

Minutes

TALC Subcommittee 'BEPS Implementation' Meeting

Date 10 February 2021

Location & Time Skype Meeting 2.30 pm

Feedback Statement on ATAD Implementation- Article 4 Interest Limitation

- Department of Finance stated that submissions will be accepted until 8th March in relation to the feedback statement which was published in December 2020. It is intended to take a single company approach in draft legislation and it is acknowledged that a robust start is needed. The approach will be to layer rules on to the existing system as there are distinct differences between the ATAD rule and the existing system. The existing interest provisions currently in the TCA 1997 are complex and it is intended to adopt a flexible approach in introducing the new ATAD rule. The Directive allows for optionality and, as the Department cannot do a wholesale review of the existing system, there is potential for targeted changes in conjunction with the Directive. The consultation queries in the feedback statement are reflective of real questions that are being considered. In terms of steps to be taken, the decision itself needs to be examined as well as the wider implications. The 8th March is the deadline for receipt of submissions which will then be discussed. The second feedback statement will be issued in late summer and will resemble the entirety of the framework. Draft legislation will be circulated in the second feedback statement.
- Practitioners opined that layering is an issue as the existing interest rules target different things. From a policy perspective, the layering approach has potential pitfalls in terms of how Ireland compares competitively to other jurisdictions. The disadvantage of such an approach for companies is that there is an additional compliance and administrative burden.
- Department of Finance are cognisant of these issues. However, there is a need to be realistic considering the timeframe. The Irish system is fundamentally different from ATAD and has evolved over years in response to specific abuses. The intention this year is not to change the existing legislation in a fundamental way but the Department is open to looking at what options exist. It may take a number of years to work through a limited suite of measures. However, the most effective measures will be examined.
- Practitioners opined that the existing CGT participation exemption and dividend exemption provisions need to be examined as Ireland is at a disadvantage compared to our competitors in that regard. We remain an unattractive location for international groups coming into this jurisdiction.
- Department of Finance will look at the worldwide/territorial issue again and there is a commitment this year that in Q4, discussions will be held. There is no intention of legislating this year. In relation to the participation exemption, different questions are being put to the wider parties. For example, if Ireland moves to a territorial regime do we need other changes e.g CFC rules, Schedule 24, etc.
- Revenue emphasised that this is a good time to clarify technical queries.
- Practitioners had a specific query in relation to 4.3 of the consultation feedback statement. The query relates to 'what are relevant profits?'. Practitioners provided

an example where the interaction of the interest rule with losses forward and capital allowances gives an undesirable outcome.

- Revenue stated that there is a drafting error. There is only a need to restrict the interest that you get value for. Practitioners requested clarification in relation to the tracking of losses. Revenue clarified that it is the year that you get value that is used. Practitioners opined that this is the missing link in the definition of relevant profits. Practitioners asked in terms of normal expenses versus the interest expense, how does one see the interest expense that you get value for? Revenue gave an example in relation to leasing. Where there are specified capital allowances, they are not considered to be specified. It was the opinion of Revenue to better to give the taxpayer flexibility. Practitioners asked why the Case IV route was chosen as it creates complexities in that it is treated as a clawback. Revenue stated that the issue is Schedule 24. If the interest expense is disallowed, it would affect the Irish measure. The intention is to simplify. Practitioners opined that where the Irish measure is understated, the interest is not recognised by keeping it out of Schedule 24. Where Case IV is used, nothing is allowed to be offset against it and it functions like a clawback. If Case I was used group relief could be used. Revenue will examine the matter.
- Practitioners opined that something like section 420B or another credit allowing other claims could make it work and flexibility would be achieved. A cash tax charge would not be imposed and the entity can surrender extra capacity relief to the group. Department of Finance stated that the intention is not to create cash tax charge. There are complexities and it would be welcomed if practitioners could submit scenarios that can be examined further.
- Practitioners had a query in relation EBITDA and whether EBC is net of the de minimis figure. Revenue opined that it is difficult to construct a single version. The intention behind layering is that it is acknowledged that a group may want to make different choices. Decisions are interlinked and the difficulty is trying to think through all of the decisions in relation to the way that they layer up. Revenue would welcome opinions on those, specifically on layering and how the decisions interact.
- Practitioners asked whether their definition of 'financial undertaking' will be adapted to include some entities and exclude others as the Directive allows this. Revenue did not think that the Directive was allowing exclusions. Practitioners opined that there could be a carve out of certain parts of the definition. For example, there may be a desire to carve out banks, regulatory funds, insurance funds. Department of Finance stated that a narrower definition of 'financial undertaking' can be adopted if there is an exemption allowed. However, there may be some entities that might prefer not to have the exemption. Revenue are of the view that some cases would be better off not having the exemption. Department of Finance stated that these are some of the questions that are being considered. It is necessary to follow the Directive.
- Practitioners opined that the strengths of the Irish tax system is that it is clear and provides certainty. Practitioners queried the treatment of fair value movements through the company accounts. Where a Case I business is providing credit, they would be treating the interest income as fair value movements and cannot split the interest and principle. Revenue are examining this issue.
- Revenue would like practitioners to provide opinions/thoughts on issues pertaining to cryptocurrency and newer transactions. The accounting issues have come up previously and need to be teased out.
- Department of Finance opined that other Member States have brought in interest rules and the Department is open to looking at their approaches.

