AmCham EU

SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Anti-Tax Avoidance Directive

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

The Anti-Tax Avoidance Directive (ATAD) evaluation is an opportunity for the European Commission to evaluate the adequacy of the architecture and implementation of anti-avoidance rules facing companies in the European Union. Multi-national enterprises (MNEs) are subject to multiple layers of anti-avoidance and tax transparency rules with more being developed at the Organisation for Economic Cooperation and Development (OECD), UN, EU and national levels.

Since the 15% global minimum tax (Pillar 2) has made a large amount of ATAD provisions redundant for in scope companies, the European Commission should examine ways to exempt these companies from ATAD. For non-Pillar 2 companies, the Commission should work to holistically declutter requirements between different anti-avoidance and tax transparency regimes as well as work closely with Member States to increase the consistency of ATAD implementation. These improvements would contribute to the Commission's decluttering agenda and decrease the cost and complexity of doing business in Europe.

Introduction

The EU, US and other international organisations have spent the past few years negotiating and implementing a whole suite of anti-avoidance and transparency rules. These include the Base Erosion and Profit Shifting (BEPS) project at the OECD level, various reforms to the US tax code, the negotiation of Pillar 2 at the OECD level and its implementation in the EU, and the Anti-Tax Avoidance Directive (ATAD) 1 & 2, Directive on Administrative Cooperation (DAC) and Public Country by Country Reporting (pCbCR) Directive at the EU level.

These rules broadly address the same or similar behaviours, but were developed separately, piecemeal, and, accordingly, place duplicative and complicated administrative and reporting requirements on companies – particularly, multi-national enterprises (MNEs).

Discussions continue to advance at the OECD, EU, and now, the UN levels, to introduce new approaches and provisions relating to international taxation of MNEs. The OECD continues to discuss Pillar 1; the UN is now discussing the creation of a UN Framework Convention on International Tax Cooperation; and the EU continues to negotiate the Unshell Directive and Transfer Pricing Directive as well as commence discussions regarding the BEFIT proposal.

Before agreeing to, and implementing a new suite of rules, lawmakers should take the opportunity to review and streamline existing requirements. This should begin with a review and assessment of duplicative provisions between EU rules and Pillar 2, and result in the removal of redundant provisions. This review should happen before negotiating rules that would add further conflicting layers of complexity to the EU tax architecture – like BEFIT.

This review is an opportunity to enhance effectiveness and consistency of anti-avoidance rules across Member States resulting in a more efficient Single Market and more stable international tax system. Likewise, minimising compliance costs and increasing certainty for companies complying with different layers of tax rules in the EU would make a concrete contribution to Europe's competitiveness without requiring the introduction of new regimes.

Comments on the Anti-Tax Avoidance Directive (ATAD)

1. Pillar 2 has resulted in many ATAD provisions being redundant

The implementation of the global minimum tax (Pillar 2) within the EU means that in-scope companies are paying at least an effective tax rate of 15% in all Member States in which they operate. In addition, due to the wide adoption of top-up taxes, they are also paying a minimum 15% rate in many jurisdictions outside the EU.

Many ATAD provisions are costly and complex to administer and the perceived mischief they target are now efficiently dealt with through Pillar 2. Accordingly, many ATAD provisions (for instance, controlled foreign company (CFC) rules and interest limitation) would appear to be surplus and not required to protect the tax base. As such, they should be repealed. At the same time, Pillar 2 implementation has given rise to jurisdictional discrepancies and heavy compliance burdens. For example, the registration requirements in Belgium alone require the use of multiple global data points with associated resource and timing costs.

2. ATAD is inconsistently implemented

The breadth of implementation options offered by ATAD has created a fragmented environment which increases costs, uncertainties and administrative burdens for taxpayers. This fragmentation was noted in a 2022 study commissioned by the FISC Subcommittee which noted that 'a reduction of the number of options should be considered for a more homogenous anti-avoidance landscape across all Member States'[1].

This is well illustrated by the implementation of CFC rules, where Member States diverged in their application of model A or B, and within specific options within each model[2]. While the majority of Member States opted for either model A or B, the Netherlands chose a combination of the two models, and Bulgaria and Finland chose to implement neither.

In addition, the percentage restriction applying under the interest limitation rule varies from 20 – 30% across Member States. The *de minimis* threshold varies from €3 million to nil. Such divergence demonstrates that ATAD has not accomplished its goal, laid out in recital 2, of ensuring that Member States implement their BEPS commitments, and act on them in a "sufficiently coherent and coordinated fashion" which "improve[s] the functioning of the internal market".

Recommendations

1. Exempt Pillar 2 companies from ATAD

Large companies subject to the Pillar 2 Directive will pay a minimum 15% effective tax rate in each jurisdiction, making many of the ATAD provisions for these companies redundant.

Exempting Pillar 2 companies from ATAD would relieve taxpayers and authorities from excessive ATAD burdens, free up resources for tax authorities and make Europe more competitive and attractive to

[1] https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703353/IPOL_STU(2022)703353_EN.pdf

[2] https://www.pwc.nl/nl/dienstverlening/tax/documents/atad-1-and-2-overview-july-2021.pdf

large investors. The Commission should also address the remaining issues and complexities associated with Pillar 2.

2. Holistically declutter anti-tax avoidance requirements

With Pillar 2 taxpayers exempt from ATAD and Directive on Administrative Cooperation (DAC) requirements, the Commission should declutter duplicative anti-avoidance requirements.

ATAD and DAC have numerous duplicative provisions which only add to the costs and administrative burdens incurred by both tax authorities and taxpayers. Aligning these requirements to prevent duplicative reporting would cut down on these costs with direct benefits to Europe's competitiveness and attractiveness to investors.

3. Increase consistency between national implementation

As part of the review, to the extent elements of the ATAD are determined to still be required, Member States should be encouraged to harmonise their ATAD implementation.

The Commission should prioritise increasing the consistency of ATAD implementation across the EU. Harmonised implementation would lead to increased compliance, reduce administrative burdens and facilitate an efficient Single Market.

The Commission should also focus on increasing consistency by ensuring that Member States' guidelines limit divergence within and between jurisdictions.

Finally, the Commission should examine how to increase the adoption of EU dispute resolution and cooperation mechanisms within the context of ATAD.

Harmonisation is vital in the context of Pillar 2 and to the future of EU tax policy. As Pillar 2 will, in effect, reduce tax competition between Member States, harmonisation is a vital opportunity to push for increased standardisation of tax policy and consistency within the EU and across jurisdictions. Likewise, it is vital to ensure a stable basis for future EU policy initiatives to minimise any impacts they may bring in terms of complexity or destabilisation.

4. Unify reporting requirements

At minimum, the Commission should take a holistic look at the reporting requirements and formats associated with multiple measures related to anti-avoidance and tax transparency (ie ATAD, Pillar 2, public Country by Country Reporting) to make them as consistent as possible.

Conclusion

Addressing the lack of consistency between national ATAD implementation and looking for ways to minimise overlap between different anti-avoidance and tax transparency regimes is vital in a period where taxpayers and authorities prepare for potential developments in the international tax system. In general, decluttering duplicative tax rules would decrease costs for companies and free up resources for tax authorities, making the EU a more competitive economy.

Furthermore, increasing the consistency of ATAD implementation across Member States is essential for reducing the administrative complexities currently faced by businesses. Ensuring a consistent and coordinated approach to tax rules will foster greater certainty and efficiency within the EU's internal market. The Commission's efforts to align reporting and compliance requirements would help promote a stable and predictable tax landscape, supporting long-term growth ahead of future policy developments.