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The EU Anti-Tax Avoidance Directive: A UK Perspective

Anzhela Cédelle*

Abstract

The EU Directive laying down rules against tax avoidance practices that directly affect the functioning of the Internal Market—the so-called Anti-Tax Avoidance Directive (ATAD)—was adopted on 12 July 2016. It has become one of the core vehicles for implementing the output of the Base Erosion and Profit Shifting (BEPS) initiative, a process led by the G20 and the Organisation for Economic Cooperation and Development (OECD), at the EU level. The ATAD has imposed a legally binding obligation upon EU Member States to incorporate the conclusions of Action 2 (hybrid mismatch arrangements), Action 3 (controlled foreign company (CFC) rules) and Action 4 (interest deductions) of the BEPS in their domestic laws and regulations, and it has secured a certain uniformity of national implementing measures across the EU by imposing a common minimum level of protection. In addition, the ATAD has also set out a general anti-abuse rule (GAAR) and exit tax provisions, which further strengthen the EU's baseline protection of tax revenues. The potential impact of this milestone Directive on the Internal Market and the tax systems of Member States in a short- to long-term period is still to be evaluated. This article offers preliminary thoughts, focusing primarily on the UK's perspective. The author first briefly addresses possible consequences for the EU as a whole, and then analyses the ATAD from the UK's point of view, showing how the adoption of this Directive fits into a broader UK tax policy and law both prior to and following the Brexit vote.

1. Introduction

Direct tax harmonisation in the EU has traditionally been slow in pace and limited in scope. For decades Member States have guarded their tax sovereignty, displaying a strong reluctance to agree upon common solutions in this sensitive field. Some proposals spent years on an EU policy agenda before any progress was made. Yet, this dynamic appears to have changed dramatically in response to the recent anti-tax avoidance and tax transparency priorities. The EU Tax Transparency Package (2015),¹ the Action Plan for Fair and Effective Corporate Taxation (2015)² and the Anti-Tax Avoidance Package (2016)³ have set out ambitious goals to facilitate the convergence of Member States' tax policies. The progress made so far towards their implementation stands out as unprecedented.

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¹ Commission, Tax Transparency Package of 18 March 2015 (IP/2015/4610).

² Commission, Action Plan for Fair and Efficient Corporate Taxation in the EU of 17 June 2015 (IP/15/5188).

³ Commission, Anti-Tax Avoidance Package of 28 January 2016 (IP/16/159).

One of the key outputs of this unique political momentum was a swift adoption of the ATAD on 12 July 2016.⁴ The Directive lays down rules against the erosion of tax bases and the shifting of profits within the Internal Market and out of it. The rules on interest limitation (article 4), CFCs (articles 7 and 8) and hybrid mismatches (article 9) seek to ensure that Member States implement the output produced under the G20-OECD initiative against BEPS.⁵ Two other accompanying measures—a GAAR (article 6) and an exit taxation (article 5)—have been put in place in pursuit of the EU’s own tax policy priorities. The ATAD is a bold step forward and it sets the scene for another far-reaching legislative proposal of the European Commission (Commission) on the common (consolidated) corporate tax base, which will be relaunched in the autumn of 2016.⁶

Given its broad scope, the ATAD raises many questions concerning its potential impact on the Internal Market and the tax systems of Member States. This article offers preliminary thoughts on these issues, focusing primarily on the UK’s perspective. The author first briefly addresses possible consequences for the EU as a whole, and then analyses the ATAD from the UK’s point of view, showing how the adoption of this Directive fits into a broader UK tax policy and law both prior to and following the Brexit vote.

2. The Internal Market’s perspective

On 8 December 2015, shortly following the publication of the final reports under the OECD BEPS project and their endorsement by the G20, the Council of the European Union (Council) called for “common, yet flexible, solutions at the EU level consistent with OECD BEPS conclusions”.⁷ The Council emphasised the need for “an effective, swift and coordinated implementation by Member States” and expressly pointed to an EU directive as the preferred instrument for the implementation of the G20-OECD BEPS conclusions.⁸ The Commission’s response was instant. On 28 January 2016, it published the Anti-Tax Avoidance Package.⁹ At the heart of the package were two legislative proposals, which addressed selected issues of BEPS and proposed to extend the exchange of information between Member States’ tax authorities to

⁴ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1.

⁵ OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2—2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2015), available at: <http://dx.doi.org/10.1787/9789264241138-en> [Accessed 30 September 2016]; OECD, *Designing Effective Controlled Foreign Company Rules, Action 3—2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2015), available at: <http://dx.doi.org/10.1787/9789264241152-en> [Accessed 30 September 2016]; and OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4—2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2015), available at: <http://dx.doi.org/10.1787/9789264241176-en> [Accessed 30 September 2016].

⁶ Council of the European Union, *BEPS: Presidency roadmap on future work* (14 July 2016 (OR. en) 11071/16 FISC 121), para.29.

⁷ Council of the European Union, *Council conclusions on corporate taxation—base erosion and profit shifting* (8 December 2015) (Council conclusions on corporate taxation), para.10.

⁸ Council conclusions on corporate taxation, above fn.7, paras 10, 12–13.

⁹ Commission Communication, *Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU* (28 January 2016, COM/2016/023 final).

include country-by-country reporting.¹⁰ The hard law instruments were supplemented by soft law measures. The Commission encouraged Member States to promote good governance in tax matters globally and recommended the EU-compliant approach to tax treaty abuse.¹¹

Although driven by a noble cause, the ATAD was not automatically accepted by Member States. The differences between the original and final text, as well as a number of documents prepared by the Presidency of the Council and other political actors involved, shed light on the main points of disagreement and the political compromises that have been made. Those disagreements varied from fairly general concerns to detailed technical issues. At the general level, Member States' governments expressed reservations concerning potential negative economic impacts and emphasised the difficulties with fitting the proposed changes into the existing national tax systems, particularly when it involved the need to introduce completely new rules.¹² At the more technical level, the major areas of disagreement concerned the interest limitation and CFC rules, as well as a subsequently removed switchover clause. The debate also involved EU national parliaments. In accordance with the legislative procedure, the ATAD proposal was sent to them for subsidiarity scrutiny. Four parliaments (the Czech Senate, the German Bundesrat, the Portuguese Assembleia da República and the Romanian Chamber of Deputies¹³) engaged in a political dialogue with the Commission, and two parliaments (the Maltese House of Representatives and the Swedish Parliament¹⁴) objected to the legislative proposal by issuing a reasoned opinion that it breached the principle of subsidiarity.

