

AmCham EU's position on the Commission Anti-Tax Avoidance Package

Executive summary

AmCham EU welcomes attempts to ensure that adoption of the OECD's recommendations is consistent across the EU and with international trading partners where they are required in order to address identified issues by the OECD such as cross border hybridity, excessive interest deductibility and abusive transactions. Consistency is vital to minimise the negative impact on cross border trade and investment and to avoiding potential double taxation. However, we are concerned that the proposed measures are not appropriately drawn to tackle the identified issues without negative impact on the single market. For example, some measures may not be legally valid within the EU, some (when considered practically) will be administratively burdensome and arbitrary, and all either address issues that were not agreed to be minimum standards by the G20 and OECD, or differ from the OECD agreed best practices. The result is that the proposal goes far beyond the measures required to address the identified issues and will place EU businesses at a competitive disadvantage and discourage investment in the EU. We strongly believe that either an impact assessment or a public consultation is required, particularly as the measures differ greatly from recently agreed international standards. We would welcome the opportunity to respond to such a consultation or provide further technical detail of our concerns to ensure that the identified issues are dealt with across the EU in a way that does not harm the single market.

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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 €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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4 April 2016

Introduction

Following the release of the Organisation for Economic Co-operation and Development (OECD) Recommendations on addressing Base Erosion and Profit Shifting (BEPS) in October 2015, and significant impetus within the European Commission, Council, and Parliament to address tax avoidance, the European Commission released a proposed package of EU measures on 28 January 2016. This paper highlights the position and view of the American Chamber of Commerce to the European Union (AmCham EU) on the Commission's Anti-Tax Avoidance Package (ATAP).

AmCham EU welcomes the Commission's attempts to ensure that adoption of the OECD BEPS recommendations is consistent across the EU

Consistent global implementation of anti-avoidance measures (including the OECD BEPS recommendations) is vital in ensuring that such measures achieve their objectives and minimise the negative impact on cross border trade and investment without resulting in double taxation. We welcome the Commission's intention to ensure that corporate taxation is fairer, simpler and more effective across the EU.

We believe that where EU countries do adopt the OECD recommendations, the EU is the right body to support adoption in ways that are consistent with (and do not go beyond) the OECD recommendations, in order to protect and enhance the single market whilst respecting the principles of subsidiarity and proportionality. In particular, we believe that the following measures would benefit from a common approach in line with, but not beyond, the OECD recommendations:

- i. Country by Country Reporting (CbCR) – Action 13
- ii. Permanent Establishment definitions – Action 7
- iii. Treaty Abuse – Action 6
- iv. Transfer Pricing International Standards – Actions 8-10
- v. Harmful Tax Practices – Action 5
- vi. Dispute Resolution – Action 14

We welcome the proposed revisions to the Administrative Cooperation Directive and Recommendation on Tax Treaties (in order to ensure consistent application of i. through iii. respectively).

We would also welcome Recommendations on Transfer Pricing and Harmful Tax Practices (in order to ensure consistent application of iv. and v. respectively), and further resources allocated to ensuring that intra-EU disputes are effectively resolved (e.g. through a Recommendation regarding the inclusion of binding arbitration in all treaties and along with additional resources allocated to streamlining the Arbitration Convention).

We also cautiously welcome the published Communication on External Strategy. We agree that the existing approach to including a standard good governance clause in treaties with external parties is proving a barrier to conclusion of treaties. Whilst we welcome the objectives of creating a more flexible approach, leading by example and assisting developing countries in achieving good governance, we are concerned at the prospect of ranking and listing third countries, as this could become a laborious exercise that slows down treaty conclusion even further.

The Treaty on the Functioning of the European Union (the Treaty) provides that EU action in the area of Direct Taxation must respect the principles of subsidiarity and proportionality. AmCham EU encourages the Commission and Member States to ensure that any action taken respects the Treaty in this regard, in order to ensure that its legal basis cannot be called into question, which would cause uncertainty for all taxpayers and Member States.

