South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

+353 1 663 1700
www.taxinstitute.ie

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

By email: ctreview@finance.gov.ie

16 August 2021

ATAD Implementation Article 4 Interest Limitation - Feedback Statement July 2021

Dear Sir/Madam

The Institute welcomes publication of the second ATAD Implementation Article 4 Interest Limitation Feedback Statement[1] (the Feedback Statement) and the opportunity to further engage with the Department of Finance regarding the implementation of the ATAD Interest Limitation Rules (ILR) in Ireland. The Feedback Statement builds on the December 2020 Feedback Statement[2] and the November 2018 public consultation on the implementation of the ATAD Anti-Hybrid Rules and the ILR.[3]

As outlined in the Institute's response to the December 2020 Feedback Statement, we firmly believe that the ILR should not impose additional, overly complex rules, on top of existing comprehensive provisions. To do so, will likely increase the cost of borrowings and significantly increase the administrative burden for companies putting Irish groups at a competitive disadvantage. In our view, a fundamental redesign of the rules for deducting interest is necessary to rebalance the effect of the comprehensive protections already afforded within the existing regime, with those now available under recently introduced anti-hybrid measures and extended transfer pricing rules and the forthcoming implementation of the ILR.

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[1] Department of Finance, ATAD Implementation – Article 4 Interest Limitation, Feedback Statement, July 2021.
[2] Department of Finance, ATAD Implementation – Article 4 Interest Limitation, Feedback Statement, December 2020.
[2] Department of Finance, ATAD Implementation – Hybrids and Interest Limitation, Consultation Paper, November 2018

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We welcome the stakeholder engagement in recent months by the Department as part of the review of submissions received in response to the December 2020 Feedback Statement to consider the complex tax technical issues that arise on the transposition of the ILR into Irish law. Considering the very technical nature of the ILR and its significant impact on most businesses, we strongly urge that the Department and Revenue continue to have frequent engagement with stakeholders up to the publication of the Finance Bill to ensure the legislation when published is clearly understood by taxpayers and is operable in practice.

We have set out in the attached Appendix our remarks, based on the feedback we have received from our members, on the proposed approach to some of the technical aspects of the ILR contained in the Feedback Statement,

The Institute would be happy to engage further on the matters raised in this submission through stakeholder meetings or direct discussions. Please contact Anne Gunnell at agunnell@taxinstitute.i.e or (01) 6631750 if you require any further information.

Yours sincerely

Sandra Clarke
Institute President

APPENDIX
Response to Questions in the Feedback Statement

A possible nine step approach

Question 1:
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 concept of setting out a possible nine-step approach in the Feedback Statement on how the ILR would be calculated and applied as an adjustment to the relevant tax computation, rather than as a separate stand-alone Case IV charge, as initially proposed in the first Feedback Statement would appear to be acceptable. However, we have set out our concerns regarding the proposed approach to transpose ILR into Irish law in the detailed responses to the specific questions relating to each step below.

Step 1: Identify the relevant entity

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.

It is proposed in the Feedback Statement to define 'interest group' by reference to the members of a group of companies considered to be part of a corporation tax loss group under section 411 Taxes Consolidation Act 1997 (TCA 1997). Section 411 loss groups include companies that are resident in EU Member States and resident in countries with which Ireland had concluded a double tax treaty.

During the Department of Finance Consultation Discussion on 19 July (the Consultation Discussion) it was stated that the definition of interest group is intended to apply to companies chargeable to Irish corporation tax. We await sight of this confirmation being reflected in legislation before commenting further.

We welcome the confirmation in subsection (3) that a company may elect not to be a member of an interest group. However, the way in which a company may make such an election is unclear. In our view, it would be preferable if a company could make such an

election on its Form CT1 (corporation tax return), as requiring a separate return for this purpose would be an unnecessary additional administrative burden. It would also reduce the risk of a company inadvertently missing the filing deadline for such an election.

The approach outlined in the Feedback Statement envisages that if a company elects **not** to be a member of an interest group, this election shall apply for a period of three years. In our view, it would be preferable for such an election to remain in place indefinitely unless, after the three-year period, the company confirms it wishes to opt out. This would reduce the risk of a company inadvertently failing to renew their election not to be a member of the interest group.

Exemptions and exclusions

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

ATAD provides that the taxpayer may be given the right to fully deduct exceeding borrowing costs if the taxpayer is a 'standalone entity'.

