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# **ATAD happened – Legislating on Tax Avoidance in the EU and Implementing the Directive in Finland**

by

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## List of Abbreviations

AG	Advocate General
ATAD or Directive	Anti-Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
Court or ECJ or CJEU	Court of Justice of the European Union
CFC	Controlled Foreign Company
GAAR	General Anti-Abuse Rule
EU	European Union
OECD	The Organisation for Economic Co-operation and Development
PE	Permanent Establishment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

## Abstract

Tax avoidance has never been fought this aggressively. The EU drafted ATAD to follow the BEPS work and they chose a minimum directive as the legislative instrument. Principle of subsidiarity and the reasoned opinions of the Malta and Sweden are analysed to support the findings of the research. The Directive goes further than the previous case law on abusive situations, and this will be analysed in the context of fundamental freedoms. This research will demonstrate the legal problems arising from the implementation of the Directive. The research will then continue to compare the Finnish law to the ATAD provisions and analyse which provisions have to be amended.

# 1 Introduction

## 1.1 Tax avoidance; base erosion and profit shifting in the EU. An Introduction to ATAD.

Implementing anti-avoidance rules is a multi-dimensional scheme. The rules are about tax evasion, tax planning versus tax avoidance, tax competition, public outrage, fair shares and hypocrisy, not leaving out bank secrecy, exchange of information, enforcement and intergovernmental agreements, tax treaties, cooperation, base erosion and profit shifting, general anti-avoidance rules (GAARs) and special anti-avoidance rules (SAARs), and the balance of domestic law and treaty obligations.<sup>1</sup> Therefore, the legislators face many problems when drafting law concerning abusive situations.

There is clear evidence that corporations shift profits to countries with lower taxation.<sup>2</sup> Base erosion and profit shifting is real, but how big are the tax revenue losses for countries? The estimated income shifting amounts of lost tax revenue are not as significant as thought by the majority.<sup>3</sup> Dharmapala also addresses the revenue issues with an idea of raising tax revenue levels with personal income tax or VAT revenue. Why is the EU not considering options to raise tax revenue as presented by him, or is this solution more of a principle than an efficient mechanism.<sup>4</sup>

The Anti-Tax Avoidance Directive (hereinafter ‘ATAD’ or ‘the Directive’) is a part of the Anti-Tax Avoidance package of the EU, which strives towards fairer, simpler and more effective corporate taxation in the EU.<sup>5</sup> This is clear from the recitals of the Directive. The leading aim of the Directive is to diminish corporate tax avoidance and profit shifting to low tax countries in a coordinated manner.<sup>6</sup> It is a follow up on the work of the OECD and G20 countries’ BEPS Action plans and the CCCTB proposal.

ATAD is the first minimum directive in the direct tax EU law. The Directive entails a minimum standard to be implemented to the national laws of the Member States. This means in essence that the Member States have to implement the directive to the level, so that at least the standards presented in the Directive are met, but they

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<sup>1</sup> Stef van Weeghel and Frank Emmerink, 'Global Developments And Trends In International Anti-Avoidance' (2013) August Bulletin for International Taxation, 428

<sup>2</sup> Dhammika Dharmapala CESIFO Working Paper No. 4612 ‘What Do We Know About Base Erosion and Profit Shifting?’ January 2014 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2398285](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398285)> accessed 19 May 2017, 2

<sup>3</sup> Ibid

<sup>4</sup> Ibid, 26-27

<sup>5</sup> ‘EU Taxation and Customs Union’ <[http://ec.europa.eu/taxation\\_customs/business/company-tax/anti-tax-avoidance-package\\_en](http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en)> accessed 15 May 2017

<sup>6</sup> 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 L193, recitals 2-3

are able to legislate higher standards than presented in the Directive.<sup>7</sup> Implementation issues might arise when the national legislators choose to implement higher standards, as there is no highest standard presented in the Directive. It is difficult to then determine in the relations to the fundamental freedoms of EU law, what is the highest accepted standard that a Member State may implement and what is not infringing primary EU law.

As Graaf and Visser questioned in their article: is the choice of minimum directive the most effective way to legislate on BEPS measures in EU law?<sup>8</sup> This is discussed throughout the research, side by side to the arguments of why it will bring problems.

In the recitals of the Directive it is argued to be essential to the enhancement of the internal market by the arguments that “only a common framework could prevent a fragmentation of the market and put an end to currently existing mismatches and market distortions”.<sup>9</sup> These arguments are not thoroughly explained in the recitals of the Directive. Questions arise especially on the fact that tax rates stay in the sovereignty of the Member States and the rates are not harmonised by the Directive. Locating businesses of MNEs still remain in the toolbox of EU tax planning.<sup>10</sup> It can be concluded already by the support of this argument, that the Directive does not address the issues of market distortions and fragmentation of the market in full. For example, Malta has a corporate tax rate of 35 %<sup>11</sup> but the effective tax rate is argued to be lower than 10 % and in some situations even 0%.<sup>12</sup>

## 1.2 Background to the Directive and the lack of an impact assessment

In the EU, the founding Treaties (TFEU<sup>13</sup> and TEU<sup>14</sup>) lay down the basic legal framework which give the EU competencies to legislate on specific issues. Article 115 TFEU gives the EU competence to legislate on issues which “directly affect the establishment or functioning of the internal market”. The EU claims that the Directive is to be implemented quickly because the issues related to internal market are in need of international coordination. There was no impact assessment made on

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<sup>7</sup> 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 L193, recital 3

<sup>8</sup> Arnaud de Graaf and Klaas-Jan Visser ‘ATA Directive: Some Observations Regarding Formal Aspects’ (2016) EC Tax Review 4, 199

<sup>9</sup> 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 193/1, recital 2

<sup>10</sup> Arnaud de Graaf and Klaas-Jan Visser ‘ATA Directive: Some Observations Regarding Formal Aspects’ (2016) EC Tax Review 4, 200

<sup>11</sup> Malta Income Tax Act Cap. 123 <

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8658&l=1> accessed 04.06.2017

<sup>12</sup> Tommaso Faccio ‘Is Malta a Tax Haven? Implications for Europe during the Maltese Presidency and beyond’ [11 January 2017] The Greens in the European Parliament, 6

<sup>13</sup> Consolidated version of the Treaty on the Functioning of the European Union OJ C 326

<sup>14</sup> Consolidated version of the Treaty on European Union OJ C 326

the legislative proposal of the Directive. This means that the seven key questions that make up an impact assessment were not answered:

1. What is the problem and why it is a problem?
2. Why should the EU act?
3. What should be achieved?
4. What are the various options to achieve the objectives?
5. What are the economic, social and environmental impacts and who will be affected?
6. How do the different options compare in terms of their effectiveness and efficiency (benefits and costs) and
7. How will monitoring and subsequent retrospective evaluation be organized?<sup>15</sup>

The principle of subsidiarity, which is one of the core principles of EU law, is one central part of the impact assessment. The Directive requires all Member States to implement the Directive measures with a minimum standard to national law. Even though not a legal problem as such, it is certainly an extensive administrative burden on the Member States when drafting laws and assessing the related impacts. It will be a burden for the tax authorities as well, at least in the beginning.

#### 1.2.1 Articles in ATAD directly derived from BEPS

Three articles are more or less directly derived from the BEPS project. Article 4 on the interest limitation, Article 7-8 CFC rules and the rule on hybrid mismatches. EU law issues were discussed in the report, as OECD wanted to make sure that all EU Member States who are OECD members would be able to adopt the interest limitation rules, and in such a manner that the rules would not be contrary to the fundamental freedoms or other relevant EU laws.<sup>16</sup> According to Annex A of the BEPS report, which outlines EU law issues related to interest limitations, fundamental freedoms could be justified with the need to preserve the balanced allocation between Member States with the power to impose taxes and the need to prevent tax avoidance and to combat artificial arrangements.<sup>17</sup> In the opinion of the author, the OECD approach seems very simplistic when considering relevant EU law. For example, subsidiarity issues were not discussed at all, even though the provisions would affect purely national transactions.

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<sup>15</sup> 'Guidelines On Impact Assessment - European Commission' (Ec.europa.eu, 2017) <[http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm)> accessed 4 June 2017.