Following a few rounds of political and technical negotiations at the EU level, the ATAD's initial text was substantially amended to reflect a compromise. The final text, which was less stringent than the original proposal, won unanimous political support in the Council. The European Parliament, on the contrary, expressed its dissatisfaction by the later version of the ATAD, as it had watered-down the minimum standard.¹⁵ A broad political agreement was reached on 17 June 2016, subject to a silence procedure that provided Member States an opportunity to raise any

¹⁰ Commission, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market* (28 January 2016, COM(2016) 26 final, 2016/0011 (CNS)); Commission, *Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation* (11 May 2016 (OR. en) 7148/16 FISC 39 ECOFIN 231).

¹¹ Commission Communication, *External Strategy for Effective Taxation* (28 January 2016, COM(2016) 24 final); Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse [2016] OJ L25/67.

¹² General Secretariat of the Council of the EU, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market—General approach* (24 May 2016 (OR. en) 9432/16 FISC 84 ECOFIN 499), para.10.

¹³ IPEX, the Interparliamentary EU information eXchange, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market* (28 January 2016, COM/2016/0026), available at: www.ipex.eu/IPEXL-WEB/dossier/document/COM20160026.do#dossier-CNS20160011 [Accessed 30 September 2016].

¹⁴ IPEX, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, above fn.13: Maltese House of Representatives <http://www.ipex.eu/IPEXL-WEB/scrutiny/CNS20160011/mtkam.do> [Accessed 30 September 2016]; Swedish Parliament <http://www.ipex.eu/IPEXL-WEB/scrutiny/CNS20160011/serik.do> [Accessed 30 September 2016].

¹⁵ European Parliament, press release, *Parliament calls for crackdown on corporate tax avoidance* (8 June 2016), available at: <http://www.europarl.europa.eu/news/en/news-room/20160603IPR30204/parliament-calls-for-crackdown-on-corporate-tax-avoidance> [Accessed 30 September 2016]; European Parliament legislative resolution of 8 June 2016 on the proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (COM(2016)0026 – C8-0031/2016 – 2016/0011(CNS)).

last-minute objections until the midnight of 20 June 2016.¹⁶ As the deadline expired without objections being raised, the draft was agreed. On 12 July 2016, the Council formally adopted the new rules.¹⁷ The ATAD was published in the *Official Journal of the European Union* on 19 July 2016 and entered into force 20 days later.

The implications of the ATAD from the Internal Market's perspective are best evaluated through the lens of its declared objectives. First, the ATAD seeks to achieve a better functioning of the Internal Market by securing the fulfilment of Member States' "commitment under BEPS" and ensuring that the actions against tax avoidance practices are implemented "in a sufficiently coherent and coordinated fashion".¹⁸ Although not all EU Member States are members of the OECD (which would make them "committed" *sensu stricto*), their overall support of the G20-OECD BEPS project has been recognised on multiple occasions at the level of the European Council and the Council.¹⁹ A positive case for EU-wide "coherent and coordinated" actions is indeed strong. One of the most crucial political factors behind the need for co-ordination is tax competition. The early adopters of stricter anti-avoidance rules risk undermining their competitive position and facing the reallocation of business activity. In the Internal Market, which is based on the idea of free movement, such competition is particularly intense. A co-ordinated approach to tax avoidance minimises those risks and makes access to one of the largest economies in the world conditional upon the acceptance of the minimum standards of "fair play". Hence, the protection achieved through coordinated measures makes the implementation of BEPS output less risky for early adopters.

The EU-wide harmonisation measure creates a more robust protection from the Internal Market's perspective; yet, it also carries some risks. Whilst non-EU countries are still considering whether, how and when to put the relevant anti-BEPS measures in place, the EU as a whole is becoming an early adopter of the G20-OECD's recommendations. The agreement between Member States on the design of anti-avoidance measures is cemented by the unanimity voting requirement: a unanimous agreement of all Member States needs to be secured before any—even minor—adjustments in the minimum standards can be made. These concerns are partially addressed in Recital 17 and article 10 of the ATAD, which stipulate that the Commission should undertake an evaluation of the application of the ATAD four years after it enters into force (August 2020) and report its findings to the Council. The review provisions draw particular attention to the impact of article 4 (interest limitation rule) and invite the Commission to offer the appropriate legislative changes if necessary. This explicit invitation to carry out an ex post evaluation is important but the challenge of achieving political consensus for any amendments remains open.

Due to this "lock-in" effect, the fact that the draft ATAD was proposed, amended and then adopted without a comprehensive impact assessment becomes particularly critical. The Commission justified this omission by "an urgent current demand for coordinated action in the

¹⁶ Outcome of the 3475th Council meeting, Economic and Financial Affairs, 17 June 2016.

¹⁷ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1, above fn.4.

¹⁸ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1, above fn.4, Recital 2.

¹⁹ The conclusions of the European Council from 13–14 March 2013 and 19–20 December 2013, and—more recently—the Council conclusions on corporate taxation, above fn.7.

EU” and referred to the preparatory work undertaken by the OECD.²⁰ Are these arguments convincing? With full respect to the extensive consultation process and analytical work carried out at the global level, the EU-based evaluation takes place in a different context and serves a different purpose. The OECD’s output neither aimed to provide an impact assessment that corresponded with the EU’s requirements, nor considered the consequences for early adopters or specific markets. Furthermore, where the BEPS output offered several options and the ATAD has pre-selected certain directions for Member States (for example, CFC rules), these policy choices should have been properly assessed and justified.

