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Quoted

Implementation of the Anti-Tax Avoidance Directive in the Netherlands, Belgium and Luxembourg

In this edition

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The Anti-Tax Avoidance Directive (**ATAD**) as adopted by the European Council on 20 June 2016 and further amended on 25 October 2016 contains five anti-abuse measures which Member States of the European Union (**Member States**) have to implement in their domestic laws. These measures include an earnings stripping rule (**ESR**), a general anti-avoidance rule (**GAAR**), a controlled foreign company rule (**CFC**), to be implemented before 1 January 2019, and an exit tax and rules on hybrid mismatches, to be implemented before 1 January 2020.

The ATAD sets minimum standards. Member States are free to impose more strict rules.

The Netherlands, Belgium and Luxembourg have timely implemented the ESR, exit tax, GAAR and the CFC.[1] In this Quoted we set out the main rule and options of each measure as provided in the ATAD and subsequently set out the choice of implementation made by the Netherlands, Belgium and Luxembourg. We will show the differences in implementation by these three Member States. The annex to this Quoted includes an overview of the various choices made by the Netherlands, Belgium and Luxembourg.

Earnings stripping rule

Article 4 ATAD

Deductibility of net financing expenses will be limited to a fixed percentage of earnings before interest, tax, depreciation and amortisation (**EBITDA**).[2] Net financing expenses are defined as ‘exceeding borrowing costs’. Any amount of exceeding borrowing costs over the fixed percentage of EBITDA is non-deductible, unless a Member State grants an exemption up to a certain threshold. The ESR is an anti-base erosion rule. It aims to limit the erosion of the taxable basis by incurring deductible interest expenses in the jurisdiction in which the entity is active. Member States can in addition to the ESR also use targeted rules against intra-group debt financing.

The ATAD provides for a maximum amount of interest that can be deducted equal to 30% of EBITDA. In addition there are a number of specific elements that Member States may introduce, which either make the application stricter or provide for exceptions.

Rather than starting from commercial accounting, EBITDA for purposes of the ESR is calculated by taking taxable profits, and adding back the exceeding borrowing costs, depreciation and impairments.

Member States may introduce a threshold per (group of) taxpayer(s) up to which exceeding borrowing costs are always deductible (**Threshold**). The maximum amount is EUR 3 million, meaning that Member States may grant an exemption up to this amount, or a lower amount.

There are three types of businesses that can be excluded from the scope of this rule (**Exemptions**). First, stand-alone entities may be excluded. These are entities that are not part of a consolidated group and have no associated enterprises[3] or foreign permanent establishments. Second, financial undertakings may be excluded. Financial undertakings range from banks and insurance companies to funds regulated as Undertakings Collective Investments in Transferable Securities (UCITS), certain (regulated) securitization companies and alternative investment funds. Third, loans used to fund long-term public infrastructure projects may be excluded.

As a grandfathering rule, exceeding borrowing costs related to loans provided before 17 June 2016 may be excluded from the application of the ESR (**Grandfathering**).

Member States may choose to apply the rule at the level of an individual taxpayer or at a group level. This can be a tax consolidated group, but also a group that is treated as a group for domestic accounting purposes and that is not a group for corporate income tax purposes.

The ATAD provides for two potential escapes for groups by comparing the position of the individual entity against the position of the consolidated group (**Ratio Escapes**).

1 The rule on hybrid mismatches needs to be fully implemented before 1 January 2020.

2 This applies to both external financing, obtained from third parties, and to group financing.

3 An associated enterprise means an entity in which the taxpayer holds a direct or indirect participation of the voting rights, capital or entitlements to receive profits of more than 25% or an individual or entity which holds directly or indirectly a participation of the voting rights, capital or entitlements to receive profits of more than 25% in the taxpayer. If an individual or entity holds directly or indirectly a participation of 25% or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, should be regarded as associated enterprises.

In case the ratio of equity to assets of an individual entity is equal to or higher than that ratio for the consolidated group, i.e., the entity has a higher equity funded ratio than the average of the group, exceeding borrowing costs could be deductible (**Equity Ratio**). For this test, there is a margin of two percentage points, meaning that the entity's ratio can be at a maximum two percentage points lower than the average of the group. Under the group ratio rule, the group ratio is determined by dividing borrowing costs in relation to third parties by EBITDA of the group (**Group Ratio**). This ratio determines the acceptable level of borrowing costs for the individual entity. Exceeding borrowing costs of the individual entity are then calculated by multiplying this group ratio against the EBITDA of the individual entity. This amount constitutes the exceeding borrowing costs that would be deductible, even if this exceeds 30% of EBITDA.

The ATAD provides for carry forward and carry back possibilities. Non-deductible exceeding borrowing costs can be carried forward indefinitely (**Carry Forward of Interest**). In addition, it is possible to combine this carry forward with a carry back for a maximum period of three years (**Carry Back of Interest**). Furthermore, a carry forward of unutilized interest deduction room for a period of maximum five years (**Carry Forward of Capacity**) can be introduced.

Implementation in the Netherlands

General

The Netherlands opted for a relatively strict implementation of the ESR, trying to close the gap in the tax treatment of debt versus the tax treatment of equity. On the other hand, the Netherlands abolished two existing specific limitations on the deductibility of interest (i.e. articles 13l and 15ad Dutch Corporate Income Tax Act (DCITA) when introducing this generic limitation.[4]

The Netherlands opted for a limitation equal to 30% of EBITDA. Also the calculation of EBITDA is in line with the ATAD.

Threshold, exemptions, ratio escapes and grandfathering

The Netherlands opted for a **Threshold** of EUR 1 million of exceeding borrowing costs that would be deductible. Under Dutch tax laws, a group of companies can, provided certain conditions are met, opt to be treated as a single taxpayer (the fiscal unity regime). The fiscal regime works as a full consolidation regime. Therefore, the ESR applies at fiscal unity level. Entities that are part of a group for accounting purposes, but are stand-alone taxpayers for Dutch corporate income tax purposes, can apply the **Threshold** per entity.[5]

The **Exemptions** available for stand-alone entities and financial institutions were not implemented, neither were the **Ratio Escapes**. There is also no **Grandfathering** for existing loans. Long term public-private partnerships that were already underway or for which tenders were provided are excluded. The projects that are covered are infrastructure projects and are specifically named in a published regulation.[6] The exemption for such long term public-private partnerships is therefore restricted in time.

