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**Anti-Tax Avoidance Directive and its impacts on the regulations of
Finland, Estonia and Ireland**

Bachelor Thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
university of examination.

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Abbreviations

ATAD-Anti-Tax Avoidance Directive

ATAD 2-Anti-Tax Avoidance Directive 2

BEPS-Base erosion and profit sifting

CFC-Controlled foreign company

The Directive- Anti-Tax Avoidance Directive

EBITDA-Earnings before interest, tax, depreciation and amortisation

EC-European Council

EEA-European Economic Area

EVL-Elinkeinoverolaki

EU-European Union

GAAR-General anti-abuse rule

OECD-The Organisation for Economic Co-operation and Development

PE-Permanent Establishment

Introduction

By a tax system a state can increase its attractiveness in a competition of alluring multinational businesses. Tax competition is desirable when it contributes economic progress within European Union (EU). EU's latest approach has been to enhance common anti-tax avoidance measures within the Member States in order to strengthen the functioning of the single market. An example of this current progress is the Anti-Tax Avoidance Directive (ATAD, the Directive), which the European Council adopted on 20 June 2016. One of the fundamental principles of the corporate taxation is that companies should pay tax where they make their profits.¹ Thus, fairer and more stable environment has been wanted to establish for the businesses in the European Union.² The Anti-Tax Avoidance Directive is a part of the European Commission's Anti-Tax Avoidance package, which has been proposed in January 2016. The Anti-Tax Avoidance Directive was formally adopted on 12 July 2016.³ The main objective of the Directive is to fight against aggressive corporate tax avoidance. Hence, the Directive under the research is fresh and not yet implemented in to the regulations of the Member States.

In this thesis, the current anti-tax avoidance regulations of Estonia, Finland and Ireland will be observed. In addition, the magnitude of changes which the new Directive will cause to the national legislations will be compared. These three countries are chosen, because of their relatively different tax regulations. Therefore, it will be interesting to see, which way the Directive will change the national legislations and how much they will be transformed compared to each other's. Finland and Estonia are neighbour countries, which still have very different backgrounds in their tax regimes. It will be also intriguing to observe the effects of the Directive to the legislation of Ireland, because the state has among the time gathered a lot of attention with its contributions in relation to corporate taxation. Ireland and Estonia were also two of the EU Member States which have given the most criticism towards the Directive.⁴ This is mainly because of states' comparatively unique and so to say competitive corporative tax regimes. Furthermore, the author of the thesis will observe the background of the principles behind the

¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning internal market (6.03.2016).

² The Anti-Tax Avoidance Directive.

www.ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en (6.03.2017).

³ EU tax developments 2016.

www.taxjournal.com/articles/eu-tax-developments-2016-14122016 (6.03.2017).

⁴ Anti-Tax Avoidance Directive and Its Implications.

www.4liberty.eu/anti-tax-avoidance-directive-and-its-implications/ (17.04.2017).

Directive. Moreover, the possible benefits of the Directive as well as problems in regards implementing it will be analysed.

Accordingly, the research question in this thesis is dealing with **the background and contents of the new Anti-Tax Avoidance Directive**. In addition, it will be observed **how the Directive will change the regulation of Finland, Estonia and Ireland by comparing the strength of the effects**. Furthermore, the Author of the thesis will research **what are the benefits of the new Directive and what possible problems implementing the Directive can cause to the national legislations of Finland, Estonia and Ireland**.

In the first chapter of the thesis the backgrounds of the Anti-Tax Avoidance Directive will be presented. Furthermore, the structure and main contents of The Directive will be described. In the second chapter, the national anti-tax regulations of Estonia, Finland and Ireland will be observed in the light of the ATAD. The ATAD contains five main measures which will be highlighted in the research of the thesis.⁵ Thus, the Author of the thesis will observe if these three national legislations already have corresponding measures as are laid down in the ATAD. If similar anti-avoidance rules are existing, they will be compared to the measures of the Directive. The second chapter includes also a short description about the backgrounds of the states' legislation and especially elements related to taxation. In the third chapter, backgrounds of the tax regimes as well as current Anti-Tax Avoidance measures of Estonia, Finland and Ireland will be compared in the light of the ATAD. In the end of the thesis, the author will make the conclusions from the whole research.

The research method in regards the topic is qualitative and comparative. Literature, regulations and case law will be analysed. Furthermore, the Author of the thesis has interviewed for the purposes of the thesis Senior inspector *Tarja Koikkalainen*, who is working in the sector of corporate tax issues in the Finnish tax Administration.

The thesis will refer remarkably to the Anti-Tax Avoidance Directive as well as to the national legislations of Estonia, Finland and Ireland. Other sources are scientific and legal books, science articles, news, case laws and legal blog writings which has connection to the topic.

The topic will be observed from the legal perspective. Furthermore, the author of the thesis will introduce the topic mainly from the European Union legislative side as well as from the national legislative side. Thus, the ATAD and its effects will be observed form the wider perspective

⁵ *Ibid*

(meaning for the EU), and on the other hand from the scope of a single Member State (in this case, Estonia, Finland and Ireland). The effects of the Directive are described from the legal side. In addition, the author of the thesis will consider some of the possible economic effects of the Directive. The subject under the observation is of interest for contemporary research as the ATAD is an example of the recent development in the international institutions, where illegal and unfair tax avoidance arrangements are tried to tackle with harmonization of the national anti-tax avoidance rules. Furthermore, the subject under the observation is controversial, as the too strict harmonization of the anti-tax measures is seen as a threat to the healthy competition between the corporations.

1.Introduction of Anti-Tax Avoidance Directive

1.1. Backgrounds of the Directive

The European Commission presented its proposal for the Anti-Tax Avoidance Directive on 28 January 2016 as part of the Anti-Tax Avoidance package.⁶ Finally, on 12 June 2016 the Economic and Financial Council adopted the Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market. The Anti-Tax Avoidance Directive contains five anti-abuse measures, which are legally binding to all the EU Member States. The main deadline for applying these measures is the 31st of December 2018, even though there are several exceptions to that date which has been mentioned later in this section of the thesis. Therefore, the effects of the Directive to the national legislation can be seen just after several years. Among the last few years there has been financial crisis in the EU.⁷ One factor behind the crisis has been structural faults and also lack of tools to prevent anti-avoidance. When there is a financial crisis in a Member State, EU is obliged to pay financial assistance. Thus, the powerless tax systems of the Member States can cause remarkable harm for the overall economy of the EU.

The Directive is strongly leaning on the Base erosion and profit shifting (BEPS) package of the Organisation for Economic Co-operation and Development (OECD). OECD together with G20 countries and developing countries announce BEPS Package in October 2015.⁸ By BEPS it is referred to tax planning strategies that uses gaps and mismatches in tax rules in order to artificially shift profits to low or no-tax locations where the actual economic activity of a company does not occur. The BEPS package includes 15 Actions which provide governments

⁶ The Anti-Tax Avoidance Directive, *supra* nota 2.

⁷ Lyons, T., The Financial crisis, tax avoidance and an EU GAAR, *British Tax Review* 2013, p 1.

