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ATAD impact on Malta Tax Systems

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AGENDA

- General principles
- Anti-Tax Avoidance Directive I
  - Interest deduction limitation rules
  - Exit taxation
  - GAAR
  - Controlled Foreign Company (CFC) rules
- Anti-Tax Avoidance Directive II
  - Anti-hybrid rules

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General principles

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General principles

- ATAD I and II were transposed in Maltese law via Legal Notices 441 of 2018, 348 of 2019 and 29 of 2020 (into S.L. 123.187).
- The rules apply to all companies as well as other entities, trusts and similar arrangements that are subject to tax in Malta in the same manner as companies, including entities that are not resident in Malta but that have a permanent establishment in Malta provided that they are subject to tax in Malta as companies.
- Regulation 10 (reverse hybrid mismatches) also applies to all entities that are treated as transparent for tax purposes in terms of the ITA.

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Anti Tax Avoidance Directive I - IDL

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Before the introduction of the IDL

- Before the transposition of ATAD 1, the ITA already provided that an interest expense due on money borrowed is deductible when the interest is payable on capital employed in acquiring the income
- A separate income approach is applied
- In a passive context, the interest expense which is deductible may not exceed the amount of interest income

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Interest deduction limitation rule (1)

- Emanating from BEPS Action 4
- Aimed at limiting base erosion through the use of interest expenses to achieve excessive interest deductions

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Interest deduction limitation rule (2)

- Where a company has 'exceeding borrowing costs', that is, when a company's borrowing costs exceed its taxable interest revenues, the exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to the lower of:
  - the taxpayer's actual exceeding borrowing costs; and
  - the higher of (i) 30% of the taxpayer's tax-adjusted EBIDTA and (ii) €3,000,000
- The IDL does not apply to standalone entities and financial undertakings, and it does not apply on interest incurred on loans which were concluded before 17 June 2016 or on loans used to fund a long-term public infrastructure project.

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Interest deduction limitation rule (3)

- For the purposes of this rule, EBIDTA is calculated by adding back to the income subject to tax the tax-adjusted amounts for exceeding borrowing costs as well as the tax-adjusted amounts for depreciation and amortisation.
- Tax exempt income is excluded from the EBIDTA calculation.
- The EBIDTA is calculated after all actual and deemed deductions provided in the ITA.

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Interest deduction limitation rule (4)

- The determination of whether the deductibility of exceeding borrowing costs is limited by the IDL shall be carried out at the level of the taxpayer, that is, by aggregating all taxable income and all exceeding borrowing costs from all sources.
- The aggregate amount of exceeding borrowing costs shall be allocated against different sources of income at the discretion of the taxpayer, provided that the amount so allocated does not exceed the exceeding borrowing costs attributable to each respective source.
- The amount by which exceeding borrowing costs for each source of income exceed the allocated deductible exceeding borrowing costs shall be a disallowed expense for the current year of assessment and may be carried forward.

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Interest deduction limitation rule (5)

- The unused interest capacity is the excess tax-adjusted EBIDTA capacity which is not used in the relevant year of assessment.
- Unused interest capacity may be carried forward up to five years and shall be utilised on a FIFO basis.

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IDL Example (1)

	Trading (Art. 4(1)(a) ITA)	Interest (Art. 4(1)(c) ITA)	Royalties (Art. 4(1)(e) ITA)	Total
	€	€	€	€
Taxable income before IDL	4,500,000	0	1,500,000	6,000,000
EBC calculation:				
Taxable interest revenues	0	4,000,000	0	4,000,000
Deductible borrowing costs (before IDL)	4,000,000	4,000,000	1,000,000	9,000,000
EBC	4,000,000	0	1,000,000	5,000,000

Source: Guidelines in relation to Anti-Tax Avoidance Directives Implementation Regulations, S.L. 123.187

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IDL Example (2)

