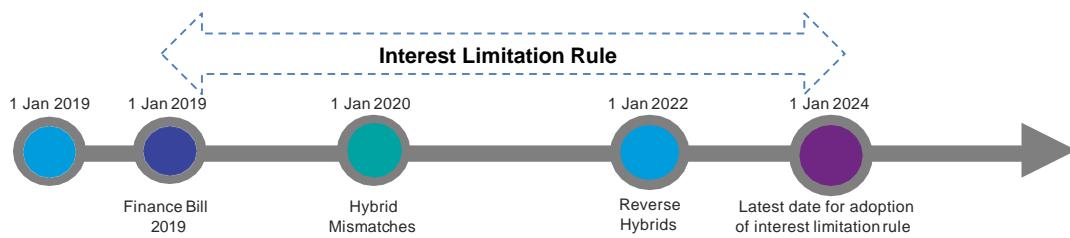


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Background

On 14 November 2018, Ireland launched a [public consultation](#) seeking feedback and insights on a range of questions relating to the adoption of hybrid mismatch measures and a general interest limitation rule. The consultation comprises a series of technical questions seeking to explore the manner of adoption of the measures into Irish law. It runs to 18 January 2019.

Ireland has committed to adopt into its corporation tax regime Anti-Tax Avoidance Directive (ATAD) measures – including those which counteract cross border hybrid mismatches between European Union (EU) Member States and between EU Member States and Third Countries.

The hybrid mismatch measures seek to counteract deduction/no inclusion (D/NI) and double deduction (DD) outcomes which can erode the tax base of countries. They are to apply from January 2020 with measures to counteract reverse hybrids to apply from 1 January 2022. The general interest limitation rule seeks to cap deductions for broadly defined, net borrowing costs to 30% of taxable earnings before interest, tax, depreciation and amortisation deductions (EBITDA). Ireland proposes to defer adoption of the general interest limitation rule until 1 January 2024 at the latest – although it may adopt the measures earlier (but not earlier than Finance Bill 2019).

Hybrid mismatch measures

The Hybrids consultation asks for views on *what entities and types of tax should be within the scope* of Ireland's hybrid mismatch measures? Such measures generally apply under the corporate income tax regime. The measures target deduction/non inclusion (D/NI) and double deduction (DD) outcomes. Questions are asked in relation to:

- *when payments should be treated as subject to tax* i.e. "included" in income even if arising to a tax exempt entity,
- *how to treat timing mismatches* e.g. in the recognition of deductions /taxation of receipts, and
- *how to apply the measures to structured arrangements.*

Where a hybrid mismatch has not been counteracted in the counterparty jurisdiction, Ireland should introduce *defensive measures* to include the mismatch in income. How should Ireland frame these measures – particularly as it looks ahead to the possible future adoption of a branch exemption regime as well as interacting with hybrid mismatch measures of other EU Member States?

How should Ireland tax hybrid mismatch income? Ireland's regime does not have a concept of 'ordinary business income', as used in ATAD, but instead taxes classes of income under a schedular system. Views are sought on how Ireland should tax a hybrid mismatch charge.

Feedback is sought on the *range of reliefs* available under the ATAD framework such as preserving mismatch deductions where it is included in income in the two jurisdictions (dual inclusion income), certain transactions by financial traders and capital market transactions. It is generally not expected that the measures should apply to non-hybrid payments to nil tax jurisdictions nor to mismatches that arise due to transfer pricing or foreign exchange differences.

If *existing measures in Ireland provide protections* against hybrid outcomes, how should these be incorporated into a new regime?

How will the hybrid mismatch regime interact with the general interest limitation rule? This issue is likely to be of interest to those in the leasing sector where lease payments can include financing and service elements as well as stock lending/repos and Islamic finance transactions.

General interest limitation rule

The consultation acknowledges the potential interlinkage of ATAD hybrids and interest limitation measures and asks general questions on adoption of an interest limitation rule. These include questions on:

- The operation of the rule in the context of Ireland's tax grouping regime – how should restrictions that apply to one tax group member be offset against unused capacity in another group member, the treatment of group leavers and joiners, etc.?
- The adoption of a de minimis exclusion for annual net borrowing costs less than €3 million (on a tax group basis).
- The type of income / expense that should be considered to be included in 'net borrowing costs' e.g. discount, guarantee fees, finance lease interest, etc.
- Grandfathering applicable to pre-existing loans concluded before 17 June 2016 where the loan remains unchanged.

