ATAD Implementation
Interest Limitation Feedback Statement
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

16 August 2021

Dear Sir/Madam

Subject: ATAD Implementation Article 4 Interest Limitation – Public Consultation

I herein enclose the PwC Ireland response to the second Feedback Statement on ATAD Implementation Article 4 Interest Limitation as published by the Department of Finance on the 2nd of July 2021.

This response from PwC Ireland follows on from the responses we provided to the first Feedback Statement earlier this year in March[1] and the one we submitted in January 2019[2] to the initial ATAD hybrids and interest limitation consultation. Additionally, PwC has submitted a response to the Feedback Statement specific to the aircraft leasing industry[3] in March and called for broad implementation of the exemption for long-term public infrastructure projects to ensure that investment in Irish renewable energy projects is covered as part of our 2022 Pre-Budget Submission[4].

[1] https://www.pwc.ie/eloqua/2021/pwc-ilr-consultation-response.pdf
[2] https://assets.gov.ie/7537/dcebd5670e9244a2a4c7eee677ccfd91.pdf
[3] https://www.pwc.ie/publications/2021/pwc-ireland-aviation-finance-response-insight.pdf
[4] https://www.pwc.ie/publications/2021/pre-budget%20submission-budget-2022.pdf

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As we have also had numerous conversations with you to discuss some of the policy, technical, and commercial aspects of implementation we have kept our responses below brief and have outlined some of the items that we have not yet had an opportunity to discuss. We will continue to work on worked examples as these are the best way to discuss some of the implications, unintended consequences, administrative complexities and overall practicality of the rules. We would welcome the opportunity to discuss these items with you further in the coming weeks.

The continued engagement by the Department of Finance with taxpayers and tax practitioners is welcome given the complex nature of the interest limitation rules and the relatively short period of time left before the rules are set to come into effect next year. We consider this engagement by the Department as important for Ireland’s reputation for tax certainty and clarity.

Notwithstanding, we would like to take this opportunity to reiterate our concern that the manner in which these rules are being added to the Taxes Consolidation Acts, 1997 (“TCA 1997”) (i.e. by layering them on top of the existing rules) is putting Ireland at a disadvantage vis-à-vis our EU counterparts and will place undue burden on taxpayers from an administrative perspective. We would like to stress the importance that these new rules are brought in with the least administrative burden on taxpayers and for you to actively review all of the interest rules with a view to consolidation and simplification in the coming years.

We welcome the opportunity to discuss the matters outlined below at your convenience.

Yours faithfully

Peter Reilly

Peter Reilly,
Tax Policy Leader, PwC Ireland

Question 1
Comments are invited on this possible approach, including whether any other matters should be considered in the transposition process.

We are in agreement with the overall approach but have made comments in relation to certain aspects of its implementation in the subsequent questions.

Question 2
Comments are invited on these possible definitions of 'relevant entity' and 'interest group' and, in particular, how the possible definition of an 'interest group' interacts with the group ratio rules.

We understand from our discussions that the "interest group" definition will be updated to ensure that only Irish taxpayers are included. Currently, the definition would include all members of a S411 TCA 1997 group ("S411 group"), which would bring non-Irish entities into the "interest group".

We understand the rationale for refining the "interest group" definition to members of an Irish losses group, however this could impact some stakeholders whose Irish group is not all contained in one S411 group. There are a number of reasons that an Irish group may be broken including:

- Entities that are held through a non-EU/DTA jurisdiction
- Companies that are held through entities which may not have share capital (e.g. certain LLCs)

In many of these circumstances it can be commercially difficult to restructure the group to ensure that all of the entities are included in the Irish S411 group and, as such, the group remains split.

For the above reason, our view is that having the option of including Irish entities that are not included in the S411 group, but would be included in the worldwide group, could reduce the administrative burden for some taxpayers. We are aware, however, of concerns associated with the potential for exchequer risk associated with such a scenario and, therefore, if this option was adopted by taxpayers, further highly targeted anti-avoidance rules (e.g. in relation to the interaction of losses and the ILR rules) for such scenarios could be considered.

In relation to the proposed 3 year interest period, we would recommend, for administrative simplicity, that once the 3 year period has lapsed, the company may then choose to rejoin the group for the next financial year or any subsequent year. Essentially, a company, which has made an election not to be a member of an interest group, would continue to stay outside the group until it elects to rejoin. It should be feasible to track the above through the Form CT1.

We believe that the group provisions should allow for more than one interest group albeit the members of both groups are part of a single Irish S411 group. There may be commercial requirements around having separate security groups etc which would mean that a taxpayer cannot elect into a single interest group. VAT grouping is probably the closest example of what we have in mind, though we would accept that there would be a bona fide.

This concept would mirror the position in certain other jurisdictions, including Germany, Belgium and the Netherlands, where a number of fiscal unities can be formed at the discretion of the taxpayer.

Question 3
Comments are invited on these possible definitions of 'standalone entity', 'associated enterprise', 'enterprise' and 'entity'.

We do not have further comments on these definitions.