Standalone entity is defined in the Feedback Statement as meaning:

"*a company resident in the State that —*
(a) is not a member of a worldwide group [see 3.6.1];
(b) has no associated enterprises [see below], and
(c) does not have a permanent establishment in a territory other than the State;"

A critical component of the definition of standalone entity is the meaning of associated enterprise. The proposed definition of 'associated enterprise' outlined in the Feedback Statement is broader than what is provided in Article 2 (4) of ATAD, as it includes persons who 'act together'. However, ATAD only applies an 'acting together' test for an associated enterprise within the scope of the anti-hybrid rules and not for any of the other ATAD measures.

As the definition of an enterprise is defined more broadly than a company, it may include anything held through a partnership, trust, or other holding structure. Therefore, depending on the interpretation of the 'acting together' test, a partnership with 10 partners who are otherwise independent of each other, each holding a 10% interest in a company could be considered associated.

In order to prevent the narrowing of the definition of standalone entity, we recommend that the definition of 'associated enterprise' for the purpose of ILR is amended to remove the 'acting together' test.

In addition, as drafted the definition of "associated enterprise" could result in a person who has the legal ownership of shares even if they do not have the beneficial ownership as well.

Consequently, a share trustee or nominee may be associated with an entity whose shares it holds even if it has no real economic relationship with it. Furthermore, two enterprises who are otherwise unconnected but whose shares are held by the same nominees or trustee may become associated.

We believe that it would be inconsistent with the objective of ATAD if two entities whose shares are held by the same nominee or trustee were deemed associated with each other or the trustee / nominee merely because it holds the shares in trust for a beneficiary. In our view, it would be appropriate to include a clarification in the legislation to the effect that that in applying the "associated enterprise" tests in section 835AA TCA 1997, nominees and trustees are to be disregarded and their ownership interests are to be attributed to the beneficial owners of the shares concerned.

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

ATAD permits EU Member States to exclude certain 'financial undertakings'[4] from the scope of the ILR. We note that the UK and a number of EU Member States, such as, Germany, The Netherlands, Sweden and Romania have not adopted such an exclusion in their domestic provisions.

We had recommended in our response to the December 2020 Feedback Statement on ATAD Implementation – Article 4 Interest Limitation that if the exclusion for financial undertakings is incorporated into Irish legislation, it should be optional for the taxpayer. In many cases, the financial undertaking within a group will generate net interest income and will have significant EBITDA. Therefore, failing to provide an opt-in clause could result in groups containing financial undertakings being adversely impacted by the automatic exclusion of the financial undertaking when computing the EBITDA of the interest group.

However, we note the comments in the Feedback Statement 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.

We understand that there is some doubt among policymakers as to whether ATAD permits the flexibility to provide an opt-in clause for financial undertakings. If it is determined that providing an opt-in clause would not comply with the terms of the Directive, we believe it may be preferable not to incorporate the exclusion for financial undertakings into Irish law, as it is unclear which entities would benefit from the exemption.

[4] Within the meaning of Article 2(1) ATAD

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.

'Legacy debt' is defined as meaning "*a debt the terms of which were agreed before 17 June 2016.*"

'The amount in respect of legacy debt' in respect of an accounting period is defined as:
"*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."

We believe that the reference to the principal of that debt as it existed on 17 June 2016 is inconsistent with the proposed definition of legacy debt (which refers to a debt the terms of which were 'agreed' before 17 June 2016) and with Article 4 (4) ATAD (which refers to loans which were 'concluded' before 17 June 2016).

It is possible that the terms of a debt were agreed before 17 June 2016, but the principal may not have existed on 17 June 2016, as it was not drawn down until after that date. In our view the definition of the amount in respect of legacy debt could be amended at paragraph (b) as follows:

(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."

It is essential that transfer pricing adjustments come within the scope of the definition of 'the amount in respect of legacy debt'. We note that during the Consultation Discussion it was confirmed that the ILR is intended to apply after transfer pricing rules and that any transfer pricing adjustments would therefore be included in the ILR calculation. We look forward to this being clarified further in the legislation.

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.

Article 4 (4)(b) of ATAD provides that EU Member States may exclude both the income and associated expenses of certain 'long-term public infrastructure projects' from the scope of the ILR, on the grounds that they present little or no BEPS risks. A 'long-term public

infrastructure project' is defined as *"a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered in the general public interest by a Member State"*.

As outlined in our response to the December 2020 Feedback Statement, we consider that a broad base approach to the definition of public infrastructure should be adopted. Any definition should be flexible enough to adapt to changing social policy objectives and include projects located in any EU Member State in line with ATAD.