⁸ About BEPS and the inclusive framework.
www.oecd.org/tax/beps/beps-about.htm (6.3.2017).

domestic and international instruments to tackle against BEPS. The purpose of the tools is to ensure that profits are taxed where economic activities generating the profits are performed and where the value is created. Moreover, the businesses are given greater certainty by reducing disputes concerning the application of international tax rules and standardising compliance requirements. BEPS project is the basis for the most of the rules included to ATAD.⁹ Only rules, which the Directive includes in addition to measures presented in BEPS, are Exit taxation rule and General anti-abuse rule (GAAR).¹⁰ EU Member States which are a part of the OECD are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece; Hungary; Ireland, Italy, Latvia, Luxembourg, The Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and United Kingdom. ¹¹Nevertheless, the OECD states which are also EU Member States, which yet has not implemented the measures laid down in the BEPS package, are not entitled to do so. ¹² This is because the ATAD consists the measures which are efficient enough to fulfil the requirements of BEPS package. In addition, the Directive ensures that Member States which are not members of OECD will have the similar anti-tax avoidance measures laid down their legislation.

According Article 288 (3) of Treaty on the Functioning of European Union: “A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”¹³ Thus, the Member States are bound to implement the measures described in the Directive. Nevertheless, the Member States can decide the way how these rules are implemented if the main goals of the measures laid down in the ATAD can be achieved.

1.2. Main objectives and principles behind the Directive

The aim of the Directive is to hinder typical ways of aggressive tax planning.¹⁴ The Directive sets minimum level of protection against corporate tax avoidance alongside the EU. It has been calculated that corporate tax avoidance deprives public budgets billions of euros a year. This

⁹ Tax Flash: Political agreement EU to implement anti-tax avoidance measures (Anti-Tax Avoidance Directive). www.loyensloeff.com/en-us/news-events/news/tax-flash-political-agreement-eu-to-implement-anti-tax-avoidance-measures-anti-tax-avoidance-directive (28.04.2017).

¹⁰ Comparison of OECD's BEPS recommendations versus EU Council's final compromise on anti-tax avoidance directive (ATAD). www.sven-giegold.de/wp-content/uploads/2016/06/Comparison-BEPS-vs-ATAD.pdf (28.04.2017)

¹¹ List of OECD Member countries – Ratification of the Convention on the OECD. www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (28.04.2017).

¹² Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning internal market, *supra* nota 1.

¹³ Treaty on the Functioning of the European Union 2012/ C 326/01.

¹⁴ Council Directive (EU) 2016/1164, *supra* nota 1.

follows that other businesses which pay their tax share will have competitive disadvantage compared to the companies which operate in black market. Furthermore, citizens of the Member States have heavier tax burden as the government tries to keep its public utilities going on. Some of the fundamental goals of EU as growth, competitiveness and a stronger Single Market are threatened when aggressive tax planning is used. In addition, regulating only in the national level can cause even more problems. When Member States create their own differing legislations concerning tax avoidance, businesses meet administrative burdens and investors have legal uncertainty. Moreover, tax avoiders will have more chances to seek loopholes with arrangements based on differing tax regulations, which may in the worst case conflict with each other. One of the main topics of the Directive is that the taxes should be paid where profits and value are generated.¹⁵ Within the effective anti-tax avoidance measures trust to fairness of the tax systems can be reminded. According to the Preamble of the Directive, as the rules of the ATAD are planned to fit in 28 separate corporate tax systems, they are limited only to general provisions.¹⁶ Hence, the power to implement has been left to each Member State. This is because the Member States are better positioned to shape the specific elements of the rules fitting to their own corporate tax system. Thus, the aim of the Directive is not to effect the tax rates or other tax measures which closely belong to the sovereignty of a state.

The Preamble of The Directive states, that the ATAD sets rules concerning to all taxpayers that are subject to corporate tax in a Member State.¹⁷ The rules are applied to the corporate tax payer which is a resident for tax purposes in a Member State or is been established under the laws of a Member State. Therefore, the aim of the Directive is not to use the measures of the Directive to types of entities which are not subject to corporate tax in a Member State. By this it is referred especially to transparent entities. The rules established in the Directive will be applied to permanent establishments of those corporate tax players which may be situated in other Member States. In addition, permanent establishments of entities which are residents for tax purposes in a third country is also covered by the Directive if the entities are situated in one or more Member State. Nevertheless, when the application of the rules give a rise to double taxation, taxpayers have a right to receive relief trough a deduction for the tax paid in another Member State or third country, as double taxation can cause other obstacles to the market.

¹⁵ Council Directive (EU) 2016/1164, *supra* nota 1.

¹⁶ *Ibid*

¹⁷ *Ibid*

The subject of providing stricter anti-avoidance measures has been under the wider international observation during the last decades. There can be a fine line between the concepts of legal tax avoidance and illegal tax evasion.¹⁸ The line between these two concepts can easily be seen unclear, as many states recognise the right of the taxpayer to arrange its affairs in a way which enhances the minimum tax liability. The globalisation which has grown over the time has improved the possibilities to avoid taxation. Nonetheless, when the line between the legal and illegal behaviour has been crossed, the consequences of the tax evasion can be costly for the involved taxpayers, the law firms, other parties involved and especially for the society. There are three types of ways to limit the tax liability of a taxpayer.¹⁹ They are tax evasion, tax avoidance and tax mitigation. Tax evasion is illegal action which is often also criminal. Tax avoidance is legal, but seen controversial in many cases. The International organizations attempts to tackle not just the tax evasion, but also tax avoidance, has risen conversation.²⁰ In some context the tax avoidance has been seen as *actus reus* of tax evasion.²¹ There have been arguments that the determination is unjust to the taxpayers which purposes has not been illegal tax planning. The Anti-Tax Directive concerns especially the ways of tax avoidance which may have adverse effects towards the functioning the internal market. Finally, by tax mitigation it is referred to legal and even morally supportable ways to plan one's taxation.

According to British Prime Minister David Cameron tax avoidance has become so aggressive that it is already rising ethical issues.²² Furthermore, according to OECD the globalisation and digitalisation has caused that that companies maximize profits by exploiting the conditions which enhance global tax strategies. Nevertheless, at the same time the rules on the taxation of profits from cross-border activities have not changed hardly at all. Furthermore, in the international conversation tax evasion has recently been connected to violation of the human rights. By corporate social responsibility it is referred to the social impact of business activities. Because of public, consumer or government pressure, companies are urged to act ethically. The responsibility of companies in relation of human rights has mostly been objected towards other

¹⁸ Merks, P., Ernst & Young and Vrije Universiteit, Amsterdam, Tax Evasion, Tax Avoidance and Tax Planning. International Tax Review, Intertax, Issue 1, January 2006, p 272.

¹⁹ Dixon, D., Defining Tax Avoidance, King's Student Law Review, Vol.5, Issue 2 (Winter 2014) p 20.

²⁰ Jacob N., The legitimacy of the tax planning, Trust & Trustees, November 2010, p 808-825.

²¹ Mullineux, J., The Distinction between Tax Avoidance and Tax Evasion, New Zealand Universities Law Review, December 2014, p 2.

²² Darcy, S., 'The Elephant in the Room': Corporate Tax Avoidance & Business and Human Rights, Business and Human Rights Journal, Volume 2, Issue 1, January p 8.

fundamental rights as sweatshops, child labour and factors of work safety. Nonetheless, the corporate responsibility has not been extended to taxes issues.

