# Guidance on the anti-hybrid rules

## Part 35C-00-01

This document should be read in conjunction with Part 35C of the Taxes Consolidation Act 1997

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The information in this document is provided as a guide only and is not professional advice, including legal advice. It should not be assumed that the guidance is comprehensive or that it provides a definitive answer in every case.

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# Executive Summary

This manual provides an overview of the anti-hybrid rules and the reverse hybrid rule that were introduced into Part 35C TCA 1997.

In relation to the anti-hybrid rules it sets out information in relation to:

1. What is meant by a mismatch outcome, being a double deduction mismatch outcome or a deduction without inclusion mismatch outcome, and the specific situations that give rise to a hybrid mismatch outcome.
2. The meaning of some of the key terms used for the purposes of the anti-hybrid rules.
3. The test for inclusion. What is meant by the term “corresponding amount” and how to test whether a corresponding amount has been included for the purposes of the anti-hybrid rules in various scenarios.
4. How the anti-hybrid rules interact with Ireland’s worldwide system of taxation and how the rules interact with an effective worldwide system of taxation such as the US check-the-box system of taxation.
5. What provisions are regarded as having similar effect to the anti-hybrid rules, and a non-exhaustive list is provided.
6. The definition of “associated enterprises” including how and when to test whether two enterprises are associated.
7. The meaning of “payee” including how to identify payees, how to test for inclusion where there is more than one payee and how to establish the payee territory.
8. Imported mismatch outcomes. What is the policy intent behind the rule and how to trace payments and identify payees.
9. The state of knowledge of the taxpayer. What is meant by “reasonable to consider” and “reasonably be expected to be aware”.
10. How the anti-hybrid rules might interact in a tax consolidation scenario.

In relation to the reverse hybrid rule matters considered include:

1. An introduction to reverse hybrid mismatches including the meaning of a “reverse hybrid entity” and the scope of the rule in an Irish context.
2. The meaning of a “collective investment scheme” that is explicitly exempt from the application of the rule by ATAD.
3. A broad overview of the operation of the rule, including the registration for and collection of appropriate tax.

# 1 Introduction to hybrid mismatches

**Part 35C Hybrid mismatches** implements the Anti-Tax-Avoidance Directives, specifically Council Directive (EU) 2017/952 of 29 May 2017 (ATAD2) amending Directive (EU) 2016/1164 (ATAD) by introducing anti-hybrid rules.

The purpose of anti-hybrid rules is to prevent arrangements that exploit the differences in the tax treatment of an instrument or entity arising from the way in which that instrument or entity is characterised under the tax laws of two or more territories to generate a tax advantage or a mismatch outcome. Essentially a hybrid-mismatch outcome arises due to differences in the tax characterisation, or to the hybrid nature of, the instrument or entity. ATAD2 specifically provides that:

(i) a mismatch outcome shall not arise where the payee is exempt from tax in the territory in which it is established[1], and
(ii) that the anti-hybrid rules should not affect the general features of the tax system of a Member State[2].

The OECD BEPS Action 2 report clearly sets out in para. 13 that "**while cross-border mismatches arise in other contexts…the only types of mismatches targeted by this report are those that rely on a hybrid element to produce such outcomes.**" As such, the purpose of the anti-hybrid rules is to address mismatches that arise due to the character and tax treatment of a payment and not because of the status of the payee or special tax regimes.

The anti-hybrid rules apply to all corporate taxpayers; there is no **de minimis** threshold below which the rules do not relate, and the rules apply to all payments made after 1 January 2020[3].

The rules are complex, specifically as they apply to cross border transactions and require consideration of the tax treatment of transactions / entities in other territories. The rules, therefore, include many new concepts and definitions that must be applied in a cross-border context.

Given the complexities of the rules in their application to various cross-border corporate transactions and structures, ATAD2 specifically states[4] that **"Member States should use the applicable explanations and examples in the OECD BEPS report on Action 2 as a source of illustration or interpretation to the extent that they are consistent with the provisions of the Directive and with Union Law".** It is therefore recommended that corporate taxpayers within the scope of the anti-hybrid rules refer to the explanations and examples contained in that report when considering the application of the rules in Part 35C to relevant transactions.

This manual is designed to provide the user with guidance as to the various concepts that arise in the anti-hybrid rules. This manual does not provide guidance on the Action 2 report, nor does it repeat any of the guidance given in that report: it focuses solely on the aspects of the Irish legislation not covered by that report. Given the complexity of the rules, the manual is being published chapter by chapter as each chapter is completed. The schedule of updates is tracked in Appendix I.

# 2 Mismatch outcomes

The anti-hybrid rules seek to address mismatch outcomes that arise in specific situations due to the hybrid nature of an entity or a financial instrument. The OECD BEPS Report on Action 2 (Neutralising the effects of hybrid mismatch arrangements) states[5] "**while cross-border mismatches arise in other contexts the only types of mismatches targeted by this report are those that rely on a hybrid element to produce such outcomes**". Essentially the rules seek to address international tax planning based around hybridity that gives rise to non-taxation via base erosion. ATAD[6] defines a mismatch outcome to mean a double deduction or a deduction without inclusion, and this is mirrored in the definition of mismatch outcome contained in section 835Z(1).

## 2.1 Double deduction mismatch outcome (D/D)

A double deduction mismatch outcome arises to the extent a payment or part of a payment is tax deductible in two territories against non-dual inclusion income. Put another way, in general terms a double deduction arises where a payment gives rise to a tax deduction in two countries but the income against which it is deducted is not included[7] in those two countries.

## 2.2 Deduction without inclusion mismatch outcome (D/NI)

A deduction without inclusion mismatch outcome arises to the extent a payment, or part of a payment, is tax deductible in one territory without a corresponding amount being included in another territory. In simple terms, due to its hybrid nature, the payer makes a tax-deductible payment, but the payee does not see itself as receiving a corresponding amount.

## 2.3 Specific situations that give rise to a mismatch outcome

As mentioned, the anti-hybrid rules only apply in specific situations. These situations are set out in Part 35C:

Five types of hybridity are classified as giving rise to a 'mismatch outcome', being:

(a) a double deduction (Chapter 2 of Part 35C);
(b) a permanent establishment deduction without inclusion (Chapter 3 of Part 35C);
(c) a financial instrument deduction without inclusion (Chapter 4 of Part 35C);
(d) a payment to a hybrid entity deduction without inclusion (Chapter 5 of Part 35C); and

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[1] ATAD2 Recital 18, 19 & 20
[2] ATAD2 Recital 9 & 24
[3] This does not include a situation where a payment is made on or after 1 January 2020 in respect of an amount accrued and tax deductible in prior years.
[4] In recital 28 ATAD2
[5] In paragraph 13
[6] Article 2(9) 3rd(a)
[7] "Included" has a specific meaning under the anti-hybrid rules and is set out in further detail in section 4 of this manual

(e) a payment by a hybrid entity deduction without inclusion (Chapter 5 of Part 35C).

Each of the above situations is dealt with separately in Part 35C (as outlined) with a specific scope of application section and specific rules to neutralise the mismatch outcome arising. For the rules to apply, the payments must be between entities that are associated enterprises (the term "associated enterprises" is specifically defined for the purposes of Part 35C[8]).

Part 35C also covers the following as part of the anti-hybrid rules:

i. **Withholding tax** (Chapter 6 of Part 35C) where a hybrid transfer of a financial instrument is designed to produce relief for tax withheld at source to more than one of the parties involved,
ii. **Tax residency mismatch** (Chapter 7 of Part 35C) where a double deduction mismatch outcome arises as the taxpayer is dual resident,
iii. **Imported mismatch outcomes** (Chapter 8 of Part 35C) where a payment to a non-EU established payee directly or indirectly funds a mismatch outcome, and
iv. **Structured arrangements** (Chapter 9 of Part 35C) where the anti-hybrid rules are applied to any structured arrangement i.e. an arrangement designed to produce a mismatch outcome.

It is important to note that chapter 6, chapter 7 and chapter 9 apply the anti-hybrid rules to a payment irrespective of whether it is between entities that are associated enterprises.

In summary, for payments made on or after 1 January 2020 an Irish entity must consider whether a hybrid mismatch arises in the course of its cross-border transactions. When determining whether a hybrid mismatch does arise it is necessary to compare the tax treatment of a payment in a number of territories. Essentially where an Irish entity obtains a tax deduction in respect of a cross-border payment it must determine whether i) that payment has also given rise to a tax deduction in another territory against income that is not dual inclusion income or ii) whether a corresponding amount has been included in a payee territory.

To this end, the concept of "included" is important in analysing the anti-hybrid rules and is discussed further in section 4.

[8] Refer to section 7 for further detail regarding "associated enterprises".

# 3 Interpretation (section 835Z)

Many of the key terms for the purposes of the anti-hybrid rules are set out in section 835Z(1).

## 3.1 "Enterprise"

The term "enterprise" is used throughout Part 35C.

It means an entity or an individual.

## 3.2 "Entity"

ATAD sets out that the anti-hybrid rules should apply to all taxpayers that are subject to corporate tax in a Member State (including permanent establishments of entities tax resident in third countries) and that the reverse hybrid rule (set out in Section 12) should apply to all entities that are tax transparent in a Member State[9]. Therefore, to ensure the correct application of the Irish rules, the term "entity" is broadly defined to ensure that all business forms that should be within scope of the rules are appropriately included.

### 3.2.1 Legal personality

"Entity" includes –

**(a)** a person[10] (other than an individual),

**(b)** an undertaking[11] (other than an individual), or

**(c)** an agreement, trust[12] or other arrangement

that has legal personality under the laws of the territory in which it is established.

For example, an Irish company registered under the Companies Act 2014 has separate legal personality distinct from the members of which it is composed. In the context of company law, the principle of separate legal personality was first set down by the House of Lords in the case of Salomon v Salomon & Company Ltd[13]. In his judgement in that case, Lord MacNaghten stated –

> '*The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent for the subscribers or trustees for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act*.'

[9] ATAD2 Recital 8 & Art. 1(1)

[10] Defined in section 18(c) Interpretation Act 2005

[11] The term undertaking is used elsewhere in the Taxes Consolidation Act e.g. in the context of investment undertakings in sections 734, 738 and 739.

[12] There is no definition for the term "trust" in the Taxes Consolidation Act, but trusts are referred to in various sections including; section 81A, section 189A, section 190, Part 19 Chapter 3, Part 27 and section 917.

[13] *Salomon v Salomon & Company Ltd* [1897] AC 22

A discussion on what does, or does not, constitute legal personality is outside the scope of this manual. Different territories can have varying views on the matter which in turn can have implications when classifying entities for tax purposes. For example, some countries employ the term “legal personality” to differentiate an entity treated as a separate corporate taxpayer from a tax transparent partnership. In these countries it is sometimes said that a corporation has legal personality, whereas a partnership does not. However, this is not always the case.

An entity with legal personality in the territory in which it is established can include both separate corporate taxpayers and tax transparent entities.

For example, Irish and UK companies are both regarded as having legal personality and are both treated as separate taxpayers in Ireland and the UK respectively.

Conversely, a UK Limited Liability Partnership and a Scottish Limited Partnership are both regarded as having legal personality in the UK and Scotland respectively but are both treated as tax transparent entities in those territories.

To add further to the complexity a limited liability company established in the State of Delaware, US, can have legal personality and can elect to be treated as either a separate taxable person or a tax transparent partnership for US tax purposes.

### 3.2.2 Having regard to other matters

As outlined previously, different territories can have different views on the meaning of legal personality. Also, certain business forms are not structured to have sperate legal personality and therefore it is necessary to broaden the definition of “entity” beyond this criterion to include:

> **(d)** an association of persons that does not have sperate legal personality but does have the capacity to perform legal acts under the laws of the territory in which it is established.

An Irish partnership is not regarded as having separate legal personality. Instead it is regarded as an aggregate of the partners who make up the firm. However, although it does not have legal personality, as a matter of law, it is common for the firm to be treated as distinct from the individual partners comprising the firm in commercial life. This follows from the fact that firms do things which are commonly associated with separate legal entities such as adopting names which are unconnected with the partners, having bank accounts and contracts in that name and having partners come and go without any outward change to that firm.[14] In this context they are regarded as having the capacity to perform legal acts.

Foreign partnerships that are established under laws that are similar to Irish partnership law, in this context, would also fall within this category.

[14] *Twomey on Partnership* Michael Twomey and Maedhbh Clancy 2nd Ed.2019

Entities that do not have legal personality are often treated as tax transparent. For example, Irish partnerships are treated as tax transparent in Ireland. Similarly, both English general partnerships and English limited partnerships (both without legal personality) are treated as tax transparent in the UK.

However, each of these partnership structures could be regarded as a separate corporate taxpayer by the US where they are checked closed under the US check-the-box rules, which is relevant for example in the application of the rules in relation to a hybrid entity (refer to section 3.3)

#### 3.2.2.1 Application of certain provisions where the entity does not have separate legal personality

Firstly, entities, such as Irish partnerships, that do not have separate legal personality typically cannot own assets. Irish partnership property is, for example, held by the partners as tenants in common. Under Irish partnership law, partners are not legally entitled individually to exercise proprietary rights over any of the partnership assets but rather they are collectively entitled to each and every asset of the partnership, in which each of them has an undivided share.[15] This legal position has implications when applying the "associated enterprises" test to an Irish partnership (or similar foreign entity).

The reader is referred to section 7 for a full discussion on "associated enterprises".

Secondly, while a partnership without legal personality may be an "entity", for the purposes of setting the scope for testing a transaction, it will not always play a part in the analysis of whether or not there is a mismatch outcome. For example, in examining (in the context of an Irish partnership or similar foreign entity) whether or not an amount is deducted or included, regard should be had to that income in the hands of the partners rather than in the hands of the partnership.

For example, where an Irish company makes a payment to an associated foreign partnership in respect of a financial instrument, the Irish company is an "entity" (under paragraph (a)) and the foreign partnership is an "entity" (under paragraph (d)) for the purposes of the anti-hybrid rules. There is, therefore, a transaction between entities that are "associated enterprises". Where the foreign partnership is a tax transparent entity it is possible to look to other payees, in this case the partners, to determine whether an amount in respect of the payment has been included. Where an amount has not been included because of the way in which the financial instrument, or the payment under the financial instrument, is characterised in the partner territory there is a mismatch outcome[16]. In this scenario, there is therefore a transaction that gives rise to a mismatch outcome between entities that are associated enterprises[17] and the anti-hybrid rules should apply.

[15] Hoffmann LJ in *Inland Revenue Commissioners v Gray* [1994] STC 360

[16] The mismatch outcome arises because of differences between domestic tax and foreign tax (broadly defined in section 835Z(1)) refer to section 835AJ.

**(e)** Any other legal arrangement of whatever nature or form, that owns or manages assets, that is subject to any of the taxes covered by this Part.

