The Implementation of the ATAD by Austria

Stefanie Geringer*

The Anti-Tax Avoidance Directive (ATAD) and ATAD II had major implications for the Austrian corporate tax regime. Particularly, Austria was obligated to introduce an interest limitation rule, a controlled foreign company (CFC) rule, and comprehensive hybrid mismatches rules. In addition to an overview of the transposition measures, this contribution particularly aims at elucidating remarkable deviations from the ATAD's standards and discussing selected issues arising in the specific Austrian context.

Keywords: Tax abuse, tax avoidance, BEPS, ATAD, EU law, adoption of EU secondary law.

1 Introduction

Austria adopted the Anti-Tax Avoidance Directive (ATAD[1]) and the amending directive (ATAD II[2]) in four steps:

- The controlled foreign company (CFC) rule was introduced, and the domestic exit taxation rule as well as the general anti-abuse rule (GAAR) were amended through the Annual Tax Act 2018 (Jahressteuergesetz 2018).
- The hybrid mismatches rules were adopted through the Tax Reform Act 2020 (Steuerreformgesetz 2020).
- The interest limitation rule was transposed through the COVID-19 Tax Measures Act (COVID-19-Steuermaßnahmengesetz). Furthermore, the defensive measure against jurisdictions included in the EU list of non-cooperative jurisdictions for tax purposes (EU blacklist) was implemented in the CFC rule.
- The rules on reverse hybrid mismatches (Article 9a ATAD) were only recently introduced through the amending act BGBl. I 2021/227.

The amendments made to the Income Tax Act (Einkommensteuergesetz, EStG), the Corporate Tax Act (Körperschaftsteuergesetz, KStG), and the Federal Fiscal Code (Bundesabgabenordnung, BAO) are discussed distinguishing between new and amended provisions. Each section begins with a brief description of the legal situation before the ATAD's adoption. Beyond an overview of the transposition measures, the particular objective of this contribution is to elucidate remarkable deviations from the ATAD's standards and discuss selected issues arising in the specific Austrian context. It concludes with observations on Austria's approach in relationship to the Austrian tax policy.

2 New provisions

2.1 *Interest Limitation Rule*

Instead of a general interest limitation rule, the Austrian corporate tax system has entailed two targeted rules refusing the deduction of interest (and licences) in situations that have been deemed particularly susceptible to abuse.[3] Article 12 (1) (9) KStG denies the deduction of interest payments if they are related to the direct or indirect acquisition of shares from an associated corporation or a shareholder that may exercise a dominant influence. To combat circumvention schemes,[4] this provision also applies to interest payments related to debt financed capital increases and contributions in the context of such

Notes

* Researcher in the Department of Tax Law, University of Vienna; senior associate at BDO Austria. She recently submitted her PhD thesis on the EU anti-abuse principle and its implications for the abuse concepts in the ATAD. Email: stefanie.geringer@univie.ac.at.

[1] 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] Council Directive 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144/1 (7 June 2017).

[3] AT: ErlRV 981 BlgNR 24. GP, at 132; AT: ErlRV 24 BlgNR 25. GP, at 13.

[4] AT: ErlRV 981 BlgNR 24. GP, at 132.

acquisitions of shares. Article 12 (1) (10) KStG disallows the deduction of interest and licence payments paid to an associated corporation or a shareholder that may exercise a dominant influence if these payments are not subject to tax or effectively taxed at a rate lower than 10%.[5]

The late transposition of the interest limitation rule in Article 12a KStG that became effective only in 2021[6] derives from the fact that Austria considered Article 12 (1) (9) and particularly Article 12 (1) (10) KStG to be equally effective national target rules for preventing base erosion and profit shifting (BEPS) risks pursuant to Article 11 (6) ATAD. The European Commission, however, did not share Austria's view and initiated an infringement procedure.[7] Nevertheless, the country had to adopt Article 4 ATAD earlier than originally scheduled.

Austria's opposition to the interest limitation rule in the negotiation process[8] explains the lawmakers' intention to merely adopt the ATAD's minimum standard and hence make broad use of the directive options[9] with the exception of the carve-out for financial undertakings.[10,11] The decision not to implement the latter might stem from the fact that their inclusion in the scope of the interest limitation rule can prove to be favourable for tax groups that include financial institutions. Their taxable interest revenues usually supersede their deductible borrowing costs, therefore, they are able to generate additional potential for interest deduction in the group.[12]

Article 12a KStG was introduced in addition to Article 10 (1) (9) and (10) KStG.[13] The interplay between these was not made clear in the legal text.[14] Due to the *lex specialis* rule, the interest limitation rule should still only be applicable in situations that are not already encompassed within the stricter[15] domestic measures.[16] This can arguably also be derived from legal materials in which it is stipulated that interest payments that are neutralized by Article 10 (1) (9) and (10) KStG should not be taken into consideration for purposes of the calculation of the exceeding borrowing costs.[17]

A characteristic of all new (ATAD-induced) provisions, among them is the interest limitation rule, is that they follow a coherent structure. Article 12a (1) KStG stipulates, as a general rule, that exceeding borrowing costs are deductible in the tax period in which they are incurred only up to 30% of the corporation's earnings before interest, taxes, depreciation and amortization (EBITDA). If the corporation belongs to a tax group pursuant to Article 9 KStG, the interest limitation rule is only applied at the level of the group parent on the basis of the consolidated taxable profit.[18]

Article 12a (1) KStG further entails an allowance for exceeding borrowing costs up to EUR 3 million per financial year in accordance with Article 4 (3) (1) (a) ATAD.[19] The implementation of the highest allowance possible is a consequential means to execute the lawmakers' aim to adopt a rather minimalist version of the ATAD's interest limitation rule. Due to Austria's characteristics as a comparably small economy, it might still prove to be problematic. Its combined effects with the other carve-outs will likely result in a broad non-applicability of the interest limitation rule in domestic situations. Thus, the issue of potential covert discrimination could come to the forefront. It is still uncertain whether the Court of Justice of the European Union (CJEU) would eventually rely on a comparably strict standard

Notes

5 Accordingly, it can be assumed that Art. 12 (1) (10) KStG applies only to cross-border situations in practice. Its compatibility with the fundamental freedoms hence appears highly questionable.

6 AT: Art. 26c (80) KStG.

7 https://ec.europa.eu/commission/presscorner/detail/en/INF_19_4251 (assessed 29 Dec. 2021).

8 G. Mayr, *Anti-BEPS-RL: wirksames Mittel zur Bekämpfung von Steuervermeidungspraktiken?*, 72(14) Betriebs-Berater I (2017).

9 Such a 'prudent adoption' of the ATAD's interest limitation rule was already recommended in C. Staringer, *Die Umsetzung der ATAD in Österreich durch das Jahressteuergesetz 2018*, 28(12) Steuer und Wirtschaft International 574, 585 (2018).