1.3. The Structure and main contents of the Directive

The preamble of the Directive highlights that the implementation of the rules against tax avoidance provided in the Directive should not affect the taxpayer's obligation to comply with the arm's length principle.²³ Accordingly, the implementations should not affect the taxpayers' obligation to comply with the arm's length principle or the Member State's right to rise tax liability in accordance with the arm's length principle. The preamble also points out that the Fundamental right to Data protection should be taken into account when the personal data has been used within the framework of Directive. When implementing the rules laid down in the Directive, it is also critical to adopt solutions that function for the internal market as a whole, which can be better achieved at Union level. Furthermore, the measures should be adopted in accordance with the principle of subsidiary and proportionality. Thus, the actions should be made as close as possible to the citizen and only when it is essential EU may intervene to the situation. In addition, the actions of EU should be limited to only necessary acts in order to achieve the objectives of the Treaties. The implementation of the Directive should be evaluated by European Commission within four years after its entry into force and report should be made to the European Council. Thus, the European Commission is obliged to possess the impact assessment of the Directive within four years. Furthermore, the Member States should inform the Commission about the implementing process.

The Anti-Tax Avoidance Directive consists of 17 paragraphs and 13 articles divided into 3 Chapters.²⁴ The first chapter includes three Articles. The scope of the Directive is regulated in Article 1. The rules which have been laid down in the Directive shall be applied to all taxpayers that are subject to corporate tax in one or more Member States. This includes also companies which are residents for tax purposes in a third country but which have permanent establishments in one or more EU Member States. Article 2 contains the definitions which have been used in the Directive. Article 3 refers to minimum level of protection, which contains the principle that states are free to regulate the higher level of protection.

²³ Council Directive (EU) 2016/1164 of July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, *supra* nota 1.

²⁴ *Ibid*

The second chapter describes five measures laid down in the Directive.²⁵ The last third chapter of the Directive includes the Final provisions. Article 10 concerns about Review. According to that the Commission shall value the implementation of the Directive by 9 August 2020. The report may include also a legislative proposal for the further developments. Member States are obliged to inform the Commission about the details which are necessary for evaluating the implementation of the Directive. Moreover, the Member States are entitled to communicate to the Commission before the 1 July 2017 about all information which is seen necessary for evaluating the effectiveness of the national targeted rules which are concerning the prevention of base erosion and profit shifting risks (BEPS).

Article 11 is about transposition.²⁶ It lays down dates, when the Directive shall be implemented at latest to the national legislation. Member States are obliged to adopt and publish the laws, regulations and administrative provisions which are needed to implement the measures of the Directive by 31 December 2018. Accordingly, those provisions shall be applied from 1 January 2019. The legal provisions which contain implemented measures shall have a reference to the Directive in its official publication. The Member States shall transfer to the Commission the text containing the main provisions of national law to which the measures of the Directive have been implemented in. In Article 11 there is also a special mention for Estonia.²⁷ As long as Estonia does not tax undistributed profits, the state may consider a transfer assets in monetary or non-monetary form, including cash, from a permanent establishment situated in Estonia to a head office or another permanent establishment in another Member State or in a third country that is a party to the Agreement on European Economic Area as profit distribution. Estonia may then charge income tax and not to give taxpayers the right to defer the payment of such tax. Member States shall adopt and publish the laws, regulations and administrative provisions which are necessary to comply with Article 5 concerning Exit taxation by 31 December 2019. The provisions shall be applied from 1 January 2020.

Furthermore, Member States which have national targeted rules for preventing BEPS risks which are equally effective to the interest limitation rule set out in the Directive at 8 August 2016, can apply a derogation to Article 4.²⁸ These states may to apply these targeted rules until the end of the first full fiscal year following the date of publication of the agreement between the OECD members on the official website on a minimum standard with regard to BEPS Action 4.

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ *Ibid*

Nevertheless, the final date for these states applying the Article 4 is 1st of January 2024. Article 12 states that the Directive shall enter into force on the twentieth day following that of its publication in the “Official Journal of the European Union”. Finally, Article 13 addresses the Directive to all the Member States.

1.3.1. The Measures laid down in the Anti-Tax Avoidance Directive

The five anti-avoidance rules which the Directive includes are: Controlled foreign company (CFC) rule, Exit taxation, Interest limitation, Hybrid Mismatch rule and General anti-abuse rule (GAAR).²⁹ The initiated version of the Directive included sixth main measure, which nevertheless was left away from the final version of the Directive.³⁰ The planned Switchover rule concerned an Anti-avoidance measure where the companies would have been obliged to tell the EU tax authority that it had received a dividend and whether or not it had paid tax on it elsewhere.³¹ The proposed Switchover rule was seen as the most controversial part of the Directive.³² It has been stated that the rule would have gone clearly beyond BEPS proposals and its impacts would have been hard to predict. In addition, the switch-over clause was criticised because it would have given EU right to impose corporate tax rates.³³ Thus, in this respect there can be noticed the effects of the compromised decision of the contents of the Directive.

1.3.1.1. Interest limitation rule

According to the preamble of the Directive, some companies arrange their inter-company loan in a way that their debt is based in one of the group’s companies in a high-tax country where interest payments can be deducted.³⁴ Whereas the interest on the debt is paid to the group’s “lender” company which is based in a low-tax country where is applied a low rate taxation or zero taxation. Hence, there has been seen a need to limit this artificial business action among the EU Anti-Tax Avoidance Directive. Article 4 limits the deductibility of taxpayers’ exceeding borrowing costs by fixing a ratio for deductibility. The ratio refers to a taxpayer’s taxable

²⁹ *Ibid*

³⁰ Compromise reached by all Member States on anti-tax avoidance directive. www2.deloitte.com/lu/en/pages/tax/articles/compromise-reached-all-member-states-anti-tax-avoidance-directive.html (29.04.2017).

³¹ *Ibid*

³² EU drops controversial ‘switchover rule’ from final anti avoidance law. www.out-law.com/en/articles/2016/june/eu-drops-controversial-switchover-rule-from-final-anti-tax-avoidance-law/ (6.3.2017).

³³ European Anti-Tax Avoidance Directive: Agreement Reached. www.lexology.com/library/detail.aspx?g=c7db899b-f96a-4e6a-86be-b1dfa93da43b (6.3.2017).

³⁴ Council Directive (EU) 2016/1164 of July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, *supra* nota 1.

earnings before interest, tax, depreciation and amortisation (EBITDA). The Member States are allowed to decrease the ratio which has been set in the Article. They can also place time limits or restrict the amount of unrelieved borrowing costs which can be carried forward or back in order to ensure a higher level of protection than in the Article. Because the Directive is only laying down minimum standards, a Member State can adopt an alternative measure which refers just to a taxpayer's earnings before interest and tax by fixing the measure in a way that it corresponds to the EBITDA based ratio. Member States can also use targeted rules against intra-group debt financing, as like thin capitalisation rules. Nevertheless, these rules have to be applied in addition to the Article 4. The preamble also points out that tax exempt revenues should not be set off against deductible borrowing costs because only taxable income should be taken into account when the amount of deductible interest is calculated.

If the taxpayer is part of a group which files statutory consolidated accounts, the indebtedness of the overall group at worldwide level may be considered for the purpose of granting taxpayers entitlement of deduct higher amounts of exceeding borrowing costs.³⁵ In addition, a Member State may lay down rules for an equity escape provision. In this provision, the interest limitation rule does not apply if the company can demonstrate that its equity over total assets ratio is approximately equal to or higher than the equivalent group ratio. The interest limitation rule should apply in relation to a taxpayer's exceeding borrowing costs without distinction of whether the costs originate in debt taken out nationally, cross-border within the Union or with a third country, or whether they originate from third parties, associated enterprises or intra-group. In a situation where a group consists of more than one entity in a Member State, the Member State may take in to account the overall position of all group entities in the same State. This may include a separate entity taxation system which allows the transfer of profits or interest capacity between entities within a group, when applying rules that limit the deductibility of interest.