The purpose of paragraph (e) is to capture any other business form, that is not covered by paragraphs (a) to (d) but should be included within the scope of the anti-hybrid rules.

## 3.3 "Hybrid entity"

A hybrid entity is defined in the context of "entity" and "enterprise".

A hybrid entity means –

(a) a person (other than an individual),
(b) an undertaking (other than an individual), or
(c) an agreement, trust or other arrangement,

whose profits or gains are treated, under the tax laws of one territory, as arising or accruing to the entity itself, but under the tax laws of another territory, as arising or accruing to another enterprise; referred to as the "participator". Essentially, the hybrid entity is treated as a chargeable person under the tax laws of one territory i.e. as tax opaque but as tax transparent under the tax laws of another territory. Once there is a conflict in the tax characterisation of an entity between any two territories then that entity is a hybrid entity.

For example, a US Limited Liability Company (LLC) might be regarded a hybrid entity in a number of scenarios.

Firstly, where the US LLC is checked open under the US check-the-box rules it is regarded as tax transparent in the US. Where that entity has non-US members that treat the entity as tax opaque the entity will fall within the definition of a hybrid entity. In this scenario, there is a conflict in the tax characterisation of the LLC between the territory of the entity, the US, and the territory of the participator, being the non-US members.

Secondly, taking similar facts, where the US LLC is checked open but this time it has no non-US members. Therefore, the members/participators now treat the LLC as tax transparent such that there is no conflict between them and the entity territory regarding the tax characterisation of LLC. However, in Ireland, the US LLC might, depending on the facts and circumstances, be regarded as tax opaque. Where an Irish payer is making a payment to such an LLC, it will see the LLC as tax opaque while the US will see the entity as tax transparent. In this context, the LLC is also a hybrid entity.[18]

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[17] Refer to section 835AI in this context.

[18] This example is for illustrative purposes only. Whether a US LLC is considered tax opaque, or not, for Irish tax purposes will depend on an examination of the founding documents of the entity based on established principles in case law.

## 3.4 "Participator"

The term "participator" is defined for the purposes of the anti-hybrid rules in the context of a "hybrid entity" (refer above). The term describes the person(s) to whom the profits or gains of a transparent entity are treated as arising or accruing. It is relevant when testing for hybrid mismatches arising in respect of payments involving hybrid entities (specifically section 835AL payment to a hybrid entity deduction without inclusion mismatch outcome and section 835AM payment by hybrid entity deduction without inclusion mismatch outcome). It is also relevant for mismatches arising where an entity is a reverse hybrid entity. Reverse hybrid mismatches are set out in more detail in Section 12.

## 3.5 "Payment"

The definition of "payment" is important in the application of the anti-hybrid rules.

Generally, the rules are drafted in the context of a mismatch arising in respect of a "payment". ATAD refers to hybrid mismatches resulting from or arising as a consequence of differences in allocation of, payments or deemed payments[19].

"Payment" means (a) a transfer of money or money's worth or (b) a deemed payment.

"Deemed payment" refers to the allocation of payments, profits or gains between a head office and its permanent establishment or between two or more permanent establishments of an entity.

## 3.6 Territory in which an entity is established (s835Z(4))

The territory in which an entity is established means;

- (i) the territory where the entity is effectively managed, or
- (ii) otherwise the territory in which the entity is registered, incorporated or created, and

in the case of a permanent establishment, the territory in which the permanent establishment carries on a business.

For example, where a company is incorporated in Ireland but effectively managed in the UK (and therefore tax resident in the UK) then, for the purposes of the anti-hybrid rules, the territory in which that entity is established is the UK. As such, it is the tax laws of the UK, and not Ireland, that are relevant in determining the tax treatment of that entity or any payment made to that entity when considering whether a hybrid mismatch arises. Conversely, a company incorporated in the UK but effectively managed in Ireland must have regard to the Irish anti-hybrid rules.

[19] ATAD2 Recital 15.

# 4 Included

As already outlined, in determining whether a double deduction or deduction without inclusion mismatch outcome arises in the context of a cross border transaction the concept of included must be fully understood.

## 4.1 Corresponding amount

When testing for inclusion, the legislation sets out that a mismatch shall arise where it would be reasonable to consider that a “corresponding amount” has not been included in the payee territory. The term “corresponding amount” is important as it is not the “same amount” or an “equal amount”. That is, if there is a deduction of €100 in the payer territory the test is not that an amount of €100 is included in the payee territory for a mismatch not to arise. Rather, the test is whether a “corresponding amount” has been included in the payee territory which allows account to be taken of variations that might arise due to differences in the value ascribed to payments between territories. These differences might arise through the application of transfer pricing or foreign exchange movements or might be due to temporary timing differences[20] between territories in terms of income and expenditure recognition. These differences should not fall within the scope of a hybrid mismatch[21].

The principles behind the concept of “corresponding amount” also apply when testing for dual inclusion income and when applying the anti-hybrid rules in the context of a worldwide system of taxation per section 835AB[22].

### 4.1.1 Foreign exchange movements

As already outlined, differences in tax outcomes that are solely attributable to differences ascribed to the value of a payment should not fall within the scope of the anti-hybrid rules.

BEPS Action 2 report specifically sets out that differences in the valuation of money resulting from foreign currency fluctuations should not give rise to a mismatch outcome.

The report includes a specific example[23]:

- Company A (in country A) provides an ordinary loan to associated Company B (in Country B).
- The loan is treated as a debt instrument under the laws of both Country A and B and the countries take a consistent position on the characterisation of the payments made under the loan.

[20] In the context of a financial instrument deduction without inclusion mismatch it should be noted that there are additional requirements for inclusion and S835AH(2) sets out the conditions in this regard.

[21] Recital 22 ATAD2.

[22] Refer to Section 5 for relevant examples.

[23] BEPS Action 2 Example 1.17

- The interest payable on the loan is deductible in Country B and included in ordinary income under the laws of Country A.

Foreign currency implications:

- The interest and principal under the loan are payable in Currency A.
- The value of Currency B falls in relation to Currency A while the loan is still outstanding so that payments of interest and principal under the loan become more expensive in Currency B terms.
- Under the Country B law, Company B is entitled to a deduction for this increased cost.
- There is no similar adjustment required under Country A law.

Interaction with anti-hybrid rules:

- The difference in the amount deducted and the amount included in this case does not arise because the tax systems of the two countries characterise the payments in different ways or arrive at a different value for the payments made under the loan.
- Rather, once the character and amount have been determined, the laws of one jurisdiction require the value of the payment to be translated into local currency.
- This type of currency translation difference, which is a difference in the way jurisdictions measure the value of money (rather than the underlying character or amount of a payment), should not be treated as giving rise to a mismatch.

Essentially, the mismatch is attributable to the way the countries measure the value of money rather than the value of the payment itself.

## 4.2 Test for inclusion

Firstly, it is noteworthy to state here that where there is more than one payee[24] to a transaction the test for inclusion need only be met once for a mismatch not to arise.

'Included' in respect of a payment has a specific meaning for the purposes of the anti-hybrid rules. The term is specifically defined in section 835Z(1) and essentially refers to an amount of profits or gains arising from the payment that is:

a) taken into account in the taxable income under the laws of the payee territory (the language "taken into account in the taxable income..." is per ATAD2 Art. 2(9) 2nd(e)), or
b) that is subject to a controlled foreign company charge or a foreign company charge (as defined in Part 35B of the Acts). (BEPS Action 2 para. 36 allows for the inclusion of a CFC regime).

[24] The concept of payee is set out in section 8.

When determining what is meant by (a) above, taken into account in the taxable income under the laws of the payee territory, a number of different scenarios are set out in section 835Z(1) depending on the tax status of the payee or the tax laws of the territory in which the payee is established.

#### 4.2.1 Section 835Z(1)(a)

##### 4.2.1.1 Chargeable to tax

**Paragraph (a)(i)** is relatively self-explanatory in that an amount of profits or gains is regarded as included where the payee is chargeable to tax (domestic or foreign) on that amount. The paragraph continues by clarifying that an amount will not be regarded as included where that amount is only chargeable to tax when it is remitted into the payee territory. Where the amount is considered to be remitted under a regime, e.g. under provisions similar in effect to section 72 TCA 1997 or is paid directly into the account of a payee in such a territory, and is chargeable to tax accordingly, it should be treated as included[25]. Once an amount is actually treated as remitted and chargeable to tax it will be regarded as included for the purposes of the rules, but any claim for a repayment of tax arising out of an amount becoming deductible must be made within the normal time limits[26].

##### 4.2.1.2 Exempt profits or gains

**Paragraph (a)(ii)** refers to circumstance where the payee is exempt from tax, specifically where the payee is a pension fund, government body or other entity that is exempt from tax which generally applies to profits or gains. In such circumstance the profits or gains that are exempt from tax which generally applies to such profits or gains will be regarded as included for the purpose of the anti-hybrid rules such that no mismatch outcome will arise.

- Example of exemption:

  A Revenue approved charity will, where relevant conditions are met, typically have an exemption from income tax under sections 207 and 208 TCA 1997, corporation tax under sections 76 and 78 TCA 1997 and Capital Gains Tax under section 609 TCA 1997. The exemption from tax is subject to conditions but mainly the exemption applies in so far as the income and profits are applied to charitable purposes only. Where a foreign territory has a similar style of exemption in place, any profits or gains that qualify as exempt should be regarded as included for the purposes of the anti-hybrid rules. To the extent that the charity is in receipt of funds that are not applied to charitable purposes (e.g. if it carries on a trade) and are therefore taxable, these amounts are likely to be regarded as included under paragraph (a)(i).

In summary, where a payment gives rise to an amount that is not included as taxable income in the hands of the payee due to the payees exempt status that amount shall not give rise to a mismatch outcome under the anti-hybrid rules.

[25] Refer to Tax and Duty Manual Part 08-03-06 for a further discussion on the remittance basis relating to interest payments where the interest is paid to an account located in a relevant territory.
[26] Refer to section 959V TCA 1997.

#### 4.2.1.3 A territory, or part of a territory, that does not impose a foreign tax

**Paragraph (a)(iii)** deals with circumstances where the payee is established in a territory, or part of a territory, that does not impose a foreign tax. Where the general feature of a payee territory is not to impose a foreign tax, this should not give rise to a mismatch outcome. This also applies to situations where part of a territory does not impose a foreign tax such as "free zones" that have emerged in some territories to boost economic development.

"Foreign tax" is defined as a tax chargeable on profits and gains under the laws of another territory which is similar to domestic tax (domestic tax being defined as meaning income tax, corporation tax (including a controlled foreign company charge) or capital gains tax). Circumstances may arise where a territory imposes some foreign tax such that it does not fall within the definition of paragraph (a)(iii).

For example, where a territory imposes a tax on income but not on capital gains. In these circumstances, payments to the territory potentially fall to be regarded as included under paragraph (a)(i) where they are income in nature and regarded as included under paragraph (a)(iii) if they are capital in nature. As previously outlined, the anti-hybrid rules only seek to counteract mismatches arising from hybridity and should not impact the general features of a tax system.

- Example:

  The corporation tax regime in Barbados imposes a tax on income but there are no specific rules on the taxation of capital gains. As such, payments to Barbados may fall within paragraph (a)(i) or paragraph (a)(iii).

  Irish company (I-Co) acquires a capital asset off a Bajan company (B-Co). I-Co claims a tax deduction in Ireland. Barbados does not have a capital gains tax, meaning that a potential Deduction / Non-Inclusion (D/NI) outcome arises. As both Ireland and Barbados see the acquisition as a capital transaction, if there was a D/NI outcome it would not be because of any hybridity but because of a general feature of the Barbados tax system. As such, the payment to B-Co should be regarded as included under paragraph (a)(iii) and no D/NI outcome arises.

#### 4.2.1.4 Territorial tax regime

**Paragraph (a)(iv)** deals with circumstances where the payee is established in a territory that does not impose a tax on payments from sources outside that territory (i.e. where the payee is established in a country with a territorial tax regime). As this is a general feature of the tax system of a territory it should not give rise to a mismatch outcome under the anti-hybrid rules[27].

[27] Refer to Tax and Duty Manual Part 08-03-06 for a further discussion on the treatment of interest payments to a company in Hong Kong in specific circumstances.

### 4.2.2 Controlled Foreign Company Charges [Section 835Z(1)(b)]

Section 835Z(1)(b) sets out that an amount that is subject to a controlled foreign company charge or a foreign company charge will be regarded as included for the purposes of the anti-hybrid rules. The terms "controlled foreign company charge" and "foreign company charge" are both defined in section 835Z(1) as having the same meaning as they have in the Controlled Foreign Company (CFC) legislation (Part 35B). A "controlled foreign company charge" is the Irish CFC charge per section 835R(2) which effectively charges to tax the undistributed income of a controlled foreign group (subject to relevant conditions). "'Foreign company charge' means a charge under the laws of a territory, other than the State, which is similar to the controlled foreign company charge".

When looking at charges that are similar to the CFC charge what is essential is whether a corresponding amount, in respect of a payment, has been included as taxable income under some regime that taxes foreign profits.

For example, for the purposes of the anti-hybrid rules income that is taxed under any of the regimes outlined below should be treated as included.

#### 4.2.2.1 Controlled Foreign Company rules under ATAD

The Irish CFC rules contained in Part 35B transpose Article 7 of ATAD which essentially requires all Member States to implement rules that have the effect of re-attributing the income of a low-taxed controlled subsidiary to its parent company. Where an amount is subject to rules that have been introduced by other Member States under Article 7, or which were implemented prior to the Directive but are aligned with Article 7, it should be regarded as included for the purposes of the rules.

#### 4.2.2.2 Global intangible low taxed income (GILTI)

Global intangible low taxed income or GILTI is a method of taxing US multinationals foreign profits. The regime specifically targets foreign intangible income arising from intellectual property. Essentially GILTI is a newly-defined category of foreign income that is added to the corporate taxable income of the US shareholder each year. Where a company can illustrate that a payment gives rise to an amount that is included in the GILTI calculation for the purposes of the groups US taxable income, that income should be regarded as included for the purposes of this section.

#### 4.2.2.3 Transfer of assets abroad

National rules may have anti-avoidance provisions similar to section 806 and section 590 (and associated provisions) which charge a person to tax on income or gains arising to an offshore company. The US passive foreign investment company (PFIC) regime similarly aims to discourage US persons from forming a foreign corporation and using that company to invest in primarily passive investments, thereby attempting to shift income out of the US. Where an Irish payer can illustrate that a payment gives rise to a corresponding amount being included in the calculation of the amount charged to tax under such an anti-avoidance provision, the income should be regarded as included for the purposes of this section.

# 5 Worldwide system of tax (section 835AB)

The Irish tax system is relatively simple and straight forward. For example;

- Ireland has a worldwide system of tax whereby companies are subject to tax on a current year basis on their worldwide profits and gains i.e. all profits arising in Ireland and all profits arising to foreign branches are subject to tax in the current year.
- Ireland does not have tax consolidation. Tax consolidation is where a country allows a group of companies to prepare a single tax return. In Ireland the requirement is to pay corporation tax on a company by company basis such that intragroup transactions are recognised in each individual company for tax purposes.

