Mr Jean-Claude Juncker, President
Mr Frans Timmermans, First Vice-President
European Commission
Rue de la Loi 200
B-1049 Brussels
Belgium

CC: Vice-President Valdis Dombrovskis, Vice-President Jyrki Katainen, Commissioner Jonathan Hill, Commissioner Pierre Moscovici

Brussels, April 14th, 2016

Anti-Tax Avoidance Package (ATAP) and the potential impact on the listed real estate sector

Dear President Juncker
Dear First Vice-President Timmermans,

The European Commission's proposal for an Anti-Tax Avoidance Directive, part of the Anti-Tax Avoidance Package (ATAP), addresses six international anti-abuse measures. As the representative of the European listed real estate sector, EPRA – the European Public Real Estate Association – wishes to highlight how our sector can make a major contribution to the Commission's aim to promote jobs and growth within the European Union, but could be negatively impacted by a number of elements within the ATAP proposals.

Importance of REITs

The use of Real Estate Investment Trusts (REITs) has significantly expanded worldwide and has a very substantial impact on today's economy.

REIT regimes have been introduced over the years as a means to:

- contribute, as part of the real estate sector, EUR 312 billion to the EU economy in 2014, employing 3.8 million people across the European Union
- democratise real estate ownership
- help promote a more transparent, efficient and trusted marketplace
- help build national retirement savings in an efficient and sustainable manner
- maximise opportunities to generate total returns that are attractive and stable
- generate social capital and other non-financial dividends
- effectively deepen capital markets and improve access to efficiently priced capital

Impact of the ATAP on the listed real estate sector

The proposals of the Commission are closely related with the discussions on the Base Erosion and Profit Shifting (BEPS) actions of the OECD. The OECD has previously recognised the importance of REITs in its 2007 REITs Report. REITs are increasingly investing cross-border, despite the fact that their privileged tax regime is typically not available in foreign jurisdictions, resulting in full tax liability there.

In the 2007 REITs Report, the OECD made reference to the legitimate concerns of the industry participants in the group that prepared such report by indicating that:

> *"(…) in order to achieve a more efficient market for portfolio investment in immovable property, REITs established in one country need to be able to invest in foreign countries' immovable property and in REITs established in other countries. Therefore, the tax obstacles that hinder such cross-border investments should be addressed"*[1].

This long-standing principle was re-confirmed by the OECD in their 2015 final publication on the BEPS Action 6 report. The fact that REIT vehicles do not pay tax on their income is the result of tax rules that provide for a single-level of taxation in the hands of the investors in the REIT[2]. REIT structures catering for just one layer of final tax (at shareholder level) are simple and non-aggressive in nature.

Given the recognised importance of REITs and REIT-like structures, EPRA recommends that the Commission take into account the following broad considerations when considering the Anti-Tax Avoidance Directive.

Risk of weakening EU competitiveness

The proposals must not result in EU Member States suffering a competitive disadvantage against third countries. Before rushing to overhaul legislation, it must be fully understood how other countries have implemented (or intend to implement) the BEPS recommendations. For instance, we have found that countries such as France apply interest deduction limitations which are sensitive, in practice, to the needs of the real estate sector and make allowance for this within their rules. Under the current proposals, investors in EU real estate may suffer a disadvantage compared to investors in non-EU real estate.

Article 4 – Interest limitation rule

As a matter of principle, all genuine third party debt should be tax deductible as it poses a low risk of interest-driven BEPS. No business will incur real costs to third parties simply to achieve a tax benefit of a percentage of that cost. Any restriction here will only distort genuine commercial behaviour and add unnecessary cost.

REITs are generally exempt from corporation tax under the condition that they distribute their earnings to their investors (to ascertain taxation at the investor level). In this context, REITs are often already subject to strict specific thin capitalization rules or interest cover tests. Imposing a further restriction on their interest deductibility at REIT or subsidiary level is unfounded and could have a negative impact on a REIT's ability to meet its regulatory requirements to distribute the relevant proportion of its profits. As such, REITs and their subsidiaries in other Member States should not be subject to further limitations than those they are already subject to in their home Member State. This can be founded on the mutual recognition principle that also underpins Article 10 on hybrid mismatches.

Articles 6 and 8 – Switch-over clause and controlled foreign company clauses

Although a REIT's income is exempt in their Member State of residence, subsidiaries of REITs in other Member States are in practice ordinarily taxed there, as the status of their parent company is generally not extended to subsidiaries. The switch-over and controlled foreign company (CFC)

[1] Public discussion draft on Tax Treaty issues related to REITs, 30 October 2007, p. 13.
[2] OECD Commentary to article 10 of the OECD Model Tax Convention, paragraph 67.1.

clauses directly affect those subsidiaries. Unlike easily movable assets, real estate cannot be shifted to low-tax jurisdictions and therefore does not pose a tax avoidance risk. Investments in (indirect) participations of which the income can be categorised as real estate income, should therefore not fall within the scope of the switch-over and CFC clauses. This is in line with Article 8(1)(c)(v) that does not regard income from immovable property as passive income if there is a tax treaty in place.

Article 7 – General anti-abuse clause

The general anti-abuse clause (GAAR), by its nature, does not define the exact circumstances under which an arrangement shall be considered non-genuine and consequently ignored for tax purposes. The uncertainty surrounding the application of the GAAR to REITs has the potential of discouraging investments in European real estate. Under the current wording of the GAAR, it is doubtful whether Member States shall recognise that investing in a tax exempt REIT is a genuine arrangement, as there is no current mechanism of mutual recognition of each other's REIT regimes between Member States. The GAAR should make explicit that an investment in a REIT does not constitute a non-genuine arrangement. For brevity's sake, we refer to pages 96 and 97 of the OECD model (article 3), which specifically acknowledges the special position of investment funds. In order to avoid unwanted "REIT shopping" and, perhaps harmful tax competition between Member States, we invite you to consider implementing minimum requirements for qualifying as a REIT (e.g. with respect to legal form, listing requirements and mandatory distribution of income).

Summary

Under the current wording of the Anti-Tax Avoidance Directive, investing in European real estate will become considerably more risky as a result of the uncertain tax treatment of REITs. We therefore strongly recommend to the Commission that Real Estate Investment Trusts and immovable property are excluded from the scope of the relevant provisions of the directive.

Finally, we welcome that the OECD is trying to encourage a level of harmonisation in the global tax rules in order to minimise the ability of companies to take advantage of distortions between tax regimes. As the Commission is seeking to expand these recommendations, it is imperative that no EU Member State is unduly impacted by anti-competitive proposals.

We look forward to working with you as the package is developed and are happy to provide further, technical information to the relevant Directorate General.

Yours sincerely,

Philip Charls, EPRA CEO

About EPRA

EPRA is the voice of the publicly traded European real estate sector: it is the representative association for commercial property companies that are quoted on the public stock exchanges of Europe and other exchanges around the world. With more than 200 active members, EPRA represents over EUR 350 billion of real estate. EPRA's membership also includes the institutional investors such as pension funds and insurance companies that invest in, or have an interest in investing in real estate indirectly via these listed property companies. Through the provision of better information to investors, improvement of the general operating environment, diffusion of best practices and the cohesion and strengthening of the industry, EPRA works to encourage greater investment in listed real estate companies in Europe with long-term and stable income producing assets.