



**European Commission's Public Consultation on the
Evaluation of the Anti-Tax Avoidance Directive (ATAD)**

Position Paper

11 September 2024

1. About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland's Chartered Tax Advisers (CTA) and is the country's only professional body exclusively dedicated to tax.

The Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice. We benchmark our education programme against the very best in the world. The continued development of our syllabus, delivery model and assessment methods ensure that our CTAs have the skills and knowledge they need to meet the ever-changing needs of their workplaces.

Our membership of over 6,000 is part of the international CTA network which has more than 33,000 members. It includes the Chartered Institute of Taxation UK, The Tax Institute (Australia), the Taxation Institute of Hong Kong and the South African Institute of Taxation. The Institute is also a member of CFE Tax Advisers Europe (CFE), the European umbrella body for tax professionals.

Our members provide tax services and business expertise to thousands of Irish owned and multinational businesses as well as to individuals in Ireland and internationally. Many also hold senior roles in professional service firms, global companies, Government, Revenue, state bodies and in the European Commission.

The Institute is, first and foremost, an educational body but since its foundation in 1967, it has played an active role in the development of tax administration and tax policy in Ireland. We are deeply committed to playing our part in building an efficient and innovative tax system that serves a successful economy and a fair society. We are also committed to the future of the tax profession, our members, and our role in serving the best interests of Ireland's taxpayers in a new international world order.

Irish Tax Institute - Leading through tax education

2. Introduction

We welcome the opportunity to engage with the European Commission on its evaluation of Council Directive (EU) 2016/1164 of 12 July 2016 as amended by Council Directive (EU) 2017/952 of 29 May 2017 (known as the Anti-Tax Avoidance Directive or ATAD).

Article 10 of the Directive states that the Commission shall evaluate the implementation of ATAD, in particular the impact of Article 4 (the Interest Limitation Rule (ILR)), and report back to the Council of the European Union. We note that the Commission's evaluation will focus on three broad themes:

- **The functioning of ATAD**, in the form of a qualitative and quantitative assessment of the effectiveness of ATAD's measures as a minimum standard in addressing aggressive tax planning.
- **Future proofing the ATAD measures**, in particular their fitness for purpose and continued relevance when considering the introduction of a Council Directive EU 2022/2523 on a global minimum level of taxation of 14 December 2022 (the EU Minimum Tax Directive).
- **The implementation of ATAD** in the Member States and the policy choices made where the Directive allowed the legislator of the Member State to choose.

In the period since ATAD was adopted by the European Council, a range of initiatives have been implemented across the EU which have a similar objective to ATAD. This has resulted in an extraordinarily complex tax environment for businesses operating in the Single Market.

We welcome the Commission's plans to declutter EU tax legislation by reducing duplicative and potentially onerous regulations and requirements in favour of more streamlined rules.¹ We firmly believe that the Commission's evaluation of ATAD should consider the continued relevance of each of the ATAD measures in the context of the wider tax legislative landscape rather than focusing on ATAD in isolation. We would urge the Commission to focus its evaluation on opportunities to simplify the tax law landscape in order to reduce the regulatory burden for business and increase the competitiveness of the Single Market.

We have outlined below the feedback which we have received from our members in respect of each of the three themes identified by the Commission for its evaluation.

3. The functioning of ATAD

The key objective of ATAD is to tackle aggressive tax planning in the internal market. Since ATAD was adopted by the European Council, a range of other initiatives have been implemented across EU Member States which address a similar objective to ATAD including amendments to Council Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (known as the DAC) in particular, DAC6;

¹Remarks by Benjamin Angel, Director of Direct Taxation at the European Commission's Directorate-General for Taxation and Customs Union, at the European Tax Adviser Federation conference on 17 April 2024.

public Country-by-Country Reporting (CbCR); and the EU Minimum Tax Directive which implemented the Pillar Two Global Anti-Base Erosion (GloBE) Rules into EU law.

The combination of these initiatives has resulted in an overly complex tax landscape for businesses operating in the Single Market. Our members highlight there has been a lack of pro-growth measures to complement the introduction of these stringent regulatory measures. In our view, this approach does not align with the European Commission's aim to increase the competitiveness of the Single Market by making business easier.