Section 835AB is designed to provide for the effective interaction between the anti-hybrid rules and Ireland's worldwide system of taxation. It combines specific rules (subsections (1) and (2)) with an overriding principle based anti-avoidance rule (subsection (3)) to ensure that Part 35C only neutralises actual economic hybrid mismatches and not juridical hybrid mismatches arising because of a worldwide system of taxation.

**Paragraph (1)** of section 835AB provides that the section applies where certain payments are disregarded ("disregarded payments") in an investor or payee territory when computing the taxable profits of an enterprise in that territory under a provision similar to section 26(1) or subparagraph (i) or (ii) of paragraph (a) of subsection (1) of Schedule D in section 18 i.e. a worldwide system of taxation.

The payments that may be "disregarded payments" for the purposes of this section are payments between;

(a) the head office of an entity and a permanent establishment of that entity,
(b) two or more permanent establishments of an entity,
(c) an individual and a permanent establishment of that individual,
(d) two or more permanent establishments of an individual,
(e) where an enterprise is a participator in a hybrid entity, the enterprise and the hybrid entity,
(f) where an enterprise is a participator in two or more hybrid entities, two or more such hybrid entities, or
(g) where an entity is an entity on which a controlled foreign company charge or foreign company charge is made in respect of two or more hybrid entities, two or more such hybrid entities.

**Paragraph (2)** provides for situations where "disregarded payments" shall be treated as included in an investor or payee territory for the purposes of the anti-hybrid rules such that a mismatch outcome will not arise. This is best illustrated by way of examples.

## 5.1 Worldwide system of taxation - Ireland

### 5.1.1 Example 1:

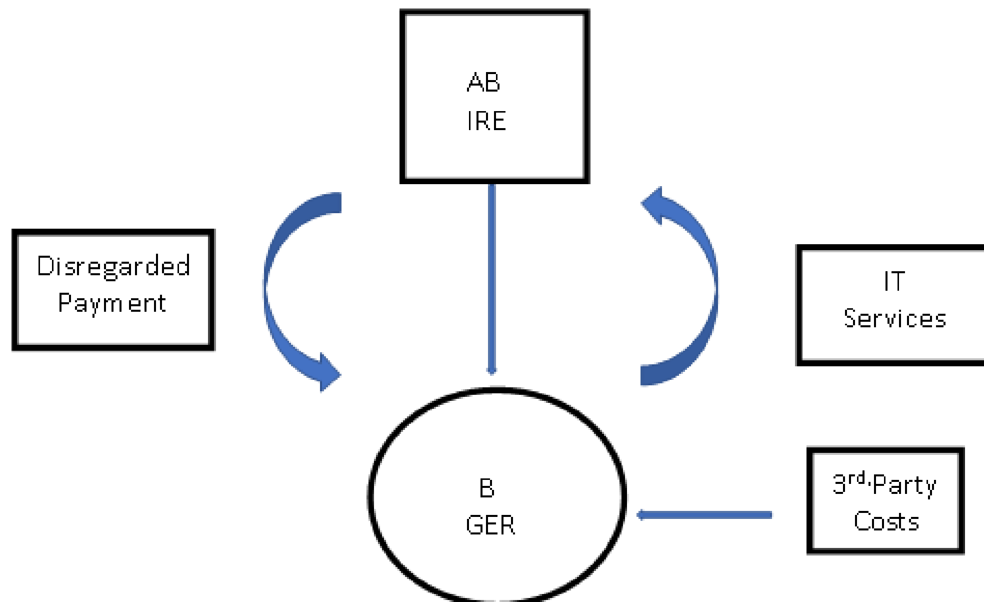


Figure 1: Payments between an Irish company and its foreign branch

- Facts:

- AB IRE is an Irish company which develops and sells computer software.
- B GER is a German branch of AB IRE which provides IT services to AB IRE.
- B GER incurs 3rd party costs in respect of its IT services.
- AB IRE pays B GER an intra company payment in respect of the IT services. The intra company payment is a "disregarded payment" per paragraph (1)(a) of section 835AB. It is a payment between the head office of AB and a permanent establishment of AB that is disregarded when computing AB's taxable profits in Ireland.

- Interaction with the anti-hybrid rules:

- B GER takes a tax deduction in respect of its 3rd party costs against its income from AB IRE (intra-company income).
- AB IRE takes a tax deduction in respect of the 3rd party costs in GER, under its worldwide system of taxation, against its 3rd party income.
- There is a double deduction (in Germany and Ireland)
- Question: Is there dual inclusion income? Yes – but not as defined. Dual inclusion income is defined as any amount which is included in both territories where the mismatch outcome has arisen. In this example, the income in Germany is a payment that is disregarded in Ireland.

- However, under the worldwide system of taxation, B GER's income is in effect taxed twice. It is clearly taxed in Germany, but it is also included in the taxable income in Ireland as AB IRE does not regard (i.e. recognise for tax purposes) the intra-company payment and therefore it does not reduce AB's taxable income by the payment.
- Therefore, in effect B's income is taxed twice while B's costs are deducted twice. Under the worldwide system of taxation there is no net tax benefit.
- Section 835AB(2) operates by treating the disregarded payment between AB and B as included in AB for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not give rise to an adjustment where it should not.

### 5.1.2 Example 2:

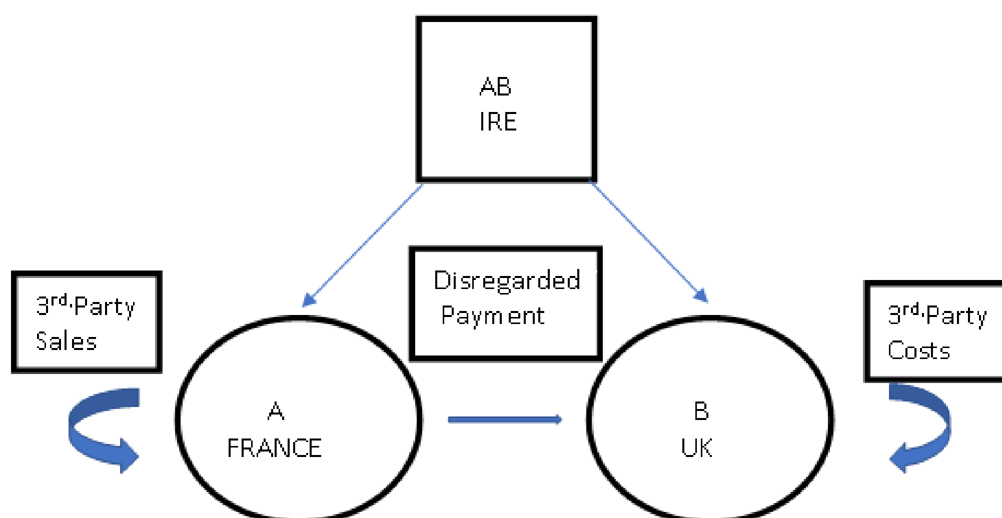


Figure 2: Payments between two foreign branches of an Irish company

- Facts:

- AB IRE is an Irish company
- B UK is a UK branch which incurs 3rd party costs manufacturing widgets that it sells to A France.
- A France is a French branch which buys widgets from B UK and makes 3rd party sales.
- Branch A pays Branch B an inter branch payment in respect of the widgets. The inter branch payment is a "disregarded payment" per paragraph (1)(b) of section 835AB. It is a payment between two permanent establishments of AB that is disregarded when computing AB's taxable profits in Ireland.

- Interaction with the anti-hybrid rules:

- B UK takes a tax deduction in respect of 3rd party costs in UK against its income from A France.
- A France is taxed on its 3rd party income, net of its expenses payable to B UK.
- AB IRE takes a tax deduction in respect of 3rd party costs in UK, under its worldwide system of taxation, against the 3rd party income of A France.
- There is a double deduction (in the UK and Ireland) and dual inclusion income (in France and Ireland)
- Question: Is there dual inclusion income? Yes – but not as defined. Dual inclusion income is defined as any amount which is included in both territories where the mismatch outcome has arisen. In this example, the income in the UK is a payment that is disregarded in Ireland.
- There is therefore a juridical mismatch outcome but not an economic mismatch outcome as in the hands of AB, under the worldwide system of taxation, A's income is taxed twice while B's costs are deducted twice. In the hands of AB, A's expenses are not deducted, and B's income is not taxed. The interaction between A and B is effectively ignored such that there is no net tax benefit.
- Section 835AB(2) operates by treating the disregarded payment between A and B as included in AB for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not give rise to an adjustment where it should not.

Example 1 and 2 may apply in similar circumstances where an Irish individual (sole trader) has a business presence abroad and the disregarded payments are between the Irish individual and the foreign business or between two foreign businesses of the individual.

Worldwide system of taxation - the US

Hybridity is a feature of the US tax code arising from its check the box system of tax. Under this system foreign entities may be checked open (treated as transparent) or checked closed (treated as opaque) for the purposes of US tax. Essentially, the foreign entity becomes a hybrid entity.

Where foreign entities are checked open it is an effective worldwide system of tax whereby the US parent (entity or individual) is taxed directly on the foreign profits and gains. In those circumstances, section 835AB operates by treating disregarded payments between a hybrid entity and its participator (paragraph (1)(e)) or between two or more hybrid entities of the same participator (paragraph (1)(f)) as included for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not arise where it should not.

### 5.1.3 Example 3: Interaction with US hybrid entities

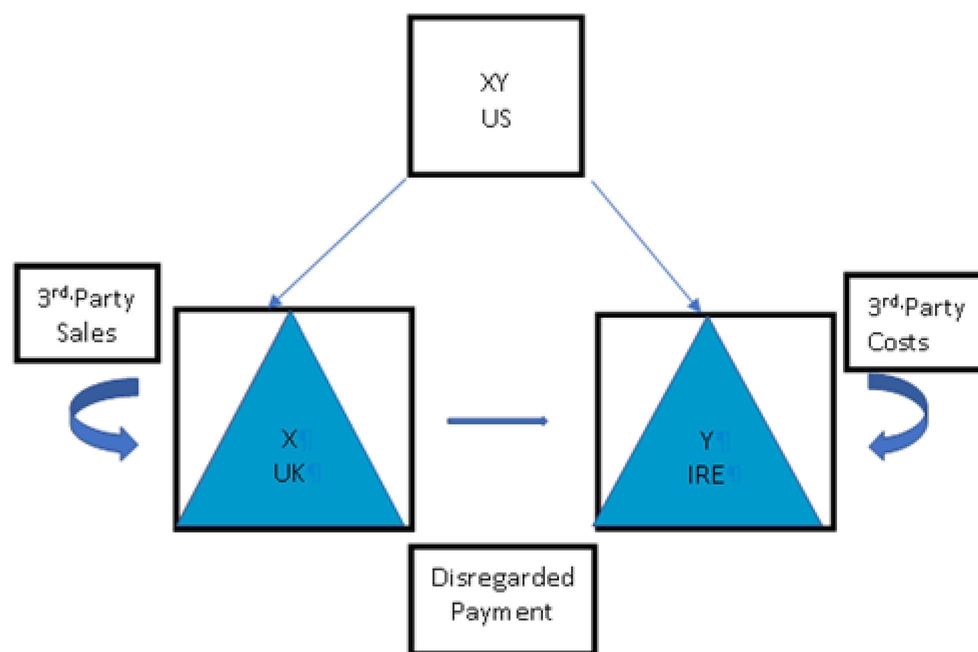


Figure 3: Payments between two hybrid entities held by a US company

- Facts:

- XY US is a US company
- Y IRE is an Irish company checked open (i.e. it is a disregarded entity) for US tax purposes. It incurs 3rd party costs manufacturing widgets to sell to X UK.
- X UK is a UK company checked open (i.e. it is a disregarded entity) for US tax purposes who buys widgets from Y IRE and makes 3rd party sales.
- X UK pays Y IRE an intragroup payment in respect of the widgets. The intragroup payment is a “disregarded payment” per paragraph (1)(d) of section 835AB. It is a payment between two hybrid entities of the same

participator XY that is disregarded when computing the taxable profits in the US.

- Interaction with the anti-hybrid rules:

- Y IRE takes a tax deduction in respect of 3rd party costs in IRE against its income from X UK.
- XY US takes a tax deduction in the US in respect of 3rd party costs in IRE against 3rd party income of UK under its check the box rules (X UK and Y IRE are treated as transparent for US tax purposes).
- There is double deduction (in the US and Ireland) and dual inclusion income (in the US and UK)
- Question: Is there dual inclusion income? Yes – but not as defined. Dual inclusion income is defined as any amount which is included in both territories where the mismatch outcome has arisen. In this example, the income in IRE is a payment that is disregarded in the US (as both X UK and Y IRE are checked open the US treats both companies as transparent effectively ignoring the intra-group transactions).
- There is therefore a juridical mismatch outcome but not an economic mismatch as, under the check-the-box rules, X's income is taxed twice while Y's costs are deducted twice. X's expenses are not deducted, and Y's income is not taxed. The interaction between X and Y is effectively ignored such that there is no net tax benefit.
- Section 835AB(2) operates by treating the disregarded payment between X and Y as included in XY for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not give rise to an adjustment where it should not.

Example 3 may apply in similar circumstances where a US individual is the ultimate participator in X and Y. For example, where XY US is checked open for US tax purposes, such that the profits and gains flow-through that entity (and perhaps other entities) and are ultimately taxed in the hands of a US individual (or individuals) the worldwide system of taxation provision may operate to treat that income as dual-inclusion income such that a technical mismatch does not arise where it should not.

Example 4: Interaction between hybrid entities and the US CFC regime

As part of the US tax system, the profits and losses of foreign (i.e. non-US) entities can be considered as part of a CFC calculation (e.g. GILTI). Where the foreign entities are hybrid entities, i.e. checked open and therefore disregarded for US tax purposes, payments made between such entities may be disregarded for the purposes of the CFC calculation. In those circumstances, section 835AB operates by treating the disregarded payments between two or more such hybrid entities (paragraph (1)(g)) as included for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not arise where it should not.

This example illustrates the interaction of the anti-hybrid rules with hybrid entities that are CFCs whose profits form part of a CFC calculation.

