Irish Real Estate Fund (IREF) Guidance Note

Part 27-01b-02

This document should be read in conjunction with Chapter 1B of Part 27 TCA 1997

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Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

The information in this document is provided as a guide only and is not professional advice, including legal advice. It should not be assumed that the guidance is comprehensive or that it provides a definitive answer in every case.

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Introduction

The purpose of this manual is to provide an overview of the operation of the Irish Real Estate Fund ("IREF") regime. The IREF regime, found in Chapter 1B of Part 27 was introduced by Finance Act 2016.

An IREF is an investment undertaking (as defined in section 739B(1)[1]), or a where that investment undertaking is an umbrella scheme a sub-fund of an investment undertaking, where –

(a) 25% or more of the value of the assets are derived from real estate assets in the State, or

(b) it would be reasonable to consider that the main purpose, or one of the main purposes, of the investment undertaking, or sub-fund of an investment undertaking, was to acquire IREF assets or carry on IREF business.

Unit holders in an IREF may be subject to 20% IREF withholding tax on the occurrence of an IREF taxable event.

A Personal Portfolio IREF ("PPIREF") is an IREF under the terms of which some or all of the IREF assets or IREF business may be or was selected or influenced by the unit holder or a person connected to the unit holder. There are special rules, which are discussed below, which apply when looking at a PPIREF and they apply on a unit holder by unit holder basis. Where a fund is described as a 'widely held' fund in these notes, this is a reference to a fund with a large number of unconnected unitholders and in respect of which consideration of the PPIREF rules is unlikely to occur.

In recognition of the complexity of the IREF regime and in the interest of providing guidance on a timely basis, this manual is being published chapter by chapter as each chapter is completed. The schedule of updates is tracked in Appendix I.

[1] Please refer to Tax and Duty Manual (TDM) Part 27-01a-02 for further information.

1 Key definitions

1.1 IREF concepts

1.1.1 IREF assets [section 739K(1)]

IREF assets means one or more of the following held by an IREF -

(a) relevant assets (within the meaning of section 29(1A));

(b) shares in a REIT (within the meaning of Part 25A);

(c) shares deriving their value or greater part of their value from the assets referred to in (a), other than shares quoted on a stock exchange which are actively or substantially trading on such stock exchange, or (b) above;

(d) specified mortgages (as defined in section 110(5A)) other than those which are issued by a qualifying company as part of a CLO transaction, a CMBS/RMBS transaction or a loan origination business (each within the meaning of section 110), or form part of a loan origination business of the IREF;

(e) units in an IREF;

1.1.2 IREF business [section 739K(1)]

IREF business means activities involving IREF assets the profits and gains of which would be chargeable to tax if section 739C did not apply. Activities that would be regarded as including dealing in or developing land or a property rental business are specifically included within the definition.

1.1.3 IREF excluded profits [section 739K(1)]

IREF excluded profits means –

(a) dividends on shares (other than REIT shares) which derive their value from Irish property, and

(b) dividends or distributions from a REIT other than property income dividends (as defined in Part 25A) and distributions in respect of gains accruing on the disposal of an asset of the property rental business.

Between 1 January 2017 and 1 January 2019, there was a third category of excluded IREF profits relating to real property that had been held for the IREF for a period of at least 5 years, where the IREF was not a PPIREF (refer to 1.3 below) in respect of a unit holder.

1.1.4 IREF taxable event [section 739K(1)]

An IREF taxable event means any way in which the value of the profits of the IREF are passed to the unit holder, namely -

(a) a relevant payment,

(b) the cancellation, redemption or repurchase of units from a unit holder including on a liquidation,

(c) any exchange of units in one sub-fund for units in another sub-fund,

(d) the issuing of bonus units,

(e) an IREF ceasing to be an IREF,

(f) the disposal of a unit, or

(g) the disposal of the right to receive any of the accrued IREF profits without a transfer of the underlying unit;

1.2 Interests in an IREF

1.2.1 Unit [section 739B(1)]

A "unit" is defined in section 739B(1) as any investment, such as a subscription for shares or a contribution as capital, that entitles the investor to a share of the profits or a right to a regular payment from the fund. In most cases it is clear what the units in the fund are. However, arrangements such as profit participating notes, which would not historically have been seen in the Irish funds industry, would also fall within the definition of a unit.

1.2.2 Unit holder [section 739B(1)]

The unit holder is defined in section 739B(1) as the person who is entitled to a share of the profits. This is important as the provisions of section 739C(1) apply to relevant profits of an investment undertaking, being those that are earned on behalf of a unit holder. A nominee holder of units is not entitled to a share of the profits and therefore the beneficial owner of the unit, rather than the nominee in whose name the unit may be registered, is the unit holder. Further supporting the fact that it is the beneficial owner of a unit, and not any nominee holder of the unit, who is regarded as the unit holder, is that the definition of unit requires the making of an investment.

1.3 PPIREF [section 739M(1) and (2)]

A personal portfolio IREF (PPIREF) is defined in section 739M. While the concept is closely linked to that of a Personal Portfolio Investment Undertaking (PPIU) in section 739BA[2] and Personal Portfolio Life Policy (PPLP) in section 730BA, there are a number of important differences. Therefore, guidance given in relation to PPIUs or PPLPs will not necessarily have application to the concept of the PPIREF.

The definition of PPIREF has two different applications within Chapter 1B, being in relation to:

i. the definition of a specified person (refer to 1.4) and

ii. the definition of IREF excluded profits (refer to 1.1.3), which is relevant to whether or not there is withholding tax on distributions of gains from investments in Irish land which has been held for over 5 years.

1.3.1 Selection and influence [section 739M(1) and (2)]

An IREF will be a PPIREF of a unit holder if, under the terms of the IREF, the unit holder is in a position to select or influence the conduct of the IREF business, whether directly or indirectly (section 739M(1)). The indirect selection or influence may be through:

- a person acting on behalf of the unit holder, e.g. an investment advisor to the IREF;

[2] Refer to Investment Undertakings General Guidelines for Calculating Tax Due and for Completing Declaration Forms and TDM Part 27-04-01 for more details

- a person connected (within the meaning of section 10) with the unit holder, e.g. a trustee of a trust in respect of which the unit holder is the settlor;
- a person connected with a person acting on behalf of the unit holder, e.g. an investment advisor appointed to represent the interests of the unitholder; or
- the unit holder and a person connected with the unit holder or a person acting on behalf of both the unit holder and a person connected with the unit holder, e.g. situations where the selection or influence is jointly exercisable by more than one person.

Regard should be had to paragraph 1.3.2 for examples of situations that will not be treated as resulting in PPIREF status of a particular investment.

The reference to the terms of an IREF may refer to the subscription agreements, or fund documentation, as well as other contractual arrangements or agreements. This is clear from the provisions of 739M(2) which clarify the terms of an IREF extend to the terms of the IREF and any other agreement between any of the persons referred to and the IREF. If terms are agreed as part of an umbrella fund, but can lead to the influence or selection of a sub-fund (the IREF), then they will be taken to be a term of the IREF.

In many funds the written terms of the fund will preclude the unit holders from having any input into the conduct of the fund's business. While this is *prima facie* evidence that the IREF is not a PPIREF, regard must also be had to the conduct of the IREF and any implied terms, which includes looking to the actions of the fund and making reasonable inferences. For example, if the written terms provide that the unit holder may have no hand, act nor part in the conduct of the business but yet that unit holder attends material meetings (either board meeting or investment meeting) and is actively engaged in material discussions on how the business is to be conducted, then that fund would be a PPIREF with respect to that unit holder.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

Section 739M(2) expressly provides that certain terms of a fund will be treated as permitting the selection of the IREF assets. Where a unit holder, or any person connected with that unit holder, can appoint an investment advisor to the IREF, then that IREF will be a PPIREF of that unitholder (section 739M(2)(b)). The IREF will also always be a PPIREF of a unitholder where the terms of the IREF or any other agreement between the IREF and the unit holder, or persons acting on behalf of the unit holder:

i. allow the unit holder, or those acting on behalf of the unit holder, to exercise an option to select the IREF property or IREF business;
ii. give the IREF the discretion to offer the unit holder, or those acting on behalf of the unit holder, the right to select the IREF property or IREF business; or

iii. allow the unit holder, or those acting on behalf of the unit holder, the right to request a change in the terms of the IREF to allow the unit holder, or those acting on behalf of the unit holder, to select the IREF property or IREF business.