Secondly, the ATAD aims to prevent a fragmentation of the Internal Market and to eliminate “existing mismatches and market distortions”.²¹ The Directive attempts to balance, on the one hand, the need for certainty and uniformity in implementing the BEPS outputs across the EU and, on the other hand, the flexibility that Member States may need to accommodate any special features of their tax systems. Where G20-OECD BEPS recommendations include a few possible options, a common EU approach prioritises certain choices with a view to ensuring the proper functioning of the Single Market. Whilst bringing a greater uniformity in certain respects, the ATAD sets up a “minimum level of protection” for national corporate tax systems across the EU (article 3) and, as such, it allows the Member States to introduce stricter rules to safeguard a higher level of protection for their domestic corporate tax bases. Similarly to other areas of law where regulatory competition causes an undesirable lowering of standards across the EU, the ATAD establishes the baseline and then leaves the rest to national authorities.

The “minimum standard” approach makes the ATAD more proportionate but less capable of eliminating the fragmentation of the Internal Market. In some instances, “existing mismatches” will remain (due to, for example, the limited scope of article 9 of the ATAD, which deals with hybrid mismatches). In addition, the nature of substantive provisions is such that it does not necessarily remove “market distortions” and, in fact, it may have an opposite effect. One can argue that the Internal Market will not necessarily operate more smoothly with a growing number of national tax systems imposing restrictions and limitations on business activities in the cross-border context, such as CFC rules or exit taxation. Apart from increased compliance costs for businesses, the most immediate risk is that of double taxation. For instance, the interest limitation rule may cause double taxation as the deductibility of an interest may be restricted, whilst it remains fully taxable in the hands of the receiving company. The ATAD devotes little attention to these drawbacks, despite the declaration made in Recital 5 that the Directive “should not only aim to counter tax avoidance practices but also avoid creating other obstacles to the market, such as double taxation”. Its explicit guidance on this issue is limited to a declaratory statement:

“[w]here the application of those rules [rules against the erosion of tax bases and the shifting of profits in the internal market] gives rise to double taxation, taxpayers should receive

²⁰ Commission, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market* (28 January 2016, COM(2016) 26 final, 2016/0011 (CNS)), s.3.

²¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1, above fn.4, Recital 2.

relief through a deduction for the tax paid in another Member State or third country, as the case may be²².

Thirdly, one of the principle justifications for the EU's intervention from the very early stages of the BEPS process was the need to provide greater legal certainty to taxpayers as regards the compatibility of the anti-BEPS measures with EU law. Certain anti-avoidance mechanisms discussed under the BEPS process, such as CFC rules, raised strong concerns in the light of EU law. The ATAD seeks to reassure the Member States' lawmakers and taxpayers by paving the way for "EU-compliant" implementation. Yet, it offers only a partial solution. Even though the Directive draws a common line for the implementing measures, Member States may go beyond the minimum standard, which re-opens the question of compatibility. Furthermore, the ATAD's provisions themselves may raise certain concerns. For instance, the scope of the EU GAAR and its interaction with the existing domestic anti-abuse mechanisms generates many questions and, in some instances, will undermine rather than increase legal certainty. The lengthy process of EU litigation means that a few years may pass before any clarity on the application of this and other provisions can be achieved.

Finally, the key question regarding the ATAD, which is not explicitly addressed in its preparatory documents, is the following: will the ATAD relieve the tension caused by tax competition between Member States? On the one hand, the ATAD secures a commitment from each EU country to implement selected G20-OECD BEPS recommendations. It is legally binding for Member States and is backed up by strong enforcement mechanisms at the EU level. The Treaty on the Functioning of the European Union (TFEU) authorises the Commission to start an infringement procedure as soon as the period provided for implementation measures has passed, requesting a lump sum or penalty payment if a Member State fails to provide notification of measures transposing a directive.²³ Hence, the ATAD offers a strong reassurance to the early adopters that similar steps will be taken by other EU jurisdictions within the set deadline. Consequently, those countries that were supporting the G20-OECD BEPS process will certainly find it easier to move forward with the implementation of its output. On the other hand, as the possibilities for profit shifting are becoming more constrained, the competition over real economic activity can be expected to increase. One could predict that the competition forces will keep driving the tax policies of EU Member States. This may generate a more rapid race to the bottom of corporate tax rates and an increase in other forms of competition permissible under the current international and EU rules. Are these effects the lesser evil?²⁴ If judged from the perspective of ensuring a level playing field and an equitable treatment of all corporate taxpayers, the answer is in the affirmative. Nevertheless, viewed from the perspective of tax revenue loss in a medium to long-term period, the implementation of the ATAD may increase the pressures on Member States' budgets and create new distinct challenges that will need to be dealt with.

To sum up, although the case for a co-ordinated response within the Internal Market is strong, the ATAD has raised several concerns. The EU's desire to "keep momentum" has resulted in a

²² Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1, above fn.4, Recital 5.

²³ TFEU [2012] OJ C326/1, 26/10/2012 art.260(3).

²⁴ For a similar question raised in the context of the OECD and EU campaign against preferential tax regimes (1998), see M. Keen, "Preferential Regimes Can Make Tax Competition Less Harmful" (2001) 54 *National Tax Journal* 757.

fast-moving pace of change without a proper evaluation of possible consequences, in particular from the Internal Market's perspective. The period that has been provided to Member States for the transposition of the ATAD, leaves enough time for the Commission to make additional inquiries concerning the possible impact of the ATAD (and the Anti-Tax Avoidance Package more generally) on national tax systems and business activity in the Internal Market, and to propose any measures that may be necessary to address potential drawbacks. Associated risks should be carefully evaluated. Several possible directions for such inquiries can be suggested, that is the issues of double taxation, the increased compliance burden for businesses, the adverse impact on the tax competitiveness of the Internal Market at the global level and transformations in tax competition between Member States. In this context, a set of concrete measures that enhance the competitiveness of the Internal Market in the global arena and that may stimulate business activity and economic growth should receive far greater attention in order to counterbalance the EU's ambitious anti-tax avoidance agenda.

