Comments on the Feedback Statement on ATAD Anti-Hybrid Rules

Submission to the Department of Finance

September 2019

EXECUTIVE SUMMARY

The American Chamber of Commerce (the American Chamber) Ireland's priority is that Ireland remains a unique transatlantic trade and investment gateway and a location of choice for US inward investment to Europe. Internationally competitive, certain corporate tax policy is a necessary part of Ireland's FDI offering to retain and attract substantive operations in Ireland. The American Chamber welcomes Government's commitment and support for international rules that avoid double taxation, are pro-growth and employment, and are grounded on value creation.

As Ireland continues to implement further ATAD provisions, member's priority is that the implementation of this complex legislation should be done in a manner which supports Ireland's competitiveness for winning inward investment and employment and is consistent with other EU Member State's transposition of the legislation.

The American Chamber is pleased to respond to the Feedback Statement on anti-hybrid legislation as an important consultation exercise that is valued by our members.

Below, we have enclosed a detailed analysis of the legislation (with a discussion of the definitions in the appendix) included in the Feedback Statement, however we would emphasise the following points with:

- International Experience: The American Chamber is of the view that clarity and certainty in respect of the implementation of the anti-hybrid legislation is of the utmost importance. While we appreciate that the full draft of the anticipated legislative proposals cannot be released at this stage, which in some respect acts as a constraint on the consultation and certainty process. Accordingly, we would encourage the Department of Finance to also take account of the learnings from other jurisdictions that have already implemented these tax rules. Most notably, the UK has already legislated for many of the issues consulted on in the consultation and we should seek to prevent some the challenges they encountered and experienced.

- Appropriate Safe Harbours: The American Chamber also highlights the interaction of the anti-hybrid legislation with overseas tax regimes. It will be important to ensure that Irish rules do not require Ireland based employees, who are responsible for tax reporting and compliance, to be experts in all tax regimes globally. Appropriate safe harbours or boundary conditions to the operation of the rules are critical. Where other countries have enacted laws in pursuance of ATAD or BEPS Action 2, no further action should be required by Irish taxpayers. This has been a feature of anti-hybrids implementation in other jurisdictions and we believe that it should guide the implementation in Ireland also.

- Effectively Targeted: It is critical that the imposition of hybrid disallowances, particularly in the area of double deduction mismatches are appropriately restricted to counteract contrived situations designed to generate tax advantages and that they do not extend further. Minor temporal mismatches (e.g. in the offset against dual inclusion income) should not lead to a permanent loss of deductions. The limited ability to offset losses brought forward for group relief is a significant issue in this regard which will have to be addressed once the full legislation is available. In implementing its analogous rules, the UK permitted regard to be had to other accounting periods and subsequently amended its rules on group relief as a result of which fewer issues arise. This meant that the anti-hybrid rules could be effectively targeted and not punish minor timing difference which are not intended to fall within scope.

- Exclude Genuine Scenarios: The American Chamber would also note that the use of US check the box elections is done for a variety of business reasons which may not create a double deduction or deduction non-inclusion outcome. We would therefore stress that the use of the check the box elections in such genuine scenarios should not fall foul of these anti-hybrid rules as this would adversely impact US MNCs operations in Ireland. The American Chamber notes that there may be intercompany payments in a US headquartered group which are disregarded for US tax purposes, but economically the relevant profits are being taxed in the US. It is important that the wording of the draft legislation is expanded to make it clear that these types of payments are also "included" or do not give rise to a mismatch outcome.

- Robust Definitions: The American Chamber is of the view that a more robust definition of hybrid entity should be provided to offer taxpayers a greater level of certainty. Consideration could also be given to following the foreign entity's tax treatment that is applied in the jurisdiction of the entity. In addition, it would be beneficial if a comprehensive list could be provided by Revenue outlining the most common forms of entities and detailing whether such entities are tax transparent or tax opaque for the purposes of the anti-hybrid legislation. We would be happy to discuss such potential solutions with the Department in this regard.