	Trading (Art. 4(1)(a) ITA)	Interest (Art. 4(1)(c) ITA)	Royalties (Art. 4(1)(e) ITA)	Total
	€	€	€	€
Tax-adjusted EBIDTA and deductible EBC calculation				
Taxable income before IDL				6,000,000
EBC				5,000,000
Tax adjusted EBIDTA				11,000,000
Deductible EBC (30%)				**3,300,000**

Source: Guidelines in relation to Anti-Tax Avoidance Directives Implementation Regulations, S.L. 123.187

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IDL Example (3)

	Trading (Art. 4(1)(a) ITA)	Interest (Art. 4(1)(c) ITA)	Royalties (Art. 4(1)(e) ITA)	Total
	€	**€**	**€**	**€**
EBC	4,000,000	0	1,000,000	5,000,000
Deductible EBC*	2,300,000		1,000,000	3,300,000
Disallowed EBC carried forward to subsequent years	**1,700,000**			

Source: Guidelines in relation to Anti-Tax Avoidance Directives Implementation Regulations, S.L. 123.187

*Allocated against each source of income at the discretion of the taxpayer provided that the amount so allocated does not exceed the exceeding borrowing costs attributable to the respective source.

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IDL Example (4)

SL 123.187 - European Union Anti-Tax Avoidance Directives Implementation Regulations, 2018
Regulation 4 - Interest Limitation Rule

Does the company have loans referred to in Regulation 4(4)?	No	
Does the company have exceeding borrowing costs not exceeding €3,000,000 (or equivalent) and is opting not to fill in the rest of this attachment?	No	Amount of EBC
Is the company an entity in a group, the members of which have all opted to be treated as a taxpayer in terms of regulation 4(1)(b) of the Regulations?	No	

<u>Section 1: Computation of the Gearing ratio</u>

Is the taxpayer a member of a consolidated group for financial accounting purposes [regulation 4(5)]?	No
Is the taxpayer opting to apply regulation 4(5)?	

<u>*Gearing ratio*</u> *(applicable only in the case the company is a member of a consolidated group for financial accounting purposes and opts to fully deduct the Exceeding Borrowing Costs [EBC] (regulation 4(5))*

Are all assets and liabilities of the company and the group valued on the same basis?

	Taxpayer	Group
Equity		
Total Assets		
Gearing	0.00%	0.00%

<u>Section 2: Calculation of EBIDTA</u>

Income subject to tax	6,000,000
Add tax-adjusted exceeding borrowing costs	5,000,000
Add tax-adjusted depreciation	0
Add tax-adjusted amortisation	0
EBITDA	11,000,000

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IDL Example (5)

Section 3: Maximum dedubtible EBC

EBITDA - Fixed ratio rule (30%)		3,300,000	
Add Unused Interest Capacity to be utilised in the current year of assessment	0	0	
			3,300,000
EBC as pre regulation 4(3)(a)		3,000,000	3,000,000
Maximum Deductible Exceeding Borrowing Costs			3,300,000

Section 4: Calculation of Borrowing Costs by source for the year under review

	EBC b/fwd	Deductible BC for the year	Taxable interest revenues and other economically equivalent taxable revenues for the year	Exceeding Borrowing Costs	Allocation of Maximum Deductible Exceeding Borrowing Costs	Actual Deductible EBC	EBC c/fwd
Income from Trade & Business, etc.	0	4,000,000	0	4,000,000	2,300,000	2,300,000	
Dividends [Article 4(1)(c) - ITA]	0	0		0	0	0	
Interests [Article 4(1)(c) - ITA]	0	4,000,000	4,000,000	0	0	0	
Discounts or Premiums [Article 4(1)(c) - ITA]	0	0		0	0	0	
Rents [Article 4(1)(e) - ITA]	0	0		0	0	0	
Ground Rents [Article 4(1)(e) - ITA]	0	0		0	0	0	
Royalties, Premiums & Other Income arising from Property [Article 4(1)(e) - ITA]	0	1,000,000		1,000,000	1,000,000	1,000,000	
Other Income [Article 4(1)(g) - ITA]	0	0	0	0	0	0	
TOTAL	0	9,000,000	4,000,000	5,000,000	3,300,000	3,300,000	1,700,000
				5,000,000	Max 3300000		