10 Article 4 (7) ATAD.

11 For a detailed comparison, *see* S. Geringer, *Die neue Zinsschranke im unionsrechtlichen Kontext*, 31(2) Steuer und Wirtschaft International 82, 83–84 (2021).

12 Similarly, H. Zöchling & F. Brugger, *Zinsschranke im österreichischen KStG ab 1. 1. 2021*, 95(34) Steuer- und WirtschaftsKartei 1564, 1567 (at fn. 13) (2020).

13 AT: ErlIA 1109/A 27. GP, at 15.

14 As was done in the context of the hybrid mismatches rules (s. 2.3).

15 In contrast to the interest limitation rule, both Art. 10 (1) (9) and (10) KStG foresee a full denial of interest deductions in all cases.

16 Such as interest payments to an associated foreign corporation that are effectively taxed at a rate below 10% abroad (Art. 12 (1) (10) KStG). Similarly, M. Mayer, *Die Zinsschranke – Artikel 4 Anti-Tax Avoidance Directive und seine Umsetzung in Österreich* 321 (LexisNexis 2019); Zöchling & Brugger, *supra* n. 12, at 1567. For a detailed comparison, *see* D. W. Blum, *Das Zusammenspiel von Zinsschranke, Hinzurechnungsbesteuerung und Abzugsverbot für niedrigbesteuerte Zins-/Lizenzzahlungen*, 39(4) Recht der Wirtschaft 289, 290–291 (2021).

17 AT: ErlIA 1109/A 27. GP, at 23.

18 AT: Art. 12a (7) (1), (3) and (4) KStG.

19 The same threshold is relevant for both individual corporations and tax groups.

as that in its case law originating in *Bosal*[20] given its rather generous approach in *Vodafone Magyarország*[21] and *Tesco-Global Áruházak*.[22,23]

The interest limitation rule is applicable to all corporations that are fully liable to tax in Austria and to domestic permanent establishments (PEs) of foreign corporations.[24] Standalone entities, however, are carved out from the personal scope.[25] To meet their criteria, taxpayers must neither be part of a consolidated group for financial accounting purposes nor have an associated enterprise. When compared to Article 4 (3) (3) ATAD, Article 12a (2) KStG more specifically refers to the absence of *foreign* PEs. The concept of PEs is usually used to describe business branches in other countries than the corporation's state of residence, therefore, this deviation should fulfil the ATAD's requirements.

Exceeding borrowing costs are understood as the amount by which deductible borrowing costs exceed taxable interest revenues in the relevant tax period. Borrowing costs are further defined as any remuneration on all forms of debt including all payments associated with the raising of finance or other costs economically equivalent to interest. Article 12a (3) KStG hence reflects the key aspects of Article 2 (1) and (2) ATAD.

In accordance with Article (4) (2) ATAD, the EBITDA is described as the adjusted sum of the corporation's income before the interest limitation rule's application. The relevant adjustments concern the addition of the tax-adjusted amounts of depreciation and exceeding borrowing costs as well as the deduction of tax-adjusted amounts of amortization.[26]

The option to introduce equity escape clauses[27] was transposed both for individual corporations and tax groups. Exceeding borrowing costs are hence fully deductible when a corporation is a member of a consolidated group for financial accounting purposes and its equity ratio is not more than two percentage points below the consolidated group's equivalent ratio.[28] For purposes of the tax group escape clause, the comparison should be made between the tax group's equity ratio[29] and the equivalent ratio of the consolidated group.[30]

Article 12a (6) KStG entails the carry forward rules for exceeding borrowing costs (unlimited) and unused interest capacity (up to five years) in accordance with Article 4 (6) (c) ATAD.[31] It is further concretized that the oldest carry forwards of unused interest capacity should predominantly be used. This provision ensures that the risk of forfeiture of unused interest capacity is reduced to the greatest extent possible; this serves the EU principle of proportionality. Hence, it should meet the requirements of EU law. Both the carry forwards of exceeding borrowing costs and unused interest capacity, however, are subject to a respective request by the taxpayer (presumably for administrability reasons[32]). Taxpayers can make their claims not only (usually) in their tax assessments but also at a later stage (i.e., in an appeal).[33]

The carve-out for loans used to fund long-term intra-EU public infrastructure projects[34] was only introduced after the review of the legal draft.[35] While its wording broadly mimics Article 4 (4) (b) ATAD, a remarkable divergence can still be identified: Nuclear power stations and climate-damaging infrastructure projects were generally excluded from its scope of application. This restriction resonates with the current Austrian tax policy to set initiatives for green investments.[36]

Notes

20 CJEU 18 Sept. 2003, C-168/01, *Bosal*, ECLI:EU:C:2003:479.

21 CJEU 3 Mar. 2020, C-75/18, *Vodafone Magyarország*, ECLI:EU:C:2020:139.

22 CJEU 3 Mar. 2020, C-323/18, *Tesco-Global Áruházak*, ECLI:EU:C:2020:140.

23 *Vodafone Magyarország* (C-75/18), *supra* n. 21, para. 52; *Tesco-Global Áruházak*, *supra* n. 22, para. 72.

24 AT: Art. 12a (2) KStG. This resonates with the personal scope of Art. 1 (1) ATAD.

25 Art. 4 (3) (1) (b) ATAD.

26 AT: Ar. 12a (4) KStG. The relevant amounts of depreciation and amortization are elucidated in more detail (referring to the specific provisions in the domestic laws) in a regulation in accordance with Art. 12a (8) KStG (AT: BGBl. II. 2021/390).

27 Art. 4 (5) (a) ATAD.

28 AT: Art. 12a (5) KStG.

29 Which should be determined on the basis of a (fictitious) subgroup financial statement.

30 AT: Art. 12a (7) (2) KStG. The equity escape clause is hence always applicable if the tax group is identical to the consolidated group for financial accounting purposes.

31 Art. 12a (6) (3) KStG allows the Minister of Finance to issue a regulation on the carry forwards' fate in the event of reorganizations. As of writing, only a regulation draft has been published.

32 In this sense, Zöchling & Brugger, *supra* n. 12, at 1572.

33 AT: ErlIA 1109/A BlgNR 27. GP, at 26.

34 Art. 4 (4) (b) ATAD.

35 AT: Art. 12a (9) KStG.

36 Similar carve-outs can be found inter alia in the degressive depreciation rule (AT: Art. 7 (1a) (d) EStG) and the recently adopted investment allowance (AT: Art. 11 (3) (6) EStG).

A grandfathering clause[37] was adopted in the transition rules of the KStG.[38] This can be explained by its limited relevance as it is only applicable until 2026. The restriction was introduced as a means of simplification to avoid eventual difficulties in distinguishing old contracts from those that are potentially amended.[39] Remarkably, Austria intentionally[40] adopted the grandfathering clause more broadly, hence for all contracts concluded before 17 June 2016.[41] The lawmakers thereby aimed to draft this provision symmetrically in relation to the general rules.[42] Although the extension arguably serves the purpose of Article 4 (4) (a) ATAD,[43] a respective decision by the CJEU must still be awaited.

