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ATAD Implementation
Interest Limitation Feedback Statement
Tax Division
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Government Buildings
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16 August 2021

Dear Sir/Madam,

ATAD Implementation Article 4 Interest Limitation – Feedback Statement July 2021

Irish Funds welcomes the opportunity to provide comments on ATAD Implementation – Article 4 Interest Limitation - Feedback Statement ("the Feedback Statement").

The Irish Funds Industry Association (Irish Funds) is the voice of the funds and asset management industry in Ireland. Founded in 1991, Irish Funds represents fund managers, depositaries, administrators, transfer agents, professional advisory firms and other specialist firms involved in the international fund services industry in Ireland.

Irish Funds' more than 145 members service or manage in excess of 14,000 funds with a net asset value of €5.3 trillion. Irish Funds objective is to support and complement the development of the international funds industry in Ireland, ensuring Ireland continues to be a location of choice for the domiciling and servicing of investment funds.

We look forward to continued collaboration with the Department of Finance on this subject matter as it applies to the Irish funds industry, and we would be happy to discuss any of our responses to the questions raised. In the meantime, if you have any queries, please do not hesitate to contact us.

Yours sincerely,

Aoife Coppinger

1 QUESTION 1 – PROPOSED NINE STEP APPROACH TO ILR

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

(Please note: 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 proposed steps appear to be a reasonable process.

2 QUESTION 2 – DEFINITION OF 'RELEVANT ENTITY' AND 'INTEREST GROUP'

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 support a definition of an 'interest group' based on established tax concepts, such as section 411. This brings more certainty to the interpretation and application of the rules, when compared to using IFRS concepts to define a local Irish group for these purposes.

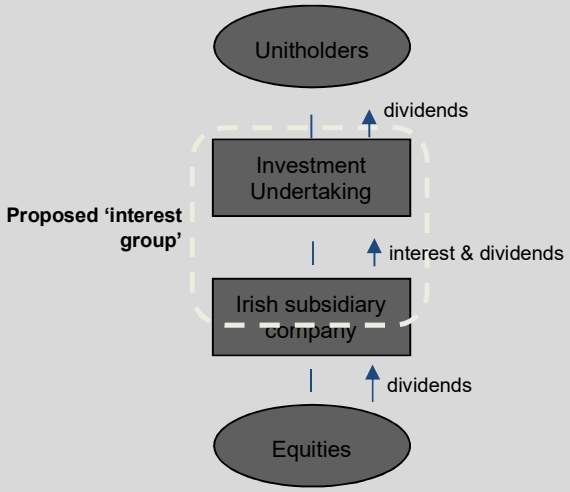
- However, as we observed in our March submission, adjustments must be made to the section 411 group concept. This is because the purpose of the 'interest group' concept is quite different to that of section 411, and the determination of overall borrowings requires a broader definition of group. In particular:

  - Inclusion of financial undertakings we submit it is very important to permit the option for financial undertakings to come within an "interest group" in circumstances where the financial undertaking exemption is introduced (which we support – see our response to question 4 below). In particular, we submit that investment undertakings (as defined in section 739B TCA) must have the facility to be included, whether they are constituted in corporate form (PLC or ICAV) or in authorised unit trust form. There are many investment undertakings which have subsidiary companies, and they should have the option to form an "interest group" like other

corporate groups, unless they have elected to avail of the 'financial undertaking' exemption. Given all the entities involved are Irish entities, there is no risk of base erosion arising from including investment undertakings within an "interest group". There are also examples of double layers of securitisation companies under an investment undertaking where the share dealing rules could be problematic. We have set out below in Example 1 an explanation why investment undertakings need to be included.

Example 1

An investment undertaking formed as an authorised unit trust wishes to invest in equities. Given that a number of the jurisdictions in which it wishes to invest are not familiar with trusts, the investment undertaking decides to establish a wholly-owned Irish subsidiary company through which to hold its investments. The investment undertaking raises €100m from unit holders, and invests the full €100m into the Irish subsidiary, by way of equity and debt. That subsidiary then uses the €100m to invest in equities. The subsidiary earns dividend income and gains and uses this to pay interest and dividends to the ICAV, which then makes distributions to its unit holders.



