Frankfurt,
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BVI[1]: Statement on Tax Omnibus

The European Commission's top priority should be to strengthen Europe's competitiveness and regain economic strength. Deregulation is necessary to achieve this goal. Furthermore, 'gold plating' by individual Member States should be ended and rolled back to achieve a harmonized implementation and application of tax rules in Europe. The planned reduction of bureaucracy through the Tax Omnibus can therefore be a first, meaningful step in this direction.
The 2024 Draghi Report has made it abundantly clear that the bureaucratic burdens and reporting requirements for European companies - and thus also for the fund industry - are enormous and hinder economic activity. Europe is increasingly losing its economic significance compared to other nations. Tax law is a major driver of this bureaucratic burden. In recent years, European tax legislation has not created incentives for economic growth but has instead focused solely on tax fairness and the prevention of tax planning. This has significantly worsened the framework conditions for private investment.

As a rule, investors use regulated funds to make their investments. An investment must not only make economic sense, but also must not entail any legal or tax risks. In this context, particular attention is focused on the Anti-Tax Avoidance Directive (ATAD), as its applicability is associated with significant uncertainty and high compliance costs. This is because, in the area of capital investments, it is often unclear to what extent the regulations apply. To hedge against this, both investors and fund providers spend large sums on legal fees. Nevertheless, a certain degree of uncertainty usually remains. If specific measures such as the CFC rules are applied, this leads to very high reporting costs. The ATAD, which is intended to prevent certain forms of tax avoidance, is too broad in some respects. As a result, it runs counter to the political goal of promoting more private investment. In particular, cross-border investments within the EU thus become a tax risk and acquire a negative image.

It is therefore important to review existing provisions in Directives as part of the so-called "Tax Omnibus," abolish outdated and overlapping tax regulations, and clearly define tax law terms.

In line with the goal of the Capital Markets Union to strengthen intra-European investment and end tax discrimination against such investments, we propose the following specific measures:

- Exemption from the purpose test for regulated funds under ATAD.
- Subsidiarily, no application of the one-third rule under the ATAD for regulated funds.
- Need of guidance regarding the acting in concert concept for regulated funds.
- No application of CFC rules for Entities, which are subject to the Global Minimum Tax Directive.
- No application of the interest limitation rule for third-party loans.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 114 members manage assets of EUR 4.8 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 26%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

BVI
Bundesverband Investment und Asset Management e.V.

Contact
Phone +49 69 15 40 90 0
www.bvi.de

BVI Berlin
Unter den Linden 42
10117 Berlin

BVI Brussels
Rue Belliard 15–17
1040 Bruxelles

BVI Frankfurt
Bockenheimer Anlage 15
60322 Frankfurt am Main

Executive Board
Thomas Richter CEO
Rudolf Siebel MD

Anti-Tax-Avoidance Directive

Article 7 (2) (a), sentence 2: Purpose Test

We recommend clarifying in the ATAD that funds subject to the Undertakings for Collective Investment in Transferable Securities Directive (UCITS Directive; Directive 2009/65/EC), or funds, that are managed under the Alternative Investment Fund Managers Directive (AIFMD; Directive 2011/61/EU) are not subject to Article 7(2) (a), sentence 1. Therefore, a new sentence 3 should be added to Article 7 (2) (a):

"Point (a) of paragraph 2 does not apply to regulated funds within the meaning of Article 2 (5) (f) and (g)."

Justification:

Many investors do not want to invest in vehicles which are subject to CFC rules as it has a negative image as well as high compliance costs. This has not yet been determined, but, in general, extensive and costly legal analyses have concluded that regulated funds satisfy the purpose test and do not fall within the scope of the CFC rules.

Funds that are subject to either the UCITS Directive or are managed under the AIFMD fulfil the substance requirements of ATAD for CFC purposes. As they are fully regulated vehicles with clearly defined organisational, supervisory, and governance structures, these funds should not be regarded as a controlled foreign company within the meaning of Article 7 (1). Rather, they should qualify as companies under Article 7 (2) (a), sentence 2.

Both Directives impose strict requirements regarding organisational substance, internal governance and operational capacity. They mandate that regulated funds must appoint an authorised management company, independent depositary, and robust administrative and operational systems. The UCITS Directive and the AIFMD rules further specify that the depositary is responsible for the safekeeping of assets, as well as for overseeing fund transactions and ensuring compliance with the law and fund documentation.

