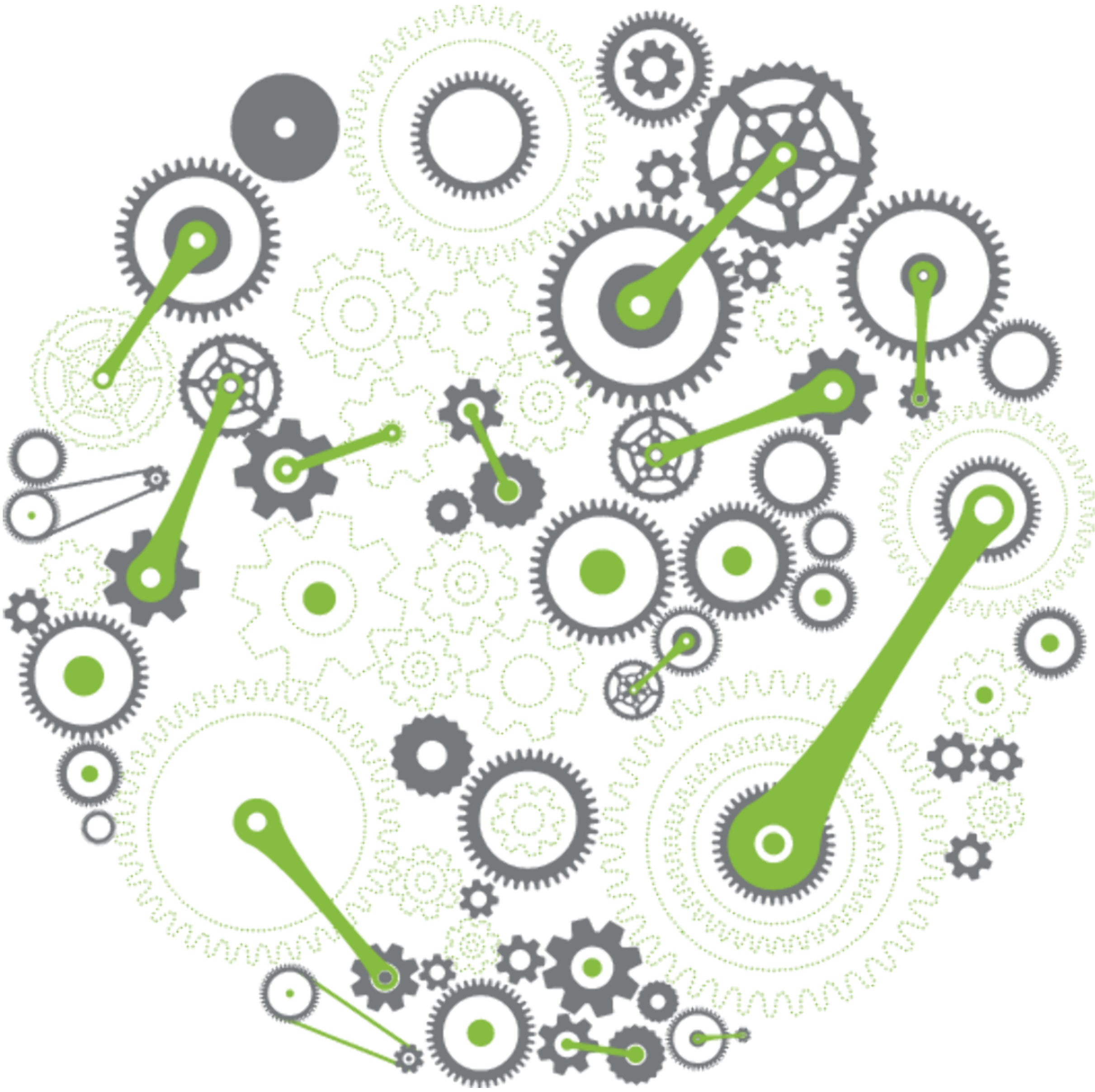
Deloitte.



Article 4 Interest Limitation

Public Consultation Response

16 August 2021

Deloitte.

Deloitte Ireland LLP
Deloitte & Touche House
29 Earlsfort Terrace
Dublin 2
D02AY28
Ireland
Tel: +353 (1) 417 2200
Fax: +353 (1) 417 2300
Chartered Accountants

www.deloitte.com/ie

16th August 2021

ATAD Implementation – Interest Limitation Feedback Statement
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

VIA EMAIL: ctreview@finance.gov.ie

Dear Sirs/Mesdames:

We are pleased to submit comments on behalf of Deloitte in response to your Feedback Statement of 2 July 2021. We appreciate this opportunity to share our views and trust that you will find our comments valuable to the discussion.

We look forward to continued collaboration with the Department of Finance on this and other tax initiatives, and are available to discuss anything in this document, as needed. In the meantime, if you have any queries, please do not hesitate to contact us at 01-417-2200.

Yours sincerely,

Lorraine Griffin
Partner
Head of Tax and Legal

Tom Maguire
Tax Partner

Contents

1. Executive Summary

This document outlines our thoughts on the detail of the proposed legislation as outlined in the Feedback Statement. We appreciate that by its nature the Feedback Statement does not contain the full proposed legislation and therefore some of the comments included in this document may already be addressed in the wider proposed law. However, we would emphasise the following points:

- As a general matter, the interest limitation rules need to take account of international best practice on the adoption of the OECD BEPS Action 4 report.
- We would recommend that clarity be provided as early as possible on the policy options which may be taken or rejected by the Department of Finance to permit specific industries sufficient time to consider the ramifications for their businesses; for example, the implications for restricted interest deductibility for non-bank financial entities.
- It is important that measures taken in the enacting of the interest restriction rules do not go beyond what is necessary to implement the Directive in that this has the capability to interfere with our competitiveness vis a vis other countries. Their enactment should avoid complexity and additional administrative burdens as much as possible. We have highlighted in our response certain proposals in the consultation document which suggest broadening the scope and implementation of the interest limitation rule beyond what is required in the ATAD. In our view, it is critical that such measures and proposals are realigned to what is required by the directive and does not go further.
- The removal of the previously suggested Case IV charging mechanism in the prior Feedback statement of December 2020 is welcome in light of the unintended consequences identified with respect to same. While we welcome the alternative mechanism involving a value basing of relevant profits to address differences in rates of corporation tax, we have outlined a number of considerations which arise on foot of proposal now contained in the Feedback statement e.g. we would argue it appropriate that the “ITDA” element of the “EBITDA” formula be value based to correspond with such treatment in “E”.
- The calculation of the various components of the interest limitation rule including the calculation of the Equity ratio and Group ratio rules should be as clear as possible and should not require taxpayers to “unpick” consolidated accounts insofar as is necessary.
- The reporting mechanism for the interest restriction rules should ideally build on existing corporation tax return obligations. While the calculation and application of the interest restriction rules will undoubtedly result in an additional compliance obligation, it is vital to ensure that the new rules do not impose an additional burden that taxpayers may find unworkable.

2. Overview of proposed approach

Question 1
Comments are invited on this possible approach, including whether any other matters should be considered in the transposition process.

(Please note: more detailed questions relating to each step are contained later in this paper, so responses to this question should focus on the general approach.)

The proposed nine step approach in the calculation of the ILR is welcome in terms of providing taxpayers and advisors with a mechanical, step by step process to apply the provisions. Commentary and observations as to each step is detailed in Part 3 of our response and therefore will not be replicated in depth in this part (Part 2).

3. Definitions to support the nine step approach

3.1 Step 1: Identify the relevant entity

> *'**relevant entity**' means a company, or where* section XXX [interest group provision] *applies, the interest group;*

> *1) For the purposes of this Part, an **interest group** —*
> *(a) shall include all companies that are deemed to be members of a group of companies under* section 411*, and*
> *(b) [shall not include a financial undertaking]*,*
> *and a 'member of an interest group' shall be construed accordingly.*
>
> *(2) Where a company, branch or agency, as the case may be, or any activities of that company, branch or agency, falls to be included in either two interest groups, or an interest group and an equivalent grouping in another Member State, then that company, branch or agency shall elect to be treated as a member of one such group only.*
>
> *(3) Notwithstanding* subsection (1)*, a company may elect not to be a member of an interest group.*
>
> *(4) The election referred to in* subsection (3) *shall —*
> *(a) apply for a period of [three] years from the beginning of the accounting period in respect of which the election is made,*
> *(b) be made in such form as the Revenue Commissioners make available, and*
> *(c) be made on or before the specified return date for the accounting period to which the election first relates.*
>
> *(5) Where no accounting period ends on the same day that the period of [three] years referred to in* subsection (4)(a) *ends, the election shall remain in effect until the end of the last accounting period which commences prior to the end of the period of [three] years.*

> **Question 2**
> Comments are invited on these possible definitions of 'relevant entity' and 'interest group' and, in particular, how the possible definition of an 'interest group' interacts with the group ratio rules.

With respect to the proposed definition of an "interest group", ATAD1 provides the following with respect to interest groups as a single taxpayer:

"For the purpose of this Article, Member States may also treat as a taxpayer

(a) an entity which is permitted or required to apply the rules on behalf of a group, as defined according to national tax law;

(b) an entity in a group, as defined according to <u>national tax law</u>, which does not consolidate the results of its members for tax purposes. In such circumstances, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and comprise the results of all its members".

It would therefore appear appropriate that the definition of interest group is defined by reference to existing group relief provisions in S411 TCA 1997.

However, TCA97 s411(1) explains that "2 companies shall be deemed to be members of a group of companies if one company is the 75 per cent subsidiary of the other company or both companies are 75 per cent subsidiaries of a third company." It may be appropriate to amend the definition of interest group to say that an interest group comprises companies which are subject to Irish corporation tax which are members of a group of companies under section 411. In that way, it would not be necessary to look to foreign companies to establish their EBITDA under Irish rules. We note from a webinar held by the Department of Finance on 19th July that the definition of a "relevant entity" and "interest group" would include only those companies which are subject to Irish corporation tax. This would be a useful clarification. We recognise the alignment between the interest group definition and the loss relief group as a practical one which should facilitate the sharing of attributes between group members without any significant modification of the Irish tax system.