<sup>16</sup> OECD, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 -2015 Final Report, 22

<sup>17</sup> OECD, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 -2015 Final Report. Annex A, 85

Article 4 on interest limitation has a political objective to discourage taxpayers from artificially shifting their debt to Member States with more generous deductibility rules. The OECD gave the countries a lot of flexibility on implementing the rule in their legislation. The outcome in the ATAD was rather similar, even though it was the most controversial of the measures in the Directive. The only measures left out was the 10 percent uplift and the possibility to use EBITDA multiannual averages.<sup>18</sup> The most debated topic in the last phase of negotiations was related to targeted rules, and the discussions led to an agreement, which can be found in paragraph 6 of Article 11, to wait for the OECD members to agree on a minimum standard.<sup>19</sup> It seems probable that no minimum standard agreement is reached, a deadline was decided to be 01 January 2024.<sup>20</sup>

The Articles on CFC-rules have a political objective for tax companies and other entities resident in low-tax countries in the case that they are controlled by EU resident taxpayers. Action 3 BEPS and Articles 7-8 ATAD are very similar; entities and PEs are covered, 50 percent threshold in both, and legal and economic control are taken into account. They included a specific provision concerning PEs of CFCs, entity approach based on the analysis of categories of income, substance carve-out rule for applying entity-approach to intra-EU situations, and transactional approach based on substance analysis. CFC rules were politically very important for the Directive to go through, but a unitary agreement was not easy to achieve, because of the political and technical difficulties of CFC-rules.<sup>21</sup> The BEPS Final Report on CFC-rules is designed to be sufficiently adaptable to the EU law provisions.<sup>22</sup> The OECD takes into account the case law of the Court by citing *Cadbury Schweppes*<sup>23</sup> where CFC-rules were only accepted when the arrangement is wholly artificial lacking economic reality. Therefore, according to the OECD, this limits the possibility to apply CFC-rules in intra-EU situations. The OECD recommended the EU Member States to include a substance analysis in the CFC-rules and to apply the rules equally to domestic and cross-border CFCs.<sup>24</sup>

Article 9 on hybrid mismatches has a political objective of neutralizing the tax effect of hybrid mismatch arrangements, which exploit differences in the tax treatment of an entity or instrument under the laws of two or more Member States

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<sup>18</sup> Aloys Rigaut, 'Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons' (2016) European Taxation, 501

<sup>19</sup> Ibid, 501

<sup>20</sup> 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, Article 11 (6)

<sup>21</sup> Aloys Rigaut, 'Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons' (2016) European Taxation, 503-504

<sup>22</sup> OECD, Designing Effective Controlled Company Rules, Action 3 – 2015 Final Report, 10

<sup>23</sup> C-196/04 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] ECLI:EU:C:2006:544

<sup>24</sup> OECD, Designing Effective Controlled Company Rules, Action 3 – 2015 Final Report, 17

to achieve deductions in both Member States, or a deduction no-inclusion situation, where the deduction is granted in one Member State and it is not included in the tax base of the other Member State.<sup>25</sup>

### 1.2.2 Articles directly derived from CCCTB

Two of the Articles derived from the CCCTB discussions, were Article 5 on Exit Taxation and Article 6 GAAR. The political objective of the article on exit taxation was to discourage tax payers from transferring their tax residence or assets for the purposes of aggressive tax planning. This measure was the easiest to draft in a political sense, as there was not much of opposition to the need of the provision. Some technical aspects were negotiated.<sup>26</sup>

The political objective of the GAAR was to close down any possible gaps in the tax laws in the area of corporate taxation. The wording of the article is in line with the PS Directive GAAR. The only notable differences are that the ATAD does not grant any benefits compared to the PS Directive, and the ATAD GAAR also includes third countries in addition to EU Member States.<sup>27</sup>

### 1.3 Aim and delimitation

The purpose of the research is to discuss the Directive as a whole from an EU law perspective, first beginning with the problems with the principle of subsidiarity, and the input provided by Member States. Principle of subsidiarity is a principle of primary EU law, and therefore it has legal relevance, even though it is a political matter because the Member States have decided to give up on their tax sovereignty by accepting the Directive.

Then the research will continue with an in-depth analysis on whether there exists a conflict of sources in EU law, when taking into account the Directive, fundamental freedoms and related case law. The research will finish with a review of how the Directive will likely be implemented in the national laws of Finland. Finland is chosen because the author is a Finnish national, and therefore it is a natural choice taking into account the disparities arising from linguistics.

This research will focus on direct taxes with limited discussion on the VAT directive<sup>28</sup>. The research is based on EU law implications and Finnish tax law changes, and will not include a comparative analysis on other Member State tax laws. There are already many scholars who have written a comparative analysis of

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<sup>25</sup> Aloys Rigaut, 'Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons' (2016) *European Taxation*, 504

<sup>26</sup> *Ibid*, 502

<sup>27</sup> *Ibid*

<sup>28</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ 347/1

the Directive. Even though principle of proportionality is of a great importance in EU law, proportionality of the Directive is left out of this paper for further research. In the section concerning Finnish law ATAD rules are compared to the rules in force in Finland, and whether they need to be amended. It is not discussed whether the rules will or will not infringe EU law, as no rules are yet implemented.

The questions the author wants to answer in the conclusion are:

- How is principle of subsidiarity addressed in ATAD when there is no impact assessment?
- Is there a conflict of sources in EU law, and if there is, what is the consequences?
- How is case law of the Court on abusive practises different from ATAD?
- Does the Directive require major changes in Finnish tax law? And if yes, what are these?

#### 1.4 Methods and material

This research is conducted by a traditional legal dogmatic approach. This means the author uses positive law as a basis for arguments, including, but not limited to, written or unwritten national and international rules, principles, concepts, doctrines, case law and literature.<sup>29</sup> Economic and political issues are mentioned, but not discussed in depth as this is a legal research. The last day of research was 04.06.2017.

## 2 Principle of subsidiarity

Article 5 TEU defines the competences of the EU and the principles of subsidiarity and proportionality, which govern the competences. Subsidiarity is one of the ground principles of the EU legal framework, and every legislative measure is evaluated under this principle before adoption.

*3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and*

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<sup>29</sup> Sjoerd Douma, *Legal Research in International and EU Tax Law* (2014 Kluwer), 18

*proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*<sup>30</sup>

The principle of subsidiarity simply distinguishes the existence of a competence, and the use of such competence. It was retained in the Lisbon Treaty which was concluded in 2009. The Lisbon Treaty contains a protocol on the principle of subsidiarity and proportionality, where it is stated in Article 2, that the Commission shall consult widely and is only permitted not to consult in exceptional cases. In any case, the Commission must give a reason for the decision to not conduct consultations. In Article 5 of the Protocol, the draft legislative acts need to be justified with regard to the principles of subsidiarity and proportionality. The assessment should contain the financial impacts of the legislative proposal, and the reasons why the objective can be better achieved at the Union level. It should be supported by quantitative and qualitative indicators if possible. All possible burdens, administrative and financial, should be taken into account in the impact assessment, which fall upon the Union, national governments, regional or local authorities, or economic operators and citizens. The CJEU has jurisdiction to rule on the possible infringement of the principle of subsidiarity under Article 263 of the TFEU in actions brought by the Member States.<sup>31</sup>

The Protocol requires the Commission to send all of the legislative proposals to the national parliaments for review of subsidiarity and proportionality. If the national parliaments find that the proposed legislation is not in line with the principles, they need to send a reasoned opinion back to the Union within eight weeks. As a consequence, if at least one third of the national parliament votes on the non-compliance of the subsidiarity principle, the Commission must review its proposal. Then the issue is in the hands of the Commission; they have to review it and vote for the possible amendment.<sup>32</sup> Even if the Commission decides not to amend the legislative proposal, the Council and the European Parliament can override the decision, and vote for the incompatibility of the legislative proposal. An important note is that the national parliaments have the right to only give an opinion on the principle of subsidiarity, and not the principle of proportionality, even though these two principles are closely tied together.<sup>33</sup>

The principle of subsidiarity has had a wide impact in practice on the Union's legislative measures. They legislate more with directives rather than regulations, and always use guidelines and codes of conduct when possible. However, success of the Protocol in the Lisbon Treaty in practice relies a lot on the parliaments of the

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<sup>30</sup> Consolidated version of the Treaty on European Union OJ C 326 (TEU), Article 5

<sup>31</sup> Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality

<sup>32</sup> Ibid, Article 7.2

<sup>33</sup> Paul Craig and Grainne De Burca, *EU Law Text Cases and Materials* (Fifth Edition, Oxford University Press 2011), 96-97

Member States. If they do not actively devote time and energy to the subsidiarity of the legislative proposals, subsidiarity issues might not be caught. The requisite of one third of the national parliaments of the Member States who need to take action before the Commission is required to review the legislative proposal is rather difficult to obtain on the same legislative proposal.<sup>34</sup> In C-233/94, which is a case concerning the freedom of establishment, the Court argued that the principle of subsidiarity is fulfilled in the case as the directive preamble explains valid reasons to legislate on the matter on the Union level. The Court also gives another argument in favour of the directive, that the Commission's Recommendation on the issue did not fully achieve the desired result, and therefore the issue is better to be legislated on the Union level. The Court also stated in this case that the directive itself doesn't have to include an express reference to the principle.<sup>35</sup>

The impact assessment contains the identification of the problem, defines the objectives of the proposed legislation, develops the main policy options, analyses the impacts of the options, compares the options and outlines policy monitoring and evaluation. Subsidiarity calculus is a part of the impact assessment.<sup>36</sup>

## 2.1 Reasoned opinion of the Maltese Parliament

The House of Representatives, Parliament of Malta decided to give an opinion on the subsidiarity issues because in their opinion the Commission is acting *ultra vires*. The competences of EU are legislated in TFEU, and Malta considers that EU is acting in a way which is not permitted by the Treaties. They consider that the recommendations given by OECD in the BEPS project are more reasonable, as they give the countries more flexibility in the implementation, compared to the legislative measures in this Directive. The Maltese Parliament also question whether the EU has actual competence for fiscal harmonization of the nature presented in the Directive.<sup>37</sup>