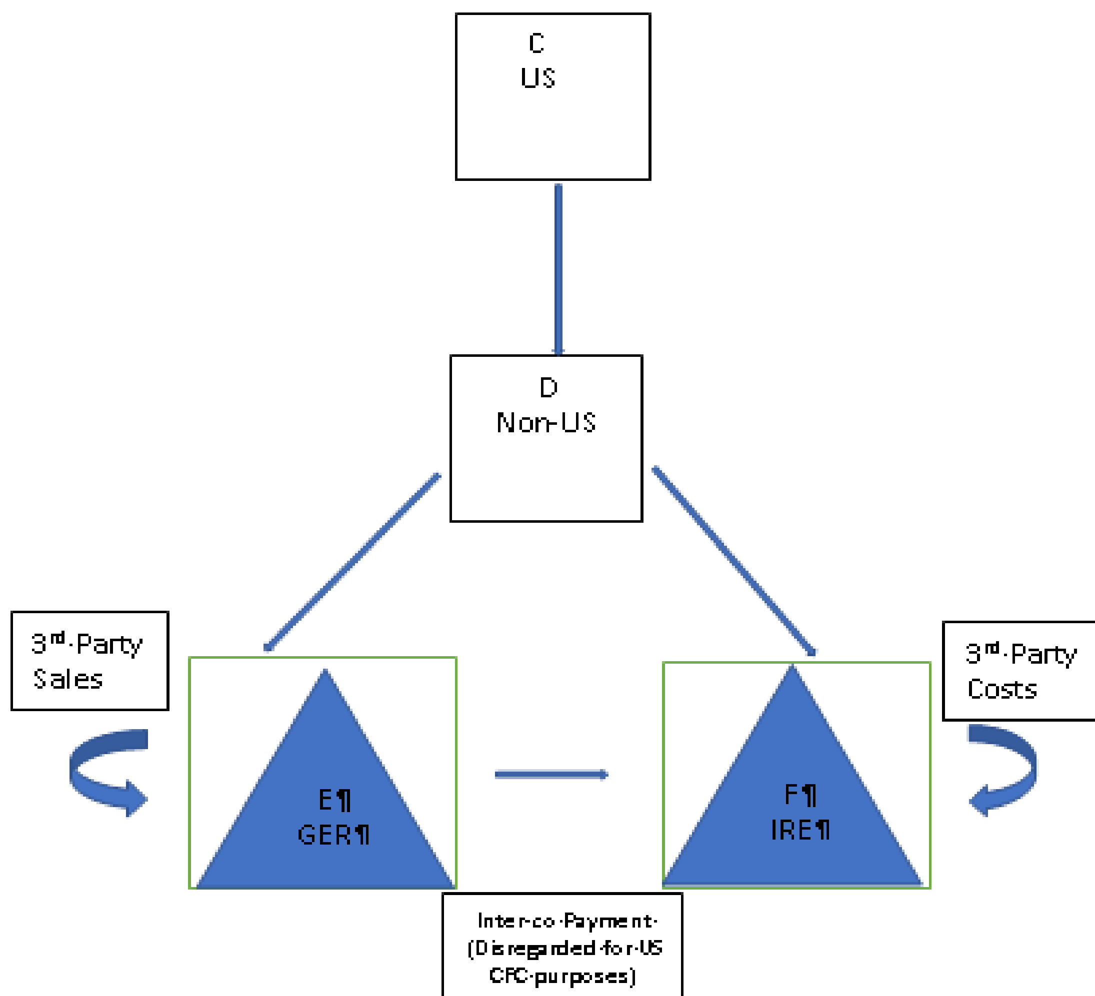


Figure 4: Payments between two hybrid entities that are subject to a CFC charge

- Facts:

- C US is a US company
- D Non-US is a non-US company that is not a hybrid entity.
- C US is subject to a CFC charge in the US. The CFC calculation is undertaken by reference to the profits and losses of its foreign subsidiaries, D, E and F.
- F IRE is an Irish company. It is a principal manufacturing company and incurs 3rd party costs as part of its manufacturing business. F IRE is taxed in Ireland on its profits.
- E GER is a German company, which operates as a sales and distribution company. It buys manufactured goods from F IRE and then sells these goods to third parties in Germany. E GER is taxed in Germany on its profits.
- C US regards E GER and F IRE as transparent entities.

- Interaction with the anti-hybrid rules:

- In the US, C US calculates a CFC charge by reference to the aggregated profits and losses of D Non-US and its subsidiaries E and F (i.e. non-US), such that the economic profits of the non-US subsidiaries are included in the CFC calculation.
- When calculating its profits F IRE takes a tax deduction in Ireland in respect of 3rd party costs against its taxable income.
- These 3rd party costs are also factored into C US's calculation of taxable profits under the CFC regime.
- There is, therefore, a double deduction arising in respect of the 3rd party costs (in Ireland and the US).
- Question: Is there dual inclusion income arising in respect of the payment? Yes – but not as defined. Dual inclusion income is defined as any amount which is included in both territories where the mismatch outcome has arisen i.e. Ireland and the US. In this example, the intra-group income in F IRE is disregarded for US CFC purposes as both E GER and F IRE are checked open the US treats both companies as transparent effectively ignoring the intra-group transactions.
- However, included in respect of a payment means an amount of profits or gains arising from the payment:
  - ✓ S835Z(1)(a)(i) that is chargeable to domestic tax. Clearly, in Ireland an amount of profits arising from the 3rd party manufacturing costs (being the intra-group payment from E GER) is chargeable to tax in Ireland and therefore included in Ireland.

  - ✓ S835Z(1)(b) that is subject to a controlled foreign company charge or a foreign company charge. In the US, C US calculates its CFC charge by reference to the aggregated profits and losses of F IRE and E GER (and D Non-US). Essentially, the 3rd party sales in E GER are taxed while the 3rd party costs in F IRE are deducted in the CFC calculation. Therefore, although the intra-group payment from E GER to F IRE is disregarded for CFC purposes, an amount of profits arising from the 3rd party costs in F IRE (being the 3rd party sales in E GER) are taxed in the US and therefore included in the US.
- Section 835AB(2) operates by treating the disregarded payment between E GER and F IRE as included in C US's CFC calculation for the purposes of the anti-hybrid rules such that the substance of the transaction is accurately reflected and a technical mismatch does not give rise to an adjustment where it should not.
- Essentially, there is no economic mismatch as F IRE's arm's length profits are subject to tax in Ireland, E GER's arm's length profits are subject to tax in Germany, and the combined profits of the non-US subsidiaries held by C (including D, E and F) are included in the US CFC calculation. There is no net tax benefit.

It has been noted that, circumstances may arise where the facts of a case may be similar to Example 4 but the disregarded payment is between a non-hybrid entity and a hybrid entity rather than between two hybrid entities. Take for example the facts of Example 4 but where the Irish entity (F IRE) is not a hybrid entity i.e. it is not treated as transparent for US tax purposes. In these circumstances, the inter-company payment between E GER and F IRE constitutes a payment between a hybrid entity and a non-hybrid entity but may be a disregarded payment for the purposes of the US CFC calculation.

Where it can be shown to the satisfaction of Revenue that the US CFC calculation is undertaken by reference to the full profits and losses of E GER (hybrid entity) and F IRE (non-hybrid entity) such that;

- F IRE's arm's length profits are subject to tax in Ireland,
- E GER's arm's length profits are subject to tax in Germany, and
- the combined profits of E GER and F IRE are included in the US CFC calculation

then the provisions of section 835AB should operate to treat the disregarded payment between E GER and F IRE as included in the US CFC calculation such that the substance of the transaction is accurately reflected and a technical mismatch does not give rise to an adjustment where it should not.

## 5.2 Section 835AB(3)

When applying section 835AB(1)(c),(1)(d), (1)(e), 1(f) or (1)(g) to a particular transaction an Irish company must have regard to section 835AB(3) which sets out when these provisions will not apply. It is effectively a principle-based test which obliges the company to look to the substance of a transaction to ascertain whether a mismatch arises either in the context of ATAD or within the meaning of the term mismatch when construed in accordance with the BEPS Action 2 report. ATAD sets out[28] that:

> **"…hybrid mismatches are the consequence of differences in the legal characterisation of payments (financial instruments) or entities and those differences surface in the interaction between legal systems of two jurisdictions…. In this context, it is useful to clarify that measures aimed to tackle hybrid mismatches in this Directive are aimed to tackle mismatch situations attributable to differences in the legal characterisation of a financial instrument or entity".**

The executive summary of the BEPS Action 2 report provides that:

> "**Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term deferral.**"

Therefore before availing of the treatment allowed in section 835AB(2), the company must be able to illustrate that the transaction has not resulted in double non-taxation (including long-term deferral).

[28] In recital 13

## 5.2.1 Example 5:

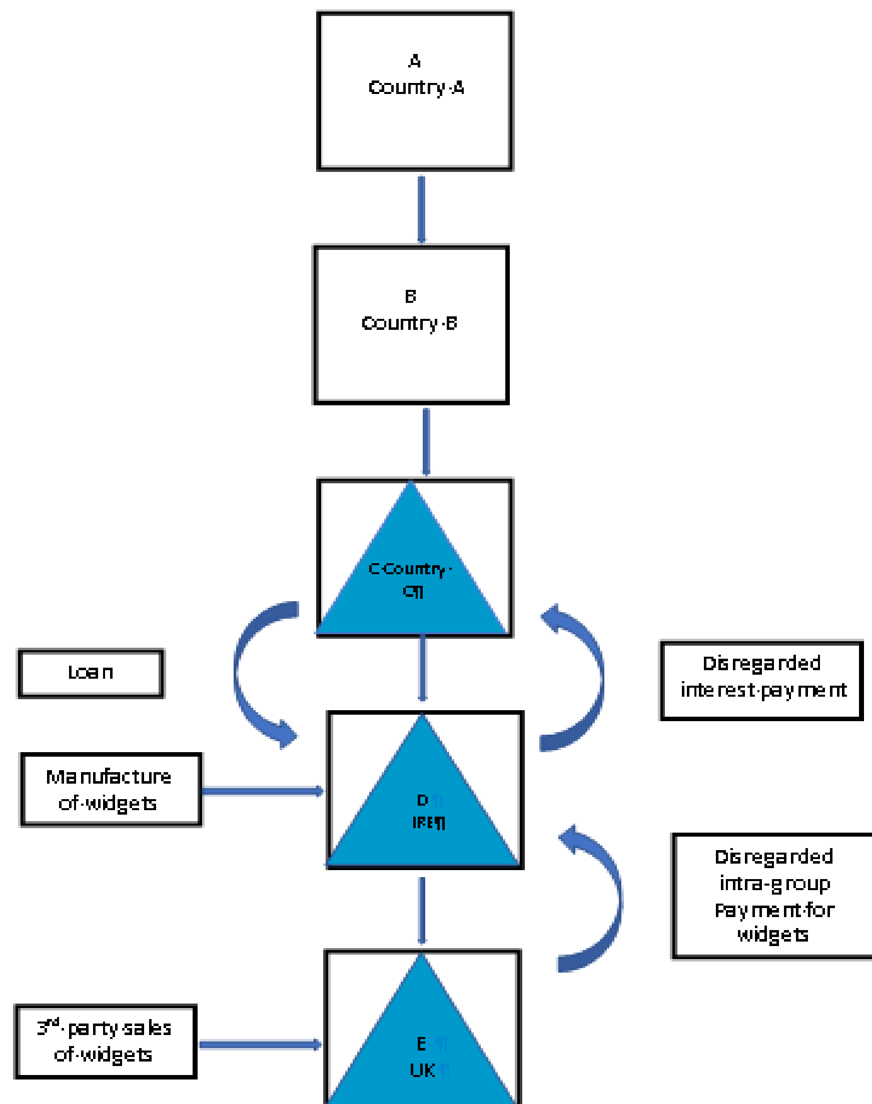


Figure 5: Application of principle-based test

- Facts:

- A is the parent company of an international corporate group manufacturing widgets.
- B is an intermediate holding company. It is regarded as a corporation from both Country B and Country A's tax perspective. It is not a hybrid entity.
- C is a transparent entity from Country C's tax perspective. B is its participator but it regards C as a company which is tax opaque in Country B. B is not chargeable to tax on C's income. C is a hybrid entity.
- D IRE is an Irish manufacturing company. It manufactures widgets. In order to fund its manufacturing activities, D IRE has received an intra group loan from C. D IRE makes interest payments to C in respect of this loan. D IRE is chargeable to Irish corporation tax. D IRE is a disregarded entity from Country A's tax perspective. It is a hybrid entity.

- E UK is a UK sales and distribution company. It buys the widgets from Ireland and sells in the EMEA market. It makes an intra group payment to D IRE in respect of the purchase of the widgets. It is chargeable to UK corporation tax in the UK. It is a disregarded entity from Country A's tax perspective. It is a hybrid entity.

▪ Interaction with the anti-hybrid rules:

- D IRE (hybrid entity) makes an interest payment to C (hybrid entity).
- D IRE takes a deduction in respect of the interest payment against its taxable income (the intra group payment from E UK in respect of the widgets).
- Question: is there a payment to hybrid entity deduction without inclusion mismatch (per S835AL)? There is a deduction in D IRE in respect of the interest payment but is there inclusion in the payee territory?
    - C is a payee as it receives the payment. C is a transparent entity from Country C's perspective. The payment is not taxed in C.
    - B is a payee as it is the participator of C. B regards C as opaque and does not tax the payment.
    - Therefore, there is no inclusion in the payee territory of either C or B.
- A is not a payee (as defined in S835Z(1)) in respect of the interest payment in this example:
    - It does not receive the interest payment
    - It is not a participator of C
    - The interest payment is not treated as arising to its benefit
    - A CFC charge is not made on A by reference to the interest payment as the interest payment is disregarded for CFC purposes.
- In this example, section 835AB(3) provides that sections 835AB(1) and (2) cannot be relied upon as there is, in substance, a mismatch outcome.

Essentially, where an Irish company obtains a tax deduction in respect of a payment, or part of a payment, it must be able to illustrate that a mismatch does not arise either because:

i) a corresponding amount has been included in the payee territory, or
ii) there is dual-inclusion income i.e. income that is included twice.

In this regard the definitions of “payee[29]” and “included[30]” are important and how they interact with section 835AB(3).

[29] Refer to section 8 for further detail regarding “payee”.
[30] Refer to section 4 for further detail regarding “included”.

# 6 Similar provisions

Section 835Z(2) sets out that where there is a reference in the anti-hybrid rules to a provision of the law of a territory, other than the State, which is similar to Part 35C that reference is to a provision that is enacted to;

(a) give effect to ATAD or is aligned with ATAD in the case of measures already in place,
(b) implement the OECD BEPS Report on Neutralising the effects of hybrid mismatch arrangements,
(c) implement the OECD BEPS Report on Neutralising the tax effects of branch mismatch arrangements, or
(d) otherwise neutralise a mismatch outcome.

In terms of determining what is meant by (d) the following is a non-exhaustive list of provisions that are similar in effect to the anti-hybrid rules.

## 6.1 Provision similar to section 817C

Where a territory applies a provision similar to section 817C in terms of restricting interest deductibility when paid to connected parties who are not yet chargeable to tax, it shall be regarded as having similar effect to the anti-hybrid rules.