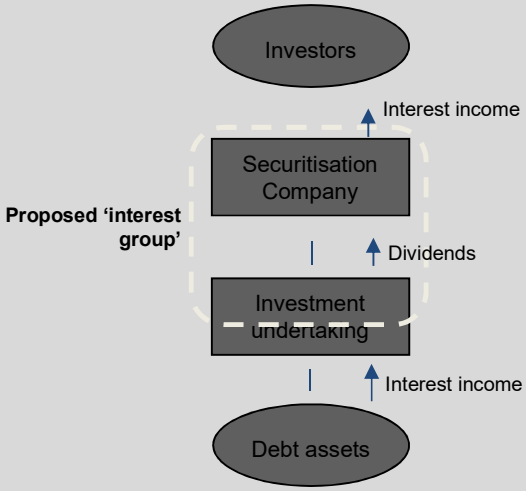
The Irish subsidiary will, viewed on a solo basis, have a net interest expense and the ILR would apply. However, the investment undertaking and the subsidiary as a group have no net interest expense, because the group earns non-interest income and pays out non-interest income. Therefore, as an "interest group", the ILR should have no impact.

- Inclusion of companies held by securitisation companies
  Companies held by securitisation companies (qualifying under section 110 TCA) should also be included. Depending on the interpretation of section 411 which excludes companies whose share capital is owned by a company "*if a profit on the sale of the shares would be treated as a trading receipt of its trade*"[1], it is possible that such companies may not fall within a section 411 group. There are numerous securitisation companies that invest in investment undertakings (or other companies) and hold the majority of the shareholding. We have set out an Example 2 below explaining why such investment undertakings (held by securitisation companies) should be included within an interest group.

[1] See subsection (1)(c)(i)(I)

Example 2

An Irish securitisation company raises €100m from investors by way of issuance of notes, and invests that €100m in an investment undertaking formed as an ICAV in return for the issuance of shares. The securitisation company holds more than 75% of the shares in the ICAV. The ICAV uses those funds, together with €50m borrowed from a bank, to acquire and hold €150m of debt investments. The ICAV earns €7m of interest income and uses this to pay €0.5m of operating expenses, €2m interest to the bank, and €4.5m of share distributions to the Irish securitisation company. The Irish securitisation company uses the €4.5m of income to meet €0.5m of operating expenses and pay €4m to its investors.



The securitisation company has a net interest expense of €4m and, viewed on a solo basis, has an interest/EBITDA ratio in excess of 88%. However, viewed as a group, there is no net interest expense, because €7m of interest income is used to pay €6m of interest expense, and the interest/EBITDA ratio is 0%.

To ensure that the securitisation company is not unfairly denied a tax deduction for its distributions to its investors, the definition of 'interest group' must be expended to include all investment undertakings.

- 50% ownership threshold. The required percentage ownership for a 'group' should be 50%, rather than the 75% required for surrendering losses under s411 TCA. We note that the alternative test considered for this "interest group" was the IFRS accounting consolidation test, and that generally applies where a 50% ownership threshold is satisfied. We do not see any reason why a 75% percentage ownership threshold should be applied under a s411-based grouping test if 50% ownership was viewed as satisfactory under the accounting approach.

- Irish residents/branches only. Only companies which are resident in Ireland, or carrying on a trade in Ireland through a branch, should be included in the definition of an "interest group". The s411 definition of 'group' is broader than this, and includes EU resident companies that have no presence in Ireland.

- Elect in. We expect that a significant number of Irish group companies will not choose to be part of an interest group. Therefore, for ease of administration and compliance in annual corporation tax returns, we submit that the election should be made to 'opt in' to the group, rather than to opt out.

- 3 year period. To avoid any suggestion that the election needs to be re-made every 3 years, for companies that wish to be part of an interest group, we would suggest that the drafting be amended to clarify that an entity may elect to leave an interest group after 3 years but in the absence of such an 'exit' election the company will remain in the interest group. Otherwise, there could be unintended departures from interest groups, if taxpayers forget to re-elect every 3 years.

- Interaction with the group ratio rules. We believe it should be feasible and practical for the 'interest group' concept to interact with the group ratio rules:

  (a) The interest group should be treated as 'one company' for the purposes of the group ratio rules. If none of the companies in the interest group is consolidated with any entity *outside* the interest group and no entities *outside* the interest group are consolidated into it, then the interest group would be treated as a 'group of one' for the purposes of applying the group ratio rules. We have set out more detailed proposals in this regard in our response below to Question 12.