They continue by stating that the Commission has not given any valid, quantitative or qualitative, indicators that the proposal cannot be better legislated on a national level. They also state that they would have expected a tighter approach, especially when considering that it is a first Directive with such a scope in the area of direct taxation. The Maltese Parliament questions whether Article 115 provisions on an internal market justification is fulfilled in this situation. They highlight that the

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<sup>34</sup> Ibid

<sup>35</sup> Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231 para. 26-28

<sup>36</sup> European Commission, Impact Assessment Guidelines, 15 January 2009 SEC(2009) 92, 5-6

<sup>37</sup> Maltese Parliament, Reasoned opinion of the Maltese Parliament on the proposal for a directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, 2 (COM(2016)0026 – C8-0031/2016 – 2016/0011(CNS))

Commission has to be able to give valid reasons and to evaluate the principles of subsidiarity and proportionality as required by Article 5 of the Protocol.<sup>38</sup>

*“The Treaties only provide for a generic provision which concerns the approximation of laws (Article 115), and as such only where there is clear internal market justification (‘... as directly affect the establishment or functioning of the internal market.’). Simply repeating this statement in the proposal (including in its title) does not exempt one from the requirement to substantiate, giving valid reasons, an evaluation of conformity with the principles of subsidiarity and proportionality, as required by Article 5 of Protocol No 2 concerning the application of these principles.”<sup>39</sup>*

The section on subsidiarity in the Explanatory Memorandum only explains that, if Member States would implement laws according to the BEPS recommendations, without an EU directive, it might possibly aggravate the existing fragmentation in the internal market and perpetuate the current inefficiencies and distortions of competition, in addition to stating this the Maltese Parliament referred to cases.<sup>40</sup> The Maltese Parliament criticizes the Commission for not giving enough material for the national parliaments to consider whether their arguments are valid or not.

*“The proposal and its accompanying documents do not appear to explain where these differences between national rules would be such as to hinder the fundamental freedoms and how they would thus have a direct effect on the functioning of the internal market or would cause significant distortions of competition.”<sup>41</sup>*

The Maltese Parliament wishes to highlight that distortions in competition should be significant in order the adoption of EU measures to be justified.

In the BEPS project, the OECD acknowledged the differences in national tax systems and therefore understood the importance of the flexibility of implementation. The Maltese Parliament argues that a single set of CFC rules are not, as proposed in the Directive, required by Action 3 of BEPS report. They also argue (contrary to their rights laid down in Protocol 2), that the interest limitation rules apply also to purely national situations which do not relate to the functioning of the internal market.<sup>42</sup>

There was no impact assessment done for this legislative proposal, and the Commission argued that this is because of the strong link to the OECD activities,

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<sup>38</sup> Ibid, 3

<sup>39</sup> Ibid

<sup>40</sup> Ibid, 3(Cases C-376/98, Germany v Parliament and Council, paragraph 106; C-300/89, Titanium dioxide, EU:C:1991:244, paragraph 23)

<sup>41</sup> Ibid, 3

<sup>42</sup> Ibid

the Staff Working document provides evidence and analysis, the interested parties were involved extensively in consultations on the technical elements of the proposed rules in a previous phase, and in particular, there is an urgent real demand for coordinated action in the EU on this matter of international policy priority. The Maltese Parliament outlined why any of these are not taking into account Malta's local dimension. They began with the fact that Malta is not a member of the OECD, and therefore the OECD did not take the circumstances of Malta into account. In addition, the OECD did not recommend to apply the rules as a minimum standard. Secondly, the Staff Working Paper does not make any kind of impact assessment of this proposal in Malta. The consultations concluded by the CCCTB framework were proven to have negative impact on Malta. They finish with an argument, that the Commission has not been able to provide even satisfactory reasons as to why there exists an exceptional urgency to not conclude an impact assessment.

The Maltese Parliament conclude with the statement that the benefits derived from the implementation of the Directive are non-existing when compared to the damage, and are speculative and doubtful.<sup>43</sup>

## 2.2 Reasoned opinion of the Swedish Parliament

The Swedish Parliament 'Riksdag' begins their reasoned opinion by stating that it is an important political priority to fight against tax evasion and tax avoidance. The Riksdag considers, however, that sovereignty of the Member States of EU in the direct tax matters, and they argue that the Member States should have the right to decide how to use the tax revenues they collect and to establish the tax bases in a way that suits the needs of that State. The Riksdag is certainly worried that if States lose tax sovereignty, it will affect their financial welfare.

The Riksdag criticizes the Commission for not carrying out an impact assessment of this Directive, and the fact that the Commission explained the reasoning behind not carrying out an impact assessment to be because of a strong connection with the OECD BEPS work. The Riksdag considers that OECD BEPS recommendations do not go as far as this minimum requirement Directive or does not correspond the work of the OECD on BEPS, and therefore they cannot justify not carrying out an impact assessment with the OECD BEPS material.

The Riksdag also highlights the facts that the proposal of the Directive was produced in a short period of time and the provisions lack clarity. They conclude with stating that, in their opinion, the Commission has not proven that the proposal

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<sup>43</sup> Ibid

is in line with the principle of subsidiarity for all the above mentioned reasons and have to be seen as incompatible with the principle of subsidiarity.<sup>44</sup>

### 2.3 Similarities and differences

The Maltese Parliament commented on some of the specific issues to argue why the proposal is not in line with the principle of subsidiarity. For example, the fact that also purely national interest payments will be affected by the legislative changes was pointed out by the Maltese Parliament. The Swedish Riksdag was more general in their opinion, and did not elaborate any specific issues. The Riksdag had a clear objective of defending tax sovereignty in direct tax matters, as in their opinion the financial situation would possibly get worse when the taxing rights would be transferred to the EU.

Both of the States saw the absence of an impact assessment as a problem in a legislative proposal which is in the area of harmonizing direct tax matters, as it will affect the State's tax income and it requires significant changes to their legislation. Both also agree that the arguments of the Commission of not doing an impact assessment cannot be explained with the BEPS work, as the Directive does not fully reflect the work. The fact that the Directive is a minimum directive and the BEPS work only provides recommendations, where national governments can find the best solution to implement the legislation, seems to be a problem for both of the States. They also agree on the fact that the legislative proposal was done in a tight timeframe and the Commission did not properly argue why it was pushed through in such a short timeframe. Both of the States conclude that because the Commission has not proven the legislative proposal is in line with the Directive, they consider it not being in line with principle of subsidiarity.

The argumentation was stronger in the Maltese opinion than in the Swedish opinion, because the Maltese Parliament raised actual specific points from the legislative proposal and discussed how the Commission had approached the issues and explained why their opinion departs from the Commission's opinion. The only mistake the Maltese Parliament made was, that they, in the opinion of the author, weakened their opinion when discussing the principle of proportionality. As discussed earlier in this paper, Protocol 2 does not give the Member States a right to review the proportionality of the legislative proposal. Sweden, on the other hand, gives a general approach in a rather short format, which gives an impression that they are not strong in their opinion about the conformity of the subsidiarity principle of the legislative proposal.

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<sup>44</sup> Swedish Parliament, Subsidiarity check of proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (COM(2016) 26), Appendix 2 Reasoned Opinion from the Swedish Parliament

The fact that the Member States have now accepted ATAD as binding law, means that they have given up their view that the Directive is not in line with principle of subsidiarity. In the next chapter the conflict of sources in EU law will be discussed, because legal problems arise from the fact that now the issue is legislated on the EU level.

### 3 Is there a conflict on the sources in EU law?

#### 3.1 Concepts of abuse of law and tax avoidance

The courts of the Member States have brought many cases to the ECJ, where the national court has deemed the practice in question as abusive. For example, in *Centros*<sup>45</sup> the Danish court argued, that the Danish nationals were circumventing the minimum capital requirements of Danish law by establishing a company in England and then selling products in Denmark. The Court clearly stated at that time, that it is merely a right of the citizens of EU to establish companies in the Member States they find to be most suitable to their needs according to the freedom of establishment. The Court did not find this situation abusive. In another case, *Cadbury Schweppes*<sup>46</sup> concerning CFC-legislation, the Court argued that the legislation is disproportionate in the case when the arrangement is not wholly artificial.<sup>47</sup> Lower taxation in itself is not an argument for less favorable tax treatment.<sup>48</sup> These cases did not concern the interpretation of secondary law, but these cases have been a vital part of the abuse of law doctrine created by the Court. In essence, the Court argues that no legislation which hinders the freedoms provided by the TFEU can be justified by abuse of law, unless it is a wholly artificial arrangement. In the field of direct taxes the concept of wholly artificial arrangement refers to abuse and fraud, even if these two terms are conceptually different.<sup>49</sup> The author disagrees with Jimenez, as one must be critical when discussing tax fraud and abuse as being of similar concept, as in essence they are two different things and should not be mixed. Even in *Halifax* these two concepts were separated with an ‘or’.<sup>50</sup>

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<sup>45</sup> C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECLI:EU:C:1999:126

<sup>46</sup> C-196/04 *Cadbury Schweppes plc ja Cadbury Schweppes Overseas Ltd vastaan Commissioners of Inland Revenue* [2006] ECLI:EU:C:2006:544

