ACCOUNTANCY EUROPE.

Commissioner Gentiloni
DG TAXUD
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Belgium

Sent by upload

Brussels, 26 August 2021

Public Consultation ***Fighting the use of shell entities and arrangements for tax purposes Shell and Letterbox Companies***

Dear Commissioner Gentiloni

Accountancy Europe is pleased to provide you with additional comments to support our response to the above-named public consultation.

Accountancy Europe supports the European Commission in its work to combat aggressive tax planning that purports to circumvent the intention of legislators through artificial or contrived tax planning and structures. This is especially important in view of the funding crisis most governments will be facing due to the Coronavirus crisis and also important to provide governments with the funds necessary to achieve the Sustainable Development Goals and to fight the impacts of climate change.

The last ten years has been a period of unparalleled change in the direct tax arena, especially in respect of measures undertaken at national level, by the EU, and globally, to combat aggressive tax planning. Legislators now have more tools available to deal with aggressive tax planning than ever before and many taxpayers, their advisors and tax authorities struggle to cope with the changes that have already been implemented.

We believe that better implementation and enforcement by Member States of existing EU legislation is crucial to combat aggressive tax planning. Therefore, having appropriate financial, technological and human resources in tax administrations is absolutely critical. As we highlight in our response to questions 3.1,3.2 and 3.5 of the consultation, some Member States are not using existing legislative tools effectively. Also, better harmonisation of tax practices across the EU would combat some forms of aggressive tax planning, notably agreement on the revision to the Interest and Royalties Directive.

It is also likely that some other significant changes in international taxation will occur with the political agreement on the OECD's Pillar One and Two proposals. The minimum tax provisions of Pillar 2 will significantly reduce the incentive for those companies affected to use shell entities purely for aggressive tax planning purposes.

Consequently, with concerted action to foster cooperation and trust between Member States and exercise supervision at a European level to ensure that Member States dedicate relevant and appropriate resources to the implementation of existing legislation (and its proper enforcement), we are not convinced of the need for specific legislative action at European Union level at this time to deal with the issue of "shell" or "letterbox" entities.

We highlight in our response to the consultation that clearly defining what constitutes a shell entity is of prime importance if specific legislation is considered – and that providing a definition that is comprehensive, clear and capable of being operationalised is difficult. As mentioned in our response to question 3.4, the definition proposed in the consultation is very broad and risks capturing entities set up for valid business reasons, including those set up by SMEs.

We also call on the Commission to research key topics raised in the consultation and only propose proportionate legislative responses once the risks of aggressive tax planning have been firmly identified. In particular, research is required in respect of:

- Question 3.5 – the adequacy of the existing legal framework to deal with shell entities
- Question 3.9 – the business activities most likely to use shell entities for tax purposes
- Question 3.11 – the most frequently used legal forms for shell entities.

We have pleasure in providing additional detail below in respect of certain key questions in the consultation.

QUESTIONS 3.1, 3.2 AND 3.5

There are currently many tools available nationally, at an EU level and internationally that, if properly used in a harmonised manner, would be effective in dealing with many of the instances of aggressive tax planning that may involve the use of shell entities. We should avoid adding another level of complexity where its effectiveness is doubtful, and the necessity is unproven.

These include specific anti-avoidance provisions, such as the EU's ATAD I and II, which contains rules covering such areas as controlled foreign companies (CFC), interest deduction limitation, hybrid mismatches and General Anti-Avoidance Rules (GAAR). The addition of the provisions of the OECD's Pillar Two, particularly in respect of setting a minimum rate of taxation for groups, will further reduce the possibility for aggressive tax planning by very large groups.

There are also disclosure tools. These include the OECD's BEPS Action 13 for country-by-country reporting (and automatic-exchange) of tax data to tax authorities – which will shortly be bolstered in the EU by the public disclosure of country-by-country tax data for large companies. Disclosure tools also include DAC 6 that requires reporting of certain tax planning activities with cross-border elements by tax advisors, including those directly working within groups of companies. Additionally, there are private sector transparency initiatives such as GRI's 207 tax standard and the Extractive Industries Transparency Initiative, which are

increasingly being adopted by businesses who see benefits in public transparency of their tax matters.

Disclosure tools also include the various anti-money laundering Directives and the requirement to disclose beneficial ownership.

Companies operating cross-borders have also seen a large increase in transfer pricing requirements, based on work done at the OECD. If transfer pricing is properly applied, a structure that performs minimal activities should receive minimal income. The question is then a matter of better enforcement, which will require more resources for tax authorities and better use of technological advances such as big data and real-time reporting.

