CFE tax advisers europe

OPINION STATEMENT

Opinion Statement FC 5/2024 - Evaluation of the EU Anti-Tax Avoidance Directive (ATAD) – Council Directive (EU) 2016/1164 of 12 July 2016 as amended by Council Directive (EU) 2017/952 of 29 May 2017

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CFE Tax Advisers Europe is the European association of tax institutes and associations of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have regarding our Opinion Statement. For further information, please contact Bruno Gouthière, Chairman of the Fiscal Committee of CFE Tax Advisers Europe or Dr. Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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1. General Remarks

CFE Tax Advisers Europe is pleased to contribute to the European Commission public consultation on the evaluation of the EU's EU Anti-Tax Avoidance Directive ("ATAD").[1] The consultation invites comments on the general implementation of ATAD in the European Union and the functioning of ATAD, a qualitative assessment of the effectiveness of the measures as a minimum standard for addressing aggressive tax planning and on future potential modifications of the Directive. Our comments relate in particular to the interaction of ATAD with the rules introduced in the European Union with the Council Directive on a global minimum level of taxation EU 2022/2523 of 14 December 2022. ("Minimum Tax Directive").

CFE's comments do not relate to the Commission's focus on quantitative assessment of the effectiveness of the measures as a minimum standard for addressing aggressive tax planning, nor to aspects such as evaluation of budget revenue generated as a result of the measures or costs for the stakeholders concerned, in particular tax administrations and affected businesses, as we do not possess such evidence nor data. Furthermore, CFE notes the difficulty in assessing ATAD's effectiveness is partly due to delayed implementation in some Member states of the EU, the requirement for tax authorities to audit companies and apply ATAD provisions, and the lack of published decisions on ATAD application.

CFE considers the public consultation an extraordinarily important tool in reaching out to stakeholders which are addressees of certain pieces of EU law, and remarks that public consultations should be of a longer duration and avoid the holiday periods where stakeholders are typically less available to provide qualitative input. This will ensure sufficiently representative feedback to be provided to the Commission in communication with our constituent bodies.

1 European Union: Council Directive (EU) 2016/1164 of 12 July 2016 as amended by Council Directive (EU) 2017/952 of 29 May 2017

2. Remarks on the functioning of ATAD and assessment of its effectiveness as a standard for addressing aggressive tax planning ("ATP")

At the outset, CFE Tax Advisers Europe's perspective has been consistent in support of the European Union efforts to tackle tax evasion, and aggressive tax avoidance. To this end, we have supported the goals and objectives of the European Commission's 2020 Action Plan for Fair and Simple Taxation as well as the Supporting the Recovery Strategy which was aimed at preventing losses to national and EU budget within the framework of globalisation, digitalisation and new business models, which "are creating new limits for tax competition and new opportunities for aggressive tax planning".[2] CFE notes ATAD has been effective in establishing EU's anti-avoidance system and changing mentality, however its implementation has led to increased complexity and administrative burdens for businesses.

The EU has sought to target aggressive tax avoidance through individual-country initiatives (European Semester Reports), EU law measures, State aid and other infringement of EU law investigations and CJEU judgments, which have all contributed to a better understanding of aggressive tax avoidance and how to address it. It is also important to note that the work of policymakers to target aggressive avoidance has centred on abusive and aggressive tax avoidance.

As indicated in CFE's Paper on professional judgment in tax planning[3], abusive and aggressive tax planning is distinct from both tax evasion (where a taxpayer breaks the law by, for example, not reporting income or simply not paying taxes due), and tax planning (where a taxpayer's obligations are minimised through the non-abusive measures intended by legislation, such as use of tax deductions, tax deferral plans and tax credits). Therefore, policymakers have focused on aggressive tax planning based on arrangements that are deemed manipulated or artificial where they are without economic substance but for the essential purpose of avoiding taxation and achieving a tax benefit which would not otherwise exist.

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2 European Commission, Communication from the Commission to the European Parliament and the Council. An action plan for fair and simple taxation supporting the recovery strategy, Brussels, 15.7.2020 COM(2020) 312 final.

3 CFE Tax Advisers Europe, "Professional Judgment in Tax Planning - An Ethics Quality Bar for All Tax Advisers", Discussion Paper, June 2021.