Carry Forward and Carry Back

The Netherlands opted for an unlimited **Carry Forward of Interest**, and did not include a **Carry Back of Interest** nor a **Carry Forward of Capacity**. As of 1 January 2020, the Carry Forward of Interest may expire based on a change of control rule which is analogous to a rule that already applies to the transfer of ownership in companies with existing tax losses. The non-deductible carry forward of interest will expire in case the ultimate beneficial ownership in the company changes for 30% or more and the business activity of the entity reduces below certain percentages.

Particularities

Dutch tax law provided for a rule under which excess financing expenses would be available for carry forward (article 15ad DCITA), which rule was abolished per 1 January 2019. The total amount of non-deductible interest on the basis of article 15ad DCITA which was eligible for a carry forward will be added as interest in 2019 for the application of the ESR.

4 The interest deduction limitation rules for participation debt (art. 13l DCITA) as well as for acquisition holding debt (art. 15ad DCITA).

5 In the implementation of this rule State Secretary of Finance, who is politically responsible for the adoption of tax laws, considered that groups may have an incentive to not include entities in a fiscal unity. Should it become apparent that this is the case, a type of anti-fragmentation rule may be implemented.

6 Regulation of the State Secretary for Finance 31 December 2018, amending certain implementing regulations in the field of taxes and allowances, Stcr. 2018, 72059.

Under Dutch tax accounting rules, interest on loans used for the construction of a fixed asset needs to be capitalized as part of the cost price of that asset.[7] As capitalized interest increases the book value of the asset, this results in a lower taxable gain on the disposal of this asset. In view of the above, the Netherlands qualifies capitalized interest as interest for the ESR. Non-deductible interest under the ESR will, other than under normal Dutch tax accounting rules, no longer be capitalized, and will be treated as non-deductible, although it is available for a **Carry Forward of Interest**.

Implementation in Luxembourg

General

Luxembourg opted for an implementation of the ESR which is very much in line with the various options offered under the ATAD. The ESR comes on top of interest deduction provisions that already existed in Luxembourg's domestic legislation.

Luxembourg opted for a limitation equal to 30% of the EBITDA. The calculation of the EBITDA is in line with the ATAD.

Threshold, exemptions, ratio escapes and grandfathering

Luxembourg opted for a **Threshold** for the deduction of exceeding borrowing costs, amounting to the highest of 30% of the EBITDA or EUR 3 million. Under Luxembourg tax law, a group of companies can, provided certain conditions are met, opt to be treated as a single taxpayer (the fiscal unity regime). Initially, Luxembourg did not implement the option to apply the ESR at the fiscal unity level. However, in March 2019 Luxembourg introduced a new rule amending the ESR with retroactive effect as from 1 January 2019 permitting the ESR to be applied either at the level of the single taxpayer or at fiscal unity level for Luxembourg taxpayers within a fiscal unity.

Luxembourg included the **Exemptions** available for stand-alone entities and financial undertakings (as defined in the ATAD), and extended it to securitization vehicles governed by Article 2 point 2 of Regulation (EU) 2017/2402.

In addition, Luxembourg implemented both the **Ratio Escapes** at the level of the group as provided for in the ATAD. Luxembourg also provides for a **Grandfathering** of loans that have been concluded before 17 June 2016.

The Luxembourg government has confirmed that this grandfathering does not extend to any subsequent modification of such debt instrument or agreement governing it.

Another exception that the Luxembourg legislator introduced is that when determining the amount of exceeding borrowing costs, a taxpayer may exclude borrowing costs arising from long-term infrastructure projects where the project operator, borrowing costs, assets and income are all originating within the European Union. A long-term infrastructure project is a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered to be in the general public interest of a Member State.

Carry Back and Carry Forward

Luxembourg opted for an unlimited **Carry Forward of Interest**, and has not opted for a **Carry Back of Interest**. Luxembourg also provides a **Carry Forward of Capacity** for a period of five years.

Particularities

There are no significant particularities in the implementation of the ESR by Luxembourg as the wording of the Luxembourg provision sticks very closely to the ESR as laid down in the ATAD. The only particularity is Luxembourg's choice to exclude EU-regulated securitization vehicles from the scope of the ESR.

Implementation in Belgium

General

The Belgian legislator opted for a somewhat less stringent implementation of the ESR in order to limit the adverse tax consequences of the rule for taxpayers with a lower risk of base erosion and profit shifting.

Belgium opted for a limitation of the exceeding borrowing costs equal to 30% of EBITDA. The EBITDA is calculated based on the result of the taxable period (i.e. the tax adjusted accounting result including disallowed expenses) to be (i) increased with depreciations, write-offs, exceeding borrowing costs carried forward that are being utilized and the exceeding borrowing costs that are tax deductible and (ii) decreased with certain tax exempt income (e.g. income that benefit from the participation exemption), the amount of the group contribution and the profit realized through

7 This applies notably to real estate.

the execution of a public-private partnership if the operator, interest cost, assets and profits are located in the EU.

Threshold, exemptions, ratio escapes and grandfathering
Belgium opted for a **Threshold** of EUR 3 million of exceeding borrowing costs that are tax deductible. This threshold amount needs to be allocated among the members of a group. The allocation key is still to be determined by Royal Decree.

If the taxpayer forms part of a group according to company law, both the exceeding borrowing costs and the EBITDA are considered on a consolidated basis. This implies that:
(i) interest expenses (or income) paid (or received) by the taxpayer to (or from) a Belgian company or Belgian permanent establishment that forms part of the group and is not excluded from the ESR, will be disregarded for purposes of calculating the exceeding borrowing costs;
(ii) the EBITDA of the taxpayer should be increased/ decreased with the amounts paid/received by the taxpayer to/from a Belgian company or Belgian permanent establishment that forms part of the group and is not excluded from the ESR.

Any non-utilized interest deduction capacity, and even amounts exceeding the interest deduction capacity, can be transferred to another Belgian group company or Belgian PE. An agreement should be concluded between both taxpayers that provides for the transfer of interest deduction capacity and a possible payment of a compensation in the amount of the tax saving resulting from the transfer.