- Appropriate Treatment of Historical Transactions: The American Chamber also notes that the definition of deduction includes payments in respect of which capital allowances are made. We would be concerned that this would cause issues in respect of assets acquired prior to the implementation of the anti-hybrid rules on which capital allowances may still be available and would impose on taxpayers an unnecessary compliance burden, who would be required to look back at their previously acquired assets to determine whether they lead to a hybrid outcome. In this regard, consideration should be given to excluding from the scope of the rules any assets acquired prior to implementation.

We look forward to continued consultation with the Department of Finance on the implementation of this anti-hybrid legislation and would welcome further discussion regarding same. As always, the American Chamber believes that Ireland must focus on the things it can control in the face of political, economic, social and technological opportunities and challenges – whatever they bring and whenever they impact – to sustain competitiveness for inward investment.

THE ANTI-HYBRID RULES

The Rule Against Double Deductions

The Normal Rule

We refer to the appendix of this submission in respect of the meaning of *"arrangement"* as well as the suitability of the application of capital gains tax with regards to this section.

The Tax Residency Rule

We refer to the appendix of this submission in respect of the meaning of *"entity"* and *"arrangement"* with regards to its use in subsection 2 of "Application of Chapter X".

We recommend that the reference to a body corporate being Irish tax resident by virtue of Section 23A TCA 1997 be removed as this would not include a non-incorporated Irish resident company within its scope.

Subsection 2(a) of "Tax residency mismatch" refers to the interaction between Ireland and a relevant Member State (presumably an EU/EEA country) with whom a double tax agreement is in force. In that instance, the draft legislation refers to the company being tax resident in the other Member State by virtue of the DTA. It is unclear therefore how there can be any *"dual residence"* giving rise to a double deduction mismatch outcome, where the provisions of the DTA residence tiebreaker have applied to determine the tax residence of the taxpayer in question. A similar question arises with subsection 2(b)(i).

Presumably the intention of the legislature is to provide that where tax residence cannot be resolved either by way of the DTA tie breaker clause (if available) or by agreement by the competent authorities then a true *"dual residence"* situation arises and regard can be had to the anti-hybrid rules to deny one of the deductions in either Ireland or abroad.

Carry Forward

We would expect that if there is a minor timing difference between the inclusion of the relevant income for foreign and domestic purposes, this should be regarded as *"dual inclusion income"*. The corresponding UK legislation provides that recognition in the results of an accounting period beginning within 12 months of the end of the relevant domestic accounting period[1] would continue to satisfy the requirements of *"dual inclusion income"* with a *"just and reasonable"* approach to complement it.

In addition, the denial of a deduction for an expense legitimately incurred should only be applied where it is clear that there is a permanent or quasi-permanent hybrid effect and not some minor timing difference such that there is no negative impact to Ireland's group relief regime.

While the carry forward provisions allow for previously denied deductions to be relieved at a future point in time, it does not take into account instances where there is a time limit to claiming such relief, such as non-trade charges and group relief for current year losses. We would therefore recommend that the mechanics for carrying forward deductions denied under the anti-hybrid rules in the above situations be clarified and that either a technical amendment be made to such sections in cases where a deduction is denied by way of the anti-hybrid rules, or the carry forward rules should specifically carve out such instances.

[1] Section 259JD TIOPA 2010

In light of further changes required by ATAD 1 regarding interest deductibility, there may be situations where interest expenses incurred by an Irish entity are not only subject to the anti-hybrid rules but also the 30% of EBITDA interest restriction[2]. The Directive provides that Member States may make provision for a carry forward of exceeding borrowing costs which cannot be deducted by virtue of the 30% EBITDA restriction. Notwithstanding the fact that legislation to implement the 30% EBITDA restriction has not yet been introduced, we would argue that the proposed carry forward of deductions under the anti-hybrid rules should be amended to reflect the interaction between the two restrictions.