  (b) If any company within the interest group *is* consolidated with an entity outside the interest group, then the interest group can apply the standard group ratio rules, and the results from the broader consolidated group can be used to determine the group equity ratio, and the group borrowing ratio. Again, we have set out more detail in this regard in our response to Question 12.

  (c) In calculating the relevant amounts for the interest group, we agree that a 'disregarding internal transactions' approach is the better approach. However, we think it should be feasible for interest groups to elect (on an irrevocable basis) to use an 'aggregation' approach instead, if they deem it to be more straightforward from an administrative and compliance basis. An anti-avoidance requirement could be added to ensure that any such election was not done for tax avoidance purposes. We have addressed this point in our response to Question 19. However, it is very important for many Investment Undertaking/SPV structures that the 'disregarding internal transactions' approach is permitted.

For these reasons, we submit that the following amendments should be made to the proposed definition of an "interest group":

(1) For the purposes of this Part, **companies shall be deemed to be members of** an **interest group if the companies** —

(a) ~~shall include all companies~~ **are resident in the State, or are within the charge to corporation tax in the State,**

(b) ~~that~~ are deemed to be members of a group of companies under section 411 **or would be so deemed to be members of a group under section 411 but for the application of section 411(1)(c)(i)**,

(c**)** **are not a financial undertaking other than a financial undertaking which has made the election pursuant to section XXX (and that election has not been revoked), and**

(d) **an election is made by each company to be part of the interest group pursuant to subsection 4,** ~~[shall not include a financial undertaking]*~~,

and a 'member of an interest group' shall be construed accordingly.

(2) Where a company, branch or agency, as the case may be, or any activities of that company, branch or agency, falls to be included in either two interest groups, or an interest group and an equivalent grouping in another Member State, then that company, branch or agency shall elect to be treated as a member of one such group only.

(3) ~~Notwithstanding subsection (1), a company may elect not to be a member of an interest group.~~ **Investment undertakings (within the meaning of section 739B) constituted as authorised unit trusts shall be deemed to be companies for the purposes of this section**.

(4) **If a company elects to be a member of an interest group, the** ~~The~~ election ~~referred to in subsection (3)~~ shall —

(a) apply **until the company elects, in accordance with subsection 5, to leave the interest group** ~~for a period of [three] years from the beginning of the accounting period in respect of which the election is made~~,

(b) be made in such form as the Revenue Commissioners make available, and

(c) be made on or before the specified return date for the accounting period to which the election first relates.

(5) **A company may elect to leave an interest group at any time after** a period of [three] years from the beginning of the accounting period in respect of which the **company joined the interest group**. ~~Where no accounting period ends on the same day that the period of [three] years referred to in subsection (4)(a) ends, the election shall remain in effect until the end of the last accounting period which commences prior to the end of the period of [three] years.~~

3 **QUESTION 3 – DEFINITION OF 'STANDALONE ENTITY', 'ASSOCIATED ENTERPRISE', 'ENTERPRISE', 'ENTITY'**

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

The proposed definition of 'associated enterprise' in the consultation is broader than in the Directive as it includes persons who 'act together'. The Directive only applies an 'acting together' test for the associated enterprises within the scope of the anti-hybrid rules and not for any of the other ATAD measures. Consequently, we recommend that the definition of 'associated enterprise' is amended.

Insofar as the definition of "standalone entity" is concerned, the "associated enterprise" test should be applied with reference to beneficial owners as otherwise a nominee or share trustee might inadvertently be treated as an associated enterprise thereby preventing an entity qualifying as standalone where, for example, its shares are held by a corporate nominee or trustee for persons who would not be associated enterprises had they held the shares directly. We suggest that this can be avoided by providing that, in applying the "associated enterprise" tests in section 835AA, the tests are applied with reference to any beneficiaries or beneficial owners where shares are held by a nominee or through a trust.

4 QUESTION 4 – FINANCIAL UNDERTAKINGS

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

- As set out in our March submission, we support the adoption of the exclusion, on an optional basis, for 'financial undertakings'. We do not believe Irish financial undertakings have been a cause of base erosion and profit shifting.