Question 4
Comments are invited on the exclusion for financial undertakings generally and this possible definition of 'financial undertaking'.

If the financial undertaking carve-out is included in the legislation, we understand that you do not believe it would be possible to include the results of the financial undertaking in an interest group. As such, from talking to our clients, we do not believe that it would be beneficial for Ireland to include the financial undertaking carve-out as part of the ILR.

Question 5
Comments are invited on this possible definition of 'legacy debt' and more generally on the concept of a modification in the context of legacy debt. Comments are invited on how this drafting would apply in respect of drawdowns on revolving credit facilities and phased drawdowns of loans under existing debt agreements.

We refer to our previous discussions in relation to legacy debt and our proposal that, provided certain features are present within the debt and that debt is in place pre 17 June 2016, the debt would qualify as legacy debt for a maximum period of 12 years from that time.

Question 6
Comments are invited on this possible approach to defining a 'long-term public infrastructure project', including by reference to the legislation and regulation. In responding to this question, please also comment on any potential considerations relevant to State aid compatibility.

We believe the long term public infrastructure exemption as provided for in ATAD should encompass renewable energy infrastructure projects funded by way of third party and connected party debt. In the absence of doing so, the risk is that there is a barrier to deployment of capital for such projects. The impact of which may unnecessarily inhibit the number of projects undertaken. For those projects undertaken and impacted by the rules, the new rules would increase the cost of capital for funding the projects which will ultimately be absorbed by the consumer paying higher electricity costs. Indeed it is worth noting that increasing the use of renewable energy and adopting a net zero approach is at the top of the EU (end global) agenda, and deploying capital to support such projects would support this policy.

Renewable energy projects are often funded by significant levels of debt, as substantial capital outlays are typically required to fund the development and initial operational phases of these projects. As such, renewable energy projects, which follow standard industry funding models, may be in breach of the 30% of EBITDA threshold in their early years due to these high levels of debt. Ireland has a long-established policy of encouraging private sector investment in infrastructure projects and this is reflected in the fact that the main investment in renewable energy in Ireland comes from the private sector. ATAD Article 4 provides that a long-term public infrastructure project must be 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”. As such, while it is important that all long term infrastructure projects have a public benefit, there is no requirement under the ATAD that should limit this exemption to loans raised by public bodies.

Further, the provisions of the exemption should take account of the funding structures which are commonly utilised within the Irish renewable energy industry. A common practice within the market is to establish an Irish holding company to lend funds to a subsidiary company which will operate the renewable energy trade (known as a HoldCo – OpCo structure). A holding company of a qualifying infrastructure company should equally be able to avail of this exemption for borrowings it incurs to invest in its subsidiary. In order to ensure that investment in Irish renewable energy projects and sustainably focused initiatives remains an attractive prospect to investors, it is critical that the interest limitation rules be implemented in such a way that ensures such projects are not adversely impacted.

We believe that this exemption should also apply to other, non-renewable, projects that are in the public interest. These could include for example transport infrastructure (road network, rail, airports and runways etc.), technological infrastructure (e.g., broadband and telecommunications) and housing.

We are engaging with key stakeholders in the above areas and we would welcome further engagement on this matter in advance of the Finance Bill.

Question 7

Comments are invited on this approach to the application of the ILR and to this possible definition of 'relevant profit or loss'.

Further to the confirmations that we received through our recent discussions we do not have any further comments on this question.

Question 8

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

We refer to our previous discussions in relation to these definitions. We believe that the definition of interest equivalent should be broad and should seek to cover off items that are directly associated with financing transactions (e.g. derivative transactions that replicate the performance of interest bearing assets) and also include items such as the financing element of medium/long term leases and returns on NPLs (non-performing loans).

In relation to the latter, it is important that the decision on the inclusion of such items considers the symmetry between interest expense and interest income. If, say, gains on NPLs are not deemed to be "interest equivalent" income then it would be possible to structure debt instruments in a similar manner to ensure that they would fall outside of the scope of the rules on the expense side.

On a whole, we believe that it may be possible, through guidance which should be developed and published in conjunction with the introduction of the legislation, to come up with an understanding of features/identifiers for items that could be considered economically equivalent to interest. We will follow-up separately in this regard.

Question 9

Comments are invited on these possible definitions of 'EBITDA', 'exceeding borrowing costs' and 'interest spare capacity'. In particular, does the definition of H in the definition of 'EBITDA' satisfactorily resolve concerns about circular calculations that may arise because both double taxation relief and EBITDA are calculated based on taxable profits?

For clarity we would suggest that the relevant terms in the ILR rules are prefaced by either "accounting" or "tax" to avoid ambiguity.

We assume that capitalised interest and other similar items are regarded as flowing through the P&L/included in EBITDA based on normal tax/accounting rules as the relevant definition requires.

Question 10

Comments are invited on this possible definition of worldwide group and related concepts which are relevant for the operation of the equity ratio rule.

We do not have any specific comments at this time.

Question 11

Comments are invited on the above approach to the transposition of the equity ratio rule.