Deduction without inclusion outcomes

Financial Instruments

The Directive provides that a hybrid mismatch arises where a payment gives rise to a deduction without inclusion outcome and such payment is not included within a reasonable period of time and the mismatch is attributable to differences in the characterisation of the instrument or the payment made under it. However, the draft legislation goes beyond what is required in the Directive by outlining that a payment will not be included where there is mismatch in characterisation or the payment has not been included in a reasonable timeframe. As such, we would recommend revision to this section to bring this in line with the tests laid out in the Directive.

Regarding subsection 1 of "Financial instruments", guidance should be issued as to the extent of the investigation required by taxpayers regarding the application of the *"reasonable to consider"* test. Furthermore, it might be useful to include a similar *"reasonable to consider"* test with regards to subsection 2(b).

The proposed wording leaves no room for doubt that the trigger point for a charge to tax in Ireland is where the *"deduction has not been denied"* in the payer territory through the operation of a provision similar to Subsection 2(a). Such a requirement places a considerable burden on Irish taxpayers who would be obliged to engage in a comparison of the foreign and domestic mechanisms implementing the anti-hybrid rules from the Directive.

The proposed wording also does not take into account the potential for changes to foreign tax law on hybrids, which may have effect after the Irish tax returns are filed but with application to payments already made. In this instance, a point in time and *"reasonable to consider"* test on the date of payment would provide Irish payees with a greater level of certainty.

Furthermore, with respect to subsection 2(b), the draft legislation refers to domestic Irish law as being the driver behind the *"non-inclusion"* of the income. This wording would appear to link the non-inclusion of the income to domestic law as opposed to a mismatch between legal characteristics.

The inclusion of Capital Gains Tax within the scope of the proposed rules may give rise to unexpected consequences for Irish taxpayers. The OECD BEPS Action 2 paper outlines an example whereby consideration/market value is given for a trading asset[3]. The example states as follows:

> *"The hybrid financial instrument rule is not intended to apply to asset transfers unless the transfer is a hybrid transfer or incorporates a substitute payment".*

[2] Article 4, Council Directive 2016/1164 of 12 July 2016

[3] Example 1.26 "Consideration for the purchase of a trading asset", Neutralising the effects of hybrid mismatch arrangements, Action 2 2015 Final report.

In our view, the scope of the anti-hybrid rules should apply only to cases where there has been a mismatch as a result of some element of hybridity. However, we would argue that the proposed wording does not fully link the application of the anti-hybrid rules to this concept of hybridity.

Hybrid Entities

With regards to the definition of *"hybrid entity",* subsection (b) does not specify exactly what will qualify as *"passing through the hands of the entity"* for the purposes to the anti-hybrid rules. However, subsection (i)(II) indicates that transparency is to be identified by situations where income automatically flows to the beneficial owners without ever resting in the entity first.

Due to a lack of certainty under existing Irish legislation, consideration must be given to the various factors which have been determined by the courts to be important in determining the transparency/opaqueness of an entity. One such factor is whether a person who has an interest in the entity is entitled to a share in the profits as they arise or whether an allocation or distribution of profits depends on the decision of the entity. Other factors derived from relevant case law[4] are set out below:

- Does the foreign entity have a legal existence separate from that of the persons who have an interest in it?
- Does the entity issue share capital or something else, which serves the same function as share capital?
- Is the business carried on by the entity itself or jointly by the persons who have an interest in it that is separate and distinct from the entity?
- Are the persons who have an interest in the entity entitled to share in its profits as they arise (which would indicate transparency); or does the amount of profits to which they are entitled depend on a decision of the entity or its members, after the period in which the profits have arisen, to make a distribution of its profits?
- Who is responsible for debts incurred as a result of the carrying on of the business, the entity (which would indicate an opaque entity) or the person who has an interest in it (which would indicate a transparent entity)?
- Do the assets used for carrying on the business belong beneficially to the entity (which would indicate an opaque entity) or to the person who have an interest in it (which would indicate a transparent entity)?