In this context, we also note that per the General Anti-Abuse Rule (GAAR) in the EU's Anti-Tax Avoidance Directive (ATAD), the main target of the policymakers is arrangements which defeat the object of applicable tax, are not genuine and are not put in place for valid commercial reasons which reflect reality.[4]

What remains problematic at EU level is the ongoing absence of clarity on definitions and a common European understanding of key concepts of law. Although the EU has adopted the ATAD, it is clear that definitions are not fit for purpose in defining what constitutes tax avoidance. Neither EU primary nor secondary legislation defines the notion of "tax avoidance", primarily due to the evolution of the concept over time and geography within the EU. Overall, a lack of consensus among Member states on a common definition of aggressive tax avoidance has shaped the EU approach. Consequently, EU legislation operates with descriptive and explanatory language instead, as per Article 6 of the ATAD, setting out the European GAAR:

"For the purposes of calculating the corporate tax liability, a Member State shall ignore 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. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as nongenuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."[5]

Combating aggressive tax planning and preventing the risks of tax avoidance and evasion constitute objectives of general public interest recognised by the European Union for the purposes of Article 52(1) of the Charter, capable of enabling a limitation to be placed on the exercise of the rights guaranteed by Article 7 of the Charter of Fundamental Rights as decided by the Court of Justice of the EU.[6]

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4 The OECD has also played a major role through its guidelines by stressing the importance of compliance with "both the letter and the spirit" of the law, as well as through its comprehensive contribution on the allocation of profits within group structures and taxation thereof, which has played into EU initiatives (cf. OECD's *Transfer-Pricing Guidelines for Multinational Companies and Tax Administrations*).

5 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD).

6 CJEU, Judgment of 8 December 2022, Case C-694/20 *Orde van Vlaamse Balies and Others*, EU:C:2022:963, paragraph 44 and the case-law cited; confirmed in Case C-623/22 *Belgian Association of Tax Lawyers and Others*, 29 July 2024.

Furthermore, the Court notes that the EU's efforts to combat aggressive tax planning and preventing the risks of tax avoidance and evasion are important not only for the protection of the tax base and therefore the taxation revenue of the EU and its Member states, but also for the establishment of a fair tax environment in the internal market, and for safeguarding of the balanced allocation of the Member states' powers of taxation and the effective collection of tax, which the Court has found to be legitimate objectives.[7]

Given the importance attached by the EU to these objectives, this use of descriptive and explanatory language of tax avoidance, which was repeated to develop the so-called hallmarks in the Directive on reportable cross-border arrangements ("DAC6") can also create issues of compliance and interpretation.[8] We reiterate the call on the European Commission to use this opportunity to evaluate whether the EU's anti-avoidance rules are still fit for purpose and proportionate, and to explore policy options that could simplify the rules overall. Our overall aim remains to support policymakers in achieving the objectives above while ensuring that anti-avoidance framework is enforceable, fit for purpose and ultimately serves the competitiveness and the resilience of the Single Market.

For the purposes of interest deductions, the ATAD Article 4 paragraph 3 allows Member states to give taxpayers the right to deduct borrowing costs up to EUR 3,000,000 regardless of the main EBITDA-based limitation rule. Considering the fixed monetary threshold was determined during an era of negative interest rates and that interest rates have thereafter increased, in economic terms this means that a taxpayer would incur the maximum borrowing cost allowed by the rule earlier and with lower amount of loan than at the time of original introduction of the ATAD. Consequently,

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7 CJEU, Judgment of 22 November 2018, Case C-575/17 *Sofina and Others,* EU:C:2018:943, paragraphs 56 and 67 and the case-law cited

8 The Directive imposes a requirement on tax advisers – or taxpayers, where applicable – to report aggressive tax-planning arrangements of a cross-border nature to tax authorities where at least one Member State is affected. Please refer to the CFE Opinion Statement on the DAC Evaluation (Opinion Statement PAC 1|2024 on Evaluation of the Directive on Administrative Cooperation in the Field of Taxation), where CFE identifies issues and makes recommendations on:

- General Simplification of the Directive & Recast of Consolidated Version;
- Transparency of Reporting;
- Pillar 2 Compatibility;
- Professional Privilege;
- Revision of Hallmarks – Broad Hallmarks & Commercially Valid Transactions;
- Penalties;
- Taxpayers Rights – Overall Balance of Rights and Obligations in the Single Market.