Subsection (1)(b) of the definition states that an interest group shall not include a financial undertaking. The feedback statement indicates that this may not find its way into the final legislation but we would argue, as we did in our previous submission, that whether a financial undertaking is within or without the interest group should be at the election of the taxpayer.

Subsection (2) of the definition of "interest group" is curious in that it allows a company, branch or agency to elect to be treated as a member of one interest group, be it an Irish or foreign such grouping. It should be the case that such election will only be binding on the Irish authorities.

With respect to the elections referred to in the proposed definition of interest group, the drafting of the above section at present provides for a time limit for election under subparagraph (3); however, no corresponding detail is provided for the election which may be made at subparagraph (2) where a company, branch or agency is included in two interest groups. Clarity would be welcome as to the form of such an election.

Subsection (3) allows a company elect that it not be a member of an interest group. This election is welcome but the question arises as to the form of that election, will it be a part of the individual company's Form CT1 or otherwise. In the interest of reducing any administrative burden we would suggest it be sufficient that an election be taken to have been made where the respective company does not make reference to interest groups etc. as part of its corporation tax return. The reader is directed to our comments on reporting in Part 6 of this document.

We would argue that financial undertakings should be allowed to form an "interest group" where the financial undertaking exemption is brought about. Investment undertakings (as defined in TCA97 s739B

TCA) should be included as part of an interest group, whether they are constituted in corporate form (e.g. ICAV) or in authorised unit trust form. In addition, companies held by securitisation companies as described in TCA97 s110 should also be allowed participate in an interest group. TCA97 s411 excludes companies whose share capital is owned by a company "*if a profit on the sale of the shares would be treated as a trading receipt of its trade*" and in certain instances those companies would not be within an interest group on the basis of TCA97 s411. This should be catered for as part of the interest group provisions.

Lastly, in terms of the definition of an "interest group" and its interaction with the two "group ratio" rules provided for in Article 4(5), we would note the following general comments:

- Equity Ratio Rule[1]: Where the interest group is defined as proposed, such companies may not prepare consolidated accounts and therefore may not have ready access to the total equity and assets required for the calculations underpinning the Equity Ratio Rule. The question of the existence of local consolidated accounts is something that we will revert to as part of the discussion of the equity ratio rule.
- Group Ratio Rule[2]: Other than the existence of local consolidated accounts mentioned above, we would not envisage significant difficulties in applying the results to an interest group as defined. This is due to the revised fixed ratio relying on exceeding borrowing costs relating to third party loans divided by the group EBITDA (i.e. the consolidated group for financial accounting purposes, not the local interest group defined as proposed).

3.2 Exemptions and exclusions

3.2.1 De minimis amount

We have no comments with respect to the de minimis amount, as its inclusion in domestic law would appear appropriate and in line with ATAD.

3.2.2 Standalone entities

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

'***associated enterprise***' *means an enterprise that is associated with another enterprise under* subsections (1) *to* (4) *of* section 835AA, *other than enterprises which would be considered associated enterprises pursuant only to* sub-paragraphs (e), (f) or (g) *of* section 835AA(2)*;*

'***enterprise***' *has the meaning assigned to it in* section 835Z(1)*;*

'***entity***' *has the meaning assigned to it in* section 835Z(1).

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

[1] Article 4(5)(a) ATAD 1
[2] Article 4(5)(b) ATAD 1

Article 2(4) of ATAD as follows:

(a) *An entity in which the taxpayer holds directly or indirectly a participation in terms of voting rights or capital ownership of 25 percent or more or I entitled to receive 25 percent or more of the profits of that entity;*

(b) *An individual or entity which holds directly or indirectly a participation in terms of voting rights or capital ownership in a taxpayer of 25 percent or more or is entitled to receive 25 percent or more of the profits of the taxpayer.*

This has the potential of narrowing the definition of “standalone entity” and therefore we would argue that the definition of “associated enterprise” not go beyond that in the ATAD.

Article 2(4) defines an “associated enterprise” by reference to a direct or indirect holding or capital or voting rights etc. The extension to the previous feedback statement’s definition of “associated enterprises” by excluding sub-para TCA97 s835AA(2)(g) which deals with certain “significant influence” requirements is welcome. However, the definition of “associated enterprise” in TCA97 s835AA goes far beyond such an approach and as such we would recommend that the definition of such enterprises adhere to that of the directive.

The use of the definition of “enterprise” from the anti-hybrid rules would mean that a company owned by 4 or fewer individual shareholders could not be a standalone entity, i.e. a traditional family or sole trader business operating via a single company would not be treated as a standalone entity. This may bring about a significant burden for SMEs generally.

3.2.3 Financial Undertakings

[Financial Undertaking

*(1) For the purposes of this Part, '**financial undertaking**' means —*

(a) a credit institution as defined in Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013;

(b) an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014;

(c) an alternative investment fund manager, as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011;

(d) a UCITS management company, as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009;

(e) an insurance undertaking, as defined in point (1) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009;

(f) a reinsurance undertaking, as defined in point (4) of Article 13 of Directive 2009/138/EC of 25 November 2009;

(g) an institution for occupational retirement provision (IORP) falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 as amended by Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016;

(h) a pension institution operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 as well as any legal entity set up for the purpose of investment of such schemes;

(i) an alternative investment fund (AIF), that is either managed by an AIFM as defined in point (b) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 or supervised under the applicable national law;

(j) a UCITS, in the meaning of Article 1(2) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009;

(k) a central counterparty, as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012; and

(l) a central securities depository, as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014.]

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

The financial undertaking exemption as envisaged above would apply only to certain entities within financial services groups and may be of limited benefit to reducing the compliance burden necessitated by the ILR provisions. We note that major European economies such as Germany, France, the Netherlands and the UK have not included this exemption in their equivalent provisions.

The reader will note that in our response to the December 2020 Feedback Statement, we had expressed the view that the exemption should be provided for in domestic legislation on an optional basis to allow flexibility to taxpayers. We are still of that view and recommend such optionality be included.

As noted earlier as part of our discussion interest groups we would argue that Irish companies that are wholly-owned subsidiaries of Irish regulated UCITS and QIAIFs should be treated as part of the UCITS or QIAIF (as the case may be) for the purpose of the ILR exception. Many Irish regulated funds have wholly-owned subsidiary Irish companies which must adhere to the Central Bank's UCITS or AIF rulebook. We have no further comments on the definition which is in accordance with ATAD.

3.2.4 Legacy debt exclusion

> ***'legacy debt'** means a debt the terms of which were agreed before 17 June 2016.*

> ***'the amount in respect of legacy debt'** in respect of an accounting period means an amount calculated as the lower of —*
> *(a) the deductible interest equivalent that arises on legacy debt in that accounting period, or*
> *(b) an amount of deductible interest equivalent that would have arisen in respect of that accounting period based on the terms and principal of that debt as they existed on 17 June 2016.*

> **Question 5**
> Comments are invited on this possible definition of 'legacy debt' and more generally on the concept of a modification in the context of legacy debt. Comments are invited on how this drafting would apply in respect of drawdowns on revolving credit facilities and phased drawdowns of loans under existing debt agreements.

We would note that the drafting above differs from that contained in the December 2020 Feedback Statement, the latter containing a reference to "modifications on the debt, the principal drawn down or the interest rate on that legacy debt". Instead, the current drafting of para (b) in "the amount in respect of legacy debt" refers to the "terms and principal of the debt as they existed on 17 June 2016". This necessitates a comparison of the deductible interest equivalent that would have arisen under the original terms compared to the deductible interest equivalent that arises under the new terms. This suggests that a change to the terms and principal of the debt would constitute a "modification" and such modification may have an impact on the deductible interest equivalent incurred by the taxpayer – it is our expectation therefore that amendments to a loan agreement that do not materially impact on the interest charged (i.e. payment terms, timeline etc.) should not constitute a modification.

While the removal of the word "modification" from the above drafting would limit the requirement for a definition to provide clarity, it can in our view creates a level of uncertainty for taxpayers.

In particular, we note that the December 2020 Feedback Statement provided confirmation that …"a loan entered into before 17 June 2016 would not be regarded as having been modified, and the ILR would not apply, in circumstances where, as a result of benchmark reform and/or withdrawal, it is necessary to replace the reference rate on the loan with a comparable benchmark (for example, due to LIBOR being phased out)."

No such confirmation has been provided in the current Feedback Statement and we would be concerned that the use of the phrase "terms and principal" may not be wide enough to capture such amendments. Similarly, we would reiterate our view previously expressed in our response to the 2020 December Feedback statement that any revisions to the terms of a loan as a result of updated Transfer Pricing rules brought about by Finance Act 2019 should not fall foul of the grandfathering provisions allowed for in ATAD.

Para (b) above seems to provide a fiction when it speaks of an amount of deductible interest equivalent "that would have arisen in respect of that accounting period" based on the terms and principal of that debt as they existed on 17 June 2016. This seems to suggest that the terms and principal could differ between the accounting period under review and those at 17 June 2016. The principal could differ e.g. due to the amount being repaid between the two dates and the terms could have changed due to modifications in the terms. Indeed, the deductible interest equivalent could be based on different terms due to transfer pricing requiring an arm's length amount being imposed.

We understand from the public consultation call of 19 July that para (b) may look at facilities that were drawn down after 17 June 2016 but where the terms were agreed before that date. While the definition of "legacy debt" allows looking at the actual debt outstanding at any point in time and asking the question as to whether its terms were agreed before 17 June 2016 "the amount in respect of legacy debt" looks to the terms and principal of the debt as they existed on 17 June 2016. The latter could be nil in the absence of a drawdown prior to that date in that a facility has been agreed but absent a drawdown on that facility then a debt would not exist in that instance. We would argue consideration be given to replacing "debt" with "an agreement" given that a debt exists when one person owes consideration to another person and debt may not exist until drawdown has occurred.

Where a phased draw down is originally envisaged when the facility was arranged and which has been reflected in the loan agreement in question, we would argue that the policy should be that interest arising on any such debt should be able to avail of the legacy debt exemption. We would hold the same view with respect to revolving credit facilities; to the extent that such credit facilities are originally envisaged and provided for in the original terms of the debt agreed prior to 17 June 2016. We would be of the view that any deductible interest equivalent arising as a result of such credit facility should be within the legacy debt exemption.