3. The UK's perspective

The general deadline for the implementation of the ATAD and certain derogations from it were subject to negotiations at the stage of adoption; as a result, EU Member States have been given more than two years to complete the process of transposition and notify the Commission. Article 11 of the ATAD sets out a general rule that Member States shall transpose the ATAD into their national laws, regulations and administrative provisions by 31 December 2018. Those provisions shall take effect from 1 January 2019. There are two derogations from this general rule. The transposition of article 5 (exit taxation) shall be completed by 31 December 2019 with the provisions entering into force by 1 January 2020. Another derogation is envisaged for the interest limitation rule. Member States with targeted rules which are "equally effective to the interest limitation rule" found in the Directive, may continue to apply these targeted rules until the OECD reaches agreement on a minimum standard with regard to BEPS Action 4, or until 1 January 2024 at the latest.

The political implications of the ATAD, as well as the amount of technical legal work to be undertaken at the domestic level, will vary considerably from one Member State to another. From a political perspective, the strongest impact will be felt in Member States with a relatively weak appetite for anti-BEPS measures. From a legal perspective, each national tax system will be evaluated in the light of the minimum standard imposed by the ATAD. If the national tax rules fall short of providing the necessary level of protection against the erosion of tax bases and the shifting of profits, changes will need to be made accordingly. The ATAD's impact will be most significant in those countries that need to put in place totally new anti-avoidance mechanisms, such as GAAR, CFC or exit tax rules, or to introduce material changes in the existing laws.

The UK does not score highly under either of these two criteria. As a long-term supporter and one of the "thought leaders" of the BEPS process, the UK Government made it clear early on that the G20-OECD's recommendations would be promptly implemented. In comparison with some Member States that have less elaborate anti-avoidance legislation, the scope of legal change will also be less extensive. Furthermore, the Brexit vote, which took place a few days after a political agreement was reached upon this Directive, makes certain drawbacks of the

ATAD less significant and even its binding force over the UK questionable, at least in the medium to long-term period. As no Member State exercised its right to veto this legislative proposal, one may assume that the EU-level co-ordination offered a “win-win” outcome for all the participants. This article puts forward that the “win” was certainly achieved by the UK. The rest of this section further elaborates on these observations.

3.1. *The UK corporate tax policy context*

In recent years, UK tax policy has been dominated by two objectives: 1. enhancing the competitiveness of the tax system; and 2. strengthening its resilience to tax avoidance. In the Coalition Agreement, published in May 2010, the Conservatives and Liberal Democrats ambitiously declared their goal to be the creation of the most competitive corporate tax regime in the G20.²⁵ The 2010 *Corporate tax road map*, which detailed the Coalition Government’s plans for reform, clearly adhered to the need to make the UK corporate tax more competitive.²⁶ The aim was for the corporate tax system to become “an asset for the UK”, making the business environment more attractive and stimulating multinationals to invest.²⁷

Alongside the competitiveness agenda, in a somewhat uncomfortable bundle, the Coalition Government also prioritised the need for “a more strategic approach” to tackling tax avoidance.²⁸ The new strategy was launched in June 2010²⁹ and was further detailed in the report on *Tackling tax avoidance* which was published in March 2011.³⁰ The 2015 report on *Tackling tax evasion and avoidance* summarised the achievements and outlined next steps to continue a crackdown on tax evasion and avoidance.³¹ The political message was clear: “[w]e are hitting tax avoidance and tax evasion harder than ever before”.³²

The anti-avoidance agenda was quickly elevated to the global arena. The UK Government repeatedly declared its strong interest in establishing co-operation with other countries, pointing out that

“while we are determined to take every possible action against abuse of the UK tax rules, the truth is that in a global economy where goods and services flow freely between countries, measures taken in Britain alone will not deal with the problem; we need global tax rules too. That is why we have been pushing, through the G8 and the G20, the European Union and the OECD, for global solutions.”³³

In view of these objectives, the UK Government has become one of the driving forces behind international tax reform by helping to initiate the process, actively engaging with G20 and OECD partners, and providing funding for the work undertaken by the OECD on BEPS issues. The

²⁵ HM Government, *The Coalition: our programme for government* (May 2010), 10.

²⁶ HM Treasury, *Corporate tax road map* (29 November 2010).

²⁷ HM Treasury, *Corporate tax road map*, above fn.26, para.1.2.

²⁸ HM Treasury and HMRC, *Tax policy making: a new approach* (June 2010), paras 2.14–2.15.

²⁹ HM Treasury and HMRC, *Tax policy making: a new approach*, above fn.28.

³⁰ HM Treasury, *Policy paper: Tackling tax avoidance* (28 March 2011).

³¹ HM Treasury and HMRC, *Tackling tax evasion and avoidance* (March 2015).

³² HM Treasury and HMRC, *Tackling tax evasion and avoidance*, above fn.31, 4.

³³ HM Treasury and HMRC, *Tackling aggressive tax planning in the global economy: UK priorities for the G20-OECD project for countering Base Erosion and Profit Shifting* (19 March 2014).

Coalition Government's position on the G20-OECD project was initially explained in a special report on *Tackling aggressive tax planning in the global economy* (March 2014).³⁴ The subsequent Conservative Government stood by these priorities. Following the endorsement of the final 2015 BEPS reports by the G20, the UK Government confirmed its intention to become one of the early adopters. The explanation of how the G20-OECD BEPS output has been and will be further integrated into the UK tax system can be found in the *Business tax road map* (March 2016).³⁵ To facilitate the implementation process at the global level, the UK Government also engaged closely in the development of a multilateral intergovernmental instrument that will allow the modification of existing bilateral tax treaties in accordance with the BEPS recommendations. The UK chairs the ad hoc group of nearly 100 countries, which is working on the new Multilateral Instrument to Implement Tax Treaty-Related Measures to Combat BEPS.³⁶

In this context, it comes as no surprise that when the Commission published the Anti-Tax Avoidance Package on 28 January 2016, the reaction of the UK Government was positive (even though it was not without reservations). The UK shared the underlying objective to put in place co-ordinated EU-wide measures against tax avoidance and, in particular, the Commission's intention to ensure the implementation of the BEPS recommendations.³⁷ In the fourth Explanatory Memorandum of 12 February 2016, which provided explanations of the draft ATAD to the UK House of Commons, the Government confirmed that "it would be beneficial to ensure that all Member States, including those that are not members of the OECD, implement the final OECD BEPS outputs".³⁸ In line with the Commission's justification for the ATAD, the UK Government put forward that the EU Directive would contribute to a greater consistency in international tax rules and to the elimination of disparities in national tax rules that could be exploited by multinational companies. It also repeated that a coherent approach to tax avoidance at the EU level would carry the benefit of legal certainty for taxpayers and would preserve the competitiveness of the EU's tax environment. This position was fully consistent with the UK's proactive role in international efforts against tax avoidance and aggressive tax planning by multinationals. In addition, the early implementation of the BEPS recommendations by the UK Government raised widespread concerns that these measures could undermine the competitiveness of the country's corporate tax regime, which had been built up so successfully in recent years. In this context, the EU-wide commitment was a very timely and welcome development for the UK Government in order to address these concerns.