CFE would encourage the Commission to assess whether a measure should be introduced to revise such a threshold on regular basis or e.g. link the maximum amount to an applicable reference index or similar to give the Member states a possibility to revise their national law, if deemed necessary.

3. GloBE Directive/ Pillar 2 Compatibility and "Decluttering"

CFE notes that certain ATAD provisions may have become obsolete for companies in scope of the Pillar Two rules and the EU GloBE Directive on Minimum Taxation of Multinational Companies in the European Union. CFE reiterates the call for "decluttering" of the tax systems in light of Pillar 2, in particular vis-à-vis CFC rules.

In spite of the nominal similarity of the Income Inclusion Rule ("IIR") of Pillar 2 with Controlled Foreign Company rules, currently mandated by Article 7 ATAD, commentators have noted the difference in objectives between IIR and CFE rules, i.e. "abuse" of foreign subsidiaries for tax purposes and creating a global level playing field by setting a commonly accepted limits in the "race to the bottom".[9]

The European Commission has also indicated it would not seek to review the CFC regime of Article 7 ATAD in light of the GloBE Directive, noting that ATAD should not be amended, given the consistency with the OECD Model Rules which allow for continued application of the ATAD CFC rules in parallel to the GloBE Model Rules.[10] Kofler also notes that the potential impact of the GloBE on tax planning and the use of shell entities has not been a sufficient reason for the EU Commission to step back from its considerations for an "Unshell" directive.[11]

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9 T. Masuda, Should Countries Declutter Their CFC Legislation Once They Adopt the Global Minimum Tax? Kluwer International Tax Blog (28 Jul. 2023).

10 European Commission, Explanatory Memorandum of the Commission's Proposal for a Council Directive on ensuring a global mini-mum level of taxation for multinational groups in the Union, COM(2021)823 (22 Dec. 2021).

11 Georg Kofler, "The Impact of Pillar Two on the Notion of Abuse in International Taxation" (forthcoming), citing the Explanatory Memorandum to the Proposal for a Council Directive laying down rules to prevent the mis-use of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021)565 (22 Dec. 2021), where the Commission argues that GloBE does invalidate the "Unshell" proposal: *"The legal framework on the minimum level of taxation exclusively pertains to the rate, i.e. level of taxation. It does not touch upon potentially harmful features of the tax base. Neither does it involve examining whether an entity possesses sufficient substance to carry out the activity that it is supposed to. It is true that the implementation of the rules on the minimum level of taxation may gradually discourage the creation of shell entities to some extent. Yet, this is yet an unknown outcome which cannot be guaran-teed at this stage."*

CFE considers that due attention should be dedicate to “decluttering” the current regime, in particular given the mandatory application of ATAD in the EU in parallel with the GloBE Directive. As such, certain elements of the GloBE regime could serve as threshold for standardisation (i.e. formulary substance-based income inclusion as an indicator of active income or sufficient economic substance).[12]

4. Conclusions

- ATAD poses a significant compliance burden and implementation has resulted in increased complexity, particularly when layered on top of existing national rules. CFE’s primary remarks is the complexity of the EU’s anti-avoidance framework is potentially hindering the EU's competitiveness and ease of doing business. CFE notes the urgent need to create a more coherent tax-avoidance rule structure and reduce complexity in EU tax rules.

- ATAD has been effective in establishing the EU’s anti-avoidance system and changing mentality, however its implementation has led to increased administrative burdens for businesses. The lack of comprehensive data makes it challenging to fully assess ATAD's effectiveness.

- There is an urgent need to align ATAD with newer initiatives such as EU’s Directive on Minimum Tax (Pillar Two) and create a more coherent structure for EU tax rules. CFE notes the need for further simplification, to improve on the clarity of concepts and the need to implement definitions. CFE’s emphasises the need to "declutter" the EU’s anti-avoidance legislation (ATAD and partly DAC6), especially for companies in scope of Pillar Two, to reduce complexity and potential redundancies or duplication in reporting requirements.

12 *Idem*., p. 9, *op. cit.*