



*Brussels, 6.6.2016  
C(2016) 3230 final*

*Mr Urban AHLIN  
Speaker of the Riksdag  
SE – 100 12 STOCKHOLM*

*Dear President,*

*The Commission would like to thank the Riksdag for its reasoned opinion on the proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market {COM(2016) 26 final}.*

*Whilst noting the Riksdag's support for the proposal's objective to combat tax evasion methods that may directly influence the functioning of the internal market, the Commission has taken due note of the concerns expressed by the Riksdag concerning the conformity of the proposed Directive with the principle of subsidiarity and in particular the observation that an 'excessively extensive' transfer of legislative competence to the Union in the field of tax may affect the financing of welfare at the national level.*

*In this regard, the Commission is of the opinion that the proposed Directive does not interfere with Member States' ability to design and implement their budgetary policies. Rather, the proposed anti-tax avoidance measures are meant to discourage aggressive tax planning practices which erode Member States' tax bases and could eventually have an adverse impact on national welfare. In addition, the proposed rules only lay down a minimum standard. Consequently, those Member States that wish to enact stricter provisions, with a view to supporting a generous welfare system, will be free to address their national policy priorities.*

*The Commission would like to note that direct taxation falls under shared competence between Member States and the Union. This is why the legal base for proposing measures in this field – Article 115 of the Treaty on the Functioning of the European Union (TFEU) – requires that the legislative proposals "directly affect the establishment or functioning of the internal market". The explanatory memorandum and the recitals to the Directive, as well as the Communication<sup>1</sup> which introduced the anti-tax avoidance package, all mention that only through coordinated action at the level of the Union can the Commission achieve its key objective of strengthening the average level of protection in the internal market against harmful tax practices.*

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<sup>1</sup> COM(2016) 23 final.

*The anti-tax avoidance measures in the proposed Directive could only bring results if applied in a uniform, or at least, coordinated, fashion across the internal market. If not, the landscape in the field of corporate taxation would remain fragmented and the current situation would persist, allowing unfair tax competition practices to flourish. On this point, the analysis of the explanatory memorandum on subsidiarity signals that individual uncoordinated practices "would in fact only replicate and possibly worsen the existing fragmentation in the internal market and perpetuate the present inefficiencies and distortions in the interaction of a patchwork of distinct measures. If the objective is to adopt solutions that function for the internal market as a whole (e.g. elimination of mismatches as a result of disparities in national tax systems) and improve its (internal and external) resilience against aggressive tax planning, the appropriate way forward involves coordinated initiatives at the level of the EU".*

*As various international players in the corporate tax field often remark, these are cross-border problems that require cross-border solutions. Clearly, none of the tax avoidance practices which are dealt with by the proposed Directive can be set up within a purely domestic context where taxpayers do not engage in cross-border transactions.*

*The proposed legislation forms part of a broader package against tax avoidance (Anti-Tax Avoidance Package) which derives from the Commission Work Programme for 2016 and was adopted by the College of Commissioners on 28 January 2016. The Commission, in its Action Plan of June 2015, announced a series of initiatives and actions with the aim of creating a fairer corporate tax environment, which would ensure effective taxation where profits are generated and create a better tax landscape for businesses as well as ensure further progress on tax transparency. The legislative proposal against tax avoidance makes good on this promise.*

*These actions also link strongly to the G20/OECD project on Base Erosion and Profit Shifting (BEPS), which was still ongoing when the Action Plan was adopted. In the meantime, the G20/OECD reports<sup>2</sup> on all BEPS actions were published (October 2015) and Member States are now expected to implement many of these recommendations in an EU law compliant manner. In this light, the conclusions of the ECOFIN Council of 8 December 2015 on corporate taxation set the framework for action at the level of the EU. The conclusions thus stressed the need for common EU solutions which are consistent with the OECD BEPS and also ensure compliance with EU law. There is support for an effective, swift and coordinated implementation of the anti-BEPS measures to be adopted at EU level and it is also observed that a common EU approach in favour of certain options would bring value with a view to ensure the proper functioning of the internal market. Finally, the conclusions consider that, where appropriate, EU directives should be the preferred vehicle for implementing the OECD BEPS outputs in the EU.*

*More specifically, the ECOFIN Council Conclusions explain that the OECD BEPS outputs on Actions 2 (hybrid mismatches), 3 (Controlled Foreign Company rules), 4 (interest limitation rules), 6 (general anti-abuse rule), 7 (permanent establishment status) and 13*

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<sup>2</sup> <http://www.oecd.org/ctp/beps.htm>

*(country by country reporting) might be implemented, following further technical analysis, through legislative proposals focusing on international anti-BEPS aspects, without precluding the application by Member States of domestic or agreement-based provisions aimed at preventing BEPS. On this basis, the Commission was called on to come forward with a proposal on certain international aspects and take fully into account the work done on these issues in the frame of the on-going legislative files, notably the Common Consolidated Corporate Tax Base (CCCTB).*