If the unit holder has the power to positively influence the investment manager to acquire an asset, or to carry out the IREF business in a particular way, it will clearly cause the IREF to be a PPIREF of that particular unit holder. In addition, if the unit holder has a power of veto over the choices of the investment manager that would also amount to the unit holder having the ability to select or influence the choice of IREF assets or the conduct of the IREF business. Whether or not the right to direct, or the power of veto, is exercised is not relevant.

There is no requirement that the unitholder actually selects or influences. It is sufficient if there is an ability to do so.

Example 1 ‘Acting on behalf of’ a unitholder
An investor invests in an IREF under the terms of which none of the unitholders is permitted to have any involvement in the selection of property to be acquired by the IREF and, as a matter of fact, the unitholder does not approve or veto any property acquisitions. However, the unitholder arranges for its investment advisor to be appointed as an advisor to the IREF and, in that capacity, the investment advisor influences the selection of property. In these circumstances, the IREF would be considered a PPIREF in respect of that unitholder.

Example 2 Acquiring units in a PPIREF
An investor acquires/invests in units in an existing IREF. The units were acquired from a unitholder with respect to whom the IREF was a PPIREF. The IREF had already acquired its property portfolio and does not intend to make additional investments.

The new unitholder had no involvement in the selection of the existing property portfolio and, in accordance with the scheme rules, does not get involved in the ongoing management of the business.

However, if the new unitholder was connected with the person from whom the units were acquired, and in respect of whom the IREF was a PPIREF, then in the majority of cases the IREF will also be a PPIREF with respect to the new unitholder. In such circumstances, the provisions relating to PPIREFs in the definition of IREF excluded profits may apply towards the calculation of the IREF taxable amount in respect of the new unit holder.

Absent such connections, the IREF should not be considered a PPIREF with respect to this new investor as there could not have been any involvement in property selection and the investor is not involved in ongoing management of the business.

Example 3 “Large” unit holders
IREF A has one unitholder who has a greater than 50% stake in the IREF. Whether the IREF should be considered to be PPIREF in respect of that unitholder who holds more than 50% of the IREF, should be determined with reference to the facts and circumstances of the case. However, the fact that one unitholder has such a large stake in the fund warrants closer

scrutiny of the facts and circumstances than would be necessary where no one person, taking account of persons connected to that person, has, directly or indirectly, a controlling stake.

If the facts and circumstances lead to the conclusion that an IREF is a PPIREF in respect of a particular unit holder, consideration should be given to whether or not the exclusions in section 739N may be applicable.

Example 4 Investing in a specific property – no involvement

An IREF is established, or is intended to be established, with a view to acquiring an Irish property portfolio. A specific property is identified by the promoter of the fund and a prospectus drawn up for potential investors. The promoter is able to attract one or more investors, who are not connected with the promoter, who decide to invest in units in the IREF based on the proposal contained in the prospectus. While the property had not been acquired prior to the investment being made by the unitholder(s), the fact that the property had been specifically identified prior to the units being marketed to the unitholder(s) concerned (and provided that those unitholders are not connected with the promoter and undertake no involvement in the ongoing business of the IREF) the fund should not be considered to be a PPIREF with respect to those unitholders.

Example 5 Investing in a specific property – pre involvement

The facts are the same as set out in Example 4, but one unitholder influenced the promoter in selecting or identifying the properties to be included in the portfolio prior to their making an investment decision. The IREF will be a PPIREF in respect of that unitholder.

Example 6 Limited Partnership investment structures

Individual or institutional investors invest in an IREF through a limited partnership. These investors have not selected the IREF's assets nor influenced the IREF's business nor do they have the ability to do so. The general partner of the limited partnership is in the same group and/or connected with the investment manager or investment advisor of the IREF.

Under section 10 all partners in a partnership are connected persons. The IREF is a PPIREF of all partners as under section 739M the assets/business of the IREF are selected/ influenced by a person connected with the unitholder and/or a person connected with a person acting on behalf of the unit holder.

(see also Example 16)

Example 7 Acquiring units in a PPIREF continued

The facts are the same as those set out in Example 2 but subsequent to the purchase in the IREF, the directors of the IREF decide to raise new capital and acquire new properties. The unitholder becomes involved in the selection of the new properties acquired by the IREF.

It will be important to determine why the unit holder can now become involved in the selection of the new properties.

- If additional rights are given to the unitholder, for example in return for investing additional amounts in the fund, then the IREF will commence to be a PPIREF of the unitholder from the date those rights were granted.
- If they are involved in the selection under a pre-existing term of the IREF or other agreement this will mean the investor always had that ability and was choosing not to use it. The IREF has therefore been PPIREF of the unitholder at all times.

Example 8 IREF ceasing to be a PPIREF

Pension Fund A has a large investment in an IREF. A new investment manager is appointed. As Pension Fund A is unsure of how the investment manager will perform, the rights of Pension Fund A as unitholder are, on the appointment of the new investment manager, amended to give Pension Fund A a right to select or influence the IREF assets and business. Pension Fund A never has cause to exercise the right of selection.

The IREF is therefore a PPIREF of Pension Fund A as 'some or all of the IREF assets or IREF business may be… selected or influenced by' the unit holder.

After a period Pension Fund A determines that it no longer wishes to have the power of selection or influence. The terms of the IREF are amended accordingly.

It is no longer true to say that 'some or all of the IREF assets or IREF business may be… selected or influenced by the unit holder'. They may have been in the past, but the retrospective test is that 'some or all of the IREF assets or IREF business … was… selected or influenced by the unit holder'. In this case, if Pension Fund A can show that it never selected or influenced the IREF assets or business then the IREF will cease to be a PPIREF of Pension Fund A.

1.3.2 Selection and influence not giving rise to PPIREF status

An employee of the fund manager of an IREF acquires units in that IREF in his/her personal capacity. In his/her capacity as an employee of the fund manager, the employee is involved in the selection of properties to be invested in by the IREF. However, in undertaking his/her employment duties, the individual acts for the benefit of all investors in the IREF and cannot make selections which are designed to benefit him/her personally to a greater extent than any of the other investors. In these circumstances, the IREF should not be a PPIREF with respect to that individual.

Example 9 Fiduciary capacity - unit holder in own right
Matt is an employee of Fund Manager Ltd. Fund Manager Ltd is the fund manager for IREF A, a large widely held IREF. Matt holds a small number, and a small percentage, of units in IREF A. In his capacity as an employee of Fund Manager Ltd Matt selects and influences the investment decisions made by IREF A. However, he is doing this in a fiduciary capacity on behalf of all unit holders and not for his own personal benefit. IREF A will not be regarded as a PPIREF of Matt solely because of his performing the duties associated with his employment with Fund Manager Ltd.

Example 10 Fiduciary capacity – office holder as unit holder
A director of a widely held IREF holds a small number, and small percentage, of units in that IREF. As part of the duties of her office, she is involved in evaluating and recommending which properties the IREF will acquire. In these circumstances, the IREF would not be considered a PPIREF in respect of that investor solely because of the duties performed in her capacity as a director of the IREF.