At the same time, in line with its traditional Euro-sceptic perspective, the UK Government emphasised that the EU measures must remain "effective, proportionate and consistent with the

³⁴ HM Treasury and HMRC, *Tackling aggressive tax planning in the global economy: UK priorities for the G20-OECD project for countering Base Erosion and Profit Shifting*, above fn.33.

³⁵ HM Treasury, *Business tax road map* (March 2016).

³⁶ OECD, *Multilateral instrument for BEPS tax treaty measures: the Ad hoc Group*, available at: <http://www.oecd.org/tax/treaties/multilateral-instrument-for-beps-tax-treaty-measures-the-ad-hoc-group.htm> [Accessed 30 September 2016].

³⁷ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016* (2016), HC 342-xxiv, Ch.7, "HMT Taxation: avoidance", para.7.7.

³⁸ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, "HMT Taxation: avoidance", para.7.56.

OECD recommendations”.³⁹ Departures from the OECD’s output were opposed by the UK Government on the basis that they could generate mismatches. The UK Government also argued that the flexibility of options offered in the G20-OECD BEPS reports should be retained to allow for the tailoring of the anti-avoidance measures to domestic circumstances.⁴⁰ The fourth Explanatory Memorandum of 12 February 2016 illustrates several specific concerns that the UK Government had at the early stages of negotiations. First, it was concerned that the initial provisions of the ATAD went “beyond or are not entirely consistent with the OECD recommendations, and may not be proportionate”.⁴¹ The main areas where the alignment with BEPS outputs was sought included the initial proposals in relation to hybrid mismatches, CFC rules and interest limitation rules.⁴² Secondly, the UK Government opposed the switchover clause as a disproportionate measure: “whereas a low effective tax rate test can be a useful indicator of where there is a higher risk of avoidance taking place, low tax rates are not by themselves harmful”, and relying upon such a test “as the sole criterion” is therefore disproportionate. Thirdly, and more generally, the UK Government expressed concerns about the lack of “a full impact assessment” for the draft ADAT, which did not allow it to assess the costs and benefits of the proposal. Yet, it appeared that the main purpose of this argument was to bring the EU’s response closer to the G20-OECD BEPS recommendations.⁴³

3.2. The legal consequences in a nutshell: what lies ahead?

In his letter of 9 May 2016, the Financial Secretary to the Treasury (David Gauke) further explained that the EU actions against tax avoidance were welcomed by the UK in so far as they implemented the internationally agreed recommendations under the BEPS project and did not go beyond or depart from those recommendations; and he also said that the UK was

“willing also to consider EU legislation on tax where this is consistent with existing UK legislation or policy, and would strengthen the tax rules and tax administration in other Member States”.⁴⁴

All five components of the ATAD are broadly consistent with these declarations. The only provision that could have brought about a visible departure from the UK’s existing corporate tax policies, namely the switchover clause, was removed from the final text of the Directive.

³⁹ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.4.

⁴⁰ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.57.

⁴¹ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.56.

⁴² UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016* (2016), Ch.10, “HMT Taxation: avoidance”, para.10.20.

⁴³ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.58.

⁴⁴ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.20.

a) Interest limitation rule

Article 4 of the ATAD introduces a rule restricting the deductibility of interest, seeking to limit the opportunities for profit shifting through the use of interest expense. In the process of negotiations, the UK supported the introduction of interest limitation rules by all Member States. However, consistently with its above-mentioned priorities, the UK insisted that such rules must correspond with the G20-OECD BEPS outputs, take into account the ongoing work at the OECD level and leave sufficient flexibility for Member States, which would allow for the design of “effective, proportionate and targeted” rules tailored to the needs of national tax systems.⁴⁵ The final version of article 4 of the ATAD represents a compromise between those Member States that requested greater flexibility and those that opposed additional waivers due to the risk of undermining the effectiveness of the limitation rule.⁴⁶ It is broadly consistent with the G20-OECD recommendations on Action 4 BEPS, and it has also left more room for flexibility in application.

As a general rule, no deduction will be given for any borrowing costs exceeding 30 per cent of the taxpayer’s earnings before interest, tax, depreciation and amortisation (EBITDA).⁴⁷ This general rule may be qualified in several ways. Member States may exclude stand-alone entities from the application of this rule, as well as give the right to taxpayers to deduct exceeding borrowing costs up to three million euros.⁴⁸ Loans that were concluded before 17 June 2016 (and not subsequently modified) and loans used to fund certain qualifying long-term public infrastructure projects may be disregarded.⁴⁹ Where the taxpayer is a member of a consolidated group for financial accounting purposes, the ATAD allows Member States to choose one of the two exclusion rules, based on either an equity/total assets-ratio or a group EBITDA-test.⁵⁰ Finally, the “financial undertakings”, as defined in article 2(5) of the ATAD, may be excluded from the scope of the rule.⁵¹ The ATAD envisages several options for the carrying forward (and back) of exceeding borrowing costs,⁵² and it also provides a transitional period during which Member States may rely upon the existing “equally effective” interest limitation rules (as explained earlier in this section).⁵³

Overall, article 4 of the ATAD has not brought a revolutionary change in the UK context, since the Government had already committed to the introduction of the new restrictive rules on the deductibility of interest before it was adopted. The first round of consultations was launched by the UK Government on 22 October 2015.⁵⁴ In March 2016, the Budget and the *Business tax road map* confirmed that the Government would proceed with these plans and the new rules on

⁴⁵ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.25.

