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Irish Department of Finance publish Feedback Statement on ATAD

Implementation of Anti- Hybrid Rules

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On 20 June 2016, the Council of the European Union (EU) adopted the Anti-Tax Avoidance Directive (ATAD) laying down rules against tax avoidance practices that directly affect the functioning of the EU's 'internal market'.

On 29 May 2017, the EU adopted the ATAD 2 (amending the ATAD) which extended the scope of the anti-hybrid provisions.

On 14 November 2018, the Irish Department of Finance launched a public consultation on the implementation of the interest limitation and anti-hybrid rules contained in the ATAD and ATAD 2. In the submissions received from the consultation process, many stakeholders noted that the anti-hybrid provisions will be complex and highly technical in nature. They also requested that the Department of Finance consult with stakeholders to the greatest extent possible in relation to the legislation.

On 22 July 2019 the Irish Department of Finance published a Feedback Statement entitled 'ATAD Implementation Anti-Hybrid Rules' to respond to the views expressed in the public consultation and to set out possible approaches to some of the technical aspects of the anti-hybrid rules.

This Feedback Statement is an important development in the context of the ATAD as it gives an indication of what we can expect to see in Ireland's draft anti-hybrid legislation - which is due to be published this October in Finance Bill 2019.

Click [here](#) to view the Department of Finance's Feedback Statement.

Anti-hybrid rules will be effective in Ireland from 1 January 2020 and anti-reverse hybrid rules will be effective in Ireland from 1 January 2022.

The EU's ATAD Anti-Hybrid Rules

The anti-hybrid provisions contained within the ATAD are intended to prevent taxpayers from engaging in tax system arbitrage. Hybrid mismatches exploit differences between tax systems (specifically in relation to the characterisation of financial instruments and entities). They may apply to a taxpayer in one EU Member State and an associated enterprise in another jurisdiction or a 'structured arrangement'. The effect of such mismatches is often a double deduction (i.e., a deduction in two or more jurisdictions) or a deduction of the income in one jurisdiction without inclusion in the tax base of the other.

To neutralise the effects of hybrid mismatch arrangements, the ATAD establishes that where a hybrid mismatch results in a double deduction, the deduction should be granted only in the EU Member State where the payment has its source. Similarly, where a hybrid mismatch results in a deduction without inclusion, the EU Member State of the payer shall deny the deduction for tax purposes of such payment.

Content of the Feedback Statement

The Feedback Statement appears to be consistent with previous statements the Irish Government have made on their proposed implementation of the ATAD anti-hybrid rules. That is, that they do not intend to extend the scope of the Irish anti-hybrid rules beyond what is included in the ATAD.

The Feedback Statement is split into three main sections, being (i) Definitions, (ii) The anti-hybrid rules, and (iii) Anti-avoidance rules. At a high level, some of the items addressed within these Sections are as follows:

1. It proposes definitions for anti-hybrid concepts included in the ATAD, that are not already defined in Irish law. For example, as none of Ireland's existing provisions accurately reflect the requirements of Article 2(4) of the ATAD, the Feedback Statement proposes a definition for 'associated entities'.
2. The Feedback Statement breaks down the concept of a hybrid mismatch outcome and proposes a number of definitions for individual concepts which may result in a hybrid mismatch outcome - for example 'payment', 'deduction', 'double deduction', 'inclusion' etc. The interaction of the definitions under the anti-hybrid rules may be complex.
3. The structure of the ATAD 2 requires countries to implement a primary rule to neutralise a mismatch outcome in the country where it arises. Where the mismatch outcome isn't neutralised under a primary rule, then certain 'defensive rules' may apply. The Feedback Statement attempts to address when other countries' primary rules may be treated as having neutralised a mismatch outcome, to prevent Irish defensive rules applying when the mismatch outcome has already been neutralised.
4. The Feedback Statement contains a proposed rule against aggressive withholding tax arbitrage. It provides that where two entities enter into a transaction with a view to tax relief being granted twice for the underlying withholding tax, then the amount of withholding tax relief which a country gives should be restricted to the amount of taxable income they recognise from that transaction.
5. There is a proposed rule against 'structured arrangements' contained in the Feedback Statement. This is the second of two anti-hybrid rules which are not restricted to transactions with associated entities. The Feedback Statement suggests that sharing in the value of the tax benefit resulting from the mismatch outcome should be made a requirement in order for a 'structured arrangement' to exist.

Consultation Process – Next steps

The anti-hybrid issues addressed in the Feedback Statement will continue to be considered by the Department of Finance until **6 September 2019**.

Stakeholders are encouraged to contact the Department of Finance at the earliest convenience should they have any queries or comments on the Feedback Statement. This will allow the Department of Finance to engage in a timely preparation of legislation for publication in Finance Bill 2019 (which is due to be published in October 2019).

On publication of the Finance Bill 2019 by the Department of Finance, it will then be debated and passed by the Irish Parliament. This process is expected to be completed by the end of the year in which the Finance Bill is published.

The views of stakeholders will be important in ensuring that Ireland's anti-hybrid rules, when introduced with effect from 1 January 2020, meet the standards required under ATAD while also being clear and operable in practice and remaining consistent with Ireland's long-standing focus on the taxation of activities with substance in Ireland.

In this regard, it is advisable to examine existing situations in the context of the published Feedback Statement and assess the potential impact.

Should you have any questions in relation to this, please do not hesitate to contact us.

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