## 6.2 EU Parent-Sub Directive

The EU Parent-Sub Directive contains provisions aimed at counteracting mismatches between a parent and subsidiary territory specifically double non-taxation on foot of hybrid loan arrangements. As the provisions operate to neutralise a mismatch scenario they are regarded as having similar effect to the anti-hybrid rules.

## 6.3 Switch-over clause

To avoid double non-taxation, recently concluded German tax treaties often include a switch-over clause allowing Germany, as the state of residence, to switch over from a tax exemption method to a tax credit method with respect of foreign income to avoid non-taxation. As these, and other, switch-over rules operate to prevent a deduction non-inclusion outcome they are regarded as having similar effect to the anti-hybrid rules.

## 6.4 US dual consolidated loss rules

The dual consolidated loss (DCL) rules were enacted to address situations where a US domestic corporation, that was treated as dual resident, could effectively double dip a single economic loss, once to offset income subject to US tax and a second time to offset income that is subject to foreign tax. As the DCL rules target the issue of double deductions they are regarded as having similar effect to the anti-hybrid rules.

# 7 Associated enterprises

Certain anti-hybrid rules only apply where the transaction giving rise to the mismatch outcome is between entities that are associated enterprises.
Details regarding the meaning of "associated enterprises" and the timing of the test for association are set out specifically for the purposes of the anti-hybrid rules in section 835AA.

The definition of associated enterprises is contained in section 835AA(2).

## 7.1 Definition – Section 835AA

### 7.1.1 Having regard to the capital of the entity

**Paragraph (a)** contains the share capital test (or in the case of an entity that does not have share capital, such as a partnership, similar ownership rights). It sets out that two enterprises shall be associated enterprises where one enterprise directly, or indirectly, possesses or is beneficially entitled to not less than 25% of the issued share capital, or ownership rights, in the other entity.

**Paragraph (b)** contains the voting power test. It sets out that two enterprises shall be associated enterprises where, one enterprise is entitled to exercise not less than 25% of the voting power in the other entity.

**Paragraph (c)** contains the profits test. It sets out that two enterprises shall be associated enterprises where, one enterprise directly or indirectly holds such rights that –

> **(c)(i)** where the other enterprise is a company, entitle them to receive 25% or more of the profits on a distribution[31], or
> **(c)(ii)** where the other enterprise is not a company, entitle them to a 25% or more share of the profits (this will include for example, the share of profits in a partnership).

Essentially, enterprises are treated as associated for the purposes of the anti-hybrid rules based on the level of investment one has in the other. An enterprise's investment in another enterprise includes looking at the percentage of voting rights or of the value of any equity interests that the first person holds in the second person.

While the measurement of voting interests will be easiest in the context of corporate entities that issue equity share capital, the term also includes equivalent control rights in other types of investment vehicles such as partnerships, joint ventures and trusts.

When considering equity interests, an instrument should be treated as giving rise to an equity interest if it provides the holder with an equity return. An equity return means an entitlement to profits or eligibility to participate in distributions. Non-voting shares, bonds, warrants or other financial instruments that carry an

[31] Chapter 2 of Part 6 sets out matters to be treated as a distribution under the Corporation Tax Acts.

entitlement to an equity return and that are widely-held or regularly traded may be excluded from the measurement of the value of equity interests where the way these instruments are issued, held or traded does not give rise to significant structuring concerns.[32]

**Paragraph (d)** sets out that two enterprises shall be associated enterprises where there is a third enterprise in respect of which the two enterprises are, in accordance with (a), (b) or (c) associated.

### 7.1.2 Acting together - Section 835AA(3)

When applying paragraphs (a), (b) and (c), section 835AA(3) provides any interests of enterprises which are acting together[33] must be amalgamated and considered in totality.

The BEPS Action 2 report provides some guidance on the rationale for including an "acting together" requirement and that guidance may be useful in interpreting the phrase, as used in ATAD. The Action 2 report, at para. 369, states:

> "**The purpose of the "acting together" requirement is to prevent taxpayers from avoiding the related party or control group requirements by transferring their voting interest or equity interests to another person, who continues to act under their direction in relation to those interests. The other situation targeted by the acting together requirement is where a taxpayer or group of taxpayers who individually hold minority stakes in an entity, enter into arrangements that would allow them to act together (or under the direction of a single controlling mind) to enter into a hybrid mismatch arrangement with respect to one of them."**

BEPS Action 2 Recommendation 11 sets out relevant definitions including what is meant by the phrase "acting together". It states that:

> **"Two persons will be treated as acting together in respect of ownership or control of any voting rights or equity interests if:**
>
> **a) they are members of the same family;**
>
> **b) one person regularly acts in accordance with the wishes of the other person;**
>
> **c) they have entered into an arrangement that has material impact on the value or control of any such rights or interests; or**
>
> **d) the ownership or control of any such rights or interests are managed by the same person or group of persons."**

[32] BEPS Action 2 Report par. 354 to 360.

[33] ATAD Art2(4). The concept of acting together is also found in section 10(8). It is not the same as "act in pursuit of a common purpose" which is in section 491(5)(i), "act in concert" which is in section 980 or the meaning of "connected persons" per section 10.

The report provides detail regarding the meaning of each part of the definition.

- Part (a) is self-explanatory.
- Part (b) refers to circumstances where a person is legally bound to act in accordance with another's instructions or if it can be established that one person is expected to act, or typically acts, in accordance with another's instructions. For example, a lawyer-client relationship.
- Part (c) refers to arrangements that are entered into with other investors and is not intended to cover arrangements that are simply part of the terms of the equity or voting interest or operate solely between the holder and issuer. In order for the arrangement to apply it should have a material impact on the value of the rights or interests.
- Part (d) refers to situations where investors interests are managed by the same person or group of persons. This requirement would pick up a number of investors whose investments were managed under a common investment mandate or partners in an investment partnership[34].

For the "acting together" test to apply, each case must be considered on its own merits – this is a question of fact. All factors should be taken into account such as, the particulars of a legal arrangement between parties in (b), the materiality of an arrangement in (c) and the specific terms of an investment mandate and the circumstances of the investment in (d).

### 7.1.3 Having regard to other matters

**Paragraph (e) and paragraph (f)** contain the consolidated financial statements test.

Under ATAD, the definition of associated enterprises also means entities that are part of the same consolidated group for financial accounting purposes[35].

ATAD sets out that a "consolidated group for financial accounting purposes" means a group consisting of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of a Member State[36].

For the purposes of Part 35C, a "consolidated group for financial accounting purposes" means a group consisting of a parent entity and all other entities, other than non-consolidating entities, which are included in the same consolidated financial statements.

[34] Specific exclusions from "acting together" in the OECD guidance cannot be relied upon in applying section 835AA(3).
[35] ATAD Art. 2(4)(c)
[36] ATAD Art. 2(10)

**Paragraph (e)** - where a parent entity prepares consolidated accounts under Irish GAAP or International Financial Reporting Standards ("IFRS"), all entities in the consolidated group will be an associated enterprise with every other entity in that consolidated group other than entities which are:

- held for sale,
- held as an investment, or
- excluded from consolidation under the 'investment entity' exclusion[37].

Essentially, any entity whose results are fully consolidated on a line by line basis into the profits, assets and liabilities of the consolidated financial statements (that is, it is fully consolidated) will be an associate of all other fully consolidated entities.

- **Example: Group ABCDE**

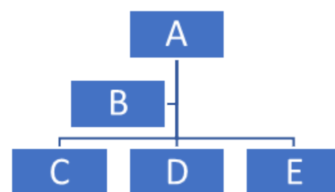


Figure 6: Consolidated group for financial accounting purposes

- A is the parent company of ABCDE. It prepares consolidated financial statements drawn up in accordance with International Financial Reporting Standards.
- The financial statements of B, C and D are consolidated with the financial statements of A on a line by line basis i.e. they are fully consolidated.
- The financial statements of E are not consolidated with the financial statements of A. Instead, E is held at fair value in A's consolidated financial statements.
- For the purposes of the anti-hybrid rules, A, B, C and D are all regarded as "associated enterprises" as they are fully included in A's consolidated financial statements. As E is a non-consolidating entity it is not an "associated enterprise" of A, B, C and D.

**Paragraph (f)** - where the entity is a member of a group that does not prepare consolidated financial statements, or that prepares them other than under Irish GAAP or IFRS, it must apply a hypothetical test: that is, it must apply the test as to who would be fully consolidated **if** IFRS consolidated accounts were prepared.

[37] These entities are 'non-consolidating entities', as defined in section 835AA(1)

**Paragraph (g)** sets out that two enterprises shall be associated enterprises where one enterprise has significant influence in the management of the other enterprise.

Section 835AA(1) provides that this is the ability to participate, at the level of the board of directors or equivalent governing body of the entity, in the financial and operating policy of the entity. It does not require for one enterprise to have control, or joint control, of the other entity.

## 7.2 Timing of association test (section 835AA(6) & (7))

While the anti-hybrid rules apply to a payment, in determining whether or not enterprises are associated consideration must be given to the relationship between the enterprises at a number of points. Association should be tested:

(a) When the transaction was entered into,
(b) When the transaction was formed, **and**
(c) When the payment arises.

Where enterprises were associated at points (a) and (b), but not when a deduction is taken for the payment referred to in point (c), consideration must be given to why the association was broken. If the enterprise can show that the breaking of that association did not have a tax avoidance motive (e.g. it was because the enterprise was sold to a third party and that sale was not envisaged at points (a) or (b) above), then for the purposes of Part 35C the two enterprises should not be treated as associated. However, if the enterprise cannot show that there was not a tax avoidance motive to breaking the association, the enterprises should be treated as associated for the purposes of Part 35C[38].

## 7.3 Application of the "associated enterprises" test to Irish partnerships[39]

### 7.3.1 Having regard to the capital of the entity

**Paragraph (a), (b) and (c) –**

Where an enterprise (partner) directly, or indirectly, possesses or is beneficially entitled to not less than 25% of the ownership rights, voting power or rights to profits in an Irish partnership that enterprise (partner) and the Irish partnership shall be "associated enterprises" in respect of each other.

As an Irish partnership does not have separate legal personality, it cannot itself own assets. Irish partnership property is instead held by the partners as tenants in common. Under Irish partnership law, partners are not legally entitled individually to exercise proprietary rights over any of the partnership assets but rather they are collectively entitled to each and every asset of the partnership, in which each of them has an undivided share.[40]

Therefore, in applying the "associated enterprises" test where an Irish partnership holds a subsidiary entity (or entities) it is necessary to look through the partnership to the partners when examining the ownership rights, voting rights and/or rights to profits in that subsidiary entity.

---

[38] Section 835AA(7) contains a "main purpose" test. Refer to TDM 33-01-01 for further detail as to the meaning of this test.

[39] The application of the "associated enterprises" test will be similar for foreign entities that are established under laws that are similar to Irish partnership law.

[40] Hoffmann LJ in *Inland Revenue Commissioners v Gray* [1994] STC 360

It follows that where a partnership holds an investment of 25 per cent or more in a subsidiary entity each partner and the subsidiary entity shall be regarded as “associated enterprises” in respect of each other.

The Irish partnership and the subsidiary entity shall be regarded as “associated enterprises” in respect of each other where paragraph (d) applies.

**Paragraph (d) –**
Where an Irish partnership holds an investment of not less than 25 percent in a subsidiary entity, each of the partners and that subsidiary entity shall be regarded as “associated enterprises” in respect of each other. Where one of those partners and the partnership are also regarded as “associated enterprises” in respect of each other where, for example, that partner owns not less than a 25 per cent investment in the partnership then it follows that the partnership and the subsidiary entity shall also be regarded as “associated enterprises” in respect of each other by virtue of their association with that partner.

### 7.3.2 Having regard to other matters

**Paragraph (e) –**
Where an Irish partnership prepares consolidated accounts all entities that are fully included in the consolidated group will be “associated enterprises” in respect of the Irish partnership. Alternatively, where another entity prepares consolidated accounts and the results of an Irish partnership are fully included in that group, the Irish partnership and all other entities fully included in the consolidated group will be “associated enterprises” in respect of each other.

**Paragraph (f) –**
Applying a hypothetical test, **if** IFRS consolidated accounts were prepared by an entity, the Irish partnership and all other entities who would be fully consolidated in those consolidated accounts would be “associated enterprises” in respect of each other.

**Paragraph (g) –**
Where an enterprise has significant influence in the management of an Irish partnership that enterprise and the Irish partnership shall be “associated enterprises” in respect of each other.

Although an Irish partnership is regarded as having the capacity to perform legal acts it would not follow that an Irish partnership could be said to have “significant influence in the management” of another enterprise so the “associated enterprises” test would not apply in that instance.

### 7.3.3 Application of “acting together” test

The application of the “acting together” test is illustrated in the following example –

- Company A and Company B enter into a partnership agreement. The companies are not otherwise associated with one another. The partnership assets include a 20% shareholding in Company C. Company A has a 5% shareholding Company C, which it holds separately to it partnership interests.

- Company A is associated with Company C as the aggregate of its 5% shareholding in Company C and its undivided share in the partnership asset consisting of the 20% shareholding in Company C means that, in total, it has 25% direct possession of the issued share capital in Company C.

- Company B is not associated with Company C. Company B has an undivided share in the partnership asset consisting of the 20% shareholding in Company C. Therefore, it has not reached the ownership threshold for association.

- Companies A and B should not be considered to be ‘acting together’ with respect to Company A’s 5% shareholding in Company C solely as a consequence of Company A and Company B being in partnership with respect to the 20% shareholding in Company C.

# 8 Payee

In simple terms, when determining whether a deduction without inclusion mismatch outcome arises in respect of a payment an Irish entity must consider whether a corresponding amount in respect of that payment has been included in the payee territory.

The "payee territory" means a territory in which a payee is established.

The term "payee", in respect of a payment, has a specific meaning for the purposes of the anti-hybrid rules.

## 8.1 The meaning of "payee" (section 835Z(1)

The term "payee" is defined in section 835Z(1) and includes;

- an enterprise, or
- a permanent establishment of an entity

which falls within any of the four categories outlined in section (a) to (d).

### 8.1.1 Paragraph (a): The person who receives the payment

**Paragraph (a)** refers to the person who receives the payment or is treated as receiving the payment under the laws of any territory.

It does not include a person, however, who receives, or is treated as receiving, the payment in a fiduciary or representative capacity.

When testing for inclusion (refer to section 4) under this heading, an Irish payer will need to determine the payee who receives the payment, or is treated as receiving the payment, and determine the treatment of the payment in the hands of that payee.

### 8.1.2 Paragraph (b): The participator

**Paragraph (b)** refers to the participator. The term "participator" is defined specifically for the purposes of the anti-hybrid rules, in section 835Z(1), and only applies in the context of a hybrid entity[41].

The test for inclusion under this heading will arise in two main scenarios.