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IDL Example (6)

Expenditure disallowed for tax purposes [Please specify below]			
ITA - Article 14(1)(p) and LN 208 of 2019 - Patent Box Regime (Deduction) Rules, 2019	TRA 113	11a	0
Disallowed interest per Reg. 4 SL123.187		12a	1,700,000
		13a	
		14a	
Provisions, Impairment differences and Other add-backs [Please specify below]			
Net non-distributed income in terms of Regulation 7(2) of SL123.187	TRA 112	15a	0
Interest deductible against royalty income		16a	1,000,000
		17a	

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IDL Example (7)

Royalties, premiums and other income arising from property [Article 4 (1)(e) ITA]	Final Tax Account	Allocated Immovable Property Account	Maltese Taxed Account	Foreign Income Account
Gross Royalties			2,500,000	
Premiums and other income from property				
Grossed up element for Flat rate foreign tax credit				
Gross income from royalties, premiums, etc		0	2,500,000	0
Less direct expenses [Details required]				
Interest expense		0	1,000,000	0
Capital Expenditure on Intellectual Properrty or Intellectual Property Rights	TRA 107	0	0	0
Patent Box Regime (Deduction) Rules, 2019	TRA 113	0	0	0
Income from royalties etc after deducting direct expenses		0	1,500,000	0

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Applying the IDL as a group

- On an annual basis, an article 16 group which has not opted for tax consolidation may elect to be construed as a single taxpayer in order to calculate the exceeding borrowing costs and the tax-adjusted EBIDTA.
- Each entity within the group having excess unused interest capacity must surrender this to any other entity within the same group which has exceeding borrowing costs which are subject to interest deduction limitations.
- The €3,000,000 *de minimis* threshold is available once for the whole article 16 group. Its allocation between group members is at the discretion of the group.
- In the case of a fiscal unit, the calculation of exceeding borrowing costs and the tax-adjusted EBIDTA is made at the level of the fiscally consolidated group, taking into consideration only the entities which are in scope of ATAD (but excluding any financial undertakings).

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Equity escape carve-out

- Where a taxpayer is a member of a consolidated group for financial accounting purposes, the taxpayer may fully deduct its exceeding borrowing costs if the ratio of its equity on total assets is equal to or higher than the equivalent ratio of the group, that is:

$$\text{If Company A's } \frac{Equity}{Total\ Assets} \gg \text{ the Consolidated Group's } \frac{Equity}{Total\ Assets}$$

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Anti Tax Avoidance Directive I – Exit Taxation

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Exit taxation (1)

- Not emanating from BEPS Actions, but rather introduced in line with ECJ case law
- Aims to ensure that EU Member States tax economic value of gains created in their territory

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Exit taxation (2)

- An exit tax is levied in any of the following circumstances:
  - A taxpayer transfers assets from its head office to its PE in another MS or in a third country insofar as the MS of the head office no longer has the right to tax the transferred assets due to the transfer;
  - A taxpayer transfers assets from its PE in a MS to its head office or another PE in another MS or in a third country insofar as the MS of the PE no longer has the right to tax the transferred assets due to the transfer;
  - A taxpayer transfers its tax residence to another MS or to a third country, except for those assets which remain effectively connected with a PE in the first MS;
  - A taxpayer transfers the business carried on by its PE from a MS to another MS or to a third country insofar as the MS of the PE no longer has the right to tax the transferred assets due to the transfer

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Exit taxation (3)

- Exit tax is a tax on unrealised capital gains that are to be calculated at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes. For this purpose, 'market value' means the amount for which an asset can be exchanged, or mutual obligations can be settled between unrelated buyers and sellers in a direct transaction

- The ITA and its subsidiary legislations apply *mutatis mutandis* to the unrealised capital gains on which exit taxation is levied

- Where it needs to be determined whether *'Malta no longer has the right to tax the capital gains'*, reference needs to be made to the ITAs as well as double taxation agreements

- Where Malta has the right to tax in terms of international tax principles but chooses not to tax, then it follows that there is no effective loss of right to tax for Malta

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Exit taxation (4)

- Exit tax is captured via the income tax return and is payable by not later than the taxpayer's tax return date

- Subject to obtaining CfR approval, where the exit tax arises in connection with a transfer of assets or tax residence to another EU/EEA State a taxpayer may settle the amount due over 5 years. Such a deferral is subject to interest in accordance with article 44(2A) of the Income Tax Management Act. The deferral of payment may be immediately discounted in a number of instances.

