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10 September 2024

Directorate-General for Taxation and Customs Union
SPA3 08/015
B-1049 Brussels
Belgium

Via Online Submission

RE: Call for Evidence on ATAD Implementation

Dear or Sir or Madam:

On 31 July 2024, the European Commission ("EC") released a call for evidence (the "Call") regarding the implementation of the European Union's Anti-tax Avoidance Directive ("ATAD"). The purpose of the Call is to provide an evaluation of ATAD and "is expected to provide evidence on the implementation of [ATAD], to what extent its objectives have been achieved, and whether the measures need to be amended in the future." The EC asked for feedback on the Call no later than 11 September 2024. On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to respond to the EC's request for feedback.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in Europe, the Middle East & Africa ("EMEA"), North and South America, and Asia. TEI, as the preeminent association of in-house tax professionals worldwide, has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our over 6,000 individual members represent over 2,800 of the leading companies in the world.[1]

TEI Comments

TEI commends the EC for seeking public comment on ATAD's implementation and hopes our brief comments set forth below assist the EC in evaluating ATAD's current and future effectiveness or lack thereof.

[1] TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986. TEI's EC transparency register number is 52413445902-12.

The Call sets forth three broad themes that will be examined in the course of reviewing ATAD's implementation:

1. The implementation of ATAD in the Member States and the policy choices made where the Directive allowed the Member State legislature to choose;
2. The functioning of ATAD, in the form of a qualitative and quantitative assessment of the effectiveness of ATAD's measures as a minimum standard in addressing aggressive tax planning; and
3. The future-proofing of the measures, in particular their fitness for purpose and continued relevance when considering the introduction of a Council Directive EU 2022/2523 on a global minimum level of taxation of 14 December 2022.

Limitation on the Deductibility of Interest

One of ATAD's key features is Article 4, which provides that Member States must introduce limitations on the amount of interest a multinational enterprise ("MNE") is allowed to deduct from their income. Member States are allowed some flexibility in how they impose interest deductibility limits under Article 4 (threshold amounts). While limiting deductions for interest paid to a related party in a low(er) tax jurisdiction may be justifiable as an anti-tax avoidance measure, the case for limiting deductions to unrelated parties is less justifiable. In any event, limiting interest deductions in whatever form will hinder investment in the EU and a "growth friendly" agenda would remove this and similar obstacles. Moreover, other measures have arguably made Article 4 of ATAD obsolete. These measures include public country-by-country reporting ("CbCR"), the DAC6 rules on mandatory reporting of cross-border tax arrangements, and the implementation of the OECD Pillar Two rules.

Controlled Foreign Company ("CFC") Rule

ATAD also includes rules addressing MNEs use of CFCs to "shift" profits from a high tax country (usually that of the MNE's parent company) to a low tax country. The CFC rules permit Member States to attribute certain income of the CFC to the MNE's parent company, where it can be taxed. Much like the interest deductibility rules of Article 4, subsequent events have made ATAD's CFC rules obsolete. In particular, the OECD Pillar Two rules operate as a global CFC regime by imposing a minimum level of tax on an MNE's operations. We question whether ATAD's CFC rules will be necessary after full implementation of Pillar Two and, if so, what the reason for maintaining the ATAD CFC rules would be.

Anti-Hybrid Rules

The anti-hybrid mismatch rules of ATAD 2 aim to prevent situations of a double deduction and a deduction without a corresponding inclusion of the income at the level of the recipient resulting from a hybrid mismatch. Three categories of rules are implemented to neutralize the tax effects of

hybrid mismatches: (i) denial of deductions; (ii) inclusion of income; and (iii) taxation of reverse hybrid entities.

Again, arguably these rules are all obsolete following implementation of various DACs, public CbCR, and Pillar Two, which has its own extensive anti-hybrid rules. In any event, for tax certainty purposes – and therefore for future investments in the EU – it would be beneficial if the EC updated the justification for the ATAD hybrid mismatch rules as their purpose seems to be satisfied by these other anti-abuse rules. In other words, does the EC see any room for these anti-hybrid rules to be repealed or significantly modified and a more targeted approach adopted?

General Anti-Abuse Rule

ATAD also includes a general anti-abuse rule ("GAAR"), which is in place to give EU Member States the power to address "artificial" tax arrangements if the more specific ATAD rules do not apply. However, it is unclear what specific problem the ATAD GAAR aims to address. Instead, like most GAARs, it appears to have been put in place due to the worry that some taxpayer, somewhere, is getting away with something, which GAAR can then be used to combat. Moreover, the scope of the ATAD GAAR is uncertain. Without a clear scope or goal for the GAAR, its effectiveness is limited and hence all it does is create uncertainty for taxpayers, which makes them more hesitant to invest in a particular jurisdiction, limiting growth. In addition, like Article 4 and the CFC rules, subsequent measures have rendered the GAAR superfluous. These measures include the anti-abuse rules in the Parent Subsidiary Directive, the Interest & Royalty Directive, DAC6, the use of black and grey lists, certain case law, and public CbCR.

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TEI appreciates the opportunity to comment on the ATAD Call for Evidence. Should you have any questions regarding TEI's comments, please do not hesitate to contact Ralf Thelosen at rthelosen@citco.com or Benjamin R. Shreck of TEI's Legal Staff, at bshreck@tei.org or + 1 202 464 8353.

Respectfully submitted,

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