2.2 *Controlled Foreign Company Rule*

Austria considered introducing a CFC rule already in the 1990s but finally refrained from it due to expected unproportional increases in administrative burden compared to its added value.[44] Instead, two switch-over clauses with differing application requirements for intercompany holdings and portfolio investments were implemented in the domestic participation exemption regime.[45] This legal background is capable of explaining why Austrian representatives fiercely (albeit unsuccessfully) advocated for the implementation of a switch-over clause in the ATAD.[46]

When adopting Articles 7 and 8 ATAD, it was decided to introduce a new Article 10a in the KStG that should include both the CFC rule and the amended (single[47]) switch-over clause. Several application requirements were further concretized through the regulation on the passive income of low-taxed corporations (VO-Passiveinkünfte niedrigbesteuerte Körperschaften, hereafter VO).[48]

The parallel existence of these two anti-BEPS measures in the Austrian corporate tax regime leads to increased complexity. Nevertheless, the switch-over clause was kept to safeguard the former protection level against abusive arrangements.[49] To still provide for a rather smooth interaction, their application requirements were partly unified. Hence, the ATAD-induced definitions of passive income and low taxation were also deemed relevant for purposes of the amended switch-over clause. Moreover, Austria adopted the ATAD's CFC rule pursuant to the categorical approach[50] that was considered to be more compatible with the switch-over clause.[51]

The Austrian approach is characterized by broadly implementing (only) the ATAD's minimum standard.[52] Accordingly, Austria made use of both options encompassed in Article 7(3) ATAD.

Article 10a (1) (1) KStG stipulates, as a general rule, that passive income of a low-taxed CFC is included in the domestic controlling corporation's tax base in accordance with the requirements of the following provisions.[53]

The relevant categories of passive income are enumerated in Article 10a (2) KStG. Despite its broad convergence with Article 7 (2) (a) ATAD, the list differs from the wording in the directive. Only dividends and income from the disposal of shares that would also be subject to tax at the domestic controlling corporation are captured by the national passive income definition. This requirement was included after the review of the legal draft when the fact was pointed out that the inclusion of income that would be tax exempt under

Notes

37 Art. 4 (4) (a) ATAD.

38 AT: Art. 26c (80) KStG.

39 AT: ErlIA 1109/A BlgNR 27. GP, at 24.

40 *Ibid.*

41 Art. 4 (4) (a) ATAD only refers to loans.

42 AT: ErlIA 1109/A BlgNR 27. GP, at 24.

43 Concurring, e.g., Zöchling & Brugger, *supra* n. 12, at 1566.

44 For example, W. Loukota & P. Quantschnigg, *Neues österreichisches Mißbrauchsabwehrrecht gegenüber ausländischen Basisgesellschaften*, 5(1) Steuer und Wirtschaft International 9, 10 (1995).

45 Former Art. 10 (4) through (6) KStG.

46 For example, G. Mayr & E. Titz, *Umsetzung der Anti-BEPS-RL: Hinzurechnungsbesteuerung ergänzt Methodenwechsel nach § 10 Abs 4 KStG*, 36(5) Österreichisches Recht der Wirtschaft 317, 319 (2018).

47 For simplification reasons, the specific regime for portfolio investments was abolished. Additionally, the scope of the switch-over clause for intercompany holdings was extended to cover participations of at least 5% (what is referred to as qualified portfolio investments).

48 The respective legal basis can be found in Art. 10a (10) KStG.

49 AT: ErlRV 190 BlgNR 6. GP, at 2. For a critical stance, *see* Staringer, *supra* n. 9, at 579.

50 Art. 7 (2) (a) ATAD.

51 For example, K. Spindler-Simader & V. Wöhrer, *Implementation of the EU Anti-tax Avoidance Directive (2016/1164) in Austria*, 58(7) Eur. Tax'n 286, 295 (2018).

52 This can likely be traced back to Austria's traditional opposition against the introduction of a CFC rule; *see also* Staringer, *supra* n. 9, at 575.

53 Art. 10a (1) (2) KStG contains the general rule for the amended switch-over clause.

the participation exemption regime anyway[54] would only cause an administrative burden.[55] As reasonable as this argument may seem, however, it is unclear whether this provision complies with the requirements of the ATAD.

The relevant actual tax rate for purposes of the low taxation requirement was defined to be exactly 12.5%, hence 50% and not less than 50% of the current Austrian corporate tax rate (25%) as required by Article 7 (1) (b) ATAD. This represents one of the few cases in which Austria went beyond the ATAD's minimum standard, in this context, to also encompass CFCs that are resident in Ireland or Cyprus.[56] In accordance with the ATAD's requirements, the CFC's actual corporate tax burden shall be determined by comparing the actual tax paid abroad with its income. For this purpose, the CFC's income must be converted in accordance with the Austrian profit determination rules.[57]

When Article 4 ATAD was adopted, Article 10a (3) KStG was amended to clarify that Article 12a KStG shall not be considered in the conversion of the CFC's income 'for simplicity reasons'.[58] The ATAD itself, however, generally does not address the interplay between the interest limitation and the CFC rules.[59] A respective preliminary request by a national court would thus be welcomed to provide legal certainty on this matter that is not only of relevance for the Austrian transposition measures.

The carve-out for CFCs accruing one third or less of their income from enumerated categories of passive income[60] was adopted in Article 10a (4) (1) KStG. As a matter of goodwill, Article 2 (2) VO allows taking an average view of the current and the past two years if the one-third threshold is exceeded by not more than 25% in the relevant tax year. Though admittedly taxpayer-friendly, it is questionable whether this provision meets the ATAD's minimum standard.

To qualify as a controlling corporation pursuant to Article 10a (4) (2) KStG, a corporation must by itself or together with associated enterprises directly or indirectly participate in the voting rights or the capital of more than 50% or be entitled to receive more than 50% of the profits. These criteria reproduce the requirements of Article 7 (1) (a) ATAD. This assertion also remains valid for the definition of associated enterprises. In accordance with Article (2) (4) ATAD, the relevant threshold is hence established at 25%. It was still clarified that associated enterprises can be natural or legal persons as well as partnerships.