During the webinar on 19 July, a reference was made to specified future drawdowns. We do not see that a distinction should be drawn between facilities with provisions for pre-agreed drawdowns and those which permit ad hoc borrowings, such as revolving credit facilities (which operate much like personal overdraft facilities but generally on a 5, 10 or 15 year basis).

3.2.5 Long term public infrastructure projects exclusion

Question 6

Comments are invited on this possible approach to defining a 'long-term public infrastructure project', including by reference to the legislation and regulation.

In responding to this question, please also comment on any potential considerations relevant to State aid compatibility.

Certain industries and indeed certain corporate bodies bear proportionately greater debt burdens than others, including those operating in the infrastructure sector. Indeed, in the infrastructure sector it would not be unusual to have interest burdens closer to 100% of EBITDA, as opposed to the 30% under the ILR. Long-term public infrastructure projects need certainty of treatment, especially as any unforeseen costs can be borne by the State. We believe that the interest restrictions should not apply to long-term infrastructure loans for several reasons. The imposition of a restriction on long-term infrastructure loans will inevitably discourage planned and future projects by making them more expensive. Worryingly, current projects will too be put at risk and the continued viability of such projects may not be sustainable which could require the cost of continuity to be borne by public finances. Long term infrastructure projects are by their nature capital intensive which requires a significant level of debt and certainty of cashflows in order for finance to be raised at the lowest cost. Many projects involve both private and public sector investment often with Government backing. To impose restrictions on these projects would decelerate investment in infrastructure in Ireland.

This exclusion from interest limitation needs to avoid a situation where there is a narrow interpretation such that only Public Private Partnerships and Private Finance Initiative arrangements could qualify for the exclusion. On legislating for this exclusion, the Government needs to adopt a wide definition such that projects passing a public benefit test should qualify. For example, this would mean that projects that have significant public sector involvement such as social housing, energy generation, waste treatment and development of information technology and communication systems among many other areas, should all benefit from this exclusion. It is important to consider from a practical application that taxpayers should be able to request and obtain advance clearance from the relevant authority that their project is for a public benefit, and thus passing a key test to claim this exclusion.

Given the importance of infrastructure to Ireland, it is essential that tax barriers are not increased.

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

3.3.1 Relevant Profit or loss

Relevant Profit or Loss

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

(2) *In calculating the relevant profit, no account shall be taken of any income or expenses relating to a qualifying long-term infrastructure project, and where a relevant entity carries on activities other than a qualifying long-term infrastructure project, income and expenses shall be apportioned on a just and reasonable basis.*

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

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

The first limb of para (1) of the definition above speaks of the "amount of profits on which corporation tax falls finally to be borne" and then amends this by requiring the taxpayer to effectively ignore any deduction for losses forward from prior periods in the calculation of the relevant profits. TCA97 s4(c) explains that abovementioned expression as being a reference "to the amount of those profits after making all deductions and giving all reliefs that for the purposes of corporation tax are made or given from or against those profits, including deductions and reliefs which under any provision are treated as reducing them for those purposes". The above is silent on losses thrown back from previous periods and we discuss that further below.

It is presumed that the value basing in the latter limb of para (1) is linked to the above-mentioned expression without regard to tax credits e.g. R&D credit, double tax relief credits that can be taken in computing the corporation tax payable by the respective company. In that regard, it may be a useful clarification to add "without regard to reductions in corporation tax payable" in the value basing limb.

Additionally, if the intention of the ILR is to identify and apply any restriction based on a taxpayers *current* tax EBITDA on a year by year basis, we would argue that relevant profits should be computed prior to any loss relief carried back from later years. Such a position should not impact on the ILR policy provisions as currently proposed in the Feedback statement, as any loss relief carried back would be ascertained in a period after the period in which the ILR is considered (i.e. for the year ending 31 December 2022 with a statutory return deadline of 23 September 2023, any loss relief carried back from FY23 to FY22 will not be fully identified and ready for carry back until 2024 at the earliest). However, we do not expect any technical amendment to be required to S396A TCA97, as such provisions refer to the losses being set against income and not "profits on which corporation tax falls finally to be borne" (as in the definition of relevant profits). Accordingly we would argue that the carry back of losses from later years should not impact on the calculation of relevant profits and there should be no circularity in the application of the law. We would welcome confirmation that our understanding of the policy in this regard is correct.

Subject to the above clarifications, then it should not be difficult to ascertain the "*amount of profits on which corporation tax falls finally to be borne*" for a single entity. However, the matter may not be as straightforward in arriving at that amount for an interest group. In particular, para 4.1 of the feedback statement requires that "amounts computed in respect of an interest group for the purposes of this Part shall comprise the results of all the members of the interest group disregarding the results of transactions between members of the interest group;". Before continuing, it can be seen that transactions between group members are to be disregarded could be a very difficult administrative exercise for companies and which would more likely than not comprise self-cancelling transactions over time i.e. income in one company would be an expense in another company. In addition, as a general point an interest group as defined would be unlikely to engage in local consolidation.

If we continue the above, say one member of the group (A) had a trading loss of €100k and another (B) had a trading profit of €150k. A group relief claim under s420A is not made as A decides to carry that loss forward to future year and so B pays tax at 12½% on its trading profits of €18,750. For the purposes of calculating the "relevant profit" for the interest group does that mean that profits and losses from all sources are aggregated for the group such that relevant amount to €50k (being Case I of €150k in A reduced by €100k losses in B) or would the calculation merely value base the tax payable by reference to the tax rate applicable to those profits of the interest group of €18,750 (before credits as discussed above). Value basing such amount would arguably not disregard the transactions between group companies as one company could pay tax on profits from sales to another etc. However, it would be based on the actual tax payable and would bring about some simplicity of application.

Para (3) refers to relevant losses and it is difficult to determine the method by which a relevant loss could "produce an amount of corporation tax equal to the amount of corporation tax computed for…" an accounting period. In that instance the loss being valued based in calculating a relevant loss in a similar manner to relevant profits would show the amount of tax that could be reduced by such a loss.

If the intention is that relevant losses incurred (as opposed to 'used' in reducing profits) in an accounting period are to be taken into account in computing EBITDA (see definition of 'D' in the definition of EBITDA at para 3.5 of Feedback statement) then see examples outlined below as to possible interpretation of the above. We have added in potential EBITDA calculations here which we will refer to later in this submission.

No relevant losses	€		€	
Case I	100.00	12.5%	12.50	
Case III	20.00			
S247 interest	(15.00)	25.0%	1.25	
Profits on which corporation tax finally falls to be borne	105.00			
Tax computed for that accounting period			13.75	
Relevant profits			110.00	
(i.e. Tax computed above Grossed up at rate in TCA97 s21(1)(f) – 12.5%)				
	E	**I**	**value based I**	**EBITDA**
	110.00	15.00		125.00
	110.00	0.00	30.00	140.00
Relevant losses	€		€	
Case I	(100.00)	12.5%	0.00	
Case III	20.00			
S247 interest	(15.00)	25.0%	1.25	
Profits on which corporation tax finally falls to be borne	n/a			
Tax computed for that accounting period			1.25	
Relevant profits			10.00	
(i.e. Tax computed above Grossed up at rate in TCA97 s21(1)(f) – 12.5%)				
	E	**I**	**value based I**	**EBITDA**
	10.00	15.00		25.00
	10.00	0.00	30.00	40.00
Relevant losses (alternative calculation)	€		€	**Value based**
Case I	(100.00)	12.5%	0.00	(100.00)
Case III	20.00	25.0%		40.00
S247 interest	(15.00)	25.0%		(30.00)
Profits on which corporation tax finally falls to be borne	5.00	25.0%	1.25	
Tax computed for that accounting period			1.25	
Value based claim TCA97 s396B	10.00	12.5%	(1.25)	0.00
Tax payable			nil	
Relevant loss	(90.00)			(90.00)
No grossing up necessary as loss remaining already calculated at 12.5% rate				
	E	**I**	**value based I**	**EBITDA**
	(90.00)	15.00		(75.00)
	(90.00)	0.00	30.00	(60.00)

*The case III income above does not constitute interest income.

The alternative calculation outlines two potential treatments of EBITDA. On the second option it is assumed that the alternative calculation would mean that a "relevant loss" would flow into the EBITDA calculation. However, we would welcome comments in connection with the above. Also, we would direct the reader to our comments on the calculation of EBITDA as regards the treatment of foreign tax.

In general, absent the application of TCA97 s83, interest as a charge cannot be carried forward and therefore would make sense to restrict only the interest "used" to reduce income concerned. If any excess

were to be subject to a group relief claim then we would argue that the "recipient" of the relief would be subject to the restriction as opposed to the surrendering party.
Where value based relief is claimed (either through the operation loss relief[3] or relief for charges on income[4]), such a claim operates to reduce the corporation tax payable as opposed to taxable profits. We understand that the intention is to amend the definition of "relevant profits" to reflect such value based relief. We would welcome discussion on such an amendment once the draft legislation is published.

3.4 Steps 3 and 4: Calculate taxable and deductible interest equivalent

3.4.1 Interest equivalent

*'**interest equivalent**' includes any amount of —*
(a) interest,
(b) amounts economically equivalent to interest including -
(i) discounts,
(ii) the finance cost element of finance lease payments,
(iii) amounts under derivative instruments or hedging arrangements connected with the raising of finance,
(iv) foreign exchange gains and losses related to interest on instruments connected with the raising of finance,
(c) amounts in connection with raising finance, including -
(i) guarantee fees, and
(ii) arrangement fees, and

shall also include any amount arising from an arrangement, or part of an arrangement, which could reasonably be considered, when the arrangement is considered in the whole, to be economically equivalent to interest.

3.4.2 Taxable interest equivalent and deductible interest equivalent

*'**taxable interest equivalent**' means the amount of interest equivalent that is income, profits or gains taken into account in calculating the relevant profit or loss of a relevant entity*

*'**deductible interest equivalent**' means the amount of interest equivalent that is deductible in calculating the relevant profit or loss of a relevant entity*

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

<u>*Definition of Interest equivalent*</u>

"Interest equivalent" is arguably the most critical definition for the purposes of the ILR in that it will determine the application or not of the rule. Therefore it should be:

[3] S396B TCA97
[4] S243B TCA97

1. Made as clear as possible without regard to guidance (although acknowledging that guidance on these complex provisions would be welcome); and
2. Should not interfere with Ireland's competitiveness vis-à-vis other jurisdictions.