In addition, the regulatory requirements ensure that the key decision-making and risk functions ('significant people functions') are exercised within the European legal and supervisory area. Abusive or artificial arrangements are effectively prevented under this regulatory framework.

The purpose test in the ATAD is also inherently fulfilled by regulated funds. AIFMD and UCITS Directive ensure that funds do not pursue any primary tax purpose but exclusively pursue collective investment objectives that serve to protect investors and the market.

For these reasons, we recommend that these regulated funds should not be qualified as controlled foreign companies under Article 7 (1), provided they fully comply with the AIFMD or the UCITS Directive requirements. This would lead to EU-wide harmonization of the regulations, reducing the bureaucratic burden on the fund industry and financial administration. Consequently, the intention and purpose of the ATAD would continue to be preserved by this extension.

Article 7 (3), sentence 2: “One-third rule”

Subsidiarily, we recommend extending the exemption to financial undertakings that qualify as regulated funds under AIFMD or UCITS Directive. A possible wording for this would be:
“[…] Where, under the rules of a Member State, the tax base of a taxpayer is calculated according to point (a) of paragraph 2, the Member State may opt not to treat financial undertakings as controlled foreign companies if one third or less of the entity's income from the categories under point (a) of paragraph 2 comes from transactions with the taxpayer or its associated enterprises. **In the case of a financial undertaking as defined in Article 2 (5) (f) and (g), the Member State should not treat these as a controlled foreign companies, regardless of whether one third or less of the entity's income from the categories under point (a) of paragraph 2 comes from transactions with the taxpayer or its associated enterprises.**

Justification:

Funds serve as a capital investment bundling instrument for investors and are used by the majority of European companies e.g. the insurance industry or pension funds, particularly to secure long-term obligations, such as occupational pension schemes. As part of this process, funds invest in diversified portfolios, which are often geared towards the global market.

In the infrastructure sector and real estate sector, it is common practice for a fund to set up a separate corporate company for each investment for administrative reasons and provide it with an arm's length loan to finance the investment’s acquisition. Taking out a loan can be a particularly effective way to structure the cash flow of income from the project company to the fund. However, according to Art. 7 (3), sentence 2, the resulting interest income could be considered relevant income for the one-third threshold. This means that the fund itself can be classified as a controlled foreign company if this passive income causes it to exceed the one-third threshold.

This places an excessive burden on regulated funds. The CFC rules in the ATAD are intended to prevent aggressive profit shifting through artificial structures. However, they were not initially designed for regulated asset management structures, which are particularly important for pension funds and insurance companies and to ensure the future of European infrastructure. This is because funds with the financing concept described above are not instruments for aggressive profit shifting and are highly regulated and supervised vehicles that invest on behalf of insurance companies, pension funds, and other companies. However, this rule classifies regulated funds as 'risky' for the purposes of the ATAD simply because they outsource investment transactions and their management to corporate companies in which they hold a 100% stake and enable these companies to acquire investments through the granted loans. This is despite the fact that such transactions are regular components of professional asset management.

We therefore request clarification that regulated funds within the meaning of Article 2(5) (f) and (g), are exempt from the one-third rule.

Acting-Concert-Rule

The rule 'acting in concert' from the OECD's BEPS Action 3 is neither explicitly defined nor regulated in the ATAD. Nevertheless, this provision has been introduced in some Member States, even though, according to the OECD's final report on BEPS Action 3, it leads to a significant increase in complexity and compliance costs.[2] So we strongly ask for guidance to ensure consistent interpretation across EU Member States, thereby excluding regulated funds to aim reducing unnecessary bureaucracy for regulated funds and tax authorities.

Justification:

The OECD defines 'acting-in-concert' as a situation in which multiple, minority-owned shareholders coordinate their actions to pursue common interests, thereby exercising de facto control over a company (e.g. a fund). This is known as the 'acting-in-concert test'. This concept is used to identify when shareholders influence or control a company jointly, for tax and regulatory purposes. In such cases, their interests will be aggregated to determine whether the CFC (e.g. a fund) is subject to CFC rules.

Funds managed under the AIFMD or operating under the UCITS Directive are subject to a regulatory framework that strictly separates the interests of investors from operational decisions. Under those Directives only authorised management companies or AIFMs are permitted to manage fund assets. Investors are excluded from day-to-day management. The management company acts solely in the collective interest of all investors and must comply with the fund rules (Article 16 of the UCITS Directive; Article 12 (1) (a) of the AIFMD). Additionally, both Directives stipulate the clear segregation of assets and the appointment of an independent depositary (Article 22 of the UCITS Directive; Article 21 of the AIFMD). Therefore, the fund manager will always make the final decisions independently of investors, so that 'acting-in-concert' cannot occur.