The Feedback Statement suggests that a long-term public infrastructure could be defined by reference to existing legislative definitions, such as "Strategic Infrastructure Developments" under the Planning and Development Acts, the Roads Acts and the Transport (Railway Infrastructure) Act and "Strategic Housing Developments" under the Planning and Development (Housing) and Residential Tenancies Act 2016. Furthermore, it is noted that the EU Taxonomy Regulation (EU/2020/852) establishes criteria for determining whether an economic activity qualifies as environmentally sustainable. In our view, if this proposed approach is adopted careful consideration is needed to ensure that the legislation does not exclude projects that are in the general public interest.

For example, we consider that the long-term public infrastructure exemption could encompass renewable energy infrastructure projects funded by way of third party and connected party debt. Such projects have an important role to play in Ireland meeting its renewable energy targets. As significant capital outlay is often required to fund the development and initial operational phases of renewable projects, these projects are often funded by considerable levels of debt. With the introduction of the ILR into Irish law, there is a risk that the availability of funding for these projects may be negatively impacted if the long-term public infrastructure exemption is not applicable.

In addition, an option for taxpayers to apply for and obtain advance clearance, within a reasonable period of time, that a project falls within the scope of the public infrastructure exemption would provide certainty to taxpayers.

Step 2: Calculate the relevant entity's relevant profit or loss

Question 7:
Comments are invited on this approach to the application of the ILR and to this possible definition of 'relevant profit or loss'.

Article 4(2) of ATAD provides that 'EBITDA' is calculated by adding back to income subject to corporation tax the tax-adjusted amounts for 'exceeding borrowing costs', depreciation and amortisation. Therefore, determining the income subject to corporation tax is fundamental to the operation of the nine-step approach.

As the Irish corporation tax system incorporates different rates of tax on income (i.e., the 12.5% trading rate, the 25% rate primarily for passive income and the 33% rate for chargeable gains) determining the income subject to corporation tax for the purposes of EBITDA is not straightforward.

The Feedback Statement defines 'relevant profit' as *"the amount of profits 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 ..."*. During the Consultation Discussion, it was indicated that 'relevant profit' is being defined in line with section 4(4)(c) TCA 1997.[5] Therefore, we understand that the references to *"an amount of profits on which corporation tax falls finally to be borne"* should be interpreted as the net amount of profits after making all the deductions which reduce those profits (i.e., charges, management expenses, group relief).

During the Consultation Discussion it was indicated that the methodology for calculating value-based reliefs for losses or trade charges when calculating the relevant profit or loss was still under consideration. At present, a number of questions also arise regarding the position of value-based reliefs for losses or trade charges when calculating the relevant profit or loss. Further questions may arise on consideration of the published legislation.

The Feedback Statement defines relevant profit and loss on a single entity basis. The mechanics of how an interest group will arrive at the group relevant profit or loss is not evident from the Feedback Statement and will need to be addressed in the legislation.

Interest on loans which fall within the provisions of section 247 TCA 1997 and are treated as charges on income, often do not reduce the profits of the relevant entity when calculating the relevant profit or loss of that entity. Instead, such interest can reduce the profits of another group member. For example, where a relevant entity has a section 247 interest expense of €200 million and interest income of €1 million, the net amount of €199 million does not reduce the profits of that relevant entity, (i.e., where the relief is surrendered to another member, it can reduce their profits where corporation tax falls finally to be borne, thus reducing its relevant profits for the purposes of the ILR).

If these results are aggregated for the purpose of applying the ILR to an interest group, this could result in a double deduction in an amount equal to the quantum of the loss in determining EBITDA. As such, we recommend that where group relief or interest as a charge is surrendered to another group member, only the company that uses the group relief to reduce its liability to tax, the claimant company, should be the entity that includes the amounts in its relevant profits / exceeding borrowing costs. This could be achieved by amending the definition of relevant profit / relevant loss to take account of the group relieved amount.

We note that during the Consultation Discussion it was confirmed that the Feedback Statement has been structured to focus on each period separately and that losses carried back will be dealt with as a separate item.

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[5] (c) an amount of profits on which corporation tax falls finally to be borne are references to the amount of those profits after making all deductions and giving all reliefs that for the purposes of corporation tax are made or given from or against those profits, including deductions and reliefs which under any provision are treated as reducing them for those purposes.