Further to our previous discussions on this matter, we would be keen to understand how the rule would work in cases where there may be negative equity at the group consolidated level or indeed at the entity or interest group level.

We would also like to understand how the administration of the rule will operate and, specifically, what will be expected from taxpayers on a year to year basis if they intend to avail of the equity ratio rule.

Question 12

Comments are invited on this possible approach to the "group of one".

We refer to our previous conversations on this question and specifically our view that the exclusion for related parties should be removed or replaced with associated enterprises.

Question 13

Comments are invited on the above approach to the transposition of the group ratio rule.

We do not have any specific comments at this time.

Question 14

Comments are invited on the proposed definitions of 'disallowable amount', 'de minimis amount', 'allowable amount', 'EBITDA limit' and 'limitation spare capacity'.

In relation to the "de minimis" amount, there has been a significant change between the December 2020 and July 2021 feedback statements without explanation or policy rationale to support the change. In the December, feedback statement, which appears to us to be in line with the Directive, the de minimis amount was added to the allowable amount, whereas in the current feedback statement, the position appears to be either an allowable amount or the de minimis. This is a substantial change that will impact a significant majority of taxpayers and will have a proportionally greater impact on smaller taxpayers for whom, we assume from a policy perspective, the de minimis is introduced to.

Question 15

Comments are invited on this potential approach to the application of the interest limitation rule.

We do not have any specific comments at this time.

Question 16

Comments are invited on the proposed interaction of the interest limitation rule with the balance of the corporation tax code.

While we appreciate that Ireland initially took the view that our existing interest deductibility rules were equally effective to those contained within ATAD and the Commission disagreed, the layering of the new ILR on top of the existing rules is in our opinion overly cumbersome and puts Ireland at a competitive disadvantage. We therefore recommend that a review of the TCA is undertaken with a view to simplification and consolidation of the interest restriction rules.

Question 17

Comments are invited on these possible methods of carrying forward of the disallowable amounts.

We believe that the "but for" rule is overly cumbersome, will lead to significant administrative complexity for taxpayers and is contrary to the messages from the Department with regard to Ireland's regime being among the most competitive in the world, especially as this ILR will be layered on top of our existing, very complex, targeted interest deductibility rules.
We understand the policy reason that lays the foundation for the "but for" rule - that it is imperative that a taxpayer could not obtain any allowance as a result of the ILR that it would not have obtained were the rules not in place. We understand that the specific concern relates to the interaction of losses and the carryforward of disallowed amounts. However, it is also important to point out that as our current interest deductibility rules are going to remain in place, the exchequer will be in a significantly better position as a result of these rules than it would have been before. Furthermore the opportunities for "planning" is limited as the rules themselves are very prescriptive in relation to how allocations can be made (see section 4.1). When this is balanced against the complexities that could arise for taxpayers that may need to stream carry-forwards into the future, it appears to us that the burden far outweighs the theoretical exchequer impact. We would also suggest that the exchequer impact of the relief of a loss earlier than expected is merely a timing difference, especially as this is the same argument that has been put forward in the first feedback statement with regard to the impact of the ILR on taxpayers.

Question 18
Comments are invited on these possible methods of carrying forward spare capacity.

We do not have any specific comments at this time.

Question 19
Comments are invited on this potential approach to applying the ILR to interest groups. In particular, it is noted that the provision would require reference to accounts that comprise the results of all group members. Comments are invited on the most effective method for compiling such accounts, noting that disregarding transactions between members of an interest group may be complex and administratively difficult for some groups. Stakeholders are invited to suggest how this process may be simplified.

We refer to our discussions in relation to aggregation Vs disregarding and the implications in asymmetric situations. We would welcome the opportunity to discuss this with you further.

Question 20
Comments are invited on this possible approach to addressing the interaction of the ILR with section 291A TCA 1997.

We do not have any specific comments at this time.

Question 21
Suggestions are invited concerning appropriate adjustments to the preliminary tax rules, to allow reasonable opportunity for compliance with preliminary tax obligations following the introduction of the ILR.

It is essential that taxpayers are not penalised for an incorrect preliminary tax ("PT") payment if it only arises as a result of the application of the ILR. There are likely many ways to deal with this and we have listed two suggestions below:

- We would suggest that no interest should apply to an underpayment of PT that arises solely as a result of the ILR.
- Another possible approach would be to include the "ILR related tax" (if applicable) in the subsequent year's PT payment. This would mean that there is a one year timing lag associated with the PT element of the ILR for any given year. As, we assume, that the majority of entities will be large companies for PT purposes this would mean that they would make this "prior year adjustment" 6 months post their year-end.

Question 22

Comments are invited on these possible reporting requirements with regard to the ILR.

We have no specific comments at this time.

Question 23

Comments are invited on these possible reporting requirements with regard to the ILR.

In an interest group situation 4.1(2) suggests that the reporting company must be the top resident company in the group. We believe that it would be administratively easier for the interest group to nominate its reporting company as there are various reasons why the top company may not be the appropriate company to be the reporting company to make the relevant return. Further we cannot see the policy rationale for the legislation being prescriptive on this matter.