<sup>47</sup> *Ibid*, para 51

<sup>48</sup> C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] ECLI:EU:C:1999:524 para 4 and C-422/01 *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt v Riksskatteverket* [2003] ECLI:EU:C:2003:380, para 52

<sup>49</sup> Adolfo Martin Jimenez ‘Towards a Homeogeneous Theory of Abuse in EU (Direct) Tax Law’ (2012) (Bulletin for International Taxation) 275

<sup>50</sup> C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECLI:EU:C:2006:121, para 68

The legislative bodies in the EU have been keen to introduce special anti-avoidance rules to the tax directives. For example, the Parent Subsidiary Directive<sup>51</sup> and the Merger Directive<sup>52</sup> and Interest-Royalty Directive<sup>53</sup> include an anti-avoidance rule, to prevent abuse of the rights laid down in the directives. An interpretation of the Merger Directive anti-abuse measure was given by the Court in *Kofoed* where the ECJ considered abuse of law for the first time as a general law principle.<sup>54</sup> Arnall argues that prohibition of abuse does not protect the rights enjoyed by companies under EU law but limits the rights that would be otherwise conferred to them.<sup>55</sup> It is still not discussed by the Court whether abuse of law is general doctrine established by the Court or a technique to interpret EU law.<sup>56</sup>

The case law of the Court has followed this same line of thought by accepting exit taxation in *National Grid Indus*. The Court argued there that a Member State is entitled to tax the economic value in the Member State where the value was created in, even though the asset was not realized to capital gains. But the Court also stated that it is not proportional to oblige the company to compensate the amount of exit tax immediately. Therefore, even if exit taxation is an obstacle for the internal market and a restriction on the freedom of establishment, it can be justified with balanced allocation of taxing rights in accordance with the principle of territoriality.<sup>57</sup>

The Court has been reluctant in accepting tax avoidance as a justification for restrictive measures towards the fundamental freedoms. There are different kinds of justification bases used by the Court, either based on the Treaty freedoms and mandatory requirements established in case law in *Cassis De Dijon*<sup>58</sup>. One of the mandatory requirements is the effectiveness of fiscal supervision. Could tax avoidance be a justification used under fiscal supervision? In *Avoir Fiscal*, the Court argued that the risk of tax avoidance cannot justify a restriction of the fundamental freedoms.<sup>59</sup> The reason for the Court not accepting tax avoidance as a justification was that the Member States could not give a clear definition on what

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<sup>51</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States OJ L 345, Article 4

<sup>52</sup> Council Directive 2009/133/EC of 19 October 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, Article 11.

<sup>53</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States OJ L 157/49

<sup>54</sup> C-321/05 Hans Markus Kofoed v Skatteministeriet [2007] ECLI:EU:C:2007:408

<sup>55</sup> Anthony Arnall 'What is a General Principle of EU Law' in Rita de la Feria and Stefan Vogenauer, Prohibition of Abuse of Law A New General Principle of EU Law? (Hart Publishing 2011) 20-21

<sup>56</sup> Stefan Vogenauer 'The Prohibition of Abuse of Law: An Emerging General Principle of EU Law' in Prohibition of Abuse of Law A New General Principle of EU Law? (Hart Publishing 2011) 558

<sup>57</sup> C-371/10 National Grid Indus BV vastaan Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam [2011] ECLI:EU:C:2011:785 para 48

<sup>58</sup> C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECLI:EU:C:1979:42 para 8

<sup>59</sup> C-270/83 Commission v France 'Avoir Fiscal' [1986] ECLI:EU:C:1986:37

tax avoidance is.<sup>60</sup> But in *Marks and Spencer*, the Court accepted tax avoidance as one of the three justifications.<sup>61</sup> In recent case law, AG Kokott has argued that the measure of the implementation of the PS Directive should not go further than necessary to prevent tax avoidance.<sup>62</sup>

The briefing clearly proposes that the GAAR is designed to meet the ‘wholly artificial test’ set by case law.<sup>63</sup> In the opinion of the author, all of the BEPS and ATAD measures are aiming to address tax avoidance situations as abusive practices, but go significantly further than the ‘wholly artificial test’ presented by the Court. This argument is supported by the fact that OECD discussed that “the BEPS project has also revisited the existing international tax standards to eliminate double taxation, in order to stop abuses and close BEPS opportunities”<sup>64</sup> OECD discusses BEPS and abuse with an ‘and’ from which the author concludes that base erosion and profit shifting have a direct link with abusive practices.

The author is of the opinion that the EU has not discussed one important feature when deciding on ATAD, which is whether these measures to diminish abusive practices used for base erosion and profit shifting can enhance freedom of establishment and free movement of capital? The preparatory works are missing the impact assessments, as discussed before, and therefore, the arguments are on vague grounds. The question will be addressed by the Court in the following section discussing case law related to ATAD, but it is nonetheless interesting to discuss. The hypothesis is that in light of previous Court case law related to the directives, that the Court will read ATAD in the light of previous judgements related to abusive situations, and will not accept the loss of fundamental freedoms. Harmonizing tax measures generally raise legal certainty, as there is no need to comply with 28 (27 after Brexit) different rules, but as this Directive gives space for the national legislators, it might still bring legal uncertainty. Further in the paper, issues related to implementing ATAD is discussed, which will be of great importance when the Court balances Directive law with the fundamental freedoms.

### 3.2 ATAD on double taxation and double non-taxation versus previous case law of the Court

ATAD is the first EU Directive to take into account double taxation and double non-taxation. The preamble explains that double taxation creates obstacles to the

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<sup>60</sup> Frans Vanistendael ‘EU vs BEPS: Conflicting concepts of Tax Avoidance’ in Dennis Weber EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid (IBFD 2017), 4-5

<sup>61</sup> C-446/03 *Marks & Spencer plc v David Halsey* [2005] ECLI:EU:C:2005:763 para 49

<sup>62</sup> Opinion of AG Kokott on 19 January 2017 C-6/16 *Eqiom SAS* ECLI:EU:C:2017:34 para 22

<sup>63</sup> Anti-tax-avoidance directive briefing, EU legislation in Progress, June 2016, 5

<sup>64</sup> OECD BEPS, Explanatory Statement 2015, 7 (point 16)

internal market.<sup>65</sup> The Directive aims to diminish double non-taxation at the same time as it ensures that double taxation will not arise from the Directive measures. While the discussion around double taxation is not a new topic in EU law, the concept of double non-taxation is. This follows from the BEPS project of the OECD and the G20 countries. Before the Lisbon Treaty was concluded, double taxation was mentioned in Article 293 EC Treaty, where it was stated that the Member States shall enter into negotiations with each other to abolish double taxation. This provision was deleted in the Lisbon Treaty.<sup>66</sup>

The ECJ has discussed double taxation in its case law. For example, in *CIBA* the Court argued, that the *EU law on its current state of development* does not lay down any criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation. The Court also argued that the Member States are not obliged to adapt their tax systems to the different systems of taxation of the other Member States.<sup>67</sup> It is possible to conclude from the case law of the ECJ, that the Court sees the fundamental freedoms as incapable of solving double taxation.<sup>68</sup>

Double tax burden brings corporations in a situation of juridical double taxation. Double taxation is against all basic principles of taxation, but is double non-taxation a real legal problem? As Martinez argues, double non-taxation is not a legal problem, but rather an economic and policy problem. The consequences of the legal measures fighting against it, may amount to legal problems. He describes as one of the arising problems, the differences of interpretation of OECD BEPS and EU measures against tax avoidance on domestic legislation, which can amount to various different interpretations. Taxation is in the national sovereignty, and this inevitably amounts to a situation with tax systems with different tax bases and rates.<sup>69</sup> The author sees that the only way around this would be the exhaustive or full harmonization of direct tax law in the EU. As Martinez argues, the tax systems built up in 1920s for a local business taxation cannot handle the issues arising from international tax planning<sup>70</sup> in a way which wouldn't be legally problematic and cause a high administrative burden on the Member States and the corporations operating across of the EU.

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<sup>65</sup> 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, recital 5

<sup>66</sup> K Daxkobler and E Huisman, 'Levy&Sebbag The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market', (2013) 402-403

<sup>67</sup> Case C-96/08 *CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi kft v Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály*, [2010] ECLI:EU:C:2010:185 para 27-29.