On point (1) it may be necessary to defer to guidance on what is meant by "economically equivalent to interest". This is a difficult term in itself and the BEPS Action report 4 explains it as follows *"Payments that are economically equivalent to interest include those which are linked to the financing of an entity and are determined by applying a fixed or variable percentage to an actual or notional principal over time. A rule should also apply to other expenses incurred in connection with the raising of finance, including arrangement fees and guarantee fees".*

It can be seen that para (b) of the definition of "interest equivalent" is written on an inclusive as opposed to exhaustive basis. On the treatment of operating leases under IFRS16 an element of rentals (whether for business premises, equipment assets etc.) is now accounted for as if it were a finance cost rather than rent. No finance is raised and, in contrast to the position of the finance element of finance lease rentals, it is not included within the definition of "borrowing costs" in ATAD. As noted below, it is specifically excluded from the concept of borrowing costs in the BEPS Action 4 report. Clarity on the treatment of operating leases would be welcome and may be appropriate to the element of an operating lease which is accounted for as a finance cost to be so regarded for the purposes of the restriction where the taxpayer so elects.

The definition of "interest equivalent" was discussed on the 19 July webinar and participants were invited to make specific comment in relation to the treatment of fair value movements on financial instruments and the extent to which they are, should be or could be included in that definition. The issue is of particular relevance to financial institutions such as banks but also to securities houses and financial traders the number and extent of which has significantly increased post-Brexit. In the absence of any statutory definition, we would expect that interest to be regarded as "payment by time for the use of money" as formulated by Rowlatt J in Bennett v Ogston. Various subsequent cases determined that it is something which accrues from time to time in contrast to discount which arises upon realisation. The proposed statutory definition includes "amounts economically equivalent to interest including … discounts" within the definition of "interest equivalent". We recognise that, in the appropriate circumstances, discount can be economically equivalent to interest. This can be readily appreciated by the issuance of Exchequer Bills by the NTMA on behalf of the State where, under more normal market conditions than exist at the moment, the discount reflects the short term borrowing cost of the issuer and takes account of little else.

By contrast, for financial institutions, discount is most often recognised as a component of the fair value movement in relation to financial assets (whether these be loans, such as home mortgages, or bonds). Without further clarification, the issue which will be faced (irrespective of the financial undertakings exemption) is the extent to which the amounts recognised in the income statement constitute "interest equivalent" for the purposes of the interest limitation rules. Take the example of a financial institution which acquires a loan book at a substantial "discount" to the nominal value of the loans. The loans may be accounted for at fair value through profit & loss (FVTPL), fair value through other comprehensive income (FVOCI) or amortised cost determined by the factors relevant to the acquisition and retention of such assets. Over time, the financial institution will recognise interest income on the loan book to the extent it is expected to be recoverable. In addition, unless the loan is repaid at the precise discounted amount, further income or expense will be reflected in due course either in respect of the change in fair value of the asset (FVTPL) or its redemption/sale price (FVOCI or amortised cost). In either case, this further income or expense reflects the difference between the discounted price at which the loan was acquired and its ultimate value. It may be referred to as discount and, where the asset was held as part of a financial trade, would be regarded as forming part of the schedule D case I profits. However, such amounts would not be "payment by time for the use of money" and thus might not be regarded as economically equivalent to interest - rather they represent the profit/loss accruing to the financial institution from e.g. acquiring distressed or challenged loan assets.

The clarity which is required is whether such gains/losses should be regarded as taxable/deductible interest equivalent or not regarded as interest equivalent at all. This would facilitate the orderly introduction of the interest limitation rules for financial institutions. Many such institutions will finance such asset acquisitions by way of sub-participation or securitisation. Accordingly, in respect of some or all of the assets which they hold they will have equal and opposite deductible expenses to the income/gains which they have realised. In such circumstances, it is important to achieve equality of treatment for both the income and expense, i.e. whether it is intended that each be included or excluded from “interest equivalent” whether income or expense. Consideration should be given to allowing an appropriate election to be made as part of the taxpayer’s computation in including such movements.

The BEPS Action 4 report further noted that amounts not to be treated as “economically equivalent” to interest would not include foreign exchange gains and losses not connected with the raising of finance and amounts under derivative instruments or hedging arrangements not related to borrowings. We would note that (b)(iii) and (b)(iv) of the proposed draft provisions specify that certain amounts “connected with the raising of finance” are to be included as economically equivalent to interest. Clarity as to the level of “connectedness” that is expected would be welcome as this term remains undefined. Where this term is not defined or given further clarity, this may cause issues in identifying the amounts actually incurred in connection with the raising of finance. For example, one derivative contract that might be used by companies is an interest rate swap which would be used for a variety of commercial purposes in relation to financing. Payments under an interest rate swap are calculated by reference to interest rates but do not comprise interest as a matter of law. Neither are costs under interest rate swaps necessarily incurred in relation to the “raising of finance” as they can pre date or post-date the raising of finance.

Further, the proposed definition of interest equivalent allows regard to be had to an overall arrangement in determining whether an amount economically equivalent to interest arises. This has its source in the BEPS Action 4 paper which specifically outlines that “any payment (including those listed above [that list is copied earlier in this section of the response under what is not to be regarded as economically equivalent for the purposes of BEPS Action 4]) may be subject to limitation under the best practice approach where they are used as part of an arrangement which, taken as a whole, gives rise to amounts which are economically equivalent to interest”. The EU’s ATAD chose not to include that as part of the directive and as such it is curious that Ireland’s ILR goes beyond the application of the ATAD. This is particularly the case seeing that it is intended that the ILR is to be overlaid upon existing rules. In that regard, such an approach could impact on Ireland’s attractiveness as a financing jurisdiction and we would suggest its removal given the “mechanical” approach adopted by the ATAD. It should be noted that a review of a series of transactions is already permitted by TCA97 S811C in determining whether or not a transaction has been entered into for the primary purpose of achieving a tax advantage.

Definition of “taxable interest equivalent”

Looking now to the definitions of “taxable” or “deductible” interest equivalents and taking the example of the latter. That refers to “the amount of interest equivalent that is deductible in calculating the relevant profit or loss of a relevant entity”. It will be seen that in calculating EBITDA, (ignoring legacy debt for a moment) that “exceeding borrowing costs” is basically the excess of deductible interest equivalent over taxable interest equivalent. Given the examples set out above at para 3.3, it would appear appropriate that these amounts be value based in a similar manner to that used in calculating relevant profits.

That could be done as part of the definitions here or as part of the EBITDA calculation but in any event such value basing of taxable or deductible interest equivalents would mean that the amount added back as part of the EBITDA definition reflects the value of that interest which is included in relevant profits.

Definition of "deductible interest equivalent"

Similar to our comments above with respect to taxable interest equivalent, it would appear appropriate that amounts in respect of deductible interest equivalent be valued based in a similar manner to that used in calculating relevant profits.

A common feature of the Irish corporate tax system is the mechanism by which losses may be surrendered and claimed via group relief. This is commonly encountered in the course of S247 loan structures whereby losses driven by deductible interest is surrendered to other companies in the group. It is unclear as to whether the definitions refer to pre or post group relief being claimed. The definition of "relevant profits" referring to "the amount of profits on which corporation tax falls finally to be borne" would suggest that group relief claimed should be taken into account in the definition of deductible interest equivalent. We would welcome confirmation on this matter that the former interpretation is correct.

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

(a) In this Part, where an amount calculated by the following formula —

$$(A - B) - C$$

where —

A is the amount of the deductible interest equivalent,
B is the amount in respect of legacy debt referred to in subsection (X), and
C is the amount of taxable interest equivalent

*is greater than or equal to zero, it shall be referred to as '**exceeding borrowing costs**'; or is lower than zero, it shall be referred to as '**interest spare capacity**'.*

*(b) '**EBITDA**', in respect of a relevant entity and an accounting period, shall be the greater of nil or an amount calculated as follows —*

$$D + E + F + G + H$$

where —

D is the relevant profit or loss of the relevant entity,
E is the exceeding borrowing costs of the relevant entity, or the interest spare capacity as the case may be,
F is the amount in respect of legacy debt referred to in subsection (X),
G is the allowances in respect of capital expenditure under Part 9 *or* Part 29, *made to or on a relevant entity in calculating that entity's relevant profit or loss less any amount of those allowances which are referable to deductible interest equivalent,*
H is the amount by which the relevant entity's income has been treated as reduced by foreign tax in calculating the relevant entity's relevant profit or loss.

Question 9
Comments are invited on these possible definitions of 'EBITDA', 'exceeding borrowing costs' and 'interest spare capacity'. In particular, does the definition of H in the definition of 'EBITDA' satisfactorily resolve concerns about circular calculations that may arise because both double taxation relief and EBITDA are calculated based on taxable profits?

The reader is directed to our comments earlier at Part 3.3 regarding the calculation of relevant profits and losses and also at 3.4 regarding the definitions of taxable and deductible interest equivalents. The point relevant for this section of the submission is that the EBITDA formula should "rebase" the amounts included in E+F+G+H to take account of the 12.5% rate as is done as part of the computation of relevant profits and losses. These amounts could include such items as TCA97 s247 interest, capital allowances on rental properties etc. and tax deductions for foreign tax on Case III income.

It can be seen from the formula above that the amount for "E" comprises "the exceeding borrowing costs of the relevant entity, or the interest spare capacity as the case may be". The reference to "interest spare capacity" here is curious. Art4 (1) of the ATAD explains that exceeding borrowing costs are to be restricted to 30% of the taxpayer's EBITDA (which is in effect replicated at para 3.7.2 of the feedback statement) and the latter is described in Art4(2) as "The EBITDA shall be calculated by adding back to the income subject to corporate tax in the Member State of the taxpayer the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortisation. Tax exempt income shall be excluded from the EBITDA of a taxpayer." It can be seen that no reference is made therein to capacity and therefore it is curious as to why the domestic legislation would include same.