We firmly believe that the Commission's evaluation of ATAD should form part of an overall simplification exercise. We would urge that a key objective of the Commission's evaluation of ATAD should be to streamline the rules by addressing areas of overlap between ATAD and other EU legislation such as the Pillar Two GloBE Rules. It is also imperative that detailed consideration is given to the how the ATAD measures will interact with future initiatives that may be adopted, such as the proposed Directive on Rules to Prevent the Misuse of Shell Entities for Tax Purposes (Unshell) and the proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT).

In evaluating any evidence to demonstrate whether the ATAD objectives have been achieved, it would be essential to consider the cost associated with such aims. For example, has the complex regulatory environment of the Single Market following the implementation of the ATAD measures across EU Member States negatively impacted on the investment decisions of companies?

4. Future proofing the ATAD measures in particular their fitness for purpose and continued relevance in light of the EU Minimum Tax Directive

ATAD Interest Limitation Rule (ILR)

The ATAD ILR is intended to discourage companies in engaging in base erosion profit shifting through excessive interest payments by limiting the deductibility of taxpayers' exceeding borrowing costs. ATAD ILR limits the exceeding borrowing costs that a taxpayer may deduct in a tax period to 30% of EBITDA.

The interest rate environment has changed significantly since ATAD was adopted with interest rates increasing as governments have adjusted their monetary policies to address inflation. This means that taxpayers are now facing higher interest costs on borrowings. However, the 30% limit under the ILR has not changed despite the significant increase in interest rates. In our view, consideration should be given to whether it is appropriate to benchmark the cap on exceeding borrowing costs under the ILR to reflect changes in interest rates.

ATAD General Anti-Abuse Rule (GAAR)

The overarching objective of the ATAD GAAR is to tackle abusive tax practices. In addition to the GAAR, general anti-avoidance provisions are included in other EU

Directives such as the Parent Subsidiary Directive² and the Interest and Royalties Directive³ which also aim to tackle abusive tax practices. The necessity for such duplicate anti-avoidance provisions should be reviewed in light of the implementation of the ATAD GAAR across EU Member States.

Overlap between ATAD and the Pillar Two GloBE Rules

We would urge that as part of its evaluation, the Commission identifies areas of overlap between the Pillar Two GloBE Rules and ATAD and consideration should be given to the continued relevance of the ATAD measures in a Pillar Two context.

Our members highlight that that detailed consideration must be given to the interaction of the ATAD Controlled Foreign Company (CFC) rules with the Pillar Two Income Inclusion Rule; and the ATAD ILR with the Pillar Two rules relating to intra-group financing arrangements.

We also believe it would be timely to undertake an evaluation of the ATAD anti-hybrid rules, which are primarily intended to combat double non-taxation, following the implementation of Pillar Two across EU Member States.

5. The implementation of ATAD

It is accepted that there is some fragmentation resulting from the implementation of the ATAD measures across EU Member States, particularly in respect of the CFC rules and the ILR. While this may reflect the policy choices and options which were available to Member States on the implementation of the ATAD measures into national law, it increases the compliance burden for companies operating across a number of EU Member States. We would suggest that the Commission be cognisant of this position when considering potential areas for simplification following the implementation of the Pillar Two GloBE Rules.

More generally, consideration could be given to the merits of providing guidance on EU Directives to assist the consistent application of EU law across EU Member States.

6. Conclusion

The Institute recognises the role of ATAD in tackling aggressive tax planning. However, it is important that the ATAD measures, when considered in the wider tax regulatory environment, do not place a disproportionate burden on businesses operating in the Single Market.

The Commission Work Programme 2024 acknowledges that reducing administrative burdens is crucial to maintaining the competitiveness of European businesses. The

² Article 1, Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

³ Article 5, Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

Commission has committed to work on how to better assess the cumulative impacts of different policy measures at EU level and to using a “one-in one-out” approach to avoid unnecessary burdens where administrative costs, such as reporting obligations, are offset in the same policy area⁴.

We urge that a key objective of the Commission’s evaluation of ATAD should be to identify areas of overlap between ATAD and other EU tax reforms, and to make recommendations to streamline the ATAD measures to the greatest extent possible considering the wider tax landscape for companies operating in the EU. We believe it is now timely to do this given the significant changes to the tax policy landscape since ATAD was first proposed, particularly following the implementation of DAC6, Public CbCR and the Pillar Two GloBE Rules across the EU.

⁴ Paragraph III, European Commission Communication COM (2023) 168 final. Long-term competitiveness of the EU: looking beyond 2030.