

20 May 2016

Commissioner Pierre MOSCOVICI  
Economic and Financial Affairs, Taxation and Customs  
European Commission  
Email: [cab-moscovici-webpage@ec.europa.eu](mailto:cab-moscovici-webpage@ec.europa.eu)

Dear Commissioner,

Subject: Proposed Anti-Tax Avoidance Directive

I refer to our letter dated 21 April 2016 with comments of the European Banking Federation (EBF), the voice of European banks, on the proposal for anti-avoidance Directive published by the Commission on 28 January 2016 (hereinafter referred to as the “ATAD”). I am aware the Association for the Financial Markets in Europe (AFME) is sending you a very similar letter to draw your attention to the same concerns as ours.

The purpose of the present letter is to set out common concerns of our organizations regarding the ATAD. The general tenor of the present submission is that a premature implementation of the ATAD bears the risk of causing severe disruptions within the Internal Market and may create a significant competitive disadvantage vis-à-vis the EU’s major trading partners. We are particularly concerned by the lack of impact assessment regarding specific EU measures foreseen in the ATAD. We note that certain provisions remain at this stage very vague and would certainly need to be further refined in order to ensure consistency and legal certainty.

The EBF is supportive of the development of new standards and measures which aim to create a simpler, fairer and more coherent international tax system with a view to preventing double non-taxation and double taxation and enhancing tax transparency. Financial institutions across Europe are still undergoing extensive adaptations to comply with a vast array of regulatory initiatives aimed at increasing financial transparency and responsibility. These notably include the OECD Common Reporting Standard, which was recently transposed into EU law by a revision of the Directive on administrative cooperation. A coordinated and coherent implementation of the OECD’s recommendations regarding base erosion and profit shifting (BEPS) at EU level, which would enhance a single uniform market, is another initiative the EBF would support. However, we should firstly say that achieving such a coordinated implementation does not necessarily need a Directive, and that the approach required in a Directive may have the undesirable effect of eliminating some of the features of the OECD’s recommendations that sought to enable effective implementation in national tax systems which are not identical in their approach. Secondly, for the reasons explained below, it is doubted that the ATAD may achieve the goal of coordinated and coherent implementation in the current state of the drafting.

We note that the Commission was part of the OECD's discussions on the BEPS project, a two year process of detailed consultation with OECD member states and other interested parties. We recommend that any final Directive aligns with the OECD's final recommendations. Where the Commission and the Council consider that EU specificities require the introduction of elements beyond the agreed OECD approach, we believe that the Commission should carry out a proper impact assessment of any proposals and take time to consult with business and other stakeholders. This should help to avoid any unintended consequences of the Commission's proposals for the business community and ensure that the EU is not placed at a competitive disadvantage relative to its trading partners, which may otherwise result from a premature implementation of the anti-avoidance package. The merits of further harmonization within the EU, an item that is not on the BEPS agenda, should be to our view subject to separate discussions between Member States.

You will find enclosed our detailed comments on the proposals.

Yours sincerely,



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*The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.5 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth. Website: [www.ebf-fbe.eu](http://www.ebf-fbe.eu)*

## Detailed EBF comments on the Proposed Anti-Tax Avoidance Directive

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### *Timing for implementation*

The EBF is particularly concerned by the proposed implementation date of 1 January 2018 set out in a recent compromise document tabled by the Dutch Presidency at Council level. First, we believe that it is absolutely necessary that ATAD must be implemented in parallel with the implementation of proper dispute resolution mechanisms, as per BEPS action 14, the latter being part of the *minimum standard* to which countries committed when approving the final BEPS reports. A draft directive on dispute resolution has not yet been released and nothing can guarantee that Member States will be able to agree on the content of such directive (and transpose it) by 1 January 2018. We encourage the Commission and the Member States to take the lead internationally in this area, by all states joining the development of mandatory binding arbitration set out by the OECD in its work on BEPS action 14. The absence of advances in dispute resolution leaves the real risk of increased double taxation when the other BEPS recommendations are implemented. Second, absent a prior and comprehensive impact assessment of the complete package proposed by the Commission, we have doubt as to the fact that the ATAD will pass the proportionality test under EU law, a fact that may significantly impede legal certainty. Third, we note that the OECD has not yet completed its work on certain items of the BEPS actions foreseen in the ATAD and Member States agreed at OECD level that the effective date for certain recommendations should be set for enough in advance to give taxpayers sufficient time to restructure existing arrangements.

