Banking & Payments Federation Ireland

BPFI Response to the Department of Finance Consultation on ATAD Implementation Article 4 Interest Limitation

4th March 2021

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Introduction

Banking & Payments Federation Ireland (BPFI) is the voice of banking, payments and fintech in Ireland. Representing some 100 domestic and international member institutions and associates, we mobilise the sector's collective resources and insights to deliver value and benefit to members, enabling them to build competitive sustainable businesses which support customers, the economy and society. Delivering a range of services through our specialist team, BPFI also offers an Associate network through which we offer many of the benefits of membership to the leading professional service firms that provide related advisory and consultancy services.

BPFI welcomes the opportunity to make this submission in response to the specific questions set out in the Department of Finance Feedback Statement of December 2020 on the implementation of the Anti-Tax Avoidance Directive (ATAD) in relation to Article 4 Interest Limitation Rules (ILR).

Question 17 - Comments are invited on the exemption generally and this possible definition of 'financial undertaking'.

ATAD Article 4(7) provides that Member States may exempt certain 'financial undertakings' (within the meaning of ATAD Article 2(1)) from the ILR.

The position articulated by BPFI on behalf of member banks in January 2019 was that this exemption for 'financial undertakings' should not be incorporated into Irish law, and this position continues to be the strong preference of member banks.

Banking groups often have structures which can include legal entities that are not regulated hence removal of the regulated financial entity from the group will distort the EBIDTA of the group and may result in unnecessary and unintended restrictions being applied. Non-regulated entities could include ancillary service companies, holding companies, third country entities, etc.

Also, if the decision is taken to include an exemption for 'financial undertakings', it should be structured in such a way as to ensure that, while the 'financial undertaking' may not be subject to the limitation on deductibility, any interest capacity of the 'financial undertaking' should be included in the assessment of the overall group position (i.e.other group entities can benefit from the net interest income of the 'financial undertaking'). Also, the proposed definition of 'financial undertakings' would need to be broadened to include all non-regulated group entities.

If the definition of a 'financial undertaking' cannot be expanded it is important that an opt-in clause is provided as failure to do so will result in Banking groups being adversely effected by the automatic exclusion of 'financial undertakings'.

In relation to s110 entities – consideration should be given to exempting s110 entities as such entities often depend on interest deduction to achieve tax neutrality and the s110 regime is a bona fide regime specifically provided for in legislation.

Question 4 - Comments are invited on this possible definition of 'interest equivalent'.

Article 2(1) provides a wide definition of "interest equivalent" and it is not clear why this is not included in the proposed definition as it would give more certainty.

On the questions regarding 'interest equivalent', the importance of achieving symmetry between what is treated as interest from an income perspective and what is treated as interest from an expense perspective has been highlighted by members.

Also, the rules need to be clear that amounts treated as interest from an accounting perspective should also be treated as interest for the purpose of ILR. To the extent that the financial statements of a company prepared under International Financial Reporting Standards (IFRS) report income as for example "interest receivable & similar income", members would expect the income to be fully taken into account without adjustment, in calculating whether net interest income, or net interest expense arises. As an example, where the income earned under a sale and repurchase agreement is treated as interest for accounting purposes, that classification needs to be respected for the ILR.

We would also request confirmation that fair value adjustments are not included as they are not economically equivalent to interest.

Question 8 - Comments are invited on the above possible approach to the operation of the ILR.

In our view the manner in which the restriction is to be applied by deeming a Case IV income to apply would appear to be unnecessarily complicated and would not necessarily be how an interest restriction might be expected to apply. It is possible that the application of Case IV could result in a tax liability where an actual restriction of interest would not give rise to such a tax liability (for example, in the case of a company with carried forward trading losses). An alternative approach to consider might be to adjust the interest deduction in the tax computation to disallow a tax deduction for interest in line with the restriction.

Question - 9 & Question 10 Carry Forward/Back Options

The Feedback Statement proposes to elect for option (c) in relation to carry forward/back of unused interest, i.e. carry forward indefinitely net interest which cannot be deducted in the current period as well as the carry forward, for a maximum period of five years, of unused interest capacity.

This would appear to be more restrictive than option (b) which reads as follows: '(b) carry forward indefinitely and to carry back, for a maximum of three years, net interest that cannot be deducted in the current period'.

There is a preference that the most flexibility is provided in relation to the use of the unused relief for taxpayers and that option (b) should be implemented.

Also, in relation to carry forward/back, it is important that certainty should be given on the interaction with group relief.

Excluding 'Standalone Entities'

Article 4(3)(b) of ATAD permits Member States to exempt 'standalone entities' from the ILR. For the purpose of assessing whether an entity has any associated entities, it should be clear that the 25% test relates to equity interests, and that such interests held in a trust capacity (for example, in the case of a bankruptcy remote S.110 company) should not be regarded as creating an associated enterprise relationship with any other entity, the shares of which are similarly held by the same trustee.

Question 23 - Comments are invited on the possible definitions of notional local group (including how consortia and joint ventures should be treated).
In our opinion, the definition of a 'local group' should be broader than what is currently provided for in relation to loss relief for groups in the Taxes Consolidation Act. Taxpayers should have the option to also include in the 'local group' an entity, which is within the charge to Irish Tax and forms part of the consolidated Group for accounting purposes.

It should also be confirmed where 'local groups' are based on consolidated accounts, intra-group transactions will be ignored for the purposes of the calculation of ILR.

Contacting Us:

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