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Exit taxation (5)

- Where assets, tax residence or the business carried on by a PE is transferred to Malta from another EU MS, the starting value of the relevant assets for tax purposes in Malta shall be that established by that other EU MS
- Having said that, the CfR may determine through an enquiry and assessment, and by engaging an independent person that is an expert in the relevant field, that such value does not reflect the market value

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Exit taxation – example (1)

1 Capital Gains on Transfer of Securities in companies not listed on the M.S.E.

IT Reference of Transferor (in case of fiscal unit)		
Is it a deemed transfer subject to exit taxation (Reg 5 - S.L.123.187)?	Yes	
Name of Company being transferred	ABC Co GmbH	
Income Tax / ROC number	000-000-000	
Number of Securities transferred	10,000	
Date of transfer	31/12/2021	
Is it a transfer of a controlling interest?	Yes	
Allocated to >	MTA	
Consideration / Market value of shares transferred		50,000
Cost of acquistion of shares transferred [computed according to the applicable provisions of the Income Tax Act and Rules]		10,000
Total Gain/(Loss) attributable to shareholder		40,000
Is the company an Original Shareholder	Yes	
What is the level of Public participation?	Less than 10%	
Taxable portion is equal to 100 % of the gain		0 Allocated below
Non Taxable portion		0 TRA116

Capital Gain / (Loss) on transfer of securities allocated	UTA	IPA	MTA	FIA
			40,000	

CfR - Malta TA2_e-CO_2022_Ver 1.1 TRA 17_1

IS ATTACHMENT COMPLETE [Y or N] ? Yes

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Exit taxation – example (2)

ITA - SL 123.187
European Union Anti-Tax Avoidance Directives Implementation Regulations, 2018 Regulation 5 - Exit Taxation

Under which regulation are the exit tax rules being applied?	Reg. 5(1)(c)		
Tax jurisdiction to which jurisdiction is the transfer being made?	EU	Please specify country	Cyprus
Is the payment of exit tax being deferred under Reg. 5(2)?	No	Date of approval	
		Permit no	

Details of Immovable Property/Securities/Other assets transferred					
Description (Immovables)	Attach.	UTA	IPA	MTA	FIA
Description (Securities or interest in partnership)	Attach.				
ABC Co GmbH	TRA17_1			40,000	

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Exit taxation – example (3)

Other transfer of assets subject to Capital Gains [Goodwill, Trade marks, etc,]						
Asset Description	Market Value	Cost of Acquisition		IPA	MTA	FIA
Business	15,000,000	0			15,000,000	
Total Capital Gains / (Loss) for the year			0	0	15,040,000	0

IS ATTACHMENT COMPLETE [Y or N] ? Yes

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Exit taxation – example (4)

Net income/(loss)			57a	0	57b	0	57c	0
5	Capital gains charged for the year	TRA 15	58a	0	58b	15,040,000	58c	0

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Anti Tax Avoidance Directive I – GAAR

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GAAR

(1) *For the purposes of calculating the tax liability in accord[ance] with the Income Tax Acts, there shall be ignored an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.*

(2) *For the purposes of sub-regulation (1), an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*

(3) *Where arrangements or a series thereof are ignored in accordance with sub-regulation (1), the tax liability shall be calculated in accordance with the provisions of the Income Tax Acts.*

- Complements article 51 ITA and provides the Commissioner for Revenue with an additional tool to assess taxpayers being within the scope of S.L. 123.187

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Anti Tax Avoidance Directive I – CFC Rules