*A number of Member States have already designed, or even passed, legislation for implementing the solutions set out in the G20/OECD reports against BEPS. However, such individual initiatives entail the risk that Member States act in divergent ways or give varying interpretations of the OECD BEPS measures. The Commission holds the view that action in the form of anti-tax avoidance measures in the internal market must be taken in a clear and coherent way; it should aim to strengthen Member States' collective stance against tax avoidance, while upholding the Treaty freedoms and EU competitiveness. Uncoordinated unilateral action by Member States would not adequately tackle the problem of aggressive tax planning.*

*Aggressive tax planning is a global problem, which requires European and international solutions. In a single market founded on the free movement of goods, persons, services and capital, uncoordinated measures against profit shifting can do more harm than good. Divergent national approaches to tackling this cross-border problem can create new loopholes for aggressive tax planners as well as raise competitiveness fears to some States. Rules in one Member State can undermine the effectiveness of the rules of others. Moreover, an uncoordinated approach can bring uncertainty and additional administrative burdens for businesses.*

*The functioning of the internal market is not only hampered when citizens and businesses encounter obstacles which discourage cross-border activity within the Union but also if national corporate tax regimes, in their interaction, allow a misuse of the freedoms. Such situations undermine the principles of an efficient and growth-friendly corporate tax system according to which companies should pay taxes in the country where profits are generated. Meanwhile, Member States suffer significant revenue losses and citizens are often called upon to carry a heavier tax burden while certain corporations avoid paying their fair share.*

*In the light of these considerations, the legislative proposal in question aims to establish a common framework, in the form of minimum standards for the internal market, with the objective of strengthening the average level of protection against aggressive tax planning and ensuring fair and effective corporate taxation.*

*As a result of the endorsement of the 13 OECD reports against BEPS by the G20 Leaders in November 2015, many Member States, in their capacity as OECD Members, have undertaken to transpose the output of the BEPS project into their national laws. Some have decided to do so urgently. Considering this, it has been critical to make fast progress on agreeing rules for coordinating the implementation of the conclusions on BEPS in the EU. Otherwise, uncoordinated unilateral actions by Member States would run the risk of leading to a*

*fragmentation of the market as discussed above. This would be a rather unfortunate outcome, as many of the distortions which currently exist in the internal market would be unlikely to be fixed.*

*Furthermore, the fact that the EU is an internal market with a significant degree of integration also justifies why it needs to adapt the approach of the OECD to the specific EU context in order to provide effective solutions against tax avoidance practices. It is thus understandable that the OECD refers to the need for flexibility, as it approaches the problems at a bilateral level where the focus is on addressing national tax policies. Yet, the EU, being an internal market where flows of income often take place tax-free amongst Member States, presents increased tax avoidance risks which can only be tackled if all Member States commit to act in the same direction.*

*To provide up-to-date analysis and evidence, a separate Staff Working Document (SWD) accompanying the draft Directive gives an extensive overview of existing academic work and economic evidence in the field of base erosion and profit shifting. This is based on recent studies, amongst others, by the OECD, the Commission and the European Parliament. The SWD highlights the drivers and most common identified mechanisms which, according to the OECD reports, are linked to aggressive tax planning. It summarises the conclusions of an in-depth review of key mechanisms for aggressive tax planning on a basis of analysis per Member State, as carried out on behalf of the Commission in 2015.*

*Against this background, no impact assessment was carried out for this proposal on the following grounds: there is a strong link to the OECD BEPS work which has been the subject of extensive analysis and consultation; the SWD supplies a significant body of evidence and analysis at the level of the EU; stakeholders were extensively involved in consultations on the technical elements of the proposed rules at a previous stage; and, in particular, there is an urgent current demand for coordinated action in the EU on this matter of international political priority.*

*The topics of the legislative proposal against tax avoidance have already been discussed with stakeholders in the framework of the proposed Directive for a CCCTB over a number of years. Member States' delegates have regularly contributed their observations at the technical Working Party on Tax Questions in Council. Since March 2011 when the Commission adopted the CCCTB Proposal, the Working Party has met several times during each Presidency and addressed hundreds of technical and policy questions in detail. In addition, the Commission Services have liaised with all major business stakeholders and heard their views on various topics of the Proposal.*

*Most Member States are members of the OECD and have participated in lengthy and detailed discussions on the anti-BEPS Actions, including on the elaboration of technicalities, between 2013 and 2015. The OECD organised extensive public consultations with stakeholders on each of the anti-BEPS Actions. Furthermore, the Commission has debated, internally and with OECD experts, several BEPS topics (e.g. CFC legislation), in particular where the Commission had doubts on the compatibility of certain ideas and/or proposed solutions with EU law.*

*It follows that in practice the Commission has consulted very widely and debated the technical details of the proposed rules over a long period of time prior to the adoption of the legislative proposal.*

*The comments above are based on the Commission's initial proposal which is currently in the legislative process involving discussions in the Council in which your government is represented.*

*The Commission hopes that the clarifications provided in this reply address the issues raised by the Riksdag and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

*Frans Timmermans  
First Vice-President*

*Pierre Moscovici  
Member of the Commission*