For the reduction of administrative and compliance burden of the rules, the preamble states that it may be appropriate that net interest is always deductible up to a fixed amount, when this leads to a higher deduction than the EBITDA-based ratio.³⁶ Consequently, Member States could reduce the fixed monetary threshold if they are willing to set higher level of protection.

Furthermore, standalone entities should have a possibility to exclusion from the scope of the interest limitation rule, if there are evidently limited risks of tax avoidance. Member States may also provide a grandfathering clause which would concern existing loans, when their terms are

³⁵ *Ibid*

³⁶ *Ibid*

not subsequently modified. The preamble also presents that Member States could exclude exceeding borrowing costs which are connected to loans which are used to fund long-term public infrastructure projects. In these case nevertheless, it should be taken in to consideration that such financial arrangements are allowed to present only little or no BEPS risks. In addition, the justifying special features of the project has to be specified. The preamble also points out that financial and insurance sectors, should be excluded from the area of applicability of the interest limitation rule. Furthermore, the Article 4 of the Member State may exclude financial undertakings, including financial undertakings which are a part of a consolidated group for financial accounting purposes.

Moreover, according to Article 4 the exceeding borrowing costs shall be deductible in the tax period in which they are incurred.³⁷ Nevertheless, the borrowings costs shall be deductible only up to 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortisation. In the Article 4 the taxpayer includes also an entity which is permitted or required, depending on the national legislation, to apply the rules on behalf of a group. In addition, as a taxpayer shall be also an entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes. If the taxpayer is either of the above, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and include the result of all its members. Furthermore, the EBITDA shall be calculated by adding back to the income the tax-adjusted amounts for exceeding borrowing costs. In addition, the tax-adjusted amounts for depreciation and amortisation will be added back to the income.

As derogation to the main rule, the taxpayer will have a right to deduct exceeding borrowing costs up to 3000 000 euros.³⁸ The sum of 3000 000 concerns the entire group. In addition, if the taxpayer is a standalone entity it shall be allowed to fully deduct exceeding borrowing costs. By a standalone entity it is referred to a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment. Moreover, exceeding borrowing cost which are loans concluded before 17 June 2016, shall not be up to any limitations. Nevertheless, the later modifications of such loans are not limited.

Furthermore, loans used to fund a long-term public infrastructure project are excluded from the limitation set in the Article 4.³⁹ In addition, also any other income arising from such a project shall be excluded from the EBITDA of the taxpayer. Furthermore, the exceeding borrowing costs

³⁷ *Ibid*

³⁸ *Ibid*

³⁹ *Ibid*

should not either be included in the exceeding borrowing costs of the related third parties. In this case the project operator, borrowing costs, assets and income should all be in the EU. By the long term public infrastructure project, it is referred in the Directive to a project which provide, upgrade, operate and/or maintain a large-scale asset that is considered in the general public interest by a Member State.

In the case the taxpayer is a member of a consolidated group because of the purposes of accounting, the taxpayer shall have certain differing rights to the main rule of the Article.⁴⁰ By consolidated group it is referred to large businesses which has been organised as a group of companies. In the consolidated group, there is a parent company and other companies which are its subsidiaries. The subject of the consolidated group taxation has been controversial, among the time. Currently, it is nevertheless seen that corporations are one legal enterprise. For the purposes of the Article, the consolidated group for financial accounting purposes consist of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of a Member State. Accordingly, the taxpayer may have a right to use consolidated financial statement prepared under other accounting standards.

According to the Article 4 in the case of member of a consolidated group, the taxpayer should have the right to fully deduct its exceeding borrowing costs, if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group.⁴¹ The asset is seen to been equal to the equivalent ratio of the group if the ratio is just two percentage lower. Second additional option is, that a taxpayer which is a member of a consolidated group for financial accounting purposes, shall also deduct exceeding borrowing costs at an amount in over of what it would have be entitled to deduct under the main rule presented in the first paragraph of the Article 4. The higher limit to the deductibility of exceeding borrowing costs shall be calculated in two steps. Firstly, the group ratio is determined by dividing the exceeding borrowing costs of parties in relation to the group over the EBITDA of the group. Secondly, the group ratio is multiplied by the EBITDA of the taxpayer.

The Member State may provide for rules to be applicable in the later period, without time limitation, if there are exceeding borrowing costs which cannot be deducted in the current tax

⁴⁰ *Ibid*

⁴¹ *Ibid*

period under any other rule in the Article 4.⁴² In addition, the Member State may postpone without time limitation, and back, for a maximum of five years, unused interest capacity, which cannot be deducted in the current tax period under any other rule in the Article 4. Moreover, the Member State may carry forward, without time limitation, exceeding borrowing costs and, for a maximum of five years, unused interest capacity, which cannot be deducted in the current tax period under any other rule in the Article 4.

Thus, it can be seen that the wording of the interest limitation rule is long. It sets strict limits for the deductibility of the interest, and names a certain amount up to which the interest can be deducted. Consequently, this rule is affecting the most the companies, which are primarily using intercompany loans.

1.3.1.2. Exit taxation rule

In the preamble of the Directive it has been stated that the function of exit taxes is ensuring that when a taxpayer moves assets or alternatively its tax residence out of the tax jurisdiction of a state, that state taxes the economic value of any capital gain which has been created in its territory.⁴³ The right for the taxation rises even though the gain has not yet been realised at the time of the exit. The exit taxation rule is not applicable to transfer of assets (also cash) between a parent company and its subsidiaries. The market value for the transferred assets at the time of exit of the assets has to be determined according to the arm's length principle. The preamble also points out that it is desirable that Member States refer to the moment when the right to tax the transferred assets is lost, when the credit method is used in the exit taxation rule. Furthermore, the receiving states should have a right to dispute the value of the transferred assets which the exit State have determined, if the value does not reflect the real market value of assets. When the exit taxation rule is implied to the legislation of the national laws, taxpayer should have the right also to defer the payment of the amount of tax by paying it in instalments over a certain number of years, possibly with interest and guarantee. The Members States could have a right to request that the taxpayers include the necessary information in a declaration. Furthermore, the exit taxation rule should not be applied when the transfer of assets is a temporary nature and the transferor will revert the assets to the Member State. In addition, exit taxation rules should not be applied if the transfer is carried out in order to meet prudential capital requirements or for the

⁴² *Ibid*

⁴³ *Ibid*

purpose of liquidity management or when it comes to securities' financial transactions or assets posted as collateral,

According to Article 5, the rule is applied in certain circumstances.⁴⁴ Firstly, the exit tax will be levied when a taxpayer of a Member State transfers assets from its head office to its permanent establishment (PE) in another Member State or in a third country. In this case, the rule may be applied as far as the Member State of the head office does not anymore have the right to tax the transferred assets because of their transfer. Secondly, if a taxpayer transfers assets from its PE in a Member State to its head office or another PE in another Member State or in a third country, the rule may be applied. The application of the rule is possible as far as the Member State of the permanent establishment does not have the right to tax the transferred assets due to the transfer. Thirdly, the rule will be applied if a taxpayer transfers its tax residence to another Member State or to a third country. Nevertheless, as an exception to the rule, if the assets stay effectively connected with a PE in the first Member State, the rule may not be applicable. Finally, the rule will be used if a taxpayer transfers the business carried out by its PE from a Member State to another Member State or to a third country. Also in this case, the rule will be applicable if the Member State of the PE does not anymore have the right to tax the transferred assets caused by the transfer of them.

