



Mr Gerassimos Thomas

Director General
DG TAXUD
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BELGIUM

27 October 2022

Dear Director General,

Proposal for Securing the Activity Framework of Enablers (“SAFE”)

We welcome and support the European Commission’s commitment to fight tax evasion.

Over the last years, we have seen a large framework of legislation being adopted by the OECD and the EU, which BusinessEurope has generally supported, designed to target aggressive tax planning and tax evasion. Following the BEPS project, ATAD I and ATAD II directives were adopted by the EU and required Member States to transpose several strict anti-abuse provisions in their national laws. In addition, the DAC6 directive has required Member States to impose disclosure obligations on intermediaries who advise on, or are involved in, certain cross-border arrangements. The breadth of the hallmarks set out in DAC6 resulted in intermediaries having to report a large amount of data for routine transactions, i.e., not necessarily tax arrangements designed to gain an advantage in the first place. A draft ATAD III directive has also been released to tackle EU shell entities (i.e., entities lacking a minimum level of substance for tax purposes).

Pursuant to the introduction of this more robust legislative framework, tax professionals have been strongly deterred from engaging in tax evasion schemes. In addition, tax professionals affiliated to professional bodies are already subject to their codes of conduct or rules in place and, in some Member States, are typically required to have in place good tax governance structures to comply with the letter of the law.

The Commission has now stated that it intends to widen this legislative framework by introducing a proposal designed to prevent ‘enablers’ providing tax advisory services in relation to certain tax arrangements in non-EU countries that lead to tax evasion or aggressive tax planning (“SAFE” – Securing the Activity Framework of Enablers). This consultation sets out a range of significant policy options for consideration, including due diligence checks to test whether an arrangement meets certain criteria, a requirement for enablers to register in the EU, a code of conduct for enablers and, in addition to these options, an annual declaration for EU taxpayers with 25% interest in non-listed companies located outside of the EU.

Whilst we have responded, where possible, to the questions set out in the consultation, we also wanted to supplement our response by setting out in more detail some of the critical issues that we think the EC needs to take into consideration before proceeding with new proposals in this area.

In order for us to support an additional set of rules in this field, we recommend that, at the outset, a clear distinction is made between aggressive tax planning and tax evasion schemes. We also recommend that any new rules contain a clear understanding of the parameters of their application and how these would interact with the existing anti-abuse and reporting directives. We remind the Commission that the introduction of the Pillar 2 Directive¹ should, by itself, significantly reduce any possibility of engaging in aggressive tax planning and tax evasion schemes. BusinessEurope is concerned that businesses and in-house tax departments are already faced with numerous challenges (namely a large amount of reporting obligations and administrative costs) to be compliant with a vast amount of legislation in this field. As such, we view these proposed rules as unnecessary and a duplicate addition that will only build additional layers of complexity to the existing structure of international tax rules. Small and medium-sized companies, in particular, may view these as a disproportionate additional administrative burden.

We therefore urge the Commission to consider the introduction of a set of standards that clearly distinguishes aggressive tax planning from tax evasion and that can be referred to as indicators of aggressive tax planning, especially given the difficulties in defining this term. These will need to be carefully drafted in such a way that would significantly reduce ambiguity in interpreting these terms. Any proposal in this field should also not suggest the use of a preferential tax regime *per se* as aggressive tax planning.

We also recommend that the Commission carries out an assessment of the existing directives in place with the aim of: (1) identifying gaps in the interaction between these directives; (2) ensuring that duplicate and overlapping legislation is avoided; and (3) ensuring that any efforts to prohibit tax evasion schemes do not prevent taxpayers from getting access to honest and impartial legal advice. This will help avoid lengthy and costly legal challenges on the compatibility of these measures with EU law. In this context, we would like to draw the Commission's attention to the legal developments in Belgium where, in the last months, the Belgian Constitutional Court has nullified in part the implementation of DAC6 and referred questions to the Court of Justice of the European Union (CJEU) on the compatibility of DAC6 with the European Convention on Human Rights and the EU Charter of Fundamental Rights. We would expect that more DAC6 reporting concerns will reach the CJEU, stating that the hallmarks have been drafted too broadly in the directive. This case should be taken as a case study to improve the drafting of any new initiatives that the Commission takes in this field.

We also encourage the Commission to release statistics on the effectiveness of the anti-abuse directives and DAC6 to date, for example, the number of schemes that have been identified across the Member States and the revenue that has been collected pursuant

¹ Directive on Ensuring a Minimum Level of taxation for Multinational Groups within the European Union



to the implementation of these directives. The results of this exercise should help the Commission assess to what extent the existing legislative framework is coherent with its objective and help frame the case for the need (or otherwise) of additional rules that truly target gaps in the existing legislative framework.

We remain at your disposal should you wish to discuss these points further.

Yours sincerely,

Markus J. Beyrer