Exemptions, ratio escapes and grandfathering
Exemptions are available for stand-alone entities, financial undertakings, financial leasing companies, factoring companies, companies whose exclusive or main activity consists of financing real estate through the issuance of real estate certificates and companies whose exclusive activity consists of executing a public participation partnership (PPT) project awarded after competition in accordance with the legislation on public procurement where the project operator, borrowing costs, assets and income are all in the EU. In addition, an exemption applies for loans used to fund a PPT project awarded after competition in accordance with the legislation on public procurement where the project operator, borrowing costs, assets and income are all in the EU. A Royal Decree still needs to lay down the conditions for benefiting from the latter exemption.

There is also a **Grandfathering** for existing loans. Loans that were concluded prior to 17 June 2016 are, however, only excluded if no essential changes were made on or after this date. For these loans the current 5:1 thin capitalization rule will remain applicable. This 5:1 thin capitalization rule will nonetheless also remain applicable for loans concluded as of 17 June 2016, if the interest is paid to tax havens. For other loans concluded as of 17 June 2016 this thin capitalization rule is abolished.

The **Ratio Escapes** were not implemented in order to avoid that the ESR is being circumvented.

Carry Back and Carry Forward
Belgium opted for an unlimited **Carry Forward of Interest** and not for a **Carry Back of Interest** or a **Carry Forward of Capacity**.

Particularities
The implementation date of the new ESR was previously set at 2020 but was recently advanced to 2019 (i.e. assessment year 2020 relating to the taxable period starting the earliest on 1 January 2019).

Exit tax

Article 5 ATAD
While the exit tax was adopted in the context of BEPS to prevent companies from leaving a jurisdiction for the sole purpose of avoiding taxation, the exit tax provided for in the ATAD applies to any exiting entities regardless of the reason behind the departure. As from 2020, exit taxation is mandatory to all Member States and will be levied on capital gains and be assessed by the Member State of origin (the **Departure Member State**).

The preamble to the ATAD (the **Preamble**) provides valuable information in respect of exit taxation, citing namely the principle of territoriality and the balanced allocation of taxing rights. The exit tax ensures that the Departure Member State may tax any economic value of the unrealized capital gain generated within its jurisdiction. The Preamble aligned the justifications for the need of a uniform exit tax in the EU, i.e. the territoriality principle and the balance allocation of taxing rights, to the justifications previously used by the Court of Justice EU (**CJEU**). Where a Member State loses its connection to a taxable item, a tax on the capital gains accrued during the period the asset was taxable in the Departure Member State, is levied.

The taxable event is the moment the Departure Member State loses its taxing rights over the taxable assets in the following situations:

- the taxpayer transfers assets from its head office (**HO**) to a permanent establishment (**PE**) in another Member State or in a third country;
- the taxpayer transfers assets from its PE to the HO or another PE located in another Member State or in a third country;
- the taxpayer transfers its tax residence to another Member State or to a third country; or
- the taxpayer transfers the business carried on by a PE to another Member State or to a third country.

The exit tax does not apply to an asset in case the Departure Member State keeps a taxing right over said asset by virtue of a nexus, for instance in the case where a taxpayer transfers its residence but keeps a PE in the Departure Member State in which the assets remain. Furthermore, the Preamble states that cash assets are excluded from the scope of exit taxation.

The difference between the market value of the asset at the time of exit and its value for tax purposes constitutes the basis for the exit tax, even though that gain has not yet been realized. Market value corresponds to the fair market value, or in other words the arm's length price that willing unrelated parties would agree upon in a direct transaction.

Given that an exit tax could give rise to a substantial burden for the taxpayer, article 5 of the ATAD grants taxpayers the right to defer the payment by paying the exit tax in instalments over a period of maximum five years. In order to benefit from the deferral, the new jurisdiction must be either another Member State or an EEA country with which the Departure Member State or the EU concluded an agreement on the mutual assistance for the recovery of tax claims.

Member States have the option to charge interest over the deferral period on the exit tax due (the **Interest Option**). In addition, Member States may require the taxpayer to provide a guarantee if there is a demonstrable and actual risk of non-recovery (the **Guarantee Option**). The ATAD does not provide any additional guidance on what constitutes demonstrable and actual risk of non-recovery. Nevertheless, no guarantee can be asked if the Departure Member State provides for the possibility of recovery of the tax through another resident taxpayer that is member of the group.

The deferral of payment is immediately discontinued and the amount of tax becomes directly due in the following cases:

- the transferred assets or the business carried on by the PE are sold or disposed of;
- the transferred assets, the tax residence or the business carried on by the PE of the taxpayer are transferred to a third country;
- the company goes bankrupt or is wound up; or
- the taxpayer does not respect its obligations with regard to the instalments and does not correct its wrong within a reasonable period of time which cannot exceed 12 months.

The receiving Member State (the **Receiving Member State**) must accept the market value of the transferred assets, exiting HO or PE established in the Departure Member State as the starting value of the assets for tax purposes, unless it does not reflect the fair market value. In other words, the ATAD imposes a mandatory step-up in basis in the Receiving Member State which corresponds to the market value used as the basis for the exit tax in the Departure Member State. In case the Receiving Member State contests the market value, the Preamble prescribes that Member States could resort to existing dispute resolution mechanisms.

Last, article 5 of the ATAD provides that the exit tax will not be charged where the transfer of a specific asset is of a temporary nature. This is the case if the asset is going to come back to the Departure Member State within 12 months, for assets related to the financing of securities, assets posted as collateral or where the transfer of assets takes place in order to meet prudential capital requirements or for the purpose of liquidity management.

Unlike the other measures adopted in the ATAD which need to be implemented by 1 January 2019, a derogation applies to exit tax which should enter into force at the latest on 1 January 2020. Member States are free to implement the ATAD exit tax before 2020.