Moreover, the paragraph 2 of the Article 5 states that a taxpayer may have a right to pay the tax in instalments over five years.⁴⁵ The exception for the rule laid down in the first paragraph of the article will be applicable when the transfer of assets or business from head office, permanent establishment or another residency is directed towards another Member State or to the possible third country which is a part of the Agreement on the European Economic Area (EEA). In this case, the transfer of assets may head either to a PE or a head office. The rule is applied to the third countries only if they are a part of the EEA Agreement and have agreed with the Member State of the taxpayer or with the EU of the bilateral cooperation for the recovery of taxes. The agreement made has to be in line with the Council Directive 2010/24.

If the payment has been deferred the interest may be charged according to the legislation of the Member State of the taxpayer or of the PE.⁴⁶ In addition, in case if there is a demonstrable and actual risk of non-recovery by the taxpayer, it may be required to perform a guarantee in order to be allowed to defer the payment. Nonetheless, the deferral of payment, which has been described

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

in paragraph 2, shall in some cases be immediately discontinued. Thus, the tax debt will be recovered. This will happen if the transferred assets or the business carried out by the permanent establishment of the taxpayer are sold or disposed of. Nevertheless, the deferral of payment shall be immediately discontinued and the tax debt will become payable. Firstly, if the transferred assets are subsequently transferred to a third country and secondly if the taxpayer's tax residence or the business carried on by its permanent establishment is subsequently transferred to a third country. Moreover, if the taxpayer goes bankrupt or is wound up the rule will be applicable. Finally, if the taxpayer fails to honour its obligations in relation to the instalments and does not correct its situation over a reasonable period of time (not more than 12 months), the rule shall be applied.

According to Article 5 the first Member State where the value of the assets has been generated will decide the starting value of the assets for tax purposes, unless this value does not reflect the market value.⁴⁷ In addition, by the market value it is meant the amount for which an asset can be exchanged or mutual obligations can be settled between interested unrelated buyers and sellers in a direct transaction. As an exception to the rule laid down in the Article, certain asset transfers shall be excluded out from the application. These types of asset transfers which are related to financing of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management, they can be excluded from the area of the rule. The rule is used for assets such as intellectual property, which is usually valued at their evaluated future income. These assets are many times not taxed when they are moved from an EU Member State to no- or low-tax countries. Thus, the companies seek to avoid paying tax in the EU on profits they generate once they sell these assets.

The exit tax -rule is another rule included to the Directive, which is not a part of the OECD BEPS report. It can be concluded from the wording of the Article, that the exit taxation rule can be applicable in four main situations related to the transfer of assets or transfer of tax residency or business. Important factors are then that for instance the assets are levied according to the real market value.

1.3.1.3. General anti-abuse rule

According to the preamble of the Article 6 the aim of the General anti-abuse rules (GAARs) is to tackle abusive tax practices that have not yet been dealt with in other anti-tax avoidance rules.⁴⁸

⁴⁷ *Ibid*

⁴⁸ *Ibid*

Nevertheless, the applicability of specific anti-abuse rules should not be affected. The GAARs is general applied to arrangements that are not genuine. The preamble of the Directive highlights that it is important to ensure that the GAARs are applying in domestic situations, within the Union and also to vis-à-vis third countries in the manner which is uniform. The Member States should take into account when evaluating an arrangement as non-genuine all valid economic reasons, which includes economic activities. The Member States may also apply penalties, when the activities can be found non-genuine and GAARs are applicable.

According to Article 6, when the tax liability of the corporate is calculated, a Member State shall ignore an arrangement or a series of arrangements which has been organised for the main purpose or one of the main purposes of obtaining a tax advantage.⁴⁹ The tax liability shall be calculated in accordance with national law. The purpose of obtaining a tax advantage must be made in a manner that defeats the object or purpose of the applicable tax law and is artificial when taken into consideration all relevant facts and circumstances. The arrangement may comprise more than one step or part. Furthermore, an arrangement or series of arrangements shall be regarded as non-genuine and artificial if they are not performed with valid commercial reasons which reflect economic reality. It is fundamental to any GAAR that its purpose is to levy tax when no tax is otherwise due.⁵⁰ From the wording of the GAAR can be also noticed, in which way has been drawn a line between allowed and legal tax planning and tax evasion and avoidance.⁵¹ Therefore, the non-abusive tax planning is permitted, but genuine planning in regards of taxation is allowed.⁵² stated that also “a tax system breaths though its loopholes”, by which it is referred that it is vital for the whole complicated tax system is that it allows genuine tax planning.

1.3.1.4. Controlled foreign company rule

The goal of the Controlled foreign company (CFC) rules is to re-attribute the income of a low-taxed controlled subsidiary to its parent company.⁵³ Thus, the attributed income become taxable on the State where it is resident for tax purposes. It depends on the policy priorities of a state if the CFC rules of a Member State target an entire low-taxed subsidiary, specific categories of income or are limited to income which has artificially been diverted to the subsidiary. In the preamble, it is also pointed out that if a Member State is limiting its CFC rules to income which

⁴⁹ *Ibid.*

⁵⁰ Gammie, M, Moral taxation, immoral avoidance – what role for the law?, British Tax Review 2013, p 8.

⁵¹ *Ibid* p 5.

⁵² *Ibid* p 8.

⁵³ Council Directive (EU) 2016/1164, *supra* nota 1.

has been artificially diverted to the subsidiary precisely target situations where most of the decision-making functions which generated diverted income at the level of the controlled subsidiary are carried out in the Member State of the taxpayer. This especially in order that CFC rules would be proportionate also in regards the BEPS, as the member states are not obliged to separately implement the regulations of the BEPS after implementing the ATAD, if they have not so far done so. If a company which has low profits or a low profit margin and it gives rise to lower risks of tax avoidance. According to the preamble, it is necessary that the CFC rules extend to the profits of permanent establishment where those profits are not subject to tax or are tax exempt in the Member State of the taxpayer.

According to the Preamble, if a Member State wishes to regulate for higher protection, it can reduce the control threshold, or employ a higher threshold in comparing the actual corporate tax paid with the corporate tax that would have been charged in the Member State of the taxpayer.⁵⁴ Furthermore, a Member State can in transposing CFC rules into their national law, use a sufficiently high tax rate with fractional threshold. The situations described in the Article 7 of the Directive should be applied both in third countries and within the European Union. The preamble also highlights that in order to comply with the fundamental freedoms, the income categories should be connected to with a substance carve-out aimed to limit within the Union, the impact of the rules to cases where CFC does not carry on a substantive economic activity. The preamble also points out that Member States are allowed to use white, grey or black lists of third countries. These lists can be crafted on the basis of certain criteria which is set out in the ATAD and may include also the corporate tax level, or use white lists of Member States as a basis.

The international tax regimes usually divide controlled companies for three different groups.⁵⁵ A company may be controlled by a single individual. In addition, the company can be controlled by another corporation, which is the parent corporation. Finally, the controlled company may be a commonly controlled corporation. By this it is referred to a model where a same person or persons control two corporations and these companies are together sibling corporations and form a corporate group. Furthermore, controlled foreign corporation means a corporate entity that is registered and conducts business in a different jurisdiction or country than the residency of controlled owners. Accordingly, the CFC rules are determining in which way taxpayers declare

⁵⁴ *Ibid*

⁵⁵ Harris, P., *Corporate Tax Law, Structure, Policy and Practice*. Cambridge Law Series, Cambridge University Press, New York, 2013, p 55.

their foreign earnings.⁵⁶ CFC is beneficial for the enterprises when the costs of establishing a business, a foreign branch or partnership in a foreign country is lower even after taxes.