All material decisions remain the responsibility of with the regulated fund management company, which is subject to continuous supervisory oversight (Article 6 of the UCITS Directive; Article 7 of the AIFMD). Consequently, the concept of 'acting-in-concert' is structurally incompatible with the governance model of AIFMD- and UCITS Directive-regulated funds.

In light of this, we ask for a clarification, in the form of binding guidelines or an ATAD amendment, stating that multiple minority-owned shareholders who invest in funds managed under AIFMD - or UCITS Directive-regulated funds should not be considered to be 'acting-in-concert' for tax purposes. This would strengthen legal certainty, promote the harmonized application of EU law, and reduce the administrative burden on market participants and tax authorities.

[2] Cf. OECD (2015), Designing Effective Controlled Foreign Company Rules, Action 3 – Final Report, paragraph 40.

Article 7: CFC taxation vs. taxation under the Global Minimum Tax Directive (Pillar II)

We recommend that entities subject to the global minimum tax should be excluded from the scope of CFC taxation under Article 7.

Justification:

CFC rules are intended to prevent the shifting of profits by immediately taxing the profits of low-taxed controlled foreign subsidiaries in the country of the controlling entity. The global minimum tax aims to curb competition through the implementation of a global minimum tax rate and, unlike CFC rules, is not limited to passive income. Therefore, while the CFC rules address the symptoms of profit shifting, the minimum tax tackles its root. It is significant to note that the global minimum tax rules are more far-reaching than those of CFC rules.

Consequently, Constituent Entities located in a Member State that are members of an MNE Group and are subject to the global minimum tax should be exempt from CFC taxation, because they are sufficiently taxed for Article 7 purposes (Keyword: Top-up Tax).
This is expected to result in a significant reduction in the compliance obligations of companies and financial administrations, whilst maintaining adequate taxation, in accordance with the objectives of the two Directives.

Article 4: Interest limitation rule

We recommend limiting the application of the interest limitation rule to intra-group financing. Therefore, a new subparagraph (c) should be added to Article 4 (4):

”[…] (c) incurred for loans contracted with external third parties”

Justification:

In infrastructure and real estate fund structures, funds acquire and maintain shares in holding companies, in the legal form of a corporation. These corporations, in return, acquire for example solar parks or properties, and maintain and manage them in their portfolios over the long term. Capital for the acquisition of properties is acquired by these entities through shareholder loans, issued by the fund, but also typically through loans from external third parties (e.g. banks or credit funds).

At the level of the capital-acquiring corporation, the interest limitation rule applies to expenses from shareholder loans, and to expenses arising from loans with external third parties. Consequently, the original purpose of the interest limitation rule, which was to combat aggressive profit shifting through excessive intra-group debt financing is not being achieved. This is because the scope of application is currently much broader, also considering third-party loans to be harmful financing instruments, that are used directly for investments at the holding level and are not forwarded into other entities in the investment structure.

During the period of historically low interest rates, including financing costs from an external third-party loan in the interest limitation rule had almost no practical relevance and therefore had no significant impact on property investment activities in Europe. However, since the interest rate shift in 2022, the situation has changed fundamentally. For instance, the interest rate on home loans with an initial fixed-interest period of ten years reached 3.73% in Germany by the end of the fourth quarter of 2025.[3] As a result, interest rates have remained well above the central bank's key interest rate, despite significant cuts by the ECB. Under these circumstances, the interest limitation rule exacerbates economic burdens rather than having a neutral effect and can lead to tax payments despite real economic weakness. In its current form, the rule is therefore more of a systematic brake on investment in Europe's already strained property market and infrastructure projects than a measure to prevent abuse.

In order to prevent this effect in the long term and stimulate future investment in Europe, we request that the interest limitation rule only applies to shareholder or intra-group financing, with third-party loans completely excluded from its scope. This ruling aims to combat profit erosion and shifting through hybrid instruments or artificial debt structures, rather than standard third-party loans, which are subject to market prices and the arm's length principle. Profit shifting through third-party loans is structurally impossible in this case.

[3] Cf. https://www.bundesbank.de/dynamic/action/de/statistiken/zeitreihen-datenbanken/zeitreihen-datenbank/723452/723452?tsId=BBIM1.M.DE.B.A2C.P.R.A.2250.EUR.N&dateSelect=.