

## Briefing for the FISC hearing (22 June 2021)

### ***"The development of new tax practices: What new schemes should the EU pay attention to?"***

covering: the Commission's August 2020 Anti-Tax Avoidance Directive (ATAD) Implementation Report and State of Play regarding the ATAD transposition checks

#### **1. The transposition timeframes**

The main<sup>1</sup> ATAD transposition timeline requirements are:

<b>Measure</b>	<b>Transposition deadline</b>	<b>Application date</b>
Interest limitation, GAAR <sup>2</sup> , and CFC <sup>3</sup>	31 December 2018	1 January 2019
Exit taxation, Hybrid mismatches (apart from reverse hybrid mismatches)	31 December 2019	1 January 2020
Reverse hybrid mismatches (with third countries)	31 December 2021	1 January 2022

#### **2. Requirement for the ATAD Evaluation**

Article 10 of the ATAD requires that the Commission evaluate the implementation of the ATAD, in particular the interest limitation provisions, by 9 August 2020, and report to the Council on it. By derogation, the provisions in respect of hybrid mismatches are required to be evaluated by the Commission by 1 January 2022.

#### **3. The ATAD August 2020 report**

On 19 August 2020, the Commission published a report on the implementation of the ATAD. The report is the **first step in the evaluation** of the impact of the ATAD and provides an **overview of the implementation** of the early applicable ATAD measures (i.e. Interest Limitation, GAAR, CFC Rules) across MS. At the time of the publication of this report, the Commission Services did not have access to data to carry out a full evaluation.

The implementation report contained the description of the ATAD measures along with options or approaches that were valuable to Member States when transposing the ATAD measures into their domestic law. The report provided statistics, where they were available, on the usage of those options and approaches. Finally, the report provided the state of play regarding the transposition checks as at August 2020.

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<sup>1</sup> Article 11(6) of the ATAD lays down a derogation for interest limitation rules of "equivalent effect" for certain Member States; Article 11(4) ensures that although non-distributed profits are not taxed in EE, this does not cancel the possibility of applying exit taxes.

<sup>2</sup> General Anti-Abuse Rule

<sup>3</sup> Controlled Foreign Company

#### 4. Open infringements (as on 11 June 2021)

There are currently 11 infringement proceedings open relating to the transposition of the ATAD, which are listed in the Commission's infringement database:

<b>Infringement</b>	<b>Country</b>	<b>Stage of the infringement</b>
Non-communication of national implementing measures for the CFC rules	Denmark	Reasoned opinion sent on 25 July 2019. However, Denmark made recently changes to their CFC rules (3 June 2021)
Non-communication of national implementing measures for the Interest limitation rule	Ireland	Reasoned opinion sent on 27 November 2019.
Non-communication of national implementing measures for (the CFC rules <b>or</b> the Interest limitation rule <b>or</b> the GAAR)	Spain	Letter of formal notice sent on 30 January 2019
Non-communication of national implementing measures for of the Anti-hybrids rules	Germany	Reasoned opinion sent on 9 June 2021. However, Germany made recently changes to their Anti-hybrids rules (21 May 2021)
Non-communication of national implementing measures for the Exit taxation rule	Germany	Reasoned opinion sent on 9 June 2021. However, Germany made recently changes to their Exit taxation rule (21 May 2021)
Non-communication of national implementing measures for the Exit taxation rule	Romania	Reasoned opinion sent on 24 January 2020
Non-communication of national implementing measures for the Exit taxation rule	Portugal	Reasoned opinion sent on 24 January 2020
Non-communication of national implementing measures for the Exit taxation rule	Spain	Reasoned opinion sent on 24 January 2020
Incorrect transportation of the Interest limitation rule and the CFC rules	Belgium	Letter of formal notice sent on 2 July 2020
Incorrect transposition of the Interest limitation rule	Luxembourg	Letter of formal notice sent on 14 May 2020
Incorrect transposition of the CFC rules	Bulgaria	Letter of formal notice sent on 9 June 2021

## **5. Full evaluation**

In the Commission's August 2020 ATAD report, it was stated that *"it is envisaged that a comprehensive evaluation report of the ATAD measures will be published, preferably by 1 January 2022. However, the timing of the completion of such comprehensive evaluation report will be dependent to some extent on the need to revise the ATAD due to EU or other international developments in the discussions on preventing corporate tax avoidance practices"*

### **5.1. The draft ATAD Questionnaire**

In order to carry out a full evaluation of the application of the ATAD measures across Member States the Commission Services need access to data on how the ATAD measures are applied in Member States. In general, such data would be obtainable primarily from Member States that apply the ATAD measures. TAXUD (D1) devised a draft questionnaire to Member States, in which Member States were asked specific questions on the application of the ATAD measures.

There is a big question mark what kind of data Member States collect on the application of the ATAD measures and the timing of the availability of such data. In this light, TAXUD probed certain Member States in March 2021. It seems that there are issues with the timing for collection of the data, e.g. for F/Y 2019, data might not be fully available by the end of 2021 due to extended filing deadlines and COVID related challenges.

While some Member States might be able to provide data on the application of the ATAD measures in the near future, it is likely that a majority will not be able to do so. Therefore, the exact timing of the full evaluation report is uncertain due to lack of complete set of data on the application of the ATAD measures across Member States.