According to the Article 7 a Member State shall perceive an entity or a PE as a CFC in certain cases.⁵⁷ An entity alone or together with its associated enterprises must have directly or indirectly more than 50 percent of all voting rights of a company. Alternatively, an entity must own directly or indirectly more than 50 percent of capital or have a right to gain more than 50 percent of the profits of an entity. In addition, the requirements set in sub-paragraph (b) has to be fulfilled in regards the entity or PE. The actual tax in relation to the profits gained has to be lower than the difference between the corporate tax that would have been charged according to the tax system of the Member State of the taxpayer and the real corporate tax paid on the profits. As an exemption to the rule laid down in the sub-paragraph (1)(b) of the article, it is mentioned that the PE of a CFC that is not levied or is exempt from tax in the jurisdiction of the CFC, may not be considered when applying the rule. In addition, the rules of the Member State determine the computation of the corporate tax that would have been levied in the Member State of the taxpayer.

The CFC's non-distributed income of the entity or PE shall be included to the tax base.⁵⁸ There are two different ways to determine which income will be seen as originating from the parent entity.⁵⁹ Another of them is an entity based approach. The income may be derived from interest or any income attributing from financial assets or from royalties or any other income originating from intellectual property.⁶⁰ Furthermore, income may be arising from the dividends and income from the disposition of shares, or from revenue from financial leasing. In addition, the income may be derived from insurance, banking and from other financial activities, or from billing companies earn income from services and sales of goods and services acquired from and sold to associated enterprises, and add no or little economic value. The income will not nevertheless be added to the tax base if the CFC pursuits a substantive economic activity, which is contributed by staff, equipment, assets and premises. The substantive economic activity of the CFC can be seen from the relevant facts and circumstances of the case in question. Member States may also decide not to apply the rule laid down in the sub-paragraph (2)(a) if the CFC is resident that is

⁵⁶ Panayi, C., H., *European Union Corporate Tax Law*, Cambridge University Press, Cambridge, The Edinburgh Building, Cambridge 2013, p 109-111.

⁵⁷ Council Directive (EU) 2016/1164, *supra* nota 1.

⁵⁸ *Ibid.*

⁵⁹ The final European Anti-Tax-Avoidance Directive: impact to EU jurisdictions. www.twobirds.com/en/news/articles/2016/netherlands/the-final-european-antitax-avoidance-directive (3.03.2017).

⁶⁰ Council Directive (EU) 2016/1164, *supra* nota 1.

not a part of the EEA Agreement. Additionally, a Member State may not apply the rule if the CFC is situated in a third country that is not party to the EEA Agreement. In addition, according to paragraph 3 of the article, the Member State may not treat an entity or PE as a CFC if one third or less of income which is originated from the entity or PE described in sub-paragraph (2)(a). Furthermore, the Member State may not consider a financial undertaking as a CFC if one third or less of the entity's income is originating from transactions with the taxpayer or its associated enterprises.

The Directive offers also a transactional approach, which is concluded in the sub-paragraph (2)(b) of the article.⁶¹ According to this option the profit of the CFC will be added to the tax base if the non-distributed income of the entity or PE is originating from artificial tax arrangements.⁶² By this it is referred to the arrangements which has been made to attain tax advantage as its' essential purpose. Moreover, the arrangement or arrangements are non-genuine if the entity or PE would not own the assets or would not have taken the risks which constitute wholly or partly its income, if it would not have been controlled by a certain company. In this specific company, there are operating the significant people, which are crucial to the formulation of assets and risks, which are constituting the CFC's income. Nonetheless, according to the paragraph 4 of the article a Member State may not apply the rule laid down to the sub-paragraph (2)(b) in certain cases. Firstly, if an entity or PE has accounting profits 750 000 euros or less, and non-trading income of 75000 euros or less. Additionally, a Member State may not apply the rule, if an entity's or PE's accounting profits are less than 10 percent of its operating costs in that tax period. Nonetheless, the operating costs may not consist of the costs of goods which are sold outside the state in which the entity is residing or the PE is situated, for tax purposes and payments to associated enterprises.

Article 8 concerns the computation of CFC income.⁶³ If the entity based approach of Article 7 is applied, the residency or the geographical situation of the taxpayer for the tax purposes determines, according to which Member State's rules the includable income from the tax base of the taxpayer must be calculated. Furthermore, according to the Article 8, the losses of the entity or PE may not be included in the tax base immediately, and can be considered in subsequent tax periods, according to national law.

⁶¹ The final European Anti-Tax-Avoidance Directive: impact to EU jurisdictions, *supra* nota 63.

⁶² Council Directive (EU) 2016/1164., *supra* nota 1.

⁶³ *Ibid.*

If the transactional approach from the Article 7 is applied the includable income from the tax base of the taxpayer may be diminished to amounts originating through assets and risks which are lined to significant people functions carried out by the controlling company.⁶⁴ Moreover, the arm's length principle determines the attribution of the CFC income. The arm's length principle is applied to commercial and financial transaction between related companies.⁶⁵ The principle states that transactions should be valued as if they would have been carried out between unrelated parties, which each act in his own best interest. Thus, the companies should not give an advantage to each other just because they are connected. Furthermore, the taxpayer's contribution to the entity defines the income, which will be included in the tax base.⁶⁶ The tax period to which the income has to be included is determined by the tax year to which the entity ends. To avoid the double taxation, it must be ensured that when the distributed profits are compounded to tax base of a taxpayer, the previously included amounts may be deducted from it. The operation should be committed when the tax connected to the distributed profits is calculated. Moreover, in order to avoid double taxation, in relation the disposition of the taxpayer's participation in the company the same rule may apply. Finally, the deduction of the tax paid by the company can be allowed by a Member State in the tax residency or location of the taxpayer.

Directive sets the minimum level for the rules concerning CFCs. Nevertheless, at the same time it gives relatively wide options to the Member States to implement them in their legislation, for instance an entity based option and transactional option. Hence, the Member State can decide which may suit the best in their tax regime. In the context of OECD BEPS project the CFC rules have been seen especially significant in purpose to fight against the tax evasion.⁶⁷

1.3.1.5. Hybrid mismatch rule

According to the preamble of the Directive, hybrid mismatches are the based on the differences in the legal characterisation of payments or entities, which come up in the interaction between the legal systems of two jurisdictions.⁶⁸ The mismatches cause of the double deduction or a deduction of the income in one state without inclusion in the tax base of the other. Therefore, the hybrid mismatch rules' purpose is to neutralise the effects of hybrid mismatch arrangements. The

⁶⁴ *Ibid.*

⁶⁵ Franze, R., et al, Transfer Pricing and Distribution Arrangements: From Arm's Length to Formality Apportionment of Income, Intertax, June-July 2005, p 260.

⁶⁶ Council Directive (EU) 2016/1164., *supra* nota 1.

⁶⁷ Gilleard, M., The BEPS Special, International Tax Review, April 2013, p 20.

⁶⁸ Council Directive (EU) 2016/1164., *supra* nota 1.

idea of hybrid mismatch rules is that one of the two jurisdictions denies the deduction of a payment, which is leading to a hybrid mismatch. The preamble of the Directive also discloses that the measures which are aimed to tackle hybrid mismatches in the Directive are not aimed to affect any further features of the tax system of a Member State. In 1998 within the European Union there has been agreed about the Code of Conduct Group, which also includes hybrid mismatch rules.⁶⁹ Nonetheless, as the Code of Conduct Group is not legally binding instrument, it is necessary to lay down effective rules.