Implementation in the Netherlands

Pre-existence of exit taxes

Under the pre-ATAD regime, when a taxpayer transfers (i) its assets from a PE in the Netherlands to a HO or other PE, (ii) its tax residence or (iii) its business carried on by a

PE to another (member) state, this will trigger the taxation of all latent gains on the assets. The pre-ATAD regime offers the option to defer the payment of the exit tax as long as the taxpayer remains the owner of the assets and provided it continues to be a tax resident in an EU or EEA state. The deferral is granted upon request if the taxpayer provides for sufficient guarantee of the payment and yearly evidences continuous ownership of the assets. Additionally, the taxpayer can request for the payment in installments at regular intervals over a maximum period of ten years from the due date of first payment. In both cases of deferral (unlimited deferral and payment in installments) interest will be charged.

Based on the at arm's length principle a step up to the fair market value is provided for assets moved to the Netherlands.

Changes

The situations which constitute a taxable event as prescribed in the ATAD are already covered in the current exit tax regime. Changes are made however to the collection of the exit tax. The (unlimited) deferral of exit tax is abolished and the maximum period for instalments payments is shortened to five years.

Interest and guarantee options

Under the pre-ATAD regime, interest was already charged on the deferral of exit tax and a guarantee was required in all cases. Under the ATAD regime the interest is still charged, but a guarantee is only required if there is a reasonable fear that the tax debt cannot be recovered.

In accordance with the ATAD, the Dutch tax authorities will, when determining a step-up, take the value that the Departure Member State has assigned to the asset as a starting point. However, if the Dutch tax authorities are of the opinion that the value assigned to the asset by the Departure Member State is not an acceptable market value, they will determine a fair market value.

In line with the ATAD, the pre-ATAD regime already provided for exclusions from exit tax for assets set to revert within 12 months.

Timing

The ATAD regime enters into force as from 1 January 2019. Any transfer performed before 31 December 2018 will continue to benefit from the pre-ATAD exit tax deferral regime (a grandfathering policy applies) resulting in potential indefinite deferral.

Implementation in Luxembourg

Pre-existence of exit taxes

Under the pre-ATAD regime, the transfer of a company's tax residence (which does not keep a PE in Luxembourg) is assimilated to a liquidation for tax purposes and triggers immediate taxation of all latent gains. The transfer of a Luxembourg PE also triggers immediate taxation of any latent gains as it is assimilated to a disposal at fair market value. The mere transfer of assets, not forming a separate business, was not covered by the pre-ATAD regime.

The pre-ATAD regime was adapted in 2014 in order to comply with CJEU's case law on the freedom of establishment. The pre-ATAD regime offers the possibility to defer the payment of the exit tax as long as the taxpayer remains the owner of the assets and provided it continues to be a tax resident in the EU, in an EEA state or a third country with whom Luxembourg concluded a double tax treaty which contains a clause allowing for exchange of information in line with the OECD Model Tax Convention. This, potentially, indefinite deferral mechanism is granted upon request and the taxpayer must evidence every year continuous ownership of the assets. Further, upon disposal or realization of the asset, Luxembourg allows to take into account actual losses realized on the asset after the exit from Luxembourg, provided that these losses are not used in the Receiving Member State.

Changes

Besides some minor linguistic differences, the ATAD regime generally transposes the ATAD exit taxation rules.

Following the implementation, all scenarios foreseen by the ATAD which trigger an exit tax are now covered by domestic law, thereby expending the pre-ATAD scope. The ATAD regime further transposes the payment instalment mechanism, including the same territorial restrictions, as well as the cases when the tax becomes immediately due. The mandatory step-up in basis when Luxembourg is the Receiving Member State has also been implemented in line with the ATAD. No dispute resolution mechanism is provided in case the Receiving Member State contests the fair market value of the transferred asset, tax residence or PE.

The ATAD regime replaces the pre-ATAD deferral mechanism of the exit tax with instalments payments for a maximum of five years. The exact modalities for the payment instalments are not covered by the ATAD regime.

In line with the ATAD, the regime provides for exclusions from exit tax for assets set to revert within 12 months.

Interest and guarantee options

The **Interest Option** and the **Guarantee Option** have not been introduced in Luxembourg.

Timing

The ATAD regime will enter into force as from 1 January 2020 in Luxembourg. Any transfer performed before 31 December 2019 will continue to benefit from the current exit tax deferral regime (a grandfathering policy applies) resulting in potential indefinite deferral.

Implementation in Belgium

Pre-existence of exit taxes

The exit tax as proposed by the ATAD will have a rather limited impact in Belgium since provisions for most of the covered transactions already existed.

An exit tax is due at the occasion of an outbound transfer of assets or the business from a Belgian PE or on the outbound transfer of a company's tax residence. The transfer of a company's tax residence is assimilated to a liquidation for tax purposes. An exemption applies in principle if the residence is transferred to another Member State and a PE is maintained in Belgium.

In order to comply with the CJEU's case law, Belgium introduced an optional deferred payment regime in 2016 by allowing instalments over five years for companies subject to exit taxes on those transfers to another Member State or an EEA country with whom Belgium concluded an agreement on the mutual assistance for the recovery of tax claims. The deferred payment regime does not result in late payment interest being due, provided that the annual instalments are paid on time. The Belgian tax authorities can make this facility subject to a guarantee from the taxpayer if they can demonstrate a real risk of non-recovery.

Prior to 2019, the transfer of assets from a Belgian HO to a foreign PE was, however, not subject to an exit tax.

Changes

The main change resulting from the ATAD is the introduction of an exit tax for the transfer of assets from a Belgian HO to a foreign PE if the profits of the PE are exempt in Belgium by virtue of a double tax treaty. The exit tax is calculated on the positive difference between the market value of the transferred assets on the one hand and the acquisition or investment value of the assets decreased with previously allowed impairments and depreciations on the other hand. The deferred payment regime is equally made applicable.

Contrary to the ATAD, no exclusions from exit tax for assets set to revert within 12 months are provided for.

In order to comply with the mandatory step-up in basis as foreseen by the ATAD, the rules have been modified in case Belgium is the Receiving Member State. Previously, these rules generally provided that assets entering the Belgian territory had to be registered at their pre-transaction book value. This implied that no step-up was granted. If these assets are subject to an exit tax in the country of emigration and Belgium has concluded a treaty with this country that provides for the possibility to exchange information, the new rules now accept that the value established by this foreign country is presumed to reflect the market value, unless it can be demonstrated that this value exceeds the market value. If these conditions are not fulfilled, the market value is presumed to reflect the book value according to Belgian rules, unless proof to the contrary is provided. The book value is, however, maintained in case a company established in a tax haven transfers its tax residence to Belgium.