⁴⁶ General Secretariat of the Council of the EU, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market—General approach* (24 May 2016 (OR. en) 9432/16 FISC 84 ECOFIN 499), para.12.

⁴⁷ ATAD art.4(1).

⁴⁸ ATAD art.4(3).

⁴⁹ ATAD art.4(4).

⁵⁰ ATAD art.4(5).

⁵¹ ATAD art.4(7).

⁵² ATAD art.4(6).

⁵³ ATAD art.11(6).

⁵⁴ HM Treasury and HMRC, *Tax deductibility of corporate interest expense: consultation* (22 October 2015).

interest deductibility should take effect from 1 April 2017.⁵⁵ The second consultation document was released on 12 May 2016.⁵⁶ The eventual substantive provisions will have to satisfy the EU's minimum standard, but article 4 of the ATAD appears sufficiently flexible. In relation to the date of entry into force, as things currently stand, the UK remains committed to a shorter implementation period than that provided under the ATAD.

b) Exit taxation

The exit tax rules are set out in article 5 of the ATAD. It provides a common framework for taxing capital gains generated in the territory of the Member State of origin at the time of the exit. The exit charge will be levied on certain cross-border transfers of assets, tax residence or business carried out by the permanent establishment (PE) within the EU or in the third-country context. More specifically, article 5(1) of the ATAD defines that the tax will apply to a taxpayer that: 1. transfers assets from its head office (HO) to a foreign PE; 2. transfers assets from a PE in a Member State to a foreign HO or PE; 3. transfers its tax residence to another country; or 4. transfers business carried on by its PE in a Member State to another country—all in so far as the Member State of exit loses the right to tax due to the transfer. The taxable gain is calculated as “the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes”.⁵⁷

The ATAD broadly reflects the existing case law of the Court of Justice of the European Union in this field.⁵⁸ Accordingly, it secures the right of a taxpayer to defer the payment of an exit tax for transfers within the EU or the European Economic Area (EEA). The deferred payment may be subject to interest charges. In certain circumstances, where there is “a demonstrable and actual risk of non-recovery”, such deferral may also be conditioned by the provision of a guarantee.⁵⁹ Article 5(4) of the ATAD defined several circumstances in which the deferral will be “immediately discontinued”, including the transfer of the transferred assets, the taxpayer's tax residence or the business carried out by its PE to a third country. The “receiving” Member States must accept the value of the assets established by the “exit” state for tax purposes unless this value does not reflect “market value” (that is “the amount for which an asset can be exchanged or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction”).⁶⁰

Since the UK already imposes an exit charge on the unrealised gains of a company that ceases to be a UK resident, the ATAD will trigger only small-scale adjustments. These changes will make the existing rules more restrictive. For instance, UK resident companies that intend to transfer their corporate residence to another EU or EEA Member State could be left with a shorter

⁵⁵ HM Treasury, *Business tax road map*, above fn.35.

⁵⁶ HM Treasury and HMRC, *Tax deductibility of corporate interest expense: consultation on detailed policy design and implementation* (12 May 2016).

⁵⁷ ATAD art.5(1).

⁵⁸ *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (C-371/10) EU:C:2011:785 (ECJ); *European Commission v Portuguese Republic* (C-38/10) EU:C:2012:521 (ECJ); *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* (C-164/12) EU:C:2014:20 (ECJ); *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (C-657/13) EU:C:2015:331 (ECJ).

⁵⁹ ATAD art.5(3).

⁶⁰ ATAD art.5(5)–(6).

period of deferral (five instead of 10 years). Furthermore, the UK rules will need to be amended to broaden their application in relation to a transfer of assets involving PEs. However, the binding impact of this provision upon the UK will depend on the future status of the UK-EU relationship. As mentioned earlier, in the process of negotiations, the date of transposition for article 5 of the ATAD was postponed until 31 December 2019 pursuant to the demand of those Member States that currently do not have such rules in place.⁶¹

c) GAAR

The UK Government was open to the consideration of a minimum standard EU-wide GAAR if this would not create unnecessary uncertainty for taxpayers, or “undermine situations where Member States already have effective legislation in place at national level”.⁶² The UK introduced a GAAR, which relies upon the double-reasonableness test, in 2013.⁶³ The EU rule was regarded as “very similar to existing rules within the UK tax code, both through the legislation for the UK GAAR and well-established case law”.⁶⁴ This proposition was not universally accepted. One obvious uncertainty arises from the CJEU’s power to interpret the EU GAAR: the CJEU’s guidance may affect the application of the provision. At this stage, however, it is not clear what legal and/or practical effects the CJEU case law will retain following Brexit, so the question as to the relevance of these concerns in the UK context remains open.

d) CFC rules

The CFC rules allow the tackling of base erosion and profit shifting by reattributing the income of a low-tax controlled foreign company and making it taxable in the “home jurisdiction”. The scope of CFC rules caused some of the most considerable disagreements between Member States at the negotiations stage, so a number of changes were made to the Commission’s original proposal. The ATAD has introduced a general rule that the taxpayer’s Member State must include in the tax base: 1. certain predefined categories of non-distributed (passive) income of a controlled foreign company unless the company is undertaking “a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances”⁶⁵; or 2. the non-distributed income of CFCs arising from “non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage”.⁶⁶ The substantive economic activity test, which is part of the first rule, may be disapplied in the third-country context. A “controlled foreign company” is defined as an entity, or a PE of which the profits are not subject to tax (or are exempt) in the “home” Member State, which satisfies specified control

⁶¹ General Secretariat of the Council of the EU, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market—General approach* (24 May 2016 (OR. en) 9432/16 FISC 84 ECOFIN 499), para.13.

⁶² UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.57.

⁶³ FA 2013 s.207.

⁶⁴ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.29.

⁶⁵ ATAD art.7(2)(a).

⁶⁶ ATAD art.7(2)(b).

thresholds and the low effective tax rate test.⁶⁷ Certain qualifications that allow Member States to limit the scope of CFC rules can be found in article 4(3)–(4) of the ATAD.