Paragraph (b) in the definition of 'personal portfolio IREF' in section 739M(1) provides that an IREF will be a PPIREF of a unit holder if someone acting on behalf of that unit holder selected or influenced the IREF business. Whether an investment manager is acting on behalf of a unitholder depends on the terms of their appointment. If they are appointed by an IREF to provide investment advice it may be that they have no contractual relationship with the unit holders. They act and are appointed solely by the IREF. If, however, they are appointed to advise both the unit holders and (either under a separate agreement or otherwise) also advise the IREF, then the position is likely to be different. It is important to note that section 739M(2)(b) may be relevant in respect of the appointment of the investment manager, and that it applies where a unit holder, or any person connected with the unit holder, has or had the option to appoint an investment advisor regardless of whether such an advisor was actually appointed. As stated in paragraph 1.3.1 above whether an IREF is a PPIREF must be determined with reference to each unit holder separately. The fact that an investment manager in an IREF acts on behalf of all investors equally in a widely held IREF will not cause an IREF to be a PPIREF.

1.4 Specified person [section 739K]

Tax will arise on the happening of an IREF taxable event in respect of a specified person. The starting point for the definition is that any person who will be subject to exit tax under Chapter 1A will not also be subject to tax on the same event under Chapter 1B (thus, for example, excluding Irish resident individuals). Also excluded from the definition of specified person are:

i. investment limited partnerships ("ILPs") (the reference to section 739D(6)(cc) in the definition of specified person and the declaration provided to the investment undertaking under Chapter 1A will suffice for the purposes of the application of Chapter 1B) whose investors are taxed on a look through basis under section 739J[3];

[3] As section 739J(2) TCA 1997 provides that the income, payments, gains and losses arising to an ILP are treated as arising directly to the partners in the partnership, in proportion to their interests in the partnership, the fund must consider whether it has an investment undertaking tax ("IUT") or IREF withholding tax obligations in

ii. exempt unit trusts (the reference to section 739D(6)(e));
iii. NTMA and any fund investment vehicles of the NTMA (reference to section 739D(6)(kb));
iv. Irish pension funds, ARFs, AMRFs, and PRSAs (including vested PRSAs) or pension schemes (section 790B) that are not PPIREFs (refer to 1.3) where a valid declaration is provided to the IREF;
v. Irish investment undertakings that are not PPIREFs where a valid declaration is provided to the IREF;
vi. Irish life assurance companies that are not PPIREFs where a valid declaration is provided to the IREF;
vii. Charities where a valid declaration is provided to the IREF;
viii. Credit unions where a valid declaration is provided to the IREF;
ix. Member State and EEA equivalents to Irish pension funds, ARFs, AMRFs, PRSAs (including vested PRSAs) or pension schemes (section 790B), investment undertakings and life assurance companies, that are not PPIREFs, where a valid declaration is provided to the IREF;
x. Qualifying companies, within the meaning of section 110, where a valid declaration is provided to the IREF (the anti-avoidance amendments to section 110 brought in by Finance Act 2016 provide that this payment will, if appropriate, be taxed in the qualifying company).

A qualifying intermediary may make a declaration in accordance with Schedule 2C TCA, on behalf of unit holders that come within iv, vii, viii and ix (pursuant only to its reference to iv) above.

Separate declarations forms are available with respect to UK superannuation schemes and UK charities for the purposes of Article 11 of the Double Tax Agreement between Ireland and the United Kingdom.

Please refer to TDM Part 27-02b-01 for further information on valid IREF declarations.

1.4.1 PPIREFs and specified persons [section 739M(3) and section 739N]

Sections 739M(3) and 739N are only relevant where the unit holder is a person within paragraphs (a), (b), (c) or (f) of the definition of a specified person in section 739K.

Whether or not a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) is a specified person in respect of an IREF involves applying the PPIREF tests set out in paragraph 1.3 at two levels.

The first level at which the test is applied is whether the IREF itself is a PPIREF of the unit holder, being a unit holder that is a pension scheme, investment undertaking or life assurance company [section 739M(3)(a)].

If applying the test at the first level results in an IREF not being a PPIREF in respect of that unit holder (including through the application of section 739N), then the second test must

respect of each of the partners in the ILP. For example, where a non-resident partner in an Irish domiciled ILP completes the IUT exemption declaration in accordance with section 739D(7) TCA 1997, consideration must then be given to their IREF WHT situation on that same chargeable event to determine whether they are a “specified person” as defined by section 739K TCA 1997.

also be passed in order for the pension scheme, investment undertaking, or life assurance company not to be treated as a specified person.

The second test is whether or not that unit holder (the pension scheme, investment undertaking, or life assurance company) would itself be regarded as a PPIREF in respect of any of its unit holders in a hypothetical scenario where it (the pension scheme, investment undertaking, or life assurance company) is treated as an IREF and its IREF business comprised its investment in the actual IREF. That is, if the IREF does not have its assets or business selected or influenced by the pension scheme, investment undertaking or life assurance company, is the pension scheme, investment undertaking or life assurance company's ownership of the IREF selected or influenced by any of its members, investors, policyholders, respectively?

For the purpose of a life company, determining whether or not the IREF is a PPIREF will depend on whether it is part of the shareholders' business or the policyholders' business.

- If the investment is held as part of the shareholders' business then, in applying this hypothetical test, the shareholders are the unit holders.
- If the investment in the IREF is held as part of its policyholders' business, then the policy holders on whose behalf the investment is made are the unit holders. For example, if the life assurance policy is a personal portfolio investment for its investors, and one (or more) of the underlying investments is an IREF, then the IREF will be regarded as a PPIREF.

The second test includes a main purpose test[4] such that the second test will not cause the pension scheme, investment undertaking or life assurance company to be a specified person if the purpose for interposing that pension scheme, investment undertaking or life assurance company between the IREF and the ultimate investors was not for the purposes of avoiding tax under Chapter 1B [section 739M(3)(b)(ii)]. In other words, if one of the main purposes for the investment by the pension scheme, investment undertaking or life assurance company in the IREF was to avoid tax under the IREF provisions, then the fact that the scheme, undertaking or company would itself be regarded as a PPIREF in respect of any of the unitholders in the hypothetical scenario outlined above, would cause it to be a specified person.

Where the pension scheme, investment undertaking, or life assurance company had invested in the IREF prior to the announcement of the changes introduced in Finance Act 2016 (upon its publication on 18 October 2016), Revenue would not envisage that such a structure was put in place for the main purpose of avoiding tax under Chapter 1B, for the simple reason that the legislation did not exist.

1.4.2 Exceptions to section 739M(3) [section 739N]

There are a number of occasions when an IREF may appear technically to be a PPIREF under the first level test in section 739M(3)(a) in respect of a pension scheme, investment undertaking or life assurance company (including their EEA equivalents), but where, in reality, there is no benefit to that connection. Section 739N provides that in these

[4] Refer to TDM Part 33-01-01 for details on main purpose tests.

circumstances the IREF will not be considered to be a PPIREF and therefore the pension scheme, investment undertaking or life assurance company will not be a specified person.

- If an IREF would be a PPIREF of a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) but that pension scheme, investment undertaking or life assurance company is widely held and would not be considered a PPIREF of any of its investors then the IREF will not be a PPIREF [section 739N(1)]. This is applying a modified second level test to the pension scheme, investment undertaking or life assurance company as the main purpose test in section 739M(3)(b)(ii) is not applied in this exception.

Example 11 Widely held fund investing in an IREF
A Luxembourg regulated fund invests in units in an IREF and is involved in the selection of property invested in by the IREF. Having applied the PPIREF tests (refer to 1.3.1 above) none of the investors in the Luxembourg fund had any involvement in, nor control over, the selection of assets invested in by the Luxembourg fund including the investment in the units in the IREF. The IREF should not be considered a PPIREF with respect to the Luxembourg fund.