<sup>68</sup> K Daxkobler and E Huisman, "Levy&Sebbag: The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market" (2013) 405

<sup>69</sup> Felix Daniel Martinez Laguna, "Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation" (2017) 2

<sup>70</sup> *Ibid*, 1-3

“From the author’s point of view, the outcome of double non-taxation is not a legal problem as such, but the due consequence of the proper application of the law in cross-border situations. If it is a problem, it seems to relate more to political, and especially economic concerns stemming from legal differences among tax systems and taxpayers legally taking advantage of them across borders.”<sup>71</sup>

Unintended double non-taxation has been discussed as a problem which should be solved, but what exactly is the problem? The fact is that double non-taxation arises from national tax laws, which are created for the needs of one State, on the sovereignty of that State, and when these tax laws are applied in international cross-border situations double non-taxation may arise. On which legal basis should it be solved? What is unintended double non-taxation?<sup>72</sup> The right to tax income is based on national law. In an international situation, the coordination on which legislation has the right to tax, is decided with tax treaties and, in the EU, with EU law measures. If according to the laws, the transaction is not taxable under either of the domestic tax laws, is it a legal problem? However, the EU and the OECD have clearly stated that this is a problem, but the definitions of the problem remains vague. Davies argues in his article that the heart of the mismatches is the heart of EU law, where the aim of the legislation is the objectives to be achieved rather than areas to be regulated.<sup>73</sup>

### 3.3 Taking into account foreign tax laws in the EU

Brokelind argues in her article, that “the content of domestic law is the result of a synergy with foreign law”.<sup>74</sup> In her eyes, learning comparative tax law might be the key to understand your own tax system in a deeper manner. Even though national legal authorities do not refer to foreign law as such, there have been cases in Sweden where foreign law has been cited. Still, from an administrative law perspective, Sweden is not bound with recognizing foreign tax rulings as equivalent to a Swedish ruling.<sup>75</sup> The author believes that this is the situation overall in the EU, that the courts of the Member States cannot be bound to take into account foreign tax laws.

Before the ATAD, any harmonization in the direct tax matters in the EU was lacking. Direct tax matters did however need to comply with the fundamental freedoms of EU law, mainly freedom of establishment (Art. 49 TFEU) and free movement of capital (Art. 63 TFEU). The Court has repeatedly held, that the

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<sup>71</sup> Ibid, 1

<sup>72</sup> For more on the subject, read: Felix Daniel Martinez Laguna, “Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation” (2017) 1-3

<sup>73</sup> G Davies “Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time” (2006) 72-73

<sup>74</sup> Cécile Brokelind ‘Interactive Law Building and EU Tax Law’ in Dennis Weber ‘EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid’ (IBFD 2017) 3

<sup>75</sup> Ibid, 4-5

Member States are not required to consider foreign legal classifications when applying their national tax laws. For example, in *Deutsche Shell* the Court stated “Freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules...”<sup>76</sup> The same was confirmed in *Krankenheim*<sup>77</sup> and later in *Damixa*<sup>78</sup>. In other words, the Member State is not obliged – under fundamental freedoms – to hold other States tax law to account when deciding on their tax rulings. This is because every tax legislation in the EU is to be viewed autonomously, under the principle of autonomy, as suggested by AG Kokott.<sup>79</sup>

In light of these Court judgements, it is obvious that the Directive goes much further in demanding cross-border recognition of laws of other Member States than before this point in the legal framework of the EU. It is interesting to note what will be decided in cases brought to the Court concerning the Directive, and in which way the will change the balance between the autonomy of Member States and the fight against profit shifting. In the Directive taking into account foreign tax law is directly linked to the need to protect tax bases from base erosion. Therefore, it is important to look back to the Court case law to see whether the EU has had a legal framework to justify breaches of fundamental freedoms with base erosion, which hinder the internal market, directly or indirectly, now or possibly in the future.<sup>80</sup> In many cases, the Court has not accepted justification based on base erosion when there is a breach of a fundamental freedom. The only justification the Court has accepted is when the situation is abusive and consists of a wholly artificial arrangement.<sup>81</sup> In the case of *Eurowings*, the Court argued that the Member States should not hinder the exercise of fundamental freedoms simply because the other Member States have a lower level of taxation.<sup>82</sup> Also in *Damixa* the Court held that;

*“It is true that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions taken by a*

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<sup>76</sup> C-293/06 *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* [2008] ECLI:EU:C:2008:129 para. 43

<sup>77</sup> C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECLI:EU:C:2008:588, para 50

<sup>78</sup> C-593/14 *Masco Denmark ApS, Damixa ApS v Skatteministeriet* [2016] ECLI:EU:C:2016:984, para 40

<sup>79</sup> Opinion of Advocate General Kokott delivered on 12 May 2016 on C-593/14 paras 19-21

<sup>80</sup> C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECLI:EU:C:1974:82, para 5

<sup>81</sup> C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECLI:EU:C:2006:544 para 55

<sup>82</sup> Case 294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] ECLI:EU:C:1999:524 para 44

*company as to the establishment of commercial structures abroad may be to the company's advantage or not, depending on the circumstances.*"<sup>83</sup>

It is clear that the Directive goes much further than the case law of the Court. It is essential now to briefly discuss whether the Directive can actually not be in conformity with EU law. There are diverging academic opinions on the issue of whether secondary legislation is bound to respect fundamental freedoms, and if yes, to what extent. In spite of some scholarly opinions which conclude that fundamental freedoms are not binding for secondary legislation, it is not debatable that EU law should be in conformity with the objective of enhancing the internal market. The fundamental freedoms can be argued to be the basic pillars of the internal market, and therefore in the author's opinion, Directives are bound to be in line with the fundamental freedoms.<sup>84</sup>

### 3.4 Implementing the Directive to national law

The Directive is likely to have a ground-breaking impact on the national tax laws of the Member States, as most of the Member States do not have such rules in their national law or the rules in force now are not in line with the Directive minimum standards. Only a few of the Member States have rules which are in line with the Directive.<sup>85</sup> As a general rule Member States must transpose the Directive into their national laws before 31 December 2019. There are a few exceptions to this, for example, the exit taxation rule transposition has an additional year to be implemented. Estonia received specific treatment concerning exit taxation, as their tax system has unique features.<sup>86</sup>

The legal problems of the Directive lies in the fact that EU law can be applied only so that it is equally as restrictive to domestic and international cross-border settings. The BEPS action plans and the Directive articles derived from it, are problematic because they might, in some situations, end up as a restriction of the fundamental freedoms.<sup>87</sup> To be able to assess whether fundamental freedoms are restricted with the national implementation of the Directive, the applicable freedom has to be found. In the case law of the Court, often times, either the tax measures fall under free movement of capital or freedom of establishment.<sup>88</sup> The fact that directives in

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<sup>83</sup> Case C-593/14 Masco Denmark ApS, Damixa ApS v Skatteministeriet [2016] ECLI:EU:C:2016:984, para 40

<sup>84</sup> Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), 256

<sup>85</sup> Daniel Gutmann, Andreas Oerdelwitz et al., 'The Impact of the ATAD on Domestic Systems: A Comparative Survey' (2017) *European Taxation*, 18

<sup>86</sup> 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, Article 11

<sup>87</sup> Oleksandr Koriak 'The Principal Purpose Test under BEPS Action 6: Is the OECD Proposal Compliant with EU Law?' (2016) *European Taxation*, 552

<sup>88</sup> In the experience of the author. This is also the most logical freedoms, as taxation affects investments and movement of capital and in the other hand the establishment of companies.

EU law do not have direct effect in a situation where a Member State could not cite a directive against an individual<sup>89</sup>, means that the Directive cannot impose obligations to individuals (companies), if they are not implemented at all, or are not correctly implemented according to national law. This is for the sake of legal certainty.<sup>90</sup>

If a measure is exhaustively harmonized in the EU, the national law needs to be tested against the harmonising provision, which, in this case is the Directive, and not primary law.<sup>91</sup> With a minimum directive, the provisions are not fully harmonized in the field, so, in principle, the laws implemented by the Member State need to be tested against fundamental freedoms. When tracing back to the AG Kokott opinion<sup>92</sup> as it is a minimum directive, it might be defined as a restriction, if the law is more restrictive than the Directive requires and applies only to cross-border situations. However, in the Directive, it is clearly stated that it ‘shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases’.<sup>93</sup>

There is a real risk that the legislation implemented from the Directive by the Member States is not in line with the fundamental freedoms and produces discriminatory measures. Basically, all Directives are valid before withdrawn, annulled or declared invalid by the Court.<sup>94</sup> In all cases, the secondary law has to comply with the primary law.<sup>95</sup> Even when the Court is open to state that the Directive is contrary to the general principles, the Court may apply certain techniques which save them from having to invalidate the Directive. In other words, the Court can choose to interpret the Directive in a way which is in line with EU law. This technique is called reconciliatory interpretation.<sup>96</sup>

In previous case law concerning reconciliatory interpretation of a regulation, the Court argued that the interpretation does not follow the wording of the regulation.<sup>97</sup> In another case, the Court argued that the directive has to be interpreted in light of the right to private life set out in Article 8 of the ECHR.<sup>98</sup> Reconciliatory

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<sup>89</sup> C 148/78 Tullio Ratti [1979] ECLI:EU:C:1979:110

<sup>90</sup> Jörgen Hettne, ‘European Legal Principles and National Legal Challenges’ in Cécile Brokelind, *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014), 20

<sup>91</sup> see, for example, C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECLI:EU:C:2003:664, para 64

<sup>92</sup> Opinion of Advocate General Kokott delivered on 12 May 2016 on C-593/14

<sup>93</sup> 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, Article 3

<sup>94</sup> C-475/01 *Commission of the European Communities v Hellenic Republic ‘Ouzo’* [2004] ECLI:EU:C:2004:585, paras 22-23

<sup>95</sup> Rita Szudoczky *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD 2014), 102