Steps 3 and 4: Calculate taxable and deductible interest equivalent

Questions 8:
Comments are invited on these possible definitions of 'interest equivalent', 'taxable interest equivalent' and 'deductible interest equivalent'.

We understand from the Consultation Discussion that it is intended that 'taxable interest equivalent' and 'deductible interest equivalent' would be value-based. However, this is not clear from the Feedback Statement and therefore consideration should be given to clarifying this in legislation.

In the Institute's response to the December 2020 ATAD ILR Feedback Statement, we highlighted that a detailed definition of borrowing costs is set out in ATAD, which includes costs 'economically equivalent to interest' and expenses incurred in connection with the raising of finance as defined in national law.[6]

It would be expected that in most cases symmetrical treatment would apply to expense payments and receipts so that an expense which is treated as 'deductible interest equivalent' in one company would be recognised as 'taxable interest equivalent' in the receiving company. In our view, the definition of 'interest equivalent' should consider the specific circumstances of the taxpayer as certain income/expenses may be 'economically equivalent to interest' for one taxpayer but this may not necessarily be the case for all taxpayers. This will, for example, be relevant when considering the position of leasing companies and the impact of IFRS 16 on the accounting treatment of leases. If leasing income is not treated as economically equivalent to interest, then leasing companies could be negatively impacted by the ILR.

Given the broad range of the type of income/expenses that could potentially be treated as economically equivalent to interest and the different circumstances of the taxpayer, we recommended it would be preferable to transpose the definition of 'borrowing costs' that is in the Directive to the greatest extent possible into Irish law. Using a legislative definition that is more aligned with the meaning of borrowing costs in the Directive could be further supported by Revenue guidance regarding the scope of the terms.

The definition of 'interest equivalent' in the Feedback Statement does not deal with fair value movements. We believe it is imperative that fair value movements are included in the definition of 'interest equivalent'. Consideration also needs to be given to the meaning of interest equivalent in the context of Case I traders providing credit as part of their core trading activity or in the case of treasury companies. Often it can be challenging to differentiate between the interest and principal components relating to the fair value movements on such loan books, fluctuating up and down.

In fact, it could prove an impossible tax calculation each year if such movements are not fully regarded as equivalent to interest because the required analysis of the legal character of the

[6] Article 2(1) ATAD

amounts in question to distinguish between what constitutes interest versus principal would not be readily available.

The definition of 'interest equivalent' also refers to *"amounts in connection with raising finance".* However, further clarity is required to understand the level of 'connection' envisaged by this definition.

'**Deductible interest equivalent**' is defined in the Feedback Statement as the amount of interest equivalent that is deductible in calculating the relevant profit or loss of a relevant entity. It was indicated during the Consultation Discussion that the intention is to include section 247 interest in the definition of 'deductible interest equivalent' but that it will be restricted to the amount of the deduction taken in the period. We look forward to this being clarified in the legislation before commenting further.

We note from the Consultation Discussion that the intention is for transfer pricing corresponding adjustments under section 835H TCA 1997 to be applied in priority to the ILR so that any transfer pricing adjustments will be included in the ILR calculation.

Step 5: Calculate EBITDA and exceeding borrowing costs or interest spare capacity

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?

The definition of relevant profit includes reference to *"the rate specified in section 21(1)(f)"* (i.e., 12.5%). As this reference is not included in the definition of EBITDA there is uncertainty as to how this can be value-based. However, we note from the Consultation Discussion that the intention is for the 'relevant profit or loss', exceeding borrowing costs' and 'spare interest capacity' to be calculated on a value basis.

On that basis, we would assume it is also intended that the components 'G' and 'H' in the definition of EBITDA would be calculated on a value basis. However, the methodology for applying the value basis is not apparent from the provisions, as currently drafted, and we look forward to this being clarified further in the legislation.

On the basis that spare interest capacity is to be calculated on a value basis, clarity would be welcomed on the methodology for allocating interest capacity against deemed borrowing costs deducted against different rates.

In respect of the calculation of EBITDA, 'G' refers to *"the allowances in respect of capital expenditure"* but it is not clear whether it is intended that this includes balancing allowances and charges. We will examine this further on publication of the legislation.

The Feedback Statement queries whether 'H' in the definition of EBITDA satisfactorily resolves concerns about circular calculations that may arise because both double taxation relief and EBITDA are calculated based on taxable profits. We have not received feedback of any remaining concerns in this regard.