Arguably, the substance carve-out is the centrepiece of the ATAD's CFC rule. The logic of the Austrian CFC rule was drafted in accordance with the Commission draft. Hence, the CFC's passive income is only included in the controlling corporation's tax base in cases of an absence of substantial economic activity.[61] This relationship of rule and exception seems to better correlate with the sequence in the assessment of national CFC rules in CJEU case law.[62]

The substance carve-out[63] was explicitly[64] extended to all third country situations despite the general intention to merely adopt the minimum standard.[65] Its broad scope still serves the legislators' second overall aim in context with the ATAD's adoption which is to design the transposition provisions as simple as possible to reduce the related administrative burden.[66] Due to the *Dzodzi* doctrine,[67] the rather strict EU abuse

Notes

[54] Particularly dividends and income from the disposal of shares related to intercompany holdings (Art. 10 (2) and (3) KStG); *see* in detail, e.g., S. Bergmann & L. Gläser, *§ 10a Abs 2 KStG*, in *Hinzurechnungsbesteuerung und Methodenwechsel* at m.nos. 3/58–3/60 (S. Bergmann, L. Gläser, E. Pinetz & P. Stanek eds, LexisNexis 2020).

[55] *See* particularly the statement by the Chamber of Tax Advisors; AT: 40/SN-36/ME 26. GP, at 4.

[56] For example, Mayr & Titz, *supra* n. 46, at 320.

[57] The computation procedure is described in detail in Art. 1 VO.

[58] AT: ErlIA 1109/A BlgNR 27. GP, at 22. Conversely, the CFC's income should be considered in the EBITDA's calculation pursuant to Art. 12a (4) KStG; M. Gruber, *Die Wechselwirkungen von Hinzurechnungsbesteuerung und Zinsschranke*, 80(13/14) Österreichische Steuer-Zeitung 660, 662–663 (2020).

[59] This also concerns the issue of potential juridical double taxation in the case of parallel applicability in Austria. Hence, this occurs when interest payments from the controlling corporation in Austria to the CFC abroad are, in a first step (partially) not deductible in accordance with Art. 12a KStG and, in a second step, included in the controlling corporation's tax base pursuant to the CFC rule. For a detailed discussion in the context of the Austrian transposition provisions, *see* Blum, *supra* n. 16, at 291–296 (identifying two possible ways to resolve this issue by either neutralizing the included interest payments in the calculation of the exceeding borrowing costs or by restrictively interpreting the term 'deductible borrowing costs' (Art. 12a (3) KStG)).

[60] Art. 7 (3) (1) ATAD.

[61] *See also* P. Stanek & K. Stückler, *§ 10a Abs 4 KStG*, in *Hinzurechnungsbesteuerung und Methodenwechsel* at m.no. 5/50 (S. Bergmann, L. Gläser, E. Pinetz & P. Stanek eds, LexisNexis 2020).

[62] This was apparently the lawmakers' aim as the legal materials in this context specifically refer to the necessity to adopt the CFC rules in accordance with the EU fundamental freedoms; AT: ErlIA 1109/A BlgNR 27. GP, at 22.

[63] AT: Art. 10a (4) (3) KStG.

[64] AT: ErlRV 190 BlgNR 26. GP, at 23–24.

[65] Arguably, the introduction of a substance carve-out would nevertheless be necessary in relation with third countries in the case of effective mutual assistance; *see* particularly CJEU 26 Feb. 2019, Case C-135/17, *X*, ECLI:EU:C:2019:136, para. 86.

[66] Mayr & Titz, *supra* n. 46, at 326; Stanek & Stückler, *supra* n. 61, at m.no. 5/51.

[67] Originating in CJEU 18 Oct. 1990, Joined Cases C-297/88 und C-197/89, *Dzodzi v. Belgian State*, ECLI:EU:C:1990:360.

concept that is associated with the idea of wholly artificial arrangements[68] is hence relevant for all situations captured by the Austrian CFC rule.

This assertion also remains applicable in relation to tax jurisdictions included in the EU blacklist. By deeming the low taxation criterion to be fulfilled in all situations involving listed countries and territories in Article 10a (11) KStG, Austria met its respective political obligation. However, the defensive measure is solely aimed at establishing a presumption of low taxation. The substance carve-out hence remains fully applicable (rendering the defensive measure arguably ineffectual).[69]

The essence of the CFC rule's substance carve-out is further specified in Article 4 VO. According to Article 4 (1) VO, the existence of substantive economic activity shall be assessed considering the overall scenario of the circumstances. This provision seems to be inspired by and thus complies with CJEU case law.[70] Similar findings can be made for Article 4 (2) VO stipulating that the foreign company should have sufficient substance (staff, equipment, assets, and premises) to perform the alleged economic activities.[71] By contrast, Article 4 (3) VO entails general (albeit refutable[72]) presumptions of abuse in the following situations:

– a mere holding of participations and their disposal;
– a routing of assets; and
– a bundling of intangible assets for the production of which the foreign company did not essentially bear the expenses itself.

These should be interpreted and applied in accordance with the prerequisites of EU law.[73] Reading Article 4 (3) VO as a mere guideline in the evaluation of potentially abusive arrangements would moreover help reconcile it with both Article 4 (1) and (2) VO and Article 10a (4) (3) KStG.

Inversely, Article 4 (4) VO entails a 'positive presumption'. Hence, the CFC's economic activity is deemed substantive if the staff, equipment, assets, and premises are used for such activities to at least 1/3, and at least one third of its income is generated from these activities. It appears questionable whether this presumption of substantive economic activity complies with the ATAD's minimum standard.

In accordance with Article 8 (1) and (4) ATAD, the (positive) income added to the controlling corporation's tax base shall be calculated in accordance with the Austrian profit determination provisions and included in the tax period in which the CFC's fiscal year ends. The CFC's income is moreover only included in proportion to the taxpayer's participation. The Austrian provisions further clarify that profit participation should supersede capital participation in the case of divergences.[74] Due to the absence of a respective tie breaker rule in the ATAD, it will be the CJEU's responsibility to decide on the provision's compatibility with the requirements of the directive.

The CFC rule is analogously applicable to foreign tax exempt PEs pursuant to Article 10a (6) (2) KStG. A provision on its analogous application was also introduced for corporations registered in Austria that are deemed tax resident of another state on the basis of the relevant bilateral tax treaty.[75] This provision makes sense considering that Austria generally uses the place of effective management as tie breaker criterion in cases of dual residency (also after the amendments to the model tax convention (MTC) of the Organisation of Co-Operation and Development (OECD) through the update 2017). Hence, these corporations are comparable to foreign companies.[76]

The carve-out for financial undertakings[77] was transposed in Article 10a (8) KStG. Remarkably, it was

Notes

[68] Notwithstanding that the threshold was lowered in the 'Danish Cases'. It now suffices that a corporation 'makes only an insignificant taxable profit when it acts as a conduit company' (CJEU 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, ECLI:EU:C:2019:134, para. 130). This standard cannot be found to equal the Court's earlier concept where reference was specifically made to letterbox and front subsidiaries (CJEU 12 Sept. 2006, C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, ECLI:EU:C:2006:544, para. 68). Arguably, the ECJ adapted its standard in an effort to adjust the EU abuse concept to the 'post-BEPS' and hence 'post-ATAD' world. Such a development was already somewhat expected in the Austrian literature; e.g., Staringer, *supra* n. 9, at 577–578; Mayr & Titz, *supra* n. 46, at 326.

