable interest equivalent" means any amount of interest equivalent that is income chargeable to corporation tax and that is taken into account in calculating the relevant profits of a relevant entity. "(a) In this Part, "deductible interest equivalent" means: (i) any amount of interest equivalent which is deductible in computing the relevant profits of the relevant entity, (ii) any amount of interest equivalent which is deductible from the relevant profits of the relevant entity, (iii) an amount calculated as — (A) 8 times any amount which is deductible from the tax chargeable on the relevant profits of the relevant entity which is referable to an interest equivalent where those profits are taxable at the rate specified in section 21(1)(f), and (B) 4 times any amount which is deductible from the tax chargeable on the relevant profits of the relevant entity which is referable to an interest equivalent where those profits are taxable at the rate specified in section 21A(3)(a), but no amount shall be treated as deductible — (I) under subparagraph (i) or (ii) where it reduces the relevant profits below zero, or (II) under subparagraph (iii) where it reduces the tax chargeable below zero; (b) References in this Part to an amount of interest equivalent, which is deductible, shall be construed as a reference to the amount calculated in accordance with paragraph (a). (c) References in this Part to the profits against which an amount of interest equivalent is deductible shall, in relation to borrowing costs referred to in paragraph (a)(iii), be taken to be the profits, the tax chargeable on which was reduced by the interest equivalent."		
5	Comments are invited on these possible definitions of 'taxable interest equivalent' and 'deductible interest equivalent'.	As noted in response to question 4 above there should be symmetry between 'taxable interest equivalent' and 'deductible interest equivalent' such that if something is considered to be a 'deductible interest equivalent' in the hands of the payor it will be treated as being a 'taxable interest equivalent' in the hands of the payee. Difficult to comment without definition of "relevant profits".
8.1. *DE MINIMIS* EXEMPTION: *Potential definition:* "*De minimis amount*" in respect of an accounting period of 12 months means €3,000,000, and where an accounting period is shorter than 12 months, that amount shall be reduced proportionately.		
11	Comments are invited on this possible approach to the *de minimis* exemption, and on the potential need for anti-avoidance provisions to accompany such an exemption.	We agree with the proposed definition, but further work is needed to understand how this would be "shared" in a group scenario As Ireland already has anti-avoidance provisions relating to interest, and it is not being contemplated that they be removed, we do not see the need to introduce additional anti-avoidance provisions.

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8.2. EXCLUDING '*STANDALONE ENTITIES*': *Proposed definitions*: "Standalone entity" means a company which under section 26(1) is chargeable to corporation tax on all of its profits, wherever arising and that — (a) is not a member of a worldwide group [defined overleaf], (b) has no associated enterprises [defined overleaf], and (c) does not have a permanent establishment in a territory other than the State. 'Worldwide group' means the ultimate parent and all entities that are fully included in the ultimate consolidated financial statements, and a "member of a worldwide group" shall be construed accordingly; "Ultimate parent" means an entity that — (a) (i) prepares consolidated financial statements under generally accepted accounting practice, or (ii) where sub-paragraph (i) does not apply, would be required under international accounting standards to prepare consolidated financial statements, and (b) (i) whose results are not fully included in any other consolidated financial statements prepared under generally accepted accounting practice, or (ii) where sub-paragraph (i) does not apply, whose results would not be fully included in any other consolidated financial statements if they were prepared under international accounting standards. "Ultimate consolidated financial statements" means — (a) the consolidated financial statements prepared by the ultimate parent under generally accepted accounting practice, or (b) where there are no consolidated financial statements to which paragraph (a) relates, such consolidated financial statements as would be required to be prepared under international accounting standards. "Associated enterprise" means an enterprise that is associated with another enterprise under subsections (1) to (4) of section 835AA, other than enterprises which would be considered associated enterprises pursuant only to sub-paragraphs (e) or (f) of section 835AA(2); "Enterprise" has the meaning assigned to it in section 835Z(1).		
12	Comments are invited on the above possible definitions, including how single companies not coming within the ATAD definition of 'standalone entity' could be treated.	The definition of 'associated enterprise' should not refer to 'significant influence' given the concept was only introduced in the context of ATAD II for the purposes of Article 9 anti-hybrid rules. Similarly the term 'acting together' only applies to Article 9. The reference to section 835AA should be amended accordingly. In the case of orphan section 110 companies see additional comments at 14 below. The definition of 'associated enterprise' should be applied to the trust rather than the share trustee company. This is because in the case of the orphan trust the trustee company does not hold its shares beneficially and does not exercise its voting rights on its own behalf. Rather it holds the shares and exercises its voting rights on behalf of a trust for charitable purposes. We should not be left in a position where the significant number of orphan SPVs established in Ireland are neither stand alone entities nor able to avail of the consolidated financial statements group provisions
14	While 'standalone entities' generally present a low risk of BEPS, the OECD notes that, in certain cases, they may be large entities held under complex holding structures involving trusts or partnerships, meaning that a number of apparently unrelated entities are in fact controlled by the same investors. What is your assessment of how the ILR could apply to such entities?	Legislation dealing with, for example, DAC 6, CRS and beneficial register requirements enable the identification of the beneficial owners of Irish corporate entities. A section 110 company is often set up as an orphan entity (i.e. its entire issued share capital is held on trust for charitable purposes). Establishing a section 110 company in this way is not done for tax avoidance purposes or to prevent the identification of the beneficial owners. Often the European Central Bank, rating agencies and/or commercial lenders require the section 110 company to be set up in this way (e.g. for bankruptcy remoteness purposes). Provided the orphan section 110 company is not part of a consolidated group for financial accounting purposes and has no permanent establishment, it should be treated as a "standalone" entity. Trustee or nominee shareholding arrangements should be ignored in determining whether an entity is 'standalone' provided the shareholder has no economic participation in the entity. Otherwise the objective behind ATAD in targeting