Step 6: Apply the equity ratio rule

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 welcome the inclusion within the proposed definition of 'worldwide group', entities which prepare their consolidated financial statements under an alternative body of accounting standards.

It is possible that alternative accounting standards not currently specified in the definition of 'alternative body of accounting standards' may become commonly used in the future. Therefore, rather than providing an exhaustive list, consideration could be given to expanding the definition of 'alternative body of accounting standards' to also include any body of accounting standards that the Minister for Finance may designate. This would avoid the need to amend the legislation to update it for future alternative accounting standards that may become commonly used.

Question 11:
Comments are invited on the above approach to the transposition of the equity ratio rule.

Question 12:
Comments are invited on this possible approach to the "group of one".

We welcome the confirmation given during the Consultation Discussion that it is the intention of policymakers for the equity ratio rule to be optional.

It is likely that difficulties will be encountered in practice when seeking to determine the equity ratio of a relevant entity. Disregarding the results of transactions between members of the interest group will be extremely complicated and in effect will require a consolidation of the Irish group to establish the equity figure for the interest group.

We believe that additional clarity is required regarding the application of the formula in subsection (1). For example, under IFRS certain preference shares are regarded as equity. However, the financial statements show such shares as financial instruments rather than share capital. In addition, the formula refers to 'total assets'. However, the meaning of 'total assets' can differ for accounting purposes and tax purposes. It is unclear which interpretation applies for the purposes of the formula set out in the Feedback Statement.

During the Consultation Discussion it was confirmed that for the purposes of the equity ratio rule, the accounting policy used for the local consolidated group accounts to determine the equity ratio of the relevant entity should be the same accounting policy as that used in the ultimate consolidated financial statements. This requirement is likely to cause practical difficulties in cases where the Irish entity uses a different accounting policy. For example, the Irish entity may use IFRS while the ultimate parent company may use US GAAP. Furthermore, there may not be a local consolidated set of accounts for the interest group (either because one is not required under Irish company law or because there are entities in the interest group which are not in local consolidation or vice versa).

Subsection (3) applies to a single company worldwide group and provides that *"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, and by decreasing the amount of equity by that amount."*

The impact of this provision is that the equity ratio for a single company worldwide group, which will in many cases be owner operated companies, will be reduced where there is an amount of debt with 'related parties'. As no definition of the term 'related parties' is provided in the Feedback Statement, we await sight of the definition in legislation before commenting further.

Subsection (4) proposes to introduce an additional anti-avoidance measure into the equity rule, such that, where in a period of six months prior to the end of an accounting period there is an increase in the equity, that increase in equity shall not be taken into account in the calculation of the relevant entity's ratio of equity over total assets unless it is shown that the scheme or arrangement was effected for bona fide commercial reasons. This anti-avoidance provision is not in ATAD and appears to be going beyond what is required by the Directive. In our view, this additional provision is introducing unnecessary complexity for taxpayers to avail of the equity ratio rule option in Ireland.

Step 7: Calculate the allowable amount

Question 13:
Comments are invited on the above approach to the transposition of the group ratio rule.

Question 14:
Comments are invited on the proposed definitions of 'disallowable amount', 'de minimis amount', 'allowable amount', 'EBITDA limit' and 'limitation spare capacity'.

EBITDA limit is defined in the Feedback Statement as "*the higher of 30 per cent and the group ratio".* We understand from the Consultation Discussion that policymakers intend for the application of the group ratio rule to be optional for taxpayers. As drafted, the

application of the rule appears to be mandatory, therefore we look forward to this being clarified in the legislation.

Step 8: Recalculation of taxable profits

Question 15:
Comments are invited on this potential approach to the application of the interest limitation rule.

Subsection (2) states that "*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.*"

This provision would appear to envisage that the profits of the relevant entity would be recalculated by reducing the amount of deductible interest equivalent by the disallowable amount to arrive at the corporation tax chargeable. This would not be possible given that, except where it comprises a single company, a relevant entity does not have taxable profits and does not pay tax.

Furthermore, we understand that both the deductible interest equivalent and the disallowable amount should be calculated on a value basis. For example, where the relevant entity for the purposes of subsection (2) is the interest group, the underlying profits may include income chargeable to tax at 12.5% rate and at the 25% rate. Therefore, we consider the legislation needs to be drafted so as to apply to individual group members with due account then taken for the tax rate applicable, such that the exceeding borrowing costs for which a deduction is to be denied are adjusted on a value basis where the rate is other than 12.5%.

