Assessment of Recent Anti-tax Avoidance and Evasion Measures

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Part I: ATAD
1. Status of Implementation (ATAD)

- All Member States appear to have adopted targeted legislation to transpose the rules in line with the different implementation deadlines
- A small number of infringement proceedings are currently pending, of which only 4 are based on substantive objections to transposition (BE, CY, IE, LU)
- Where options exist for implementation, Member States have made divergent choices. All Member States are allowed to ‘go beyond’ minimum standard.

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<th>Interest limitation</th>
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2. The Legality of the ATAD Rules

• Questions of Competence
  Although frequently raised in literature, CJEU jurisprudence suggests that no real risk of incompatibility arises

• Compatibility with Primary Law
  Some risk for Member State implementing rules but not for ATAD itself; impact on internal market freedoms intended by EU legislature

• Concerns of Constitutionality
  In some Member States, implementation has raised potential conflicts with constitutional rules; low risk that these would override primacy of EU law

• Relationship to International Law
  Conflicts with international conventions are mostly avoided by the ATAD’s drafting; where they arise, the Directive overrides bilateral treaties
3. Uncertainties of Interpretation and Implementation (ATAD)

- Although the Directive has been adopted more than five years ago, several questions of interpretation remain unresolved. Case law is still absent.

- Open questions include, e.g.:
  - Requirement to impose an exit tax on exempt assets
  - Relationship of the GAAR to other anti-avoidance rules
  - Implementation of options granted to Member States as options for taxpayers
  - Implementation and administration of anti-hybrid measures: references to OECD BEPS 2 and the burden for taxpayers
4. Implementation Effects (ATAD)

• Changes in Member States Laws in Response to the ATAD
  • Differs significantly for different rules; GAARs universally existed, but changes made; exit tax rules were common; interest limitation and anti-hybrid rules very new for most national tax laws

• The Impact of the ATAD
  • More uniformity, but still limited harmonisation; while fragmentation persists (permitted by the Directive), greater fragmentation has likely been prevented.

• Gaps/loopholes and need for revision
  • CFC rule: limitations of ‘Model A’ and ‘Model B’ rules
  • GAAR: uncertainty and unclear situation on penalties
  • Pending proposal: substance conditions for companies
Part II: DAC6
1. Background

• DAC(s): tackling tax avoidance and tax evasion through *transparency* built on tax cooperation (= information exchange).

• Unprecedented wave of adopted legislation: currently 7 DAC(s).

• Why DAC 6?
  • ATAD’s right hand-man.
  • Latest implemented piece of legislation on information disclosure and exchange.
  • Pinnacle of tax transparency and anti-tax avoidance: first time obligation imposed on MS to request disclosure and exchange information on tax avoidance and/or evasion schemes that come to their attention.
2. General Criticisms of DAC6

• Broad framing and lack of definitions.
  (-) Uncertainties: eg. Absence of ‘arrangement’ definition, hallmarks and definitions therein.
  (-) Sources of discrepancies (reliance on national law): eg. Exemption from disclosure obligation (professional secrecy), penalties.
  (-) Leeway to MS in the implementation process: Lack of uniform implementation across the Union
  (+) Political necessity to achieve unanimity.
2. General Criticisms of DAC6 (cont’d)

• Legality
  - Legal basis (113, 115 TFEU): meaningful and necessary means to ensure the functioning of the internal market?
  - Compliance with the subsidiarity and proportionality principles?
  - Compliance with fundamental freedoms?
  - Compliance with taxpayers’ fundamental rights?
  - Retroactivity?
  - Compliance with CJEU case law? (presumption of tax avoidance)
3. Implementation across Member States: Trends

• Discrepancies and divergences
  
  - Going **beyond the minimum standard**: reportable *domestic* arrangements, coverage of wider scope of taxes (VAT, excise duties), additional hallmarks.
  
  - **Objective scope**: What is an arrangement? Different levels of requisite complexity, legal bindingness vs. ‘promises’, intentional vs. unintentional.
  
  - **Subjective scope**:
    
    - Intermediaries → exclusion of secondary intermediaries, requirement of a nexus with the MS at issue, knowledge/intention requirement.
    
    - Exemption from disclosure obligation: professional secrecy based on national law: no exemption, exemption only for lawyers, exemption for more professions (eg. Tax advisers), exemption conditional on the information to be reported.
3. Implementation across Member States: Trends (cont’d)

• Discrepancies and divergences
  ➢ Hallmarks
    ➢ Additional hallmarks.
    ➢ Main benefit test: What constitutes a tax advantage?
    ➢ Different interpretations or definitions of terms in hallmarks: eg. What constitutes ‘standard documentation’ (Hallmark A.3.); ‘cross-border payment’ (Hallmark C.1.)
  ➢ Penalties: Variations between EUR 4.7 million and EUR 3,200
    → Deterrent effect?
4. Impact of Different Implementation

- Multi-fragmented implementation across the Union/ lack of uniformity.
- Divergences as to both the objective and subjective scope:
  - Different information (quantitatively and qualitatively) to be disclosed and, thus, exchanged across the Union.
  - Different reporting persons: intermediary ‘friendly’ vs. Intermediary ‘hostile’ MS.
- Too early to assess the practical implementation.
  - Factors not related to DAC 6: capacity and know how of tax administrations.
  - Intermediaries’ ‘behaviour’: eg. Submission of unsorted documentation.
5. Conclusion

• EU going beyond the OECD and BEPS by establishing a minimum standard.

• Success in practice could be improved by defining certain undefined terms or providing more details to reduce uncertainties.

• DAC 6 seen ‘in context’ is a success despite the lack of uniform implementation.