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ATAD Implementation in the Netherlands

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In this contribution, the authors provide an overview of the implementation of the EU Anti-Tax Avoidance Directives (ATADs) 1 and 2 in the Netherlands. After providing an overview of the implementation process, the authors will analyse and comment on the several amendments made to Dutch corporate income tax law. There is specific focus on the interest deduction limitation rule, controlled foreign company (CFCs), general anti-abuse rule (GAAR), and hybrid mismatches. The authors will address certain ambiguities and highlight some potential issues from an EU law perspective. The authors will also briefly discuss recent developments such as the Netherlands' proposal to unilaterally address certain transfer pricing mismatches and the impact of the ECJ case law on abuse and tax avoidance. This contribution will not examine tax treaty implications.

Keywords: ATAD, ATAD2, EBITDA, earnings stripping, interest deduction limitation, CFC, hybrid mismatch, hybrid, GAAR, documentation requirements.

1 Introduction

1.1 *Tackling Tax Avoidance*

The Netherlands takes an active role in the international tax debate and generally welcomes and endorses internationally coordinated initiatives aimed at addressing tax avoidance.[1] It was also under the Netherlands' Presidency of the Council of the European Union that political agreement was reached on the final compromise text of the Anti-Tax Avoidance Directive (ATAD).[2] The complexity of the ATAD provisions and the ambiguity in the interpretation thereof, however, seems to increase the level of legal uncertainty and add to tax controversy. This complicates, among others, the Netherlands' endeavour for arriving at a balance between addressing tax avoidance while preserving the attractiveness of the tax climate for investors and businesses.[3] These are issues that are also of relevance at the EU level with respect to the resilience of the internal market.[4]

In this contribution, the authors will discuss several elements of ATAD and ATAD2 that required implementation in Dutch tax law. This introductory paragraph will continue with a short summary of the general outline of the ATAD and the Dutch implementation process. Subsequently, paragraph 2 will debate more in-depth on the provisions that were newly added to Dutch corporate income tax (CIT) law: the earnings stripping rules, controlled foreign company (CFC) rules, and the anti-hybrid mismatch rules. Paragraph 3 will address the ATAD provision that only required some amendments to already existing legal provisions. That part relates to exit taxation. Paragraph 4 briefly describes the ATAD general anti-abuse rule (GAAR) that did not lead to any amendments in Dutch tax law as the Dutch Government's interpretation was that a pre-existing anti-abuse principle in Dutch law was already sufficient to achieve the ATAD's objective in that respect.

At the time this contribution was drafted, the ATAD implementation in the Netherlands did not lead to an

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[1] Letter from the State Secretary for Finance with an assessment of the BEPS Project-outcomes is available in English, https://www.government.nl/documents/letters/2015/10/19/letter-presenting-an-assessment-of-the-outcome-of-the-beps-project-and-the-outlook-for-the-dutch-tax-climate-for-businesses (accessed 5 May 2021). *Also see* Netherlands International Tax Treaty Policy 2020 (Notitie Fiscaal Verdragsbeleid 2020), para. 2.5, of 29 May 2020 and the Letter from the State Secretary for Finance of 5 July 2021 with the Netherlands' appreciation of the historic political global agreement on the OECD's Pillar One and Pillar Two, no. 2021-0000131418.

[2] *See* 5639/16 FISC 10 – COM(2016) 26 final, 5 July 2016, Brussels. *Also see* European Commission, Business Taxation for the 21st Century, COM(2021) 251 final.

[3] *See* M. F. de Wilde & C. Wisman, *Chapter 19: Netherlands,* in *Tax Avoidance Revisited in the EU BEPS Context* (A. P. Dourado ed., IBFD 2017), Online Books IBFD.

[4] For example, FISC 226 ECOFIN 1097, 13350/20, Brussels (27 Nov. 2020), Council conclusions on fair and effective taxation in times of recovery, on tax challenges linked to digitalization, and on tax good governance in the EU and beyond.

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infringement procedure; not for late implementation nor for incorrect transposition. There is no case law on any of the ATAD or ATAD2 provisions from any Dutch tax court yet. The authors, however, will address potential points of discussion in relation to the implemented provisions. It is expected that the implementation will result in future court cases, e.g., with respect to the correct interpretation from an EU law perspective.

1.2 *ATAD*

On 12 July 2016, the European Council agreed on the first Anti-Tax Avoidance Directive (hereafter: ATAD).[5] Following the 2015 OECD Base Erosion and Profit Shifting (BEPS) Action Plans,[6] the European Commission was of the opinion that a harmonized response was necessary for implementation of measures countering base erosion and profit shifting across Europe.[7] In the creation of the ATAD, the EU even went a step further by adding elements that were not part of the OECD BEPS Project. According to its preamble, a key objective is to improve the resilience of the internal market against cross-border tax avoidance, ensuring that tax is paid where profits are generated.[8]

The ATAD included several topics: an interest deduction limitation rule, rules on exit taxes for enterprises, a general anti-abuse rule (hereafter: GAAR), controlled foreign company (hereafter: CFC) rules, and rules countering hybrid mismatches. The anti-hybrid mismatch rules in the ATAD were limited to intra-EU situations. However, since the desire among the Member States was to counter hybrid mismatches in the relation between an EU Member State and a non-EU Member State, the ATAD was amended on 29 May 2017 (hereafter ATAD2) [9] even before the original directive was to be transposed into domestic law.

Compared to other EU Directives in the field of direct taxation,[10] the ATAD is of a different character. Previous directives in the field of direct taxation created rights and (tax) benefits for taxpayers. The ATAD was different in that regard as its objective was to counter base erosion and profit shifting by taxpayers. Therefore, it obligated Member States to include provisions in domestic tax law limiting tax benefits in specific situations. As under general directive law, the ATAD only served as minimum harmonization. The directive, however, does not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases.[11] Stated differently, the ATAD allowed stricter implementation in domestic tax law, leading to a sooner denial of tax benefits to taxpayers. The authors emphasize, however, that Member States must design and apply their national anti-tax avoidance rules in conformity with EU law.[12] The choices made by the Dutch Government will be discussed below where the individual measures included in Dutch tax law are described.

1.3 *Implementation Process*

The Dutch parliamentary processes regarding the implementation of both the ATAD and its amending Directive ATAD2 were both preceded with a public internet consultation.[13] All stakeholders could comment on the draft legislative proposal before it was forwarded to Parliament. The public input, among others, asked for the government's attention to the concurrence of the ATAD with US tax reform[14] and the impact on the investment climate, especially with respect to the use of certain Dutch partnerships (so-called *CV-BV* structures) and to the conformity with the Court of Justice of the European Union (ECJ)'s case law on the abuse of law. This, however, led to only a limited number of amendments.[15]

The legislative proposal of the act implementing the ATAD was sent to the Lower Chamber of Dutch

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5 Anti-Tax Avoidance Directive: 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).

6 OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, www.oecd.org/tax/beps-explanatory-statement-2015.pdf (accessed 5 May 2021) and the final reports on Actions 1–15.

7 *Ibid.*, preamble point 2.

8 Anti-Tax Avoidance Directive, *supra* n. 5, preamble points 1–3 and 16. On 18 May 2021 the European Commission announced that it aims to propose EU Directives to implement the OECD's Pillar One and Pillar Two. The Directives should also include rules that regulate the interaction between e.g. the ATAD's CFC-rule and Pillar Two's Income Inclusion Rule (IIR).*See* Business Taxation for the 21st Century, COM(2021) 251 final.

9 Anti-Tax Avoidance Directive 2: Council Directive 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L144/1 (7 June 2017).

10 For example, Parent-Subsidiary Directive: 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, OJ L 345/8 (29 Dec. 2011); and Merger Directive: Council Directive 2009/133/EC of 19 Oct. 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310/34 (25 Nov. 2009).

11 Anti-Tax Avoidance Directive, *supra* n. 5, Art. 3.

12 In this respect, special reference is made to the CJEU's doctrine on the abuse of EU law in tax matters. We will discuss this in para. 4.

13 Consultations and public comments, https://www.internetconsultatie.nl/consultatiedocumentatad1 and, https://www.internetconsultatie.nl/consultatiedocumentatad2 (both accessed 5 May 2021).

14 The 2017 US Tax Cuts and Jobs Act (TCJA) introducing rules as the Global Intangible Low-Taxed Income (GILTI) and Foreign Derived Intangible Income (FDII) and the Base Erosion and Anti-Abuse Tax (BEAT).

15 For example, NL: *Parliamentary Papers II* 2018/19, 35241, at 3.

Parliament on 19 September 2018.[16] Since the ATAD had, in the meantime, already been amended by the ATAD2, the original provisions regarding hybrid mismatches from the original directive were not transposed into Dutch domestic law at that moment in time. In response to the advice of the Dutch Council of State that always accompanies the legislative proposal, the Dutch Government answered that it was their choice to opt for a robust implementation of the ATAD. In doing so, they opted to apply strict measures that cannot be considered in an isolated manner but in concurrence with other, separate proposals in relation to corporate income tax (hereafter: CIT) such as the abolishment of the dividend withholding tax act and the gradual reduction of CIT rates.[17] The fact that the dividend withholding tax act was ultimately not abolished and the reduction of CIT rates was delayed did not alter or reduce the strength of any of the provisions implementing the ATAD. The Lower House of Parliament accepted the act implementing the ATAD on 15 November 2018[18] after which it was sent to the Upper House of Parliament on 20 November 2018.[19] The Upper House of Parliament subsequently agreed on the act on 18 December 2018.[20] It was published on 28 December 2018[21] and entered into force on 1 January 2019.

The ATAD2 was implemented in a comparable manner. The legislative proposal for the act implementing it was sent to the Lower House of Parliament on 28 June 2019[22] that agreed on the proposal on 14 November 2019.[23] On the same date, the proposal was forwarded to the Upper House of Parliament[24] that accepted the act on 17 December 2019.[25] The act implementing the ATAD2 was published on 27 December 2019[26] and entered into force on 1 January 2020. However, for some elements, the effective date was set on 1 January 2022. That will be elaborated on below.

2 New provisions

2.1 *Earnings Stripping Rule*

2.1.1 *General Outline of the ATAD Provision*

The main rule of the earnings before interest, tax, depreciation, and amortization (EBITDA) regime is essentially quite simple.[27] Interest revenues (and other economically equivalent taxable income) are deducted from the interest expenses incurred by a taxpayer.[28] If a positive balance remains, i.e., the exceeding borrowing costs, it should be determined for which part this excess is deductible. In principle, the deductibility of the exceeding borrowing costs is limited to 30% of the taxpayer's EBITDA.[29] Tax-free income is excluded from a taxpayer's EBITDA.[30]

2.1.2 *Options*

The ATAD offers various possibilities for more leniency in order to add subtlety to the EBITDA rule. A Member State may choose not to apply the EBITDA rule to long-term public infrastructure projects or to apply the rule at a consolidated level rather than at a stand-alone level.[31] Otherwise stated, the ATAD also permits a fiscal unity to qualify as a 'taxpayer' for the EBITDA rule. In addition, a threshold of up to EUR 3 million can be introduced.[32] If a taxpayer is then confronted with a limitation of interest deduction because the exceeding borrowing costs comprise more than 30% of the EBITDA while that excess is still below the threshold of EUR 3 million maximum, the entire excess would still be deductible.

Member States are also afforded the possibility to exempt stand-alone entities from the generic limitation

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[16] NL: *Parliamentary Papers II* 2018/19, 35030, at 2.

[17] NL: Advice of Council of State of 19 Sept. 2018, 35030/4, at 5.

[18] NL: *Parliamentary Papers II* 2018/19, 35030, at 24.

[19] NL: *Parliamentary Papers I* 2018/19, 35030, A.

[20] NL: *Parliamentary Papers I* 2018/19, 35030, point 21.

[21] NL: Official Gazette 2018/508, at 1.

[22] NL: *Parliamentary Papers II* 2018/19, 35241, at 2.

[23] NL: *Parliamentary Papers II* 2019/20, 35241, at 24.

[24] NL: *Parliamentary Papers I* 2019/20, 35241, A.

[25] NL: *Parliamentary Papers I* 2019/20, 35241, point 14.

[26] NL: Official Gazette 2019/508, at 1.