- We do not share the view expressed in section 3.2.3 of the Feedback Statement that Article 4(7) "*states that, if financial undertakings are excluded from the scope of the ILR, they must also be excluded from the local interest group; the group ratios' and the carry-forward provisions.*" Article 4(7) provides, "*Member States may exclude financial undertakings from the scope of paragraphs 1 to 6, including where such financial undertakings are part of a consolidated group for financial accounting purposes.*" Recital 9 provides, "*Although it is generally accepted that financial undertakings, i.e. financial institutions and insurance undertakings, should also be subject to limitations to the deductibility of interest, it is equally acknowledged that these two sectors present special features which call for a more customised approach. As the discussions in this field are not yet sufficiently conclusive in the international and Union context, it is not yet possible to provide specific rules in the financial and insurance sectors and Member States should therefore be able to exclude them from the scope of interest limitation rules*."

  Member States have a choice as to whether to implement a financial undertaking exclusion, and as to the scope of that exclusion (e.g. as to whether the exclusion may or should extend to financial undertakings that are part of a consolidated group for financial accounting purposes, and as to whether a taxpayer election is included). While Member States may decide not to implement a financial undertaking exclusion, where they decide to implement an exclusion, the Directive does not preclude a Member State from including a taxpayer election as part of the exclusion.

- Further as set out in our March submission, we continue to strongly submit that Irish companies that are wholly-owned subsidiaries of Irish regulated UCITS and QIAIFs should be treated as part of the UCITS or QIAIF (as the case may be) for the purpose of this rule. There are many Irish regulated funds that have wholly-owned subsidiary Irish companies. These subsidiaries must comply with the Central Bank's UCITS or AIF rulebook in everything they do. To all intents and purposes, they are treated as part of the regulated fund. The purpose of the exemption for UCITS and AIFs would be frustrated if they were treated for the purposes of the ILR in a way that was different to a regulated fund itself.

- The proposed definition of financial undertaking appears comprehensive to us.

- In terms of adjustments to the group ratios and carry-forward provisions, we make the following observations:

  - The default position could be that a financial undertaking is not excluded from the ILR, and would have the ILR apply to it like any other company.

  - A financial undertaking could elect to claim an exclusion from the ILR. Any election would be irrevocable for [five] years.

  - If a financial undertaking elected to claim an exclusion from the ILR, it would have the following consequences:

    (a) the financial undertaking could not elect into an "interest group"

    (b) for the group ratio rules, the results of the financial undertaking would have to be excluded from the consolidated accounts. This would require more internal administrative work for the taxpayer group, but would only apply if the taxpayer group decided it was beneficial to for the financial undertaking to make the election.

    (c) any interest spare capacity could not be surrendered to (or by) the financial undertaking

5 QUESTION 5 – LEGACY DEBT

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 welcome the updated definition of '*legacy debt*' and have no further comments on it.

- Regarding modification of legacy debt, we think that the definition of '*the amount in respect of legacy debt*' requires some further adjustment in order to align with ATAD. Recital 8 to the ATAD Directive makes clear that loans agreed before June 2016 should fall within the scope of the safe harbour to the extent that "their terms are not subsequently modified". If the original terms of a loan entered into before June 2016 envisage the possibility of multiple draw-downs (and variable principal), such as a revolving credit facility, then these loans should still fall within the scope of the safe harbour. While Recital 8 to the Directive specifically references increases in the "amount" (ie, principal) of a loan after June 2016, this is only in the context of where that increase has been brought about due to a "modification" of the terms of the loan. We would therefore recommend that the definition of '*the amount in respect of legacy debt*' be adjusted as follows:

'**the amount in respect of legacy debt**' in respect of an accounting period means an amount calculated as the lower of —

(a) the deductible interest equivalent that arises on legacy debt in that accounting period, or

(b) an amount of deductible interest equivalent that would have arisen in respect of that accounting period based on the terms ~~and principal~~ of that debt as they existed on 17 June 2016.

6 QUESTION 6 – DEFINITION OF 'LONG-TERM PUBLIC INFRASTRUCTURE PROJECT'

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.

- A broad implementation of the exemption for long-term public infrastructure projects should be taken, which should include renewable energy infrastructure projects funded by way of third party and connected party debt, with a view to ensuring that Ireland meets its renewable energy targets on the transition to net zero. 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

- 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, unless they fall within the definition of a long-term public infrastructure project.

- 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 Directive 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.

- Consideration could be given to providing a list of strategic projects that could be updated by the Minister from time to time as required.

7 **QUESTION 7 – RELEVANT PROFIT OR LOSS**

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

- We generally agree with this approach to a value basis calculation of the ILR.
- We would suggest the following drafting amendments to definition of 'relevant profit or loss'.