Timing

The new exit tax and step-up rules apply to transfers that occur as of 1 January 2019.

General anti-abuse rule

Article 6 ATAD

General anti-abuse rules (**GAARs**) have long been existent in the domestic law systems of various Member States. However, following the release of BEPS Action 6, it has been considered that a uniform GAAR was desired to fill in any gaps in the domestic law of Member States in a uniform manner.

The Preamble to the ATAD recites this aim and clarifies that the GAAR proposed by the ATAD should not affect the applicability of any specific anti-abuse rules that may already be implemented by the Member States in its domestic laws.

The Preamble underwrites the basic concept that taxpayers should in principle be allowed to choose the most tax efficient manner to structure its commercial business. With this statement, the Preamble aligns the purpose of the GAAR to considerations previously indicated through the discussion of BEPS Action 6, as well as the case law that exists on this point, clearly including that all valid economic reasons should be considered by Member States when assessing a potential case of abuse under its GAAR. The latter is also specifically codified in paragraph 2 of article 6 of the ATAD.

Although leaving a certain leeway for the Member States such as the before-mentioned specific anti-abuse rules and the option to apply penalties where the GAAR is applicable, the Preamble is clear in its intention to ensure a uniform application of the GAAR in both domestic and cross border situations. Such uniform application should not only be considered between Member States but also vis-à-vis third countries.

The GAAR should be applicable in case of:

- an arrangement or a series of arrangements[8] which;
- having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage;
- that defeats the object or purpose of the applicable tax law;
- is not genuine having regard to all relevant facts and circumstances.[9]

If the GAAR is considered applicable, Member States should ignore the particular arrangement (or series of arrangements) for the purpose of calculating the corporate tax liability. In such a case, the tax liability should be calculated in accordance with the national law of the Member State.

The practical impact of the GAAR will be seen following its implementation. Some Member States have indicated that the anti-abuse rules currently implemented in their domestic laws are already in line with the GAAR as included in article 6 of the ATAD. Furthermore, limited guidance has been released as to how certain aspects of the GAAR provision should be interpreted (e.g. *´the main purpose or one of the main purposes´*). As with domestic anti-abuse rules, it is expected that the CJEU, as well as domestic courts, will have to provide the relevant guidance for the interpretation of these concepts.

Similar to the majority of the measures adopted in the ATAD, the GAAR should have been implemented by 1 January 2019.

Implementation in the Netherlands

General

The Dutch Supreme Court introduced the *fraus legis* abuse of law doctrine in 1984. This doctrine is a GAAR and basically a substance-over-form rule as developed in case law which is also applied in the presence of anti-abuse provisions. The Dutch legislator has chosen not to transpose the GAAR from the ATAD into national legislation, since the fraus legis doctrine is considered sufficient for the implementation.

Pre-existence of GAAR

Under the fraus legis doctrine, the actual facts of a transaction are reclassified or substituted to reflect its true substance. Fraus legis requires that (i) the main purpose of the transaction is to avoid taxation (the motive requirement) and (ii) the tax avoidance defeats the purpose of the applicable tax law (the norm requirement).

Changes

The Dutch legislator is of the opinion that according to CJEU's case law a general legal framework, such as the fraus legis doctrine, that is consistent with a directive is sufficient for the implementation. Since the fraus legis is a general legal framework that achieves the objective of the GAAR, the Dutch legislator is of the opinion that the GAAR has already been implemented in the Dutch legislation.

Although the fraus legis doctrine does not have a separate artificiality/non-genuine requirement as opposed to the GAAR, the business reasons that are included in the ATAD that are relevant to the determination of artificiality are also relevant in the assessment of the motive requirement in applying fraus legis. However, according to case law of the CJEU the fraus legis doctrine should be applied in line with the GAAR from the ATAD.

8 Under article 6 of ATAD ´an arrangement´ may comprise more than one step or part.

9 Under article 6 of ATAD, an arrangement or a series thereof shall be regarded as 'not genuine' *to the extent that they are not put into place for valid commercial reasons which reflect economic reality*.

Implementation in Luxembourg

General

A general anti-avoidance provision that refers to the notion of 'abuse of law' already existed in Luxembourg law. The law implementing the ATAD amended the existing provision to reflect the wording used in the ATAD.

The scope of the new Luxembourg GAAR continues to apply to all taxpayers, corporate entities and individuals.

Pre-existence of GAAR

Under the domestic GAAR,[10] the concept of abuse of law had been clarified by case-law which set out four cumulative conditions that needs to be satisfied:

1. The misuse of forms and institution of civil law;
2. the existence of a tax avoidance;
3. the use of inadequate means; and
4. tax considerations as the sole objective.

Once all criteria were met, the tax administration could requalify the use of forms and institutions of private law. A substance over form approach already existed in Luxembourg.

Changes

The amended GAAR extends the scope of the former domestic GAAR. The principal elements in the concept of abuse of law remain to a large extent the same, namely: (i) the misuse of forms and institution of law; (ii) for the purpose of circumventing or reducing the tax burden that defeats the object or the purpose of the law; and (iii) that is non authentic in the sense that the path does not reflect the economic reality and lacks any commercial reason.

Reference to 'use of forms and institution of law' has been kept with the difference that there no longer is a mention of 'private law'. Therefore all legal fields are now covered by the GAAR. Further the terms 'arrangement or series of arrangements' have not been inserted since these are unknown to Luxembourg law, but rather the wording states 'the legal path which can encompass several steps or parts'.

The comments to the bill implementing the ATAD specify that any abuse is covered by the GAAR, and not just the reduction and circumvention of the tax liability. Situations such as the reimbursement of tax or of a foreign tax credit are also covered.

The burden of proof remains at first on the Luxembourg tax administration. However, indications of the absence of a valid reason other than a fiscal one are sufficient for the tax administration. The burden of proof will then be shifted onto the taxpayer who needs to evidence that there was genuine economic reason.