[27] *Also see* i.a., J. van Strien, *Beperking renteaftrek via EBITDA-regels in ATAD1*, Weekblad Fiscaal Recht 2018/19; P. Hoogterp, *Voorkomen buitensporige renteaftrek in Action 4 en Art. 4 ATAD*, Weekblad Fiscaal Recht 2017/147; and H. van den Hurk & S. Ubachs, *De EBITDA-regel binnen OESO- en EU-verband, een verstandige keus?* (part I, Weekblad Fiscaal Recht 2016/233) and (part II, Weekblad Fiscaal Recht 2016/238).

[28] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 2(1).

[29] *Ibid.*, Art. 4(1).

[30] *Ibid.*, Art. 4(2).

[31] *Ibid.*, Art. 4(1), second sentence, and under a and b.

[32] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 4(3)(a).

on interest deductions.[33] According to the ATAD, this concerns taxpayers that are not part of a consolidated group for financial accounting purposes and have no associated enterprise or permanent establishment.[34] This option is motivated in particular by the limited risks of base erosion by stand-alone entities.[35] A Deloitte study showed that at least thirteen Member States[36] have opted to implement the exception for stand-alone entities.[37]

2.1.3 *Generic Limitation on Deduction in Dutch CIT*

2.1.3.1 Robust Implementation

The Netherlands has implemented the generic limitation on interest deduction in Article 15b of the Corporate Income Tax Act 1969 (CITA 1969) and decided to closely adhere to the terminology of the ATAD.[38] The need for this limitation is substantiated with reference to the similar analysis in the final report of OECD BEPS Action Point 4 by noting that it is possible to respond to differences in profit tax rates that exist between various states.[39] The limitation on deduction as a result of the earnings stripping measure applies to all net interest that is payable by a taxpayer.[40]

The Dutch legislator thus opted for a robust implementation of the earnings stripping measure. Its objective is not only to combat base erosion but, according to the legislator, also to achieve a more equal corporate income tax treatment of equity capital and loan capital among all taxpayers. There is an incentive for companies to finance business activities with borrowed capital because of that difference (the remuneration on borrowed capital is deductible, however, the remuneration on equity is not).[41] In the authors opinion, this objective *as suc*h is understandable as the distinction between interest and dividends, i.e., the debt bias,[42] may need to be reduced or adjusted because of its distorting effect.[43] The authors note, however, that the objective of a more equal treatment of interest and dividend, as proposed by the legislator, seems to be focussed on the tax position of the payer; the tax position of the payee – interest being taxable profits while dividends are usually exempt under the participation exemption regime – is not figured into the equation by the legislator. Additionally, the legislator does not elaborate on the impact of the effective economic double taxation arising from the earnings stripping rule and the procyclical effect.-[44] The authors consider this an unbalanced approach.[45]

As a general interest deduction limitation rule, the legislator has clarified that the ATAD earnings stripping rule comes on top of existing interest deduction limitation rules. In order to not have too many concurring interest deduction limitation rules, several targeted interest deduction limitation rules were abolished, especially for excessive participating interest and for excessive acquisition interest.[46] The pre-existing provision countering interest deduction in the case of profit shifting remains in force.[47] This could mean that interest costs would first (entirely or partially) be considered non-deductible under the targeted interest deduction limitation rule and, on top of that, interest could be considered non-deductible based on the earnings stripping rule. The legislator, however, indicated that any interest that is considered non-deductible based on targeted interest deduction limitation rules would be kept out of scope of the interest ratio under the

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33 *Ibid.*, Art. 4(3)(b).

34 *Ibid.*, Art. 4(3), last sentence.

35 OECD BEPS Action 4 Report 2015, point 52, at 34.

36 Croatia, Belgium, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Lithuania, Luxembourg, Malta, Portugal, Romania and Romania.

37 *See Deloitte's Survey Implementation of Interest Expense Limitation Rule*, https://www2.deloitte.com/global/en/pages/tax/articles/atad-survey.html?nc=1 (accessed 8 Jan. 2021).

38 In the report on 'Taxation of Multinationals', the Committee chaired by B. Ter Haar suggests to take into consideration to lower the 30% threshold to 25%. NL: *Parliamentary Papers II* 2019/20, 31066, 623, at 119.

39 NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 8.

40 *Ibid.,* at 9.

41 *Ibid.,* at 9.

42 For example, European Commission, *Taxation papers – The Debt-Equity Tax Bias: Consequences and Solutions,* Working Paper, N. 33–2012.

43 *See* inter alia, E. Kemmeren, *BEPS en renteaftrek en andere financiële betalingen: de verkeerde route*, Weekblad Fiscaal Recht 2015/1107; and M. F. de Wilde, *Een aanzet voor een rechtvaardigere heffing van vennootschapsbelasting van in Nederland actieve groepen*, Maandblad Belasting Beschouwingen 2011/9, at 347. Otherwise, *see* P. van der Vegt, *Enkele hoofdlijnen van een meer beginselmatige en neutrale Wet op de vennootschapsbelasting*, Weekblad Fiscaal Recht 2012/340; F. Engelen, *Herziening van de vennootschapsbelasting: vermogensaftrek of tariefverlaging?*, Weekblad Fiscaal Recht 2010/779; and Q. Kok, *Ondernemingsfinanciering in de vennootschapsbelasting*, Maandblad Belasting Beschouwingen 2010/7-8, at 268.

44 *See* inter alia, S. Cnossen, *What Kind of Corporate Tax Regime in the European Union*, in *EFS 30 Anniversary* (P. Kavelaars ed., European Fiscal Studies / Erasmus University Rotterdam 2021); S. Stevens, *Evaluation of the Earnings Stripping Rules*, 4 EC Tax Rev. (2020); Ruud A. de Mooij & Shafik Hebous, *Curbing Corporate Debt Bias,* IMF Working Paper (accessed 30 Jan. 2017).

45 Noteworthy, the debt bias and its effects on economics, is studied by the European Commission, *see*, https://ec.europa.eu/jrc/en/corporate-tax-policy/debt-bias-in-corporate-taxation (accessed 5 May 2021).

46 NL: Art. 13c and Art. 15ab Dutch corporate income tax act 1969 (CITA 1969).

47 NL: Art. 10a CITA 1969.

earnings stripping rule.[48] By excluding earlier determined non-deductible interest from the scope of this rule, the effect should be that a higher amount of interest would not be non-deductible by concurring interest deduction limitation rules than would have been non-deductible solely under the earnings stripping rule.

If a part of the interest that is paid is considered to be non-deductible under the earnings stripping rule, that interest can be carried forward. Consequently, it could be deductible in any later year as it is not time-restricted.

2.1.3.2 Objective and Justification of Choices Made

Even though the Dutch legislator opted for a robust implementation, it does apply several of the exceptions that are provided. For example, a threshold of EUR 1 million was introduced so that at least EUR 1 million can be deducted from the exceeding borrowing costs regardless of the 30% EBITDA limit being exceeded. This is, however, a lower threshold than the allowed EUR 3 million threshold.

Under Dutch law, the earnings stripping measure may be applied at the level of a fiscal unity.[49] This may produce a more favourable result at the fiscal unity level than would have been the case if the limitation on interest deduction had to be calculated per individual entity. It should be noted that some EU law discussion points on the per-element approach are anticipated[50] in this respect.[51] After all, by applying the exceeding borrowing costs balance at a fiscal unity level instead of at an individual company level, the balance could be more favourable. As the fiscal unity can only be applied by Dutch resident entities, the argument could be brought forward that the more preferential balance is limited to Dutch domestic situations which could constitute an infringement on the freedom of establishment.[52] The Dutch legislator previously determined that – for comparable provisions such as the targeted interest deduction limitation rule discussed above – the fiscal unity should be deemed not to exist. As a consequence of that, interest payments within a fiscal unity that were previously considered non-existing for corporate tax purposes now became visible. However, until currently, the Dutch legislator did not see any need to amend the Fiscal Unity Emergency Repair Act (*Wet spoedreparatie fiscale eenheid*) in relation to the ATAD earnings stripping rule.[53]

Even though the ATAD provides an optional exception for certain industries, the Dutch legislator initially opted out for the exceptions for financial undertakings[54] and for long-term public infrastructure projects.[55] At a later stage, the government did allow the exception for the application of the earnings stripping rule for twenty existing projects concerning public-private cooperation.[56] The exceptions all relate to the improvement, creation, or broadening of highways, tunnels, or locks.

In principle, all other optional exceptions were not introduced into Dutch tax law. The legislator deliberately opted not to implement the exception for stand-alone entities included in the ATAD. The inclusion of such an exception would undermine the objective of the Dutch 2017 coalition agreement to promote more equal treatment of equity and debt capital. Against that background, the legislator saw no justification in providing a wider range of possibilities for interest deduction to stand-alone entities than to entities with an affiliated entity or an affiliated natural person.[57] In addition to that, the Netherlands did not opt to exclude loans that

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48 NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 37; and NL: *Parliamentary Papers I*, C, at 8–9.

49 NL: Art. 15 CITA 1969.

50 Due to the availability of the option to calculate the limitation on interest deduction in the Netherlands at a fiscal unity level, it is possible that, in EU relationships (in which the EU parent company or subsidiary cannot be merged into the fiscal unity), a (higher) limitation on interest deduction would have to be concluded than would have been the case if the EU entities could have been merged into the fiscal unity. This could produce a violation of the freedom of establishment. *See* inter alia S. van Mierlo & F. van der Zeijden, *Het EU-rechtelijke risico van de earnings strippingmaatregel*, Maandblad Belasting Beschouwingen 2019/2, at 74. Differently: D. Smit, *De Nederlandse implementatie van de earnings strippingmaatregel uit ATAD 1*, Maandblad Belasting Beschouwingen 2018/11, at 438; and O. Marres, *Waarom de earnings strippingmaatregel niet in strijd met het primaire Unierecht is*, Nederlands Tijdschrift Fiscaal Recht 2019/3022. Marres contends that the prima facie limitation results from the option offered by the directive itself so that this limitation to domestic tax units is not imputable to Dutch law but rather to the EU Directive. Thus, only a limited review of the directive for compliance with the freedom of establishment would be required which, according to Marres, would not lead to an infringement. Although there are no precedents, it can be argued that the mere compliance with implementation conditions should not result in differences in treatment. *See* e.g., NL: ECJ, 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, ECLI:EU:C:2007:655. Here, too, the withholding exemption in EU situations that was in accordance with the conditions established in the Parent-Subsidiary Directive, could not be less favourable than the conditions for the exemption in domestic relations. By analogy, a similar analysis could apply to the implementation of the limitation on interest deduction.

51 *Also see* Z. Reijn, N. van de Voorde & F. van der Zeijden, *Tax Grouping in an EU Context: All Roads Lead to Brussels*, Eur. Tax'n 306 (2018).

52 Compare NL: ECJ, 22 Feb. 2018, Joint Cases C-398/16 and C-399/16, *X BV and X NV v Staatssecretaris van Financiën*, ECLI:EU:C:2018:110.

53 NL: *Parliamentary Papers II* 2018/19, 350303, at 12.

54 According to the legislator, there was no need for an exception for financial institutions as a consequence of the possibility to apply the earnings stripping rules at a fiscal unity level. NL: *Parliamentary Papers II* 2018/19, 35030, 7, at 19.

55 NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 13.

56 NL: *Parliamentary Papers I* 2018/19, 35030, E, attachment 865736.

57 NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 11.

were concluded before 17 June 2016 from the scope of the provision.[58]

2.1.4 *Potential Criticism*

2.1.4.1 Social Housing Corporations

The creation of the broad earnings stripping rule created discussion especially in relation to social housing corporations. No exception was made for this industry, meaning that they are also subject to the interest deduction limitation rules. The robust implementation and the objective to treat equity and loans in a more comparable manner made a significant impact since housing corporations cannot finance themselves with equity since they do not have shareholders. For the financing of investments, they rely on the capital market and, in particular, on the bank loans secured through the Dutch Social Housing Guarantee Fund, WSW. As a consequence, they are penalized by a limitation on interest deduction, all the more so since housing corporations serve a social purpose. Effectively, the excessive borrowing costs are rather quickly at a level resulting in interest deduction limitation, even though this follows from the nature of social housing corporations.