Many of these tools are so recent that it is hard to gauge their effectiveness and some measures, such as elements of automatic disclosures under the DAC, are not being used by Member States to their full extent. In this regard, we refer to the European Court of Auditors' special report Exchanging tax information in the EU: solid foundation, cracks in the implementation. Their conclusion was that a suitable framework has been established but the information exchanged is of "limited quality and is not widely used, and that they (Member States) do little to monitor the system's effectiveness".

There is also the question of better harmonisation of tax practices across the EU. In particular, the long-awaited revision to the Interest and Royalties Directive would also reduce the opportunity for shell entities to be used for aggressive tax planning by groups of companies.

QUESTION 3.2

The anti-avoidance 'toolbox' will also be strengthened when the ongoing work of digitalisation of the VAT system comes to fruition. Although such measures as real-time reporting and electronic invoicing may be considered primarily as measures to improve the efficiency and accuracy of the VAT system, ultimately real time reporting has the potential to reduce tax avoidance in respect of Direct Taxes as well. A holistic approach is needed that brings together all the disparate work in respect of taxation.

We call on the Commission to carry out the appropriate research, analysis and impact assessment of all relevant dimensions related to this public consultation. This will facilitate informed and proportionate decisions, considering the effectiveness of existing legislation (and how to improve it), the impacts of potential new measures and the key areas of risk to exchequers that shell entities pose.

QUESTIONS 3.3 – 3.4

We believe that the definition is too general and all encompassing. This approach was tried in Italy with a large number of 'indices' but so many businesses were affected that they introduced a ruling system, and some 70 000 ruling requests were received. As a consequence, the badges \ 'indices' were reduced and then carve outs were introduced reducing the effectiveness of the legislation and increasing its complexity.

QUESTION 3.5

We are aware that shell companies can be used in the EU for aggressive tax planning, but as mentioned, there are many legitimate uses for such companies as well– see notably our comments under this question in the questionnaire.

Accountancy Europe has stated that accountants must not devise and promote tax planning structures that are wholly artificial and contrived and seek to exploit loopholes and mismatches or different treatment of structures in different countries. This would include use of "shell" or "letterbox" entities in aggressive tax planning. Our views on the ethical considerations in respect of professional accountants providing tax advice can be found in our publications themed *Accountants & Tax.*

We have no empirical data as to whether such companies are 'mostly' used for aggressive tax purposes.

Overall, we believe that a sufficient toolkit against aggressive tax arrangements involving shell entities would exist through a combination of:

- consistent and proper use of existing EU rules and frameworks
- more harmonisation in certain national tax rules. For example, some countries base taxing rights on the place of incorporation, others on place of effective management control and others on both – leading to conflicts of jurisdiction of taxing rights
- proper monitoring of transfer pricing calculations, and
- upcoming tax policy developments in the EU and globally.

QUESTION 3.7

All these characteristics, or badges, individually could be indicative of a higher risk of a shell entity being used for tax aggressive tax planning purposes, but individually, or even collectively, they are not prima facia evidence that an entity is a "shell entity" in the terms of this consultation.

The more characteristics that an entity has on this list, the higher the risk that an entity's primary purpose may be aggressive tax planning - but is still not proof. Consequently, such characteristics should, at most, be used for risk assessment purposes in determining whether entities should have a tax audit.

The characteristics should not be used as an automatic measure to, for example, deny tax advantages or treaty benefits. It is notable when a similar approach of using 'badges' has been taken in the DAC 6, at least some of the badges are linked to a main benefit test to avoid resulting in too many "false positives".

QUESTION 3.9

We are aware that all the stated business activities can make use of shell companies for aggressive tax planning, but also for many other commercial purposes. We have no empirical

evidence of which, if any, business activities are more likely to lead to the use of shell companies for tax purposes.

QUESTION 3.31

This peer review mechanism used by The Code of Conduct Group set up in March 1998 was considered a very innovative process and it has produced concrete results in dismantling several special tax regimes.

As mentioned previously, greater harmonisation and coordination of Member States' tax laws and practices could help to further reduce the possible use of shell entities for aggressive tax planning.

Consequently, we believe that The Code of Conduct Group could be instrumental in creating a new and positive "dynamic" among Member States whereby the peer review process identifies mismatches between Member States' tax laws and practices that promote cross-border aggressive tax planning and creates a positive environment to work to remove these mismatches.

Sincerely,

Myles Thompson

President

Olivier Boutellis-Taft

Chief Executive

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