(1) Subject to subsections (2) and (3), 'relevant profit' means **an** ~~the~~ amount of profits **which** ~~on which corporation tax falls finally to be borne of a relevant entity arising in an accounting period before any relief for losses carried forward from prior accounting periods computed as if~~, were it charged to corporation tax as profit of the relevant entity arising in the accounting period at the rate specified in section 21(1)(f), would produce an amount of corporation tax equal to the amount of corporation tax computed for that accounting period in accordance with the Corporation Tax Acts **before an application of the provisions of** ~~notwithstanding~~ this Part.

(2) In ~~calculating~~ **computing** the corporation tax for an accounting period in accordance with the Corporation Tax Acts **before an application of the provisions of this Part** ~~the relevant profit~~, no account shall be taken of any income or expenses relating to a qualifying long-term infrastructure project, and where a relevant entity carries on activities other than a qualifying long-term infrastructure project, income and expenses shall be apportioned on a just and reasonable basis.

(3) The amount of a relevant loss for an accounting period shall be computed for the purposes of this Part in the like manner as a relevant profit in that period would have been computed under this section.

8 QUESTION 8 – DEFINITIONS OF INTEREST EQUIVALENT

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

- As a drafting point, we would again make the suggestion that the defined term of "interest equivalent" could be shortened to "interest". It would make the Part easier to read. There are numerous sections in the TCA where "interest" is defined to include items that are strictly not interest payments in law.
- We would suggest that a reference to debt factoring arrangements could be included.

'interest ~~equivalent~~' includes any amount of —

(a) interest,

(b) amounts economically equivalent to interest including -

(i) discounts (whether on original issuance of a debt instrument or reflecting a discount on par value on the acquisition of an existing debt instrument,

(ii) the finance cost element of finance lease payments,

(iii) amounts under derivative instruments or hedging arrangements connected with the raising of finance,

(iv) foreign exchange gains and losses related to interest on instruments connected with the raising of finance,

(v) the finance cost of debt factoring arrangements

(c) amounts 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.

9 **QUESTION 9 – EBITDA**

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?

[We have no comments on this proposed drafting.]

10 **QUESTION 10 – DEFINITION OF WORLDWIDE GROUP AND EQUITY RATIO RULE**

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 would submit that the 'hypothetical' consolidation concept does not need to be included in the worldwide group definitions. These definitions are only relevant for the equity ratio rule and the group ratio rule. Both these reliefs require *actual* consolidated accounts to be prepared. The mere fact that consolidated accounts *could* be prepared is not sufficient, it appears, for a taxpayer to rely on either the equity ratio rule or the group ratio rule.

- We have suggested an addition to the definition of a consolidating entity, to accommodate those financial undertakings who elect to be excluded from the ILR. The consequence of such an election should be that there results are not included in the consolidated accounts used

for these purposes. This would result in more work for the taxpayer group in question – in preparing adjusted consolidated accounts – but that is an optional course of action that they would decide to take if they elected to exclude their financial undertaking from the ILR.

'**worldwide group**' means the ultimate parent and all consolidating entities 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 an alternative body of accounting standards [see overleaf]~~, 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 an**~~,~~ alternative body of accounting standards [see overleaf], ~~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 an alternative body of accounting standards [see overleaf],

~~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;~~

'**alternative body of accounting standards**' means standards that accounts of entities are to comply with which are laid down by any such body or bodies having authority to lay down standards of that kind in the territories of Australia, Canada, China, Hong Kong, India, Japan, New Zealand, South Korea, Singapore and United States of America .

'**consolidating entity**' means an entity which is consolidated in the ultimate consolidated financial statements other than**:**

(a) a non-consolidating entity; and

(b) any financial undertaking that has made an election pursuant to section XXX [election to be excluded from the ILR] which election has not been revoked.

'**non-consolidating entity**' means an entity which would be consolidated in the ultimate consolidated financial statements but for a consolidation exemption, and, as a result solely of that exemption, is valued in those consolidated financial statements using —

(a) fair value accounting (within the meaning of international accounting standards),

(b) on the basis that it is an asset held for sale or held for distribution (within the meaning of international accounting standards), or

(c) similar concepts in an alternative body of accounting standards, where the ultimate consolidated financial statements are prepared under an alternative body of accounting standards.

11 QUESTION 11 – EQUITY RATIO RULE

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

- We would suggest replacing the reference to 'related parties' with a reference to 'associated enterprises'. Given that there is only a single company involved in this context, it should be straightforward to apply this ATAD concept to the relevant financial statements.