Example 12 Pension funds collectively investing in IREFs [section 739N(3)]
EEA regulated Fund, which is opaque, invests in an IREF to acquire Irish property. The EEA fund is held by a number of EEA based pension schemes. The EEA based pension schemes are widely held Government pension schemes and/or pension schemes covered by the Institutional Occupational Retirement Provision (“IORP”) Directive.

Investment advisors for the EEA pension schemes and the EEA regulated fund are involved in property selection; however, none of the underlying beneficiaries in the pension schemes can influence property selection.

It is likely that the IREF will not be a PPIREF as, depending on the exact make-up of the pension funds, the investment is likely to fall within section 739N(1).

Example 13 Layered ownership [section 739N(1)]
A widely held EU pension scheme, invests in a Luxembourg FCP, which invests in a Luxembourg SICAV, which in turn invests in an IREF. The investment manager for the entities at each level is the same and is involved in selecting the property. The pension scheme would not be considered a personal portfolio for any of its beneficiaries.

Section 739N(1) can only apply to a single layer. Therefore, the presence of multiple layers may cause the IREF to be regarded as a PPIREF in respect of its immediate unitholder.

However a refund of the IREF WHT may be available and regard should be had to section 739Q(3) (dealt with in 1.4.3 below) where the EU pension scheme is equivalent to an Irish pension scheme.

- If an IREF would be considered a PPIREF of a unit holder that is a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) solely because of a contribution **in specie** of assets on the scheme of amalgamation to which section 739D(8C) applied, then that IREF will not be considered a PPIREF in respect of those unit holders [section 739N(2)]. However, if there is any other reason that the IREF should be considered a PPIREF in respect of a unit holder then it will be a PPIREF.

Example 14 Exempt unit trust conversion (section 739N(2)]

Pension Fund Z had, for many years, invested in Exempt Unit Trust Q. Exempt Unit Trust Q converted into an investment undertaking. Pension Fund Z will not, because of the contribution in specie which happened upon that conversion, be regarded as influencing the selection of the PPIREF business or assets.

However, if shortly after the conversion, Pension Fund Z appointed an investment advisor to IREF Q (the new name for Exempt Unit Trust Q), then IREF Q would be a PPIREF of Pension Fund Z.

- If an IREF would be considered a PPIREF of a unit holder that is a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) solely because a person connected with that unit holder may select or influence the IREF, but where that connection cannot be to the benefit of the unit holder, then the IREF will not be a PPIREF [section 739N(3)]. Whether or not the connection can benefit the unit holder is determined through the application of a two-pronged test:
  (a) can the connected person be influenced by the unit holder in the exercise of his or her duties?
  (b) can the connected person show any preference to the unit holder over other unit holders?

  In order to fall within the exception in section 739N(3) it is necessary that the answer to both of these questions is ‘no’.

  It is important to note that this is only in relation to connected persons and not the wider sphere of persons that must be considered when determining whether or not an IREF is a PPIREF of a unit holder.

Example 15 Group relationships [section 739N(3)]

Life Assurance Ltd invests in a large number of investment undertakings, some of which are IREFs, on behalf of its life policy holders. It invests in some widely held IREFs which are managed by Fund Managers Ltd. Fund Managers Ltd manages many investment undertakings, some of which are IREFs, on behalf of a wide variety of investors. Life Assurance Ltd and Fund Managers Ltd are both part of the same corporate group, so they are connected.

However, as Fund Managers Ltd cannot be influenced by Life Assurance Ltd and cannot show it any preference, section 739N(3) provides that the IREF will not be regarded as a PPIREF of Life Assurance Ltd.

Example 16 Partnership relationships [section 739N(3)]
GKH LP is a limited partnership which is the sole unit holder in an EU Fund which is the sole unit holder in an IREF. The investment manager in the EU Fund and the IREF is connected with the general partner in GHK LP. Applying section 739M(3)(a), the IREF is a PPIREF of the EU fund and therefore the EU fund is a specified person.

The exemption in section 739N(1) does not apply because the EU Fund is a PPIREF of its sole unit holder (the limited partnership) and neither does 739N(2) apply. Can it be said that the IREF is only a PPIREF of the EU Fund because a person connected with the unit holder may select or influence the IREF assets or business? It is likely, that as sole unit holder, the IREF would be a PPIREF of the EU Fund regardless of the involvement of a connected investment manager.

(see also Example 6)

- An IREF (first IREF) shall not be treated as a PPIREF of a unit holder which is an IREF (second IREF) where the holding of the units in the first IREF by the second IREF is for **bona fide** commercial purposes and is not part of a scheme with the main purpose of avoiding tax [section 739N(4)]. Where an IREF holds units in an IREF and this test is not satisfied, a double charge to tax may arise.

The exceptions in section 739N do not apply to exclude a unit holder who is a specified person under section 739M(3)(b) from being a specified person. Therefore, it is possible that a pension fund, for example, would be a specified person under section 739M(3)(a) but for the application of section 739N(3), but is a specified person under section 739M(3)(b).

Example 17
An entity which invests in a widely held IREF (or company connected with that entity) is in the business of providing investment advisory services to funds and fund managers. In the course of that business, the entity / connected entity provides professional advice to the IREF in which it is a unitholder. In providing these services, the advisor is acting in a professional capacity and acting in a manner which is not designed to benefit primarily it / the connected entity in its investments. In these circumstances, the IREF should not be considered a PPIREF with respect to that investor.

1.4.3 Interaction with section 739Q(3)

While indirect investments by a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) will in many cases attract withholding tax under Chapter 1B, section 739Q(3) provides that if such an entity would not have been a specified person had it been a direct unitholder then it can claim a refund of the withholding tax suffered from Revenue. The IREF withholding tax refund claim form is available on the Revenue website. However, no amount of withholding tax will be repaid where the IREF taxable profits to which the IREF taxable amount refers arose prior to the pension scheme, undertaking or company indirectly investing or where the repayment arises from a scheme or arrangement put in place for tax avoidance.

1.4.4 Equivalent treatment

The definition of a "specified person" in section 739K makes reference to equivalent treatment in paragraph (f) (refer to paragraph ix. of section 1.4). Equivalent treatment under paragraph (f) of the definition of a specified person applies to a scheme, undertaking or a company equivalent to (a) to (c) below which is authorised by a Member State or an EEA state and subject to supervisory and regulatory arrangements at least equivalent to those applied in the State:

(a) Pensions schemes are defined as a fund approved under section 774, 784(4) or 785(5), an ARF within the meaning of section 784A, an AMRF within the meaning of section 784C, a PRSA (including a vested PRSA within the meaning of section 790D(1)) or a person exempt from income tax under section 790B, or
(b) An investment undertaking, or, where appropriate, a sub-fund, or
(c) A company carrying on life business (within the meaning of section 706).

1.4.5 UK / Ireland double tax agreement (DTA)

Under the UK / Ireland DTA, certain UK superannuation schemes and charities should be treated as equivalent to certain Irish superannuation schemes and charities. The term "superannuation scheme" is as defined in Article 11(2)(b) of the DTA. In order to claim this equivalence, the UK superannuation scheme or charity must be in possession of a certificate of equivalence from the UK's competent authority, as provided for in Article 11(2)(a) of the DTA. The certificate of equivalence will be in a form as determined by the competent authority of the UK. It is not sufficient to provide the UK charity number or the registered superannuation scheme number.

Once the certificate of equivalence is obtained from the competent authority, a relevant UK superannuation/ charity declaration form should be completed. Please refer to TDM Part 27-02b-01 for the relevant declaration forms.

Where the pension scheme or charity does not hold a certificate of equivalence, then the normal pension and charity equivalence provisions, set out below, will apply.

1.4.6 Pensions

Outlined in this section are specific considerations which should be given in relation to equivalent treatment applying to foreign pension schemes. The scheme should be equivalent to an Irish scheme and subject to supervisory and regulatory arrangements equivalent to those applied to Irish pension schemes.