<sup>96</sup> *Ibid*, 108

<sup>97</sup> Joined cases C-402/07 and C-432/07 *Sturgeon and others* [2009] ECLI:EU:C:2009:716, paras 47-48

<sup>98</sup> Joined cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECLI:EU:C:2003:294 paras 68, 91

interpretation is also an obligation for the Member States when they are implementing secondary legislation.<sup>99</sup> The Court has stated that the Member States have to interpret the directives in a manner which balances the law provided in the Directive and the fundamental freedoms of the Court.<sup>100</sup>

There is only one case, which has dealt with the validity of one of the direct tax directives from the viewpoint of their compatibility with fundamental freedoms.<sup>101</sup> Namely, *Gaz de France*, was a case about the interpretation of the companies included in the PS Directive scope. The national Governments and the Commission argued that restricting harmonisation and approximation of legislation to certain fields cannot be unlawful.<sup>102</sup> The Court then stated,

*“The Court has consistently held that the Community institutions are free to introduce harmonisation gradually or in stages. It is generally difficult to implement such measures because they require the competent Community institutions to draw up, on the basis of diverse and complex national provisions, common rules in harmony with the aims laid down by the EC Treaty and approved by a qualified majority of the Members of the Council, or even, as is the case in fiscal matters, their unanimous agreement”*<sup>103</sup>

and,

*“The Court has already held that, in respect of shareholdings which are not covered by Directive 90/435, it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or by conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation. However, that does not of itself allow them to impose measures that are contrary to the freedoms of movement guaranteed by the Treaty”*<sup>104</sup>

Even though it has to be noted that PS Directive is not a minimum directive as ATAD is, and therefore ATAD has to be analysed in a slightly different light. The Court states above, that the Member States have the right to implement the directive in such a way that the aim of the directive provisions is interpreted in line with national legislation. It is true that it is difficult for the Member States to implement directive law, when taking into account that the tax laws across the EU are diverse and interpreted in a different manner, and that the Directive cannot take all of these into account in its text. In *Gaz de France*, the Court states directly that it is the

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<sup>99</sup> Rita Szudoczky ”The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation”, 110

<sup>100</sup> C-101/01 Lindqvist, ECLI:EU:C:2003:596, para 90.

<sup>101</sup> Ibid, 445

<sup>102</sup> C-247/08 *Gaz de France – Berliner Investissement SA v Bundeszentralamt für Steuern* [2009] ECLI:EU:C:2009:600, para 47

<sup>103</sup> Ibid, para 52

<sup>104</sup> Ibid, para 60

responsibility of the Member States to implement directive provisions in a manner which is in line with the fundamental freedoms.

To summarize, it seems to be improbable that the Court would actually withdraw, annul or declare the Directive invalid. As TFEU lays down the fundamental freedoms in hard law, the secondary law has to always be in conformity with them. Because the national Governments have space to implement the Directive into national law, it is possible that the Court does not comment on the Directive itself, but that it will hold the national implementation of the Directive law as contrary to the fundamental freedoms.

## 4 Implementing ATAD in Finland

### 4.1 General tax atmosphere in Finland

Discussions around corporate taxation has been on the table in the Finnish Parliament. The main aim of the Finnish government is to establish a tax system which is competitive, does not favour certain investments with tax planning objectives, and does not create opportunities for tax planning purposes.<sup>105</sup> The discussion in Finland is mainly addressing the question: how to adapt the tax system for the challenges of globalization? Finland has reacted already to the tax competition of tax bases by lowering the corporate tax rate and implementing the interest limitation rules for intra-group loans. The discussion in the parliament has also included thoughts and ideas about more effective and fair dividend taxation.<sup>106</sup>

In the sections below, the comments on ATAD from the Finnish legislators are presented, where the majority agreed that ATAD should stay as it is, but some of the members had a dissenting opinion, which will be presented as well. After this, ATAD provisions and the possible implementation will be discussed. The analysis will be based on the article of Viitala<sup>107</sup> and an official statement by Helminen<sup>108</sup>, as well as the author's remarks on the issue.

### 4.2 Finance Committee Statement on ATAD VAVL 2/2016 vp, including U 7/2016 vp and E 11/2016 vp – valiokunnan lausunto

The Finance Committee produced a statement on ATAD in the beginning of 2016. The main tasks of the Finance Committee are to analyse State budgets and supplementary budgets, and legislative matters concerning taxes and other financial

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<sup>105</sup> Hallitusohjelma (2015): Ratkaisujen Suomi - Pääministeri Juha Sipilän hallituksen strateginen ohjelma 29.5.2015, Hallituksen julkaisusarja 10/2015

<sup>106</sup> Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 6/2017 Tammikuu 2017, 8

<sup>107</sup> Tomi Viitala 'EU:n veronkiertodirektiivi' (2017) Verotus

<sup>108</sup> Marjaana Helmisen lausunto ehdotuksesta direktiiviksi sisämarkkinoiden toimintaan suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta

matters. There are 19 members in the Committee.<sup>109</sup> On ATAD the opinions of the Committee were divided and some members of the Financial Committee delivered a departing opinion, which is presented after the official opinion of the Financial Committee.

The majority of the Committee were very supportive towards the Directive, and they acknowledged that it was a part of the tax package which aims to combat tax avoidance. The Committee acknowledges that the Directive is only a part of the solution, and that CCCTB would address the problem in a more efficient manner and bring a systemic approach to the issue. They also state the fact that the heart of the problem lies in the differences of national tax systems. They are of the opinion that the timetable for the drafting of the Directive is very ambitious, as it is done in such a short timeframe. They accept the Commissions arguments on expediting the Commissions' approach because of the risk related to time of an overly lengthy process. The Commission is worried that if they do not act immediately, the States would implement BEPS project recommendations into their national law and the results would be different across the EU, and this would result in obstacles within the internal market.

The Ministry of Finance set up a working group to study the financial outcomes of tax avoidance and the financial effects of base erosion and profit shifting, but this study was not supposed to be ready until late 2016 (it is still not available), and therefore it is not included in the analysis on the effects of ATAD. The Finance Committee gave their full support for the provisions on exit taxation, GAAR, and anti-hybrid rules. They comment that these rules will increase legal certainty and, in their opinion, the EU has the competence to legislate on these matters as they are with a cross-border dimension. They also state that these provisions will raise the efficiency of the law and helps in finding a similar approach to the issues all over the EU.

The Finance Committee raised a question whether the interest limitation and CFC rules are on the scope of national legal sovereignty in direct tax matters. But, in the end, they state that they support the objectives, but they wish to strike a balance between Member States' tax sovereignty and, at the same time, have efficient tax coordination. The CFC rules in the Directive are based on the calculation of the profits where the taxpayer is a resident and in Finnish legislation it is based on the industry at the moment. Some companies now in the scope of CFC legislation will probably drop out of the scope of the CFC rules. The new CFC-rules will add administrative burden to both taxpayer and the tax authorities. However, the Financial Committee concludes that CFC rules are not of importance in the corporate income tax because of the low number of CFC situations. The Financial

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<sup>109</sup> Finance Committee Website (accessed 16 May 2017)  
<<https://www.eduskunta.fi/EN/lakiensaaminen/valiokunnat/valtiovarainvaliokunta/Pages/default.aspx>>

Committee states that having CFC rules are an important part of every national legislation, and therefore it is good to have them for all EU Member States. The rules drafted should anyhow be adjustable to be suitable to the national tax systems.

Interest deduction limitations affect also purely national situations and therefore it is the most significant legal measure for national tax systems in the Directive. The Financial Committee comments that it affects companies doing business without a tax motive as much as it affects companies with a tax planning intention. The ATAD provision is similar to the Finnish provision, but the scope is wider, with the addition of a categorical approach, not including the financial field, and all kinds of interest. The increase of non-deductible interest would be significant, 470 million euros, which is an 80 percent increase, compared to the situation at the moment. This significant increase of non-deductible interest payments would be because of the addition of third parties. The calculations do not take into account interest payments in a group consolidation related possible changes. The Financial Committee notes, that they assume that standalone entities are also included, so they are included in the calculations. Their share of the tax effect would be 62 million euros and increase from 117 million euros to 210 million euros. It would also increase the amount of companies concerned from 200 companies to some 375 companies. The Financial Committee supports the interest deduction limitations, especially if the exceptions can be limited with clear criteria, for example, to standalone companies.

The Financial Committee concludes that they support the Directive proposal with certain reservations. It is desirable to find flexible, clear and efficient solutions. They are of the opinion that even though the legislative proposal affects the tax sovereignty of the Member States, it is acceptable in this case, as it tackles many international taxation problems. They state that the Directive is efficient and increases legal certainty, but the Commission has to be careful with the risk of double taxation. Therefore, for it to be successful, the Member States need certain effective and easily enforced rules to solve double taxation issues.<sup>110</sup>

#### 4.3 Dissenting opinion on ATAD

Six members of the Committee had a different opinion of the Directive. They raised six opinions which differ from the general opinion in the Financial Committee. Their opinions are based on the fact that neither the European Commission, nor the Finnish government present an efficient way to end aggressive tax planning of MNEs. According to the OECD principle on unitary tax systems, the income of a group should be calculated as if the entire group is a unity. Also, the interest

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<sup>110</sup> Valiokunnan lausunto VaVL 2/2016 vp – U 7/2016 vp ja 2 11/2016 vp) <[https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/VaVL\\_2+2016.aspx](https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/VaVL_2+2016.aspx)> accessed 04.06.2017

deductions should be divided according to certain principles to the subsidiaries with regard to real business functions. As the taxation within national powers and States compete for the CFCs, the MNEs have the possibility to optimize taxation by creating loan chains without economic substance, to shift profits to a low tax country.