The Directive includes a rule concerning Hybrid Mismatches in its Article 9.⁷⁰ There are differences between the Member States in regards the tax treatment towards income or entities. By this it is referred to hybrid mismatches, which some companies take an advantage of. The companies deduct their income in both countries or get a tax deduction in one country on income that is exempt from tax in the country of destination. Therefore, the Directive proposes that when there is a mismatch, the legal characterisation given to a hybrid instrument or entity by the Member State where the payment originated shall be followed by the Member State of destination. Thus, the deduction should be given only in the Member State where such payment has its source and one or two jurisdictions in a mismatch should deny the deduction of a payment leading to such an outcome. According to the Directive if a hybrid Mismatch results in a double deduction, the deduction should be activated only in the Member State where such payment has its source. Furthermore, the Member State of the payer shall deny the deduction of such payment, if a hybrid mismatch results in a deduction without inclusion.

As the Hybrid mismatch rule of the ATAD is not concerning the non-EU countries, there were seen that the Directive would require a further amendment.⁷¹ Therefore, the European Commission has agreed of the adaption of Anti-Tax Avoidance Directive 2 (ATAD 2) which is concerning about all types of hybrid mismatches. The ATAD 2 will be submitted for the formal adaption in April 2017.⁷² These hybrid mismatches are not allowed to be used for the purposes of

⁶⁹ Code of Conduct Group (Business Taxation).

www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ (23.04.2017).

⁷⁰ Council Directive (EU) 2016/1164 *supra* nota 1.

⁷¹ Fair Taxation: Commission welcomes new rules to prevent tax avoidance through non-EU countries, European Commission, Press release, Brussels 21 February 2017.

www.europa.eu/rapid/press-release_IP-17-305_en (2.05.2017).

⁷² ATAD II: Political agreement in ECOFIN Council.

www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-atad-ii-political-agreement-in-ecofin-council.pdf (2.05.2017).

tax avoidance in the EU even they would involve third countries. The rules laid down to the ATAD 2 will come into force on January 1, 2020.

1.4. Differing views towards the Anti-Tax Avoidance Directive

There has been stated many counter claims for the adaption of the Anti-Tax Avoidance Directive, already at the phase of its preparation. Consequently, the final version of the Directive is in many ways a compromise between diverse arguments.⁷³ According to one point of view the diversity of the tax systems is not building a barrier for the internal market, but is stimulating the trade.⁷⁴ This is because of the remarkable effects which the taxes make to the share of costs and further share of the price of factors of production as well as labour in generally. In this theory taxes are seen just as one factor by which states can use in the competition. Thus, one of the heavy critique towards EU has been, that it should equally allow competition based on the governmental issues as like taxation. Hence, tax system harmonization would limit the normal business practice of companies according to some opinions.

In addition, it has been pointed out that ATAD goes too much beyond OECDs recommendations.⁷⁵ Furthermore, there has been concerns that ATAD will set EU at a competitive disadvantage when the Member States are trying to attract global investment.⁷⁶ According to one point of view the diversity of the tax systems is not building a barrier for the internal market, but is stimulating the trade.⁷⁷ This is because of the remarkable effects which the taxes make to the share of costs and further share of the price of factors of production as well as labour in generally. In this theory taxes are seen just as one factor by which states can use in the competition. Thus, one of the heavy critique towards EU has been, that it should equally allow competition based on the governmental issues as like taxation. Hence, tax system harmonization would limit the normal business practice of companies according to some opinions. In addition, there has been seen threats towards such fundamental principles as the free movement of capital, especially in case of exit taxation rule. The criticism towards the exit taxation has highlighted that the provision does not contain safeguards against double taxation. Furthermore, the

⁷³ Compromise reached by all Member States on anti-tax avoidance directive, Luxembourg Tax Alert. www2.deloitte.com/lu/en/pages/tax/articles/compromise-reached-all-member-states-anti-tax-avoidance-directive.html (28.04.2017)

⁷⁴ Anti-Tax Avoidance Directive and Its Implications, *supra* nota 4.

⁷⁵ *Ibid.*

⁷⁶ Helminen M., *Ehdotus neuvoston direktiiviksi sisämarkkinoiden toimintaan suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta*, COM (2016) 26 lopullinen.

⁷⁷ Anti-Tax Avoidance Directive and Its Implications, *supra* nota 4.

In case of interest limitation rule, some EU Member States already have as their deductible EBITDA percentage set at 30%, when other countries are using thin-capitalization rules for interest limitation.⁷⁸ Furthermore, as states may implement the Directive's rules also in a stricter form, they may set even lower threshold than 30% in case of deductible interest. Thus, this may deteriorate business conditions even more. All in all, it has been estimated that the interest limitation rule of the Directive will have the most impact to the Member States legislations together with the GAAR.⁷⁹ It has been also highlighted that the regulation of direct taxes should be in the competence of each individual Member States.⁸⁰ Thus, the criticism has stated that the sovereignty of the Member States is threatened. For instance, in the case of exit taxation rule, the recipient Member State is obliged to accept as an entry value of assets the value used by the exit Member State (except when this value does not correspond with the market value).⁸¹ When a Member State has a right to impose an exit tax for an asset before it is transferred. This has been seen as a threat for the freedom of establishment in regards of transfer of assets. Thus, when a taxpayer wishes to establish itself in another Member State, it will face disadvantageous conditions in comparison with a taxpayer who is staying in that Member State.⁸² It has been also pointed out that this provision does not contain safeguards against double taxation. Thus, theoretically, the Member State can impose an exit tax which is higher value than the market value because the Directive just sets minimum requirements. Therefore, the recipient Member State is not obliged to use higher value as entry value. By restricting the free movement of capital also other freedoms are affected such as the freedom of establishment. Accordingly, this may have effects to the amount of businesses which are established and furthermore to the employment rate.

Critics has also pointed out that the wording of ATAD is too vague.⁸³ Thus, there can be unintended consequences of increases tax administration costs and also uncertainty in the business environment may rise. For instance, the GAAR does not determine strict requirements

⁷⁸ *Ibid*

⁷⁹ Q&A-What is the impact of the EU anti-tax avoidance Directive on investment funds?. www.loyensloeff.com/en-us/news-events/news/qa-what-is-the-impact-of-the-eu-anti-tax-avoidance-directive-on-investment-funds (2.05.2017).

⁸⁰ Helminen (2016), *supra* nota 81.

⁸¹ Anti-Tax Avoidance Directive and Its Implications, *supra* nota 4.

⁸² Communication from the commission to the council, The European Parliament and the European Economic and Social Committee, Exit taxation and the need for co-ordination of Member States' tax policies, COM (2006) 825 final, Brussels 2006.

⁸³ Helminen M., *Ehdotus neuvoston direktiiviksi sisämarkkinoiden toimintaan suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta (COM (2016) 26 lopullinen, supra nota 81*

and it is only up to the local tax authorities to set the limits of non-genuine business rationale.⁸⁴ Consequently, this creates easily legal uncertainty and may also cause even corruption. Moreover, the CFC rule changes significantly the taxation of all profits of a sovereign subsidiary due to a high increase in the general cost of capital, and this may have affects to the in the general investment behaviour. However, it has been also presented as the Member States still have relatively wide powers to control their Anti-Tax Avoidance measures, it has been stated that most probably instead of the ATAD it will be easier for the European Commission to tackle to aggressive tax planning by regulating the state aids.⁸⁵ As an example, for this is the recent Apple case, where the commission held that Apple is required to pay back to the government of Ireland 13 milliards, because of unfair state aids.

