LITERATURE REVIEW

Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch?, Sabine Kirchmayr, Gunter Mayr, Klaus Hirschler & Georg Kofler (editors), Linde, 2017 and *Die Anti-Tax-Avoidance Richtlinie,* Michael Lang, Alexander Rust, Josef Schuch & Claus Staringer (editors), Linde, 2017

1. INTRODUCTION

The Anti-Tax Avoidance Directive (ATAD)[1] contains the most significant corporate tax harmonization measures since the first company taxation measures passed in 1990. Its stated aim is nothing less than to 'restore trust in the fairness of tax systems and to allow governments to effectively exercise their tax sovereignty'.[2] But the unprecedented speed of its adoption with little substantive debate has been criticized, as have certain features of its five measures to tackle 'aggressive tax planning' that might be overly strict (especially in comparison to the case law of the Court of Justice of the European Union, CJEU), not strict enough (as judged by reference to BEPS proposals) or, in any event, too uncertain to be applied effectively.[3] The latter is particularly worrying: While the Court has the power to curb overly stringent rules and Member States are allowed to create more restrictive ones due to the 'minimum level of protection' nature of ATAD, a lack of clarity stemming from insufficient time for serious deliberation is unlikely to be remedied at the national level in the rather short time available for transposition.

Other than concerns surrounding an accurate and effective implementation of the ATAD provisions, broader questions arise surrounding the directive's relationship with primary EU law, in particular the competence rule upon which it is based; its interaction with fundamental freedoms and fundamental rights; and its impact on external relations with third countries. The implementation of the general anti-abuse rule (GAAR) required by Article 6 of the ATAD offers an acute example of the overlapping difficulties facing Member States: Is the Union competent to regulate corporate behaviour in purely national situations? And in situations concerning third countries? Is the wording of the provision compatible with the case law of the CJEU on 'abuse of law'? And is it possible to implement it by relying on existing domestic GAARs (and even judicial anti-avoidance doctrines)? These problems present stark challenges to the implementation of the ATAD, which is likely to spark disparities and disputes for years to come. It is high time for academic debate to be applied more thoroughly to the issues at stake.

2. THE APPROACH OF THE BOOKS TO THE ATAD

Two books published in 2017 by the leading Viennese tax law departments – at the University of Vienna and the Vienna University of Business and Economics (WU), respectively – represent the first serious attempt to analyse all of the provisions, with particular respect to their implementation and impact on domestic law. Although the primary focus lies on the interaction with Austrian (and, to some extent, German) corporate tax law, many of the detailed discussions will be familiar and useful to tax experts from other jurisdictions. Both books follow academic conferences held in November 2016 and January 2017 in Vienna, respectively. Publication has been sufficiently far apart to allow the second (*Die Anti-Tax-Avoidance-Richtlinie*, edited by Michael Lang, Alexander

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

[2] Recital 1 ATAD.

[3] *See* D. Gutmann et al., *The Impact of the ATAD on Domestic Systems: A Comparative Survey*, 57(1) Eur. Tax'n 2–20 (2017).

Rust, Josef Schuch and Claus Staringer; in the following: LRSS) to include frequent references to the first (*Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch?*, edited by *Sabine Kirchmayr*, *Gunter Mayr*, *Klaus Hirschler* and *Georg Kofler*; in the following: KMHK). Unfortunately, although these references demonstrate a sincere effort to contribute to a healthy academic dialogue, there is little engagement with the substantive arguments made in the earlier publication.

Both books commence with general chapters that locate the ATAD in the tax policy context of the OECD Base Erosion and Profit Shifting project and the ongoing attempts to tackle tax competition and aggressive tax planning together. They differ sharply in their approach, however. *Kofler* and *Möhlenbrock*, in their opening chapters of KMHK, focus on detailed descriptions of the step-by-step development, in response to the OECD BEPS project, of the ATAD (*Kofler*), on the one hand, and of national measures in Germany (*Möhlenbrock*), on the other. Together, these chapters provide the reader with a wealth of background and references that are useful to the understanding of the ATAD.

By contrast, *Staringer* (in LRSS) undertakes a highly critical overall assessment (*Gesamtwürdigung*) of the object, purpose and details of the ATAD from a normative perspective, aiming to contribute to a general debate on the appropriateness of corporate tax harmonization and the limits thereof within the EU, rather than describing the way to achieve this harmonization in the BEPS context. *Staringer* concludes, intriguingly, that the EU upstaged the OECD with the 'coup' of the ATAD, winning the mantle of the more effective institution to tackle issues of profit shifting by virtue of its power to legislate. On the contrary, one might be tempted to conclude that the power of the EU to act was substantively constrained by its political obligation to act following the OECD's initial move.