Firstly, where an Irish entity makes a payment to a hybrid entity (section 835AL Payment to a hybrid entity deduction without inclusion mismatch outcome).
When testing for inclusion under this section, an Irish entity must take reasonable steps to consider whether the entity to whom it is making a payment is a hybrid entity. This will require the Irish entity to consider the tax treatment of the entity in the territory in which it is established and potentially the territory in which the participator is established.

[41] Refer to section 3 for further detail.

Under this scenario, the Irish entity will see itself as making a payment to the foreign entity. The Irish entity should therefore start by testing the treatment of the payment in the territory in which the foreign entity is established. Depending, however, on the tax treatment of the foreign entity either in the territory in which it is established or the territory in which its participator(s) is established the payment may be treated as arising or accruing to the participator(s). In this instance, the Irish entity may need to test the treatment of the payment in the participator territory also. This will require the Irish entity identifying the participator(s) of the foreign entity and the territory in which they are established.

Secondly, where an Irish entity making a payment is regarded as a hybrid entity because of the tax rules of another jurisdiction (section 835AM Payment by a hybrid entity deduction without inclusion mismatch outcome).

Under this scenario, the Irish entity will know that it is a hybrid entity. Therefore, when it makes a payment it must consider the treatment of that payment in the hands of its participator(s).

Where the Irish entity makes a payment to its participator it will see the participator as receiving the payment. It will therefore treat the participator as the "payee". The participator, however, may not recognise the payment i.e. it may treat the payment as a "disregarded payment". Nevertheless, in these circumstances, the payee territory is the territory that the payment is treated as being received by the payer i.e. the participator territory.

### 8.1.3 Paragraph (c): The person who is treated as benefiting from the payment

**Paragraph (c)** refers to the person to whom the benefit of the payment is treated as arising or accruing under the laws of any territory.

Circumstances might arise where a payment, although made to one person, is treated, under the laws of a territory, as benefitting another.

For example, where an Irish entity makes a payment to a transparent foreign entity, such as a partnership, the Irish entity will regard the payment as arising or accruing to the partners. As such, the Irish entity will treat the territory where the partners are established as being the payee territory. However, the territory in which the partners are established might view the benefit of the payment as arising to the entity itself (i.e. treat the entity as opaque) which will have an impact when testing for inclusion in that territory[42].

### 8.1.4 Paragraph (d): The person who is subject to a CFC or similar charge by reference to the payment

**Paragraph (d)** refers to a person on which a controlled foreign company charge, or foreign company charge, is made by reference to the payment.

[42] Refer to section 8.2.1 for an illustrative example.

The terms "controlled foreign company charge" (CFC charge) and "foreign company charge" (a charge similar to a CFC charge) are both explained in detail in section 3.2.2. That section also sets out the types of tax regimes that should be treated as being similar to a CFC charge. In simple terms a CFC or similar charge is a tax that is charged on foreign profits, subject to relevant conditions.

This paragraph is relevant where an Irish entity makes a payment and a CFC or similar charge is made, by reference to that payment, on another entity.

An example of this scenario is set out in section 5.2.2.

## 8.2 Situations where there is more than one payee

Considering the four categories outlined in the previous section, situations may arise where there is more than one payee to a payment and consequently more than one payee territory.

From the perspective of an Irish entity making a payment, once a corresponding amount in respect of the payment has been included in one of the payee territories the test for inclusion will be regarded as met such that a deduction without inclusion mismatch will not arise.

### 8.2.1 Example:

- Irish company (IRE Co) makes a payment of €100 to a UK partnership (UK P)
- IRE Co takes a tax deduction of €100.
- UK P is owned by three partners A, B and C established in territory A, B and C respectively.
- UK P is, however, transparent for UK tax purposes such that the benefit of the €100 accrues directly to the partners A, B and C. Therefore, A, B and C are "payees" as defined.
- Where a corresponding amount in respect of the €100 (allowing for FX translations and timing differences) is included in territories A, B and C a hybrid mismatch should not arise.

However, where for example;

- UK P is treated as transparent for UK tax purposes such that the €100 is treated as accruing directly to the partners A, B and C in the ratio 50:25:25.
- No amount in respect of the €100 is included in the UK.
- €50 is taxed in territory A in the hands of A.
- €25 is taxed in territory B in the hands of B.
- No amount, however, is taxed in territory C as that territory regards UK P as opaque such that the income is not regarded as accruing direct to C.
- There is therefore a hybrid mismatch deduction without inclusion relating to €25 of the payment.

In summary, once a corresponding amount in respect of a payment is included in at least one of the payee territories there is no requirement to further test for inclusion[43]. There will be no deduction without inclusion mismatch outcome for the rules to apply.

## 8.3 Payee territory

When testing for inclusion what is important is whether a corresponding amount has been included in the payee territory.

Once the payee or payees, have been identified (as discussed in previous sections) the next step is to establish the payee territory. The payee territory is simply the territory in which a payee is established.

Section 835Z(4) sets out what is meant by a territory in which an entity is established for the purposes of the anti-hybrid rules and is set out in more detail in section 3.

As such, an Irish entity making a payment should have due regard to the above factors and specifically the territory in which a payee is effectively managed as this territory takes precedence when testing for inclusion.

## 8.4 Identification of payee(s)

To determine whether a mismatch outcome arises in respect of a payment an Irish entity will be required to firstly identify the payee(s) to the payment and secondly determine the payee territory. As there can be more than one payee to a payment the identification process may be complex. Factors that should be considered include;

- the tax treatment of the payment itself under the laws of all relevant territories,
- the tax treatment of the entity to whom the payment is made under the laws of all relevant territories,
- the nature of the corporate group structure, and
- whether a CFC or similar charge arises in relation to the payment.

### 8.4.1 Reasonable to consider

It is worth noting here, however, that the anti-hybrid rules do take account of the state of knowledge of a taxpayer[44]. Therefore, when identifying the payee(s) in respect of a payment what is important is that an Irish entity has reasonably considered the transaction. It is not expected that the taxpayer has perfect knowledge as this would likely require an excessive burden on the entity to investigate the treatment of a payment. However, equally, it is expected that there will be no artificial structuring with a view to “keeping the Irish taxpayer in the dark” about activities outside of Ireland.

[43] OECD BEPs Action 2 Report para. 89 & Example 1.8
[44] Refer to section 10 for further detail on the state of knowledge/awareness test.

### 8.4.2 Where a mismatch arises between related parties

Where a mismatch arises under a transaction between related parties, being associated enterprises, the head office of an entity and it's permanent establishment or between two or more permanent establishments of an entity, Revenue would typically expect that an Irish entity should be in a position to reasonably consider the identity of a payee and the treatment of the payment. Therefore, in the context of the anti-hybrid rules, there is an onus on an Irish entity making cross-border related party payments to consider their corporate group structure and the tax treatment of relevant entities within that group.

### 8.4.3 Where a mismatch arises under a structured arrangement

A mismatch will only arise under a structured arrangement where an Irish company would reasonably be expected to be aware that it entered into a structured arrangement (as defined in section 835Z(1)), it shared in the value of the tax benefit arising from the mismatch and the mismatch has not been neutralised in another territory. Therefore, in this context, it is expected that the company should know the identity of the payee on the basis that it has knowledge of the mismatch.

### 8.4.4 Where the payee is a transparent entity

It is recognised that where a payment is made to a transparent entity there is an increased burden on the taxpayer to determine the identity of the payee(s) and the treatment of the payment. The BEPS Action 2 report sets out in para. 417 that "**A payee means any person who receives a payment. The payee will generally be the person with the legal right to the payment. There may be cases, however, where, due to tax transparency of the direct recipient, the payment is not included in ordinary income by the direct payee but is included in the income of an underlying investor. In this case the taxpayer will have the burden of establishing, to the reasonable satisfaction of the tax administration, how the tax transparency of the direct recipient and the tax treatment of the payment by the underlying investor impacts on the amount of the adjustment required under the rule**".

# 9 Imported mismatches

Imported mismatch outcomes are set out in chapter 8 of Part 35C. Section 835AR provides that the rule applies to:

- an Irish company,
- where a mismatch outcome arises through a transaction or series of transactions between; associated enterprises, the head office of an entity and its permanent establishment or two or more permanent establishments of an entity, and
- under the transaction the Irish company makes a payment to a payee established outside the EU.

The rule is designed to capture scenarios where an Irish company makes an ordinary (non-hybrid) payment to an associated enterprise[45] established outside the EU, and that payment directly or indirectly funds a mismatch outcome, through a transaction or series of transactions, that has not already been neutralised under anti-hybrid rules. Section 835AS provides that where it would be reasonable to consider that this scenario arises, the imported mismatch rule operates by denying the Irish company a tax deduction in respect of the payment to the extent that the mismatch outcome has not been neutralised in another territory.

It is noted that, due to the vast number of nuanced scenarios under which an imported mismatch might arise, each case must be viewed strictly on its own merits. In this context, it is recommended that the BEPS Action 2 report, and specifically chapter 8, be considered for both a discussion and a series of examples that provide guidance relating to the imported mismatch rule.

However, a number of points that are dealt with in the report are worth noting and are set out in the following subsections.

## 9.1 The policy behind the imported mismatch rule

Para. 234 of the report states that "**The policy behind the imported mismatch rule is to prevent taxpayers from entering …. arrangements with group members that shift the effect of an offshore hybrid mismatch into the domestic jurisdiction through the use of a non-hybrid instrument such as an ordinary loan…… While these rules involve an unavoidable degree of co-ordination and complexity, they only apply to the extent a multinational group generates an intra-group hybrid deduction and will not apply to any payment that is made to a taxpayer in a jurisdiction that has implemented the full set of recommendations set out in the report.**"

This policy is consistent with section 835AR, where the payment from the Irish company must be to a payee established outside the EU to be within the scope of

[45] Refer to BEPS Action 2 page 161 for discussion on the scope of the imported mismatch rule.

the rule. This is on the basis that any intra-EU payments will be subject to a primary, or secondary, rule in the relevant Member State, under ATAD, such that any mismatch is already neutralised in that Member State.

This principle may also apply where a payment is made by an Irish company to a payee outside the EU but which is established in a territory that has implemented equally effective anti-hybrid rules[46] such that a mismatch should not arise . Where, however, there may be doubt as to the effectiveness of the anti-hybrid rules in a non-EU territory such that it would be reasonable to consider that a mismatch might arise in respect of a payment to a payee in that territory, the burden of proof shall lie with the Irish company to show to the satisfaction of Revenue that in fact there is no hybrid mismatch arising as a consequence of the transaction and that the payment does not fall within the scope of the imported mismatch rule.

In this context "**It will be the domestic taxpayer who has the burden of establishing, to the reasonable satisfaction of the tax administration, that the imported mismatch rule has been properly applied in that (*other*) jurisdiction. This initial burden may be discharged by providing the tax administration with copies of the group calculations together with supporting evidence of the adjustments that have been made under the imported mismatch rules in other jurisdictions.[47]**"

## 9.2 Tracing payments and identifying payees

It is noted that the process of tracing payments and identifying payees under the imported mismatch rule may be complex. Again, it is recommended that the taxpayer refer to chapter 8 of BEPS Action 2 for both a discussion and a series of examples on the matter.

It is also noted that this rule, similar to the other anti-hybrid rules, is drafted in the context of the "reasonable to consider" test as set out in section 10.1. Therefore, when considering a payment in the context of the imported mismatch rule what is important is whether the Irish company has considered the transaction or series of transactions in a manner akin to a reasonable company. It is not expected that the taxpayer has perfect knowledge.

[46] It will be important here for the Irish entity to establish whether the relevant payee territory has, or has not, implemented anti-hybrid rules that are equally effective to those implemented under ATAD.
[47] BEPS Action Report para. 265

# 10 State of knowledge/awareness test

In applying the anti-hybrid rules, an entity is required to have knowledge of the tax treatment of a payment to determine whether a mismatch arises.

## 10.1 Reasonable to consider

The Irish rules, contained in Part 35C, have implemented ATAD2 based on a **reasonable** awareness test. The specific language used in the relevant sections refers to "where it would be reasonable to consider"[48][49] a mismatch arises.

Accordingly, where an Irish entity makes a payment, what is important is whether it would be (i) **reasonable** to (ii) **consider**, that a mismatch arises in respect of that payment.

i. The word "reasonable" is based on the common law "reasonable man test"[50]. The reasonable man test asks what a "reasonable person of ordinary prudence" would do in a given situation. It is an objective test.
ii. The word "consider" is an action verb which therefore suggests that something is to be done by the entity. It means; to think carefully about, to contemplate, or to reflect upon.

Therefore, what is important, in the context of the anti-hybrid rules, is whether an Irish entity has taken action and thought carefully about/contemplated the tax treatment of a payment in a manner akin to a hypothetical reasonable entity. The test involves asking oneself a hypothetical question of what a reasonable entity would reasonably consider, given the facts of the case. What is not important is the particular facts or circumstances of the Irish entity as that would be a subjective test. As already outlined, it is an objective test.

## 10.2 Awareness test under a structured arrangement

Structured arrangements are dealt with section 835AU.

The language used in that section refers to where a company "would **reasonably** be expected to be **aware**".

i. Again, it is an objective or a "reasonable man test" as referred to in the previous section.
ii. The word "aware" however is different to "consider" in that it is not an action verb. "Aware" is an adjective and means having knowledge or cognisant.

[48] This language is not included in section 835AM as it is assumed that an entity will know whether it is a hybrid entity or not as the case may be in the context of a payment by a hybrid entity.
[49] This phrase is not the same as "reasonably expect" or "knows or could be reasonably expected to know" which are both used for the purposes of DAC 6. Refer to TDM 33-03-03 for further detail.

[50] Refer to TDM Part 33-01-01 for a discussion on the objective test.

Therefore, what is important, in the context of a structured arrangement, is whether a hypothetical reasonable entity, would be expected to have knowledge, that it entered into a structured arrangement, it shared in the value of the tax benefit and that any mismatch arising has not been neutralised in another territory. This is the standard against which an Irish entity is compared. What is not important is the particular facts and circumstances of that Irish entity.

# 11 Included and tax consolidation

Tax consolidation can be a form of hybridity where the effect of the consolidation is that transactions and payments between group members are disregarded for tax purposes. The BEPS Action 2 Report specifically deals with such hybridity and how the anti-hybrid rules should operate in such circumstances[51].

It is noted, however, that in the context of the definition of "included" a technical mismatch may arise in a tax consolidation scenario where there is in fact no economic mismatch. Specifically, where an Irish entity makes a payment to a payee who is a member of a tax group that payee may not itself be chargeable to tax on the payment but rather the payment may form part of the aggregate taxable income of the group on which a group remitter is charged to tax.