The lobbying has thus far not been fruitful. The effect, however, is that social housing corporations have less funds to spend on their primary purpose, i.e., building houses. While other countries determined that social housing corporations could benefit from the exception for large (social) infrastructural projects, the Dutch Government did not.[59] Additionally, an exception for stand-alone companies could have helped in this aspect.[60] That would have been in accordance with the OECD BEPS Action Plan to implement in general, and the potential effect of that exception would be limited to – more or less – small companies that were not affected by the earnings stripping rule after all and by social housing corporations. In the authors' opinion, this can be considered as a missed opportunity.[61]

2.1.4.2 Concurrence with Liquidation Loss Rules

Another topic for which the earnings stripping rules potentially lead to discussions are to be found in the concurrence with the liquidation loss rules. Under Dutch law, the parent company is allowed not to apply the participation exemption (and thus effectively deduct) liquidation losses of its subsidiary upon liquidation of that entity.[62] The liquidation loss is calculated based on a mathematical rule, i.e., the liquidation proceeds (e.g., the liquidation settlement and the dividends distributed in the five years before liquidation) minus the amount that (historically) was paid for the subsidiary increased with subsequent capital contributions.

In the situation in which a liquidation loss would occur and be deductible can also affect the interest ratio under the earnings stripping rule. The starting point for that is the calculation of the profits following the regular understanding of 'profit' under Dutch tax law. The deducted liquidation loss is part of that profit. This essentially means that the basis for calculating the earnings stripping ratio will be lower if the subsidiary was liquidated. Subsequently, that lower profit could have a negative impact of the exceeding borrowing costs balance and thus a taxpayer would face the interest deduction limitation at an earlier stage. It would be allowed, though, to correct the profit by adding, for instance, the amount of certain depreciations, deductions to a lower fair market value of an asset, or certain interest ratios. Nijkeuter and Brilman argued that it could be possible to increase the profit for the earnings stripping rule by making a correction for liquidation losses.[63] As such, they take the position that a liquidation loss can be brought within the scope of 'depreciations'. The authors, however, do not agree with this position. In the parliamentary process, no arguments can be found to support the qualification of a liquidation loss as a depreciation. Potentially, a tax court should ultimately decide on the plausibility of this argument. In this, the authors are of the opinion that the national tax court should seek for a preliminary ruling by the ECJ on the correct interpretation of the ATAD.

2.2 *CFC*

2.2.1 *General Outline of the ATAD Provision*

In OECD BEPS Action 3, the OECD recommended that countries design or strengthen CFC rules.[64] Taxpayers may attempt to shift profits by relocating mobile assets – such as intangible assets – to a controlled entity

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[58] NL: *Parliamentary Papers II* 2018/19, 35030, at 14.

[59] Apparently, Belgium and France exempted housing corporations from the earnings stripping rule. *See* NL: *Parliamentary Papers II* 2018/19, 35030, 5 (amendment of Beckerman and Leijten to apply Art. 15b CITA 1969 to housing corporations). The State Secretary for Finance advised not to accept the proposed amendment by letter of 15 Nov. 2018; NL: *Parliamentary Papers II* 2018/19, 35030, at 56.

[60] On the exception for standalone companies, *also see* Stevens, *supra* n. 44, at 158.

[61] More extensively, *see* J. J. A. M. Korving & G. J. W. de Ruiter, *Wie kan dat betalen? Onze huur!*, Weekblad Fiscaal Recht 2020/80.

[62] In the meantime, a temporal and geographical limitation was added to the liquidation loss rules, effective as of 1 Jan. 2021; NL: Official Gazette 2020/539, at 1.

[63] E. Nijkeuter & L. Brilman, *Over de fiscale gevolgen van een 'fiscale EBITDA' als maatstaf*, Weekblad Fiscaal Recht 2019/201.

[64] OECD BEPS Action 3 Final Report 2015.

established in a low-taxed state or to a permanent establishment (PE) situated in a low-taxed state so that the profits associated with those assets are taxed there. This constitutes an attempt to avoid taxation (or at least to postpone it as long as the profits from the relocated mobile assets are not distributed). In order to avoid discrepancies within the EU internal market, the ATAD also included CFC rules. The ATAD CFC rules consist of two provisions: Article 7 ATAD determines the CFC rule and Article 8 ATAD provides for the rules on computation of CFC income.

A lower-tier subsidiary or permanent establishment can be considered a CFC (1) if a taxpayer, with or without an associated enterprise, directly or indirectly holds a shareholding of more than 50% in that entity, and (2) the actual corporate income tax on the profits of that entity is less than 50% of the regular corporate income that would have been due.[65]

Once it is determined that a company has a CFC, the Member States have the choice to implement the actual CFC rules under a Model A or a Model B. Under Model A, the taxpayer shall include in its tax base specifically mentioned types of non-distributed income of the CFC, like dividends, interest and royalties.[66] Under Model A, an EU Member State can opt not to treat an entity as a CFC if one third or less of the income accruing to that entity falls within the categories specifically mentioned.[67] Financial undertaking can be disqualified as CFCs if one third or less of the financial undertaking's income from the specifically mentioned categories derives from transactions with the taxpayer or its associated enterprises.[68] Under Model B, on the other hand, the taxpayer's tax base shall include the non-distributed income of the CFC arising from non-genuine arrangements that have been put in place for the essential purpose of obtaining a tax advantage.[69] An entity can be disqualified as a CFC under Model B if it has accounting profits of no more than EUR 750 000 and non-trading income of no more than EUR 75 000 or the accounting profits of the entity are equal to or less than 10% of its operating costs for the tax period.[70]

The computational rules broadly refer to calculation in accordance with the CIT rules of the Member State of the taxpayer holding the CFC under Model A[71] or to transfer pricing under Model B.[72] The CFC income will only be added to the taxpayer's tax base in proportion of the latter's shareholding in the CFC[73] in the fiscal year of the taxpayer in which the CFC's fiscal year ends.[74] Double taxation is avoided by allowing for a deduction of previously included CFC income in the event that the CFC distributes the income to the taxpayer.[75]

2.2.2 *CFC in Dutch CIT*

2.2.2.1 Model A or Model B?

The ATAD obligated the Netherlands to introduce a CFC measure on prevention of profit shifting to foreign low-taxed controlled entities or permanent establishments or to amend existing CFC rules if these are not in accordance with the ATAD1.[76] On the basis of the arm's-length principle enshrined in the Dutch CITA 1969, the Netherlands already includes such profits in the tax base of Dutch taxpayers. Consequently, the Dutch legislator indicated that it already applied Model B and that, strictly speaking, it does not need to issue any additional regulations to comply with the obligation under the ATAD.[77]

However, when implementing the CFC measure, the Dutch legislator wanted to go beyond than what was strictly necessary. It chose to introduce a scheme based on model A (the additional CFC measure) in addition to the existing application of the arm's-length principle

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65 Anti-Tax Avoidance Directive, *supra* n. 5, Art. 7(1).

66 *Ibid.*, Art. 7(2)(a).

67 *Ibid.*, Art. 7(3), first sentence.

68 *Ibid.*, Art. 7(3), second sentence.

69 *Ibid.*, Art. 7(2)(b).

70 *Ibid.*, Art. 7(4).

71 *Ibid.*, Art. 8(1).

72 *Ibid.*, Art. 8(2).

73 *Ibid.*, Art. 8(3).

74 *Ibid.*, Art. 8(4).

75 *Ibid.*, Art. 8(5).

76 Generally, *see* I. de Groot & B. Larkin, *European Union Implementation of Controlled Foreign Company Rules Under the EU Anti-Tax Avoidance Directive (2016/1164)*, Euro. Tax'n 261 (2019).

77 NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 3. However, *see* Lohuis et.al., *Who Doubt the Correctness of This Argument in Wetsvoorstel Wet implementatie eerste EU-richtlijn antibelasting-ontwijking* (ATAD1), Nederlands Tijdschrift Fiscaal Recht 2018/2247. The legislator interpreted the criticism as a request to enshrine the arm's length principle in law but did not *see* the need to do so; *see* NL: *Parliamentary Papers II* 2018/19, 35030, 7, at 6. The OECD transfer pricing rules would already be sufficiently enshrined in the Dutch CITA 1969; *see* NL: *Parliamentary Papers I* 2018/19, 35030, C, at 4. As stated by Arnold: 'Countries such as Belgium, Luxembourg and the Netherlands, which have traditionally acted as hospitable jurisdictions in which MNEs may establish CFCs, have adopted the weakest form of CFC rules possible', B. Arnold, *The Evolution of Controlled Foreign Corporation Rules and Beyond*, Euro. Tax'n 640 (2019).

(Model B).[78] This approach could help to remove the Netherlands' tax haven image.[79] The legislator proposed to limit the application of this CFC rule under Model A to CFCs in states without profit tax or with a statutory rate of less than 9%[80] or in states included in the EU list of non-cooperative jurisdictions for tax purposes (EU list of non-cooperative jurisdictions).[81,82] Below, the authors will only address the specific additional implementation of the CFC-rule under Model A.

2.2.2.2 Implementation of Model A

The CFC-rule under Model A may apply in situations when a taxpayer, whether or not together with an associated - i.e. a linkage via an interest of at least 25% - company or natural person, has a direct or indirect[83] interest of more than 50% in an entity or a permanent establishment.[84] A CFC exists in such situations if – stated briefly – that entity is a resident or that permanent establishment is situated in a state that does not subject entities to tax on profits or does so at a statutory rate of less than 9% (low-tax state) or in a state that is on the EU list of non-cooperative jurisdictions.[85] A dual resident company that is resident in both a listed and a non-listed state does not qualify as a CFC provided that the company is subject to tax in the non-listed state.[86] Tax transparent bodies can also qualify as CFCs in order to acknowledge the prohibitive character of the Dutch CFC implementation rules.[87]

In order to prevent Dutch companies with real foreign activities from being at a competitive disadvantage compared with companies that only operate locally in those states and to make the supplementary scheme practicable for the business community and the Dutch tax authorities, a framework has been provided for the exception resulting from the directive within Model A for a 'substantive economic activity'.[88] In accordance with the scope of the participation exemption, a worldwide exception for CFCs with a 'substantive economic activity' has been chosen.[89]

The assessment of whether the exception for 'substantial economic activities' applies or, stated differently, the assessment of whether a structure is set up for tax avoidance purposes, is to be made by analysing all relevant facts and circumstances and must be done on a continuous basis. The Netherland's so-called minimum substance requirements[90] no longer function as a 'safe harbour'.[91] Instead, they are used to divide the burden of proof between the taxpayer and the tax authorities. Meeting the substance requirements will lead to the presumption of 'non-abuse' which is respected unless the tax authorities provide evidence to the contrary. Furthermore, if the substance requirements are not satisfied, the taxpayer may otherwise provide proof that there are substantial economic activities and the specific structure is not aimed at tax avoidance, i.e., reflects the economic reality.[92] The substance requirements include a labour cost criterion of – briefly – EUR 100,000 and the requirement that office space should have been available for at least twenty-four months. These are both quantitative and qualitative criteria. The work to be performed by the staff may not be purely ancillary or subordinate, and the staff must possess the required professional knowledge. The office space must be a private office space that is furnished and actually used to conduct the work.[93] The authors emphasize that, according to current Netherlands' tax standards, the mere fact that all criteria on the list of the minimum requirements are met does not automatically constitute the presence of 'substantial economic activities'

Notes

[78] *Also see* R. Adema, J. Bouwman & I. Burgers, *Controlled Foreign Company Legislation in the Netherlands*, in *Controlled Foreign Company Legislation* (George Kofler, Michael Lang & Jeffrey Owens eds, IBFD 2020).

[79] De Groot & Larkin, *supra* n. 76, at 266.

[80] This originally was 7%.

[81] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 4.

[82] Whether a state is considered to be low-taxed is determined on 1 Oct. of the preceding year. Currently, the following countries are considered to be low-taxed: Anguilla, Bahamas, Bahrein, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turkish- and Caicos islands, Turkmenistan, United Arab Emirates and Vanuatu. Countries on the EU list of non-cooperative jurisdictions currently are: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands, and Vanuatu. The two lists are combined and published at the end of each year. The same list is used for the withholding tax on interest and royalty payments i.e., levied by the Netherlands as of 2021.

[83] For a numerical example, *see* De Groot & Larkin, *supra* n. 76, at 263–264.

[84] NL: Art. 13ab CITA 1969.

[85] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 5.

[86] NL: Art. 13ab(3), last sentence CITA 1969.

[87] NL: *Parliamentary Papers II* 2018/19, 35030, 7, at 38.

[88] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 4.

[89] NL: Art. 13ab(5) 5 CITA 1969.

[90] NL:Art. 2e CITA Regulation 1971.