Question 16:
Comments are invited on the proposed interaction of the interest limitation rule with the balance of the corporation tax code.

We understand from this proposed provision that it is intended the ILR will apply after the application of the anti-hybrid rules contained in Part 35C TCA 1997.

Step 9: Carry forward amounts

Question 17:
Comments are invited on these possible methods of carrying forward of the disallowable amounts.

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

Carry forward of disallowable amount
Differing treatment will apply to the carry forward of deemed borrowing costs depending on how the disallowable amount, giving rise to the deemed borrowing cost, would have been treated in the relevant entity in the period in which it arose.

This is outlined in subsections (2) and (3):
"(2) (a) This subsection applies to a deemed borrowing cost which arose from a disallowable amount that would have, but for this Part, reduced the tax payable of the relevant entity in the first mentioned accounting period.

(b) Subject to subsection (4), where this subsection applies a relevant entity shall deduct its deemed borrowing cost from its taxable profits arising in a succeeding accounting period, and such deduction shall be after all other claims to relief have been made.

(3) (a) This subsection applies to deemed borrowing costs which arose from a disallowable amount that would have, but for this Part, resulted in the relevant entity incurring a loss, or incurring a greater loss, in the first mentioned accounting period.

(b) Subject to subsection (4), where this subsection applies a relevant entity's deemed borrowing cost shall be treated as a loss incurred in the first mentioned accounting period and relief for that loss shall be given in accordance with the provisions of section 396(1) or section 399 as the case may be, and sections 397, 400 and 401 shall apply to this amount as they apply to a loss."

Subsection (2)(a) applies where but for the operation of the ILR, a disallowable amount would have reduced the tax payable of the relevant entity. The application of subsection (2)(a) is unclear in cases where the denial of the deduction as a result of the operation of the ILR, is offset by a loss surrendered by a group company to the relevant entity or a loss is set back to a prior year to reduce the tax payable. In those circumstances, the operation of the ILR will not result in the tax payable by the relevant entity being reduced.

Subsection (3)(a) applies where but for the operation of the ILR, the relevant entity would have incurred a loss. However, a denial of a deduction arising from the operation of the ILR may be offset by group charges or losses forward with the result that the relevant entity does not incur a loss. In those circumstances, the application of subsection (3) is unclear.

At present, other than the joining and leaving provisions contained in paragraph 4.2, the only reference to the allocation of deemed borrowing cost is contained in subsection (1)(c)(i) of

the interest group reporting provisions.[7] In our view, additional clarification is needed on the proposed methodology for the allocation of deemed borrowing cost to the interest group members. For example, how is it intended relief under section 396(1) TCA 1997 would apply in an interest group context to a deemed borrowing cost treated as a loss incurred under subsection (3)(b)? Is it assumed that differing rules would apply to allocations to group members of deemed borrowing costs carried forward in accordance with subsection (2) and subsection (3) notwithstanding this has not been specified in the Feedback Statement?

Subsection (4) provides that relief under subsection (3) is to be given in priority to relief under subsection (2). The position regarding the deemed borrowing costs under subsection (2) which are displaced under subsection (4) to give priority to relief under subsection (3) is unclear. As the ILR should operate as a deferral it would be important that in such circumstances such displaced deemed borrowing costs continue to be available for carry forward.

An investment company for the purposes of section 83 TCA 1997 which carries forward section 247 interest as an expense of management would not appear to come within the terms of subsection (2) or (3). Policymakers could consider including an additional provision to address the position of interest carried forward by such companies as an expense of management.

We understand from the Consultation Discussion that it is intended that where a company leaves a group the deemed borrowing costs, as attributed to that company, would leave the group. Although this is not specified in the draft provisions outlined in the Feedback Statement, it would appear to be implied by the allocation of deemed borrowing costs for interest group members and addressed in the provisions regarding total spare capacity left behind in circumstances where a company ceases to be a member of an interest group (in paragraph 4.2 of the Feedback Statement).

It is evident that the carry forward provisions outlined in the Feedback Statement give rise to many questions regarding their intended operation in practice. It is also apparent that the practical operation of the provisions, including the tracking of amounts carried forward will be cumbersome. In our view, overlaying such complex rules on top of existing comprehensive provisions significantly increases the administrative burden for companies and puts Irish groups at a competitive disadvantage. It is imperative that there continues to be engagement with stakeholders to ensure that policymakers fully comprehend the impact of the proposed provisions for businesses and that the legislation, when published, operates as intended.