## 11.1 Example:

- Where an Irish entity makes a payment to Company X (that is within the scope of the anti-hybrid rules) it must consider whether a corresponding amount has been included in territory X (the payee territory).
- Where Company X is a member of a consolidated tax group the onus will be on the Irish entity to show to the satisfaction of Revenue that an amount in respect of the payment:
  - is included in the taxable income of Company X, and
  - forms part of the aggregate taxable income for the consolidated tax group on which tax is charged.
- Where the test in (a) and (b) are met, the amount may be regarded as "included" for the purposes of the anti-hybrid rules such that a mismatch does not arise.
- This is irrespective of the fact that the payee itself is not strictly chargeable to tax on the amount but rather the amount forms part of the aggregate taxable income of the group on which tax is charged.
- There is in substance no economic mismatch.

Please note that this is general guidance and, as with all cases, the matter of inclusion will depend on the particular facts of a case.

[51] Refer to Example 3.2 page 293 of the OECD report.

# 12 The reverse hybrid rule

The purpose of the anti-hybrid rules is to prevent arrangements that exploit differences in the tax treatment of an instrument or entity to generate a tax advantage or a mismatch outcome. Similarly, the purpose of the reverse hybrid rule is to prevent arrangements that exploit the difference in the tax treatment of an entity to generate a tax advantage or a reverse hybrid mismatch outcome.

Reverse hybrid mismatches are set out separately from the anti-hybrid rules in ATAD[52] and the provisions apply from 1 January 2022[53].

In an Irish context, the provisions are contained in Chapter 10A of Part 35C and apply to tax periods commencing on or after 1 January 2022 (unlike the anti-hybrid rules that apply to payments made or arising on or after 1 January 2020).

## 12.1 Introduction to the reverse hybrid rule

Broadly, the purpose of the reverse hybrid rule is to address tax advantages (being the non-taxation of income) that arise where an entity is a reverse hybrid entity.

In simple terms, a reverse hybrid entity is an entity that is treated differently for tax purposes in the territory in which it is established and the territory of one or more of its investors. Broadly, a reverse hybrid is an entity that is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person, or as tax opaque, by one or more of its participators.

Where this scenario arises, some, or all, of the profits of the reverse hybrid entity may go untaxed. This is referred to as a reverse hybrid mismatch outcome.

Entities that are treated as tax transparent in Ireland and therefore within scope of the reverse hybrid rule include partnership structures[54] and common contractual funds (CCFs)[55].

- Example 1 – an Irish general partnership ABCD

[52] ATAD Art. 9a.
[53] ATAD2 Art. 2(3).
[54] For Investment Limited Partnerships refer to section 739J and for Limited and General partnerships refer to sections 30 & 1008 TCA 1997.
[55] Section 739I refers.

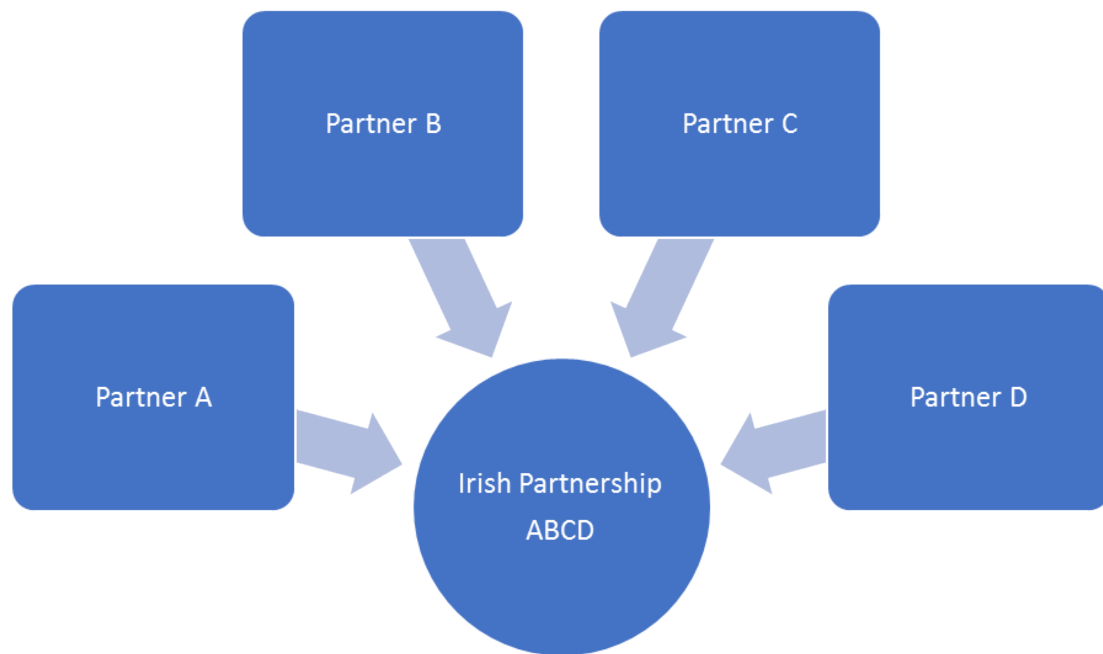


Figure 7: Irish general partnership ABCD

- ✓ Irish partnership ABCD is treated as tax transparent in Ireland. The profits and gains of ABCD are treated as arising directly to the partners.[56]
- ✓ Partner A, B and C are located in territories that also regard ABCD as tax transparent. As such, Partner A, B and C are taxed on their share of ABCD's profits and gains as they arise.
- ✓ However, Partner D is located in a territory that regards Irish partnerships as separate taxable persons. As such, territory D teats the profits and gains as arising to ABCD on its own account such that Partner D is not taxed on his/her share.
- ✓ Partner D's share of the profits essentially goes untaxed because of the conflict in the tax characterisation of ABCD between Ireland and territory D. In this regard, ABCD is a reverse hybrid entity and the non-taxation of the profits is a reverse hybrid mismatch outcome.

Where a reverse hybrid mismatch outcome arises, the hybrid entity (in this case the Irish partnership ABCD) is to be regarded as a resident of the Member State in which it is established (Ireland) and taxed on its income to the extent that income is not otherwise taxed[57]. Essentially, the portion of the profits and gains attributable to partner D is taxed in Ireland as if ABCD was a company resident in Ireland for the tax period.

[56] Sections 30 and 1008 TCA 1997.
[57] ATAD Art. 9a(1).

## 12.2 Chapter 10A – Interpretation (section 835AVA)

Chapter 10A has its own interpretation section which sets out some of the key terms in the application of the reverse hybrid rule.

### 12.2.1 "Reverse hybrid entity" (s835AVA(1))

The term "reverse hybrid entity" means a hybrid entity established in Ireland –

(a) whose profits or gains are treated in Ireland as arising or accruing to its participators (treated as tax transparent in Ireland), and

(b) whose profits or gains are treated as arising or accruing to itself on its own account by some, or all, of its participators (treated as tax opaque in some or all of its participators territories).

Essentially, there is a conflict in the tax characterisation of the entity between Ireland and the territory in which some, or all, of its participators are established.

### 12.2.2 "Relevant participator" (s835AVA(1))

For the reverse hybrid rule to apply, ATAD requires that the entity, or the entity and its associated entities, that regard the reverse hybrid entity as a separate taxable person hold a 50 per cent or more ownership interest ("relevant ownership interest") in it. For the purposes of the Irish reverse hybrid rule, this is referred to as a "relevant participator".

### 12.2.3 "Relevant ownership interest" (s835AVA(1) & (4))

A "relevant participator" holds a "relevant ownership interest" where –

(a) the participator, or the participator and its associated entities, possess or are beneficially entitled to, directly or indirectly, 50 per cent or more of the ownership rights[58] in the entity,

(b) the participator, or the participator and its associated entities, are, directly or indirectly, entitled to exercise 50 per cent of more of the voting power in the entity, or

(c) the participator, or the participator and its associated entities, hold, directly or indirectly, rights entitling them to 50 per cent or more of the profits of the entity.

### 12.2.4 "Associated entities" (S835AVA(2))

In examining the "relevant ownership interest" of a participator, "associated entities" has the same meaning as the term "associated enterprises"[59] used for the purposes of the anti-hybrid rules, subject to the following modifications –

(a) the term "enterprise" shall be construed as a reference to "entity",

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[58] Ownership rights might include a partner's interest in a partnership or units held by unit holders in the case of a common contractual fund.

[59] Refer to section 7 for full discussion.

(b) references to 25 per cent in section 835AA(2) shall be construed as references to 50 per cent[60], and

(c) two entities shall not be treated as "acting together" for the purposes of subsection 835AA(3) solely because they are partners in a partnership.

Without paragraph (c), every partner in an Irish partnership would be a relevant participator because partners in an Irish partnership are, by definition, acting together meaning that each partner would be associated with all of the other partners. The purpose of paragraph (c) is therefore to ensure that the reverse hybrid rule operates as intended by ATAD and that Irish partnerships are not automatically within the scope of the rule solely because the partners are in partnership together. The application of the "acting together" test, in the absence of paragraph (c), would seem contrary to the intent of ATAD as it would result in the 50 per cent or more ownership requirement being effectively meaningless in the context of an Irish partnership.

- Example 2 – Irish general partnership ABCD

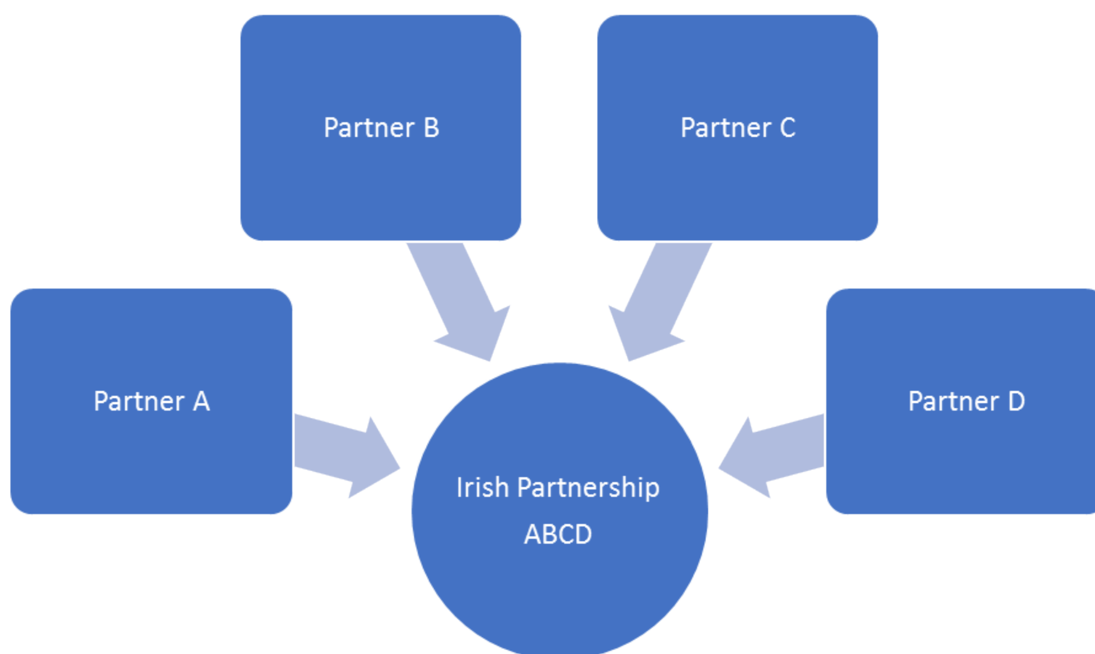


Figure 8: Irish general partnership ABCD

Taking the same example and fact pattern as Example 1 -

- ✓ Partner A, B, C and D each hold a 25 per cent share of ABCD (as set out in the terms of the partnership agreement). On their own, none of them have a "relevant ownership interest" of 50 per cent or more in ABCD.
- ✓ Partner A, B, C and D are not regarded as "acting together" solely because they are in partnership. Therefore, on the assumption that the partners are

[60] ATAD Art.2(4)

not regarded as "acting together" for any other reason their interests should not be amalgamated.

- ✓ Accordingly, Partner D is regarded as holding a 25 per cent share of ABCD.
- ✓ Assuming that Partner D is not associated with any of the other partners, Partner D does not have a "relevant ownership interest" in ABCD and is therefore not a "relevant participator".
- ✓ Accordingly, the reverse hybrid rule does not operate in this scenario.

#### 12.2.5 Territory in which an entity is established (s835AVA(3))

For the purposes of the reverse hybrid rule, the territory in which an entity is established means the territory in which the entity is registered, incorporated or created. Unlike the anti-hybrid rules, it does not mean the territory in which an entity has its effective management.

For example, where a partnership is registered in Ireland, but the majority of partners are based in the UK, the territory in which the partnership is established is Ireland for the purposes of the rule.

### 12.3 "Collective investment scheme" (Section 835AVB)

ATAD provides for a mandatory exclusion from the reverse hybrid rule for a "collective investment vehicle" meaning an investment fund or vehicle that –

1. is widely held,
2. holds a diversified portfolio of securities and
3. is subject to investor protection regulation in the country in which it is established[61].

For the purposes of the Irish reverse hybrid rule, the term used is a "collective investment scheme" so to avoid any confusion with existing terms used in the Taxes Consolidation Act 1997, in the context of Irish investment funds.

#### 12.3.1 "Collective investment scheme" definition

The definition of a "collective investment scheme" essentially follows the criteria set out in ATAD. It means a "relevant investment undertaking" –

(a) that is widely held, and

(b) which holds a diversified portfolio of assets.

#### 12.3.2 "Relevant investment undertaking"

In broad terms, a "relevant investment undertaking" is a tax transparent investment vehicle that is subject to investor-protection regulation in Ireland.

In Ireland, authorised investment vehicles are regulated by the Central Bank of Ireland as either Undertakings for the Collective Investment in Transferable

[61] ATAD Art. 9a(2)

Securities (UCITS)[62] or Alternative Investment Funds (AIFs)[63]. Both UCITS and AIFs are subject to EU standard levels of protection for investors.

There is also another type of AIF which is registered with the Central Bank of Ireland and has a manager (an AIFM) that is authorised by the Central Bank of Ireland[64]. This type of AIF is also subject to EU standard level of protection for investors and therefore also meets the requirement of ATAD.

As the reverse hybrid rule only applies to Irish entities that are tax transparent it is only relevant to include tax transparent UCITS and AIFs in the definition of a "relevant investment undertaking".

Accordingly, a "relevant investment undertaking" means –

(a) a common contractual fund[65],

(b) an investment limited partnership[66], and

(c) a relevant partnership being a partnership, or Limited Partnership under the Limited Partnership Act 1907, that is managed by an AIFM.

To note, where the common contractual fund or investment limited partnership is an umbrella scheme the relevant investment undertaking refers to a sub-fund of that scheme.

### 12.3.3 "Widely held"

ATAD is silent as to the meaning of "widely held" and there is no EU recognised definition of the term in the context of an investment fund and the anti-hybrid rules.

To address this, the Irish approach is to leverage from the concept of a "beneficial owner" as set out in the Fourth Anti-Money Laundering Directive (AMLD4)[67] and which was transposed into Irish law by way of a number of legislative amendments in 2019[68] and 2020[69].

