GLOBAL FEDERATION OF INSURANCE ASSOCIATIONS

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Comments on the European Commission's corporate taxation (anti-tax avoidance) initiatives

The Global Federation of Insurance Associations (GFIA) would like to take the opportunity to comment on the publication of the European Commission's anti-tax avoidance package, which also aims to ensure the uniform implementation of the OECD's BEPS recommendations across EU Member States.

GFIA supports the European Commission's efforts to tackle abusive tax practices and believes that implementing the outcome of the OECD's BEPS Action Plan in the EU will meet this objective. GFIA notes however that the Commission's proposals go further than the OECD's recommendations in a number of ways and believes that these discrepancies could negatively impact the cross-border operations of insurers, and other corporations. GFIA therefore urges the European Commission to implement the OECD recommendations at the same time and to the same extent as other (non-EU) jurisdictions, to ensure that there is consistency in the scope and timing of proposed measures at the international level. Otherwise, EU-based insurers, along with all EU corporations, would be at a competitive disadvantage compared to those in non-EU jurisdictions and, at the same time, the EU would become a less attractive investment destination for multi-national enterprises, including (re)insurers.

In what follows, GFIA explains its concerns on a number of aspects relating to how anti-tax avoidance rules may end up inadvertently affecting insurers' ability to do business at a global level.

Cross-border pooling of risk and transfer of capital

When devising rules for controlled foreign companies (CFCs), GFIA urges the European Commission to take into account the fact that insurers have a unique business model which means that they take on risks over which they have no control (i.e. third-party risks). Insurers then make use of both internal and external reinsurance and retrocession to appropriately manage these risks at a global level. This generates important benefits through diversification and risk pooling, flexibility in global risk management and capital efficiency, which in turn benefits individual and corporate policyholders, through lower prices and greater availability of insurance coverage, and thus improves the functioning of the economy as a whole.

It does not mean that if insurers transfer risk to another jurisdiction that this is tantamount to tax abuse. This is usually done for capital optimisation purposes to reduce the cost of providing the risk cover. When a reinsurance contract is concluded, a genuine transfer of risk takes place between the parties. Similar considerations apply when it comes to capital. To support the risks they take on and transfer, insurers typically need to set up separately regulated insurance companies or branches with ring-fenced assets in all the territories where they operate. When a transfer of risk takes place, the regulators of both the insurer and the reinsurer need to be satisfied that the reinsurer has the required capital and capability to take on and effectively manage these risks. Therefore, the maintenance of an appropriate level of capital within a jurisdiction is not a business choice for insurers, open to flexibility depending on the tax treatment, but instead it is critical to insurers' ability to carry on business at a global level.

It is straightforward to determine whether such internal or external transfers of risk and capital are genuine or not. The OECD offers a way to determine this in its final BEPS Action 3 recommendations, saying that, if all or most of the following conditions are satisfied, there is no reason to suspect tax abusive behaviour in the case of risk transfers through reinsurance:

- The reinsurance contract is priced on arm's-length terms.
- There is diversification and pooling of risk in the reinsurer.
- The economic capital position of the group has improved as a result of diversification and there is therefore a real economic impact for the group as a whole.
- Both the insurer and reinsurer are regulated entities with broadly similar regulatory regimes and the regulators require evidence of risk transfer and appropriate capital levels.
- The original insurance involves third party risks outside the group.
- The CFC has the requisite skills and experience at its disposal, including employees in the CFC or a related service company with senior underwriting expertise.
- The CFC has a real possibility of suffering losses.

GFIA agrees with the OECD's recommendation in this regard and believes that applying the OECD test will show that insurers engage in cross-border transfers of risk and capital for legitimate business reasons and, as such, intra-group reinsurance should continue to be subject to the existing OECD transfer pricing rules and the arm's-length principle.

Country-by-country reporting

GFIA notes that the European Commission has decided to implement the OECD recommendations in Action 13 relating to country-by-country (CbC) reporting through an update of the Administrative Cooperation Directive. GFIA believes that this step is sufficient for compliance with OECD standards and to allow tax administrations access to all the information they need to get an accurate picture of a multi-national enterprise’s global operations.

GFIA understands that the European Commission is considering future legislation requiring the publication of CbC reports and strongly advises against such a step; not only because this would go beyond OECD recommendations, but because publishing these reports, even anonymised, could lead to disclosure of business secrets and would be anti-competitive. GFIA sees a real danger that non-EU jurisdictions would refuse to share their CbC information with EU tax authorities in this case, as their own standards forbid the publication of this information. In fact, the US Treasury recently confirmed that there is no circumstance in which it would allow the publication of the CbC reports it receives, and publicly stated that if other tax authorities publish US-sourced data that they will stop sharing it. Furthermore, there is no added value in making CbC information public. Tax authorities are the ones that need to have access to this information, as they are the only ones who have the know-how to accurately interpret it.

Finally, GFIA would like to highlight that, in order to facilitate compliance with reporting requirements, the templates used for intra-EU reporting under DAC and extra-EU reporting under other national initiatives implementing CbC should be identical.

External strategy for effective taxation

The European Commission’s external strategy communication makes reference to a number of additional measures which could further strengthen the promotion of tax good governance internationally. GFIA understands that at the core of these measures lies the creation and maintenance of an EU-wide list of tax jurisdictions considered “problematic”.

GFIA would like to emphasise that, for the purposes of this list, non-EU jurisdictions should be assessed according to existing OECD standards (including, but not limited to BEPS). The vast majority of non-EU jurisdictions are committed to implementing OECD standards in their jurisdictions, particularly since they have participated in the development of these standards. Going further than these international standards and effectively asking non-EU jurisdictions to comply with any EU standards which differ from the OECD standards would not, in GFIA’s view, be a reasonable approach.

Additional comments

Interest limitation rules: GFIA understands that the European Commission has decided to wait for the OECD to finalise its recommendations on interest limitation rules in 2016 before coming up with EU-level proposals. GFIA supports this decision, as it will ensure that any European proposals are in line with international standards.

Hybrid regulatory capital: GFIA understands that the European Commission is currently considering which treatment it should apply to hybrid regulatory capital in upcoming tax-related legislative initiatives. In this context, GFIA urges the European Commission to acknowledge that hybrid regulatory capital is not designed to create tax mismatches and that its use does not constitute a harmful tax practice. This type of capital is very useful to insurers, for regulatory and commercial reasons. Therefore, hybrid regulatory capital should be exempted from any additional tax burden.

Finally, GFIA would ask the European Commission to give due consideration to the positions recently expressed by Insurance Europe in the context of the recently-announced anti-tax avoidance regulatory proposals in Europe.

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About GFIA

Through its 40 member associations, the Global Federation of Insurance Associations (GFIA) represents the interests of insurers and reinsurers in 60 countries. These companies account for around 87% of total insurance premiums worldwide. GFIA is incorporated in Switzerland and its secretariat is based in Brussels.