When analysing the applicability of equivalence for all types of pension schemes consideration must be given to whether the objectives and purpose of the foreign scheme are in line with the objectives and purpose of an Irish pension scheme as reflected in pensions legislation. Equivalent treatment will only apply where the supervisory and regulatory arrangements are equivalent to that of an Irish pension scheme **and** the objectives and purpose of the scheme in relation to the provision of pension related benefits are equivalent to the objectives and purpose of an Irish pension scheme.

The objectives and purpose of an Irish Revenue approved pension scheme is to provide retirement benefits for the beneficiary, and their families, upon retiring. Irish pension schemes do this by way of collecting contributions from employees / employers / self-employed contributors (as appropriate), and accumulating capital to meet obligations to make future payments to beneficiaries under the scheme by way of investments. Irish pension schemes are subject to rules concerning pension age and pay out benefits.

As the core objective and purpose of an Irish pension scheme is the provision of pension related benefits upon or during retirement, foreign schemes whose objectives and purpose are more broadly cast and, for example, mainly provide a means to accumulate savings for scheme beneficiaries may not be equivalent to an Irish pension scheme. The below is a non-exhaustive list of benefits which Revenue do not consider to be in keeping with the objectives, and in turn the purpose, of an Irish pension scheme. As the features listed below suggest that the foreign scheme's objectives and purpose are not aligned with those of an Irish pension scheme, foreign schemes which have these features are unlikely to be eligible for equivalent treatment under section 739K–

- The payment of third level fees, either in whole or in part, for the beneficiary, any member of the beneficiary's family or anyone related or connected to the beneficiary.
- Making loans to the beneficiary, any member of the beneficiary's family or anyone related or connected to the beneficiary.
- The early withdrawal of funds which have been paid into a pension scheme by a pension beneficiary, or on behalf of a beneficiary, without the existence of strict supervisory and regulatory limitations placed on the pension in relation to early withdrawal of funds, is likely to suggest an objective and purpose of the scheme that is more akin to a savings scheme. As part of assessing the objectives and purpose of a foreign scheme, any early extraction features of a foreign scheme should be compared to the very limited circumstances in which an Irish scheme would allow for an extraction of contributions.
- The ability to have a loan or mortgage backed on the pension to purchase, for example, the principal private residence of the beneficiary of the pension.

IORPs

The way in which pension schemes are organised and regulated varies significantly between Member States. Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of Institutions for Occupational Retirement Provision (IORPs) set common standards for IORPs registered or authorised in a EU Member State, which operate pension schemes (i.e. contract, agreement, trust deed or rules stipulating which retirement benefits are granted and under which conditions). Pension schemes to which the Directive applies will generally (and refer to the comments on closely held pensions below) be regarded as equivalent to Irish pension schemes.

Other widely held pensions

In certain Member States or EEA States there are widely held schemes whose function is to collect contributions from employees, employers and self-employed individuals and to provide retirement benefits (pensions, lump sums etc.) for a wide number of people which may not fall within the above paragraph on IORPs, for example where they are not operated by an IORP because of local legal or regulatory considerations. A non-exhaustive list of general criteria which should be considered in order to establish if equivalent treatment applies includes:

- Supervision by the local supervisory authority;
- Existence of a custodian supervised by the local supervisory authority;
- Existence of a management company;
- Separation of functions between Custodian and Management Company;
- Provision of regular information to the investors;
- Risks' diversification;
- Recourse to borrowing;
- Conditions surrounding the redemption of the shares upon request.

When looking at such a widely held scheme for the purpose of equivalent treatment it is necessary to apply the elephant test[5] which Stuart-Smith LJ[6] described as: **"It is difficult to describe, but you know it when you see it."**

Example 18 The elephant test: widely held pension scheme

A mutual pension insurance company operates a scheme in Finland in respect of the Earnings-Related Employment Pension. There are over 300,000 employees and self-employed members of the scheme. Due to the structure of Finnish pension law, the scheme cannot be covered by the IORP paragraph above. However, the scheme is mainly financed through contributions from employers, employees and other self-employed individuals, and it exists for the purpose of providing retirement benefits to those employees / self-employed individuals and their families. The beneficiaries do not control or influence its decision to invest in the IREF. To provide those benefits it accumulates capital by way of income producing investments. It is supervised by the Finish Financial Supervisory Authority, subject to risk-based solvency requirements and subject to statutory regulation in Finland.

Such a scheme passes the elephant test as being equivalent to an Irish pension scheme.

When looking at smaller pension schemes the elephant test will continue to have some application, but a closer look at the scheme will be required. In addition to the factors outlined above, consideration must also be given to the anti-avoidance rules and restrictions which apply to domestic pension schemes such as the standard fund threshold, the retirement age, restrictions on related party transactions, other anti-avoidance provisions etc. A closely held pension scheme authorised by a Member State or an EEA state will not be equivalent to an Irish pension scheme, regardless of supervisory or regulatory arrangements which are in place, if that scheme would be impacted by any of the Irish anti-avoidance rules or restrictions if it were authorised in Ireland.

It is important to note that equivalent pension schemes, particularly closely held schemes, must consider whether or not the PPIREF rules (refer to 1.3 above) apply.

[5] For example, the US Supreme Court in Jacobellis v Ohio [1964] 378 US 184; Jaggers v Ellis [1997] 71 TC 164,

[6] at para 17, Cadogan Estates Ltd v Morris [1998] EWCA Civ 1671

1.4.7 Investment Undertakings

Investment undertakings, as defined in section 739B, can have many legal forms. However, they must be regulated as:

- A UCITS (Council Directive 2009/65/EC, Commission Directive 2010/43/EC and Commission Directive 2010/44/EC) or
- An AIF (Commission Directive 2011/61/EU as amended, Commission Delegated Regulation (EU) No 231/2013)

Where a fund is regulated as a UCITS or an AIF by the equivalent of the Central Bank of Ireland in an EU or EEA state and is equivalent to an Irish Unit Trust, ICAV or Plc[7] (and note that this does not include funds which are the equivalent of an Investment Limited Partnership which are transparent structures in Ireland[8]) then it should be treated as equivalent for the purposes of Chapter 1B (please refer to paragraph ix. of section 1.4). Where funds are managed by an AIFM without themselves being regulated, they cannot be treated as equivalent to an Irish fund.

1.4.8 Companies carrying on life business

Companies which are authorised by a Member State or an EEA State in accordance with the European Communities (Life Assurance) Framework Regulations 1994 (as amended) will be treated as equivalent to Irish life companies, which carry on the business described in section 706.

1.4.9 Charities

EU and EEA charities may apply for equivalent treatment under section 208A by completing Form DCHY1 (via ROS). An EU and EEA charity would then be in a position to make a declaration as required by the definition of a "specified person" in section 739K, as it would be exempt from tax by virtue of section 207(1)(b), as applied by section 208A.

1.4.10 Pooling vehicles

Pension schemes and charities may invest in an IREF via a pooling vehicle, such as a UK common investment fund. Where the pooling vehicle is the unit holder in the IREF it is unlikely to be in a position to assert equivalence, for example while the investors in a pooling vehicle may all be equivalent pension schemes the vehicle itself will not be a pension scheme. In situations where section 739QA(1)(a) advance clearance would be available in respect of all investors in the pooling vehicle, the pooling vehicle may complete the relevant declaration noting in the space provided for "nominee account holders" that it is a pooling vehicle for named pensions, charities etc. as appropriate.

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[7] Consideration should also be given to whether the foreign vehicle is more akin to a Plc which is an Irish Real Estate Investment Trust (REIT), and is taxed under Part 25A. Vehicles which are more akin to a REIT would not be eligible for equivalence.

[8] It should also be noted that where the investment is made through an ILP, or an equivalent transparent vehicle, it is the partners in that partnership who are the unit holders, rather than the ILP.