Specific anti-avoidance rules, such as the one included in the Luxembourg participation exemption, continue to prevail over the GAAR (*Lex specialis derogate lex generali*).

The Luxembourg State Council confirmed in its opinion that the right to choose the least taxed path continues to exist under Luxembourg law, except where the purpose or one of the main purposes is to circumvent or reduce the tax charge that defeats the object or purpose of the law and the path is not authentic considering all the facts and circumstances.

There is no sanction applied with respect to the GAAR. The Luxembourg tax authorities may ignore the path considered as abusive and will determine the tax due based on the path considered as authentic considering all facts and circumstances.

The amended Luxembourg GAAR is applicable since 1 January 2019. The impact of the new GAAR should be limited since Luxembourg law already contained a GAAR. The amended provision extends the scope of the GAAR and it is anticipated that courts will follow the (harmonized) interpretation used in the EU.

Implementation in Belgium

General

The existing Belgian GAAR was inspired by CJEU case law prohibiting abusive practices. The Belgian legislator considers that this GAAR already meets the requirements of the ATAD and that no further amendments are needed.

The Belgian GAAR applies to all taxpayers, corporate entities and individuals.

10 §6(1) StAnpG reads as follows: "the tax liability may not be circumvented or reduced as a result of an abuse of forms and institutions of civil law" (unofficial translation).

Pre-existence of GAAR

Pursuant to the GAAR, the Belgian tax authorities can disregard a legal act or a series of legal acts if they demonstrate that fiscal abuse has been committed.

The notion of 'fiscal abuse' has an objective and a subjective component. The objective component is present if the taxpayer either (i) avoids the application of a provision of the Income Tax Code (ITC) or its Decree of execution in a way that is incompatible with the provision's objectives or (ii) claims that the application of a provision of the ITC or its Decree of execution confers a tax benefit that is incompatible with the provision's objectives.

The subjective component refers to the fact that the essential objective behind the taxpayer's choice of legal act(s) was to obtain a tax benefit.

If an abuse of tax law has been established, the taxpayer must prove that there were underlying reasons for his or her act(s), other than to avoid paying income tax. In the event that the taxpayer cannot provide this counterproof, the Belgian tax authorities must correct the taxpayer's taxable base. In doing so, the transaction will be subject to tax, in accordance with the objectives of the law, as if the abuse had not taken place.

The GAAR is a last resort for the Belgian tax authorities. Specific anti-avoidance rules, such as the one included in the participation exemption, thus prevail over the GAAR.

Changes

No adjustments have been made to the GAAR following the ATAD. The question remains whether the Belgian GAAR is entirely in line with the ATAD since the Belgian GAAR, for example, only applies to 'legal acts', whereas the ATAD GAAR targets 'arrangements'. It is however expected that the Belgian GAAR will be interpreted in accordance with the ATAD and future CJEU case law on this topic.

CFC-rule

Article 7 and 8 ATAD

The ATAD prescribes Member States to implement CFC-legislation. The effect of these rules is to attribute (part of) the non-distributed income of a CFC to its parent company. In accordance, the parent company is subject to tax on such attributed income in the state where it is resident for tax purposes.

Both entities and PE's can fall within the scope of article 7 and 8 ATAD. An entity is considered to be a CFC if (i) the taxpayer by itself, or together with associated enterprises, holds a direct or indirect participation of more than 50 percent of the voting rights, capital or entitlement to receive profits of that entity (**Control Test**) and (ii) the actual corporate tax paid by the entity is less than 50% of the corporate tax it would have been charged if resident in the Member State of the parent company (**Low-Taxed Test**). For PE's no control test, but the same Low-Taxed Test applies. An associated enterprise means an entity in which the taxpayer holds a direct or indirect participation of the voting rights, capital or entitlements to receive profits of more than 25% or an individual or entity which holds directly or indirectly a participation of the voting rights, capital or entitlements to receive profits of more than 25% in the taxpayer (**Associated Enterprises**). If an individual or entity holds directly or indirectly a participation of 25% or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, should be regarded as associated enterprises.

The ATAD prescribes that the income of each CFC is attributed to the parent company via either the categorical approach (**Model A**) or transactional approach (**Model B**).

According to Model A the taxpayer which controls the CFC must include non-distributed income of its CFC into its taxable base when the income is derived from certain passive income categories.[11] However, under Model A there is an escape if the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances (**Substance Escape**). Additionally two safeguard clauses may apply (**Article 7(3) Safeguards**). The first safeguard allows Member States to opt not to treat a company as a CFC if one third or less of the income accruing to the company falls within the categories of passive income (**De Minimis Exception**). The second one offers the same option for Member States to opt not to treat financial undertakings as a CFC if one third

11 (i) interest or any other income generated by financial assets; (ii) royalties or any other come generated from intellectual property; (iii) dividends and income from the disposal of shares; (iv) income from financial leasing; (v) income from insurance, banking and other financial activities and (vi) income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value.

or less of the passive income comes from transactions with the taxpayer or its associated enterprises (**Financial Undertaking Exception**).

For Member States implementing Model A, the foreign income to be included in the tax base must be calculated in accordance with the rules of the corporate tax law of the resident state of the taxpayer. The application of the CFC rules may be avoided if the income is distributed before the end of the tax year. The losses of the CFC are not included in the tax base but may be carried forward (according to national laws) to reduce CFC income in the future (**Loss Carry Forward**).

According to Model B the taxpayer which controls the CFC must include non-distributed income of such a CFC into its taxable base provided that the income is derived from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. An arrangement is defined as non-genuine to the extent that the CFC "*would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income*".

Under Model B, the ATAD provides that the amount of income attributed to the parent company is limited to the amount generated through assets, risks, and significant people functions carried out by the controlling company. Therefore, the income to be attributed should be determined by reference to the arm's-length principle.

Two de minimis exemptions may apply under Model B (**Article 7(4) Safeguards**). The first one allows Members States to exclude the application of Model B to a company with accounting profits of no more than EUR 750,000 and non-trading income of no more than EUR 75,000 (**Profit Escape**). The second one offers the same opportunity for a company of which the accounting profits amount to no more than 10% of its operating costs (**Costs Escape**).