[69] S Geringer, *Umsetzung und Anwendung der EU-Blacklist in den Mitgliedstaaten*, 31(8) Steuer und Wirtschaft International 415, 422–423 (2021).

[70] For example, CJEU 7 Sept. 2017, C-6/16, *Eqiom and Enka*, ECLI:EU:C:2017:641, para. 32: 'In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry *out an individual examination of the whole operation at issue*'. (emphasis added).

[71] For example, *N Luxembourg 1 and Others* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 68, para. 131: 'The absence of actual economic activity must, *in the light of the specific features of the economic activity in question*, be inferred from an analysis of all the relevant factors' (emphasis added).

[72] These presumptions were originally drafted as being irrebuttable. This was changed after the review (potentially because its conformity with EU law had been (rightfully) challenged).

[73] For example, situations involving a routing of assets should be assessed in accordance with the CJEU's findings on conduit companies in Joined Cases *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 68, paras 124–139. For a critical stance on the presumptions of abuse for holding companies, *see also* K. Spies & V. Wöhrer, *Verfahrensrecht und Amtshilfe*, in *Hinzurechnungsbesteuerung und Methodenwechsel* at m.no. 12/20 (S. Bergmann, L. Gläser, E. Pinetz & P. Stanek eds, LexisNexis 2020).

[74] AT: Art. 10a (5) KStG.

[75] AT: Art. 10a (6) KStG.

[76] AT: ErlRV 190 BlgNR 26. GP, at 26.

[77] Art. 7 (3) (2) ATAD.

declared applicable for both the CFC rule and the domestic switch-over clause.

Article 10a (9) KStG entails detailed provisions on the avoidance of double taxation. Distributions of profits that were already included the controlling corporation's tax base on the basis of the CFC rule are thus exempt from corporate taxation. Similarly, such income should be deducted from the tax base in the case of disposal of the participation or the PE as far as the proceeds from the disposal were previously added in the tax base pursuant to the CFC rule. It was additionally clarified that the CFC's income shall not be added to the controlling corporation's tax base insofar as it was already taxed at another associated enterprise in Austria. The possibility to deduct the tax paid abroad[78] was made subject to a respective claim by the taxpayer. The Austrian adoption rule also allows for a carry forward of any exceeding foreign tax.

2.3 *Hybrid Mismatches Rules*

Already before adopting the ATAD, mismatches stemming from hybrid financial instruments had been addressed by Article 10 (7) KStG in inbound situations. Dividends have hence not been exempt from corporate tax inasmuch as they have been deductible in the payer's host state to counter double non-taxation.[79] The (non-)deductibility of the payments in the other state has hence been the decisive factor for defining the boundaries of the scope of application of Article 10 (7) KStG and the switch-over clause[80] respectively (the former preceding the latter).[81] Outbound situations (i.e., deductible payments not being 'sufficiently' taxed in the recipient state from the Austrian perspective) have been targeted by Article 12 (1) (10) KStG insofar as they have concerned interest and royalty payments.[82]

In a similar fashion as that in the context of the interest limitation rule,[83] Austrian lawmakers decided to keep these national provisions. As of 2020,[84] they have yet been complemented by Article 14 KStG. This new provision is tailored to apply to all other situations that are additionally dealt with in the ATAD's hybrid mismatches rules.[85] Accordingly, Article 14 KStG is only applicable in inbound situations that are not already covered by ex-Article 10 (7) which is now Article 10 (4) KStG.[86] Similarly, Article 12 (1) (10) KStG precedes Article 14 KStG in outbound situations.[87]

Comparing Article 14 KStG with the respective provisions in the ATAD reveals a high degree of identicalness. While it broadly adheres to the ATAD's essence, the provisions were still kept comparably brief and simple.[88] Article 14 KStG has moreover been divergently structured and follows a clear logic. This arguably increases its comprehensibility in comparison to the (highly complex) hybrid mismatches rules in the ATAD. The broad coherence with the ATAD resonates with the legislators' aim to merely adopt the minimum standard and only go beyond the mandatory rules when it serves simplicity.[89]

Article 14 (1) KStG stipulates, as a general rule, that tax discrepancies in the context of hybrid mismatches are neutralized pursuant to the requirements of the following provisions. Tax discrepancies are defined as deduction/non-inclusion (D/NI) and double deduction (DD) situations respectively in Article 14 (2) KStG.

Hybrid mismatches can occur in D/NI situations due to differences in the:

– qualification of financial instruments (hybrid financial instruments);
– attribution of income from a transferred financial instrument (hybrid transfer);
– assessment of the tax subjectivity of the payer or recipient (hybrid entity);
– allocation of earnings and expenses to a PE (hybrid PEs); and
– assessment of the existence of a PE (disregarded PE).

In DD situations, hybrid mismatches originate from a tax discrepancy due to specific tax regimes that lead to a DD of expenses of hybrid entities, PEs, or dual-resident corporations. These tax discrepancies should arise either between associated companies, the head office and a PE, two or more PEs of the same taxpayer, or due to a

Notes

78 Art. 8 (7) ATAD.

79 AT: ErlRV 981 BlgNR 24. GP, at 131.

80 *See* s. 2.2.

81 For example, S. Kirchmayr & S. Geringer, *Ausgewählte Fragen zur Hinzurechnungsbesteuerung und zum Methodenwechsel „neu"*, in *Handbuch Hinzurechnungsbesteuerung* 48 (Kirchmayr et al. eds, Linde 2020).

82 *See* s. 2.1.

83 *Ibid.*

84 AT: Art. 26c (72) KStG.

85 AT: ErlIA 984/A 26. GP, at 35–36.

86 When the CFC rule was adopted in Art. 10a KStG, the domestic switch-over clause was amended and moved to Art. 10a (7) KStG (s. 2.2). The domestic hybrid mismatches rule was accordingly renumbered and is now featured in Art. 10 (4) KStG. The provision, however, has not been substantially amended.

87 *See also* Kirchmayr & Geringer, *supra* n. 81, at 48.

88 C. Schlager, *Die neuen Regelungen zu hybriden Gestaltungen im Überblick*, 29(5) Steuer und Wirtschaft International 239, 247 (2019).

89 *Ibid.*, at 247.

structured arrangement to effectuate the consequences of the hybrid mismatches rules.[90]

Deemed payments between the head office and a PE are not mentioned in the provisions on the manifestation forms of hybrid mismatches as it was felt that there was no need for such a rule. Contractual relationships between a head office and a PE are generally not recognized for Austrian income and corporate tax purposes. Moreover, Austria issued a reservation on Article 7 (3) OECD MTC.[91]

In contrast to Article 2 (4) (2) (a) ATAD, Article 14 (4) KStG establishes the participation threshold for the associated enterprise criterion at 25%. Austria went beyond the ATAD's minimum standard so that the same benchmark is used for both the CFC rule and Article 14 KStG. Hence, it was aimed at safeguarding the consistency in the Austrian corporation tax system.[92] Associated enterprises are additionally found to exist in a consolidated group for financial accounting purposes.

