

Werner Haslehner, Katerina Pantazatou, Georg Kofler and Alexander Rust (Eds.), *A Guide to the Anti-Tax Avoidance Directive*. Cheltenham: Edward Elgar, 2020. xxx + 336 pages. ISBN: 9781789905762. GBP 145.

“Aggressive tax planning” has dominated the international tax debate in the 21st century. It has commonly been used as an umbrella term covering such diverse phenomena as tax evasion, tax abuse, and plain forms of sophisticated tax planning. In a similar vein, the Anti-Tax Avoidance Directive (ATAD) goes beyond the introduction of measures counteracting tax avoidance (as the title would suggest), but indeed broadly focuses on the protection of the Member States’ tax bases. It is the first corporate tax directive which potentially causes, or increases, a tax burden, and moreover the first which additionally addresses domestic and third-country situations. In this sense, the ATAD can rightly be considered to have broken new ground, which renders the work of tax scholars that try to make sense of how these recent developments fit in the existing EU tax law system all the more relevant. This is the environment in which the *Guide to the Anti-Tax Avoidance Directive* is fundamentally situated. This volume brings together the rich expertise of leading scholars in this field and provides both for invaluable guidance and ample food for thought in one of the most exciting areas in EU tax law.

The first three chapters lay the groundwork for the following detailed analyses of each of the ATAD’s specific provisions. Vanistendael takes the reader swiftly on a journey through the more than 40-year long history of the related ECJ case law. During this period, the ECJ has refined its concept from a mere reference to the Member States’ right to prevent abusive rule avoidance in *van Binsbergen* to the groundbreaking “Danish Cases,” where the Court expressly confirmed the EU anti-abuse principle as a general principle of EU law in the field of direct taxation, which Ismer then discusses in detail in Chapter 3. Emphasis is moreover laid on the remarkably wide panoply of differing wordings in the case law as well as in the corporate tax directives. These terminological differences should nevertheless not be attributed too much value, given the rather standardized criteria applied by the ECJ. This approach is moreover reflected in Kuźniacki’s observations on the ATAD’s General Anti-Abuse Rule (GAAR, Ch. 6). Another remarkable aspect of the Danish Cases is that the ECJ seems to have upped the relevant threshold. Accordingly, a real presence should not suffice if the entity “makes only an insignificant taxable profit” (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, para 130). It seems likely that the Court thereby tried to align the EU anti-abuse principle’s concept

with the new, OECD-induced anti-abuse provisions. This issue has major potential for further research.

Chapters 1 and 3 bookend the assessment of the ATAD's scope and its interplay with other legal layers. The high degree of uncertainty inherent in the ATAD's often unprecise wording becomes all the more evident when we compare Haslehner's elaborations on the ATAD's personal scope and its impact on the Member States' tax treaties with (partially) differing, yet equally reasonable approaches taken in Chapter 7 (regarding the relationship between controlled foreign company (CFC) rules and double taxation treaties) and Chapter 9 (regarding the ATAD's personal scope). Indeed, it seems virtually impossible to cut the Gordian knot of the ATAD's personal scope in a fully satisfactory way (wording and directive's (broad) objective vs. implementation of Art. 1(2)). Before we then assess the relevance of Article 351 TFEU, we should keep in mind that this provision fundamentally presupposes the existence of a conflict between the relevant EU law and the Member States' treaties. Hence, the preliminary question ought to be scrutinized whether the application of a certain ATAD provision would conflict with the respective treaty's provisions or objectives in the first place. This needs to be assessed on a case-by-case basis, considering, among other things, a teleological interpretation (as indicated in Ch. 2), the existence of a treaty GAAR (which could be interpreted in line with the ATAD's GAAR), and the applicability of the saving clause of the multilateral instrument (MLI).

The following Chapters 4 to 9 encompass more thorough discussions on the ATAD's five specific anti-avoidance rules. Each of these assessments gives proof of the authors' solid body of knowledge in their areas and broadly follows a consistent structure. Most notably, specific parts are devoted to the relevant case law as well as to the particular implementation challenges related to the respective provisions. The rich illustrations in Chapters 8 and 9, which provide for a good understanding of the examples complementing the assessments of the ATAD's complex hybrid mismatch rules, prove especially helpful. A *leitmotiv* permeating the authors' observations is the ATAD's fundamental aptitude to foster tax planning and tax competition among Member States. When we call to mind that some provisions, particularly the interest-limitation and CFC rules, were highly disputed in the negotiation process, the broad array of adoption options can most likely be considered the price for the determination of a common minimum standard at the EU level.

Gutmann vividly depicts, using the example of the diverse types of group taxation systems established in the Member States' taxation systems, how adopting the ATAD's interest limitation rule comes along with a particularly high level of complexity. In the context of the definition of "payments under profit participation loans," an interesting parallel is drawn with the ECJ's decision concerning the interpretation of a similar clause in Article 11(2) of the tax treaty between Austria and Germany. Although the concept is unlikely to be directly taken over (with regard to the different legal environments), I agree that the Court might be inspired by these findings on account of the comparable criteria of the two provisions.