Since 1984 the UK has had a special regime for CFCs. These rules have changed several times, most recently in 2013 as part of a broader move towards a more territorial approach to taxation. When the ATAD was proposed, the UK Government supported the introduction of CFC rules in all Member States.⁶⁸ It regarded the lack of CFC rules in other countries as potentially creating “a competitive disadvantage”, so the EU-wide standard was clearly for the benefit of the UK.⁶⁹ In line with its general priorities, the UK Government insisted on flexibility in relation to CFC rules, which would allow Member States “to design their own rules, provided they are consistent with the OECD framework”.⁷⁰ The final version of the ATAD broadly follows the OECD framework, and no substantive amendment of the UK CFC rules is deemed necessary.

e) Hybrid mismatches

On 5 October 2014 the UK Government announced its intention to introduce domestic provisions to give effect to the recommendations of BEPS Action 2 (hybrid mismatch arrangements).⁷¹ The consultations on the implementation in the UK were opened on 3 December 2014.⁷² This was followed by the draft legislation, which was again offered for consultation.⁷³ The rules, which were incorporated in the 2016 Finance Bill, will take effect from 1 January 2017.⁷⁴ Against this background, the UK Government was understandably supportive of introducing effective international rules to prevent hybrid mismatches. As in other instances referred to above, the UK Government prioritised consistency with the approach agreed at the OECD level, arguing for the rules that would not be less effective than the BEPS output.⁷⁵

Article 9 of the ATAD is, however, much more modest in scope. The new rules are brief and apply only to intra-EU situations. It has been agreed at a political level that further proposals on hybrid mismatches involving third countries will be made by the Commission in October 2016 with a view to reaching an agreement by the end of 2016.⁷⁶ This political solution aimed at resolving disagreements between those Member States in favour of extending the scope of article 9 to third countries and to other forms of hybrid mismatches in order to realign it with Action 2 BEPS, and other Member States that were not prepared to adopt such extensions without additional technical examination.

⁶⁷ ATAD art.7(1).

⁶⁸ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, “HMT Taxation: avoidance”, para.7.57.

⁶⁹ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.23.

⁷⁰ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.23.

⁷¹ HM Treasury, *Government takes further step to clamp down on aggressive tax planning* (5 October 2014).

⁷² HM Treasury and HMRC, *Tackling aggressive tax planning: implementing the agreed G20-OECD approach for addressing hybrid mismatch arrangements* (3 December 2014).

⁷³ HMRC, *Corporation Tax: anti-hybrid rules* (9 December 2015, withdrawn on 17 March 2016).

⁷⁴ HMRC, *Corporation Tax: anti-hybrids rules* (16 March 2016).

⁷⁵ UK House of Commons, *Documents considered by the European Scrutiny Committee on 11 May 2016*, above fn.42, Ch.10, “HMT Taxation: avoidance”, para.10.21.

⁷⁶ Code of Conduct Group (Business Taxation), *Report to the Council* (13 June 2016 (OR. en) 9912/16 FISC 97 ECOFIN 558).

f) Switchover clause

The switchover clause would have carried the most significant implications for the UK's current corporate tax system. It would have influenced certain exemptions from corporation tax that apply to the receipt of dividends, as well as the elective exemption regime from UK corporate tax for profits generated by foreign PEs. Broadly, the introduction of the switchover clause would have led to a less territorial system of taxation. The UK Government was not prepared to accept the switchover rule unless it was offered as an optional tool.⁷⁷ At the negotiations stage, it reiterated the UK's commitment to a territorial approach to taxing corporate profits, which can be limited only in certain instances to prevent tax avoidance, for example, when CFC rules become applicable.⁷⁸ The introduction of the switchover clause was refused on the grounds of it being unnecessary when "effective" CFC rules are combined with a "properly applied" transfer pricing regime.⁷⁹ The UK Government also emphasised that "a low tax rate is not harmful in principle, and it is a point of principle in relation to tax sovereignty that countries have the right to set their own tax rates".⁸⁰ This can probably be seen, at least partially, as an attempt to defend the UK Government's own right to a low corporate tax rate. The switchover clause raised irreconcilable objections, so it was removed from the final text of the ATAD.

3.3. *Following the Brexit vote*

The Brexit referendum took place on 23 June 2016, just a couple of days after a political agreement was reached upon the ATAD. Does the Brexit vote change the implications of the ATAD for the UK? Will the ATAD even come into effect, given that most provisions will have to be transposed by the end of 2018? In a nutshell, the withdrawal from the EU must follow the procedure stipulated by article 50 of the Treaty on European Union (TEU). To start with, the UK needs to notify the European Council of its intention to seek a withdrawal. There is no set time frame as to when this has to be done; neither is there a predetermined procedure that needs to be used. The new UK Prime Minister (Theresa May) is determined to trigger article 50—which will initiate the formal Brexit negotiations—without seeking Parliamentary approval, which in itself raises many controversies.⁸¹ Once triggered, article 50 TEU provides two years for negotiations, unless the European Council unanimously decides to extend this period. The EU Treaties cease to apply to the Member State seeking the exit from the date that the withdrawal agreement enters into force or, failing that, two years after the notification is given. Theresa May has recently announced that the notification will not be made until the start of 2017 at the earliest.⁸² In view of this political statement, the ATAD may become enforceable whilst the UK is still a full member of the EU.

⁷⁷ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, "HMT Taxation: avoidance", para.7.57.

⁷⁸ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, "HMT Taxation: avoidance", para.7.57.

⁷⁹ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, "HMT Taxation: avoidance", para.7.57.

⁸⁰ UK House of Commons, *Twenty-fifth Report of Session 2015–16: Documents considered by the European Scrutiny Committee on 9 March 2016*, above fn.37, Ch.7, "HMT Taxation: avoidance", para.7.57.

⁸¹ BBC News, *Government to "push ahead" with Brexit* (31 August 2016).

⁸² BBC News, above fn.81.