The ATAD includes (unrefined) provisions to avoid double taxation resulting from the application of CFC rules. These include a tax credit where the attributed CFC income is also subject to foreign corporate taxes (**Foreign Tax Credit**) and situations where a CFC actually distributes dividends out of income that has already been attributed to its resident shareholders under the CFC rules or where a resident shareholder disposes of the shares in the CFC (**Participation Exemption**). The ATAD, however, does not provide guidance as regards other economical double taxations. The ATAD provides that the CFC rules may apply to both direct and indirect shareholding as long as the 50% threshold is met. This may cause double taxation in case there are multiple Member States in the chain of companies above the CFC, all applying the CFC rules.

Implementation CFC-rule in the Netherlands

Model A or B and attribution of income

The Dutch legislator takes the position that the at arm's length principle already provides for a sufficient implementation of **Model B**. Based on this principle, the income of a controlled company should already be attributed to the Dutch controlling company to the extent this income is generated by significant people functions performed in the Netherlands. No Low-Taxed Test and a different Control Test apply under Model B.

Nevertheless, the Netherlands implemented a light version of **Model A** as well. Under the Model A tainted income of a CFC which is not distributed before year-end, is attributed to the Dutch parent company. The CFC income is attributed in proportion to the size of the participation. A **Loss Carry Forward** applies for six years.

Control and Low-Taxed Test

The Dutch **Control Test** is defined as a direct or indirect interest of more than 50% in nominal capital, voting rights or entitlement to profits, alone or together with related entities. An **Associated Enterprise** is defined in line with the ATAD. The **Low-Taxed Test** is met if the entity or PE is established in jurisdictions with a statutory profit tax rate of less than 9% or in jurisdictions that are EU blacklisted.[12]

Escape and Safeguards

The **Substance Escape** is implemented so that under Model A, income of a CFC is not attributed to the Dutch controlling company if the CFC performs a substantive economic activity. The Dutch minimum substance requirements and the so-called own office plus EUR 100k

12 The EU list of non-cooperative tax jurisdictions is composed of countries that either failed to deliver on their commitments to comply with required good governance criteria, or did not commit to do so at all.

annual salary requirement apply as a safe harbor to meet the substantive economic activity threshold.[13] However, the taxpayer can also indicate other reasons that reflect the economic reality.

Dutch law does not provide for **Article 7 (4) Safeguards**, but does provide for both of the **Article 7 (3) Safeguards**. The **De Minimis Exception** is met if 30% or less of the total income of the CFC is considered to be tainted income. The **Financial Undertaking Exception** applies to financial undertakings mentioned in Article 2 (5) of Directive 2016/1164/EU if 70% or more of the tainted income is earned from others than the taxpayer or with the taxpayer associated enterprises.

Avoidance of double taxation

A **Foreign Tax Credit** applies for the foreign corporate tax paid by the CFC and the **Participation Exemption** applies for dividend and capital gains directly connected to attributed CFC income. The Dutch implementation however does not contain measures preventing double taxation due to the application of CFC rules by other jurisdictions.

Implementation CFC-rule in Luxembourg

Model A or B and attribution of income

The Luxembourg legislator chose to implement **Model B** as they consider this model to more precisely identify and quantify which income is being shifted through tax avoidance practices. In addition, they consider Model B to reduce the risk of double taxation. In general terms, Model B is more in line with Luxembourg's domestic tax policy.

According to Luxembourg's implementation of Model B, the income included in the Luxembourg taxpayer's taxable basis is limited to the income arising from a non-genuine arrangement. An arrangement is considered non-genuine where income generated from the arrangement is attributable to significant people functions carried out in Luxembourg by the Luxembourg parent company (i.e., Luxembourg-based employees and managers who exercise functions on behalf of the CFC, and manage assets and risks on behalf of the CFC). In addition, an arrangement is non-genuine where the CFC would not own the assets or would not have undertaken the risks which generate all, or part of, its income, if it were not controlled by the Luxembourg parent company where the significant people functions – linked to those assets and risks – are carried out and play an essential role in generating the CFC's income.

Control and Low-Taxed Test

The Luxembourg **Control Test** is defined as a direct or indirect interest, by the Luxembourg parent company alone or together with its associated enterprises, of more than 50% of the voting rights, more than 50% of the capital, or the entitlement to receive more than 50% of the profits.

The Luxembourg implementation of the definition of an **Associated Enterprise** is in line with the ATAD.

The **Low-Taxed Test** is met if the subsidiary or PE is established in a jurisdiction where the corporate income tax paid on its profits is lower than 50% of that which would have been payable, had the subsidiary or PE been liable to tax in Luxembourg. The comparable tax test already existing in Luxembourg's tax law can be used as a basis: the tax rate paid by the entity or PE should correspond to at least 8,5%, levied on a similar tax base (i.e., worldwide tax base without any material tax base deviations).

Escape and Safeguards

Luxembourg has implemented the two **Article 7 (4) Safeguards**. The **Profit Escape** applies to CFCs with a commercial accounting profit equal to or below EUR 750,000. The **Costs Escape** applies to CFC with accounting profits which are equal to or below 10% of its operating costs for the period. The costs of goods sold outside the country where the CFC is resident or where the PE is established, and payments to associated enterprises, cannot be included as operating costs.

Avoidance of double taxation

Luxembourg law also provides for a **Participation Exemption** which applies to dividends distributed out of previously attributed CFC income, so that the amounts previously included in the net income of the Luxembourg taxpayer are deducted from the net income of the taxpayer up to the taxable amount of such dividend distribution. In addition, where capital gains relating to previously attributed CFC income are realized, such amounts previously included in the net income of the Luxembourg taxpayer are deducted from the net income of the

13 As a result of recent case law of the CJEU it is currently uncertain whether the use of safe harbors is allowed under EU law.

Luxembourg taxpayer up to the amount of such capital gain.

Luxembourg law also provides for a **Foreign Tax Credit** for the taxes paid by the CFC in its country of residence. However, the allocation of the profits of the CFC to the Luxembourgish taxpayer is not limited to the taxpayer's participation but may also include income of a sub-CFC and no measures are available preventing double taxation due to the application of CFC rules by other jurisdictions.