The Feedback Statement provides that total spare capacity (which comprises both interest spare capacity and limitation spare capacity) can only be carried forward for 60 months. In our view, the reference in Article 4(6)(c) of ATAD to 'unused interest capacity' is referring only to limitation spare capacity and is not referring to what is referred to in the Feedback Statement as 'interest spare capacity'. 'Interest spare capacity' arises where there is a negative figure for 'exceeding borrowing costs' (i.e., the taxable interest equivalent exceeds the deductible interest equivalent).

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[7] Department of Finance, ATAD Implementation – Article 4 Interest Limitation, Feedback Statement, July 2021, at paragraph 6.2

As the Directive provides that interest income is taken into consideration in determining exceeding borrowing costs, and as such forms part of the exceeding borrowing costs definition, the indefinite carry forward of exceeding borrowing costs should similarly apply to interest spare capacity.

In addition, as limitation spare capacity has a 60-month time constraint, priority of use should be given to the limitation spare capacity before the use of interest spare capacity.

Operation of local groups

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.

Application to an interest group
It is proposed that in applying the ILR to an interest group, the group must firstly disregard transactions between members of the interest group. Feedback from our members suggest that such an exercise in most cases would be extremely complex and administratively difficult and onerous.

Disregarding **all** transactions between interest group members would be an enormous compliance exercise. Indeed, even if the requirement were to apply to interest transactions only this would be complicated. There appears to be an assumption that a local consolidated set of accounts will exist for the interest group. This may not be the case, either because one is not required under Irish company law or because there are entities in the interest group which are not in local consolidation or vice versa. Large groups would not generally prepare consolidated accounts for the Irish corporation tax loss group. While ledgers for different business lines may be prepared, in many cases these would not be aligned with the separate legal entities within the group.

It is unclear whether in disregarding intra-group transactions that there is also a requirement to ‘redo’ the tax computation. If this is the case, in our view it would be unworkable. Indeed, no indication is given as to what the implications would be where intra-group transactions are eliminated. For example, what if the relevant activities of the counterparties concerned are taxed under different cases or different tax rates – would a new notional tax charge be introduced as a consequence of these adjustments? What if the adjustments would affect the ability to use losses, reliefs, or tax credits – would these new notional adjustments be taken into account?

We understand from the Consultation Discussion that policymakers are concerned that using an aggregation approach instead, could result in asymmetrical transactions (i.e., where

income in one company may be treated as a capital in another company), which in turn could result in an incorrect increase or decrease in the EBITDA of the interest group. We note that there are already situations where asymmetric treatment arises (for example, the taxation of trading and non-trading transactions) and, as necessary, countermeasures have been introduced to prevent misuse (e.g., section 817C TCA 1997). In our view, it would be preferable for any concerns regarding asymmetrical transactions to be addressed using targeted provisions to prevent abuse (if existing provisions do not already address such concerns) rather than imposing such an onerous compliance requirement on all entities.

Given that these provisions are fundamental to the operation of the ILR, it is critical that there continues to be engagement with stakeholders to fully understand the practical implications of the proposed approach and to ensure that the legislation is workable for businesses.

Should policymakers proceed with the proposed approach set out in paragraph 4.1 of the Feedback Statement, as a simplification measure, we believe there should be an option for an interest group to use an aggregation approach.

Subsection (3)(c) provides that where the accounting period of a group member is not aligned with the interest group, there should be an adjustment on a "just and reasonable basis". In our view, it would be preferable if the apportionment were to take place on a time basis, similar to the requirements under section 422 TCA 1997.

Subsection (3)(h) refers to 'Excess interest capacity'. This may be a drafting error as this terminology is not used elsewhere in the Feedback Statement.

Allocating disallowable amounts

Subsection (3)(d) of paragraph 4.1 provides for the allocation of disallowable amounts to interest group members. In our view, the use of the term "chargeable on" the group members in subsection (d) is inappropriate as the regime does not create a 'charge'. Instead, it gives rise to a denial of a deduction to be taxed in accordance with the provision outlined in paragraph 3.8.1. It is the application of the provision in paragraph 3.8.1 that gives rise to an additional tax liability.

It follows that it is not appropriate to allocate this to all members of an interest group as some may not have any interest deduction to which a denial could be applied. We suggest that it would be more appropriate for the default to be a pro rata allocation based on the quantum of excess borrowing costs of those members.