2 Anti-avoidance measures: Case IV Schedule D Charge

Finance Act 2019 introduced certain circumstances in which a charge to income tax under Case IV of Schedule D will arise to IREFs[9].

2.1 Excessive financing costs [sections 739LA and 739LAA]

Section 739LA and section 739LAA provide that a charge to income tax under Case IV Schedule D will arise where certain imposed debt and financing cost deduction limits are breached. The legislation applies to financing costs arising in relation to both IREF and non-IREF assets.

Revenue recognises that unavoidable commercial situations may have arisen historically where a non-IREF asset was acquired by an IREF at the same time as an IREF asset. Outlined in examples 19 and 20 below are specific situations in which Revenue accept that the cost of the non-IREF asset may be taken into account when applying section 739LA[A].

Example 19 Acquisition of a property along with the associated operating company

In 2017 an IREF acquired an Irish property. As part of the terms of the acquisition of the property (an IREF asset) the IREF also acquired the associated operating company (a non-IREF asset).

As the acquisition of the operating company was directly linked with the acquisition of the property, the activities of the operating company are intrinsically linked with the property and the operating company was acquired at the same time as the property for *bona fide* commercial reasons, then the cost of the operating company should be taken into account for the purposes of applying section 739LA[A](2), and the pre-tax profits from that business should be included for the purposes of applying section 739LA[A](3). In applying the tests set out in section 739LA[A], regard should be had to the consolidated position of the IREF and the operating company, disregarding any transactions between the two.

Example 20 Acquisition of a portfolio of real estate assets

In 2017 an IREF acquired a single portfolio of real estate assets from a single source. Included in the portfolio of real estate assets were both Irish properties (IREF assets) and properties located in Northern Ireland (non-IREF assets).

As the real estate portfolio was offered for sale as a whole, had to be acquired as a whole, and as the acquisition of all the properties within the portfolio occurred at the same time for *bona fide* commercial reasons, then the cost of the properties located in Northern Ireland may be taken into account for the purposes of applying section 739LA[A](2), and the profits from the business should be included for the purposes of applying section 739LA[A](3).

[9] The income tax charge arises on deemed income, and as such, the exemption from tax in section 739C cannot apply to that income as it cannot be relevant profits, being amounts earned on behalf of unit holders.

2.1.1 Interaction of section 739LA and section 739LAA

Section 739LA applies with effect from 9 October 2019[10] whereas section 739LAA applies with effect from 1 January 2020. However, it is accepted by Revenue that IREFs can choose to apply section 739LAA from 9 October 2019.

2.1.2 Calculation of the amount to be charged to income tax

There are two metrics contained within the section 739LA[A] which calculate the amount to be charged to income tax –

- The first metric is the 50% debt threshold. This applies where the debt[11] incurred by the IREF exceeds 50% of the cost of the IREF assets. The cost of the IREF assets is the amount which would be allowed as a deduction for CGT purposes[12]. Where the 50% threshold is breached, then a specified formula[13] is used to calculate the proportion of the property financing costs of the IREF which are associated with the excessive debt. That formula is then used to calculate the amount treated as income received by the IREF and charged to income tax under Case IV of Schedule D.

- The second metric is the property financing cost ratio[14] which applies where, for an accounting period, the property financing costs ratio of an IREF is less than 1.25:1. Where, the property financing cost ratio is breached, then an amount is treated as income received by the IREF and charged to income tax under Case IV of Schedule D. The amount of income that the IREF is treated as receiving is the amount by which the adjusted property financing costs[15] would have to be reduced for the ratio to equal 1.25:1.

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[10] Section 739LA applies to IREF accounting periods commencing on or after 9 October 2019. Where an accounting period commences before that date and ends after that date then it should be divided into two parts, one beginning on the date the accounting period begins and ending on the 8 October 2019 and the other beginning on the 9 October 2019 and ending on the date which the accounting period ends. Refer to section 107 in relation to apportionments between periods.

Following the introduction of section 739LA on 9 October 2019, section 739LAA was provided for as a Committee Stage Amendment and applies with effect from 1 January 2020. Section 739LAA provides for similar provisions as section 739LA however it contains some clarifications on the application of the debt and interest limitations which section 739LA did not.

[11] A debt means "…**any debt incurred by an IREF in respect of monies borrowed by, or advanced to, the IREF**…", which includes accrued, but unpaid, interest, for example.

[12] Please refer to TDM Part 19-02-10 for further information.

[13] (the property financing costs) x (the excess specified debt/the total specified debt)

[14] Definition of "property financing costs ratio" – section 739LA "**means the ratio of the sum of profits of an IREF and the adjusted property financing costs of an IREF to the adjusted property financing costs of the IREF". Section 739LAA "means the ratio of the sum of the annual IREF profits and the adjusted property financing costs of an IREF to the adjusted property financing costs of the IREF"**.

[15] In both section 739LA and section 739LAA "adjusted property financing costs" means the property financing costs less any amount of income calculated by the debt ratio metric.

The amount calculated under the first and second metrics are added together, and this is the amount which is charged to income tax.
The amount which can be charged to income tax in any accounting period is capped at the amount of the property financing costs in that accounting period.

Please refer to Appendix II for an illustrative example of the application of section 739LA[A].

2.1.3 Third party debt [section 739LC]

Section 739LC provides for relief where some or all of an amount of the interest payable by an IREF under section 739LA[A] relates to third-party debt associated with premises in the State. The amount of income charged under Case IV can be reduced by the amount which would have been charged to tax if the IREF only had its third-party debt. The reduction for third-party debt applies to both a charge that can arise under the 50% specified debt metric and/or the property financing costs ratio.

For the purposes of the IREF legislation third party debt means –

(a) A loan advanced to an IREF by an enterprise other than one which is an associate (within the meaning of section 739KA) of that IREF,

(b) Where the full amount[16] of the principal advanced is employed in the purchase, development, improvement or repair of a premises of the IREF[17], and

(c) The loan is not subject to any back-to-back arrangements which have been designed to disguise related party debt as third party debt.

A third-party debt will also include a loan which satisfies conditions of (a) and (c) above where the amount advanced is used to repay a previous loan[18] which meets condition (b). Any amount advanced in excess of the amount used to repay the principal of the previous loan does not qualify as third-party debt. Over the period an IREF owns a premises there may be more than one refinancing. Where the funds advanced on a subsequent refinancing satisfy conditions (a) and (c), and

i. the financing costs over the life of the new loan are lower than on the debt that is being refinanced, or

ii. the financing costs over the life of the new loan are higher than on the debt that is being refinanced, but the refinancing is of third-party debt and the increased financing costs arise from genuine market conditions which are out of the control of the IREF,

the subsequent loan can be treated as third-party debt.

Condition (b) above has an additional restriction where the premises are acquired from an associate. In such circumstances, any amount borrowed can only be treated as third party

[16] Dual purpose loans, which are used partially for an allowable purpose and partially for a non-allowable purpose, can be treated as two separate loans for the purposes of this section.

[17] For the purpose of satisfying this condition any amount paid towards costs which are directly associated with the purchase, development, improvement or repair of a premise of an IREF, such as stamp duty or legal fees, will fall to be considered as being “employed”, but amounts used to pay any financing interest arising on the loan (whether paid as it arises and capitalised and subsequently paid) will not be.

[18] It is important to note that this only applies to the repayment of a loan. It does not apply to the repayment of promissory notes or equity or other types of financing.

debt for these purposes if immediately before that purchase the associate had carried out significant development work on that premises and the IREF purchasing the developed premises will use that premises in its property rental business. Significant development work means work such that the cost of the development exceeds 30% of the market value of that premises prior to the commencement of the development works.