A structured arrangement can only be deemed to exist when the tax discrepancy was priced into the terms of the arrangement, or it has been designed to produce a hybrid mismatch outcome. In accordance with Article 2 (11) ATAD, a carve-out is included for situations when it cannot be reasonably assumed that a taxpayer was aware of the hybrid mismatch, or the value of the benefit was not shared.[93]

The primary and secondary responses to neutralize D/NI and DD situations are described in Article 14 (6) and (7) KStG, respectively. Accordingly, deductions are disallowed in an outbound D/NI situation.[94] In the reversed circumstance, earnings underlie a corporate tax at the domestic shareholder corporation if the other country does not deny the deduction of a hybrid entity's expenses. The applicability of the inbound D/NI rule was limited to scenarios involving hybrid entities to make use of the margin of freedom provided by the directive. A provision concerning the secondary response in connection with hybrid financial instruments was not introduced in Article 14 (6) KStG as these are already addressed by Article 10 (4) KStG.[95]

In inbound DD situations, the deduction is denied to the domestic (shareholder) corporation. When it is not disallowed in the other state in the reversed situation, the deduction is denied to the domestic hybrid entity and PE. Dual resident corporations should not deduct their expenses in Austria except when they are considered Austrian residents on the basis of an intra-EU bilateral tax treaty. In accordance with Article 9 (1) ATAD, these provisions are not applicable when any such deduction can be set off against dual inclusion in the current or subsequent tax years.

Income from a disregarded PE is generally subject to Austrian corporate tax. Article 14 (8) KStG is not applicable if the PE's income is tax exempt under a bilateral tax treaty with a third country.

Expenses for a payment to an associated enterprise in a third country may not be deducted in Austria when these payments are offset against deductible expenses in a third country within a hybrid mismatch. This provision is aimed at neutralizing imported hybrid arrangements. Accordingly, it does not apply if one of the third countries involved has already neutralized the hybrid mismatch.[96]

Article 14 (11) KStG limits the benefit of relief for tax withheld at source on a payment derived from a transferred financial instrument in proportion to the net taxable income regarding such a payment. For the application of this provision, it is further required that the hybrid transfer is designed to produce relief to more than one of the parties involved. Although source taxes can generally only be credited up to the maximum creditable amount in Austria, Article 9 (6) ATAD was nevertheless transposed in a specific provision as a precautionary defence measure against abuse.[97]

Until very recently, a provision adopting the reverse hybrid mismatches rule (Article 9a ATAD) was the great absentee in Article 14 KStG. It was still included in the draft version[98]; ultimately, Austrian lawmakers, however, decided to make full use of the transposition period[99] and hence will not implement a reverse hybrid mismatches rule before 2022.[100] Instead, Article 14 (10) KStG has clarified that neutralizations of hybrid mismatches qualify as events with retroactive effect so that earlier tax rulings might be corrected upon request pursuant to Article 295a BAO.[101] By the amending act BGBl. I 2021/227, Article 14 (12) KStG was introduced which stipulates a limited tax liability of the foreign controlling company notwithstanding a double tax treaty in the case of reverse hybrid mismatches. Its criteria resonate with the ATAD's requirements. Hence, the local

Notes

90 AT: Art. 14 (3) KStG.

91 AT: ErlIA 984/A 26. GP, at 49–50.

92 *Ibid.*, at 50. *See also* P. Knesl & M. Schilcher, *Sondervorschriften für hybride Gestaltungen*, 37(9) Recht der Wirtschaft 634, 638 (at fn. 36) (2019).

93 AT: Art. 14 (5) KStG.

94 Art. 14 (6) (1) KStG is only applied if the deduction is not already disallowed pursuant to other provisions (e.g., Art. 12 (1) (10) KStG); AT: ErlIA 984/A 26. GP, at 51.

95 AT: ErlIA 984/A 26. GP, at 51.

96 AT: Art. 14 (9) KStG.

97 AT: ErlIA 984/A 26. GP, at 55.

98 On the provision draft, *see* e.g., Schlager, *supra* n. 88, at 245–246.

99 Art. 2 (3) ATAD II.

100 AT: ErlIA 984/A 26. GP, at 36.

101 *Ibid.*, at 54–55.

entity (partnerships, no collective investment vehicles) should be regarded as a taxable person by the other state. Additionally, one non-resident corporation by itself or together with non-resident associated companies must hold a direct or indirect interest in 50% or more of the voting rights, capital interests, or rights to a share of profit. Lastly, it is required that the income from participating in the Austrian partnership is not otherwise taxed in Austria, the host state of the foreign controlling corporation, or any other jurisdiction.

3 Amended provisions

3.1 *Exit Taxation Rule*

Austria already levied exit taxes on business assets (Article 6 (6) EStG)[102] and private capital assets[103] (Article 27 (6) (1) EStG) before the adoption of the ATAD.

Following the developments in CJEU case law,[104] Austria revised its exit taxation rules in 2015. The regime to defer exit taxes until the actual realization of hidden reserves in business assets in cross-border situations within the EU and the European Economic Area (EEA)[105] was replaced by an instalment concept. Hence, exit tax could be paid in instalments over a period of seven years (fixed assets) or two years (current assets) respectively. Instalments for fixed assets became immediately due as soon as the transferred assets were sold, left the books for other reasons, or relocated to non-EU/EEA countries.[106] The deference regime, however, has been kept for purposes of Article 27 (6) (1) EStG inasmuch as taxpayers move to another country in the EU or EEA or transfer their private capital assets to another natural person in an EU/EEA country without payment.[107] For both exit taxation regimes, the scope of application was broadened to cover not only (company) re-domiciliation or transfers of assets but any situation restricting Austria's taxation rights in relation to other jurisdictions.[108] The application of the instalment or deference regimes has been dependent on a respective claim by the taxpayer. Otherwise, exit taxes have been fully levied at the time of departure.[109]

The ATAD's exit taxation rule basically adopts CJEU case law.[110] Accordingly, only a few amendments had to be made to ensure Article 6 (6) EStG meets the ATAD's minimum standard.[111] Instalments for fixed assets are now spread over five years in accordance with Article 5 (2) ATAD.[112] Since the ATAD's transposition, the remaining tax debt for fixed assets also becomes recoverable in cases of re-domiciliation to non-EU/EEA countries, bankruptcy, and liquidation.[113] Furthermore, instalments are immediately due whenever taxpayers fail to (fully) pay the instalments due within twelve months.[114]

The amended provisions are applicable to exits after 2018[115] and affect both individual businesses and corporations. Hence, they go beyond the ATAD's personal scope. Considering that the ATAD's exit taxation rule widely reproduces CJEU case law (i.e., the requirements under EU primary law), the broad transposition of Article 5 ATAD in Austria should not lead to any specific implications. Hence, the effects of the *Dzodzi* case law[116] arguably run dry in this context.