The issue with the proposed wording is that it applies for the purposes of the tax acts and existing case law on the identification of the legal characteristic of an entity might be overruled which would have significant and wide-ranging implications beyond anti-hybrid legislation. For example, the proposed wording could result in instances where a partnership in some cases must be treated as a corporate. In such cases, if this wording were to be adopted then this would likely require transitional rules to deal with same.

Anti-Hybrid Rules

We refer to our earlier comments, noting the following in summary:

- The wording provides no safe harbour with respect to the level of knowledge Irish entities are expected to have as to foreign tax regimes and anti-hybrid rules.
- The proposed wording also does not take into account the potential for changes to foreign tax law on hybrids, which may have effect after the Irish tax returns are filed but with application

[4] e.g. *Quigley v Harris* [2008 IEHC 403] and *Memec v CIR* [1998 STC 754]

to payments already made. In this instance, a point in time test on the date of payment would provide further clarity and certainty to Irish payees.

- The proposed wording refers to domestic Irish law as being the driver behind the *"non-inclusion"* of the income. This wording would appear to link the non-inclusion of the income to domestic law as opposed to a mismatch between legal characteristics.

The rule against disregarded permanent establishments

As mentioned earlier, further guidance would be welcomed to confirm the level of due diligence required by Irish taxpayers as to the foreign tax treatment of certain payments made.

The rule against aggressive withholding tax arbitrage

We would welcome further guidance and clarity as to what would be required in identifying "A" in the draft legislation as we would expect practical difficulties in carving out the profit arising specifically from the hybrid transfer.

ANTI-AVOIDANCE RULES

The rule against imported mismatches

As mentioned in our previous submission[5], the American Chamber is concerned about the administrative burden involved in tracing transactions to which the Irish taxpayer is not a party. Knowledge of a foreign tax regime and the application and efficacy of its anti-hybrid rules would, in our opinion, be an unduly onerous burden for an Irish taxpayer. There should be a safe harbour when dealing with EU counterparties such that a formal analysis of the implementation is not required as it would be expected that the Commission would take infringement proceedings against any Member State which failed to implement them appropriately.

Secondly, we note that the proposed wording brings a payment made within the scope of the imported mismatch rules where a payment by the body corporate *"directly or indirectly"* funds the mismatch outcome. While this is in line with the Directive, the interpretation and scope of what would be classified as indirect may cause difficulties and uncertainty among taxpayers and therefore, further guidance is required as to what will fall within the scope of indirectly funding the mismatch.

Finally, we note that the imported mismatch rule is currently drafted to apply to "mismatch outcomes" and not "hybrid mismatches". As currently drafted the rule will have a much more expansive application and will apply where mismatched outcomes arise for reasons other than hybridity. As this was not the policy intent, we suggest that the rule be revised to apply to hybrid mismatches only.

The rule against structured arrangements

The proposed legislation would appear to be ring-fenced within this Chapter and this is in line with recital 12 of ATAD 2 where it makes the point that *"In order to ensure proportionality, it is necessary to address only the cases where there is a substantial risk of avoiding taxation through the use of hybrid mismatches. It is therefore appropriate to cover hybrid mismatches that arise* [certain specific examples given] *and those resulting from a <u>structured arrangement</u> involving a taxpayer* [emphasis added]*".*

However, article 9(4)(a)(iii) contains certain exclusions from hybrid mismatches and one of which includes those involving financial instruments issued *"not as part of a structured arrangement"*. As such, it should be noted that this may have implications beyond this Chapter, particularly in respect of financial instruments.

ATAD 2 refers to a hybrid mismatch as being one where the mismatch outcome is attributable to differences in the characterisation of the financial instrument. There must, therefore, be a stronger causal link between the mismatch outcome and the hybridity as a result of differences in legal characterisation. We would expect that this would be dealt within a definition of *"mismatch outcome"* which we would hope to see included in the final legislation.