In broad terms, "beneficial owner" means any natural person who ultimately is entitled to, or controls, either directly or indirectly, more than 25 per cent of the capital (or units), profits or voting rights of an entity or otherwise controls the entity[70]
.

[62] Subject to the UCITS European Directives (Council Directive 2009/65/EC, Commission Directive 2010/43/EC and Commission Directive 2010/44/EC)

[63] Subject to the Alternative Investment Fund Managers Directive (Directive 2011/61/EU).

[64] Subject to the Alternative Investment Fund Managers Directive (Directive 2011/61/EU).

[65] Within the meaning of section 739I

[66] Within the meaning of section 739J

[67] Council Directive (EU) 2015/849 of 20 May 2015

[68] The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (S.I. 110 2019) in respect of corporate entities.

[69] The European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) Regulations 2020 (S.I. 233 2020), and the Investment Limited Partnerships (Amendment) Act 2020 which amends the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and the Investment Limited Partnership Act 1994.

[70] This is a broad meaning of the term. A full discussion on the meaning of, and the process of identifying a "beneficial owner" is outside the scope of this manual. For further information, the

For the purpose of the definition of a "collective investment scheme", a "relevant investment undertaking" is considered to be "widely held" where there is no "beneficial owner" in relation to that undertaking. In simple terms, where there is no natural person who ultimately owns or controls more than 25% of the undertaking that undertaking will be considered "widely held".

Under current Irish AML legislation, both CCFs and investment limited partnerships (ILPs) are required to identify and disclose their beneficial owner(s) in the Central Beneficial Ownership Register for Certain Financial Vehicles ("Beneficial Ownership Register[71]") held by the Central Bank of Ireland ("CBI").

In the case of an ILP, where, having carried out all appropriate checks, no "beneficial owner" is identified details of the general partners(s) are entered into the register[72]. In the case of a CCF, where there is no beneficial owner(s) identified details of the senior managing official(s) of the management company are entered into the register[73]. Where either of these scenarios arise the ILP or CCF in question would be regarded as "widely held" for the purposes of the definition of a "collective investment scheme".

As both Irish ILPs and Irish CCFs are required to identify their beneficial owner(s) for AML purposes, the requirement to identify their beneficial ownership for the purposes of the "collective investment scheme" exemption should not be a further burden for these taxpayers.

For a "relevant partnership" that falls within the scope of the exemption it is recommended that the taxpayer follow the guidance provided by the CBI regarding ILPs.

#### 12.3.4 "Diversified portfolio of assets"

The third and final condition of a "collective investment scheme" is that it must hold a "diversified portfolio of assets".

In considering whether a fund holds a diversified portfolio of assets, the legislation sets out a number of factors to consider, both qualitative and quantitative, including the nature of assts, the exposure risk and the number of investments. Each case should be viewed on its own merits; however, a fund shall not be considered to hold a diversified portfolio where -

- the fund holds securities and more than 10[74] per cent of those securities are issued by a single issuer[75], or

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reader is referred to AMLD4, relevant parts of Irish law, as referenced in previous paragraphs of this section, and the Central Bank of Ireland (CBI) website. Some useful information can also be found on the RBO site.

[71] Beneficial Ownership Register

[72] Subsection 3 of section 27A of the Investment Limited Partnerships Acts 1994 and 2020

[73] Subsection 3 of section 18A of the Investment Funds, Companies and Miscellaneous Provisions Acts 2005 and 2020.

[74] The 10% test is based on the market value of the fund.

[75] Based on the Central Bank of Ireland's AIF handbook for Loan originating QAIFs.

- in the case of a fund holding land, unless it holds 3 or more properties and the market value of each is less than 40 per cent of the total market value of all properties held[76].

When considering whether or not a fund holds a diversified portfolio of assets, the structure of the investment may be relevant. For example, in certain circumstances a "relevant investment undertaking" might invest in a diversified portfolio of assets via a mid-tier fund (a fund of fund type structure). In these circumstances, more than 10 per cent of the securities held by the "relevant investment undertaking" will be issued by a single issuer (being the mid-tier fund). Where the mid-tier fund is itself a regulated investment undertaking, in applying the above tests regard should be had to assets held indirectly by the "relevant investment undertaking", through the mid-tier fund, as if they were held directly by the "relevant investment undertaking".

### 12.3.5 Purpose test

During the start-up and wind-down phase of a fund, a purpose test is applied in determining whether a fund is "widely held" and/or "holds a diversified portfolio of assets" in order to fall within the "collective investment scheme" exemption.

During the start-up phase, there is a grace period of 24 months allowed from the date on which the fund makes its first investment where it would be reasonable to consider that the fund will meet the two conditions and that the reason why the condition or conditions are not met is temporary and unavoidable given the specific facts and circumstances of the fund.

Similarly, during wind-down, there is a 12-month grace period allowed where the conditions are no longer met and the reason why the conditions are not met is because the fund is winding down.

Some relief is also allowed in certain circumstances during the life of the fund where the conditions will be treated as being satisfied where there is a temporary breach and that breach is inadvertent and unavoidable given the specifics facts of the case.

## 12.4 Application of the rule (section 835AVC)

The reverse hybrid rule applies to –

(a) a reverse hybrid entity (as defined), that is not a collective investment scheme (as defined), which has a relevant participator (as defined), and

(b) a reverse hybrid mismatch outcome.

[76] Based on section 705B(1)(b)(ii).

## 12.5 Reverse hybrid mismatch outcome (section 835AVD)

### 12.5.1 When does a reverse hybrid mismatch outcome arise?

A reverse hybrid mismatch outcome shall arise where some, or all, of the profits or gains of a reverse hybrid entity that are attributable to a relevant participator are subject to neither domestic tax nor foreign tax.

- Example 3 – Irish general partnership ABCD

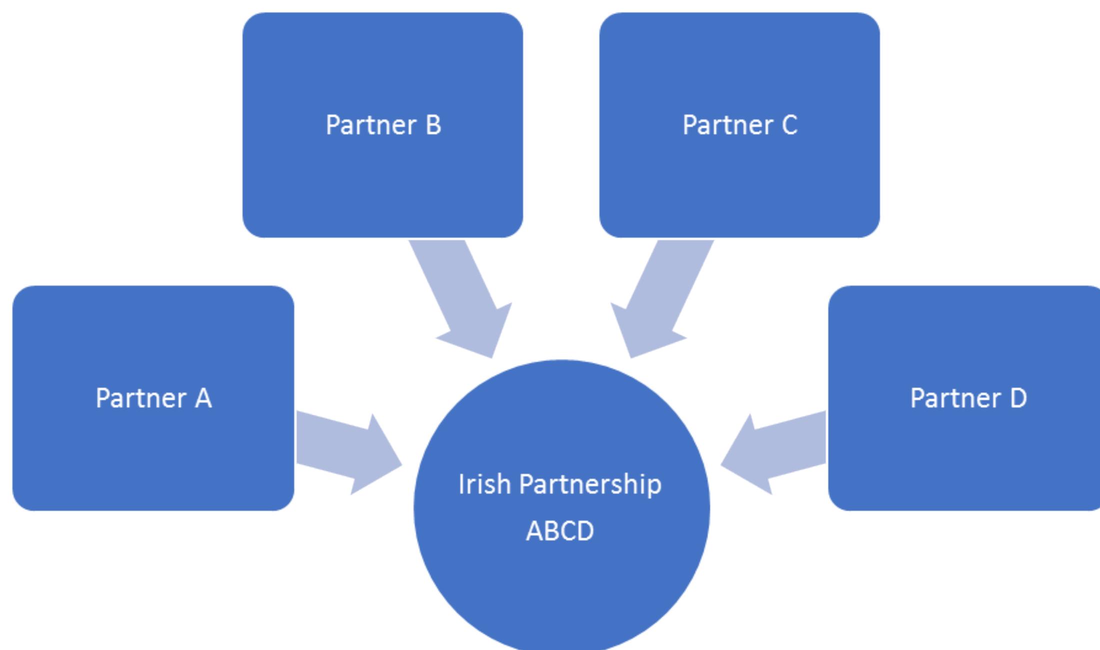


Figure 9: Irish general partnership ABCD

Taking similar facts to Example 1 and 2 –

- ✓ Irish partnership ABCD is treated as tax transparent in Ireland. The profits and gains of ABCD are treated as arising directly to the partners.[77]
- ✓ Partner A, B and C are located in territories that also regard ABCD as tax transparent. As such, Partner A, B and C are taxed on their share of ABCD's profits and gains as they arise.
- ✓ However, Partner D is located in a territory that regards Irish partnerships as separate taxable persons. As such, territory D treats the profits and gains as arising to ABCD on its own account such that Partner D is not taxed on his/her share.
- ✓ In this example, Partner D holds a 51% share in ABCD. Partner D therefore holds a "relevant ownership interest" and is therefore a "relevant participator".
- ✓ Accordingly, the share of the profits that are attributable to a relevant participator, Partner D, goes untaxed in both Ireland and territory D. In this regard, there is a reverse hybrid mismatch outcome.

[77] Sections 30 and 1008 TCA 1997.

While Territory D may always see ABCD as opaque, it may still tax Partner D's share of the profits. Territory D may have a CFC regime under which D's share of the profits in ABCD were subject to a CFC charge. In that case, even though ABCD is a reverse hybrid in respect of a relevant participator, no reverse hybrid mismatch arises.

### 12.5.2 When does a reverse hybrid mismatch outcome not arise?

As set out previously, the reverse hybrid rule does not apply to an entity that falls within the definition of a "collective investment scheme".

A reverse hybrid mismatch outcome shall also not arise where the profits or gains that are attributable to a relevant participator go untaxed in the following circumstances –

(a) Where the relevant participator is a tax-exempt entity such as a pension fund or charitable body (section 835AVD(2)(a)).

(b) Where the relevant participator is established in a territory or part of a territory that does not impose a foreign tax (section 835AVD(2)(b)).

(c) Where the relevant participator is established in a territory that has a territorial system of taxation such that tax is not generally applied to income received from foreign sources (section 835AVD(2)(c)).

In each of the circumstances outlined in (a) to (c) above, the income of the Irish partnership or CCF attributable to the relevant participator would go untaxed irrespective of hybridity either because of the tax exempt status of the participator or the features or a certain tax system. ATAD2 specifically states that the anti-hybrid rules should only apply to hybrid mismatches and should not affect the tax-exempt status of a payee[78] or the general features of a tax system.[79]

### 12.5.3 How is a reverse hybrid mismatch outcome neutralised?

Where a reverse hybrid mismatch outcome does arise the untaxed profits or gains that are attributable to the relevant participator are charged to Corporation Tax in Ireland as if the partnership or CCF was a company resident in the State for that tax period.

Essentially, the partnership[80] or CCF[81] must register for, calculate and pay Corporation Tax in respect of the untaxed portion of profits and gains. In this context, the partnership or CCF will file a Form CT1 for the relevant tax period and complete that form, in respect of the untaxed portion of profits/gains, as if it were a company resident in the State.

[78] ATAD2 Recital 18, 19 and 20.
[79] ATAD2 Recital 24
[80] General and limited partnerships ordinarily file a Form 1(Firms) Partnership Tax Return while an ILP also files a Form ILP1. These entities can use these existing tax reference numbers to register for the purposes of Corporation Tax.
[81] CCFs ordinarily file a Form CCF1. A CCF can use its existing tax reference number to register for the purposes of Corporation Tax.

Taking the facts per Example 3 –

- ✓ Partnership ABCD would firstly have to register for Corporation Tax using its existing tax reference number (per Form 1).
- ✓ The profits and gains of ABCD that are attributable to Partner D (being 51%) would be charged to Corporation Tax, under normal Corporation Tax rules, for the tax period.
- ✓ ABCD would file a Form CT1 and pay the Corporation Tax due, in line with the normal principles of assessment and collection of Corporation Tax.

In terms of calculating, assessing and collecting any Corporation Tax due under the reverse hybrid rule –

- in the case of a partnership all obligations shall be fulfilled by the precedent partner, and
- in the case of a CCF all obligations shall fall on the management company, but the management company shall not be held liable in a personal capacity for any tax imposed.

In order to link the Corporation Tax liability to the relevant participator, so that not all partners (in the case of a partnership) or unit holders (in the case of a CCF) suffer the charge to tax, the legislation provides that where a charge to Corporation Tax does arise the partnership or CCF is entitled to appropriate or cancel such portion of units of the relevant participator as is required to meet the tax liability[82].

### 12.5.4 Interaction with Double Tax Treaty provisions

Where the reverse hybrid rule applies, and the relevant participator is a resident of territory with which Ireland has a Double Tax Treaty, the provisions of that treaty will take precedence to the reverse hybrid rule. Essentially, where the treaty provisions give taxing rights to the participator territory the reverse hybrid rule will not apply to charge the relevant profits or gains to Irish Corporation Tax.

[82] Section 739E(3) sets out a similar provision where there is a charge to investment undertaking tax in certain conditions.

# Appendix I Schedule of material updates

July 2020: Created

March 2021: Updated to reflect amendments for FA20 to:

- Section 5: Worldwide system of taxation (Section 835AB) to reflect the insertion of section 835AB(1)(e) by the Act.

Updated to insert the following new sections:

- Section 3: Interpretation, which sets out some key terms.
- Section 4.1.1: Foreign exchange movements, which sets out an example of how foreign exchange movements might be treated when testing for a corresponding amount.
- Section 7: Associated enterprises, which outlines the various tests for association and when these tests should be considered.
- Section 8: Payee, which provides guidance as to the meaning of the term and how it is applied when testing for a hybrid mismatch.
- Section 9: Imported mismatches, which provides guidance on the policy intent behind the rule and how the rule might apply in practice.
- Section 10: State of knowledge/awareness test, which outlines the “reasonable to consider” and “reasonably be expected to be aware” tests.
- Section 11: Included and tax consolidation, which sets out an example illustrating how a payment might be tested for inclusion in a group tax consolidation context.

June 2022: Updated to reflect amendments for FA21 to:

- Section 3: Interpretation (Section 835Z) to reflect the broadening of the definition of “entity” to include forms of business that do not have legal personality.
- Section 5: Worldwide system of taxation (Section 835AB) to reflect the broadening of the scope of that section to include situations where an individual payee or investor is subject to a system, or effective system, of worldwide taxation.
- Section 7: Associated enterprises to reflect the updates made to paragraph (e) and (f) of section 835AA(2) to ensure the section operates as intended and the insertion of a new

subsection setting out the application of the "associated enterprises" test to Irish partnerships.

Updated to insert new section 12:

- Section 12: Reverse hybrid rule to reflect the introduction, by FA21, of Chapter 10A Reverse hybrid mismatches into Part 35C in line with the deadline prescribed by ATAD2. The section sets out relevant definitions and provides guidance on the operation of the rule.