We see from para 3.9.2 of the feedback statement that "interest spare capacity" forms part of "total spare capacity" and that can be carried forward for the relevant period, being a period of 60 months from the end of the accounting period in which it arose. Our comments on that will be outlined later in this submission. It is not clear from the EBITDA formula whether the figure for "interest spare capacity" is positive or negative in the first instance. Given that it is, in effect, the opposite of "exceeding borrowing costs" then we presume, but would welcome the Department's views, that the figure would be negative if it is to form part of the total spare capacity that can be carried forward to future years. If that is the case then it would reduce the EBITDA in the year that such capacity arises thereby reducing the allowable amount. That said, the disallowable amount in para 3.7.2 of the feedback statement, and ignoring the de minimis amount for the moment, comprises the amount by which the exceeding borrowing costs is greater than the allowable amount. Where there is interest spare capacity then there should be no exceeding borrowing costs to restrict. We would welcome a discussion on the policy behind including a reference to interest spare capacity as part of the EBITDA formula.

In our view 'H' should allow the gross amount of, inter alia, foreign income to form part of the EBITDA calculation. That could be done by including such amount of foreign tax that would ensure the amount of foreign income before foreign tax is included in EBITDA calculation. Otherwise there may be some circularity between double tax relief calculations and the application of the ILR. Further, we understand that including 'H' in the formula would align with a purposive exclusion of 'T' as part of the 'EBITDA' calculation given that tax charged on profits and disclosed as part of the company's financial statements would not be an allowable deduction in computing 'E' in the first instance. The latter is computed in accordance with tax law as opposed to being based on the financial statements.

That said, the definition of "relevant profits" is based on the "Corporation tax acts notwithstanding this Part". On that basis, it would appear that any foreign tax deduction taken into account in computing relevant profits would be based on the non-application of the ILR. Therefore, such foreign tax deduction would be calculated in the same manner as would have been the case in the past. By restricting H to the deduction allowed for foreign tax in computing "relevant profits" then the computation of foreign tax credits and deductions in computing the final tax payable can take the ILR into consideration. We would welcome confirmation of our understanding.

Clarification would be welcome on whether “DA” includes amounts for balancing allowances and charges for respective assets (the latter former treated as a positive amount to increase the EBITDA and the latter being treated as a negative to reduce the EBITDA).

3.6 Step 6: Apply the equity ratio rule

3.6.1 Worldwide Group

'***worldwide group***' *means the ultimate parent and all consolidating entities in the ultimate consolidated financial statements, and a 'member of a worldwide group' shall be construed accordingly;*

'***ultimate parent***' *means an entity that —*

(a) (i) prepares consolidated financial statements under generally accepted accounting practice, or an alternative body of accounting standards [see overleaf], or

(ii) where sub-paragraph (i) does not apply, would be required under international accounting standards to prepare consolidated financial statements, and

(b) (i) whose results are not fully included in any other consolidated financial statements prepared under generally accepted accounting practice, alternative body of accounting standards [see overleaf], or

(ii) where sub-paragraph (i) does not apply, whose results would not be fully included in any other consolidated financial statements if they were prepared under international accounting standards;

'***ultimate consolidated financial statements***' *means —*

(a) the consolidated financial statements prepared by the ultimate parent under generally accepted accounting practice, or an alternative body of accounting standards [see overleaf], or

(b) where there are no consolidated financial statements to which paragraph (a) *relates, such consolidated financial statements as would be required to be prepared under international accounting standards;*

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

'***consolidating entity***' *means an entity which is consolidated in the ultimate consolidated financial statements other than a non-consolidating entity.*

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

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

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

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

Question 10
Comments are invited on this possible definition of worldwide group and related concepts which are relevant for the operation of the equity ratio rule.

We note that the definition of a "non-consolidating entity" is partly similarly to that contained in Part 35C, but with an additional reference to a "consolidation exemption". We would welcome a discussion with the Department to understand the rationale and the extent of such a reference in the draft legislation.

With respect to the definition of "alternative body of accounting standards", consideration should be given to broadening this to reflect the fact that while a formal accounting standards body may not have statutory authority, it may in fact exist in practice.

3.6.2 Equity Rule

(1) *In this section '**ratio of equity over total assets**', in relation to financial statements which are prepared under generally accepted accounting practice or an alternative body of accounting standards, means —*

$$\frac{E}{A}$$

where —

E is the equity, including share capital, share premium, and reserves and
A is the total assets

(2) *This section applies to an accounting period where the relevant entity's ratio of equity over total assets, computed based on the financial statements which are included in the ultimate consolidated financial statements in which the relevant entity's accounting period ends, is no lower than two percentage points below the worldwide group's ratio of equity over total assets, computed based on the ultimate consolidated financial statements in which the relevant entity's accounting period ends.*

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

(4) *In applying* subsection (2), *where in a period of 6 months prior to the end of an accounting period there is a scheme or arrangement which results in an increase in the equity, including share capital, share premium, and reserves of the relevant entity, the results of that scheme or arrangement shall not be taken into account in the calculation of the relevant entity's ratio of equity over total assets unless it is shown that the scheme or arrangement was effected for bona fide commercial reasons and it is reasonable to consider it is not, or does not form part of, any scheme or arrangement of which the main purpose, or one of the main purposes, is the application of* subsection (2).

(5) *Where this section applies to a relevant entity for an accounting period,* section XXX (2) *[the interest limitation] shall not apply.*

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

The application of the Equity Rule is welcome. We understand from the Public consultation call on 19th July of this year that the intent is that the taxpayer can invoke either the equity rule or the group rule such that both are optional. Ss5 above disapplies the interest limitation rule where the section “applies” without outlining a type of election etc. That optionality is specified in the explanation to para 3.6 of the feedback statement so it may be the case that the legislation is incomplete given the nature of a feedback statement in the first instance. Therefore clarity as to that optionality would be welcome.

It can be seen that the computation of the “ratio of equity over total assets” is in ss1 is stated as being “in relation to financial statements” and ss2 speaks of the relevant entity’s ratio being computed “based on” the financial statements which are included in the ultimate consolidated financial statement. Similarly, ss2 speaks of the worldwide group’s ratio being computed “based on” the ultimate consolidated financial statements in which the relevant accounting period ends. Our question is merely a confirmation in relation to “E” and “A” included in the formula in ss1. Are E and A to be determined by reference to the balance sheets of the respective entities without further analysis behind same? It is presumed that is to be the case, given the implication in ss3 for single entity worldwide groups that the relevant entity accounts be “adjusted decreasing total debt by any amount of debt with related parties”, but as the reader will know the financial statements are generally prepared by reference to a transaction’s economic substance rather than its legal substance. For example, certain preference shares could be accounted for as a financial liability of a company but in law would be regarded as share capital. A similar point may be made with respect to the concept of “total assets” in the definition of “A” above; from a company law perspective, we would expect to see assets disclosed on the Balance sheet equal to gross assets less liabilities.

It is presumed that to make the computation of the equity rule as least administratively burdensome as possible from the taxpayer’s perspective that the respective balance sheets of the entities concerned form the basis of the computation of “E” and “A” of the equity rule once consistently applied between entities but such clarification would be welcome.

Ss3 above makes reference to single company worldwide groups and requires that the financial statements forming a basis for the equity rule calculation “be adjusted by decreasing the total debt by any amount of debt with related parties, and by decreasing the amount of equity by that amount”. The term “related parties” is not defined. We understand from the public consultation call on 19 July 2021 that regard may be had to accounting standards for a definition of same. We would query as to why a new definition be brought about for the purposes of the domestic legislation. We would suggest that a reference to “associated enterprises” as included in p8 of the Feedback statement may be more appropriate. It is of note that “E” is to be reduced for liabilities owing to related parties but the question arises as to whether the amounts owing *by* related parties should be excluded from A. This would ensure related party transactions are excluded from the “equity rule” calculation. That in itself would provide some similarity of approach with the group ratio rule which disregards all transactions with related parties. That disregarding of *all* related party transactions could bring about an excessive administrative burden on such companies and will be discussed further as part of the group ratio rule. In order to limit such burden it may be appropriate to adjust for related party balances that may bring about interest income or interest expense.

The Equity Rule requires the E/A formula to be calculated for a relevant entity and the latter can comprise an interest group. Following on from the Public Consultation call on 19th July 2021 we understand that an interest group is to include only companies subject to Irish Corporation tax. It is more likely than not that consolidated accounts will not be available for companies comprising the interest group which brings about the question as to whether that means that consolidated accounts would have to be prepared by the interest group companies in order to avail of the Equity Rule? The reader is directed to our comments in part 4.1 which address the application of the ILR to an interest group. In particular, subparagraph (3)(g) (page 26 of the feedback statement) would suggest that where an interest group does not prepare consolidated accounts, then the equity ratio rule is to apply to the consolidated financial statements “which would be prepared…if such accounts were required to be prepared”. Such an approach would, in our view, constitute a significant administrative burden on companies and would render the Equity Ratio rule practically difficult to administer.

Consider an EU resident holding company which has five 100% Irish resident subsidiaries. The five sisters would not prepare consolidated accounts and therefore the question of Equity as a proportion of assets would be difficult given that each company's issued share capital would be held by a company outside the members of the interest group. Compare than with an EU resident company which has one Irish subsidiary which in turn has another and so on such that the EU resident company such that all equity there could be based on the ultimate Irish parent company. Therefore we would suggest that in that both instances the E comprise the combination of all entities.

The equity rule is provided for in ATAD 4(5) with no requirement to impose specific anti-avoidance provisions prior to obtaining the right to fully deduct exceeding borrowing costs where the required conditions are met. Subparagraph (4) would therefore appear to go beyond ATAD.

Subparagraph (5) in the proposed equity ratio rule would disapply the interest limitation where the relevant conditions are met, but the drafting is silent as to whether a relevant entity would be obliged to meet reporting requirements envisaged by Part 6.1 of the Feedback statement. The drafting outlined with respect to reporting does not address whether the equity ratio rule has or has not been met in the accounting period for which the return is being made.

