CRITICAL REVIEW OF THE ATAD IMPLEMENTATION: FOREWORD

The Implementation of the ATAD in the EU: The Same but not the Same

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Unlike other previous EU Directives in the field of direct taxation, the Anti-Tax Avoidance Directive (ATAD) Directives (1[1] and 2[2]) have resulted in detailed legislation that countries are required to transpose into their own domestic tax legislation. For this, countries have reviewed the compatibility of existing rules with the provisions of the ATAD and, in accordance with this review, countries have introduced new rules, amended their existing rules, or argued that the existing rules comply with the ATAD provisions.

As is already known, EU initiatives in the field of direct taxation are subject to unanimity. Their content is introduced in the EU by means of directives. The directives enable countries to decide to introduce rules that are more restrictive, however, they cannot introduce those that are less restrictive. Therefore, countries can do more but they cannot do less than the provisions of the directive that is being transposed.

The ATAD can be regarded as a legal transplant that addresses the borrowing of rules developed by one country or international/supranational organization (i.e., donor) to another country (i.e., recipient). As has been argued elsewhere,[3] legal transplants can be voluntary (intended or unintended) or imposed, for instance, in the case of *acquis communitair*e for countries wishing to join the European Union or international organization (e.g., International Monetary Fund (IMF)) requiring the introduction of new rules in order to provide assistance or funding.

The ATAD is a very interesting case of a legal transplant since EU countries have introduced rules to implement it. However, by the nature of the instrument of implementation, i.e., directive, these rules vary taking into account EU countries' own tax systems and the countries' willingness to introduce the same or rules that are more restrictive than those provided in the ATAD (e.g., lower threshold in interest deduction or fewer exemptions/carve outs). In addition, these rules can also vary considering the choices made by the government and the result of the parliamentary discussions on the content of the directive.

The ATAD is also an example of an import and export of rules.[4] Some of the provisions of the ATAD have been *imported* from the Base Erosion and Profit Shifting (BEPS) Project, primarily BEPS Actions 2, 3, 4, and 6 addressing hybrid mismatches, CFC legislation, the interest limitation rule, and tax treaty abuse (General Anti-Avoidance Rule (GAAR)), respectively. Some of these rules have been also *exported* to non-EU countries, for instance, in the content of the ATAD 2 that provides for the application of the rules not only for EU countries but also for third (non-EU) countries ('hybrid mismatches with third countries' ATAD 2). In addition, for the import and export of rules, the ATAD has gone beyond the BEPS Project since it contains a number of additional rules (exit taxes) that were not part of the latter.

In order to address these differences in the legal transplant of the ATAD by EU countries, in this issue and in following issues of Intertax, some articles will be presented in which authors address the implementation of the ATAD in their respective country. In particular, attention will be given to the (new) provisions, the

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1 Anti-Tax Avoidance Directive: Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (19 July 2016).

2 Anti-Tax Avoidance Directive 2: Council Directive 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 regarding hybrid mismatches with third countries, OJ L144/1 (7 June 2017).

3 The topic of legal transplants has been addressed in I. J. Mosquera Valderrama, *Policy Note: The Study of the BEPS 4 Minimum Standards as a Legal Transplant: A Methodological Framework*, 48(8/9) Intertax 721 (2020).

4 *See* on the import and export of rules by the EU. I. J. Mosquera Valderrama, *The EU Standard of Good Tax Governance in Tax Matters for Third (Non-EU) Countries*, 47(5) Intertax 458 (2019).

adapted/amended provisions, and the provisions that have remained the same in the country while implementing the ATAD. The provisions that are addressed dealt with hybrid mismatches, CFC rules, exit tax, interest deduction limitations, and the GAAR. These articles also discuss, from a theoretical perspective, some possible litigation arising from the implementation of the directive.

This issue presents the analysis of the implementation of the ATAD in two countries, the Netherlands and the United Kingdom. The Netherlands has implemented the ATAD following a consultation procedure with taxpayers, civil society, and parliamentary discussions. The authors Korving and Wisman highlight the result of this participation in their article, for instance, regarding the introduction of Model A for CFC legislation. The Netherlands has also introduced new provisions (interest limitation rule, CFC, hybrid mismatches), revised some others (exit taxes), and argued that some of its provisions already comply with the ATAD (GAAR). In addition, in order to remove its tax haven image, the Netherlands has introduced, in some cases, provisions that are more restrictive than the ATAD provisions. This demonstrates that the implementation of the ATAD in the Netherlands takes into account the country's own political choices that are also influenced by the participation of stakeholders in this process.

The United Kingdom, while introducing rules to implement the ATAD, is also an interesting case of study mainly taking into account the new status following the BREXIT and the commitments made in the framework of the new EU-UK Trade and Cooperation Agreement. According to the author, Daly, the United Kingdom has amended their existing rules regarding CFCs, hybrid mismatches, and exit taxes whereas the provisions regarding the interest limitation rule and the GAAR have remained the same. The United Kingdom was bound by the ATAD until its final departure from the EU (i.e., 31 December 2020).

The EU-UK Agreement mentioned above states in Article 5.1 that the United Kingdom commits to implementing the principles of good governance in the area of taxation that include the BEPS Minimum Standards. However, Article 5.3 states that these provisions are not legally binding, therefore, the United Kingdom finds itself in a position in which only the minimum standards and not the provisions of the ATAD may need to be followed. Since, from the provisions of the ATAD, only the GAAR is a minimum standard (i.e., Action 6), the question remains of how this will affect future litigations. This question is being addressed by the author with some preliminary conclusions regarding how this future relationship between the EU and the United Kingdom will take place.

In conclusion, the implementation of the ATAD may vary among countries due to its nature of being a directive and the differences in the tax systems among EU countries. In addition, countries are making their own choices for provisions that are more restrictive or additional requirements that substantiate that one size does not fit all and, therefore, the implementation of the ATAD will need to be carefully studied in each country. The articles that have been published in this issue and in forthcoming issues intend to provide an overview of these differences and to highlight some possible litigation issues that can arise from the implementation of the ATAD.