- Long term infrastructure exemption – the scope of projects that should be considered as eligible for this exemption.
- Factors related to the standalone entity exclusion?
- Possible exclusions for financial institutions and regulated entities and non-regulated entities carrying on the same activities.
- As the purpose of the measures is to protect Ireland's tax base from erosion due to finance expense deductions, feedback is sought on reliefs available by reference to consolidated group-wide earnings or assets:equity ratio tests.
- Feedback on the choice of one of three policy options for relief for carried forward unused expense or interest capacity.
- The interaction of the ATAD interest limitation rule with existing Irish measures for interest relief and anti-avoidance related to interest.

KPMG intends to respond to the consultation. If you believe your business could be affected by these measures and would like to provide input, please contact your KPMG team to have your voice heard.

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What should you do next?

Ireland's policy makers would like to receive feedback from business in relation to the potential impact of these measures. This is so that Ireland can adopt the measures into its corporation tax regime and afford the greatest certainty for business in the manner of adoption and application of the measures.

Having your voice heard

KPMG will be responding to the consultation – please get in contact with your KPMG team to have your voice heard.

Hybrid mismatch measures – what should you do next?

Review intra group transactions and consider if adoption of ATAD measures could inadvertently affect current outcomes

Ireland already has a number of features in its domestic regime which reduce the likelihood of D/NI and DD outcomes arising from hybrid mismatch measures. These measures may be revised to fit within the ATAD framework.

It is not intended that hybrid mismatch measures would affect differences in outcome arising from receipts taxed under nil tax regimes, receipts by tax exempt entities, transfer pricing adjustments or differences arising from foreign exchange movements.

Does your group have transactions with entities subject to US Check-the-Box provisions?

Transactions with entities that have been subject to a Check-the-Box election for US tax purposes can be viewed differently for Irish tax purposes. If your group has entered into these transactions, you will already be considering the impact of US tax reform on taxing income of non-US subsidiaries as well as US anti-hybrid measures.

The interaction of these measures with the ATAD measures should be considered for Irish group members.

Review potential impact: structures with multiple holding entities

Groups which have a number of intermediary holding layers will need to consider the impact of these measures when tracing the tax effect of payments deductible in one jurisdiction through to the ultimate recipient.

Establishing when a payment can be said to be subject to tax is likely to be of particular interest to those operating in the funds sector or engaged in debt raising activities where aggregating investor interests, etc. can mean multiple intermediary layers of holding entities with limited information on the identity of investors.

Ireland's choices upon implementation of reverse hybrid measures will also be of interest to those in the funds sector.

Financial services

The implementation of anti-hybrid measures may affect the tax treatment of regulatory capital instruments and repo / stock lending transactions as well as other capital markets transactions.

Businesses operating in these sectors should review the scope of potential reliefs / exclusions and consider their potential impact if adopted.

General interest limitation rule – what should you do next?

Consider the overlapping/interacting effect of the interest limitation rule and anti-hybrid measures

Net borrowing costs is broadly defined to include not just interest but also potentially discount expense, finance lease interest, foreign exchange movements, guarantee fees, etc. How could a different treatment for such expenses influence existing financing transactions?

The measures could also interact with potential changes to Ireland's transfer pricing regime and feedback is sought on the manner in which the measures could interact with transfer pricing measures.

Leasing and other arrangements can include financing costs that are framed differently from a legal perspective.

Consider which current protections from base erosion might reasonably be removed under a general interest limitation rule

Ireland already has a series of targeted anti-avoidance measures which afford strong protection from base erosion due to financing expense deductions.

Should they be removed where a general interest limitation rule applies?

Is your business operating in a sector with heavy capital investment?

These sectors are likely to be affected by the measures. They could include leasing, property and other sectors where debt levels are typically higher than levels in other sectors due to the security available to lenders over the assets of the borrower.

Could certain projects be eligible for the long term infrastructure exemption?

Review potential exceptions and their application to your business

A number of exceptions are potentially available for Member States' choice under ATAD.

You should review these and consider whether they might be applicable to your business and the impact on your business if not adopted by Ireland.

Consider if group based reliefs could apply to deductions in Ireland

Reliefs available include those designed to permit deductions for third party debt at levels aligned with group-wide debt. Different possible approaches are available including relief based on group-wide equity:asset ratios or tests based on consolidated earnings.

You should review the manner of operation of these reliefs and how they could affect your business if they were available.