

Mr. Gerassimos Thomas
Director-General for Taxation and
Customs Union
European Commission
DG TAXUD
B-1049 Brussels
Belgium

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Subject: Tax Omnibus

Dear Mr Thomas,

As strong supporters of the work of the European Commission in seeking to simplify and streamline the European direct tax legislation, we commend the Commission on the ambitious proposals contained in the [proposed Tax Omnibus Directive](#). Many of the issues we highlighted in [our response to the EC's call for evidence on tax simplification](#), which built on our paper, [The Accountancy profession's recommendations to streamline the EU tax system](#), have been addressed fully or in part. We are pleased that the proposals deal with the major tax frictions faced by businesses and their advisors whilst still helping to protect the EU's tax base from abuse.

IMPORTANT SIMPLIFICATIONS

We consider that the Omnibus proposals contain some extremely important simplification measures, offering a considerable reduction in burdens and costs for cross border businesses, in particular:

- The removal of the minimum participation requirements in both the Parent Subsidiary Directive (PSD) and Interest and Royalty Directive (IRD)
- The removal of the option for Member States to require pre-authorisation before the IRD provisions can be applied
- The major changes to the Interest Limitation Rule in the Anti-Tax Avoidance Directive (ATAD), including:
 - The mandatory safe harbour of €3 million for interest payments with the automatic indexing mechanism
 - The mandatory group escape clause option
 - The full deductibility of interest payments on low-risk loans from third parties

- The business option to carry forward exceeding borrowing costs to be made mandatory
- The full deduction of interest if the taxpayer can demonstrate that EBITDA has decreased by at least 50% in a tax year
- Carving out entities subject to Pillar Two taxation from CFC rules and removing the importation of hybrid mismatches

We also support the proposal to allow accelerated tax depreciation of expenditure on qualifying research and development tangible capital assets, which will provide a cash flow advantage for those businesses based in Member States that do not have equivalent provisions.

Whilst we strongly support the Tax Omnibus proposals, we do have some suggestions to further enhance their effectiveness and thereby improve the competitiveness of the European Union.

SMES

We note that SMEs have been explicitly carved-out from the Controlled Foreign Companies rules in the Anti-Tax Avoidance Directive (EU) 2016/1164 (ATAD) and effectively from the Interest Limitation rule (by proposing a mandatory safe harbour for interest deduction of €3 million and allowing full deduction for interest on 'low risk' third party debt, which is normally the main source of external funding for SMEs).

However, in accordance with the 'Think Small First' principle, we believe that small and medium-sized entities should be totally excluded from the anti-avoidance provisions of the ATAD. As detailed in the impact assessment, "only around 10% of EU SMEs have cross-border activities, and only about 5% of SMEs are part of a group." The impact assessment also states that (in the context of CFCs) "the vast majority of these SME groups do not operate on a cross-border basis and therefore do not have operating structures that would avail themselves of controlled foreign companies; or possess limited resources for engaging in cross-border aggressive tax planning." We contend that this would also apply to the other anti-avoidance elements of the ATAD.

The impact assessment does not include a policy option to completely exclude SMEs from the scope of the anti-avoidance provisions of ATAD so it is not possible to ascertain why such an option was not considered. We would ask that the Commission and Member States reconsider this matter and determine whether including all SMEs in scope of the ATAD is proportionate in view of the disproportionate costs of tax compliance for smaller entities and for the tax authorities that have to dedicate resources to enforcing the rules.

CFC RULES

Accountancy Europe supports the carve-out of both SMEs and entities subject to Pillar Two taxation from the ATAD's CFC's rule. However, this would lead to an anomalous situation that those group entities in the 'middle ground' could end up with a higher effective rate of tax on similar structures than paid by their larger Pillar Two competitors.

We would therefore recommend that an amendment is introduced to include a mechanism by which the additional tax paid under the CFC rules for these 'middle ground' entities is capped at the same 15% effective minimum rate of tax paid by Pillar Two entities.

PSD: HOLDING COMPANY ACTIVITIES & FLAT RATE CAP

We are disappointed that no substantive amendments have been made to Article 4(3) of the PSD apart from specifying that its scope applies to a minimum holding participation of 10%. Relating to the deductible costs of holding company activities and the cap on the maximum flat rate that Member States have the option to charge, the inconsistent application of this rule across Europe creates complexities and costs for EU resident groups. Additionally, some Member States are using it as a means of raising revenue rather than representing the true costs of holding company activities – which are normally far lower than 5% of profits distributed by the subsidiary.

Consequently, we recommend that the Member State option to fix management charges at a flat rate of up to 5% be eliminated.