3.6.3 Group of one

*'**single company worldwide group**' means a company that is not a member of a worldwide group and is not a standalone entity.*

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

In the absence of additional legislation, it would appear that the main purpose of this definition is to extend the "equity rule" and the "group ratio rule" to such "groups of one". This is a welcome policy, but we would refer to the reader to our comments in response to Question 2 on interest groups and Question 13 regarding owner managed companies and the suggested treatment of transactions with related parties.

3.7 Step 7: Calculate the allowable amount

3.7.1 Group ratio rule

(1) *'**group ratio**' means, subject to* subsection (2), *an amount calculated as —*

$$\frac{\textit{Group exceeding borrowing costs}}{\textit{Group EBITDA}}$$

where —

*'**group exceeding borrowing costs**' means the amount in the ultimate consolidated financial statements which equals the net finance expense for the for the period for which the ultimate consolidated financial statements have been prepared.*

*'**group EBITDA**' means the amount in the ultimate consolidated financial statements which equals the profit or loss before taking into account any amount of income tax, finance income, finance costs, depreciation, amortisation or impairments for the period for which the ultimate consolidated financial statements have been prepared.*

(2) *Where a relevant entity is a member of a single company worldwide group, group exceeding borrowing cost and group EBITDA shall be computed based on the financial statements of the relevant entity prepared under generally accepted accounting practice as adjusted by disregarding transactions with related parties.*

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

It can be seen from the above that both definitions of 'group exceeding borrowing costs' and 'group EBITDA' refer to "the amount in the ultimate consolidated financial statements which equals…" the respective amounts for each definition. Compare this wording with that used in "E" and "A" in the equity rule discussed above. The above definitions would more closely point to looking at the accounts but may be added to say "the amount disclosed in the ultimate consolidated financial statements" which would suggest that one only looks to disclosures either on the face of the accounts or in the notes to determine the respective amounts i.e. no further analysis would be required as to determine the legal (as opposed to economic) substance of the amounts. We would argue that consideration should be given to such an amendment.

We would also note that the above definition refers to an amount of "net finance expense". We understand that under IFRS model accounts, it would be expected that the net finance expense should be disclosed as a single line item and therefore where such rules are correctly followed this should not present a problem to companies in identifying the correct components of the group ratio. However, there may be cases where accounts either do not follow the IFRS model accounts for whatever reason e.g. materiality; in such cases, there may be no "net finance expense" as a single line item to refer to. Such difficulties may be overcome through guidance in due course.

The issue of "single company worldwide groups" has been discussed earlier in this submission regarding our views regarding "related parties" as part of the equity ratio discussion apply here also.

It can be seen from the above for single company worldwide groups then "exceeding borrowing cost" and "group EBITDA" are to be based on such entity's financial statements "as adjusted by disregarding transactions with related parties". This differs slightly with the equity rule in that that refers only to adjusting certain debt arrangements whereas this rule requires all transactions with related parties to be disregarded. It is not clear why all transactions should be ignored in this instance and consideration should be given to ignoring transactions that could give rise to interest income or expense. For example, an owner-managed company's P&L could include such items as rent paid to its owner on his or her property and owner' salary and such amounts would be taxable in their hands. Should another owner-managed company have the same results as the first example but instead rent is paid to a third party landlord then both companies have the same use of assets but have a differing interest deduction. Therefore we would argue that any related party adjustments be restricted to transactions that could give rise to interest income or expense. This could be supplemented by saying that other related party transactions should be restricted to the extent they are not incurred for bona fides commercial reasons and are incurred where the main or one of the main purposes is the avoidance of tax.

3.7.2 Calculating the allowable deduction

*'**disallowable amount**' means —*

(a) where the exceeding borrowing costs are greater than the de minimis amount, the amount by which the exceeding borrowing costs is greater than the allowable amount, or

(b) where the exceeding borrowing costs are less than or equal to the de minimis amount, nil;

*'**de minimis amount**' in respect of an accounting period of 12 months means €3,000,000, and where an accounting period is shorter than 12 months, that amount shall be reduced proportionately;*

*'**allowable amount**' means an amount calculated as the greater of —*

(a) (EBITDA limit X EBITDA), or

(b) the de minimis amount

*'**EBITDA limit**' means the higher of 30 per cent and the group ratio;*

*'**limitation spare capacity**' is the amount by which exceeding borrowing costs is less than an amount calculated as (EBITDA limit x EBITDA)*

Question 14

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

With respect to the definition of "EBITDA limit", we would note that ATAD 4(5) provides that the "taxpayer *may be given the right to*…deduct exceeding borrowing costs at an amount in excess of what it would be entitled to deduct under paragraph 1." Such construction in ATAD would suggest that it is open to the taxpayer to apply *either* the 30% threshold or the higher group ratio. The definition as proposed above would suggest that there is in fact no optionality with respect to which ratio should be used and that the higher of the two options must be used. While it is expected that taxpayers with a higher group ratio will most likely opt for this instead of the 30% threshold, in our view taxpayers should be allowed to choose between the two thresholds in applying the ILR. We would also note that the current drafting would effectively require a comparison between the 30% EBITDA limit and the group ratio; in instances where the taxpayer has insufficient information to ascertain the group exceeding borrowing costs and group EBITDA (i.e. in cases of large corporate groups with separate financial functions and teams), the current drafting may not be appropriate but we understand from the Department's webinar in July that such optionality is intended.

3.8 Step 8: Recalculation of taxable profits

3.8.1 Applying the interest restriction

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

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

(b) [the relevant entity is not a financial undertaking], and*

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

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

* If this provision is introduced, see section 3.2.3

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

Based on Step 2 of the proposed approach to calculating and applying the ILR, our understanding is that the taxable profits of the relevant entity should be the starting point (i.e. the tax adjusted profits/losses for the relevant entity on which corporation tax falls to be borne). It would therefore be logical for the end point in the ILR process to be on the recalculation of taxable profits followed by an ultimate calculation of the corporation tax due. The above drafting in subparagraph (2) would appear to move directly to the calculation of the corporation tax chargeable.

We would expect that the application of the ILR to an interest group as envisaged in Part 4.1 of the feedback statement should happen in priority to the above provisions i.e. the disallowable amount and total spare capacity should be allocated as required to the members of the interest group followed by a recalculation of the taxable profits. We expect that due to the nature of the feedback statement, further legislation outlining the application of the ILR in the context of interest groups may be forthcoming in Finance Bill 2021.

3.8.2 Order of application

> ***Order of application***
> *Notwithstanding section 835AX(1), and other than as expressly provided for in this Part, this Part shall apply after the application of Part 35C.*

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

The above disapplies TCA97 s835AX (1) and explains that the ILR will apply after Pt35C which contains the legislation for hybrids. TCA97 s845AX(1) explains that the hybrid legislation applies after all provisions of the Tax Acts and the Capital Gains Tax Acts, other than TCA97 s811C and therefore the purpose outlined in the feedback statement would appear to be addressed.

3.9 Step 9: Carry forward amounts

3.9.1 Carry forward of disallowable amount

> ***Carry forward of disallowable amount***
>
> *(1) Where in an accounting period a relevant entity incurs a disallowable amount (referred to in this section as the first mentioned accounting period), following the application of* section XXX(2) *[the interest restriction], the relevant entity shall carry forward the disallowable amount to succeeding accounting periods, and such amount shall be referred to as a 'deemed borrowing cost' of that accounting period.*
>
> *(2) (a) This subsection applies to a deemed borrowing cost which arose from a disallowable amount that would have, but for this Part, reduced the tax payable of the relevant entity in the first mentioned accounting period.*
>
> *(b) Subject to* subsection (4)*, where this subsection applies a relevant entity shall deduct its deemed borrowing cost from its taxable profits arising in a succeeding accounting period, and such deduction shall be after all other claims to relief have been made.*
>
> *(3) (a) This subsection applies to deemed borrowing costs which arose from a disallowable amount that would have, but for this Part, resulted in the relevant entity incurring a loss, or incurring a greater loss, in the first mentioned accounting period.*

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

(4) The aggregate of the relief available in an accounting period under subsection (2) *and* subsection (3) *shall be limited to the amount of the total spare capacity in that accounting period, and where the relief available under* subsection (2) *and* subsection (3) *exceeds the total spare capacity in that accounting period, then relief under* subsection (3) *shall be given in priority to relief under* subsection (2).

(5) Any relief under subsection (2) *and* (3) *shall be given as far as possible in respect of the first subsequent accounting period and, in so far as it cannot be so given, in respect of the next accounting period and so on.*

(6) For the purposes of determining the amount of relief available for deemed borrowing costs, the amount of deemed borrowing cost available for any subsequent accounting period shall be reduced by the amount relieved in prior accounting periods.

(7) A deemed borrowing cost shall not form part of the relevant entity's deductible interest equivalent in succeeding accounting periods.

3.9.2 Carry forward of total spare capacity

Total spare capacity

(1) A relevant entity shall carry forward its total spare capacity for a period of 60 months from the end of the accounting period in which it arose, referred to in this Section as the 'relevant period'.

(2) Where during the relevant period the relevant entity incurs a disallowable amount, the relevant entity shall, on making a claim, be entitled to reduce the disallowable amount by the total spare capacity carried forward.

(3) Any relief under subsection (2) *shall be given as far as possible against a disallowable amount arising in the first subsequent accounting period and, in so far as it cannot be so given, against the disallowable amount in respect of the next accounting period and so on.*

(4) Any relief under subsection (2) *shall be given in respect of total spare capacity carried forward from an earlier period in priority to total spare capacity carried forward from later periods.*

(5)	*Where the relevant entity is treated as incurring a disallowable amount in an accounting period which begins before the end of the relevant period and ends after the end of that relevant period then the amount for which relief may be given shall be reduced by applying the fraction* $$\frac{I}{J}$$ *where —* *I is the length of period common to the relevant period and the accounting period of the relevant entity* *J is the length of the accounting period of the relevant entity*
(6)	*For the purposes of determining the amount of relief available for total spare capacity, after the making of a claim for relief under* subsection (2), *the amount of total spare capacity available for any subsequent claims shall be reduced by the amount claimed under the first-mentioned claim.*

'total spare capacity' is the aggregate of interest spare capacity and limitation spare capacity.