> (3) In applying subsection (2), where a relevant entity is a member of a single company worldwide group [see 3.6.3 below], the single company worldwide group's ratio of equity over total assets shall be computed based on the financial statements of the relevant entity prepared under generally accepted accounting practice, but those accounts shall be adjusted by decreasing the total debt by any amount of debt with ~~related parties~~ **associated enterprises**, and by decreasing the amount of equity by that amount.

12 QUESTION 12 – GROUP OF ONE

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

- We agree that the 'group of one' is a practical solution to the situation of companies with one or more shareholders owning a 25% or greater shareholding.

- The equity ratio rule contains an additional restriction, in subsection 2, when calculating the total debt and equity of the 'group of one' and requires the debt and equity to be reduced by the amount of any debt due to 'related parties'. As mentioned above, we suggest that the concept of "associated enterprises" should be used instead of the term 'related parties' (which appears to be undefined). There is already a well-established meaning of "associated enterprises", in the context of ATAD, which we submit meets the necessary requirements in the current context. Given there is only a single company involved, there

should be no issues in identifying (and excluding) the 'associated enterprise' debt from the financial statements figures.

- We suggest that it should be confirmed that, if the entities in an "interest group" are not themselves consolidated with other entities outside the "interest group", the interest group itself be treated as a 'group of one' for the purposes of applying the group ratios.

'**single company worldwide group**' means:

(a) a company that is not a member of a worldwide group and is not a standalone entity**; or**

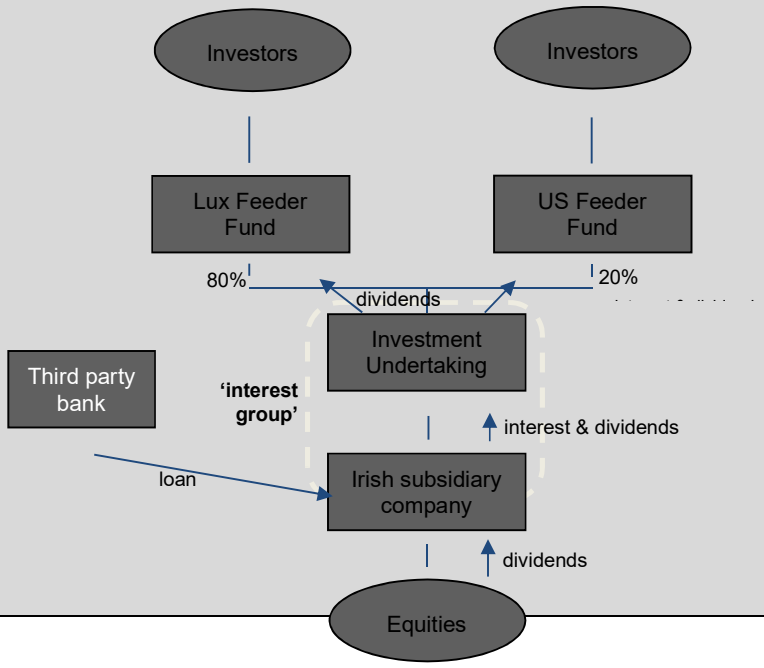
(b) an interest group where no member of that interest group is a member of a worldwide group which includes an ultimate parent or consolidating entities that are not themselves a member of the interest group

- We have set out some examples below:

Example 1 – No Consolidation

An investment undertaking has 2 feeder funds, both formed as companies. A Luxembourg feeder fund holds 80% of the shares in the investment undertaking. A US feeder fund holds the remaining 20% of the shares. The investment undertaking has an Irish subsidiary company through which it makes its investments. The investment undertaking and the Irish subsidiary company elect to be an 'interest group'. The Luxembourg feeder fund is not required to consolidate the investment undertaking (or its subsidiary) under IAS.

The investment undertaking raises €100m from its feeder funds, in return for shares, and invests this €100m in the Irish subsidiary company in return for debt and equity. The Irish subsidiary then borrows a further €100m from a third party bank. The Irish subsidiary invests the full €200m in purchasing equities. The Irish subsidiary earns €10m in dividend income in an accounting period, and uses €6m of this to pay interest to the third party bank. The remaining €4m is used to pay interest and dividends to the investment undertaking.



