The Consultative Committee of Accountancy Bodies-Ireland

Chartered Accountants Ireland
The Association of Chartered Certified Accountants
The Chartered Institute of Management Accountants
The Institute of Certified Public Accountants in Ireland

47/49 Pearse Street,
Dublin 2.

ATAD Implementation

Article 4 Interest Limitation

Comments on Feedback Statement

About CCAB-I

The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) is the representative committee for the main accountancy bodies in Ireland. It comprises Chartered Accountants Ireland, the Association of Chartered Certified Accountants, the Institute of Certified Public Accountants in Ireland, and the Chartered Institute of Management Accountants.

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Introduction

The CCAB-I values the opportunity to contribute to this important consultation. The Interest Limitation Rules (ILR) as set out in the Anti-avoidance Tax Directive are complex and have far reaching implications for businesses operating in Ireland. The Department of Finance's approach of extensive stakeholder engagement in the development of ILR legislation for Finance Act 2021 is commendable and we look forward to participating in this process.

Interaction between existing rules and ATAD ILR

Question 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?

Once the ATAD rules are in place the more onerous aspects of the existing anti-avoidance rules on interest deductibility such as Section 840A and Section 249 should be removed or scaled back significantly.

Question 2

What, if any, further adaptations of the existing legislation could be considered in later Finance Bills?

The following provisions should be reviewed to consider if they are necessary:

- Section 81 - wholly and exclusively trading loans.
- Section 247 - interest as a charge (restrictions in section 243).
- Section 247(4A to 4G) anti-avoidance on section 247 deductions.
- Section 249 - recovery of capital.
- Section 97 - incurred in the acquisition or enhancement of property for Schedule D, Case V.
- Section 130 - re-classification as distribution rules.
- Section 817C - unpaid interest.
- Section 840A - restrictions on trading interest.

A possible seven step approach

Question 3

Comments are invited on this possible approach, including whether any other matters should be considered in the transposition process. (More detailed questions relating to each step are contained later in this paper, so responses to this question should focus on the general approach.)

The suggested step approach makes sense. A good starting point is the company's taxable profit. However, of some of the terminology and language used is complex and we suggest using the terms within the Directive.

The Directive refers to Corporate Tax. However, it is not clear if ILR is intended to apply also to income tax. For example, non-resident corporates holding Irish real estate are subject to income tax rather than corporation tax and it is not clear if ILR should apply to income tax applicable to such entities.

Interest equivalent

Question 4

Comments are invited on this possible definition of 'interest equivalent'.

We agree that the concept of interest equivalent should be symmetrical as between "borrowing costs" and "taxable interest equivalents". Accordingly, the broad approach suggested in the Feedback Statement is appropriate. However, we are surprised to note that the proposed definition of borrowing costs does not appear to align with the Directive definition and would advocate that this be corrected while preserving the symmetrical approach on the revenue side. This will impact the statutory definition of interest equivalent and we would suggest that it should include the full definition of financing return in section 835AH and not just paragraph (c). We also find it difficult to understand how the references to expenses such as guarantee fees and arrangement fees can be accommodated within a revenue context.

Question 5

Comments are invited on these possible definitions of 'taxable interest equivalent' and 'deductible interest equivalent'.

The definition of "deductible interest equivalent" will depend upon the definitions of "relevant profits" and "relevant entity" which are not set out in the Feedback Statement. More information on these definitions would be helpful.

Exceeding borrowing costs and EBITDA

Question 6

Comments are invited on these possible definitions of '*exceeding borrowing costs*' and 'exceeding deductible interest equivalent'.

It is critical that these key definitions ensure that there is clear symmetry between what a paying taxpayer is required to include as a "borrowing cost" and a recipient taxpayer can include as taxable interest equivalents. For example, if a lessee is required to include the interest element of an operating lease as a borrowing cost (given the accounting treatment to be applied under IFRS 16), a lessor should also be entitled to treat the implicit interest return earned on its operating lease income as economically equivalent taxable interest revenue.

Question 7

Comments are invited on this possible definition of '*EBITDA*'.

The following matters require clarification in the context of this definition:

- What will the exact starting point be for the purposes of calculating EBITDA. Presumably, this will be the tax adjusted profits or losses before any application of these new rules?
- In addition, it is important that the terms "depreciation" and "amortization" are broad enough to include any related type of expenditure. For example, from time to time it may be necessary for asset owners to create an impairment against one or more of their owned assets due to fluctuations in valuations of that asset type. Such impairment

expenses should clearly be treated as “depreciation” or “amortization” for the purposes of the EBITDA calculation.

