Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

5 March 2021

ATAD Implementation – Interest Limitation Feedback Statement – Submission

1 Introduction

The Law Society of Ireland (the "**Society**"), as the educational, representative and co-regulatory body for the solicitors' profession in Ireland, welcomes the opportunity to make a submission to the Department of Finance's ATAD Implementation Article 4 Interest Limitation Feedback Statement.

This submission draws on our members' extensive knowledge and experience in tax policy and tax administration and aims both to improve the system for taxpayers and benefit the wider economy and ease of doing business.

The recommendations are drawn from the Society's Committees, in particular the Taxation Committee and, as ever, the Society remains available to meet with Department officials to clarify any of the matters raised and to support additional initiatives in the area.

2 General Comments

We believe that the existing and detailed measures in Irish taxation governing the tax deductibility of interest must now be examined and reformed.

Failure to do so will result in Ireland having two separate sets of rules with the same objectives, which would be far more onerous than most other EU Member States, thereby placing Ireland at a significant competitive disadvantage internationally.

In addition, and again unlike other EU Member States, Ireland operates a full withholding tax regime on interest payments. Most notable among these other member states is Germany which, we understand, created a domestic interest limitation regime. It is a matter of substantial concern that Ireland would end up with two, or even three, systems restricting interest payments where the requirement under the Directive is merely for an interest limitation rule.

Secondly, in implementing the Directive, Ireland should have regard to its common law system principles under which existing Irish tax legislation operates. One example of this are the principles of trust law, where Ireland (generally) treats the beneficial owner as the relevant person for imposing or relieving tax, rather than the legal owner. We believe that this will be relevant, for example in the definition of "standalone entity", where the share trustee in a typical orphan securitisation company structure is merely the legal owner of the shares and as such, should be disregarded in applying the "associated entity" test. Instead, the underlying purpose trust should be considered.

More broadly, we would say that the Irish legislation implementing the Directive should be kept clear, concise and as simple as possible which, of course, is challenging given the complexity of the underlying Directive. We believe the Directive should be implemented appropriately, but with all the optionality permitted in the Directive reflected in the Irish legislation, again given the many other measures dealing with interest deductibility and interest withholding which already exist in Irish law.

3 Responses to Questions

3.1 **Question 4: Comments are invited on this possible definition of 'interest equivalent'.**

unlike the definition of borrowing costs in the ATAD, the proposed definition of "interest equivalent" at section 4.1 is not sufficiently comprehensive. It is too vague, particularly the last sentence. Additional guidance on the definition is required as is the necessary provision of clear examples around precisely what would constitute 'interest equivalent'.

3.2 **Question 5: Comments are invited on these possible definitions of 'taxable interest equivalent' and 'deductible interest equivalent'.**

The definition of "taxable interest equivalent" at section 4.2 should be worded sufficiently broadly to include all amounts which are economically equivalent to interest.

3.3 **Question 7: Comments are invited on this possible definition of 'EBITDA'.**

Section 5 of the feedback statement notes that tax exempt income should be excluded from EBITDA. In the Society's view, foreign dividends which do not suffer incremental Irish tax (due to double taxation relief) are not tax exempt and should not be excluded from EBITDA.

3.4 **Question 8: Comments are invited on the above possible approach to the operation of the ILR.**

In calculating the ILR, a Case IV tax charge may arise, rather than restricting the interest deductibility (as had been expected). However, if a company had Case I losses for the year, it seems odd that a loss-making company could now have a Case IV tax charge for the year? The proposed approach to the operation of ILR does not adequately address such a position and so, further consideration is necessary.

3.5 **Question 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?**

There is considerable legislation, both domestic and international (e.g. DAC 6, CRS, beneficial register requirements), which should make it possible to identify the beneficial owners behind any Irish corporate entity. Any tests which operate by share ownership will pick up the beneficial owner of those shares (in line with existing tax legislation). This should be sufficient to identify the true owners of the company in question.

There are circumstances in which an SPV may be established with its entire issued share capital held on trust for charitable purposes. This is done for specific reasons (which include satisfying requirements of the European Central Bank, rating agencies and commercial lenders), rather than to obscure its beneficial ownership or for any tax avoidance purpose (as acknowledged by Revenue in its published guidance).

As long as an SPV is not part of a consolidated group for financial accounting purposes and has no permanent establishment, a normal SPV (all of the shares of which are held on trust for a charitable purpose for bona fide reasons) should be a "standalone" entity for the purposes of the ILR. It cannot be the case that the term standalone entity has no practical application as that would undermine the policy of the ATAD and result in an overbroad interpretation of a policy that is targeted at multinational groups and not, financing or asset-

holding entities which are deliberately structured to be bankruptcy remote, for good commercial reason.

Where such entities are not considered “standalone entities” for the purpose of ILR, we consider that Ireland should adopt the UK “group of one” concept. Under the UK rules, the ultimate parent must be a relevant entity (i.e. a company), and it cannot be a consolidated subsidiary of another relevant entity. In the case of an ultimate parent with no consolidated subsidiaries, the ultimate parent is treated as a Single-Company Worldwide Group (“SCWG”). Provisions within UK legislation, including the application of group ratios which apply to worldwide groups, also have application for a SCWG.

3.6 **Question 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.**

Under the definition of 'legacy debt' at 8.3, it appears that drawdowns on loans in place prior to 17 June 2016 would be considered a modification. We would request that drawdowns on facility loans in place prior to 17 June 2016 should not be considered modifications, in keeping with similar positions which have been adopted by other EU member states. For example, the tax circular issued by the Luxembourg tax authorities in January 2021 confirmed that drawdowns of an existing facility loan should not be considered a modification.

3.7 **Question 17: Comments are invited on the exemption generally and this possible definition of ‘financial undertaking’.**

We agree that financial undertakings should be excluded from the ILR. We submit that the definition of 'financial undertaking' at 8.5 should include subsidiaries of regulated entities, which are also within regulatory scope of the paper, for example, a Section 110 that is a subsidiary of an ICAV.

4 Conclusion

Thank you for the opportunity to make this submission to help develop a robust legislative approach to the operation of Interest Limitation Rules.

We look forward to future consultations on this important matter as the year develops.