[91] As per 1 Jan. 2020. In reaction to DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1, X Denmark A/S, C Danmark I and Z Denmark ApS v. Skatteministeriet*, ECLI:EU:C:2019:134, and DK: ECJ, 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark and Y Denmark Aps*, ECLI:EU:C:2019:135. *See* NL: *Parliamentary Papers II* 2019/20, 35305, 3.

[92] DE: ECJ, 20 Dec. 2017, Case C-504/16, *Deister Holding AG and Juhler Holding A/s. v. Bundeszentralamt für Steuern,* ECLI:EU:C:2017:1009.

[93] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 6.

nor is it decisive in determining whether valid business reasons exist that reflect the economic reality. All facts and circumstances must be assessed, including the intention and aim of the legal structure.[94]

2.2.2.3 Income of a CFC

When a CFC is deemed to exist, the positive balance of tainted benefits that are not distributed in time or at all is included in the taxpayer's profit. The tainted benefits are specified categories.[95] The benefits taken into account are in line with the ATAD and consist of: (1)interest or other benefits from financial assets; (2) royalties or other benefits from intangible assets; (3) dividends and benefits from the disposal of shares; (4) benefits from financial leasing activities; (5) benefits from insurance activities, banking activities, or other financial activities; and (6) benefits from invoicing activities that add no or little economic value, comprising sales or service benefits from goods or services purchased from or sold to the taxpayer or to an associated company or individual. Since the ATAD does not further define these benefits and the CFC measure is prohibitive in nature, the legislator has also opted not to further define the tainted benefits so that they have a broad scope of application.[96] The amount of the tainted benefits is determined according to Dutch standards. If a CFC has the form of a permanent establishment, the object exemption for foreign business profits does not apply to the tainted benefits that are attributable to that permanent establishment.[97] If the CFC's benefits are negative and not taken into account in the year at hand, they will reduce the positive CFC income for the following six years.[98]

A CFC only exists if the benefits received by the entity in question generally consist of benefits other than tainted benefits. Otherwise stated, a CFC is indicated to exist only if 30% or more of the benefits received by that controlled entity generally consists of tainted benefits. For the purposes of this test, a comparison is made on a net basis, i.e., taking into account the costs relating to the benefits.[99] The Netherlands also opted for the exception for CFCs operating a financial enterprise that generally receives the tainted benefits from third parties.[100] The exception for financial enterprises does not apply to permanent establishments.[101]

2.2.2.4 Double Taxation

Dutch law provides rules aimed at preventing double taxation in the event of taxation of a subsequent distribution of profits by a CFC or on the disposal of shares in a CFC. The CFC rule only applies insofar as the balance of the tainted benefits of a controlled entity received in any year is positive and has not been distributed by that controlled entity before the end of the taxpayer's financial year. In principle, a dividend distribution is a distribution of the profit of the previous year. The starting point is thus that the so-called last in, first out (lifo) method applies. However, in situations in which it is plausible that the dividend distribution concerns a distribution of profits realized in another year, the course of action would be to apply this method as well. The dividend resolution is decisive in this respect.[102]

The ATAD does not provide for rules preventing double taxation in the event that several states apply the CFC measure in respect of the same CFC, resulting in effective economic double taxation. This may occur, for example, if a taxpayer in State A holds a direct interest in a controlled entity while a corporate income taxpayer in the Netherlands holds an indirect interest in that same controlled entity. The same could apply when the CFC measure is applicable to several Dutch resident taxpayers in respect of the same CFC. Since the Dutch legislator was of the opinion that Dutch law already accorded with the ATAD CFC rules under Model B, it could have opted to include rules avoiding double taxation in the additional CFC measure as it was already not necessary to implement the Model A-variant for abusive situations. However, the legislator decided not to do so because it deliberately opted for an additional CFC measure according to Model A. Consequently, it aimed at CFCs in low-tax states or states on the EU list of non-cooperative jurisdictions without a substantive economic activity. Therefore, the objective is for the measure to function as a deterrent so that such arrangements aimed at avoiding tax will no longer be set up using the Netherlands. The legislator argued that arrangements for the avoidance of double

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[94] The authors note that the impact of SV: ECJ, 20 Jan. 2021, Case C-484/19, *Lexel AB v. Skatteverket*, ECLI:EU:C:2021:34 is yet unknown in this respect; this will be discussed in para. 4.

[95] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 5.

[96] *Ibid.*, at 30.

[97] *Ibid.*, at 5.

[98] NL: Art. 13ab(7) CITA 1969.

[99] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 34.

[100] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 7(3).

[101] NL: *Parliamentary Papers II* 2018/2019, 35030, 3, at 6.

[102] *Ibid.*, at 31.

taxation other than those provided for in the directive would not be appropriate.[103]

2.2.3 *Some Comments*

During the implementation process of the CFC rules, a debate was initiated regarding whether the Dutch Government was correct in its statement that the Netherlands already applied CFC rules under Model B. Essentially, it had been argued that the Netherlands' rules only required an arm's length service fee to be charged for significant people functions performed by a (Netherlands) parent on behalf of its foreign subsidiary[104] instead of actually including the foreign (in)direct subsidiary's undistributed income in the Dutch parent company's tax base. The Dutch State Secretary for Finance, however, rejected this criticism by defending that Dutch tax policy adhered to the OECD Transfer Pricing Guidelines.[105] In the authors' opinion, the fact that Dutch law (indeed) is in line with the OECD Transfer Pricing Guidelines in itself is not sufficient for Dutch law to be accord with the ATAD CFC rules under Model B. The European Commission, however, to date, did not initiate an infringement procedure against the Netherlands.[106] The deviating (and additional) implementation of the ATAD CFC rules under Model A, however, strongly depends on the pre-existing application of Model B. Even though the authors admit that the correctness of the argument that Model B was already pre-existing in the Netherlands can be debated, they agree with De Groot to the extent that the Dutch version of Model B[107] is formulated as an open norm so that it probably can be interpreted in line with the ATAD provisions.[108] However, this should be verified and interpreted by Dutch courts; that is, after seeking a preliminary ruling from the ECJ.

When dealing with CFC rules, the impact of primary EU law immediately comes to mind. In the past, the ECJ judged in the Cadbury Schweppes case that the UK CFC rules were incompatible with EU law. Especially the qualitative requirements determining whether a CFC exists differentiated between domestic and cross-border situations before the ECJ judged that the applicable justification grounds were disproportionate. The authors do not see a potential problem with the freedom of establishment for the Dutch Model A implementation.[109] Even though comparable qualitative requirements are applicable compared to the requirements that led to the Cadbury Schweppes judgment, such as the 50% shareholding threshold and a lower effective tax rate, the geographical limitation under Dutch law resolves the issue. Under the former UK rules, EU resident companies could still qualify as CFCs if they met the qualitative requirements. Therefore, intra-EU situations could be treated less favourable than UK companies. That is different in the Netherlands as Dutch CFC rules under Model A only apply to CFCs in non-cooperative or low taxed jurisdictions. Currently, the listed countries are all non-EU Member States. As long as the Netherlands limits the application of its CFC rules under Model A to non-EU countries in which a taxpayer holds a shareholding that provides them with definite influence in decision-making, an appeal to the freedom of establishment would remain unsuccessful since that has no effect in relation to third countries. The authors note that questions, however, may arise as to the compatibility of the CFC rule with the free movement of capital.[110] Dutch CFC rules under Model B already apply to both domestic and cross-border situations.

2.3 *Mismatches*

2.3.1 *General Outline of ATAD2: Unbalanced Tax Effects*

The EU's ATAD2 addresses mismatches in tax effects that arise from certain disparities between national tax systems, which must be tackled by the EU Member States via the national corporate income tax system.[111] The provisions attempt to effectively address the unbalanced outcome in tax effects, i.e., double deduction (DD), deduction/no inclusion (D/NI), or double non-taxation, that originate from differences in qualification, classification, or allocation.

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[103] *Ibid.*, at 6–7.

[104] *Also see* De Groot & Larkin, *supra* n. 76, at 266–267.

[105] NL: *Parliamentary Papers II* 2018/19, 35030, 7, at 6–7.

[106] *See* European Commission, *Report on the Implementation of the Anti-Tax Avoidance Directive,* COM(2020)383 final (19 Aug. 2020), at 10.

[107] NL: Art. 8b CITA 1969.

[108] I. de Groot, *Implementation of the Controlled Foreign Company Rules in the Netherlands*, Intertax 771–772 (2019).

[109] Contrary: Adema, Bouwman & Burgers, *supra* n. 78, at 340. Adema c.s. contend that the Dutch substance safe harbour would be contrary to the Danish cases. Since the ATAD does not extensively harmonize CFC rules, an appeal to primary EU law would still be possible. In the authors' opinion and as explained above, Dutch substance requirements no longer have the effect of a safe harbour, however, they only serve as a presumption of proof against which both the taxpayer and tax authorities can provide counter evidence.

[110] Compare, to this extent, the following case law: DE: ECJ, 26 Feb. 2019, Case C-135/17, *X-GmbH v. Finanzamt Stuttgart – Körperschaften*, ECLI:EU:C:2019:136; DE: ECJ, 17 Sept. 2009, Case C-182/08, *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II*, ECLI:EU:C:2009:559, UK: ECJ, 13 Nov. 2012, case C-35/11, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs*, ECLI:EU:C:2012:707, AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08) and Österreichische Salinen AG (C-437/08) v. Finanzamt Linz*, ECLI:EU:C:2011:61, and NO: EFTA, 9 July 2014, Joined Cases E-3/13 and E-20/13, Fred. Olsen and Others and Petter Olsen and Others and The Norwegian State, EFTA Court Reports 2014, 400.

[111] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 1, 9, 9a and 9b.

They concentrate on (1) hybrid mismatches, i.e., mismatches in the qualification of payments and instruments as well as the classification of entities and profit allocation, resulting in DD or D/NI-outcomes, (2) mismatches in corporate residency that effectuate double non-taxation, and (3) the so-called reverse hybrids that generate tax deferral or double non-taxation. Member States must neutralize mismatches regardless of whether they arise in the interaction with the corporate tax system of another Member State or the system of a third state.[112] Member States must also address the effects of hybrid mismatches between third states that are effectively imported into tax jurisdictions within the EU, the so-called 'imported mismatches'. The ATAD2 rules, however, are not aimed at avoiding effective double taxation in all circumstances or to address all disparities. They target the tax effects that originate from the explicitly listed hybridities.[113]

Most of the mismatches are neutralized by balancing tax effects, i.e., to arrive at an outcome of a single deduction, no deduction/no inclusion, deduction/inclusion, or single taxation. According to ATAD2's preamble, neither the general characteristics of the national tax system, classifications under domestic law, nor the allocation of tax jurisdiction under a bilateral tax treaty are intended to be affected by the directive. Nevertheless, questions arise as to the interaction with bilateral tax treaties, e.g. in relation with the provisions on treaty abuse, especially with respect to tax treaties with non-EU Member States. Mismatches already neutralized via other EU Directives, e.g., the Parent-Subsidiary Directive, are out of the scope of application of the ATAD2 provisions.[114]

To ensure proportionality, the ATAD2 states that it is necessary to address only cases in which 'there is a substantial risk of tax avoidance through the use of hybrid mismatches'.-[115] The ATAD2 should prevent taxpayers 'from exploiting remaining loopholes'. However, despite the terminology of the preamble, the provisions remarkably do not refer to the intent[116] of the taxpayer nor to the artificiality or economic reality of a structure. The provisions appear to apply mechanically. In the authors' opinion, this may raise questions as to the conformity of, e.g., the hybrid mismatch rules with primary EU law following the ECJ's strict interpretation of 'abuse' in the recent *Lexel* case.[117]

The Netherlands implemented mismatch provisions by adding a new and separate paragraph to the CITA 1969,[118] except for the reverse hybrid rule, i.e., the tax liability measure of inverted hybrid entities, which the Netherlands incorporated into the general tax liability provision.[119]

2.3.2 *Mismatches*

2.3.2.1 Directive Provisions on Hybrid Mismatches

Hybrid Mismatches

The ATAD2 attempts to effectively address 'hybrid mismatches' that result in either a D/NI or a DD outcome.[120] The 'hybrid mismatches' to be addressed are listed in the ATAD2 and thereto relate to unbalanced tax effects from the hybridity of financial instruments, entities, and permanent establishments including profit allocation. These mismatches must arise between associated enterprises, between a taxpayer and an associated enterprise, between the head office and permanent establishment, between two or more permanent establishments of the same entity, or under a structured arrangement between non-related parties. The authors note that, in the case of transactions or relations between related parties, the ATAD2 provisions essentially presume the intent of tax avoidance when there is an advantageous tax effect arising from disparities in a cross-border situation. Since there is no possibility for taxpayers to prove otherwise, this effectively (though not legally) forces them to avoid any tax hybridity arising from

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[112] Anti-Tax Avoidance Directive 2, *supra* n. 9, preamble point 5.