Applying the ILR to a single company

Question 8

Comments are invited on the above possible approach to the operation of the ILR.

We note that the proposed Case IV charge cannot be offset by any "loss, deficit, expense or allowance". This could create a cash tax charge for a company in a significant loss forward or excess capital allowances position and is clearly inequitable.

Carry forward/back options

Question 9

Comments are invited on this possible approach to carrying forward non-deductible ‘*exceeding borrowing costs*’.

Ireland should allow taxpayers choose one of the three options to carry forward losses as set out in Article 4, Paragraph 6(a), (b) and (c) of the Directive. We do not believe that we are restricted to implementing only one of these rules. This is supported by the wording of the Directive.

The option under (c) to *“carry forward, without time limitation, exceeding borrowing costs and, for a maximum of five years, unused interest capacity, which cannot be deducted in the current tax period”* will be the most attractive option for taxpayers.

Question 10

Comments are invited on this possible approach to carrying forward ‘excess interest capacity’.

The proposed approach appears sensible.

Question 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.

The proposed approach to the de minimis exemption appears sensible. Ireland operates robust general anti-tax avoidance rules, and it is unnecessary to introduce a specific layer of anti-avoidance measures for the de minimis exemption. Overly complex rules will place Ireland at a competitive disadvantage compared to other EU jurisdictions.

Question 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 proposed definition of a worldwide group appears sensible. As regards the "associated enterprise" test for a standalone entity, the shares held in the SPV have limited economic value and a trustee will generally hold the shares on trust for charitable purposes. Standalone entities should include bankruptcy remote SPVs that are not "part of a consolidated group for financial accounting purposes" and have no permanent establishment.

Question 13

Comments are invited on how Ireland might implement ATAD Articles 2(10) and 4(8), having regard to the different accounting standards and State Aid rules.

General Accepted Accounting Principles permitted under the Irish Collective Asset Management Vehicles Act (ICAV) may be a useful point of reference in this regard and an extract from s116 of the ICAV Act is set out below.

"The annual accounts may be prepared in accordance with—

(a) generally accepted accounting practice in the State,

(b) international financial reporting standards, or

(c) subject to subsection (5), an alternative body of accounting standards.

(5) To the extent that the use of any alternative body of accounting standards does not contravene any provision of this Part, a true and fair view of the assets and liabilities, financial position and profit or loss of an ICAV may be given by the use by the ICAV of those standards in the preparation of its annual accounts.
(6) In this section "alternative body of accounting standards" means standards that accounts of bodies corporate are to comply with which are laid down by any such body or bodies having authority to lay down standards of that kind in—

(a) the United States of America,
(b) Canada,
(c) Japan, or
(d) any such other country or territory as may be prescribed by regulations made by the Minister,

as may be prescribed by regulations so made".

It will be important to provide flexibility to the taxpayer in this regard considering the international nature of many groups which operate within Ireland.

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?

Ireland's general anti-tax avoidance rules should be sufficient to deal with the risks highlighted by the OECD. However, if targeted anti-avoidance measures are deemed necessary to counter contrived structures involving trusts, then care should be exercised to ensure that orphan Special Purpose Vehicles owned by charitable trusts undertaking bona fide financial services activities are excluded from such provisions.

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.

In our view, it should be made clear that immaterial or technical amendments to a loan, or transfers of a loan, should not be considered modifications for these purposes. In addition, a transfer pricing adjustment on foot of an analysis should not be classed as a modification to legacy debt. The modification of an existing arrangement is defined wider in the Feedback Statement than is required by the Directive and we would recommend that it be amended to align with the Directive.

Question 16

Comments are invited on potential approaches to the criteria relevant to the '*long-term public infrastructure project*' exemption.

ATAD Article 4 defines long-term public infrastructure to mean "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". In our experience, there are all manners of projects (ranging from roads, broadband, aircraft, hospitals, bridges, wind farms and other projects) which could be public infrastructure projects. It is impossible to be exhaustive. In this context, we believe that a broad view should be taken on what loans qualify in this category. Furthermore, the nature of public infrastructure will always change, and it is not possible to conceive now what will be the public infrastructure of the future. As a result, we recommend that there should be no exhaustive definitions and the concept of public infrastructure projects should be kept as flexible as possible.

Question 17

Comments are invited on the exemption generally and this possible definition of '*financial undertaking*'.