The first point raised within the diverging opinion is for Finland to demand that, in the EU and in the third countries, a unitary taxation and unitary interest deductions should be adopted. They argue, that as long as the companies can benefit from group consolidation, the problem is not solved and the groups can still benefit from debt push over. They support their arguments with numbers on the non-deductible interest expenses worth 590 million euros, where 313 million euros (53 percent) was accepted to be deductible according to the group consolidation. They also argue that Finnish legislation on limiting interest deductions is not effective and it has certain inadequacies, for example, income derived from sources which are under TVL (income tax law) are not in the scope. They even argue that Finland is a tax haven for companies investing in shopping malls due to the fact that their business falls under TVL income. This Directive would not solve this problem of division of income.

Point two of their opinion is that Finland should support interest deductibility limitations when it does not include standalone taxpayers. Point three of their opinion is that Finland supports a 10 percent limit on interest expenses. Point four of their opinion is, that Finland needs to demand an interest deductibility limit of 500 000 euros instead of the proposed 1 000 000 because, otherwise, it pushes the government to increase the limit to stay in tax competition with other EU Member States. Point five of their opinion is that Finland needs to demand to include a provision in the Directive concerning interest deductibility for cases where the net interest expenses have been less in the previous year, a certain percentage from the adjusted profits deduction cannot be granted. Point number six of their opinion is that Finland should support 20 percent effective tax rate as a criterion for the CFC rules.

They conclude their opinion by stating that the Finnish legislation against tax avoidance is not adequate, and the authorities do not react to obvious misuses of law. In this situation, Finland has to choose if they want to be a part of the problem or a part of solving the problem. Therefore, they conclude that Finland should not support the Directive as it is and should demand to redraft the proposal according to the above stated.<sup>111</sup>

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<sup>111</sup> Valiokunnan lausunto VaVL 2/2016 vp – U 7/2016 vp ja 2 11/2016 vp  
<[https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/VaVL\\_2+2016.aspx](https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/VaVL_2+2016.aspx)> accessed 05.06.2017

#### 4.4 Finnish law as it stands now and the effect of the ATAD provisions

##### 4.4.1 Interest limitation rule

The provision in Article 4 is similar in principle, to the Finnish interest limitation rule laid down in EVL (Business Income Act)<sup>112</sup> section 18. There are, however, some differences between the Directive and Finnish law in the scope of the interest limitation. Non-related companies are in the scope of the Directive, but, under Finnish law, the provision includes only transactions between related companies. In Finland, including other than related companies was not considered to be necessary, as usually only related companies aim for tax benefits with interest payments. The Directive provision includes bank loan interest payments, when in contrast that type of payment has not been in the scope of Finnish tax law. The Member States are allowed to use the interest limitations in a situation where there is no significant risk for tax avoidance and loss of tax revenue for the State. Finland has to amend their provision to also include non-related companies to be in the scope of the interest limitation rules to be in conformity with the Directive.<sup>113</sup>

According to the Directive rule, companies are always allowed to deduct the amount of interest which corresponds to the amount of the interest income. Article 4(3a) introduces a safe harbour rule of a maximum of 3 million euros. This provision is of the same purpose as in Finland, but, in Finnish law, the maximum amount is 500 000 euros. The Finnish rule is also stricter in the sense that it does not give the tax payer a right to deduct until a 500 000 maximum limit without consideration of the full amount of interest, but it means that interest limitation rules do not apply to interest rates under 500 000 euros. The ATAD rule is less strict as it allows a safe harbour until 3 million euros of interest. This part of the Finnish rule is already in conformity with the Directive, as it is stricter than the rule in the Directive. The Directive gives a standalone entity the right to deduct interest without limitations. This means that the rule would apply to only associated enterprises which appear in the financial statements of the company. Article 4(5b) of the Directive gives consolidated groups of companies an option to calculate the interest expenses when a certain ratio with equity is equal to or higher than the equivalent ratio of the group. The Directive gives an opportunity for the Member States to leave out financial undertakings, as for example banks. As the Directive widens the scope of interest limitations to also include, for example, real estate companies, it puts pressure on the Finnish government to leave stand-alone companies out of the scope of the interest limitation rule.<sup>114</sup>

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<sup>112</sup> Laki Elinkeinotulon verottamisesta 1968/360

<sup>113</sup> Tomi Viitala 'EU:n veronkiertodirektiivi' (2017) Verotus, 492-493

<sup>114</sup> Ibid

The EBITDA rule on the calculation is similar to the rule in Finnish legislation. As mentioned in the Directive Article, tax exempt income cannot be included in the calculations of EBITDA. In Article 4(6) of the Directive, three ways are given to time limit the interest which is not deductible and non-used interest capacity (can be referred to as non-used EBITDA also). According to the first option, the interest can be deducted without time limitations as long as it doesn't fall under the interest limitation rules. This option is in line with Finnish legislation. The second option is that the Member State is allowed to deduct the interest in the previous three years and also in the future years. The third option is that interest and non-used EBITDA can be deducted in the upcoming years, but with a time limit of five years' maximum.<sup>115</sup>

The definition of interest in the Directive is wide in its scope, as it includes all kinds of borrowing cost, and not only interest payments. Article 2(1) defines borrowing costs with a general definition and a list with examples. This list of examples seems to oblige the Member States to qualify these payments as interest, regardless of the national definitions of interest. The list also includes payments that are not included in the scope on definition of EVL § 18. This will require change to the Finnish law, as the definition of interest needs to be in conformity with the Directive.<sup>116</sup>

#### 4.4.2 Exit taxation

The exit taxation provision is not all new in Finnish law. Article 5 in the Directive names four situations in which a company is liable to pay exit tax when moving business functions or assets out of the country where they are liable to pay taxes at the time of moving. Two of the situations established in the Directive are already in Finnish tax law, namely situations b) and d) of the Directive. In situation b) the taxpayer transfers assets from its permanent establishment in one Member State to the head office in another Member State or to a third country, and, as a consequence, the first Member State loses the taxing rights to the transferred assets, and d) where a taxpayer transfers the business carried by a permanent establishment to another Member State so that the Member State loses its taxing rights to the transferred assets. According to EVL section 51e in Finnish law, in a situation when the assets of a permanent establishment situated in Finland is moved out of the country, Finland has the right to tax the probable capital gains as if the asset was sold.

Finland has to implement changes in the tax law on situations a) and c). Where in a) the situation where a taxpayer transfers assets from its head office to its permanent establishment in another Member State or to a third country, and therefore loses taxing rights to the transferred assets, and in situation c) the taxpayer

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<sup>115</sup> Ibid

<sup>116</sup> Ibid

transfers its tax residence to another Member State or to a third country, except for those assets which remain effectively connected with a permanent establishment in the first Member State. In the abovementioned situations, Finland does not have legislation in force, and has to draft new legislation, however, Viitala does not see this as a big difference to the tax laws in Finland. He bases his argument on the grounds, that Finland applies credit method in these situations to eliminate double taxation, and therefore does not usually lose the taxing rights, as presented in the Directive, as such in the present legal framework.<sup>117</sup>

Finland has only legislated on moving a SE to another Member State in EVL section 52g, but has not legislated on a situation where a Finnish company would move its tax residence to another Member State or to a third country. The lack of legislation is because, in Finnish law, there are no laws on the transferring of a business so that it would shift from a taxable person to a person of limited tax liability, and at the same time become a taxable person in another Member State. In turn, it is possible that a company is a taxable person in both countries at the same time, where the tax liability is calculated on the basis of a double tax treaty, in a case where these two countries have agreed on a double tax treaty.<sup>118</sup>

It seems like when Finland is implementing the Directive into national tax legislation, it also has to take into account situations when the tax residence is changed according to the tax treaties concluded between countries. Finland has to draft a lot of new legislation to implement the Directive rules, to be able to collect taxes effectively in the case where exit taxation is triggered.<sup>119</sup>

#### 4.4.3 GAAR

The wording of the GAAR is similar to the wording in the PS Directive GAAR and therefore it is already implemented in Finnish law EVL section 6a. A general anti-abuse rule was already in force in VML<sup>120</sup> section 28, which is mainly in line with the Directive requirements. For VML section 28 to be applicable, the arrangement has to be wholly artificial and lacking economic substance. The taxpayer has to have an intention to gain tax benefits which are not the purpose of the tax law. The threshold to apply the GAAR is high and it is rarely used.<sup>121</sup>

The wording of the Finnish GAAR in VML section 28 is different to the wording of the GAAR in the Directive, and therefore it is not clear whether the Finnish GAAR will catch all the situations which would fall under the Directive GAAR.

