

# 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.

EU 27	Interest limitation	Exit taxation	GAAR	CFC		Anti-hybrid
				Var. A	Var. B	
Austria	X	X	X	X		X
Belgium	X	X	X		X	X
Bulgaria	X	X	X		X	X
Croatia	X	X	X	X		X
Cyprus	X	X	X		X	X
Czech Republic	X	X	X	X		X
Denmark	X	X	X	X		X
Estonia	X	X	X		X	X
Finland	X	X	X		X	X
France	X	X	X		X	X
Germany	X	X	X	X		X
Greece	X	X	X	X		X
Hungary	X	X	X		X	X
Ireland	X	X	X		X	X
Italy	X	X	X	X		X
Latvia	X	X	X		X	X
Lithuania	X	X	X	X		X
Luxembourg	X	X	X		X	X
Malta	X	X	X		X	X
Netherlands	X	X	X	X	(X)	X
Poland	X	X	X	X		X
Portugal	X	X	X	X		X
Romania	X	X	X	X		X
Slovakia	X	X	X		X	X
Slovenia	equivalent rule	X	X	X		X
Spain	X	X	X	X		X
Sweden	X	X	X	X		X

## 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.