If financial undertakings are to be exempt from the interest limitation rules the exemption should be applied at a group level to any group which contains financial undertakings.

Regulated entities such as banks and insurance companies may undertake some of their activities (including raising debt) through subsidiary companies which may not themselves be regulated (and which may not be financial undertakings as a result). This is common for legal or regulatory reasons. It would not seem to make sense to apply the interest restriction to such subsidiary companies merely because they are different legal entities and do not have the same regulatory status as their parent companies.

Providing "group ratios"

Question 18

If Ireland were to provide only one of the two "group ratios", which would be preferred?

This is a very difficult question to answer because one rule will favour or damage different sectors of the economy e.g., asset intensive companies, businesses where earnings fluctuate significantly. For this reason, we endorse the suggested approach of permitting either group ratio.

Question 20

Technical analyses are invited as to whether the "Group Ratio Rule" (third-party interest divided by EBITDA) should be calculated based on the group's consolidated accounts or using tax-adjusted values. The accounting figures for EBITDA and borrowing costs may bear little resemblance to the Irish tax concepts while the tax-adjusted values give rise to practical difficulties such as how to treat intragroup transactions and negative EBITDAs. Taking account of the provisions of ATAD Article 4(5)(b), and the issues identified above, how could this aspect of the "Group Ratio Rule" be designed?

From a practical perspective it would make sense to calculate the Group Ratio Rule based on the group's consolidated accounts as using tax adjusted values will be more challenging due to complexity and difficulties accessing information on the tax adjusted values.

Question 21

How might third-party borrowings be defined for the purpose of the "Group Ratio Rule"? Should it be borrowings excluding amounts borrowed from other members of the 'worldwide group'? Taking account of the definition of '*standalone entity*', which recognises that BEPS can occur between '*associates*', should it also exclude borrowings with '*associates*'? Accounting standards require that transactions with related parties are disclosed: should borrowings with a related party be excluded?

Third party borrowings should be defined as borrowings that take place outside of the consolidated group as defined under Article 2(10).

Treating a notional local group as a single 'taxpayer'.

Question 23

Comments are invited on the possible definitions of notional local group (including how consortia and joint ventures should be treated). In particular:

(i) How should the notional local group be defined? Should it be based on an existing definition (such as that used for group loss relief) or be a new definition?

(ii) If a new definition is adopted, are there issues relating to the interaction of a new notional local group for ILR purposes and existing group reliefs?

(iii) Does the way in which the notional local group is defined impact on your views on any of the other issues raised in respect of local groups?

(iv) What considerations should be given to the operation of the two "group ratios" where the notional local group approach is adopted? For example, it is relatively easy for a single company to compare its balance sheet to the group consolidated balance sheet, in order to calculate if relief is available under the "Equity Ratio Rule (as detailed in section 9.3). But what difficulties might a notional local group encounter in carrying out that comparison, particularly where it does not prepare local audited consolidated accounts?

It will be necessary to exercise care in implementing these provisions to ensure that our tax definitions of a group and the absence of a fiscal unity regime in Ireland does not limit the definition regarding what constitutes a taxpayer as provided for within the Directive. In our view the definition of group should include all companies (including financial undertakings)

that would fall within the section 411 definition and would also include any Irish tax resident company that would be consolidated for financial accounting purposes within that Irish group. In addition, only the results of companies within the charge to Irish tax should be included in the definition of a group.

Question 26

Is it practical to make a single company responsible for reporting information to Revenue on behalf of the notional local group and allocating amounts (including excess interest capacity and amounts carried forward) among group members? If so, the following questions arise:

(i) What criteria should be used to determine the reporting company?

(ii) How should changes in group structures that alter the position of a reporting company in a group (mergers, acquisitions etc.) be managed?

(iii) What information should be returned to Revenue by the reporting company? Should any information be reported at an entity level?

(iv) Is there an alternate manner in which information reporting should be dealt with?

Where exceeding borrowing costs and EBITDA fall to be calculated at the level of the group, the members of a group should have discretion to fully or partially allocate any restriction imposed by the Interest Limitation rules.

As Ireland already operates effective targeted avoidance measures to protect against base erosion from interest payments, this ATAD Interest Limitation Rule should not impose further conditions on how a local group can, or cannot, allocate interest deductions within its local group. This approach would be consistent with the discretion which Irish companies currently exercise in the surrender of group relief among group companies. The mechanics of group relief also offer a route to take with respect to other calculation aspects of the rule, such as companies joining and leaving groups and companies with different accounting periods.