AmCham EU is concerned that the proposed measures are not appropriately drawn to tackle the identified issues without negative impact on the single market

We are concerned that several proposed measures of the ATAP go beyond the OECD's recommendations. In particular, some of these measures appear to be working directly against the objective of ensuring that profits should be taxed where value is created. Our key concerns relate to the Anti-Tax Avoidance Directive (ATAD), which we believe will also create a significant compliance burden and uncertainty to the detriment of the competitiveness of the single market:

Articles 6 (Switch-over clause), 8 & 9 (Controlled foreign companies), and 5 (Exit taxation) extend far beyond the requirements of 'anti-avoidance'

- The general consensus among G20 and OECD countries (as affirmed in the BEPS Project) is that tax should be levied where economic activity takes place, and the profits attributed to each country should be in line with the value generated by those economic activities.
- Anti-avoidance legislation should, therefore, seek to prevent the shifting of taxable profits away from the countries where taxes would otherwise be due on those profits.
- As there are no carve-outs included for genuine economic activities, the proposals on switchover clauses and CFCs go directly against these principles.

Articles 8 & 9 (Controlled foreign companies), and 5 (Exit taxation) may not be legally valid within the EU

- Following European Court of Justice (ECJ) decisions, several EU countries have passed legislation allowing specifically for indefinite deferral of exit charges (until assets leave the group or the European Economic Area) or CFC rules with specific carve outs for genuine economic activities.
- The ECJ's decisions on such matters are multiple and complex, and we are concerned that they do not appear to have been taken into account in the design of the ATAD.
- In addition, EU countries have double taxation treaties in place which already assign taxing rights in relation to categories of income between themselves and non-EU countries. The impact that new legislation would have on these existing treaties is unclear.

Articles 4 (Interest limitation), 8 & 9 (Controlled foreign companies), and 10 (Hybrid mismatches) address issues that were not agreed to be minimum standards by the G20 and OECD, and differ from the OECD agreed best practices.

- The OECD BEPS Project did not recommend that all measures should be implemented by all countries as minimum standards, because it was recognised that certain measures did not need to be implemented by all countries in order to be effective in those countries that do choose to implement.
- In addition, these measures are not aligned with the best practices that were agreed by the OECD in these areas. In fact, in some cases the proposals go far beyond the optional best practices agreed at the OECD.
- The ATAD provides that Member States may implement stricter rules than those in the ATAD. Therefore, the risk of inconsistent approaches and potential double taxation arises,

notwithstanding the Commission's argument in favour of coordinated action in implementing the OECD recommendations.

- Accordingly, we do not believe that the explanatory memorandum is correct in its assumption that most Member States are already committed to implementing similar measures.

Articles 6 (Switch-over clause) and 8 & 9 (Controlled foreign companies) are arbitrary and impractical.

- Under the proposals it is not clear whether every tier of a European holding structure would simultaneously levy CFC/switchover charges on the income generated by subsidiaries, or whether any credit would be available for taxes paid (including, for example, other CFC charges at lower holding tiers).
- Definitions based on percentages of (effective or statutory) tax rates are arbitrary and will cause considerable administrative difficulty. Any changes to the circumstances of the CFC itself or the tax regime of the country in which it is resident could have an impact in each of its European holding companies, as could any changes in the effective or statutory rates of the holding companies themselves.
- Because the proposed CFC and Switch-over rules are based on the tax rate in the Member State of the recipient entity, different Member States would have to apply CFC or Switch-over charges to different other countries' income (some of which may actually have higher rates than other EU countries).
- When these points are considered together, it could be common for companies to have to undertake a full analysis of their global group's individual subsidiaries in each year, and each year CFC charges could arise in multiple (yet different) European holding companies. This level of complexity runs counter to the Commission's goal of reforming corporate taxation to make it fairer and more efficient, as set out in the June 2015 Action Plan for a Fair and Efficient Corporate Tax System in the EU.
- Additionally, we note that the statutory tax rates remains a sovereign decision for EU Member States and the rates range from 10% to 35% as different Member States elect to make different policy decisions regarding taxation. In effect, a switchover clause is an alternative to CFC rules and having both risks multiple taxation, increased uncertainty, additional complexity and differing interpretations by different Member States.