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<sup>117</sup> Tomi Viitala 'EU:n veronkiertodirektiivi' (2017) Verotus, 495-497

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> Laki verotusmenettelystä 1995/1558

<sup>121</sup> Marjaana Helminen 'Mahdollistaako VML § 31 etuyhteyslainan uudelleenluokittelun ilman VML 28 § tukea?' (2014) Defensor Legis 1/2014, 87

The comparison is difficult to make between these two GAARs. The most probable way to implement the GAAR in Finnish tax law is to simply add it, as it is worded in the Directive. The PS Directive GAAR was added on a similar basis. It would mean that the GAAR would be added to both EVL and TVL tax laws.<sup>122</sup>

This is going to raise questions about the overlap for all of the four GAARs in Finnish tax law, and as a consequence, discussion about the need of overlapping anti-avoidance rules. It seems like the anti-avoidance rule in the Directive is overlapping with the EVL 6a and also the SAAR in EVL section 52h concerning restructurings of companies. The most natural way to refuse the overlap between these is to take out EVL section 6a and EVL section 52h from the Finnish tax law. The relationship between the implemented GAAR from the Directive and VML section 28 has to be discussed, and possibly amend the wording of the VML section 28 GAAR, so that no overlap will exist.<sup>123</sup>

#### 4.4.4 CFC rules

Articles 7 and 8 of the Directive are CFC-rules, which include the definition of a CFC and the calculation rules on the taxable income of CFCs. Finland has had CFC-rules in force since 1994.<sup>124</sup> Both of these rules, in the Directive and in the Finnish law, have the same objective which is to catch arrangements which are non-genuinely set up to shift profits of a corporation to a lower taxation country.<sup>125</sup> The CFC-rules set up in the Directive are however not similar to the Finnish rules, and on the basis of this, the rules in Finland need to be amended to be in conformity with the Directive.

The control requirement of a CFC is rather similar in both of them, as both consider direct and indirect ownership of equity, assets or if the taxpayer is entitled to a share of profits of more than 50 percent. The level of what is considered to be low taxation is similar in both the Directive and Finnish legal instrument; both are based on the grounds of an effective tax rate in the Member State of tax residence and the CFC company country of residence. The amount of effective tax rate is different, as in Finnish law, it is 3/4 of the amount of tax in Finland and in the Directive, the boundary is set to 50 percent of the tax rate in the home State.

The Directive gives two options on how to decide what is included in the tax base. The first option is the non-distributed income of the entity or permanent establishment which is derived from certain income categories, and the second

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<sup>122</sup> Tomi Viitala 'EU:n veronkiertodirektiivi' (2017) Verotus, 497

<sup>123</sup> Ibid

<sup>124</sup> Laki ulkomaisten väliyhteisöjen osakkaiden verotuksesta (1994/1217).

<sup>125</sup> 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 L193, recital 12

option is to identify income which is arising from non-genuine activities which have been put in place for the essential purpose of obtaining a tax advantage.<sup>126</sup> Both of these approaches are different to the approach in Finnish law.

The current CFC-legislation in Finland has been successful in catching profit shifting situations, but amending the legislation seems questionable, according to Viitala. He also questions whether the Directive should be a minimum Directive or whether the aims would have been achieved with a regular Directive. Now Finland needs to make significant legal changes to the CFC-rules, which have proven to be effective and which have achieved the aim of the legislation. He also argues for the Directive, as it still leaves room for the national parliaments to discuss and decide upon. In any case, the Finnish legislators have a great deal of work to do to amend the legislation to be in conformity with the Directive. The next question for the Finnish legislators is to decide whether they will amend the current CFC legislation or build a new one on the basis of the Directive.<sup>127</sup> In the authors opinion, amending the legislation may be more difficult, than to draft new law on the basis of the Directive wording.

#### 4.4.5 Anti-hybrid rules

Finland does not have any specific rules concerning hybrid financial instrument or hybrid entity mismatches, if the PS Directive rules which are implemented in EVL section 6a are not taken into account, and therefore the Directive will demand them to create anti-hybrid rules. Anti-hybrid rules, as established in the Directive, apply to situations where the parties achieve a mismatch of legislations, where the situation ends in either double deduction or double deduction and no inclusion of the interest payment in the other country. The Directive was already amended concerning the hybrid rules by adding third countries within the scope of the rule.<sup>128</sup> To implement the Directive into Finnish legislation, Finland has to create general rules which make it possible to deny a deduction for a payment, which would otherwise be deductible.

#### 4.4.6 Concluding remarks on the implementation of ATAD in the national legal framework

Helminen argues that all of these measures are, in principle, suitable to achieve taxation wherein the value is created. These measures can still worsen the competitive position of EU countries, if the non-EU countries do not implement similar anti-BEPS law. Her opinion is, that even though this will weaken the tax

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<sup>126</sup> Ibid, Article 7(2)

<sup>127</sup> Tomi Viitala 'EU:n veronkiertodirektiivi' [2017] Verotus, 498-499

<sup>128</sup> Council Directive amending Directive (EU) 2016/1164 regarding hybrid mismatches with third countries (ATAD II)

sovereignty of Finland, it will not bring dramatic changes to the legislation, as most of the measures are already implemented in the law.<sup>129</sup> Helminen argues that these measures are not only for the sake of generating more tax revenue, but to enhance the moral of the taxpayers.<sup>130</sup> Helminen highlights that especially in the next couple of years, there will be more cross-border double taxation cases. She argues, that these have to be solved as efficiently as possible.<sup>131</sup>

In the opinion of the author, even though some of the measures are already present in Finnish law, they all require re-drafting to some extent. When the measures are re-drafted, the importance of the new measures being in conformity with fundamental freedoms of EU law cannot be highlighted enough. For CFC-legislation for example, it may be better to build on the basis of the Directive wording, rather than amending the old law. As Helminen argued, and the author agrees, the Directive implementation will raise double taxation issues in the EU, at least in the beginning, and an effective solution should be found to address the problem.

## 5 Conclusion

The Member States of the EU have accepted ATAD as binding law and it is evident that they had to give up part of their tax sovereignty in order for the Directive to go through. ATAD is the first minimum tax directive which aims to harmonise direct tax laws in the EU. The Member States accepted it for many reasons, but mainly because the EU assured that anti-BEPS measures need action on a supranational level to succeed. Taxes MNEs avoid with schemes may not be as big in amount as it is generally thought, as explained in the introduction. It is more about enhancing the morality of the taxpayers and to promote fair taxation across the EU. It is debatable, whether the Directive will be effective in combatting tax avoidance in the EU.

The principle of subsidiarity is a core principle in the EU legislation process. To safeguard Member State interests, they can give a reasoned opinion on every legislative proposal within two months, if they disagree with the Union about the subsidiarity of the legislative instrument. Only two Member States gave a reasoned opinion of ATAD which was rather surprising for the author, taking into account the unique features of the Directive and the lack of impact assessments. The Member States raised up similar questions in their opinions. It was found in the research, that the EU does not explain subsidiarity of the Directive thoroughly, but

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<sup>129</sup> Marjaana Helminen lausunto ehdotuksesta direktiiviksi sisämarkkinoiden toimintaan suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta, 3

<sup>130</sup> Ibid, 2

<sup>131</sup> Ibid, 4

merely states that it will enhance the functioning of the internal market in the Directive recitals.

This research addressed whether the Directive is in line with the previous case law of the Court, and what are the consequences when the Member States implement the Directive to their national laws. The concepts of abuse and avoidance in relation to the fundamental freedoms were thoroughly discussed in the paper. The author concludes that even though case law does not go as far as the Directive addressing abusive practices, it is improbable that the Court would completely overturn the case law related to abusive practices and tax avoidance as justification for restrictions to fundamental freedoms.

The Directive is promoted to raise legal certainty, but as an outcome of the research, it seems that there is a real possibility that it would, on the contrary, bring legal uncertainty and a risk of double taxation, which would in the worst case be unsolved. In the optimal situation, the Directive will raise legal certainty and promote fair taxation by closing up tax planning possibilities. It is the responsibility of the Court to provide Member States uniform interpretation and ensure that legal certainty is protected across the Union.

National legislatures have two limitations when implementing the Directive. Firstly, the minimum requirements laid down in the Directive, and secondly the maximum is the limits from case law of the Court on fundamental freedoms. National legislations need to be aware of the fundamental freedoms when implementing this Directive to national law. As fundamental freedoms are the ground to a properly functioning internal market, the national legislators have to make sure that they are not infringed while implementing it. It seems improbable that the Court would withdraw, annul, or declare the Directive invalid, even though it goes further than the current case law on abusive situations. In the other hand, it is probable that the Court will read the Directive in light of the previous judgements and use reconciliatory interpretation when deciding on cases related to the implementation of ATAD. Therefore, national legislators have to be careful with EU law requirements when drafting laws to comply with the Directive. There are many aspects left for further research, as illustrated by the author throughout the text, especially when Member States have implemented the Directive.

The Finnish law has to be amended to be in line with the Directive requirements, which requires extensive amount of drafting for the legislators. Finland has CFC legislation, a GAAR, exit taxation and interest limitation rules in force already, but all of these needs to be amended to comply with the Directive. Amending these provisions raises up further questions, for example on the overlap of GAARs and SAARs of the national law.

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