While Schwarz discusses several key issues of exit taxation rules that have not yet been addressed either by the Court or by the EU legislature, the absence of a "tie-breaker rule" in cases of conflicting opinions regarding the relevant market value in the Member State of origin and the Member State of destination seems to be a particularly serious obstacle for the good functioning of the internal market. As the author indicates, it is rather dubious that we are to perceive a "switch in time" and the Court will hence provide for uniform standards in the future. This assertion rests on the Court's long-standing case law according to which the EU legal system "does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community" (*Kerckhaert and Morres*, C-513/04, para 22). This obstacle will, however, hopefully be addressed in the course of the BEFIT initiative. Similar observations can be found in the context of the former CCTB proposal in Chapter 12.

The thorough analysis of the ATAD's GAAR by Kuźniacki not only carves out where the ECJ case law and the Commission recommendation on aggressive tax planning from 2012 help us capture the essence of this, by its nature, vague provision. I particularly endorse the approach to depict the convergences in the abuse concepts of the ATAD's GAAR and the MLI's Principal

Purpose Test (PPT), as it will allow us to define uniform standards in the assessment of (possibly) abusive arrangements and hence prevent fragmentation of the abuse concept in the Member States' direct taxation systems.

Rust then elaborates on the ATAD's CFC rule, which reflects another variety of this well-established tool to protect domestic tax bases that has translated into a US "export hit" over the last decades. Whereas the impact of Case C-135/17, *X* is particularly discussed in the context of the opt-out clause in Article 7(2)(a), it should moreover not be overlooked that the ECJ thereby accepted a German CFC rule of "automatic nature," encompassing a *de facto* irrebuttable presumption of tax evasion or avoidance, in relation to third countries on the grounds of the effectiveness of fiscal supervision. The critical precondition for the Court's decision was the absence of a legal framework which would genuinely empower the German fiscal authorities to verify the relevant information. In my opinion, this decision could have significant impact on the Member States' future tax treaty policies if we bear in mind that the lack of effective exchange of information practically allows the fiscal authorities to apply these easily administrable anti-avoidance tools in situations covered by the free movement of capital.

Another benefit of this volume is that the ATAD's anti-hybrid rules are discussed in two separate chapters, which, first, brings a clear structure to these complex provisions and, second, allows the contributors to elaborate on the specific issues related to hybrid financial instruments and hybrid entities, respectively. One of the key challenges in the context of the ATAD's hybrid mismatches rules is to determine a chronological order of application, considering that their scope intersects with both the anti-hybrid rule of the Parent-Subsidiary Directive and the ATAD's interest limitation rule. While Recital 30 of ATAD 2 (Directive 2017/952) clearly indicates the priority of the Parent-Subsidiary Directive's anti-hybrid rule, Parada argues for a prioritization of the interest limitation rule over the ATAD's hybrid mismatch rules – despite contrasting indications in OECD BEPS Actions 2 and 4 – most notably in an effort to avoid economic double taxation. While the ATAD 2 amendments have made it particularly difficult to understand the anti-hybrid rules' concept for hybrid entities, the analysis by Spies helps disentangle this complex system of norms and proves especially helpful for academics, practitioners and students alike who wish to familiarize themselves with this topic.

Richelle then provides for an innovative approach towards the ATAD's provisions, while shedding light on their technical details specifically from a double taxation perspective. In this context, it is rightly pointed out that the existing mechanisms, in particular Directive (EU) 2017/1852, are not capable of dealing with these obstacles to the good functioning of the internal market. A broad adoption of joint audits, which have been more and more frequently practised, among others, in cross-border situations between Austria and Germany, could yet translate into a promising approach for the future. These cooperative actions might then contribute to restoring the perceived loss in confidence in institutions identified in this chapter.

Like any other corporate tax directive, the ATAD needs to be regarded in a broader context with other developments particularly at the EU level. The final two chapters of this volume provide for the bigger picture by contextualizing the ATAD with DAC 6, another EU directive whose origins can be traced back to the OECD/G20 BEPS project, and the anti-abuse provisions of the former CCTB proposal. Beyond a solid presentation of the main features of DAC 6, the key issues following its adoption are precisely addressed in this chapter. Pantazatou bridges her observations on the possibly overambitious character of DAC 6 and experiences with the US IRS. Similar issues could moreover be observed in context with DAC 1 through DAC 3. Two related EU reports pointed to the fact that Member States have apparently already exchanged more information on the basis of these directives than they have been able to process. A particularly interesting reference was made to a survey from 2017 conducted on behalf of the Greens/EFA Group which could raise concerns whether the intended preventive effect of DAC 6 will indeed materialize.

Although the European Commission officially withdrew the pending CCCTB proposal in its recent communication on "Business Taxation for the 21st Century," it can be assumed that BEFIT will broadly draw on this preliminary work. Against this background, van Raaij's considerations in the final Chapter 12 are highly likely to be relevant *mutatis mutandis* for

BEFIT purposes. Among other things, we will similarly have to discuss whether, and how, the ATAD's provisions should be integrated into this concept. Although it is rightly argued that several mechanisms would then become obsolete (such as the group carve-out clauses of the ATAD's interest limitation rule), transferring the existing mechanisms into the BEFIT proposal as far as possible should still be favoured from a practical perspective. Further considerations on the "Meseberg Declaration," which include enhanced CFC and switch-over rules as well as an undertaxed payments rule, could moreover become relevant as soon as the minimum global tax recently agreed on at the OECD level needs to be transformed into EU (hard) law.

Overall, this volume successfully delivers on its objective to provide both a comprehensive and accessible guide to the ATAD.

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