A loan from a third-party bank routed through an associate may, where it satisfies the conditions set out in (b) and (c) and in the following very specific circumstances, be treated as third-party debt. The loan must:

- be advanced to the associate, who is a unit holder or an indirect investor in the IREF, for the purposes of being employed by the IREF;
- be advanced to the associate, rather than directly to the IREF, solely because the bank insists on having security over more assets than just the IREF assets;
- the loan must then be advanced directly from that associate to the IREF, and the loan repayments must be made directly from the IREF to that associate;
- the IREF's loan repayments must mirror exactly the loan repayments from the associate to the bank[19].

In addition, the IREF must be in possession of, or be in a position to secure, all details of the bank loan to its associate.

2.1.3.1 "at or about the time of the purchase of the premises"

For the purpose of applying section 739LC, Revenue are prepared to accept that the term "at or about" in section 739LC(2)(c)(i) encompasses situations where for bona fide commercial reasons the IREF was temporarily fully equity funded at the time the premises was acquired, with third party debt being introduced within a reasonable period thereafter. Section 739LC(2)(c)(i) provides that third party debt advanced to an IREF at or about the time the premises is purchased (note that this does not apply to amounts used to develop, improve or repair a premises) can be treated as amounts employed in the purchase of the premises. In applying this test, it must be clear from all sources (including documentary evidence such as board minutes and any correspondence with third party lenders in advance of the acquisition, and other evidence such as the capital structure of the deal) that the intention was always that the property would be partially financed by way of third party debt[20].

Where loans for the purchase of a premises are advanced by a genuine third party but due to pending regulatory approval, the premises is acquired and the loans are temporarily borrowed by an associate of the IREF and then transferred with the premises to the IREF, the loans may still be treated as loans advanced to an IREF for the purchase of a premises. This will only apply where it is clear that the intention was always that the liability for the monies advanced would be transferred to the IREF together with the premises, that the IREF was in

[19] If the associate is obliged, by transfer pricing requirements, to charge a different interest rate to the IREF than it pays to the bank, then the amount which can be treated as financing on third party debt by the IREF is limited to the actual amount paid to the bank by its associate.

[20] Regard should also be had to paragraph 4.4.1.1 in TDM Part 04-09-01 for guidance on a similar concept in section 110(5A)(a).

the process of being established and as such the loans could not be held by the IREF directly upon advancement, and the liabilities are subsequently transferred to the IREF once regulatory issues are finalised (and it is anticipated that this should take no more than 6 months from the point the premises was acquired).

2.1.4 Enforcement of a security

Section 739LC(4) provides that a genuine third-party loan will not cease to be such where the third party lender becomes an associate of the IREF solely due to the enforcement of a security which had been granted as a genuine condition of the loan.

This provision will apply both in situations where the third-party takes ownership of the IREF through the actual enforcement of the debt, or where it is agreed with the third-party to transfer ownership of the IREF to avoid having to go to enforcement.

Where a third-party has taken ownership of the IREF, there can be some difficulty in determining the full amount of the principal advanced which is employed in the purchase, development, improvement or repair of a premises of the IREF. In applying Section 739LC(4), regard should be had to the principal committed at the time the IREF and the lender were third-parties. The following example shows how section 739LC(4) should be applied in practice, including determining whether or not the condition outlined in section 739LC(2)(a)(ii) is satisfied.

Example 21 Third-party debt and enforcements

IREF ABC entered into agreements with Bank Limited to borrow €10 million to build a hotel. IREF ABC has drawn down €7 million of this bank debt, of which €6 million was employed in the construction of the hotel with the remaining €1 million set aside in a bank account for future costs of the hotel construction.

IREF ABC is mid construction, but due to unforeseen circumstances is now encountering difficulties in meeting its obligations under the loan.

Bank Limited enforced its security and took over IREF ABC. Following the enforcement the €10 million which had been committed (under the agreements entered into before IREF ABC encountering difficulties and before any consideration of enforcement) will be considered as the third-party debt provided it is all employed in the construction of the hotel as originally planned.

2.1.5 Capitalised financing costs

Property finance costs are defined as costs in respect of debt finance which are taken into account in arriving at the profits of the IREF. There are two key aspects to this definition: The first is that they are amounts which are “in respect of”, which has a very broad meaning. The second is that the definition refers to the profits of the IREF and is not restricted to amounts taken into account in arriving at the ‘annual IREF profits’, which is defined as excluding certain capital, rather than trading, disposals. Therefore, while this includes amounts expensed as interest, it also include any amounts which have been capitalised in the financial statements of an IREF, whether booked in the base cost of the assets or to the cost of sales, as they are released through the profit and loss account/statement of comprehensive income. This ensures consistency of treatment under the IREF rules for interest amounts whether they are expensed or capitalised.

Taking an IREF that borrows €450,000, with interest @ 3% per annum, to construct a building:

- If the annual interest is expensed, each year there will be financing costs of €13,500.
- If the interest is capitalised as part of the cost of the building over a 3 year period, and the building is then sold, the €40,500 [€13,500 * 3] of financing costs rolled up into the cost of the asset sold will be taken into account in arriving at the profits of the IREF in that year.
- If the interest is capitalised as part of the cost of a building, and the cost of the building is depreciated through the income statement, then the portion of the depreciation that relates to the capitalised interest will be a financing cost.

2.1.6 Date of calculation

The tests set out in 739LA[A] apply constantly, that is, the provisions technically apply at any time when the thresholds are exceeded. However, Revenue will accept that the above amounts can be calculated as at the IREF's financial statement year end in certain circumstances. There must be no unusual movements in the debt or financing cost amounts which have the effect of lowering any applicable Case IV charge. In addition, there must not be any steps or arrangements entered into in order to reduce or eliminate an amount which would otherwise arise at the year end. If Revenue are not satisfied with the nature of all movements in debt of financing cost amounts, the calculations must be performed on a daily basis.

Example 22 Movements in shareholder debt

IREF A develops property. Its accounts, at 1 January 2020, show that it is funded by way of €1,000 in equity and €49,999,000 in shareholder debt, which carries interest at 14% per annum. In November 2020 it converts the €49,999,000 shareholder debt to equity and writes off the accrued, but unpaid, interest on the loan.

At the year-end, 31 December 2020, IREF A is not funded by way of any shareholder loans. As the conversion of the loan to equity, in the circumstances outlined, do not represent any unusual movements to avoid a Case IV charge, IREF A can apply the tests in section 739LAA on 31 December 2020.

2.2 Other excessive deductions [section 739LB]

Section 739LB sets out that any amount of disbursement or expense taken as a deduction when computing the profit position of the IREF must have been wholly and exclusively incurred for the purposes of the IREF business[21]. Any amount in excess of what would be considered wholly and exclusively is charged to income tax under Case IV Schedule D.

[21] If any distribution or expense relates to non-IREF business, and where the IREF has non-IREF business in circumstances outlined in Example 19 and 20, then provided the full amount of the expense is wholly and

The section applies to IREF accounting periods commencing on or after 9 October 2019. Where an accounting period commences before that date and ends after that date then it should be divided into two parts, one beginning on the date the accounting period begins and ending on the 8 October 2019 and the other beginning on the 9 October 2019 and ending on the date which the accounting period ends.

2.3 IREFs holding an interest in a partnership

IREFs may invest in Irish property through a partnership structure. For the purposes of calculating any amount to be charged to income tax under section 739LA[A], or section 739LB, an IREF should be regarded as being entitled to the assets, liabilities, income and expenses of the partnership in proportion to the percentage interest the IREF holds in the partnership. Consequently, the relevant calculations should be performed as if the IREF's proportionate share of the partnership's income statement and balance sheet were included in its financial statements.

To the extent that the IREF and the partnership do not prepare their accounts using the same basis period, the IREF's proportional interest in the partnership's assets, liabilities, income and expenses should be determined by reference to the IREF's accounting period, pro-rating the partnership's results as appropriate.

2.4 Case IV pay and file obligations

An IREF which is within the charge to income tax under sections 739LA, 739LB or 739LAA must return the amount which is within the charge by filing a Form 1 IREF by 31 October in the year following the year in which the accounting period in which the amount arises ends. The income tax due on the amount arising must also be paid by 31 October.

