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Harmonising Anti-Tax Avoidance Rules

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This special issue of the Review is focussed upon the new EU Anti-Tax Avoidance Directive (ATAD).¹ Whilst not taking away from the significance of obtaining unanimous approval for this new Directive, the speed – for standard EU timeframes – in which it was approved is not only due to the need to fulfil the timeframe for BEPS implementation, but is in itself symptomatic of the level of urgency felt across EU Member States to respond to the challenges raised by the globalisation and digitalisation of the economy.

The international tax system, and by extension the EU tax system, set out in the 1920s has traditionally been based upon the principles of source and residence.² Whilst the system has never been perfect, and has been famously designated as a “flawed miracle”,³ for many decades these two principles satisfactorily formed the basis for the allocation of taxing right rules; identifying which country had the jurisdiction to tax which income. In the territorial and physical world of the 1920s, these principles were reasonably effective in identifying a country that had both the legitimacy to tax a specific income (substantive jurisdiction to tax), and the ability to collect that income tax (enforcement jurisdiction to tax).⁴ In the new globalised and digitalised world, however, these principles create serious distortions to international trade, amplified by attempts by both Governments and corporations to benefit from them, by engaging in either tax competition or in tax avoidance, respectively. In this world, ascertaining which country or countries have, both substantive and enforcement jurisdiction to tax income, is no longer straightforward.

The international response, and that of most Member States, has been an attempt at limiting tax competition through the introduction of concepts such as that of harmful – as opposed to non-harmful – tax competition; and an attempt at curtailing tax avoidance through the introduction of anti-avoidance rules and principles. We have therefore witnessed in the last decade to a proliferation of anti-avoidance rules: general (GAARs) and special (SAARs); international (BEPS) and national.⁵ It is against this background that the new ATAD sits. Whilst ostensibly an attempt at ensuring harmonised implementation of BEPS within the EU, the ATAD has at its heart a wider concern about establishing a level playing field within the Internal Market. In order to ensure that a minimum level of protection against tax avoidance applies in all Member States, the ATAD aims at preventing the extensive use of lenient approaches to tax avoidance as a form of tax competition.

This Issue includes six articles, which discuss various aspects of the new Directive. In the first article, Ana Paula Dourado discusses thin capitalisation and the new interest deductibility limitation rule in Article 4 of the ATAD, questioning whether the new rules are compatible with existing CJEU case-law.⁶ Steven Peeters then discusses how exit taxation has been reformulated in Article 5 of the ATAD as an anti-avoidance rule, by concentrating on the taxation of unrealised capital gains.⁷ From Special Anti-Avoidance Rules (SAARS) to General Anti-Avoidance Rule (GAARs), attention then turns to Article 6 of the ATAD, with an analysis by Luc de Broe and Dorien Beckers of that Article in the context of principle of prohibition of abuse of law, as developed by the CJEU, as well as other

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¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19/07/2016, p. 1–14.

² League of Nations, *Double Taxation and Tax Evasion, Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion*, G.216.M.85.1927.II., April 1927.

³ R. Avi-Yonah, “The Structure of International Taxation: A Proposal for Simplification” (1996) *Texas Law Review* 74, 1301-1359, at 1303-1304.

⁴ The theorization of the concept of jurisdiction to tax can be found in W. Hellerstein, “Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective” (2003) *Georgia Law Review*, 1-39.

⁵ A.P. Dourado (ed.), *Tax Avoidance Revisited in the EU BEPS Context* (Amsterdam: IBFD, 2017), forthcoming.

⁶ A.P. Dourado, “The Interest Limitation Rule in the Anti-Tax Avoidance Directive (ATAD) and the Net Taxation Principle”, in this Issue.

⁷ S. Peeters, “Exit Taxation: From an Internal Market Barrier to a Tax Avoidance Prevention Tool” in this Issue.

recent anti-abuse measures.⁸ From the GAAR, back to SAARS: Jens Schönfeld focusses on CFC rules, and the minimum standards set out in Articles 7 and 8 of the ATAD, arguing that the new provisions will not revolutionise CFC rules but questioning their compatibility with *Cadbury Schweppes*.⁹ That article is then followed by Gijs Fibbe and Ton Stevens' analysis of the new provision in Article 9 of the ATAD on hybrid mismatches, where they compare it with one initially proposed by the European Commission, and assess both provisions in the context of the BEPS requirements.¹⁰ In the final article, after those dedicated to each of the general and special anti-avoidance rules included in the ATAD, Gianluigi Bizioli makes an overall analysis of the Directive, looking in particular at the compatibility of its various provisions with both the fundamental freedoms and the CJEU case-law, questioning the hierarchy of legal sources.¹¹

After decades of CJEU case-law on national anti-avoidance measures, it is hard to overestimate the significance of the new ATAD for EU tax policy. The ATAD is not, however, a panacea. Whilst necessary elements of any tax system as last resort measures, anti-avoidance rules are, inherently, limited in scope and temporary in nature. They address the symptoms, not the causes of international tax avoidance. The ATAD is a good step forward. Now we need to fix the fundamentals of the international corporate income tax system.¹²

⁸ L. De Broe and D. Beckers, "The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive", in this Issue.

⁹ J. Schönfeld, "CFC Rules and Anti-Tax-Avoidance Directive", in this Issue.

¹⁰ G.K. Fibbe and A.J.A. Stevens, "Hybrid Mismatches under the ATAD I and II", in this Issue.

¹¹ G. Bizioli, "Taking EU Fundamental Freedoms Seriously. Does the Anti-Tax Avoidance Directive take precedence over the Single Market?" in this Issue.

¹² As proposed in M. Devereux and R. de la Feria, "Designing and Implementing a Destination-Based Corporate Tax" (2014) *Oxford University Centre for Business Taxation WP14/07*.