3.2 *General Anti-abuse Rule (GAAR)*

Since the BAO's introduction in 1961, Article 22 (1) declared that the abuse of legal forms and arrangements

Notes

[102] Art. 6 (6) EStG has been applicable to both individual businesses and corporations. This can be derived from Art. 7 (2) KStG that generally stipulates the analogous application of the profit determination rules in the EStG for corporations inasmuch as no specific rules are established in the KStG.

[103] In light of Art. 6 and Art. 13 (1) OECD MTC, introducing an exit taxation rule for immovable assets was not considered necessary. For example, A. Wild, *Die neue Entstrickungsbesteuerung im AbgÄG 2015*, 12(1) taxlex 4, 7 (fn. 33) (2016).

[104] *See* particularly CJEU 23 Jan. 2014, C-164/12, *DMC*, ECLI:EU:C:2014:20; 21 May 2015, C-657/13, *Verder LabTec*, ECLI:EU:C:2015:331.

[105] Provided that full mutual assistance has been effective in relation to these (specifically EEA) countries.

[106] AT: Art. 6 (6) (d) and Art. 27 (6) (1) EStG respectively.

[107] This stems from the fact that it was considered uncertain whether the CJEU would analogously apply its findings in *DMC* (C-164/12) and *Verder LabTec* (C-657/13) to situations in the private sphere, e.g., Wild, *supra* n. 103, at 4.

[108] AT: Art. 6 (6) (b) and Art. 27 (6) (1) EStG respectively. Another event that leads to a restriction of Austria's taxing rights might be, for instance, the entry into force of respective amendments to applicable bilateral tax treaties. For a critical valuation of the comparably restrictive Austrian approach in the context of its implications for Austria's competitiveness, *see* e.g., Staringer, *supra* n. 9, at 583–584.

[109] AT: Art. 27 (6) (1) (a) EStG.

[110] For example, C. Docclo, *The European Union's Ambition to Harmonize Rules to Counter the Abuse of Member States' Disparate Tax Legislations*, 71(7) Bull. Int'l Tax'n 367, 372 (2017); P. Schwarz, *The Exit Tax Rule (Article 5 ATAD)*, in *A Guide to the Anti-Tax Avoidance Directive*, at m.no. 5.11 (W. Haslehner, K. Pantazatou, G. Kofler & A. Rust eds, Edward Elgar Publishing 2020).

[111] For example, Staringer, *supra* n. 9, at 583.

[112] AT: Art. 6 (6) (d) EStG.

[113] The divergent regime for current assets was kept for administrability reasons; AT: ErlRV 190 BlgNR 26. GP, at 7.

[114] AT: Art. 6 (6) (d) EStG.

[115] AT: Art. 124b (330) EStG.

[116] *See* s. 2.2.

under civil law could not reduce or circumvent tax liability. In such situations, taxes were to be levied pursuant to the economic procedures, facts, and circumstances.[117] Article 22 BAO could hence be viewed as a specific manifestation of the economic approach permeating particularly the Austrian income and corporate tax regimes.[118]

According to the (rich) case law of the Administrative Court (Verwaltungsgerichtsh of, VwGH),[119] tax abuse in the context of Article 22 BAO materialized in situations when legal forms appeared unusual and inappropriate in light of the underlying economic goal. Their use could hence only be explained by the related tax savings achieved. By contrast, it could not be stated that tax abuse had occurred just because taxpayers minimized their tax burden in accordance with the opportunities provided by the tax system. In addition to the objective element, the financial authorities had to prove the taxpayer's striving for the aspired tax advantage (subjective element). The latter could still account for considerable non-fiscal reasons for the chosen arrangement.

It was generally assumed that Article 22 BAO and the corresponding case law met the ATAD's requirements.[120] Nevertheless, the national GAAR was amended to ensure compliance with Article 6 ATAD for abusive arrangements in the field of corporate tax law.[121]

Article 22 (1) BAO reads broadly identical. Reference is now made to legal forms and arrangements under *private* law to emphasize that, inter alia, arrangements under company law are also encompassed within the national GAAR. The amended focus reflects longstanding case law and the predominant legal opinion.[122] However, Article 6 ATAD more generally addresses (non-)genuine arrangements. Potential issues arising from the Austrian GAAR's narrower wording are still not likely to gain much relevance in practice. Abusive tax structures are usually based on an exploitation of legal forms and arrangements under private law. Nevertheless, the EU lawmakers' aim to establish a common GAAR with the broadest scope possible to fill all remaining loopholes[123] indicates that Article 22 BAO should be extensively understood in order to also cover the (admittedly very seldom) cases of utilizing legal forms and arrangements under public law.

The new Article 22 (2) BAO includes a definition of tax abuse that resembles a mix of the language in VwGH case law and the ATAD's wording.[124] Arguably, this resonates with the lawmakers' intent to safeguard the former interpretive tradition as much as possible.[125] The choice for a linguistic compromise still predominantly translates into redundancies, deficiencies in readability, and difficulties in the interpretive process. For instance, references are made to both the requirement of a tax saving being the only explanation for the respective structure (domestic case law) and the purpose of obtaining a tax advantage (Article 6 (1) ATAD). Arguably, the term 'tax advantage' is broader and encompasses different types of favourable tax treatment, including tax savings. To ensure compliance with the requirements of EU law, Article 22 (2) BAO must nevertheless be read as covering all types of tax advantages. Hence, solely adopting the ATAD GAAR's abuse definition would have been preferable.[126]

The carve-out demands for valid commercial reasons that reflect economic reality in accordance with Article 6 (2) ATAD. This literal transposition might yet prove problematic in some situations. The Austrian GAAR not only addresses arrangements covered by the ATAD's material scope (i.e., in the field of corporate tax law) but also potentially abusive schemes, inter alia, in the field of income tax law. Particularly in the private sphere, some arrangements might be solely justifiable by non-economic reasons (e.g., anticipated inheritance). For these situations, however, it could be argued that only a broad understanding of the ATAD GAAR's carve-out can be reconciled with the requirement in Article 6 (1) ATAD to consider '*all relevant* facts and circumstances'. An extensive reading should hence meet the requirements of EU law and

Notes

[117] AT: Art. 22 (2) BAO.

[118] In this sense, AT: VwGH 7 Nov. 1989, 86/14/0203.

[119] For example, AT: VwGH 24 May 1978, 2586/77; 7 Nov. 1989, 86/14/0203; 10 Aug. 2005, 2001/13/0018, 0019; 29 Nov. 2006, 2003/13/0034; 18 Oct. 2012, 2010/15/0010; 25 May 2016, 2013/15/0244; 15 May 2020, Ra 2018/15/0113. For a detailed and critical analysis, *see* e.g., M. Lang, *Die Neuregelung des Missbrauchs in § 22 BAO*, 78 (13/14) Österreichische Steuer-Zeitung 419, 420–427 (2018).