The investment undertaking and the Irish subsidiary company are treated as a single 'relevant entity' for the purposes of the ILR. The 'relevant entity' should be treated to have borrowed the funds from the third party bank.

The interest/EBITDA ratio of the 'relevant entity' is in excess of 30% (given the Irish subsidiary is paying 60% of its gross revenues to the third party bank). Therefore, the ILR is in scope. However, the 'relevant entity' should be treated as a 'group of one', because it is not a standalone entity nor is it consolidated with any other group company. As a 'group of one', the relevant entity can calculate its group ratio, as €6m/€10m or 60%. This debt is owing to a third party, so there is no need to adjust its group ratio to accommodate related party debt. The relevant entity's group ratio is therefore equal to its actual interest/EBITDA ratio, so the ILR should not deny a tax deduction for any interest expenses of the relevant entity.

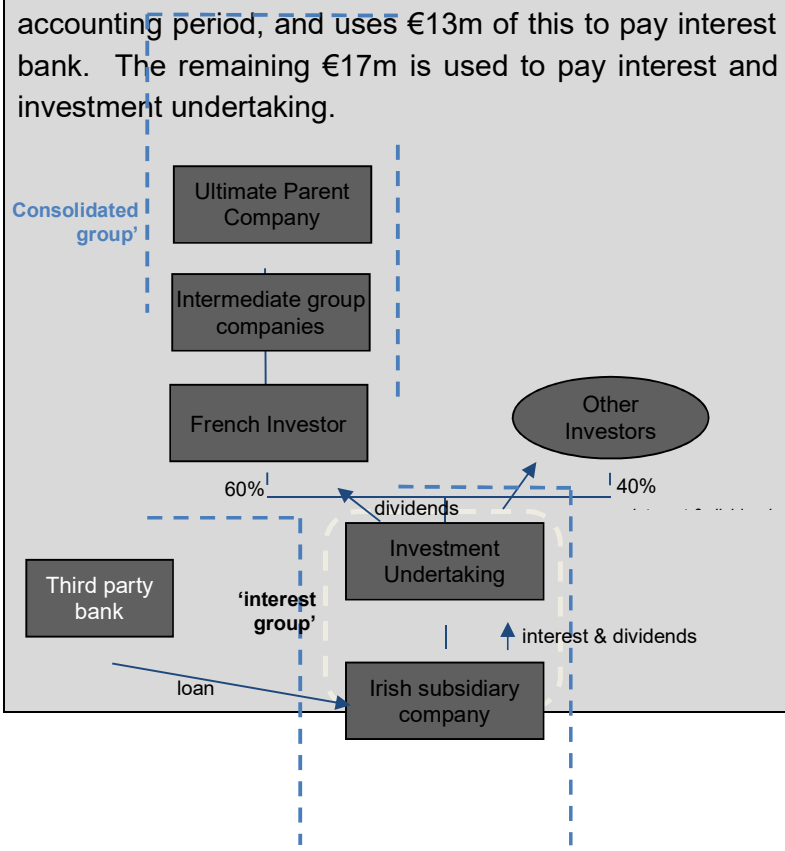
The interest deduction within the relevant entity – for interest payments paid by the Irish subsidiary company to the investment undertaking – should not be denied under the ILR because it should be disregarded.

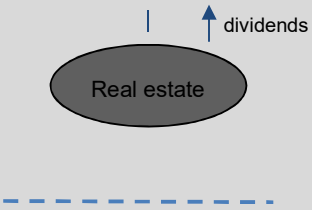
Overall, we submit this treatment is in line with the policy objectives of ATAD. The only tax deduction being claimed is for interest paid to an unconnected third party, and for internal payments within the relevant entity.

Example 2 – Consolidation with Anchor Investor

An investment undertaking has a French company as its anchor investor, holding 60% of its shares. Its investment strategy is to invest in European real estate. The remaining 40% of its shares are widely held. The investment undertaking has an Irish subsidiary company through which it makes its investments. The investment undertaking and the Irish subsidiary company elect to be an 'interest group'. The French investor is a subsidiary of a wider corporate group, and the ultimate parent of that wider corporate group is required to consolidate the investment undertaking (and its subsidiary) under IAS, due to the majority shareholding and the (non-financial) asset class. The group ratio of the French investor's group is 52%.