One might also consider the following disadvantage that stems from the EU's legislative power being subject to unanimity in the Council, namely that the need to compromise among all Member States could result in considerable difficulties in amending the ATAD, should gaps in its effectiveness or administrative feasibility become apparent. While individual Member States found themselves unable to oppose the ATAD as a whole, resisting later changes to address possible failures could be much less politically fraught – the ongoing negotiations over amendments to the Interest and Royalties Directive provide an instructive example here.

In this context, one is invited to contemplate recent announcements made by the Commission to 'activate' Article 116 of the TFEU, which is reserved for the issuing of directives to tackle distortions of competition in the Internal Market following diverging national rules, as a basis to harmonize direct tax rules.[4] Indeed, while *Staringer* does not explore this possibility, he analyses the various reasons put forward for the adoption of the ATAD, finding most of them wanting, as they are rather ill-defined ('restoring trust in the fairness of tax systems and to allow governments to effectively exercise their tax sovereignty' is more about 'feeling than fact'; 'avoiding fragmentation' is unachievable due to the mere minimum standard set by Article 3 of the ATAD; 'fighting aggressive tax planning' remains undefined and 'diffuse') and referring to the variously expressed doubts as to the legality of grounding the Directive in Article 115 of the TFEU,[5] although without taking a position himself on that question. Presumably, this follows from the pragmatic conclusion drawn that the 'ATAD, today, is a fact; it is only about its implementation in national law. It is thus no longer necessary to discuss the policy questions surrounding BEPS with zeal; instead one can devote priority to processing the directive's content in order to support national implementation'.[6]

3. Chapters on individual ATAD rules

The books different approaches visible in the opening chapters are to a large extent mirrored by the following chapters, which examine the five substantive rules of the ATAD: where KMHK concentrates on a detailed description of the rules and textual analysis to understand their meaning, and mostly sidesteps interactions with primary EU law and CJEU case law, LRSS aims at a deeper and more critical analysis beyond the initial information that was the subject of multiple journal publications already in 2016. Both books look in detail into the interaction of the ATAD provisions with existing national statutory laws and doctrines, and the resulting consequences for a successful implementation.

The review of the interest deduction limitation (Article 4 of the ATAD) is a great example in both

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[4] For a recent review of the application of Art. 116 to harmonize tax regimes, *see* P. Schwarz Martínez, *IP Box Regime im Europäischen Steuerrecht*,11 Lux. Legal Stud. 199–205, Nomos (2017). By contrast, Kube, Reimer and Spengel invoke Art. 48(7) of the TEU to move beyond unanimity. H. Kube, E. Reimer & C. Spengel, *Tax Policy: Trends in the Allocation of Powers Between the Union and Its Member States*, 25(5/6) EC Tax Rev. 247, 253 (2016).

[5] F. Oppel, *BEPS in Europa: (Schein-) Harmonisierung der Missbrauchsabwehr durch neue Richtlinie 2016/1164 mit Nebenwirkungen*, Internationales Steuerrecht 797 (2016); S. Bendlinger & G. Kofler, *RuSt 2016: Highlights aus dem Workshop 'Internationales Steuerrecht'*, Recht der Wirtschaft 782 (2016). *See also* Gutmann et al., *supra* n. 3, who note that the ATAD includes measures that might have a 'rather remote connection to the Internal Market'.

[6] C. Staringer, *Die Anti-Tax-Avoidance-Richtlinie: Gesamtwürdigung aus steuerpolitischer Sicht*, in *Die Anti-Tax-Avoidance-Richtlinie* 23 (M. Lang, A. Rust, J. Schuch & C. Staringer eds, Linde 2017) (author's translation).

books. *Zöchling* (in KMHK) balances his textual, contextual and teleological analysis of the ATAD provision and concrete proposals for its implementation with a pointed critique of its necessity and feasibility for Austria, which already provides for a – more targeted and simpler – deduction limitation and an outlook on the impact of the provision on Austrian businesses. With its critical policy outlook, it stands apart from the majority of the other chapters in the book, which strike a more sober technical tone (the other exception being the critical account by *Schlager* of the anti-hybrid rule). The chapter by *Mayer* (in LRSS) largely comes to the same conclusions and adds little more in terms of detail, although it includes – one assumes chiefly due to its later publication – a number of further references that readers will find useful for further study.