Further guidance as to the level of due diligence to be carried on by the taxpayer with regard to the concept of *"reasonably expected to be aware"* would also be welcome.

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[5] https://www.amcham.ie/getattachment/Advocacy/Policy-Work/Submissions/ATAD-Implementation/ATAD-Implmentation-American-Chamber.pdf.aspx?ext=.pdf

Appendix - DEFINITIONS

Associated Entities

The American Chamber is of the opinion that the definition of *"entity"* should not extend to natural persons given that article 1 of ATAD provides that the anti-hybrid rules should apply to *"…all taxpayers that are subject to corporate tax…"*.

Furthermore, as drafted, the concept of *"undertaking"*, according to settled EU case law, is "*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed"* [emphasis added]. Therefore *"entity"*, as written in the proposed legislation, could comprise an entity engaged in economic activity, which is somewhat circular. We recommend that *"undertaking"*, if retained, be adequately defined in Irish law so as to avoid unnecessary ambiguity as would limit the effectiveness of the Directive which relies on a consistent transposition.

The idea of an *"agreement"* or an *"arrangement"* presupposes the existence of two or more parties carrying out the terms of the agreement rather than an entity being defined as such. We recommend the removal of Subsection (v) of the definition of *"entity"*.

While the definition of *"associated entities"* is consistent with existing concepts of associated entities within TCA 1997, the Directive imposes no requirement to consider future interests or an entitlement to acquire same in identifying associated entities. As such, we are of the view that the introduction of the words *"entitled to acquire"* goes beyond what is required by the Directive and may result in situations where two parties might be regarded as associated under Ireland's anti-hybrid rules while not being considered associated in a relevant overseas territory. We would therefore recommend that this be removed.

We note that the concept of *"significant influence"* is referred to in the proposed law in respect of:

i. Significant influence within the meaning of international accounting standards. Or
ii. Significant influence over management of an entity.

The former can be understood by reference to the accounting standards and, in particular can be construed in line with IAS 28.

However, the concept of "exercises significant influence over its management" is more problematic and, if it is to be retained, should be clarified. For example, it is unclear whether "management" refers to shareholder level, board level or indeed lower levels of management.

In addition, the definition of *"associated entity"* in ATAD 2, where significant influence is mentioned, reads *"…an associated enterprise also means an entity that is part of the same consolidated group for financial accounting purposes as the taxpayer, an enterprise in which the taxpayer has a significant influence in the management or an enterprise that has a significant influence in the management of the taxpayer".* It can be seen that there is only one use of the term *"significant influence"* here as opposed to distinguishing between the accounting and its ordinary meaning. We are of the view that the control section outlined in section 11 TCA 1997 should be considered.

In addition, there is uncertainty as to what is intended by the use of the word *"formed"* in subsection 5(b). While one may be able identify when certain transactions or arrangements were entered into, the concept of when the transaction was *"formed"* is unclear and a distinction should be made between the timing of entering into a transaction and "forming" a transaction. We also refer back to our earlier discussion on the use of the term arrangement in respect of its use in subsection 5.

Defining Mismatch Outcomes

Payment

The reference to *"under provisions similar to Part 35A"* within the definition of "p*ayment"* should be clarified as it is unclear whether the relevant overseas provision would have to conform with the 2010 guidelines (as is currently the position in Irish law) or to the specific version of OECD guidelines which are in effect in Ireland.