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

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

The carry forward provisions would appear to distinguish between (a) deductible interest incurred which would, but for the ILR, reduce an amount of tax payable and (b) deductible interest incurred which, but for the application of the ILR, result in a loss. The rationale for such an approach would appear to us to ensure that the disallowable amount carried forward for use in future years is not given more flexibility than it would have otherwise be granted, and to ensure that the existing loss relief rules remain robust. However, we would note a number of technical points for consideration for both categories.

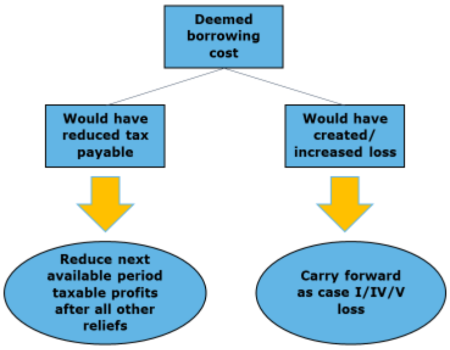
With respect to the first category (reducing the tax payable), subparagraph 2(b) would appear to give priority to "all other claims to relief" ahead of the deemed borrowing cost arising from a disallowable amount. In our view this aims to give priority to losses forward, current year loss relief and group relief. While the rationale for such priority is clear to us, it does raise an interesting question with respect to the treatment of losses carried back from later years. Take for example the below:

- Year One: The application of the ILR results in a disallowable amount of €100.
- Year Two: The company has sufficient interest capacity to take a deduction for the deemed borrowing costs of €100 from Year One.
- Year Three: The company has a tax adjusted trading loss of €100 which cannot be used on a value basis in the current year, nor can it be group relieved. It is open to the company to carry this loss relief back to Year 2.

The question which arises based on the above fact pattern is what happens to the deemed borrowing cost of €100 that was previously deducted in Year 2, but is now replaced by loss relief in Year 3. We note that part 3.9.1 of the Feedback statement refers to the carry forward of a disallowed amount resulting in a deferral rather than a denial of interest deductibility. Accordingly, we would expect that the deemed borrowing cost which is effectively replaced by losses carried back should revert back to being carried forward indefinitely for use in a later period. However, the wording of subparagraph (1) would not appear to achieve these aims as it refers solely the accounting period in which an entity incurs a disallowable amount. Clarity on this matter would be welcome.

Moving to the latter category (disallowable amounts which would, but for the ILR, result in a loss/increased loss), we note that subparagraph 3(b) addresses this. In particular, such a disallowable amount is to be treated as a loss and relief for same is to be given in accordance with (inter alia) S396(1) TCA97. Under S396(1), a loss forward would need to be claimed in the corporation tax return for the first period for which it can be utilised. If this is not done, an assessment made in accordance with the return cannot be amended to incorporate the loss forward. We note that subparagraph 3(b) is "subject to" subparagraph (4) which limits the use of any carried disallowable amount to the total spare capacity; such drafting should, in our view, alleviate any concerns with respect to the "use it or lose it" approach for losses forward. Confirmation that our understanding is correct would be welcome.

The treatment of a disallowed expense, can in our view, be summarised as follows



We have summarised as above in that absent the ILR the deductible amount would have either reduced profits on which tax finally falls to be borne or would have been carried forward as part of any loss depending on the nature of the source.

On ss2(a), it is not clear why reference is made to *"a deemed borrowing cost … that would have, but for this Part, reduced the tax payable of the relevant entity in the first mentioned accounting period"*. A deemed borrowing can reduce tax in two ways (i) by deduction from the profits which in turn reduces the tax payable by a company and (ii) where the cost forms part of a loss which is value based in accordance with s396B or s420B. It is presumed, given the application of ss3(a) that ss2(a) is intended to deal with a deduction mentioned at (i) above and would welcome confirmation of our understanding.

The treatment of investment companies, to which TCA97 s83 applies, does not give rise to a loss but rather deems excess expenses of management (or charges on income paid wholly and exclusively for the purposes of the company's business which could comprise interest to which TCA97 s247 applies) in one accounting period to be expenses of management of that investment company in succeeding accounting periods. It is unclear whether this "type" of TCA97 s247 interest comes within the above "deemed borrowing costs" and may be so reflected in legislation that is not part of the Feedback statement given its nature. Therefore, if not already addressed, we would suggest that ss3 be amended to cater for such excess expenses of management carried forward.

The points made earlier in this submission to "value basing" the "ITDA" elements of the EBITDA formula also apply equally here.

Also it may be appropriate supplement the references to sections 396, 397, 400 and 401 above with "…shall with any necessary modifications, apply in relation to a relevant entity comprising an interest group as they do for a company". This is because those abovementioned provisions apply on a company by company basis. Taking TCA97 s396(1) this requires that trading losses be carried forward to reduce the same trade of a particular company. Given that an interest group could contain companies carrying on different trades then the question arises as to whether a deemed borrowing cost forming part of a TCA97 s396(1) loss for an interest group could be regarded as such a loss for the purposes of ILR in subsequent periods. We note the point made in the feedback statement that *"…a disallowable amount should not be used more broadly to shelter a charge to tax than would have been the case had the ILR not been implemented"*. However, in this instance given that EBITDA and tax capacity are value based then consideration could be given to allowing the disallowable amount to be regarded as a loss of the interest group rather than the entity (within that group) which gave rise to it this is especially so seeing as spare capacity has to be considered on a relevant entity (which can comprise an interest group) basis.

Question 18 deals with spare capacity and some of the issues described above will also apply in that connection particularly regarding interest groups.

4. Operation of local groups

4.1 Applying the ILR to an interest group

Application to an interest group

(1) This section applies where a company is a member of an interest group.

(2) An interest group shall have a reporting company and that reporting company shall be a company -

(a) that is resident in the State,

(b) the shares of which are not held by any other member of the interest group, and

(c) that is a chargeable person, within the meaning of Part 41A,

and where more than one company in an interest group satisfies conditions (a) to (c) then the interest group shall jointly elect which of the interest group companies is the reporting company.

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

(a) amounts computed in respect of an interest group for the purposes of this Part shall comprise the results of all the members of the interest group disregarding the results of transactions between members of the interest group;

(b) the accounting period of an interest group shall be the accounting period which is common to the majority of members of that group and where there is no such period, the accounting period of the reporting company;

(c) the results of any member of the interest group whose accounting period is other than the accounting period of the interest group shall be apportioned such that the income and expenses are those which, on a just and reasonable basis, arose during the accounting period of the interest group, and all balance sheet amounts are those which, on a just and reasonable basis, would be reflected in the balance sheet of that member on the final day of the interest group accounting period;

(d) (i) *Subject to (ii), a disallowable amount under XXX(2) [Interest limitation] shall be deemed to arise to, and be chargeable on, each member of the interest group in proportion to their deductible interest equivalent relative to the deductible interest equivalent of the interest group, unless the reporting company and each company concerned jointly notify the Revenue Commissioners, in the form made available, that it, or a portion of the disallowable amount, should be deemed to arise to, and be chargeable or relieved in respect of, that other member, or members as the case may be, of the interest group;*

(ii) *a disallowable amount allocated to a member of an interest group shall not exceed the deductible interest equivalent of that group member for the accounting period;*

(e) *total spare capacity shall be deemed to arise to, and be relieved in respect of, each member of the interest group in proportion to their taxable interest equivalent relative to the taxable interest equivalent of the interest group, unless the reporting company and another member, or members as the case may be, of the interest group jointly notify the Revenue Commissioners, in the form made available, that it, or a portion of the total spare capacity, should be deemed to arise to, and be relieved in respect of, that other member, or members as the case may be, of the interest group;*

(f) *in applying section XXX(2) [carry forward of disallowable amount], references to the relevant entity in the succeeding accounting periods shall be read as a reference only to the members of the interest group in those succeeding accounting periods which were also members of the interest group in the first mentioned accounting period;*

(g) *where the interest group does not prepare consolidated financial statements under generally accepted accounting practice or an alternative body of accounting standards, section XXX [Equity ratio rule] shall apply to the consolidated financial statements which would be prepared under generally accepted accounting practice, if such accounts were required to be prepared;*

(h) *a payment for relief made under* section XXX *[exceeding borrowing costs] or relief made under* section XXX *[Excess interest capacity], shall not —*

(i) *be taken into account in computing profits or losses of either company for corporation tax purposes, and*

(ii) *be regarded as a distribution or a charge on income for any of the purposes of the Corporation Tax Acts,*

and, in this subsection, 'payment for relief' means a payment made by the claimant company to the surrendering company in pursuance of an agreement between them as respects an amount surrendered by means of relief made under section XXX *[exceeding borrowing costs] or relief under* section XXX *[Excess interest capacity], being a payment not exceeding that amount.*

Subparagraph (2)(b) requires that the reporting company shares not be held by any other member of the interest group and presumably is to make the top or parent company of the interest group the reporting company. However, where an interest group is linked to a loss group under TCA97 s411 but limited to only companies within the charge to Irish corporation tax, it is possible that the entity meeting condition (2)(b) may in fact not be an Irish resident. In addition, in many instance the most appropriate reporting company may in fact be a group service company or similar as might employ the finance or tax function but may not be the ultimate holding company. We would suggest that the condition is removed, or would welcome a discussion with the Department to further understand its objectives.

We note that where more than one company satisfies the requirements, the interest group should identify by election which of the companies is the reporting company. No further detail is given as to the form of the election to be made (i.e. whether made in writing etc.). We would be of the view that while an election in writing may be considered, it would be preferable for the ILR reporting mechanism (however designed) should serve as an election for the purposes of subparagraph (2). Such an approach would act to simplify matters, rather than creating a new compliance/notification obligation for taxpayers to adhere to.

With respect to subparagraph 3(a), the reader is referred to our comments in part 3.3.1 and to our discussion of the equity and group ratio rules in this document on the treatment of transactions between members of the interest group. A requirement whereby transactions between members of an interest group are disregarded would be a very difficult administrative exercise for companies and which would more likely than not comprise self-cancelling transactions over time i.e. income in one company would be an expense or capital allowance in another company. In that regard we would suggest the removal of ss3(a) above.