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		multinational groups will be undermined by impacting financing or assets holding entities that are structured for bona fide commercial reasons as orphan entities. If not treated as a standalone entity then Ireland should adopt a concept similar to the UK "group of one" concept whereby the ultimate parent must be a relevant entity (i.e. a company), and it cannot be a consolidated subsidiary of another relevant entity. In that way the ultimate parent is treated as a Single-Company Worldwide Group ("SCWG").
8.3. EXEMPTING "LEGACY DEBT" (IF NOT MODIFIED): *Proposed definitions*: "Legacy debt" means a security, within the meaning of section 135(8) that was entered into before 17 June 2016 in respect of which the relevant entity has a deductible interest equivalent. The amount of the "interest equivalent" arising on that loan which can be excluded from the interest limitation could be defined as: "The amount of interest equivalent in respect of legacy debt for an accounting period, is an amount calculated as the lower of — (a) the interest equivalent that arises on legacy debt in an accounting period, or (b) an amount that would have arisen in respect of that accounting period but for any modification of the terms of that debt on or after 17 June 2016, including modifications to the duration of that debt, the principal drawn down or the interest rate on that legacy debt."		
15	Comments are invited on the above approaches to defining and exempting "legacy debt" and more generally on the concept of a 'modification' in the context of legacy loans.	The interest limitation rules applies to interest and interest equivalent amounts. As such the definition should be broadened to cover both concepts. In respect of the modification concept: • The drawdown of amounts that were made available under the terms of a loan entered into pre 17 June 2016 but not drawn down until after that date should not be regarded as a modification. • Changes of interest rate mechanic/calculation already contemplated in the agreement should not be treated as a modification
8.4. 'LONG-TERM PUBLIC INFRASTRUCTURE PROJECT' EXEMPTION: ATAD Article 4(4)(b) provides that Member States may exclude both the income and associated expenses of certain 'long-term public infrastructure projects' from the scope of the interest exemption, on the grounds that they present little or no BEPS risks. A 'long-term public infrastructure project' is defined as "a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered in the general public interest by a Member State".		
16	Comments are invited on potential approaches to the criteria relevant to the 'long-term public infrastructure project' exemption.	Broadly in our view Ireland should follow the approach set out by the OECD in the Action 4 Report. But we think the concept should be kept as broad and flexible as possible with possibly a Schedule to the TCA regularly updated with a list of the types of project which are considered in the public interest, There should be no limiting factors such as private ownership etc disqualifying such projects from this exemption. The focus should be on the purpose of the project. Ireland is likely to encounter significant public expenditure constraints for some time to come and the use of innovative financing techniques to provide assets/ services for the public benefit should not be constrained by a narrow transposition of this measure.
8.5. EXCLUDING 'FINANCIAL UNDERTAKINGS': ATAD Article 4(7) provides that Member States may exempt certain 'financial undertakings' (within the meaning of ATAD Article 2(1)) from the ILR. *Proposed definition*:		

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'Financial undertaking' means — (a) a credit institution as defined in Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013, (b) an investment firm as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council, (c) an alternative investment fund manager, as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011, (d) a UCITS management company, as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009, (e) an insurance undertaking, as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009, (f) a reinsurance undertaking, as defined in point (4) of Article 13 of Directive 2009/138/EC of 25 November 2009, (g) an institution for occupational retirement provision (IORP) falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 as amended by Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016, (h) a pension institution operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council and Regulation (EC) No 987/2009 of the European Parliament and of the Council as well as any legal entity set up for the purpose of investment of such schemes, (i) an alternative investment fund (AIF), that is either managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU or supervised under the applicable national law; (j) a UCITS, in the meaning of Article 1(2) of Directive 2009/65/EC, (k) a central counterparty, as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council, and (l) a central securities depository, as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council.		
17	Comments are invited on the exemption generally and this possible definition of 'financial undertaking'.	We agree with the inclusion of a 'financial undertakings' exemption in the proposed Irish legislation but would contend the definition should be extended to include wholly-owned subsidiaries of banks, insurance companies, Irish regulated UCITS and AIFs/QIAIFs or where the relevant undertaking is itself a wholly owned subsidiary of another company. Not doing so would potentially produce inequitable results where certain aspects of a consolidated group' business have to be conducted out of different entities some of which are financial undertakings and others that are not. But such capacity should be opt in/out to enable different factual scenarios to be catered for – with appropriate anti-avoidance savers.