[120] For example, A. Langer, *Die Missbrauchsklausel der Anti Tax Avoidance Directive – Handlungsbedarf für Österreich?*, 35(6) Recht der Wirtschaft 459, 464 (2017).

[121] AT: ErlRV 190 BlgNR 26. GP, at 42. It is still remarkable that a need to amend Art. 22 BAO was felt in the context of Art. 6 ATAD while no similar observations were made regarding the broadly identical Art. 1(2) and (3) of Council Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), OJ L 345/8 (29 Dec. 2011), as amended by Council Directive (EU) 2015/121 of 27 Jan. 2015, OJ L 21/1 (28 Jan. 2015). In the same vein, *see* H. Hayden & T. Hayden, *§ 22 BAO (Missbrauch) neu*, 36(6) Recht der Wirtschaft 378, 381 (2018).

[122] AT: ErlRV 190 BlgNR 26. GP, at 41.

[123] Recital 11 ATAD.

[124] For example, Lang, *supra* n. 119, at 433–434; Hayden & Hayden, *supra* n. 121, at 383. This is also somewhat acknowledged in the legal materials; AT: ErlRV 190 BlgNR 26. GP, at 41–42.

[125] AT: ErlRV 190 BlgNR 26. GP, at 42.

[126] Similarly, Lang, *supra* n. 119, at 434.

moreover allow for consistency in the application of Article 22 BAO.[127]

The former Article 22 (2) BAO was changed to a new Article 22 (3) BAO, yet no substantial amendments were made. Article 7 (3) of the Commission draft similarly stipulated that the tax liability be calculated by reference to economic substance in accordance with national law in abusive situations. This was changed in the course of the negotiations so that Article 6 (3) ATAD merely refers to a calculation in accordance with national law. In light of CJEU case law,[128] using an economic approach to determine the relevant consequences nevertheless appears crucial to ensure conformity between the ATAD GAAR and the EU anti-abuse principle.[129] Article 22 (3) BAO hence meets the criteria of the ATAD.[130]

Besides complying with the ATAD's requirements, it was particularly aimed at maintaining a single national GAAR.[131] Article 6 ATAD was accordingly adopted for all situations covered by the BAO, hence particularly all areas of income and corporate tax law (both domestic and cross-border situations). Since its entry into force in 2018,[132] Article 22 BAO has thus been fully shaped by the European abuse concept materializing in the EU anti-abuse principle.[133]

Over the last decades, the VwGH has broadly reproduced the developments in CJEU case law on national anti-abuse provisions in its case law.[134] It has particularly acknowledged the direct effect of the EU anti-abuse principle as a general principle of EU law.[135] The assessment of taxable events in light of an economic approach (i.e., with particular emphasis on a teleological interpretation) forms the basis of both CJEU[136] and VwGH case law. In this context, it can be reasonably assumed that the 'Europeanization' of the Austrian GAAR should not lead to significant changes in the legal valuation.

4 Conclusion

Austria apparently followed a coherent pattern in the adoption of the ATAD.

Provisions equivalent to the interest limitation rule, the CFC rule, and the hybrid mismatches rules were not known in the pre-ATAD corporate tax regime. In these contexts, it was generally intended to merely adopt the minimum standard and make broad use of the options encompassed in the directive. This was done to avoid complexity but arguably also to preserve Austria's attractiveness for (headquarters) companies. The latter is also reflected in the fact that Austria has delayed the adoption of both the interest limitation and reverse hybrid mismatches rules in accordance with the opportunities offered by the ATAD's transposition rules. By contrast, only piecemeal amendments had to be made to the exit taxation rule and the GAAR to ensure compliance with the ATAD.

Deviations from the ATAD's minimum standard were accepted when it served simplicity, administrability, and/or coherence with the Austrian corporate tax system. The objectives of simplicity and administrability are still somewhat thwarted by the lawmakers' decision to retain the former anti-abuse measures in addition to the new ATAD-induced provisions.

The preceding analysis elucidated many of the open questions permeating the Austrian transposition measures. While solutions can be partly derived from CJEU case law or established principles (which is also shown in the pertinent literature), respective decisions by the Court must still be awaited for greater clarity.

Notes

[127] Similarly, Staringer, *supra* n. 9, at 582; *ibid.*, at 429; Hayden & Hayden, *supra* n. 121, at 383.

[128] CJEU 21 Feb. 2006, C-255/02, *Halifax and Others*, ECLI:EU:C:2006:121, paras 94–97; 22 Nov. 2017, C-251/16, *Cussens and Others*, ECLI:EU:C:2017:881, paras 48–50.

[129] Concurring, e.g., B. Kuźniacki, *The GAAR (Article 6 ATAD)*, in *A Guide to the Anti-tax Avoidance Directive*, at m.nos. 6.98 and 6.100 (W. Haslehner, K. Pantazatou, G. Kofler & A. Rust eds, Edward Elgar Publishing 2020); G. Maisto, *Counteracting Tax Treaty Abuses from a European Perspective: Frictions and Interactions Between the OECD PPT and the ATAD GAAR*, in *Thinker, Teacher, Traveler: Reimagining International Tax, Essays in Honor of H. David Rosenbloom* 350 (G. Kofler, R. Mason & A. Rust eds, IBFD 2021).

[130] Concurring, e.g., A. Langer & D. Orzechowski, *Die General Anti Abuse Rule (Art 6 der Anti-tax-Avoidance-Richtlinie)*, in *Die Anti-Tax-Avoidance-Richtlinie* 89 (M. Lang, A. Rust, J. Schuch & C. Staringer eds, Linde 2017); S. Kirchmayr & L. Franke, *Missbrauch neu – Eine „Synthese" sekundären Unionsrechts und der VwGH-Judikatur*, 14(7/8) taxlex 238, 240 (2018).

[131] AT: ErlRV 190 BlgNR 26. GP, at 42.

[132] AT: Art. 323 (57) BAO.

[133] *See* s. 2.2. Similarly, Staringer, *supra* n. 9, at 580; Lang, *supra* n. 119, at 434–435; Hayden & Hayden, *supra* n. 121, at 382.

[134] A particularly illustrative case is AT: VwGH 27 Mar. 2019, Ro 2018/13/004. This decision centred on the valuation of the genuineness of the economic activities of a Luxembourg holding. Only the holding's parent company had staff and office rooms. In light of the CJEU's findings in *Deister Holding and Juhler Holding* (Joined Cases C-504/16 and C-613/16), the VwGH nevertheless considered the holding to perform genuine economic activities.

[135] For example, AT: VwGH 3 Apr. 2019, Ra 2017/15/0070, para. 19.

[136] *See* particularly *N Luxembourg 1 and Others* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 68, paras 103–105.