[113] For example, *Ibid.*, preamble point 19: '*The hybrid mismatch rule should not apply, however, where the mismatch would have arisen in any event due to the tax exempt status of the payee under the laws of any payee jurisdiction*'. The authors note that the limited scope of the ATAD does raise questions as to the scope of the ATAD's GAAR to other mismatches in tax effects and the potential impact or relevance in this respect of the obligation for EU Member States to address abuse of EU law as a principle of primary EU law.

[114] Anti-Tax Avoidance Directive 2, *supra* n. 9, preamble point 30.

[115] *Ibid.*, preamble point 12.

[116] Except for the structured arrangements.

[117] *Lexel* (C-484/19), *supra* n. 94. *See* on this C. Wisman, *Bedoeld of onbedoeld; verrassende wending EU-uitleg 'belastingontwijking'*, Tax Live (10 Feb. 2021).

[118] NL: para. 2.2A CITA 1969; Art. 12aa (primary rule), Art. 12ab (secondary rule), Art. 12ac (definitions), Art. 12ad (imported mismatches); also including Art. 12ae (dual residency), Art. 12af (dual included income) and Art. 12ag (document requirements) CITA 1969. Also *see* Art. 15e(9) CITA 1969 and Art. 2(8) Unilateral Decree on the avoidance of double taxation 2001. Although the Netherlands did implement the ATAD2 quite precisely, the authors note that it nevertheless could be argued that the Netherlands possibly did made an err by not addressing hybrid mismatches that arise between an entity and an individual in the CITA 1969, cf. art. 2(9) and 2(4)(b) ATAD. *See* Lex van Heijningen, De natuurlijk persoon in de context van de Nederlandse antihybridemismatchmaatregelen, NLF-W 2021/32. *Also* see *Ciska Wisman, Over de rol van het Unierecht: natuurlijke personen en hybride mismatches, NLF-W 2021/33 and Bart Peeters and Lars Vanneste, The Hybrid Financial Instruments: The Effects of the OECD BEPS Action 2 Report and the ATAD, Intertax 2020/480103.* See *different* Gijs Fibbe and Ton Stevens, Hybrid Mismatches Under the ATAD I and II, EC Tax Review 2017 (Vol. 26), No. 3, p. 153-166. Noteworthy, on 7 Sep. 2021, internal documents of the Dutch tax authorities were published following a request thereto by an individual based on the Wet Openbaarheid van Bestuur (WOB), the Dutch Freedom of information Act. These documents show that this specific question actually has come up in practice and was already internally discussed in Oct. 2020. However, the conclusion or outcome of the discussion are not made public (yet). On a related note, the authors point out that questions could occur as to the compatibility of the non-addressing of those mismatches with the EU state aid rules. Compare to this General Court, Cases T-516/18 and T-525/18 (*Engie*).

[119] NL: Art. 2 CITA 1969.

[120] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 9.

structuring international businesses. Due to this assumption of abuse instead of a qualification as abuse based on facts and circumstances, the authors expect questions to arise as to the conformity of the national legislation implementing the ATAD2's provisions with primary EU law.[121]

Primary and Secondary Response

The ATAD2 stipulates a primary response and a secondary response to hybrid mismatch effects to which Member States must adhere. A deduction/no inclusion (DN/I) outcome is primarily addressed via the denial of the deduction for the payer. If the primary rule does not apply, e.g., when the payer's jurisdiction is a third state, the secondary rule applies.[122] The secondary response to a DN/I outcome is to tax the amount otherwise creating a mismatch as profit at the level of the payee. The ATAD2 thus seems to prefer effective taxation in the state of the payer. A double deduction (DD) outcome is primarily addressed via the denial of the deduction at the level of the investor. If the primary rule does not apply, e.g., when the investors jurisdiction is a third state, the secondary rule applies. The secondary response to a DD outcome is to deny the deduction for the payer. The directive thus permits the preference to allow the deduction in the payer jurisdiction. A deduction is not denied to the extent there is corresponding dual included income. The ATAD2 closely aligns to the recommendations set forth in the 2015 OECD Final Report on Neutralising the Effects of Hybrid Mismatch Arrangements.[123] In this respect, the authors note that the policy of preventing effective non-taxation appears to be dominant over the policy choices as to which state should be allowed to tax certain profits.

Value and Transfer Pricing

It is noteworthy that the differences in tax outcomes that are solely attributable to differences in valuation or transfer pricing are not encompassed within the ATAD2's scope of a 'hybrid mismatch'.[124] The Netherlands, however, is currently of the opinion that certain transfer pricing mismatches should be addressed.[125] Despite the its view that tax avoidance should be addressed in a coordinated manner as much as possible, in 2020, the legislator announced its intent[126] to publish a legislative proposal in 2021[127] to effectively unilaterally adjust the application of the at arm's length principle to other states' approach to avoid tax avoidance via international transfer pricing differences.[128] The formal legislative proposal is preceded by a public consultation in spring 2021.[129] Inspired by the initiatives of the OECD and the EU to address international tax mismatches, the Netherlands aims to unilaterally address certain transfer pricing mismatches leading to double non-taxation as per 1 January 2022. The proposal may impact any international transactions that are not 'at arm's length' in the event that a Dutch corporate income taxpayer is involved as either the payer or the payee. For Dutch CIT calculation purposes, in general, transactions between related parties are taken into account at 'arm's length'. To the extent that the actual pricing is not set at arm's length, a transfer pricing adjustment is made to arrive at a pricing that would have been agreed upon between unrelated parties in similar circumstances. The correction may be a 'downward adjustment' or an 'upward adjustment' depending on the deviation. Following the case-law of the Supreme Court, a downward adjustment usually entails the recognition of

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[121] To the extent that the ATAD does not carry out exhaustive harmonization. In such cases, the CJEU has held that EU law allows for the assessment of the compatibility of national legislation adopted to implement a directive provision with primary EU law. *See* FR: ECJ, 8 Mar. 2017, Case C-14/16, *Euro Park Service v. Ministre des finances et des comptes publics*, ECLI:EU:C:2017:177. In addition, reference is made to DE: ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, ECLI: EU:C:2000:695; UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, ECLI:EU:C:2006:121; UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:544; *Glaxo Wellcome* (C-182/08), *supra* n. 110; HU: ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, ECLI:EU:C:2015:832; UK: ECJ, 22 Dec. 2010, Case C 277/09, *The Commissioners for Her Majesty's Revenue & Customs v. RBS Deutschland Holdings GmbH*, ECLI:EU:C:2010:810; FR: ECJ, 7 Sept. 2017, C-6/16, *Eqiom SAS, formerly Holcim France SAS and Enka SA v. Ministre des Finances et des Comptes publics*, ECLI:EU:C:2017:641; *Deister Holding* (C-504/16), *supra* n. 92; *N Luxembourg 1 c.a.* (Case C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 91; *T Danmark* (C-116/16 and C-117/16), *supra* n. 91 and *Lexel* (C-484/19), *supra* n. 94.

[122] As opposed to the anti-mismatch rule of the EU Parent-Subsidiary Directive. Under that rule, the double non-taxation is addressed at the level of the payee; i.e., the payee is denied the tax exemption and is taxed for profits to the extent that such profits are deductible for the payer. *See* Art. 13 (17) CITA 1969, which takes priority over the hybrid mismatch rules.

[123] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements*, BEPS Action 2 Final Report 2015.

[124] Anti-Tax Avoidance Directive 2, *supra* n. 9, preamble point 22.

[125] In this respect, the authors note that questions, in general, have arisen as to whether transfer pricing mismatches could constitute state aid from an EU law perspective.

[126] This responds to one of the recommendations of the ad-hoc Advisory Committee on the Taxation of Multinationals as included in their report presented to House of Representatives on 15 Apr. 2020. The advisory committee consisted of tax and economic experts and was set up by the Ministry of Finance in 2019. It was given the task to advise on a more fair taxation of multinationals, i.e., a broadening of the corporate tax base while preserving the Netherlands' attractive investment climate. The advisory committee proposed non-binding suggestions and recommendations but also called for some restraint until the effects of the OECD's BEPS and the EU's ATAD are known. *See* rapport Adviescommissie Belastingheffing van Multinationals, Op weg naar balans in de vennootschapsbelasting, analyses en aanbevelingen, 15 Apr. 2020.

[127] Letter of the State Secretary for Finance in response to the Report of the Advisory Committee, 15 Sept. 2020, no. 2020–0000169545, Betreft Kabinetsreactie naar aanleiding van het rapport *'Op weg naar balans in de vennootschapsbelasting" van de Adviescommissie belastingheffing van multinationals*'. As a first step, a public consultation to this end was initiated on 4 Mar. 2021 and closed on 2 Apr. 2021.

[128] NL: Art. 3.8 Individual income tax act 2001 (IITA 2001) and Art. 8b CITA 1969. A downward adjustment of profit following the Netherlands' informal capital or deemed dividend doctrine will no longer be accepted if the other state does not apply a corresponding upward adjustment for profit tax purposes.

[129] The consultation document and the public's input are available (in Dutch) via, https://www.internetconsultatie.nl/verrekenprijsverschillen (accessed 5 May 2021).

either an informal capital contribution or a deemed dividend distribution for tax law purposes. Within the Netherlands' tax system, this doctrine functions in a coherent and consistent manner with balanced results. However, the application of this doctrine to international transactions may result in effective double (non)taxation, e.g., in the case of differences in the interpretation or the calculation of the at arm's length pricing or such an approach being absent in the other state. Following the consultation document, as per 2022, a downward adjustment of the taxable base of a corporate taxpayer will only be applied to the extent that a corresponding upward adjustment is made to the taxable base of the relevant counterparty in the other state. The authors note that the rules are designed to apply mechanically without reference to the aim or intention of the taxpayers involved. The proposed changes may result in the Netherlands taxing an amount of profit that, by its own standards, deviates from an at arm's length tax base. Taxpayers involved in international transactions may be confronted with a greater Netherlands tax burden. The authors emphasize that this proposal consequently raises questions as to the compatibility with EU law since the ECJ appears to draw the line at 'arm's length'.[130] National tax rules in need for justification grounds need, as it currently seems, to result in the taxation of an at arm's length calculated taxable base.[131]

Double Deduction

The ATAD2 addresses the full range of DD outcomes. A double deduction refers to the deduction of effectively the same payment, expenses, or losses in the jurisdiction of source or the jurisdiction where the hybrid entity or permanent establishment is established or situated, i.e., the payer jurisdiction, and in another jurisdiction, i.e., the investor jurisdiction.

The Netherlands implemented this element in conformity with the ATAD2.[132] The country emphasizes the broad scope of this provision as even including currency exchanges results. In practice, questions arise as to the interpretation of 'dual included income'.

Financial Instruments

A payment under a financial instrument giving rise to a D/NI outcome is considered a hybrid mismatch provided that the mismatch in tax effects is attributable to differences in the characterization of the instrument or the renumeration and the payee is not taxed within a reasonable timeframe. This also includes hybrid transfers with the same effect. According to the ATAD2, the criterion of taxation within a reasonable period of time is met if the payment is included in the taxable base by the jurisdiction of the payee in a tax period that commences within twelve months of the end of the payer's tax period. Additionally, the criterion is satisfied when it is reasonable to expect that the payment will be included by the jurisdiction of the payee in a future tax period and the terms of payment are at arm's length, i.e., in accordance with the conditions that would be expected to be agreed between independent enterprises. Certain financial instruments can be excluded from the scope of application.[133] The anti-mismatch rule of the EU Parent Subsidiary Directive[134] takes precedence over the those of the ATAD2.[135]

The Netherlands has implemented this element in accordance with the ATAD2,[136] albeit without making use of the exception for certain financial instruments and the banking sector. The latter is because this would, according to the legislator, interfere with the Netherlands' policy objective of effectively addressing tax avoidance.[137] It is noteworthy, at the moment, that the country's implementation[138] of the anti-mismatch rule of the EU Parent Subsidiary Directive is subject to legal proceeding with a focus on its compatibility with both secondary and primary EU law.[139] The authors expect discussions as to the interpretation of taxation within a reasonable timeframe. Additionally, discussions may arise regarding the scope of these provisions, e.g., as to whether to address non-taxation outcomes that are the

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[130] As a combined effect of the case law DE: ECJ, 31 May 2018, Case C-382/16, *Hornbach-Baumarkt-AG v Finanzamt Landau*, ECLI:EU:C:2018:366, and *Lexel* (C-484/19), *supra* n. 94.