Draft anti-hybrid guidelines – Part 2

- Revenue stated that in relation to the comments received regarding the draft guidance, most of those comments have been incorporated. The rules are extremely complex and there are structures that are particularly nuanced. It is difficult to look at all scenarios and the guidance is a general document. Each case must be looked at on its own merits.
- Practitioners opined that the guidance is helpful and useful. They welcomed more clarity in relation to the imported mismatch where payments are made to a non-EU jurisdiction and how the UK is treated. Is it viewed similar to the US?
- Revenue stated that the guidance does not contain an exhaustive list. An established jurisdiction will have equivalent legislation. There is a requirement on an Irish company to establish what is meant to happen and does that actually happen in reality. The term 'reasonable to consider' is incorporated into guidance. The onus is on the Irish taxpayer to understand what is happening. If the payment is made to a non-EU jurisdiction they will know that that is the case.?????
- Revenue opined that the US has anti-hybrid rules but still has hybrids. The intention of ATAD is that there is an equivalence across Member States.
- Practitioners queried the treatment of fair value movements. The foreign exchange examples are helpful. Will the same approach be taken in respect of fair value movements/impairments??????
- Revenue opined that some jurisdictions have fair value movements and some do not. Therefore, a clear answer cannot be given. Practitioners had provided examples. However, in relation to the second example Revenue is not sure where the mismatch is. Also in relation to the first example, where there is an Irish subsidiary of a US parent, Revenue would welcome background on that.
- Practitioners presented an issue regarding the treatment of partners as investors who are interpreted as acting together. They believe that this is a tough interpretation and that there should be relief in those circumstances which would be consistent with case law (look at 'intent' and 'pattern of behaviour'). The OECD report does not take such a narrow view and there is an exception for collective investment vehicles. There may be a case where there is a genuinely widely held fund which is not making collective decisions. It would be helpful if a more flexible approach can be taken.
- Revenue stated that paragraph 7.1.3 emphasises the 'case by case' approach. There is no carve out for partners. Practitioners accept this as a fair approach and perhaps they were incorrect in reading this paragraph. Revenue stated that each partnership must be looked at and that the approach is fact specific. Revenue explained that the worldwide provisions are about corporate groups (they do not apply to income tax) and that working party IV specifically targets investment partnerships where they are the source of hybrid transactions. Revenue would be hesitant to include anything further on partners in the guidance.
- Practitioners expressed the view that, as guidance was circulated late last week, they would welcome the opportunity to provide additional feedback. Revenue stated that the guidance is a living document and, as it is intended to publish as soon as possible, feedback would need to be submitted quickly. It was agreed to submit feedback by c.o.b Monday 15th February.

Action Points

Revenue will publish the Transfer Pricing guidance by the end of February.

Attendees of meeting of 10 February 2021:

CCAB – I: Enda Faughnan, Maud Clear, Kevin Doyle, Paschal Comerford

ITI: David Fennell, Anne Gunnell, Peter Reilly, Gareth Bryan,
Emma Arlow

Law Society: Caroline Devlin, Andrew Quinn, Aidan Fahy, Niamh Caffrey

Department of Finance: Deirdre Donaghy, Lorraine Caulfield

Revenue: Jeanette Doonan, Áine Hollingsworth, John Quigley, Mary Breen, Lynda O'Keefe, Sheila Mullally, Yvonne Ruane, Audrey Bridgeman