As a bare minimum, Article 4(3) should be amended to:

- reduce the maximum flat rate charge to 1%, which is a more realistic estimate of holding company costs, and /or
- to require that Member States accept a taxpayer election to provide the actual costs of holding company activities – (this option could be provided even were the cap to be reduced to 1%, as holding company activities often cost less than 1% of distributable profits.) For VAT purposes there is a clear distinction between passive and active holding companies, with active holding companies entitled to recover input VAT. Perhaps a similar distinction could also be useful for the purposes of the PSD, particularly as Member States would have VAT records supporting the costs incurred by active holding companies

PILLAR TWO CARVE OUT FROM ILR

We consider that the ILR is also not necessary for those entities in the scope of Pillar Two. Pillar Two was agreed on the basis that 15% is an acceptable minimum rate of taxation for the group so compliance with Pillar Two negates the need for many additional anti-avoidance measures. Additionally, Pillar Two contains its own anti-abuse rules that further reduce the need

APPLICATION DATES

As mentioned, we see the real value in the proposed Tax Omnibus changes both from the point of view of reducing administrative burden and costs and from the point of improving the competitiveness of the EU as a place to do business.

Navigating the fragmented EU landscape for corporate income taxes and, particularly, Member States' divergent rules and varying interpretations, increases administrative costs and reduces certainty in all areas of taxation in the EU. The Tax Omnibus' provisions have the strong potential to alleviate some of the most egregious issues.

As the competitiveness issue in particular is pressing, we are consequently disappointed at the proposed application dates. The general implementation date of 1 January 2029 is probably realistic, taking account of the difficult negotiations ahead.

However, the deferment of the mandatory safe harbour (and its automatic indexation mechanism) in the ILR to 1 January 2032 is disappointing, particularly in respect of its role in protecting SMEs.

Also the deferment of the key changes to the IRD and PSD, which could provide considerable relief to many cross-border groups, to 1 January 2037 is very disappointing.

Consequently, we call on the Member States to work towards early agreement on the provisions of this proposal, without diluting the ambitions of the Tax Omnibus, facilitating earlier adoption of these key measures well before the current proposed dates of application.

In addition to these recommendations, we set out some detailed technical comments below:

Anti-Tax Avoidance Directive

The Interest Limitation Rule (ILR)

Whilst we welcome the proposed insertion of Paragraph 2(a) allowing full deduction of interest in respect of low-risk third-party loans, we believe that the provisions contained in Paragraph 2(a)(b) are unnecessarily restrictive. This provision denies the full deduction where the loan is not used exclusively to finance the borrowing entity's own activities but is passed down to other group entities or permanent establishments.

Having a group entity that provides central treasury services, raising external financing and allocating the funds internally, is common practice in groups and may help secure the best rates of borrowing available. Whilst we appreciate the anti-avoidance element of paragraph 2(a)(b) we consider it unnecessarily restrictive and ask that such arrangements could still benefit from Paragraph 2(a) if, for example, it could be demonstrated that funds released to other group entities were:

- Only used for genuine commercial / trading purposes
- The group contains no entities that are non-trading entities, that are subject to low or zero rates of corporate income tax etc.

CFC Rules

We welcome that the EC is proposing that the Member State option relating to Models A and B be removed, with the current proposal being that all Member States adopt Model A. Harmonisation would definitely improve certainty and reduce administrative burdens for cross-border businesses in Europe. The current two Model test is disproportionate to the impacts they have on profit-shifting.

We acknowledge that this will be a difficult political negotiation as most Member States require Model A but a substantial number require Model B or a hybrid solution. Whilst the main policy objective is to harmonise on one rule, we have received input that the least onerous of the Models is Model A, particularly as the main benefit test is already a consideration for transfer pricing purposes and for other anti-avoidance rules. In scope businesses are likely to already have supporting documentation in respect of the main benefit test.

Tax Dispute Resolution Mechanism Directive

We support the changes proposed in this directive – particularly:

- the introduction of some clear deadlines
- improvements in the requirement to communicate with taxpayers, and

- the proposal that opening a complaint under this mechanism only pauses other dispute resolution processes and does not cancel them, as is currently the case.

However, we would still propose that Member States are required to permit the taxpayer to actively participate in all of the key stages of the DRM, with rights to:

- engage in dialogue
- to receive updates at all stages of the procedure, and
- to provide evidence and views throughout the Mutual Agreement and arbitrations phases.

We also contend that taxpayers should be able to demand mandatory joint tax audits involving all the relevant authorities (and with a binding commitment to a common assessment) before the DRM process starts – only if consensus fails after the joint audit process would escalation to the DRM be required.

Also, this would seem to be the ideal time to extend the scope of the DRM to include indirect taxes, particularly VAT. The current Alternative Dispute Resolution and SOLVIT are widely considered to be inadequate and, conceptually at least, it makes little sense to have different dispute resolution mechanisms for different taxes. As VAT is a tax where businesses often have daily contact and where Member States have many divergent rules and interpretations, strengthening and streamlining the cross-border dispute resolution processes would be a significant benefit for many European businesses. This could draw on the experiences learned from the cross-border rulings pilot project.

Sincerely,



Jens Poll

President



Eelco van der Enden

Chief Executive

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