[131] *See* on this, e.g., Opinion Statement ECJ-TF 1/2021 on the CJEU decision of 20 Jan. 2021, in Case C-484/19, Lexel AB, concerning the application of Swedish interest deductibility rules Prepared by the CFE ECJ Task Force Submitted to the EU Institutions on 9 Apr. 2021. *Also see* C. Wisman, *supra* n. 117; and M.F. de Wilde, *Wat is eigenlijk de rol van arm's length*, Nederlands Tijdschrift Fiscaal Recht 2021/1228.

[132] NL: Art. 12aa (1)(g), (3) and (4) and Art. 12a (1)(c) CITA 1969.

[133] I.e., financial instruments that have conversion, bail-in, or write down features and financial instruments that have been issued with the sole purpose of satisfying loss absorbing capacity requirements applicable to the banking sector and the financial instrument is recognized as such in the taxpayer's loss absorbing capacity requirements.

[134] Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 219/40 (25 July 2014).

[135] Anti-Tax Avoidance Directive 2, *supra* n. 9, preamble point 30.

[136] NL: Art. 12aa(1)(a) and (5), Art. 12ab and Art. 12ac CITA 1969.

[137] NL: *Parliamentary Papers II* 2018/19, 35 241, 3, at 3.

[138] NL: Art. 13(17) CITA 1969.

[139] NL: Decision of 28 Aug. 2020, ECLI:NL:RBNHO:2020:8559. To the authors' knowledge, the case is being referred to the Court of Appeal. After that, the taxpayer and tax authorities may bring matters to the Supreme Court.

result of disparities other than those explicitly referred to by the ATAD2.

Hybrid Entities

A payment to a hybrid entity that effectuates a D/NI outcome is considered a hybrid mismatch. This is applicable if the mismatch outcome is the result of differences in the allocation of payments made to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity. Stated differently, no hybrid mismatch is established when both the jurisdiction of the potential hybrid entity and the jurisdiction of the investor would treat the entity as tax transparent. Moreover, a payment by a hybrid entity that gives rise to a D/NI outcome is considered a hybrid mismatch if the outcome is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction.

The Netherlands has implemented this concept in accordance with ATAD2.[140] During parliamentary proceedings, stakeholders have signposted the possible adverse consequences of these provisions with respect to, e.g., the US 'check-the-box' rules. These rules could instigate the application of the anti-hybrid mismatch rules also in non-tax avoidance situations. The legislator has provided assurance that it will bring this to the European Commission's attention.[141]

Permanent Establishment

With respect to permanent establishments, the ATAD2 identifies three types of hybrid mismatches: dissimilarities in the recognition of a permanent establishment as such (disregarded permanent establishment), variances in the profit allocation (head office or permanent establishment), and differences in taking into account deemed payments between the payer and payee jurisdiction[142] to the extent that those differences result in a DN/I-outcome.

The Netherlands implemented this provision in accordance with ATAD2.[143] The authors note, in general, that the recognition of a permanent establishment and the profit allocation thereto is subject to international debate. The impact of the digitization and globalization only add to the complexity. In the specific context of the ATAD2, discussions might arise as to whether the provisions can be understood as only addressing the hybridity as explicitly referred to or to also target other non-taxation outcomes that result from other disparities.

Imported Mismatches

To prevent taxpayers from undermining the effectiveness of the rules by way of only importing the effect of a hybrid mismatch between third states into an EU tax jurisdiction,[144] the ATAD2 also addresses 'imported mismatches'. An imported mismatch is a mismatch that arises between non-EU Member States for which the tax avoidance effect is shifted into the jurisdiction of a Member State via a non-hybrid payment. The directive only prescribes one response: the deduction of the payment is disallowed if that payment at the level of the payee is directly or indirectly set off against a deduction that arises under a hybrid mismatch giving rise to a DD or D/NI outcome between third states.

The Netherlands has implemented this element in accordance with the ATAD2,[145] albeit with the explication that there must be a causal link between the payment by the payer in the Netherlands and the hybrid mismatch arising between the tax jurisdiction of third states.[146] There are no statistics available on the extent to which the effect of such imported mismatches was previously shifted into the Netherlands' tax jurisdiction. The causal link must be assessed on the basis of the facts and circumstances of the case at hand. In this, the sequence of the facts is part but not decisive for the assessment.[147] According to the legislator, such link may be established by the similarities in the principal amount, conditions and payment data. According to the legislator, such link is present if those align. In practice, questions arise as to the determination of the 'causal link' and to the specific documentation requirements in this respect.

Structured Arrangements

A structured arrangement is defined by the ATAD2 as 'an arrangement involving a hybrid mismatch where the mismatch outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome'. There is no

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[140] NL: Art. 12aa(1)(b) and (e), (3), Art. 12ab and Art. 12ac CITA 1969.

[141] NL: *Parliamentary Papers I* 2019/20, 35241, C, at 15/16.

[142] Somewhat remarkable, the European Commission performed a state aid investigation into a permanent establishment disparity in the past. However, the European Commission arrived at the conclusion such mismatch did not give rise to state aid, *see* Commission Decision on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe, Brussels, 19 Sept. 2018, C(2018) 6076 final.

[143] NL: Art. 12aa (1)(c), (d) and (f), (3), (4) and (5), Art. 12ab, Art. 12ac and Art. 15e(9) CITA 1969.

[144] Anti-Tax Avoidance Directive 2, *supra* n. 9, preamble point 25.

[145] NL: Art. 12ad CITA 1969.

[146] NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 24/25.

[147] NL: *Parliamentary Papers II* 2019/20, 35241, 7, at 12.

structured arrangement if the taxpayer or associated entities could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from it.

The Netherlands has implemented this provision in accordance with the ATAD2.[148] According to the legislator, a structured arrangement in any case exists if an arrangement (1) is designed or part of a plan to create a hybrid mismatch, (2) includes a condition or involves a transaction or action with the intent to create a hybrid mismatch, (3) is primarily offered to entities located in the state where such a hybrid mismatch arises, (4) contains a clause stating that the terms of the arrangement will be altered if the tax benefits of the hybrid mismatch are omitted, and (5) would result in a negative yield in the absence of the hybrid mismatch. [149] Discussions may arise as to the element of the objectified 'reasonable awareness', especially considering the documentation requirements and the sharing of the tax benefit. Additionally, the authors expect future discussions on implications of the GAAR as to structured arrangements and imported mismatches.

2.3.2.2 Reveres Hybrid Mismatches

One of the ATAD2's provisions is aimed at the so-called reverse hybrid mismatches,[150] i.e., differences in the classification of an entity. A 'reverse hybrid entity' is any entity that is considered transparent for tax purposes by the state of incorporation, establishment, or registration and considered non-transparent by the state where the participants in that entity are established. In contrast to the other mismatches targeted by the ATAD2, reverse hybrid mismatches are solved at the root of the problem, i.e., the qualification conflict, by making the entity liable to corporate income tax in the state of incorporation, establishment, or registration. This only applies in the event that participants hold, in aggregate, a direct or indirect interest in 50% or more of the voting rights, capital interests, or rights to a share of profit of the entity. The reverse hybrid entity is regarded a resident of that Member State and taxed to the extent that the profit is not otherwise taxed either under the laws of the Member State or any other jurisdiction. The ATAD2 provides Member States with the possibility to exclude collective investment funds from the scope of this provision. In addition, Member States may postpone the implementation to 1 January 2022.

The Netherlands choses to implement the reverse hybrid rule, i.e., the tax liability measure of inverted hybrid entities, by including it in the general tax liability provision.[151] Such reverse hybrid entities will become resident taxpayers and will be taxed on their profits in the Netherlands to the extent that the profit will otherwise not be taxed. To the extent that the profit is taxed by the state of the participants, an exemption from tax effectively applies in the Netherlands.[152] It has chosen to make use of the extended implementation deadline because, according to the legislator, this rule deviates from the current law and practice.[153] The new rule is effective as per 1 January 2022.[154] If proven necessary, additional administrative guidance will be published.[155] It is noteworthy that, by the end of 2021, a separate proposal is expected that will introduce the obligation to withhold Dutch withholding taxes.[156] In accordance with the option provided by the ATAD2, the Netherlands will not apply the reverse hybrid rule to certain collective investment vehicles.[157] Recently, a public consultation was held on its implementation.[158]

The reverse hybrid rule has caused some turmoil in the Netherlands international tax practice. A probably even internationally well-known example of tax planning via a hybrid entity, the so-called CV/BV-structure, is effectively eliminated by this rule. A CV, a partnership established under Netherlands' law under conditions, is considered as transparent for Dutch corporate income tax purposes while the state of the participants may regard it to be non-transparent for tax law purposes. In effect, income of the CV is not taxed by the Netherlands and not yet taxed by the other state, resulting in the possibility of tax deferral. The CV/BV-structure is also well-known for its appearance between the tax jurisdiction of

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[148] NL: Art. 12aa(1) and (2), and Art. 12ac(1)(f) CITA 1969.

[149] NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 65.

[150] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 9a.

[151] NL: Art. 2 CITA 1969.

[152] NL: Art. 2(3) and Art. 2(12) CITA 1969 and Art. 9(1)(f) CITA 1969 new.

[153] NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 17.

[154] NL: Art. 2(7) CITA 1969.

[155] NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 17.

[156] *Ibid.*, at 28.

[157] NL: Art. 2(13) CITA 1969 new. *See* NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 28. Collective investment vehicles encompassed within the scope of Art. 1 of Council Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302/32 (17 Nov. 2009), or Art. 4 (1)(k) of Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174/1 (1 July 2011).

[158] The consultation document and the public's input are available (in Dutch) via, https://www.internetconsultatie.nl/belastingplichtmaatregelatad2 (accessed 5 May 2021).

the United States and the Netherlands. As a result of the reverse hybrid rule, the CV will be liable to tax in the Netherlands in conformity with the directive. This will effectively dispense with the attractiveness of the structure from a corporate income tax perspective. The authors note that most tax advantages of such structures are already eliminated as per 1 January 2020 via the hybrid mismatches rules as described in the preceding paragraph. Additionally, in conjunction with the ATAD implementation, as per 1 January 2020, the policy decree on hybrid entities under the Netherlands – United States tax treaty has been withdrawn.[159] In addition, the authors refer to the public consultation held in spring 2021[160] where the legislator announced a legislative proposal to consider a CV, as default, to be transparent for tax law purposes as per 1 January 2022. Moreover, the Netherlands aims to alter its approach to the classification of foreign legal entities in order to minimize mismatches as per that same date. The exact concurrence between the reversed hybrid rule, the transparency of a CV, and the new classification approach needs yet to be determined.

Several stakeholders called upon the Netherlands to monitor for the possible negative impact on the investment climate of the effective shutdown of the CV/BV-structure also in non-tax avoidance situations.[161] The legislator, however, is of the opinion that it will contribute to effectively addressing tax avoidance and promised a decrease of the corporate income tax rate as a compensation.[162] However, despite earlier proposals, the standard tax rate remains 25%.

2.3.2.3 Tax Residency Mismatches

A specific ATAD2 provision is directed at tax residency mismatches effectively resulting in non-taxation, i.e., the deduction of a payment, expense, or loss in more than one tax jurisdiction because of the dual residency of a corporate taxpayer. If one of the tax jurisdictions in which the taxpayer is a resident is a Member State, that Member State must deny the deduction to the extent that the other jurisdiction allows the duplicate deduction to be set off against income that is not dually included. If both jurisdictions are Member States, the place of residence for their bilateral tax treaty purposes is decisive. The Member State where the taxpayer is not deemed to be a resident for tax treaty purposes must deny the deduction. The deduction is therefore allowed in the state where the taxpayer is resident for tax treaty purposes.