The investment undertaking raises €500m from its investors, in return for shares, and invests this €500m in the Irish subsidiary company in return for debt and equity. The Irish subsidiary then borrows a further €200m from a third party bank. The Irish subsidiary invests the full €700m in European real estate. The Irish subsidiary earns €30m in rental income in an accounting period, and uses €13m of this to pay interest to the third party bank. The remaining €17m is used to pay interest and dividends to the investment undertaking.





The investment undertaking and the Irish subsidiary company are treated as a single 'relevant entity' for the purposes of the ILR. The 'relevant entity' should be treated to have borrowed the funds from the third party bank.

The interest/EBITDA ratio of the 'relevant entity' is in excess of 30% (given the Irish subsidiary is paying 43% of its revenues to the third party bank). Therefore, the ILR is in scope. However, the 'relevant entity' should be entitled to rely on the group ratio rule, because it is consolidated with the French investor's group. The relevant entity can therefore apply the ILR using a percentage ratio of 52% (being the French investor's group ratio). Therefore, the full amount of the interest payable to the third party bank should be deductible for the relevant entity.

The interest deduction within the relevant entity – for interest payments paid by the Irish subsidiary company to the investment undertaking – should not be denied under the ILR because it should be disregarded.

Overall, we submit this treatment is in line with the policy objectives of ATAD. The only tax deduction being claimed is for interest paid to an unconnected third party, and for internal payments within the relevant entity.

13 QUESTION 13 – TRANSPOSITION OF GROUP RATIO RULE

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

[We have no comments on this proposed drafting.]

14 **QUESTION 14 – CALCULATING THE ALLOWABLE DEDUCTION**

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

[We have no comments on this proposed drafting.]

15 **QUESTION 15 – APPLYING THE INTEREST LIMITATION**

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

- In line with our previous comments, we submit that the exclusion for financial undertakings should be introduced but should be optional. We have suggested some drafting below in this context.

(1) This section applies to a relevant entity for an accounting period where —

(a) that relevant entity is, at any time in that accounting period, not a standalone entity,

(b) [the relevant entity is not a financial undertaking **other than a financial undertaking which has made the election pursuant to section XXX (and that election has not been revoked)**]*, and

(c) the relevant entity has a disallowable amount in respect of the accounting period.

(2) Where this section applies, the corporation tax chargeable of a relevant entity for an accounting period shall be recalculated, reducing the amount of deductible interest equivalent by the disallowable amount.

16 **QUESTION 16 – ORDER OF APPLICATION**

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

[We have no comments on this proposed drafting.]

17 **QUESTION 17 – CARRY FORWARD OF DISALLOWABLE AMOUNTS**

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

[We have no comments on this proposed drafting.]

18 **QUESTION 18 – CARRYING FORWARD SPARE CAPACITY**

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

[We have no comments on this proposed drafting.]

19 **QUESTION 19 – ANTI-AVOIDANCE RULES**

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 believe that disregarding internal transactions is the better approach, because it aligns with the general scheme of ATAD in adopting an accounting consolidation approach when applying the group ratios. However, we believe it should be feasible to also offer interest groups the option to apply an 'aggregation' approach instead, for ease of administration or compliance. This approach would involve a simple aggregation of the individual financial statements of each entity in the interest group. Such an 'aggregation' approach could be irrevocable, if an interest group decides to adopt this approach. An anti-avoidance provision could also be added to protect the Exchequer.

(1) For the purposes of applying this Part to an interest group:

(a) **subject to paragraph (b),** amounts computed in respect of an interest group for the purposes of this Part shall comprise the results

of all the members of the interest group disregarding the results of transactions between members of the interest group,

(b) **a reporting company may make an election, on the formation of an interest group, to compute amounts in respect of an interest group for the purposes of this Part by aggregating the amounts reflected in the financial statements of each member of the interest group, and any such election shall be irrevocable and shall apply to the interest group, irrespective of the addition or departure of members, for all accounting periods thereafter.**

(2) A reporting company may not make the election referred to in subsection 1(b) if it is reasonable to consider that the purpose, or a main purpose, of making the election was the avoidance of tax.

20 **QUESTION 20 – INTERACTION WITH OTHER PROVISIONS**

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

[We have no comments on this proposed drafting.]

21 **QUESTION 21 – PRELIMINARY TAX**

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.

[We have no comments on this proposed drafting.]

22 **QUESTION 22 - REPORTING**

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

[We have no comments on this proposed drafting.]

23 **QUESTION 23 – INTEREST GROUP**

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

[We have no comments on this proposed drafting.]