ETAF
European Tax Adviser Federation

ETAF statement on the evaluation of the Anti-Tax Avoidance Directive (ATAD)

Introduction

The European Tax Adviser Federation (ETAF) would like to thank the European Commission for the opportunity to comment on its evaluation of the Council Directive (EU) 2016/11641 of 12 July 2016 (the Anti-tax Avoidance Directive – ATAD1), as amended by Council Directive (EU) 2017/9522 of 29 May 2017 (ATAD2).

We view the ATAD as an important tool laying down minimum standard measures on addressing the most common forms of aggressive tax planning and tax avoidance practices that directly affect the functioning of the internal market. It provides for measures in five areas which Member States are required to implement: an interest limitation rule, exit taxation, controlled foreign company (CFC) rules, hybrid mismatches rule and a general anti-abuse (GAAR) rule.

As a preliminary remark, ETAF would like to highlight the multiplication of EU anti-abuse measures these last years, with ATAD1, ATAD2, the Minimum Tax Directive, the successive DACs and more recently the UNSHELL Directive proposal, also known as ATAD3. To avoid any potential overlapping and overregulation, which could hamper efficiency, we believe that, before releasing any new measure, the Commission should thoroughly evaluate the existing legislation in this field.

For this reason, we welcome very much the evaluation of the ATAD as a concrete action in the framework of the ongoing European Commission's effort to rationalise EU reporting requirements.

We support the five evaluation criteria chosen by the Commission (effectiveness, efficiency, relevance, coherence and EU added value). We also believe that the evaluation should focus on finding concrete solutions to provide relief for companies in the scope of the Minimum Tax Directive regarding the application of ATAD CFC rules, while safeguarding the effectiveness of the EU's anti-tax avoidance rules.

I. Relevance and effectiveness of the GAAR

The general anti-abuse rule (Article 6 of the ATAD) tackles abusive tax practices that have not been dealt with through specifically targeted provisions. The ATAD requires the GAAR to be applied to any arrangement that is *"put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law"* and *"is not genuine having regard to all relevant facts and circumstances"*, including economic reasons.

The GAAR constitutes a minimum standard and not a genuine definition of aggressive tax planning and is by nature uncertain in its interpretation.

Article 6 is completed by the important recital 11, which makes it clear that taxpayers should have the *“right to choose the most tax efficient structure”* for their commercial affairs, limited only by the requirement that these should not be *“non-genuine”.*

Any changes to the terms of the GAAR might reveal counterproductive as it would likely raise new uncertainties rather than effectively clarifying open questions. The publication of guidance by the Commission on its view regarding interpretation and application of the GAAR would however be welcomed.

II. Implementation challenges

The ATAD contains a noticeable number of options for Member States in the application of anti-avoidance rules (e.g. the exclusion of financial undertakings from the interest limitation rule; the extension of the substance carve-out to third-country resident CFCs; the exclusion from the scope of the anti-hybrid rule for certain mismatches resulting from interest payments).

In some Member States, the ATAD measures were implemented excessively. In principle, such an excessive implementation would not have been necessary to prevent tax avoidance practices. On the contrary, this now leads to excessive bureaucracy and double taxation, which should not be created by the introduction of ATAD (e. g. the implementation of the imported mismatches).

Our members identified some challenges in applying the anti-hybrid rules. On the one hand, this is due to excessive implementations, in particular concerning the imported mismatches. On the other hand, it is due to the general structure of the rules. The rules leave a number of terms undefined and appear highly complex and wide-ranging, given the need for information about taxation in other countries. In this context, it should be examined whether these comprehensive rules are still needed within the internal market. Due to the ongoing harmonization of the internal market, there are fewer differences between national corporate tax systems that can be exploited by hybrid mismatches.

Both the 2020 Commission’s interim evaluation and a 2022 European Parliament’s study concluded that the Directive allows for too many options for fighting tax avoidance, which resulted in significant differences in the implementation of the ATAD provisions in the Member States and therefore to a greater fragmentation of the internal market, still allowing taxpayers to take advantage of existing legislative gaps in the Member States. We do agree that a reduction of the number of options should be considered for simplification reason. The margin of discretion of the Member States should be reduced in order to minimise double burden for taxpayers, particularly double taxation and bureaucracy.

III. Coherence with other EU Directives

1. ATAD and the Minimum Tax Directive

The introduction of the Minimum Tax Directive has created some overlaps with the ATAD Directive. Under the Minimum Tax Directive, MNE groups within the scope of the Directive are obliged to provide comprehensive and detailed information on their profits and effective tax rate in every jurisdiction where they have constituent entities – even if they are already subject to an effective tax rate of at least 15%.

In particular, each constituent entity of a multinational group located in an EU Member State will have to file a yearly so-called "top-up tax information return", unless this return is filed in another jurisdiction with which the EU Member State has an agreement regarding the exchange of information.

The top-up tax information return must be filed within 15 months after the end of the fiscal year of the constituent entity and shall notably include identification information on the constituent entities (including their tax identification numbers), information on the overall corporate structure of the MNE group and information that is necessary in order to compute the effective tax rate for each jurisdiction and the top-up tax of each constituent entity.

We consider that with the introduction of the Minimum Tax Directive, most of the information required by the Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD1) should be waived for multinational companies meeting Pillar Two thresholds (i.e., more than €750 million of consolidated revenues in at least two of the four preceding years) in order to avoid duplication.

In particular, the relation between the Minimum Tax Directive and the Controlled Foreign Company (CFC) rule in the ATAD1 needs clarification. They pursue the same intention, namely the prevention of tax avoidance practices by transferring income to low-tax jurisdictions and they overlap in their scope of application. Therefore, the abolishment of the CFC rules should be taken into consideration.

A closer look should also be given to the evidence to be provided in accordance with the anti-hybrid mismatches rules set out in ATAD1 and ATAD2. The Minimum Taxation Directive ensures that the income of a group of companies is subject to a minimum tax of 15% in all cases. Accordingly, for groups of companies that fall under the scope of the Minimum Taxation Directive, hybrid mismatches resulting in a deduction without inclusion are no longer possible for these groups of companies. Therefore, an abolishment of the hybrid mismatches rules could also be taken into consideration.

2. Assessment of the added value of ATAD3

We believe that the European Commission should seize the opportunity of this evaluation to thoroughly assess the added value of its 2021 proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (UNSHELL), also known as ATAD3.

We believe that the ATAD1, the exchange of information covered by the successive modifications of the Directive on administrative cooperation in tax matters (DAC), the Transfer Pricing rules and the CFC rules already tackle many of the issues that the UNSHELL Directive is seeking to address.

Conclusion

ETAF calls on the European Commission to draw all the lessons from this evaluation. The adjustment of the information requirements in relation with the ATAD1 CFC rules for the companies in the scope of the Minimum Tax Directive would already lead to a considerable rationalisation of reporting obligations.

We are looking forward to the final results of the evaluation, expected to be published in Q3 2025. ETAF remains available to constructively engage with the European Commission on this matter.

Notes
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About ETAF
The European Tax Adviser Federation (ETAF) is a European umbrella organisation for tax professionals whose activities are regulated by law. It is set as an international not-for-profit organisation (AISBL) governed by Belgian law, based in Brussels and was launched on 15th December 2015. It represents more than 220 000 tax professionals from France, Germany, Belgium, Romania, Hungary, Austria and Croatia. ETAF is a registered organisation in the EU Transparency Register, with the register identification number 760084520382-92.