The Netherlands implemented this rule into a new national provision,[163] closely aligning with the ATAD2's terminology. In general, the place of residence of a corporate taxpayer is determined based on the place of effective management of the entity, i.e., the place, the geographic location, where the strategic commercial and management decisions are made.[164] Entities incorporated under the Netherlands' law, such as the NV and BV, are deemed to have their place of residence in the Netherlands.[165] The Netherlands determines the place of residence autonomously. If dual residency occurs under a bilateral tax treaty, the corporate tie-breaker will determine the place of residence for tax treaty purposes. The Netherlands uses the OECD Model Tax Convention and the OECD Commentary as a blueprint for its bilateral tax treaties, and its policy is to closely adhere to recent texts, albeit with some mostly minor deviations.[166] The Netherlands also signed the Multilateral Instrument[167] to implement the tax treaty related outcomes of the G20/OECD BEPS Project, and those outcomes are also included into the country's tax treaty policy. Consequently, to the extent the tax treaty can be considered a covered tax agreement by both contracting states and both contracting states have made the same choices, the corporate tie-breaker in the Dutch tax treaty network will thus gradually be shifted from the 'place of effective management' to the 'mutual agreement'. The COVID-19 pandemic and the travel restrictions have raised question as to the impact of, e.g., meetings being held online at the place of residency of corporate entities. According to the OECD, 'a temporary change in location of board members or other senior executives is an extraordinary and temporary situation due to the COVID-19 pandemic and such change of location should not trigger a change in treaty residence'.[168] The Netherlands endorses these

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159 NL: Decree 3 Dec. 2019, Intrekking van het CV/BV- Besluit en heroverweging van het Besluit IFZ 1997/204M, no. 2019–200938. In brief, the withdrawn decree stipulated that Art. 24, para. 4, of the tax treaty is not applied to hybrid entities that are considered transparent for Dutch tax purposes and non-transparent for US tax purposes.

160 The consultation document and the public's input (in Dutch) are available via, https://www.internetconsultatie.nl/fiscaalkwalificatiebeleidrechtsvormen (accessed 5 May 2021).

161 *See* e.g., the AmCham's Tax Committee Responds to Proposed ATAD2 Measures, available via, https://www.amcham.nl/news/amchams-tax-committee-responds-proposed-atad2-measures (accessed 5 May 2021).

162 NL: *Parliamentary Papers II* 2018/19, 35241, 3, at 32.

163 NL: Art. 12ae CITA 1969.

164 NL: Art. 4 General Tax Act (GTA).

165 NL: Art. 2(4) CITA 1969.

166 NL: Tax Treaty Policy 2020.

167 http://www.oecd.org/tax/treaties/beps-mli-position-netherlands.pdf (accessed 5 May 2021).

168 *See* the OECD Policy Responses to Coronavirus (COVID-19) Updated guidance on tax treaties and the impact of the COVID-19 pandemic, 21 Jan. 2021, an update to the OECD Policy Responses to Coronavirus (COVID-19), OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis of 3 Apr. 2020.

guidelines from the OECD on the COVID-19 pandemic and the impact on tax residency.[169] In this regard, the authors expect questions to arise as to the element of COVID-19 being a temporary situation and the consequence of board members voluntarily working from another location, e.g., from home, or enterprises adopting such a policy as opposed to being forced to do so because of national enforced travel limitations. This may impact the application of the tax residency mismatch provision.

2.3.3 *Documentation Requirements*

The Netherlands introduced specific documentation requirements along with the implementation of the anti-mismatch rules of the ATAD2. Corporate taxpayers are obligated to maintain an administration that includes all data relevant to support their ATAD2 tax position.[170] The file must substantiate to what extent the hybrid mismatch rules do or do not apply. This includes an analysis of the tax law of the other state(s) involved.[171] The authors signal that especially providing proof that the hybrid mismatch-rules do not apply can easily be overlooked. Data to be included consist of, among other things, the global organization chart, foreign tax returns and assessments, expert opinions on foreign (tax) law, and an analysis of the domestic and foreign tax treatment of the relevant financial instruments, entities, and permanent establishments.[172] Upon request of the tax authorities, the taxpayer must provide additional information within a reasonable timeframe, i.e., a timeframe depending on the complexity of the case at hand with a minimum of six weeks. [173] If the tax authorities expect the ATAD2 to be applicable, an insufficient file or inadequate response to the request may result in an even more extensive burden of proof for the taxpayer.[174] In such a scenario, the taxpayer must 'convincingly demonstrate'[175] the correctness of its ATAD2 position taken in the tax return instead of making it 'plausible'.[176] The burden of proof and the request for information, however, must be applied within reason, e.g., with respect to certain structured arrangements with which the taxpayer might not be confronted with the more demanding burden of proof if the taxpayer makes it plausible that it cannot be reasonably held to have the relevant data available.[177] The legislator has yet to provide further administrative guidance on the documentation requirement [178] that is additional to the general obligation to continue sufficient administration of tax related data.[179]

3 Amended provisions: Exit taxes

3.1 *Dutch Tax Law*

In the Netherlands, companies would be taxed under the corporate income tax act. Individuals performing entrepreneurial activities in their personal enterprise without legal personality are taxed under the individual income tax act. Both tax acts, however, apply the same concept for enterprise, and both contain an exit tax for the company or enterprise leaving the Netherlands.[180] The exit taxes are due at the moment that the company or enterprise ceases to be a Dutch resident taxpayer (without leaving a permanent establishment in the Netherlands) or when a specific asset (with a capital gain) would leave the Netherlands.

Both exit taxes are almost identical. Two elements need to be distinguished: First, the amount of the exit tax needs to be determined. Subsequently, that amount needs to be recovered. Under Dutch law, the amount of the exit tax is determined as the difference between the fair market value at the time of the transfer and the tax book value of the assets that are concerned.

It was, however, the recovery component that led to several amendments over the last decade. Initially, it was required that the exit tax be paid immediately. Following cases like National Grid Indus[181] and the closing of the infringement procedure against Sweden,[182] Dutch law was amended. The calculation method for the application of the

Notes

[169] NL: Letter State Secretary for Finance, Aanbieding antwoorden schriftelijk overleg Notitie Fiscaal Verdragsbeleid, no. 2020–0000166279 (21 Sept. 2020).

[170] NL: Art. 12ag(1) CITA 1969.

[171] NL: *Parliamentary Papers I*, 2019/20, 35241, E, at 4–6.

[172] NL: *Parliamentary Papers II* 2019/20, 35241, 7.

[173] *Ibid.*

[174] NL: Art. 12ag(2) CITA 1969.

[175] In Dutch: 'doen blijken'.

[176] In Dutch: 'aannemelijk maken'.

[177] NL: *Parliamentary Papers I* 2019/20, 35241, C, at 9/10.

[178] NL: Art. 12ag(3) CITAv 1969. *Also see* NL: *Parliamentary Papers II* 2019/20, 35241, 7.

[179] NL: Art. 52 GTA. In general, taxpayers are held to fill in their tax return correctly without any reservations, Art. 8 GTA.

[180] Besides that, exit taxes exist for substantial shareholders and pensions. These exit taxes, however, are beyond the scope of this contribution.

[181] NL: ECJ, 29 Nov. 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, ECLI:EU:C:2011:785.

[182] Infringement procedure 2007/2372.

exit tax itself was considered to be in accordance with EU law. The fact that the tax debt needed to be recovered immediately, however, was not. An exit tax is only levied in cross-border situations. In domestic situations, taxation on capital gains only occurs upon realization. For exit taxes, unrealized capital gains are being taxed. Following EU developments, the Netherlands introduced an optional deferral of payment for the exit taxes for companies and enterprises. Consequently, the starting point would still be the immediate recovery of the exit tax, however, taxpayers could decide to defer taxation until the moment of actual realization or for payment in ten equal annual installments. If a taxpayer would opt for either form of deferral of payment, he needed to place guarantees, and interest could be calculated on the tax debt. In the event that the taxpayer would apply the deferral of payment in ten annual installments, it would become irrelevant whether the capital gain was actually realized within that ten-year period or whether the company or enterprise would leave the EU. Even in that case, the ten-year deferral period would still exist.

If the Netherlands would have been the country of immigration, it would require the assets of the new resident company or enterprise to be valued at fair market value. This required step-up would have to be determined based on Dutch valuation rules.

3.2 *ATAD Exit Tax Provisions*

The exit tax rules of the ATAD do not follow from the OECD BEPS Project. Article 5 ATAD can actually be considered to be the codification of the ECJ's exit tax case law. As a result, the ATAD requires the imputation of an exit tax when (1) a taxpayer transfers assets from its head office to a permanent establishment abroad or vice versa, (2) an asset (or the entire enterprise) is transferred from one permanent establishment to another permanent establishment, and (3) a taxpayer transfers its tax residence to another state (but only to the extent that no permanent establishment remains). Broadly speaking, the exit tax is due when a company, enterprise, or asset leaves an EU Member State following which the EU Member State concerned loses its taxing rights on that company, enterprise, or asset.

The exit tax is calculated by an amount equal to the market value of the transferred assets at the time of exit of the assets less their value for tax purposes. The exit tax can be recovered immediately. The ATAD, however, requires EU Member States to provide, in intra-EU or intra-European Economic Area situations, an option to pay the exit tax in instalments over five years.[183] The optional deferral of payment may be accompanied by the calculation of interest based on domestic rules.[184] Guarantees can only be required if there is a demonstrable and actual risk of non-recovery.[185]

In the case that a taxpayer opts for the payment in five annual installments, the deferral of payment automatically ends when, for instance, the company, enterprise, or assets would leave the EEA within that five-year period, realizes the capital gain (or loss), or is concluded.[186]

Finally, from an immigration perspective, the EU Member States are required to accept the value established by the Member State of emigration as the starting value of the assets for tax purposes unless this does not reflect the market value.[187]

3.3 *Only Small Amendments*

As Dutch tax law already included an exit tax for companies and enterprises that aligned with ECJ case law, and the ATAD provision on exit taxes mostly follows the same line, no material amendments were required in the Netherlands for implementing the ATAD exit tax provision. As indicated previously, an exit tax is included in the individual income tax act and the corporate income tax act in a significantly comparable way. The ATAD exit tax requirements, however, only relate to companies. As such, the Dutch legislator decided only to amend the recovery rules for the exit tax in the corporate income tax act. The recovery rules for the exit tax under the individual income tax act would remain unchanged.[188]

The existing calculation method for Dutch exit tax purposes already adhered to the ATAD exit tax provision. Regarding the recovery of the exit tax claim, however, the Dutch system differed on two elements from the ATAD:

– The existing Dutch system provides for the option between immediate recovery of the exit tax or filing a request for deferral of payment. Once the deferral of payment is granted and a gain is actually realized, the taxpayer can choose whether it would immediately pay the exit tax claim or opt for payment in ten equal annual installments. The general rules for deferral of payments are to be reduced to a period of five years.

Notes

[183] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 5(2).

[184] *Ibid.*, Art. 5(3), first sentence.

[185] *Ibid.*, Art. 5(3), second sentence .

[186] *Ibid.*, Art. 5(4).

[187] *Ibid.*, Art. 5(5).

[188] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 17.

– Based on the ATAD, a taxpayer who has been granted the deferral of payment only needs to provide guarantees if there is a demonstrable and actual risk of non-recovery. Under Dutch law, the tax authorities could require the provision of guarantees in any case. This also required an amendment.[189]

Another small amendment was required in relation to the step-up value. Even though the Netherlands already valued assets at fair market value upon immigration, the Dutch tax authorities now would have to accept the exit value by the state of emigration as the step-up value. During the parliamentary process, the State Secretary for Finance acknowledged this to be the starting point. He added that, when the tax authorities would mean that this value could not be considered an acceptable fair market value under the at arm's length principle, the tax authorities are allowed to set a value corresponding to the fair market value.[190]

The ATAD would allow for a delayed implementation of the exit tax provisions. Instead of by the end of 2018, the exit tax provisions should only be implemented by the end of 2019, being effective as of 1 January 2020.[191] The Netherlands did not use the extended implementation term since, in practice, the existing system of deferral of payment is almost never utilized.[192]

Remarkably, the authors note, the ECJ case *Wächtler* could lead to the conclusion that the characteristics of the exit tax as described above and as implemented by the Member States turned out to be contrary to the fundamental freedoms of the Treaty on the functioning of the EU (TFEU).[193] Consequently, following *Wächtler*, it could be argued that the implemented exit tax rule is contrary to primary EU law by requiring the recovery of the exit tax upon a transfer to a non-EU Member State. This is especially applicable when that non-EU Member State would have an agreement with the EU including a provision that, to a certain extent, guarantees the free movement of persons. The authors expect future case law to provide more guidance in this respect, e.g., whether this line of reasoning must be applied to exit taxation in general.