In some scenarios, the jurisdiction making the transfer pricing adjustment may not adopt OECD principles or could simply borrow language from same without explicitly adopting them. Therefore, it is unclear whether *"provisions similar"* is sufficient to cover such instances. In particular, the US Internal Revenue Code prescribes transfer pricing rules for use by US corporations as opposed to adopting the OECD guidelines per se. The extent to which the US statutory rules and OECD guidelines may diverge from time to time should not result in a perceived hybrid mismatch. In particular, we would note that ATAD2, recital 22 makes it clear that there is no restriction to any particular form of transfer pricing as it requires that:

> *"Differences in tax outcomes that are solely attributable to differences in the value ascribed to a payment, including through the application of transfer pricing, should not fall within the scope of a hybrid mismatch."*

The term *"deemed equity deductions"*, should also be defined. We would expect that it relates to notional deductions by reference to a particular rate of return on the capital of a company rather than specifically referring to a deduction for equity. The wording in this clause (ii) of the definition could also be expanded to make it clear that notional interest deductions which are linked to broader concepts than just equity (e.g. loan payables, total assets), are not included in the "payment" concept.

Deductions

The inclusion of the phrase *"on which tax falls finally to be borne"* within the definition of "deduction" suggests that in order for a payment to be regarded as a deduction, tax must be borne on same. This may cause issues where an entity is looking to claim loss relief (either current year, carried forward or group relief). Therefore, we would recommend that (i) be amended as follows:

> *"which is to be taken into account in the computation of the entity's profits or losses".*

The definition of *"domestic tax"* includes capital gains tax. We would bring your attention to the corresponding UK anti-hybrid legislation[6], which includes the following definition:

> *"In this Part "tax" means—*
>
> *(a) income tax,*
> *(b) the charge to corporation tax on income,*
> *(c) diverted profits tax,*
> *(d) the CFC charge,*
> *(e) foreign tax, or*

[6] Section 259B Taxation (International and Other Provisions) Act 2010

(f) a foreign CFC charge."

Based on the above, we are of the view that the inclusion of capital gains tax within the scope of the anti-hybrid rules for Irish tax purposes is not required and should be removed.

As mentioned in our previous submission, the American Chamber is also of the view that a broad view be taken in respect of foreign tax. In this regards, we would recommend that Revenue guidance be issued in respect of *"foreign tax*", to confirm that CFC, Sub Part F, GILTI (global intangible low-taxed income) or other similar provisions should be included. Similarly, foreign tax charged by a municipality or political subdivision (i.e. local, city, state and provincial taxes which are similar in nature to corporation tax) should also be included.

Inclusions

With respect to subsection (a) of the definition of *"inclusion",* the American American Chamber would recommend the removal of *"without any further action by the payee"*. Further it is not clear whether the remittance basis, mentioned in subsection (a), is an example of an inclusion or of a further action to be taken by the payee. In addition, the current draft wording also does not make it clear that remittance and taxation of income in a country with a remittance basis regime would constitute "inclusion" under (a).

It is unclear whether the phrase *"established in a territory"* within subsection (c) means place of incorporation, place of tax residence, place of registered office or simply any territory in which it has an establishment. As such, it would be important to clarify the intended scope in clear statutory language, including that "established" includes the concept of tax residence.

Also in (c) we note the requirement that the payment must be regarded as arising or occurring "under the laws of that territory". It is unclear whether zero tax jurisdictions will have local laws that recognise income as accruing, particularly in cases where an amount is unpaid. We suggest amending the language so that "any amount paid or payable to an entity in a jurisdiction that itself does not impose tax shall be recorded as included."

Revenue guidance should be issued in respect of the use of *"similar"* in subsection (d) to include CFC regimes in jurisdictions which are not based on ATAD but which have the same effect of taxing offshore profits in the parent jurisdiction (such as the GILTI regime in the US).

We presume that the use of *"resident"* within the definition of *"payee"* is to be taken to mean "tax resident" and would suggest that this be amended accordingly. In addition, it is unclear whether *"established"* means incorporated by virtue of local company law or whether it has a wider meaning and this should be also be clarified. As noted above, it would be important to clarify that (c) includes the concept of tax residence**.**

Guidance should also be issued in respect of the order of priority between tax residence, establishment or where the payee is "situated". As an example, a payee could be tax resident in Country A, but legally incorporated in Country B. The definition at present does not explain how such a situation is to be determined.