In their analyses of the exit taxation provision (Article 5 of the ATAD), the differing general approaches adopted by the two volumes appear more obvious. *Mayr* (in KMHK), the head of the Tax Policy and Material Tax Law section of the Austrian Ministry of Finance and a professor at University of Vienna, proceeds to trace the way from the existing exit tax regime in the Austrian tax code to the (minor) changes necessitated by the ATAD, while commenting succinctly on the influence that CJEU case law will have on the implementation, concluding that 'legal certainty in the area of exit taxation would be served well by (somewhat) reduced legislative dynamism on the part of Europe'.[7] *Koch* and *Siller* (in LRSS) take an almost opposite approach, as they first elaborate extensively on CJEU case law leading to the drafting of Article 5 of the ATAD provision, and then proceed to a critical analysis of its implementation and the relative merits of the provision in light of its failure to achieve real uniformity across Europe. The different emphasis arguably reflects the authors' different backgrounds; which approach readers will find more useful and interesting will probably equally depend on their background.

Taking a close look at the European and national jurisprudence on abuse of law, *Drüen* (in KMHK) reviews each element of the GAAR enshrined in Article 6 of the ATAD and concludes that Germany´s existing statutory provisions require no amendment in order to comply with the standard set by it. Any shortcoming of Article 42 of the General Tax Code (*Abgabenordnung*) could be resolved by way of a stricter judicial interpretation. *Drüen* also points to a curious consequence of the ATAD's providing only for a 'minimum standard': where national GAARs exceed the requirements of the Directive, the CJEU ceases to be competent for the interpretation of the provision, potentially leading to 'divided judicial control'. *Langer* and *Orzechowski* (in LRSS) devote considerably more space to a comprehensive consideration of the legislative options for Austria: adoption of Article 6 of the ATAD next to the existing national GAAR; adoption of Article 6 of the ATAD in replacement of the national GAAR; and implementation by way of reinterpreting the national GAAR, flagging various challenges that are connected with each alternative.

On the CFC regime, the two chapters in KMHK by *Kirchmayr* (on Article 7 of the ATAD) and *Hirschler* and *Stückler* (on Article 8 of the ATAD) provide a more practical account that is peppered with examples to illustrate the operation of the regime. *Orlet* (in LRSS), by contrast, develops a more critical contextual analysis and positions Articles 7 and 8 of the ATAD within the framework of CJEU case law and national provisions.

On the anti-hybrid provisions, finally, *Schlager* (in KMHK) judiciously explores the match between OECD BEPS Action 2 and EU anti-mismatch rules (Articles 9 and 9a of the ATAD) and notes a lack of in-depth substantive discourse during the latter's legislative process, which results in a regime that leaves multiple gaps and uncertainties on a technical level, yet is insufficiently based on principle to allow for an 'organic' implementation into national law. The critique is especially pertinent coming from this author, who is the head of the legislative drafting department of Austrian Ministry of Finance, as the person most directly responsible for transposing that regime into national law. *Allram* and *Hörtenhuber* (in LRSS) focus more squarely on the technical study of the ATAD provisions, their compatibility with primary EU law and the implementation requirements in Austria, drawing equally critical conclusions.

4. Conclusion

LRSS is written by academic researchers from the Vienna University of Economics and Business (WU) and aims to highlight technical details and problems for the implementation of the ATAD in national law. It achieves its objective to go beyond the earliest comments published on the ATAD, adding a more in-depth and detailed account that will be very useful for policymakers tasked with implementing the Directive. KMHK is authored by a mix of leading academics, ministerial tax officials and tax practitioners, who attempt and succeed in answering the question as to what the ATAD means for national systems that have to implement its rules.

Neither book manages to completely satisfy the reader's appetite for clarity on all issues. However, if such satisfaction were at all possible a little over a year after the

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[7] G. Mayr, *Wegzugsbesteuerung gem Art 5 Anti-BEPS-RL*, in *Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch?* 74 (S. Kirchmayr, G. Mayr, K. Hirschler & G. Kofler eds, Linde 2017) (author's translation).

adoption of the Directive, it was always impossible to achieve within the scope of such rather thin volumes (184 pages and 168 pages, respectively). Yet these have the advantage of allowing the reader quickly to grasp an impressive number of legal and – to a somewhat lesser extent – policy questions that will inform anti-avoidance legislation in the EU for years to come. A still more thorough account that engages with several of the issues that remain un(der)explored in these two books[8] will surely be forthcoming in the future. Until then, they are the starting point and benchmark for any further research.

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[8] To mind come, in particular, a separate assessment of the question of EU competence; the scope of the Directive defined in Art. 1 of the ATAD; a more comprehensive analysis of questions raised by the (lack of) definitions in Art. 2 of the ATAD; the nature and meaning of Art. 3 of the ATAD; and a consistent and more careful examination of the relationship between the Directive and primary EU law.