We note that where members of the interest group are not aligned with the common accounting period, the results are to be apportioned on a "just and reasonable basis". Similar wording is present elsewhere in TCA97[5] but notably the approach suggested for interest groups differs from that adopted in the case of group relief provisions and identifying "corresponding accounting periods[6]". The approach taken in group relief provisions would look to time apportion the results of a group member; we would submit that while the provisions of TCA97 S422 need not be replicated in the draft interest group section, a similar approach would likely be more mechanical and easier to apply compared to a "just and reasonable" test.

We note that the suggested provisions in paragraph 3(d) and (e) allow for an allocation (in the form to be made available) of both disallowable amounts and spare capacity. While guidance may be forthcoming with respect to the form of such allocation, the reader is referred to our comments on reporting in Part 6.1. Where feasible, reporting and allocation of disallowable amounts and spare capacity should be reflected in the Form CT1. This would avoid the need for a separate "ILR return" and would be more easily built into existing tax return preparation software common among Irish taxpayers and advisors.

The reader is also referred to our earlier comments in part 3.3.1 with respect to the preparation of consolidated accounts at interest group level. We understand that preparation of such accounts may be relatively uncommon among Irish taxpayers and for groups with Irish companies; we would therefore envisage subparagraph 3(g) as potentially creating an administrative difficulty in a number of cases. We do not think that it is practical to require the preparation of additional financial statements disregarding transactions between members of an interest group as the individual tax returns of such companies will not disregard the transactions. It would appear inappropriate to determine the profits by one set of accounts and any potential interest limitation by a different set.

[5] Refer to S291A(5)(b)
[6] S422

4.2 Anti-avoidance rules

Companies joining and leaving groups
(1) Where in an accounting period a company ceases to be a member of an interest group, and is not a reporting company, any total spare capacity allocated to that group member shall be reallocated to the reporting company for subsequent reallocation as appropriate.
(2) Where in an accounting period a company ceases to be a member of an interest group, and is a reporting company (the first mentioned reporting company), a new reporting company shall be appointed in accordance with section XXX, _and total spare capacity allocated to the first mentioned reporting company shall be reallocated to the succeeding reporting company._

Question 19
Comments are invited on this potential approach to applying the ILR to interest groups. In particular, it is noted that the provision would require reference to accounts that comprise the results of all group members. Comments are invited on the most effective method for compiling such accounts, noting that disregarding transactions between members of an interest group may be complex and administratively difficult for some groups. Stakeholders are invited to suggest how this process may be simplified.

The proposed drafting with respect to companies joining and leaving an interest group would appear to implicitly provide that any deemed borrowing costs carried as an attribute by a member of an interest group at a time when they leave that group should remain attributed to that company at the date of exit. This is implied by the requirement in (1) above that spare capacity is to be allocated to remaining group members whereas the draft section remains silent on deemed borrowing costs carried forward. We would submit that it would be more helpful for taxpayers in understanding the provisions to make it explicitly clear in drafting how deemed borrowing costs carried by members of an interest group are to be treated.

5. Interaction with other provisions

5.1 Other profit based interest restrictions

Should a disallowable amount reduce the aggregate amount of any interest incurred in connection with the provision of a specified intangible asset and any allowances to be made to a company under section 284 as applied by section 291A *in an accounting period, to an amount which is less than the amount as set out in* section 291A(6)(a) *or* section 291A(6)(ba)*, as applicable, a claim may be made to increase the allowances by an amount equal to the lower of the difference and the excess amount in* section 291A(6)(b)(i).

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

We understand that the intention of the above drafting is to effectively "substitute" additional capital allowances for interest treated as a disallowable amount after application of the interest limitation. This provides limited clarity to taxpayers who may seek to apply it and it may be appropriate that this be supplemented with Revenue guidance.

The existing legislation in S291A also operates to restrict the amount of any capital allowances on specified assets and interest costs incurred in connection with the acquisition of such assets[7] to 80% of taxable profits from the relevant trade. The interest restriction rules, when taken in conjunction with the existing 80% cap in S291A, leaves Irish companies availing of such relief in an unenviable position. We would recommend that a more simplistic amendment would be to either remove the 80% cap provided for in S291A overall, or to remove the 80% cap to the extent that it impacts on interest incurred in connection with the acquisition of specified assets.

[7] Acquired on or after 11 October 2017

5.2 Preliminary tax

Question 21
Suggestions are invited concerning appropriate adjustments to the preliminary tax rules, to allow reasonable opportunity for compliance with preliminary tax obligations following the introduction of the ILR.

With respect to small companies, preliminary tax may be based on either 100% of the prior year corporation tax liability or 90% of the current year tax liability. Accordingly, we would not expect companies with a corporation tax liability below €200,000 for the year ending 31 December 2021 to experience significant issues in calculating their preliminary tax for the year ending 31 December 2022 as amounts payable may be based on prior year figures.

With respect to large companies subject to a two stage preliminary tax payment process, we would not expect a significant challenge in calculating the first instalment of preliminary tax, as such figures may be based on either 45% of the tax charge of the current accounting period of 50% of the previous accounting period tax charge. Some larger companies may wish to carry on an exercise to calculate the projected current year tax liability after the application of the ILR; however where such an approach is not favoured either due to time or resource constraints it is still open to them to opt for 50% of the tax charge for the previous accounting period in meeting their first instalment obligations. It should be recognised that reliable figures required to calculate EBITDA and also the group or equity ratios for the current year may not be available prior to the first preliminary tax payment date; we would therefore not advise any adjustment to the preliminary tax rules that would strictly require a calculation of the current year tax liability (with ILR included) unless opted for by the taxpayer. The status quo with respect to the first instalment of preliminary tax for large companies should therefore be maintained.

With respect to the calculation of the second instalment of preliminary tax, this may be more challenging for taxpayers as they will be required to make a second payment to bring the total amounts paid equal to 90% of the tax due for the current accounting period. As already noted, reliable figures for the calculation of EBITDA may not be available at this stage. In addition, figures forming part of the group ratio derived from the ultimate consolidated financial statements are unlikely to be available to the taxpayer prior to the accounting period end date and until such time as the consolidated accounts are in fact prepared and audited. Accordingly, consideration should be given to providing a workable solution, either through

(a) Allowing the equity ratio and group ratios from prior years to be substituted into the current year calculations (on the assumption that the overall ratios for the group are unlikely to experience significant changes year on year); or
(b) Amending the second instalment rules to provide that the company is to be required to make a payment to bring the amount paid up to 90% of the *prior year* corporation tax liability.

A final alternative may look to existing legislation in addressing practical difficulties around the calculation and payment of preliminary tax. In particular, TCA97 s959AS allows for a top up of preliminary tax to be made in respect of tax on profits gains or losses accruing on financial assets or financial liabilities. Such a "top up" mechanism could be considered to alleviate the complexity around calculating preliminary tax and in applying the interest limitation. While existing legislation providing for this top up would require the tax to be paid in the month immediately after the end of the accounting period in question, such a time frame would likely be unworkable where consolidated accounts are required to identify key components of the Equity ratio and group ratio rules. Therefore, a more realistic timeframe would be 6 months from the end of the accounting period in question.

6. Reporting

6.1 Single entity

Reporting

(1) Subject to section XXX [Interest group reporting], the relevant entity shall make a return, by the specified return date for the accounting period, in the form made available by the Revenue Commissioners which includes the following details:

(a) (i) the calculation of the allowable amount, and
(ii) the calculation of the disallowable amount or total spare capacity of the relevant entity as the case may be,

(b) in respect of the carry forward of deemed borrowing cost —
(i) the calculation of the deemed borrowing cost for the relevant entity,
(ii) the accounting period in which the deemed borrowing cost arose,
(iii) the relief utilised in prior accounting periods, and
(iv) the relief utilised in the accounting period, if any,

(c) in respect of the carry forward of total spare capacity —
(i) the calculation of the total spare capacity for the relevant entity
(ii) the accounting period in which the total spare capacity arose,
(iii) the relief utilised in prior accounting periods, and
(iv) the relief utilised in the accounting period, if any.

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

We would recommend that any reporting requirements for the ILR be built into existing tax compliance rules and infrastructure, namely the existing Form CT1. We would not recommend the creation of or provision for a new, separate ILR return as this would likely increase the existing compliance burden for taxpayers and their advisors. Additionally, building reporting into the Form CT1 would enable taxpayers and advisors to utilise existing tax return preparation software (similar to the approach taken for the UK's CIR compliance).

6.2 Interest group

Interest group reporting

(1) Where section XXX *[Application to an interest group] applies, the reporting company shall make a return on behalf of the interest group on or before the specified return date for the accounting period, in the form made available by the Revenue Commissioners, which includes the following details:*

(a) in respect of the group —
- *(i) the name and tax reference number of each member of group, and*
- *(ii) the name and tax reference number of each company that has elected under* section [XXX] *not to be a member of the group,*

(b) in respect of the application of this Part to an interest group for the accounting period,
- *(i) the calculation of the allowable amount, and disallowable amount or total spare capacity of the interest group as the case may be,*
- *(ii) the allocation of any disallowable amount or total spare capacity to members of the interest group,*

(c) in respect of the carry forward of deemed borrowing cost —
- *(i) the calculation of the deemed borrowing cost for the interest group,*
- *(ii) the allocation of the deemed borrowing costs to the interest group members*
- *(iii) the accounting period in which the deemed borrowing cost arose,*
- *(iv) the relief utilised in prior accounting periods, and*
- *(v) the relief utilised in the accounting period, if any, and to which group member it is allocated,*

(d) in respect of the carry forward of total spare capacity for the interest group —
- *(i) the calculation of the total spare capacity for the interest group,*
- *(ii) the allocation of the total spare capacity to the interest group members*
- *(iii) the accounting period in which the total spare capacity arose,*
- *(iv) the relief utilised in prior accounting periods, and*
- *(v) the relief utilised in the accounting period, if any, and to which group member it is allocated*

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

The reader is referred to our responses to Question 22, and we would again reiterate our view that any ILR reporting should be incorporated into the existing Form CT1, similar to the approach taken for group relief claims. Building ILR reporting into the existing Form CT1 could serve two aims:
1. To serve as a form of election to identify the reporting company and members of the interest group; and
2. To outline the disallowable amount and total spare capacity, carried amounts and the allocation of same to members of the interest group.