Once an IREF is within the charge to income tax it must continue to file a Form1 IREF until such time as it ceases to be an IREF or ceases to have debt or unamortised interest costs. An IREF within the charge to income tax must also fulfil its preliminary tax obligations, further details can be found on the Revenue website.

exclusively for the purpose of that non- IREF business, a charge to income tax will not arise.

3 Interaction with other taxes

3.1 CGT

As the profits accumulated within an IREF will be subject to IREF withholding tax, or not, as applicable, a non-resident is not charged to CGT on the disposal or redemption of a unit in an IREF [section 739G(2)(h)] or on the disposal of an asset that derives its value from an IREF [section 739N(5)].

3.2 Interest withholding

Investment undertakings are relevant persons who may have an obligation to operate withholding tax under section 246. Where the unit in the IREF is a profit participating note, withholding under the IREF regime should be done in priority to withholding under section 246.

Section 246 will continue to apply to interest on debts other than those which are units in the IREF. Where the loans are funding bonds section 51(3) provides that the issuing of notes will be treated as a payment of interest for the purposes of the Tax Acts. As such, withholding under section 246 arises.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[…]

4 Stamp Duty exemption

Prior to 1 July 2017, it was possible to transfer the business of the IREF or developing land to a "specified company" within the meaning of section 739V TCA.

Prior to 1 January 2018, it was possible to transfer the property rental business of the IREF to a "qualifying REIT" within the meaning of section 739W TCA.

Transfers under section 739V TCA and section 739W TCA are exempt from stamp duty.

Note that regulations 3 and 4 of the Stamp Duty (E-stamping of Instruments and Self-Assessment) Regulations 2012 (S.I. No. 234 of 2012) contain a requirement to file an electronic stamp duty return through ROS in order to claim the exemption where the instrument is:

- a conveyance or transfer of land or an interest in land, whether on sale or by way of gift;
- an assignment of a lease of lands, tenements or heritable subjects where the unexpired term of the lease exceeds 30 years.

When completing the electronic return, the person filing the return should claim the exemption from stamp duty by selecting "Miscellaneous Acts which contain Stamp Duty Exemptions" from the dropdown menu on the appropriate screen.

5 Annual IREF returns along with payment of IREF withholding tax obligations [section 739R]

All IREFs are required to file annual returns with Revenue. All details in relation to any IREF withholding tax must also be included on this annual return. The deadline for filing these returns and to pay over any IREF withholding tax is 30th July (for year-ends up to 31-December the prior year) or 30th January (for year-ends up to 30-June the prior year).

The return, available for download on the Financial Services area of the website, must be submitted as an Excel file through MyEnquiries:

- Under the 'My Enquiry relates to' field please select 'Other than the above'
- Under the 'More specifically' field please select 'IREF withholding tax'.

Payments must be made by EFT to the following bank account:

Office of the Revenue Commissioners – UTD EFT – Public Bank Account
Danske Bank
International House
3 Harbourmaster Place
IFSC
Dublin 1
IBAN: IE37DABA95159920003514
BIC: DABAIE2D

When remitting a payment, as bank reference, please quote “IREF” along with the customer reference number.

The customer is also required to forward an e-mail to moneytrans@revenue.ie to advise the following:

- The date of payment
- The customer tax registration number
- The fund name and umbrella name
- The amount of payment
- The period to which the payment is proper

Please note this annual IREF return is required by all IREFs and is in addition to any filing required under section 2.4.

6 Financial statements electronic filing requirements [section 739FA]

Revenue made regulations, in accordance with section 739FA, entitled the Investment Undertaking Electronic Account Filing Requirements Regulations 2018 (S.I. No. 368 of 2018) in September 2018. These Regulations provide that IREFs are to electronically file financial statements with Revenue for each accounting period.

The filing dates for the submission of the financial statements, which are based on the filing obligations of the IREF returns, are –

- Where an accounting period ends on or before 30 June in a financial year, within 30 days of 31 December of that year, and
- Where the accounting period ends between 1 July and 31 December, within 30 days of 30 June of the following year.

For accounting periods of an IREF which ended during 2017, the financial statements had to be provided by 30 January 2019.

The financial statements must be filed in text searchable PDF format via MyEnquiries:

- Under the 'My Enquiry relates to' field please select 'Other than the above'
- Under the 'More specifically' field please select 'IREF withholding tax'.

Appendix I
Schedule of material updates

Sept 2017:	Created
Mar 2018:	Updated as follows:
	1.1.3 on holder of excessive rights updated to reflect FA17 amendments
	1.3 defining specified persons updated to reflect FA17 amendments
	1.3.1 on PPIREFs and specified persons is updated to clarify how the PPIREF rules should be applied to life companies which carry out both widely held business and also personal portfolio type business
	1.3.2 dealing with exceptions to section 739M(3) updated to reflect FA17 amendments
	1.3.1 on the interaction with 739Q(3) updated to reflect FA17 amendments
	1.3.4 on equivalent treatment introduced
	2. on interaction with other taxes and 3. on stamp duty exemptions introduced
Jun 2018:	Section 4 included with details on how to pay and file.
Oct 2018:	Section 5 included with electronic account filing requirements
April 2019:	1.3.3 updated to include reference to the IREF withholding tax refund claim form
Nov 2020:	Section 1 key definitions updated
	1.3. updated with respect to assessing equivalence
	A new Section 2 and Appendix II inserted for Case IV charge as inserted by FA19 and previous section 2 onwards became section 3,4,5,6
	Section 5 updated to reflect the extension of the IREF return filing obligations to apply to all IREFs as per FA19 amendments
Mar 2022:	1.4 and 1.4.5 updated to refer to the UK superannuation scheme (as defined in Article 11 of the Double Tax Agreement between Ireland and the United Kingdom) declaration form contained in TDM Part 27-02b-01.
	1.4 updated to clarify the basis of an ILP’s investment in IREFs, in light of the ILP’s transparent nature.

Appendix II

Illustrative example of s739LA[A]

IREF ABC	Before 3rd party debt carve out	3rd party carve out	
IREF assets cost	1,000,000		
Long term debt [Note 1]	900,000		
Annual rent (assuming 7% yield)	70,000		
Rental costs (assuming rate of 2%)	1,400		
Profit before interest	68,600	Profit before interest	68,600
Interest expense [Note 1]	72,000	3rd party interest [Note 1]	30,000
Profits of the IREF	-3,400	Profit after interest	38,600
s.739LA[A]			
ss(1)			
Specified debt	900,000		600,000
Relevant cost	1,000,000		1,000,000
Property financing costs	72,000		30,000
Adjusted property financing costs: (72,000 – 32,000) (30,000 – 5,000)	40,000		25,000
Property financing costs ratio (-3,400+40,000) : (40,000) (38,600+25,000) : (25,000)	0.92 : 1		2.54 : 1
ss(2)			
Specified debt > 50% relevant costs?	Yes		Yes
A (property financing costs)	72,000		30,000
B (excess specified debt)	400,000		100,000
C (total specified debt)	900,000		600,000
Case IV amount (AxB/C)	**32,000**		**5,000**
ss(3)			
Is the property financing costs ratio < 1.25 : 1?	Yes		No
Adjust right hand side of property financing costs ratio to 80% of left hand	36,600 : 29,280		

side[22]		
Case IV amount is difference between right hand side adjustment (40,000 – 29,280)	**10,720**	
Total Case IV amount (32,000 + 10,720	**42,720**	**5,000**
(42,720 – 5,000)		**37,720**

Note 1: Debt split

3rd party	600,000	5%	30,000
Shareholder	300,000	14%	42,000
Total	900,000	8%	72,000

[22] This method of calculation should be adopted in all scenarios to ensure consistency of approach.