The UK will be seeking a “unique” deal with the EU that will determine the scope of mutual rights and obligations.⁸³ As negotiations progress, the Government and Parliament would have to search for a suitable approach to the legal status of EU-based laws, rules and regulations: those provisions may be kept as part of the legal system, or may be amended or repealed. It is possible, and even likely, that UK laws implementing EU law, including the ATAD, will initially remain effective. The legal constraints on UK laws will be agreed upon in the process of the Brexit negotiations and will depend on any subsequent developments in the UK–EU relationship. The exact scope of sovereignty that will be regained as a consequence of Brexit will be defined on the basis of mutual political compromise. Yet, unless agreed to the contrary, UK laws will be free to follow a different path to their EU counterparts. It is possible, therefore, that the UK will be free to depart from the ATAD if it is deemed necessary. In other words, whilst EU Member States will be “locked-in” to the ATAD’s agreement by the unanimity vote, the UK’s control over its legislation is subject to the Brexit negotiations. This “freedom” may prove useful if the minimum standard imposed by the ATAD becomes uncomfortably tight for some reason. However, despite some speculations that the tax competitiveness agenda may force the UK to defer the implementation of the BEPS-related measures, or to adopt a more lenient approach, politically it seems highly unlikely. Tax competition is likely to manifest itself in a different form: through a gradual lowering of the UK’s main corporate tax rate below 17 per cent, as well as a potential further reduction of the current 10 per cent tax rate under the Patent Box.⁸⁴

The drawbacks of Brexit are equally conditional upon the ultimate outcome of negotiations; however, a few preliminary conclusions can already be made. Prior to the Brexit vote, the fact that the ATAD is to secure the commitment of EU-based competitors to the implementation of the BEPS recommendations in certain select areas could have been regarded as a major gain for the UK Government. Following Brexit, the UK will have no access to a powerful tool for influencing EU-wide policies. Its international efforts will naturally concentrate on an alternative global player in this area, namely the OECD. It remains to be seen what effect Brexit, and the fact that the UK will lose the ability to shape and drive EU-wide policies, will have on the UK’s political weight in the global arena.

The anti-avoidance measures incorporated in the ATAD apply in both contexts, between the EU/EEA Member States and between the EU Member States and third countries. Following Brexit (if no special arrangement is put in place), the UK will be treated as a third country for the purposes of the ATAD. Although the applicable minimum standard is similar, several provisions may be applied differently in a third-country context. First, under article 5 (exit taxation), the ATAD secures the right of a taxpayer to defer the payment of an exit tax by paying it in instalments over five years but only for those taxpayers making a transfer to an EU or EEA Member State. Secondly, article 7 (CFC rules), allows EU Member States to disapply the substantive activity test when the controlled foreign company is resident or situated in a third country. Thirdly, the application of article 9 (hybrid mismatches) is currently limited to the intra-EU context. Finally, and more generally, the ATAD sets out a minimum standard of protection and Member States may go beyond it. If so, the measures that can be introduced in relation to other Member States need to respect the free movement law, and be justified and

⁸³ BBC News, above fn.81.

⁸⁴ HM Treasury, *Business tax road map*, above fn.35, 22.

proportionate. In this respect, businesses operating in a third-country context will be protected only by the free movement of capital.

4. Conclusion

The swift adoption of the ATAD in less than six months illustrates a feasible change of pace in EU tax policies. Following the G20-OECD BEPS initiative, the perception that tax policies are a purely domestic matter has somewhat changed. Tax co-ordination is becoming a more widely accepted approach at the global level, and this affects the willingness of Member States to engage in co-operation at the EU level. The BEPS process and the EU anti-tax avoidance agenda have clearly become mutually reinforcing. However, the progress that has been achieved should be regarded with some caution from the Internal Market perspective. It is important to conduct an impact assessment of the direct and indirect implications of the ATAD (and the Anti-Tax Avoidance Package more generally), with due regard being given to the underlying competitive forces in the intra-EU and global context. It is necessary to evaluate the potential consequences for national tax systems and business activity in the Internal Market. This will allow for the identification and addressing of accompanying difficulties, such as the possible instances of double taxation, the increased compliance burden on cross-border business activities, the risks for the tax competitiveness of the Internal Market in the global arena and, in a medium to long-term period, potentially increased competition over corporate tax rates between Member States.

At the level of Member States, the effect of the ATAD will differ depending on their general political support of the G20-OECD BEPS process and the existing state of their anti-avoidance legislation. For the UK, which has been a loyal supporter of international tax reform from its earliest stages, the domestic impact of the ATAD will not be as substantial as in some other countries with a less explicit political commitment. The anti-avoidance mechanisms contained in the ATAD will not change the trends emerging in the UK's legal landscape. Some provisions (such as GAAR and CFC rules) already exist in UK law and will not require any material changes; in relation to other provisions (such as the interest limitation rule and hybrids), the UK Government had already consulted stakeholders and committed to these before the adoption of the ATAD. The provision that could have changed this evaluation—the switchover clause—was removed from the compromise text.

Yet, the importance of the ATAD for the UK should not be underestimated. The Directive made it significantly easier for the UK Government to move forward with the anti-avoidance measures, backed up by the reassurance that other EU Member States will apply similar standards. If the early implementation of the BEPS recommendations has been raising concerns because it undermines the attractiveness of the UK tax system, the ATAD brings the important benefit of levelling up the playing field with the Internal Market. In addition, one should not underestimate the impact that the ATAD may have beyond the EU. The early adopters of the G20-OECD BEPS recommendations will inevitably attract the attention of other countries that are facing similar choices. The EU's standard may be followed on various grounds, such as the phenomenon of "Europeanisation beyond Europe", conditionality or tax competition forces, which will further extend the territorial borders of a level playing field.

Last but not least, one should mention the Brexit vote, which took place a few days after a political agreement was reached upon this milestone Directive. The negotiations with the EU will determine the extent to which the UK will have to adhere to the ATAD following its exit from the EU. One consequence, however, is quite certain. Unless alternative institutional structures are put in place, the UK will lose access to an important platform for influencing EU-wide tax policies and any possible modifications of the EU's standards. With respect to the ATAD, the UK has so far secured a definite "win". Nevertheless, it is about to leave the game and let the rest of the Member States decide upon the future direction of EU co-operation in tax matters. ¹³

¹³ Base erosion and profit shifting; Brexit; Controlled foreign companies; EU law; Exit charge; Hybrid mismatch arrangements; Interest deductibility; OECD; Tax avoidance

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