Impact on the internal market

- We are concerned in particular at the impact that the above points will both have on investment into and through the EU, and the ability of the EU to negotiate with non-members states (who will be concerned about their ability to both attract EU investment and retain sovereignty over their tax rates without EU countries imposing additional taxes on their investors).
- Some of the provisions may also incentivise Member States further in the 'race to the bottom' to attract investment by causing fewer domestic groups to be subject to them.
- We are also concerned that including measures different to agreed international standards in the ATAD will unnecessarily delay agreement between Member States leading to prolonged uncertainty.
- Even if the ATAD provisions are to be implemented across the EU, any departure from, or extension of, the OECD best practices will result in uncertainty and additional administrative burden for EU businesses, and more importantly will make the internal market less competitive than its international competitors. We are concerned at the impact this will have on growth and jobs within the EU.

We recognise that if Member States are planning on implementing such provisions unilaterally consistent with the OECD recommendations, then pan-EU recommendations on how such rules could be implemented to ensure that they are consistent and in line with EU law are needed. However, for the reasons noted above we do not believe that mandatory implementation of certain measures is appropriate, particularly in the form that the ATAD proposes.

AmCham EU would welcome consultation on the measures proposed in the ATAD

We do not agree with the assertions in Sections 3 and 4 of the ATAD proposal that neither a public consultation nor an impact assessment is required.

Regarding the public consultation, we do not consider that the measures included in the ATAD have been widely consulted on during the Common Consolidated Corporate Tax Base (CCCTB) consultations for these reasons:

- i. Some of the measures in the ATAD were simply not included in previous CCCTB consultations;
- ii. Even to the extent that broad concepts have been discussed in the context of whether they should be included in a CCCTB, we still believe that stakeholders should be given a chance to comment on the detailed proposals as they are introduced individually and outside the context of the overall CCCTB context (e.g., points raised above regarding ambiguity and other difficulties identified); and
- iii. There are several areas that we understand may be in conflict with European Law (or domestic treaties already in place).

Regarding the impact assessment, we do not agree with the claim that there is a strong link to the OECD BEPS work which undertook extensive consultation for two reasons:

- i. None of the measures included in the ATAD were deemed to be minimum standards in the OECD's BEPS Recommendations and (and accordingly their impact was not assessed on similar grounds by the OECD or its Members). In fact, some of the measures (i.e., Exit Taxation, Switchover Clause) were not included in the BEPS Project at all; and
- ii. Rather than being 'extensive', the consultations on the BEPS Project were actually severely limited by the time constraints against which the OECD was working. Businesses would have appreciated additional consultations (and additional time for all of the consultations that were undertaken).

Conclusion

We welcome the Commission's desire to ensure that anti-avoidance measures across the EU (including in particular anti-BEPS measures) are consistent with the OECD approved international consensus. Consistency in rules adopted by Member States should result in reduced administrative burden and risks of double taxation relative to each Member State introducing rules unilaterally.

However, we are disappointed that the ATAD will mandate the adoption of rules in many areas where the OECD has already determined that minimum standards are not required or recommended in order to be effective.

Where the OECD has dictated minimum standards (i.e. treaty shopping, harmful tax practices, country by country reporting and dispute resolution) the internal market would benefit from the EU mandating consistent implementation.

However, the ATAD instead focuses only on areas in which the OECD has recommended best practices (or agreed internationally that no recommendations at all were required in order to address the identified issues). Setting minimum standards in these areas, in contrast with OECD BEPS recommendations, risks driving investments and key entrepreneurial and management functions out of the EU. Further, the minimum standards proposed are not aligned with the internationally agreed best practices, thus compounding the potential for differences with the international consensus.

We strongly believe that either a consultation or impact assessment is needed. The Anti-BEPS Directive covers a wide range of issues, many of which have not been considered within the scope of the EU's CCCTB or OECD BEPS Projects when previous analysis has been undertaken. Given the significant distance between the Commission's proposals and those already agreed internationally, we recommend that Member States undertake their own impact assessments to ensure that the impact on their growth, employment and tax revenues is well understood.