For the reasons set out above, we believe that any implementation date earlier than 1 January 2019 would be overly ambitious and may cause severe disruptions in the effective implementation of the Commission's anti-avoidance package. Should Member States nevertheless choose to apply an earlier implementation date, the EBF urges Member States to provide for suspension rules regarding certain critical actions. These notably include interest limitations rules in the financial sector (as per BEPS action 4) and hybrid mismatch rules (as per BEPS action 2).

### *Interest limitation rules*

We welcome that the Commission is waiting for the OECD to complete its work on rules for the financial services sector. Considerable care is needed in considering any rules that could apply for the banking industry as regards the treatment of debt. Interest is the primary raw material upon which is built the banking activity: banks borrow from depositors or in the wholesale market to provide lending to individuals, SMEs, corporates and governments at a margin over cost of funds to the bank. The interest expense is a cost of sales for the bank, a key resource involved in a bank's products. Because financial institutions borrow and lend as part of their core activity, limiting the interest deductibility for them would be comparable to limiting the deduction of costs of acquisition of fruits and vegetables for greengrocers. Given the protection provided by the regulatory environment (already recognised by the OECD in its final report<sup>1</sup> on interest limitation rules published in October 2015) and by transfer pricing principles which govern the interest rates that can be charged on loans, we would favour an exemption from the general fixed ratio rule for regulated banking groups, and we do not believe that further restrictions on the tax deductibility of interest expense for banks are required.

The limitation of interest deductibility for banks' customers would also inevitably increase the costs of borrowing and could ultimately have a negative impact on the economy as a whole. A proper assessment of these potential implications should be conducted and discussed with the industry.

### *Hybrid mismatch rules*

We believe that it is desirable for the EU to follow the approach recommended by the OECD. Therefore, we recommend that the EU-wide rules are appropriately targeted by limiting them to intra-group "structured" transactions only. Without such limitations, such a rule will introduce a fiscal barrier for companies seeking to access public debt markets, would be at odds with capital markets union and would disadvantage EU issuers.

Furthermore, given the large volume of ordinary course of business transactions, we believe that there should be an exemption for "financial traders" when carrying out their normal role of financial intermediation, which can involve intra-group transactions. In addition, we believe that Member States should be encouraged to develop appropriate rules to account for intra-group regulatory capital and stock lending and repo transactions.

We note that the provisions set out in the ATAD regarding hybrid mismatches are extremely short and would certainly need to be refined in line with the OECD's recommendations on BEPS action 2. Regarding this particular action, an implementation from 1 January 2018 onwards would be certainly premature considering the following recommendation from the OECD: *The effective date for the hybrid mismatch rules should be set far enough in advance to give taxpayers sufficient time to determine the likely impact of the rules and to restructure existing arrangements to avoid any adverse tax consequences associated with hybridity<sup>2</sup>*».

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<sup>1</sup> See OECD Final report on Base Erosion and Profit Shifting: "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments" – paragraph 184, page 75.

<sup>2</sup> BEPS 2 final report, page 101, section 9, para 310 ff.



### *CFC rules and the GAAR*

Many Member States already have established and well understood controlled foreign companies (CFC) rules and a general anti-avoidance rule (GAAR). We recommend that flexibility is afforded to Member States in the transposition of these measures so as to avoid any adverse impact on ordinary course business.

### *Switchover clause and exit taxation*

The switch-over clause is one of the proposals which go beyond the BEPS recommendations and even contradict the BEPS philosophy which aims to levy taxes where the economic activities took place and where value was created. As to the exit tax, considering extensive and well-established jurisprudence of the European Court of Justice, we are seriously concerned that this measure, when applied within the EU, would conflict with basic EU freedoms.

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