Implementation CFC-rule in Belgium

Model A or B and attribution of income

Since the Belgian legislator takes the position that **Model B** effectively avoids profit shifting and is more in line with existing double tax treaties, it has opted for this approach. The attribution of income is limited to the income attributable to the significant people functions carried out by the Belgian parent company. The CFC-rule applies irrespective of whether the CFC resides in a Member State or in a third country.

The Belgian legislator confirmed that the Belgian transfer pricing rules that are applied in accordance with the internationally accepted arm's length principle, take precedence over the CFC-rule.

Control and Low-Taxed Test

The Belgian **Control Test** is defined as a direct or indirect interest of more than 50% of the voting rights, or a direct or indirect interest of 50% or more in the capital or entitlement to profits. Contrary to the Directive, Belgian law does not refer to the interests of **Associated Enterprises**. The **Low-Taxed Test** is met if the entity or PE is established in a jurisdiction where it is either not subject to an income tax or is subject to an income tax that is less than half of the income tax if the entity or PE would be established in Belgium. In calculating this income tax, the profits that this foreign entity would have realized through a PE is disregarded if a double tax treaty between the country of the foreign entity and the country in which the PE is located exists that exempts this profit.

Escape and Safeguards

Belgium did not implement the two **Article 7 (4) Safeguards**.

Avoidance of double taxation

A **Participation Exemption** applies for dividends distributed out of previously attributed CFC income and for capital gains to the extent that CFC income was previously attributed, has not yet been distributed and still exists on an equity account prior to the alienation of the shares.

No **Foreign Tax Credit** exists for the taxes that the CFC pays in its country of residence. Moreover, the allocation of the profits of the CFC to the Belgian taxpayer is not limited to the taxpayer's participation and no measures are available preventing double taxation due to the application of CFC rules by other jurisdictions.

Conclusion

Although one might hope that the ATAD would lead to a uniform implementation by the Member States, this Quoted makes it clear that there are already significant differences in implementation by only three Member States. One can only imagine the differences in implementation by all 28 Member States.

The most significant differences in the implementation of the ATAD by the Netherlands, Luxembourg and Belgium can be found in the implementation of the ESR and the CFC-rule. Additionally, the application of the measures by the various Member States will most likely lead to even more differences as some of them, for instance the GAAR, are open to multiple interpretations. Only once the CJEU judges on the correct application of the measures a uniform application by all Member States can be expected.

Annex

ATAD Measure and options	The Netherlands	Luxembourg	Belgium
Earning stripping rule			
Threshold	€ 1.000.000	€ 3.000.000	€ 3.000.000
Exemptions	Exemption for certain existing public infrastructure projects	Exemption for stand-alone entities, financial undertakings, certain securitisation vehicles and long-term public infrastructure projects	Exemption for stand-alone entities, financial undertakings, financial leasing companies, factoring companies, certain companies financing real estate and certain companies executing a public participation project
Grandfathering	No	Yes, for loans concluded before 17 June 2016	Yes, for loans concluded before 17 June 2016
Application at group level	Yes, fiscal unity level	Yes, fiscal unity level	Yes, group level
Ratio Escapes	No	Yes, Equity Ratio and Group Ratio	No
Carry Forward, Carry Back of Interest or Carry Forward of Capacity	Unlimited Carry Forward of Interest, but subject to change of control provision	Unlimited Carry Forward of Interest and Carry Forward of Capacity for a period of five years	Unlimited Carry Forward of Interest
Entry into force	1 January 2019	1 January 2019	1 January 2019
Exit tax			
Changes to current regime	No more (unlimited) deferral of payment and only payment in installments for a period of max. 5 years	All scenarios foreseen by the ATAD will trigger an exit tax and no more deferral of payment and only payment in installments for a period of max. 5 years	Exit tax for transfer of assets to a foreign PE if the profits of the PE are exempt in Belgium by virtue of a double tax treaty and a (conditional) step-up in basis if Belgium is the Receiving Member State
Interest on installments	Yes	No	No
Guarantee	Guarantee only required if reasonable fear that the tax debt cannot be recovered	No	Guarantee only required if real risk of non-recovery
Entry into force	1 January 2019	1 January 2020	1 January 2019

ATAD Measure and options	The Netherlands	Luxembourg	Belgium
GAAR			
Changes to current regime	Interpretation fraus legis doctrine in accordance with the ATAD	Amending the existing provision to reflect the wording used in the ATAD and extend the scope to all legal fields and any abuse	Interpretation preexisting domestic GAAR in accordance with the ATAD
Entry into force	n/a	1 January 2019	n/a
CFC			
Model A or B	Model A and Model B	Model B	Model B
Control test	The Dutch taxpayer owns, alone or together with related entities (25% threshold), directly or indirectly > 50% voting rights, or holds directly or indirectly ≥ 50% of the capital, or profit entitlement	The Luxembourg taxpayer owns, alone or together with related entities (25% threshold), directly or indirectly > 50% voting rights, or holds directly or indirectly > 50% of the capital, or profit entitlement	The Belgian taxpayer owns directly or indirectly > 50% voting rights, or holds directly or indirectly ≥ 50% of the capital, or profit entitlement
Low-taxation test	Subject to a less than 9% statutory tax rate or resident in blacklisted country	Subject to less than 8,5% tax levied on a similar tax base	Not subject to income tax or subject to income tax that is lower than 50% of the tax due if the enitity or PE would be established in Belgium
Substance escape (Model A)	Yes, if the Dutch controlling company performs a substantive economic activity	n/a	n/a
Minimis Exception (Model A)	Yes, if 30% or less of the total income of the CFC is considered to be tainted income	n/a	n/a
Financial Undertakings Exception (Model A)	Yes, for certain financial undertakings if at least 70% of the tainted income is earned from others than (associated enterprises of) the taxpayer	n/a	n/a
Loss Carry Forward (Model A)	Loss Carry Forward for six years	n/a	n/a
Article 7 (4) Safeguards (Model B)	No	Profit Escape and Costs Escape in line with ATAD	No
Avoidance of double taxation	Foreign Tax Credit and Participation Exemption	Foreign Tax Credit and Participation Exemption	Participation exemption
Entry into force	1 January 2019	1 January 2019	1 January 2019

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