The OECD Action 12 report defines "*payee"* as *"any person who receives a payment under an arrangement including through a permanent establishment of the payee"*. We assume that the inclusion of the phrase *"passing through the hands of another entity"* is to have the effect that the payee is to be regarded as being separate from its PE, but clarity would be required on this point.

In addition, the American Chamber is unclear as to the intention behind the inclusion of the words *"without the payment passing through the hands of another entity"*. Strictly, payments will pass through the hands of another entity as funds may be routed via financial institutions acting as intermediaries. A similar issue arises where a payment is made to a partnership and it is the partners who are assessed to tax on the payment. We would recommend that this expression be removed.

As mentioned earlier, the reference to a controlled foreign company charge should be defined to include as many CFC type regimes and charges as possible (i.e. to include EU Member States who have implemented CFC rules under a different option to Ireland and also to include analogous foreign regimes such as the US GILTI and Sub Part F rules). In this regard, the corresponding UK legislation defines a *"foreign CFC charge"* as meaning:

> *"… a charge (by whatever name known) under the law of a territory outside the United Kingdom which is similar to the CFC charge (and reference to a "foreign CFC is to be read accordingly)"*

We recommend a similar definition be included in the Irish legislation with additional guidance as to the type of regimes that could be regarded as *"similar"* to Irish rules.

Dual inclusion income should be construed in the widest manner possible, such that a restriction of tax relief should not apply where there is in fact no hybrid outcome. We recognise that drafting the necessary legislation will be complex, but it will be required to ensure that the anti-hybrids rules do penalise innocent transactions.

We refer to the draft legislation included on page 11 of the Feedback Statement. While this deals with payments between head office and permanent establishments or between permanent establishments, there is a risk that this may not include entities which are themselves disregarded (i.e. via the US *"check the box"* mechanisms or indeed tax consolidations that are available in Europe). Given the Feedback Statement's preamble to this section being to *"…prevent transactions that do not in reality give rise to a hybrid mismatch outcome being subjected to an adjustment under anti-hybrid rules",* it would be important to consider transactions involving such entities as the effect will be similar to transactions between head offices and their permanent establishments or between two or more permanent establishments of a head office. For example, there may be intercompany payments in a US headquartered group which are disregarded for US tax purposes, but economically the relevant profits are being taxed in the US. It is important that the wording of the draft legislation on page 11 is expanded to make it clear that these types of payments are also "included" or do not give rise to a mismatch outcome.

The use of the phrase *"worldwide profits"* would be better constructed as a reference to *"all its profits wherever arising"* or some similar language to ensure it is consistent with section 26(1) TCA 1997. Certain countries may operate participation exemption systems which would exempt dividends etc. irrespective of their situs.

Finally, we note that *"mismatch outcome"* is not defined in the draft legislation and would suggest that such a definition would be beneficial.

Referring to similar rules in foreign territories

The inclusion of the words *"where the provision has a similar effect"* presents difficulties for the taxpayer with respect to the interpretation and application of the anti-hybrid rules. Where any Member State does not properly implement the ATAD rules in line with the European Directive, it is expected that the European Commission would take infringement proceedings against such Member State. Accordingly, we suggest that an Irish taxpayer should be able to rely on the fact that another jurisdiction has implemented domestic rules in line with either (a), (b) or (c) of this draft section without regard to whether the local implementation has a *"similar effect"* to Irish law.

Where an Irish taxpayer wishes to rely on (d), we would suggest that it would be appropriate for the taxpayer to satisfy themselves at this point that the provisions are similar to Irish law and as such that the line *"where the provision has a similar effect to the corresponding provision in this Part"* be relevant for paragraph (d) only.

In addition, we would note that the corresponding UK legislation does not impose a requirement that the taxpayer should establish that the relevant overseas rules are effective[7] and we should therefore not include such a requirement within the Irish legislation.

[7] Section 259BA TIOPA 2010