4 No amendments: GAAR

Article 6 ATAD introduced a General Anti-Abuse Rule. The wording of the GAAR is comparable to the Specific Anti-Abuse Rule (hereafter: SAAR) that was shortly included in the Parent-Subsidiary Directive before the ATAD.[194] However, as the Parent-Subsidiary Directive's (PSD) SAAR had a more limited scope (i.e., solely to profit distributions that are in encompassed within the PSD), the ATAD GAAR was introduced.

The Netherlands indicated that no explicit implementation in Dutch tax law was required since Dutch law already applies the principle of 'fraus legis'; a doctrine that is developed in domestic case law.[195] For the application of fraus legis, two elements are relevant: (1) actions of a taxpayer should have as a decisive objective to frustrate taxation and (2) this frustration should be contrary to the aim and purpose of the law.[196] Even though fraus legis does not have a specific artificiality requirement, this is embedded to some extent in the first element mentioned above.

The fact that the Netherlands has chosen for 'implementation' of the ATAD GAAR by means of an already existing doctrine could lead to the fact that the ECJ would also interpret the doctrine. Even though the ECJ could not, of course, in itself initiate a procedure, the Dutch Supreme Court could and, in the authors opinion, also should ask the ECJ for a preliminary ruling in the case that it would have doubts on the interpretation of the fraus legis doctrine in light of the ATAD GAAR. During the parliamentary process, the State Secretary for Finance agreed on this approach even though some members of Parliament apparently would have preferred no interference from the ECJ at all.[197] In the authors' opinion, however, the mere fact that the legislator 'implemented' the ATAD GAAR under reference to a pre-existing doctrine has the consequence of becoming an EU law based principle that, at least for situations within the scope of the ATAD, needs to be interpreted in accordance with EU law.[198] Therefore, it could occur that a situation would not be limited by fraus legis - intrepreted in the traditional way - when the ATAD GAAR would limit application of Dutch tax law

Notes

[189] *Ibid.*, at 16.

[190] *Ibid.*, at 17–18.

[191] Anti-Tax Avoidance Directive, *supra* n. 5, Art. 11(5).

[192] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 18.

[193] DE: ECJ, 26 Feb. 2019, Case C-581/17, *Martin Wächtler v. Finanzamt Konstanz*, ECLI:EU:C:2019:138. *Also see* the annotation to the judgment in Vakstudie-Nieuws 2019/13.5.

[194] Parent-Subsidiary Directive, *supra* n. 10, Art. 1(2–4), as amended by Directive 2015/121 of 27 Jan. 2015, OJ L 21/1 (28 Jan. 2015).

[195] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 14. The legislator explicitly referred to DK: ECJ 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, ECLI:EU:C:2007:408, where the CJEU allowed the application of the Danish general anti-abuse principle as implementation of the Merger Directive's anti-abuse rule.

[196] NL: *Parliamentary Papers II* 2018/19, 35030, 3, at 15.

[197] NL: *Parliamentary Papers II* 2018/19, 35030, 7, at 24.

[198] By analogy, reference can be made to H. Vermeulen & H. Zuidhof, *Onder welke omstandigheden dienen nationale voordelen als Unierechtelijke voordelen aangemerkt te worden?*, Weekblad Fiscaal Recht 2020/225, even though the authors apply the doctrine of 'interpretation in conformity with EU law' to benefits granted by EU Directives. In the authors' opinion, a comparable analysis can be made for application of the domestic GAAR implementing the ATAD GAAR.

benefits. In that situation, the interpretation by the ATAD GAAR should have preference, because of the supremacy of EU law.[199] If the ECJ would ever judge that the Netherlands would have to interpret fraus legis in line with the ATAD GAAR, it cannot be excluded that the then preferred interpretation would impact the application of fraus legis in fully domestic situations as well.

The impact of the ECJ's interpretation of the concept of the abuse of EU law on the Netherlands' tax system, in the authors' opinion, cannot not be underestimated. During parliamentary proceedings, the legislator suggested that the Supreme Court remain in control with regards to the interpretation of fraus legis. The ECJ, however, seems to strive for a uniform delimitation of 'abuse of law' to be broadly applied by Member States.[200]

Unfortunately, the ECJ's case law shows a somewhat ambiguous approach towards defining 'tax avoidance'.[201] This resonates in the concept of abuse for the purpose of justifying a restriction on the fundamental freedoms and in the concept of abuse for the purpose of anti-tax avoidance rules. Shifting the focus from 'wholly artificial arrangements'[202] via the 'absence of sufficient economic, commercial or financial reasons',[203] the ECJ recently stated that restrictions of the fundamental freedoms via transactions that are carried out at arm's length conditions cannot be justified based on tax avoidance considerations.[204] The fight against 'tax evasion and tax avoidance', according to the ECJ, refers to combatting purely artificial or fictitious arrangements. The ECJ, in the authors' opinion, subsequently remarkably states that: *' … transactions which are carried out at arm's length and which, consequently, are not purely artificial or fictitious arrangements created with a view to escaping the tax normally due on the profits generated by activities carried out on national territory'*.[205] The ECJ indicates that such restrictions cannot be justified based on the fight against tax evasion and tax avoidance. In the authors' opinion, if the mere presence of at arm's length priced legal transactions rule out tax avoidance, the Netherlands anti-abuse and anti-mismatch provisions might be at risk from an EU law perspective to the extent they improperly target legal structures with at arm's length conditions. However, future case law must provide more guidance as to the competence of Member States to use a more broadly defined concept of abuse.[206] The *Lexel* case, in the authors' opinion, might also put at risk, beforehand, the anti-mismatch measures arising from the G20/OECD Inclusive Framework on BEPS with respect to Pillar Two [207] to the extent they are not actually addressing aggressive tax planning or abuse.[208] Because of these potential far-reaching consequences for both tax authorities and taxpayers and the ambiguity in its case law, the authors note that the ECJ should either conform, nuance or revoke its point of view in this respect. [209]

5 Concluding remarks

In the past, the Netherlands took a cooperative yet critical stance towards projects of both the OECD[210] and EU[211] because of the far-reaching consequences, i.e., the effective limitation on the tax sovereignty including limiting the possibility to autonomously pursue fiscal policies. It now seems open to adhering to what will be agreed upon internationally.[212] The Netherlands implemented the ATAD to effectively address tax avoidance in a broad manner.

Notes

199 Even though the interpretation of terms used in the ATAD GAAR could still also lead to discussions. *See* J. J. A. M. Korving, *Internal Market Neutrality,* SDU (2019), para. 7.5.2.3.

200 For example BE: ECJ, 18 Oct. 1990, Case C-297/88, *Massam Dzodzi v. Belgian State*, ECLI:EU:C:1990:360; NL: ECJ, 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECLI:EU:C:1997:369; *Halifax* (C-255/02), *supra* n. 121; IE: ECJ, 22 Nov. 2017, Case C-251/16, *Edward Cussens and Others v. T. G. Brosman*, ECLI:EU:C:2017:881; *N Luxembourg 1 c.a.* (Case C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 91; *T Danmark* (C-116/16 and C-117/16), *supra* n. 91.

201 *See* M. F. de Wilde & C. Wisman, *Hof van Justitie over 'misbruik van Unierecht' in de directe belastingen: quo vadis?*, Ars Aequi 2020/1, at 22–36; and De Wilde & Wisman, *supra* n. 3.

202 *Cadbury Schweppes* (C-196/04), *supra* n. 121.

203 *N Luxembourg 1 c.a.* (Case C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 91; and *T Danmark* (C-116/16 and C-117/16), *supra* n. 91. *See* L. C. van Hulten & J. J. A. M. Korving, *Svig og Misbrug: The Danish Anti-Abuse Cases*, 47(8/9) Intertax (2019).

204 *Lexel* (C-484/19), *supra* n. 94.

205 *Ibid.*, point 56.

206 This also relates to the interpretation of Anti-Tax Avoidance Directive, *supra* n. 5, Art. 3 and Art. 6 and the interaction between secondary and primary EU law.

207 M.F. de Wilde & C. Wisman, *OECD Consultations on the Digital Economy: 'Tax Base Reallocation' and 'I'll Tax If You Don't'?*, in *Taxing the Digital Economy, The EU Proposals and Other Insights* (Pasquale Pistone & Dennis Weber ed., IBFD 2019).

208 *Also see* Opinion Statement ECJ-TF 1/2021 on the CJEU decision of 20 Jan. 2021, in Case C-484/19, Lexel AB, concerning the application of Swedish interest deductibility rules prepared by the CFE ECJ Task Force Submitted to the EU Institutions on 9 Apr. 2021; Wisman, *supra* n. 117; and De Wilde, *supra* n. 131. *Also see* M.F. de Wilde & C. Wisman, Over tripledip- en overnamestructuren; heeft de Hoge Raad het Hof van Justitie gepasseerd?, NLF-W 2021/26.

209 *Also see* Opinion Statement ECJ-TF 1/2021 on the CJEU decision of 20 Jan. 2021, in Case C-484/19, Lexel AB, concerning the application of Swedish interest deductibility rules prepared by the CFE ECJ Task Force Submitted to the EU Institutions on 9 Apr. 2021; Wisman, *supra* n. 117; and De Wilde, *supra* n. 131.

210 For example, NL: *Parliamentary Papers I*, 2012/13, 25087, D.

211 For example, Notice To Members of 3 May 2011. Reasoned opinion by the House of Representatives of the Kingdom of the Netherlands on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) and National Parliament Reasoned Opinion On Subsidiarity of 6 Feb. 2017, Reasoned opinion by the House of Representatives of the Kingdom of the Netherlands on the proposal for a Council Directive on a Common Consolidated Corporate Tax Base.

212 NL: Letter of the State Secretary for Finance, 5 Nov. 2020, no. 2020–0000213386 and NL: *Parliamentary Papers II* 2020/21, 32140, 73.

The balance between addressing tax avoidance and preserving the attractiveness of the tax climate for businesses, however, is delicate. The interpretation and application of some of the implemented provisions is ambiguous, resulting in legal uncertainty. In addition, the ATAD may result in effective economic double taxation that may hamper economic activity. Moreover, a substantive part of the ATAD provisions do not require a taxpayers' intention of tax avoidance. Finding balance could become even more complicated to achieve when the most recent OECD[213] and EU[214] initiatives towards an international minimum effective corporate income tax rate materialize. This would negatively impact the Netherlands' and other states' ability to continue an international tax policy of capital import neutrality.[215] One of the most pressing points, in all, as the authors see it, is finding a just delimitation of the concept of tax avoidance and the appropriate measures to counter it in order not to hamper economic activities while respecting states' tax sovereignty.

Notes

[213] *See* OECD Inclusive Framework on BEPS, Tax and digital: *Public Consultation Meeting on the Pillar One and Pillar Two Blueprints*, virtually held on 14 and 15 Jan. 2021, discussion on the input of stakeholders in response to the OECD *Public Consultation Document Reports on the Pillar One and Pillar Two Blueprints*, 12 Nov. 2020. *Also see* OECD *Pillar One Blueprint* and *Pillar Two Blueprint* of 14 Oct. 2020.

[214] The European Parliament called, as the authors *see* it, essentially, for an 'ATAD 3'. *See 'The European Parliament … calls on the Commission, therefore, to consider putting forward a legislative proposal for coordinated defensive measures against tax avoidance and evasion, taking into account the negotiations on Pillar II of the Inclusive Framework or on a minimum effective tax rate at EU level … '*, European Parliament resolution on reforming the EU list of tax havens, 2020/2863(RSP)(21 Jan. 2021). Also the investigation to introduce a Debt Equity Bias Reduction Allowance (DEBRA) should be mentioned. It is being researched whether the EU should either abolish the deduction of interest, or introduce an allowance for encouraging the financing of investments with capital. Both options aim at making it less attractive to finance investments with debt. To the opinion of the authors, the actual prohibition of interest deduction does not appear to make it. The proposal for the allowance, however, does not appear to recognize that several EU Member States that had a comparable allowance, like Belgium, in the meantime have almost effectively abolished it. Also, DEBRA did not await the effects of the ATAD earnings stripping rule, nor does it foresee in rules to avoid concurrence.

[215] J. J. A. M. Korving, *Minimumbelasting zet soevereiniteit van landen op het spel*, Tax Live (5 Dec. 2019); C. Wisman, *Het GloBE-voorstel van de OESO: enkel een wereldwijd minimum winstbelastingtarief?*, Tax Live (6 Dec. 2019); and De Wilde & Wisman, *supra* n. 207.