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CFC rules (1)

- Emanating from BEPS Action 3
- Aimed at the prevention of artificial shifting of profits to companies in low tax jurisdictions

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CFC rules (2)

- In terms of these rules, certain undistributed income of a CFC should be included in the tax base of the taxpayer in Malta.
- What is a CFC?
  - A CFC is either an entity or a permanent establishment of which the profits are not subject to tax or are exempt from tax.
  - For an entity to be considered a CFC, two thresholds must be met, namely: (1) the Controlling Threshold and (2) the Effective Taxation Threshold.
  - For a PE to be considered a CFC, the Effective Taxation Threshold must be met.

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CFC rules – the Controlling Threshold

- For the Controlling Threshold to be satisfied, the taxpayer by itself, or together with its associated enterprises, must have a participation of more than 50% in the entity's voting rights (directly or indirectly), the entity's capital or its right to profits.

- A two-step approach is applied to determine whether the Controlling Threshold is met:
  - Step 1: Determination of associated enterprises (only one criterion needs to be satisfied: (1) ownership of at least 25% capital / (2) at least 25% voting rights / (3) at least 25% entitlement to profits)
  - Step 2: Application of anti-fragmentation mechanism (the objective aggregation of direct and indirect interests of the taxpayer together with those of associated enterprises)

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CFC rules – the Effective Taxation Threshold

- For the Effective Taxation Threshold to be satisfied, the entity or PE's actual corporate tax paid (including any withholding) on its profits must be lower than 50% of the tax that would have been payable in Malta had the profits of the entity or PE been taxed in the hands of the taxpayer. That is:

$$\textit{Actual corporate tax paid} < (\textit{Tax that would have been charged in Malta} - \textit{Actual corporate tax paid})$$

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CFC rules – triggering point

- If an entity or PE has met the thresholds to be considered a CFC, the taxpayer is not automatically taxed on the entity's or PE's undistributed income
- CFC rules will be triggered where the undistributed profits of the CFC arose from 'non-genuine arrangements' which were put in place for the essential purpose of obtaining a tax advantage
- Attribution of undistributed income is not required if the CFC:
  - Has accounting profits of not more than €750,000 and non-trading income of not more than €75,000; or
  - Has accounting profits which are not more than 10% of its operating costs for the tax period (not including the costs of goods sold outside the country where the entity is resident, or the PE established and any costs to associated enterprises.

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CFC rules – non-genuine arrangements

- An arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or PE would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by the taxpayer where the significant people functions, which are relevant to those assets and risks, are carried out in Malta and are instrumental in generating the CFC's income
- Determining whether a non-genuine arrangement is in place requires a factual analysis of the role played by the taxpayer and the CFC. The more important a role a party places the more attribution of profits will arise to that party.
- The term 'significant people functions' focuses on the physical presence of persons performing these functions.

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CFC rules – computation of CFC income

- The income to be included in the tax base of the taxpayer is:
  - limited to amounts generated through assets and risks linked to the significant people functions carried out in Malta
  - calculated in proportion to the taxpayer's participation in the entity on the basis of the highest applicable criterion (capital / voting rights / entitlement to profits)
- Any tax paid by the CFC on the attributed income should be available as a credit against the liability of the taxpayer.

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CFC rules – example (1)

SL 123.187 European Union Anti Tax Avoidance Directives Implementation Regulations, 2018
Rule 7 - Controlled Foreign Company Rule

Does the taxpayer have foreign holdings satisfying the 'Controlling Threshold' under Reg. 7(1)(a) of the Regulations and/or foreign PEs? **Yes**

Number of Foreign Holdings satisfying the 'Controlling Threshold' above and / or Foreign PEs **3**

Please list the Foreign Holdings / PEs identified above:

Name	Place of incorporation	TIN (Place of incorporation)	Place of Management & Control	TIN (Place of Mgmt and Control)	Effective Tax Rate	Applicability of Reg 7(2)	Does the Reg 7(5) exclusion apply?	Does the entity/PE have any non-distributed income?	Does Reg 7(7) apply?
DEF Sp. Z o.o	Poland	123 45 67 890	Poland	123 45 67 890	0%	No SPF in Malta			
GHI B.V.	Netherlands	1111 22 333	Netherlands	1111 22 333	7%	SPF in Malta giving rise to a NGA (see comment)	No	Yes	Yes
KLMN S.L.	Spain	878787878	Spain	878787878	33%	SPF in Malta giving rise to a NGA (see comment)	No	Yes	No

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CFC rules – example (2)

Specify the aggregate non-distributed income which falls to be included in the taxbase of the taxpayer in terms of Reg. 7(2)

Source of Income		Allocation to Tax Accounts for Tax Computation Purposes ONLY (Net of Expenditure)		
		Immovable Property Account	Maltese Taxed Account	Foreign Income Account
Income from Trade & Business, etc.	page 3	0	100,000	0
Dividends [Article 4(1)(c) - ITA]	TRA 08	0	0	0
Interests [Article 4(1)(c) - ITA]	TRA 09	0	0	0
Discounts or Premiums [Article 4(1)(c) - ITA]	TRA 10	0	0	0
Rents [Article 4(1)(e) - ITA]	TRA 11	0		0
Ground Rents [Article 4(1)(e) - ITA]	TRA 12	0		0
Royalties, Premiums & Other Income arising from Property [Article 4(1)(e) - ITA]	TRA 13	0	0	0
Other Income [Article 4(1)(g) - ITA]	TRA 14	0	0	0
Capital Gains [Article 5]	TRA 15	0	0	0
Total		0	100000	0

IS ATTACHMENT COMPLETE [Y or N] ? Yes

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CFC rules – example (3)

Provisions, Impairment differences and Other add-backs [Please specify below]			
Net non-distributed income in terms of Regulation 7(2) of SL123.187	TRA 112	15a	100,000

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Anti Tax Avoidance Directive II – Anti-Hybrid Rules

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Anti-hybrid rules (1)

- Emanating from BEPS Action 2
- Aimed at establishing rules which neutralise hybrid mismatches (deduction without inclusion [D/NI outcome] or double deduction [DD outcome] resulting from conflict in characterisation of payments or entities
- Anti-hybrid rules apply where hybrid mismatches arise between associated enterprises (50%+), between the HO and PE or two PEs of the same structure, or under a structured arrangement

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Anti-hybrid rules (2)

- Anti-hybrid rules operate as follows:

- D/NI outcomes are eliminated by:
  - denying the deduction if Malta is the payer jurisdiction
  - in certain instances, including the payment in income if Malta is the payee jurisdiction and the deduction is not denied in the payer jurisdiction

- DD outcomes are eliminated by:
  - denying the deduction if Malta is the investor jurisdiction
  - denying the deduction if Malta is the payer jurisdiction and the deduction is not denied in the investor jurisdiction

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Anti-hybrid rules (3)

- The following is a list of the hybrid mismatches which are within the scope of the ant-hybrid rules:
  - A payment under a financial instrument gives rise to a D/NI outcome and such payment is not included within a reasonable time and the D/NI outcome is attributable to differences in the characterisation of the instrument or the payment made under it
    - Rules provide for denying of deduction/inclusion of income
  - A payment to a hybrid entity gives rise to a D/NI outcome as a result of differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in the hybrid entity
    - Rules provide for denying of deduction but not inclusion of income

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Anti-hybrid rules (4)

- The following is a list of the hybrid mismatches which are within the scope of the ant-hybrid rules (cont'd):
  - A payment to an entity with one or more **PEs** gives rise to a D/NI outcome as a result of **differences in the allocation of payments between the HO and PE or between two PEs**
    - Rules provide for denying of deduction but not inclusion of income
  - A payment gives rise to a D/NI outcome as a result of a payment to a **disregarded PE** (i.e. a PE which exists per HO jurisdiction but not in the PE jurisdiction)
    - Rules provide for denying of deduction but not inclusion of income
  - A payment by a **hybrid entity** gives rise to a D/NI outcome as a result of the fact that **the payment is disregarded under the laws of the payee jurisdiction**
    - Rules provide for denying of deduction/inclusion of income

