Countering tax avoidance in the European Union and beyond
Chair: Daniel Gutmann | Université Paris-1 Panthéon-Sorbonne, CMS Francis Lefebvre

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The European Union Anti Tax-Avoidance Directives I and II ("ATAD") were the focus of this panel, which was structured based on the following blocks:
1. Introduction;
2. Have ATAD policy goals been achieved?;
3. Technical difficulties in implementing ATAD;
4. Looking forward; and
5. Concluding remarks.

1. Introduction

To initiate the debate, the Session Chair provided context by elaborating on the (i) report prepared by the European Commission to the European Parliament and the Council on the implementation of ATAD, and (ii) European Parliament´s assessment of ATAD and DAC6, whose reading was highly recommended by the Session Chair.

2. Have ATAD policy goals been achieved?

Following the introduction, some data on ATAD´s impact on domestic legislation was given, such as: (i) 16 jurisdictions made changes or adopted new GAARs; (ii) only 6 Member States had "equally effective rules" regarding interest deduction limitation, so ATAD gave rise to changes in this field for at least 21 jurisdictions; (iii) several Member States did not even have CFC rules before ATAD and were forced to implement it; (iv) ATAD's anti-hybrid rules also resulted on the introduction of entirely new provisions on domestic tax systems with this respect.

After that, the speakers brought the question of whether tax avoidance has been curved after ATAD´s implementation. To illustrate this debate, Article 4 (interest deductibility restrictions) was mentioned as a measure where the policy goals of ATAD were broad and ambitious, going well beyond the prevention of tax avoidance. In this sense, tax avoidance would not have been fully curved with respect to interest expenses, as ATAD created no direct link to tax avoidance when it concerns the application of this measure, rather a maximum proportion of income as deductible interest expenses. Additionally, the options for carrying back and forward reveal ATAD's intention to actually allow the deduction of interest expenses over time. Therefore, this rule may be insufficient to curve tax avoidance.

Subsequently, it was mentioned that ATAD´s goal was to achieve only a minimum level of harmonization and that the outcome of this approach was that legislation on tax avoidance remains different between Member States. The speakers demonstrated the diversity of rules with concrete examples related to Article 7 (CFC), Article 4 (interest deduction limitation), and Article 3 (minimum level of protection). To illustrate this debate, regarding Article 7 (CFC) it was mentioned that only the existence of Model A (the categorical approach) and Model B (the transactional approach, related to the so-called income from non-genuine arrangements) is already enough for creating a diverse framework, as 13 Member States opted for Model A, 10 Member States opted for Model B, 1 Member State adopted a combination of both models and the systems created by 2 Member States would not be fully classified either as Model A or Model B.

Not only the existence of these models created diversity in the CFC rules among different Member States, as even the most fundamental tests (such as control test and low-taxed test) are not uniform after ATAD implementation. There is also diversity when it concerns the adoption of the options provided within Model A and Model B (e.g. the Model A substance carve-out was extended to third-country situations for Member States such as Austria, Croativa, Czech Republic and Romania, but this was not the case for other jurisdictions).

Regarding diversity in implementation of Article 4 (interest deduction limitation), it was clarified that ATAD would not have harmonization as a goal, rather coordination. In this sense, the great level of diversity regarding Article 4 implementation could be explained by (i) the differences between the group taxation systems of the Member States, which influence the computation of EBITDA at entity or group level; (ii) the option to deduct exceeding borrowing costs up to EUR 3M; (iii) the variety of options for the carry forward and carry back of exceeding borrowing costs; (iv) the fact that percentage of EBITDA for interest deduction capacity may be lower than 30%; (v) the option to grant right to fully deduct exceeding borrowing costs if the taxpayer is a standalone entity; and (iv) the option to carry forward the unused interest capacity which cannot be deducted in the current tax period for a maximum of 5 years.

3. Technical difficulties in implementing ATAD

This debate was focused on ATAD´s interpretation and practical challenges. One of the interpretation difficulties raised was to what extent should OECD BEPS reports be taken into account in interpreting ATAD. The answer was that it depends and the analysis should be performed on a case-by-case basis. With respect to GAAR and exit taxation one will not find corresponding BEPS deliverables. As regards other ATAD measures, it would depend on the reports themselves (which are best practices recommendations and not minimum standards); on some occasions you may use the OECD BEPS reports, while on some occasions you even have to do so, depending on the measure and report.

ATAD´s unclear concepts were also mentioned as a challenge. The speakers elaborated on concepts brought by Article 9 and 5 that are not clear (e.g. Article 5 – exit taxation - does not distinguish between exempt or non-exempt assets, which creates challenges on the application of the provision, and there is also no definition of a “demonstrable and actual risk of non-recovery of the tax”, which makes it harder to understand when a guarantee may be required by a Member State). There is also a great deal of uncertainty regarding the concept of inclusion in ATAD 2.

The diversity in interpretation among different Member States was also raised as a challenge and the Article 9 definition of “reasonable period of time” would be the perfect example for this situation. The interaction between different ATAD rules is also challenging (e.g. CFC rules and ATAD 2), as well as ATAD´s complex implementation.

4. Looking forward

After evaluating ATAD from different angles, the speakers proposed a critical analysis focusing on the future. Some questions were raised to provoke the reflection: should the EBITDA model of Article 4 be repealed or complemented by other instruments? Will ATAD be merged into BEFIT? How will ATAD combine with the newest developments of EU legislation? Is there a future for CFC rules in the era of Pillar 2? How will the ATAD GAAR coexist with the Unshell Directives´s substance rules?

All those questions gave rise to an interesting debate. To illustrate that, the speakers clarified that the manner in which BEFIT will interact with ATAD is still undefined. In this sense, BEFIT will have to have anti-abuse rules. One could argue that BEFIT might have a different scope with regard to the ATAD, since it solely deals with the corporate income tax base that will have to apply to predefined groups. Thus it is possible that a situation might arise in which a dual standard would apply within the EU, i.e. the "ATAD-standard" that will vary from Member State to Member State, and a parallel "BEFIT-standard" that will be harmonized at a European level in order to achieve the key objective of the BEFIT Proposal (namely to lay down single corporate tax textbook for multinational companies operating throughout Europe).

Finally, the speakers reflected on whether there is room for improvement of the EU tax legislation process. Some concerns were raised regarding the growing number of directives (and the importance of a reflection on their combination) and the relationship between the tax directives and (i) bilateral agreement and third countries; and (ii) EU primary law. This discussion also encompassed the need to coordinate the EU legislation process with the work that has been done by the OECD/G20 in order to avoid double standards.

The panel debated ended with quick concluding remarks.

Panel members:

- Daniel Gutmann (Session Chair) | Professor of Tax Law at Université Paris-1 Panthéon-Sorbonne, Partner CMS Francis Lefebvre
- Johanna Tschurtschenthalerg | Counsel (Tax) at Allen & Overy Luxembourg
- Emmanuel Raingeard de la Blétière | Associate Professor of Tax law at University Rennes 1, Partner at PwC France
- Jérôme Monsenego | Professor of International Tax Law at Stockholm University
- Filip Majdowski | Director at Tax System Department of the Polish Ministry of Finance
- Fernanda Moura (Panel Secretary) | Lawyer, International Tax LL.M. University of Amsterdam