Companies joining and leaving groups

The provisions address a scenario where a company ceases to be a member of an interest group during an accounting period. It would be essential that the application of the group provisions in circumstances where entities join or leave a group is clearly set out in legislation, for example, where there is a new company within a group, or one group acquires another group.

Subsection (3)(f) of paragraph 4.1 only allows carry forward disallowable amounts to be used in future periods by the same group members. This limitation would greatly increase

the compliance burden on groups requiring them to track all carry forward amounts by reference to the group membership when amounts arose. Consequently, this may also result in groups being restricted from reorganising their business as it could result in the loss of use of carry forward amounts. For instance, where a new company is formed, and a trade / part of a trade is transferred to the new company or where a new company is acquired and joins the interest group. As the new company was not a member of the group at the time the disallowable amount arose, it cannot use any carry forward amounts of the group.

As an alternative, consideration could be given to introducing a targeted provision preventing the surrendering to/from new group members of disallowable amounts or spare capacity carried forward where there is a change in ownership and a material change in business of the newly acquired entity.

Interaction with other provisions

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

As outlined in our response to the first Feedback Statement, it is the Institute's view that layering the ILR onto existing interest deductibility and anti-avoidance provisions will significantly increase the level of complexity in the Irish corporate tax code. We therefore recommended several modifications to existing tax law to help to integrate the ILR into domestic legislation, without imposing significant additional complex rules on businesses, while maintaining the necessary protections for the corporate tax base. One of the modifications we proposed was removing the interest expense from the scope of the 80% cap in section 291A TCA 1997, as the interest will be subject to the 30% of EBITDA restriction under the ATAD ILR going forward.

The approach proposed by policymakers in the Feedback Statement is to retain the interest restriction in section 291A TCA 1997 and to introduce a new provision to address the circularity which will occur because of the interaction of the ILR with section 291A. If such a provision is introduced, we believe it would be important that the provision should apply automatically rather than requiring a claim to be made. However, taxpayers could be given the flexibility to opt to elect out of the application of the provision.

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.

Large companies pay preliminary corporation tax in two instalments with the first instalment of preliminary corporation tax (PT1) due on the 23rd of the sixth month of the current accounting period. For example, large companies with a 31 December 2022 year-end will pay PT1 by 23 June 2022.

PT1 can be either 50% of the corporation tax liability of the previous accounting period, or 45% of the corporation tax liability for the current accounting period. Therefore, for the first year the ILR is in operation (i.e., 2022), under the current rules, companies may choose to base PT1 on 50% of the corporation tax liability for 2021.

The second instalment of preliminary corporation tax (PT2) is due on the 23rd of the eleventh month of the current accounting period. For example, large companies with a 31 December 2022 year-end will pay PT2 by 23 November 2022.

PT2 must bring the total amount of preliminary corporation tax on account (i.e., PT1 plus PT2) to 90% of the final corporation tax liability for the current accounting period. However, for accounting periods in 2022 the data for the purposes of the application of the ILR will not be available for these companies to correctly calculate 90% of the corporation tax liability for the current accounting period. For example, the group EBITDA will be unknown at that stage. In addition, for accounting periods ending earlier than December 2022, it is unlikely that software providers will have the necessary updates made to their corporation tax software packages to facilitate the calculation of ILR.

We believe consideration should be given to introducing changes to the preliminary corporation tax rules for large companies, such as, allowing PT2 to bring the total amount of preliminary corporation tax on account to 90%/100% of the prior year corporation tax liability. These changes could be reviewed once the ILR has been in operation for a period.

It would be inappropriate, in our view, to penalise companies with the imposition of statutory interest to underpayments of preliminary tax in cases where it is not possible for an entity to accurately estimate the impact of the ILR on its preliminary tax obligations, due to the unavailability of necessary group financial information.

Reporting

Question 22: Single entity
Comments are invited on these possible reporting requirements with regard to the ILR.

Question 23: Interest group
Comments are invited on these possible reporting requirements with regard to the ILR.

In our view it would be preferable to build the reporting requirements for the ILR into the existing Form CT1 (corporation tax return), rather than creating a separate return for ILR purposes. This would be administratively more straightforward and reduce the risk of a taxpayer inadvertently missing a filing deadline. Consideration could be given to modifying the existing group relief schedules on the Form CT1 for the purposes of the ILR.

An overly restrictive time limit should not apply to the reporting requirements for the ILR. We believe that it would be appropriate for companies to be provided with the flexibility to amend, within a reasonable timeframe, their corporation tax returns to take account of any additional information or changes to the worldwide group ratios etc.