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Anti-hybrid rules (5)

- The following is a list of the hybrid mismatches which are within the scope of the ant-hybrid rules (cont'd):
  - A **deemed payment** between **the HO and PE or between two PEs** gives rise to a D/NI outcome as a result of the fact that **the payment is disregarded under the laws of the payee jurisdiction**
    - Rules provide for denying of deduction but not inclusion of income
  - A DD outcome occurs against income that is not **dual-inclusion income**

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Anti-hybrid rules – example (1)

- OPQ Ltd (resident in Country R) distributes a dividend of EUR 400,000 to MaltaCo.
- MaltaCo is able to claim participation exemption, and OPQ Ltd claims the dividend as a tax deductible expense

Deduction non-inclusion (Malta is the payee jurisdiction)					Number of hybrid mismatches		1
Type of hybrid mismatch (Regulation 3)	IT reference (in case of fiscal unit)	Name of Payer	Tax Identification Number (Payer jurisdiaction)	Jurisdiction	Mismatch Amount	Was the deduction denied in the payer jurisdiction?	Amount to be included as part of chargeable income
Paragraph (a)		OPQ Ltd	44455566677	Country R	400,000	No	400000

Specific add-backs			
Accounting expenditure added back to be replaced by statutory expenditure	TRA 60	18a	0
Deemed Income of relevant Originator or Assignor [LN324 of 2011 - Rule 6]		19a	
Gains or Profits to Non-Qualifying Shareholder/s (Fourth proviso to article 12(1)(u)(1))		20a	
Hybrid mismatches [SL123.187 - Regulation 9]	TRA 117	20b	400,000

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Anti-hybrid rules – example (2)

- MaltaCo makes a payment to STU Partnership, established in Country W, which payment is incurred wholly and exclusively in MaltaCo's production of income.
- Country W regards STU Partnership to be tax transparent, and accordingly attributes the payment to the partners in Country X. Country X however considers the STU Partnership as tax opaque.

Deduction non-inclusion (Malta is the payer jurisdiction)			Number of hybrid mismatches		1
Type of hybrid mismatch (Regulation 3)	IT reference (in case of fiscal unit)	Name of Payee	Tax Identification Number (Payee jurisdiction)	Jurisdiction	Mismatch Amount (Amount to be denied as deduction)
Paragraph (b)		STU Partnership	4.43466E+11	Country W	240,000

Specific add-backs			
Accounting expenditure added back to be replaced by statutory expenditure	TRA 60	18a	0
Deemed Income of relevant Originator or Assignor [LN324 of 2011 - Rule 6]		19a	
Gains or Profits to Non-Qualifying Shareholder/s (Fourth proviso to article 12(1)(u)(1))		20a	
Hybrid mismatches [SL123.187 - Regulation 9]	TRA 117	20b	640,000

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Reverse hybrid mismatches

- Where one or more associated non-resident entities holding in aggregate a direct or indirect interest in 50% or more of the voting rights, capital interests or rights to a share of profit in a hybrid entity that is incorporated or established in Malta are located in a jurisdiction or jurisdictions that regard the hybrid entity as a taxable person, the hybrid entity shall be regarded as a resident of Malta and taxed on its income to the extent that the income is not otherwise taxed under any other provision of the Income Tax Acts or in any other jurisdiction.
- This Rule is applicable from 1 January 2022 onwards.

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Tax residency mismatches

- To the extent that a deduction for payment, expenses or losses of a taxpayer who is a dual resident (in Malta and elsewhere) is deductible from the tax base in Malta and in the other jurisdiction of residence, the deduction shall be denied in Malta if there is no dual inclusion income in the other jurisdiction.
- If the other jurisdiction is an EU jurisdiction, the deduction shall be denied only if the taxpayer is not deemed to be resident in Malta according to the double tax treaty in place between Malta and the concerned EU jurisdiction.

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