Thus, as it be concluded from the differing comments in regards the ATAD, that it included many controversial measures. Nonetheless, the author of the thesis considers, as the Directive contains exceptions for the main rules, it is probable that the effects will not be as highlighted as some of the criticism points out. Member States and the corporations doing business in the EU, will have still time to plan how to implement the rules in the best possible way to their legislation. Furthermore, the corporations will have time to reform their business plans taking into account the new directive.

2. Introduction of the national regulations before implementing the Anti-Tax Avoidance Directive

2.1. Anti-tax regulation in Estonia

2.1.1. Background of the taxation principles in Estonia

The legislation in Estonia is a part of Continental European civil law systems and its legislation is strongly based on German law.⁸⁶ The tax authority for the state taxes in Estonia is the Tax and Customs Board. The Tax and Customs Board is a government agency which acts within the area of government of the Ministry of Finance. Furthermore, the local governments have the authority to impose local taxes. Nonetheless, only a few municipalities actually have local taxes. Estonia joined European Union in the spring 2004 and OECD in 2010.⁸⁷ Euro has been the currency of Estonia since January 2011.⁸⁸ The main difference between Estonian tax system and so to say

⁸⁴ Anti-Tax Avoidance Directive and Its Implications, *supra* nota 4.

⁸⁵ Kiistelty direktiivi puuttuu yleisiin veronkiertotilanteisiin. www.castren.fi/fi/blogijauutiset/blogi-2016/kiistelty-direktiivi-puuttuu-yleisiin-veronkiertotilanteisiin/ (27.04.2017).

⁸⁶ OECD (2011), Global Forum on Transparency and Exchange of Information for Tax Purposes, Peer Reviews: Estonia 2011: Phase 1: Legal and Regulatory Framework, Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews, OECD Publications p 10 -11.

⁸⁷ List of OECD Member countries – Ratification of the Convention on the OECD *supra* nota 11.

⁸⁸ Estonia.

traditional tax systems is that it taxes profit just in the distribution phase.⁸⁹ Thus, the profit which has not yet been distributed will not be taxed. The tax for the distributed dividends is 20/80 of the amount in 2017.⁹⁰ The Estonian tax system relies on the Taxation Act (*Maksukorralduse seadus*) in case of the anti-tax avoidance measures.⁹¹

2.1.2. Anti-tax avoidance regulation in Estonia before implementing the ATAD

2.1.2.1. Interest limitation rule

In Estonia, currently there does not exist Interest limitation rules. Thus, the state must adapt at least the interest limitation regulations contained in the ATAD.

2.1.2.2. Exit taxation rule

Estonian tax legislation does not contain exit taxation rules. The distinctive characters of Estonian corporate tax legislation, namely income taxation which is taxed just when profits are distributed, has nonetheless taken into account in the provision of ATAD related to exit tax rule.⁹² Thus, also in the wording of ATAD there is a special mention for Estonia. According to the Article 11(4) of the Directive Estonia should not give taxpayers the right to defer the payment of tax related to a transfer of assets in monetary or non-monetary form including cash from a permanent establishment situated in Estonia to a head office or another permanent establishment in another Member State or in a third country that is a party to the EEA Agreement. As opposite, Estonia should treat these transfers as profit distribution, and tax them according to it. Thus, the taxation of assets taken out of a permanent establishment of a non-resident should not be postponed. This is based on the principle that the operation is seen according to Estonian Income Tax Act as a profit distribution.

2.1.2.3. General anti-abuse rule

In the Estonian tax legislation, there is a general anti-abuse rule in §84 titled “Transactions and acts performed for purposes of tax evasion” of the Taxation Act (*Maksukorralduse seadus*).

www.europa.eu/european-union/about-eu/countries/member-countries/estonia_en (29.04.2017).

⁸⁹ Latt, P., et al., Estonia Could Face Tax Battle with European Commission, *International Tax Review*, Vol 18, Issue 10 (November 2007) p 17-18.

⁹⁰ Tax rates.

www.emta.ee/eng/business-client/income-expenses-supply-profits/tax-rates (29.04.2017).

⁹¹ Taxation Act, 20.02.2002, RT I 2002,26,150.

⁹² Council Directive (EU) 2016/1164, *supra* nota 1.

⁹³According to §84 if it is evident that there has been purpose of tax evasion when the transaction or act has been performed, conditions which would be applied to the actual economic content of the transaction or act will be applied. The evidences for the tax evasion are according to the paragraph 84 observed from the content of the transaction or act.

Comparing the §84 of the Estonian Taxation Act to ATAD Article 6, the meaning of GAAR is very similar. The observation of the applicability of the rule is based on the economic reality of the transaction or an act. According to the Directive if the arrangements or a series of arrangements are non-genuine, they should be ignored and the tax liability should be calculated according to the national law. According to §84 the actual economic content of transactions or acts will be taken into account when the tax liability is calculated.

2.1.2.4. Controlled Foreign Company rule

Estonia does not have CFC rules for corporate taxpayers (Estonian CFC rules are only applicable to individuals). Nevertheless, Estonian tax legislation already recognises CFC rules in the individual taxpayer's tax legislation.

2.1.2.5. Hybrid mismatch rule

Estonian tax legislation does not contain hybrid mismatch rules. Therefore, the provision has to be implanted wholly as a new part to the national legislation.

2.2. Anti-tax avoidance regulation in Finland

2.2.1. Background of the taxation principles in Finland

Finland is a part of the Nordic civil law system.⁹⁴ Finland has been a member of EU since 1995 and OECD 1969.⁹⁵ Finland joined the Euro zone in January 1999.⁹⁶ The corporate tax rate which has gotten its effect in 2016 is 20%.⁹⁸ The Finnish corporate income tax rate is currently lower than it has ever been before.⁹⁹ Finland has also in this tax issue followed its neighbour Northern countries as Sweden and Denmark, which have also during the last few years lowered

⁹³ Taxation Act, 20.02.2002, RT I 2002,26,150.

⁹⁴ OECD, Global forum on Transparency and Exchange of Information for Tax Purposes, Peer Reviews: Finland 2013, Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings, OECD Publications 2013, p 13.

⁹⁵Finland.

www.europa.eu/european-union/about-eu/countries/member-countries/finland_en (29.04.2017).

⁹⁶ List of OECD Member countries – Ratification of the Convention on the OECD *supra* nota 11.

⁹⁷ Finland, *supra* nota 97.

⁹⁸ Income taxation – companies and organisations.

www.vero.fi/en-US/Companies_and_organisations/Income_taxation (29.04.2017)

⁹⁹ Finland Corporate Tax rate.

www.tradingeconomics.com/finland/corporate-tax-rate (29.04.2017).

its tax levied on corporate income. Finland has been over the been forced to compete with the other Nordic countries which tax regimes may have attracted more multinational headquarters as their resident with their more central geological location and favourable corporate tax regime.¹⁰⁰ Thus from the beginning of the 21st century Finland has tried to more adapt itself to competitive corporate tax regime. In Finland, there is no local or municipal taxation on corporate taxpayers. In Finland, Anti-tax Avoidance measures concerning corporations has been laid down to several different parts of the tax legislation, which in generally is typical for the Finnish style of legislation.

2.2.2. Anti-tax avoidance measures in Finland before implementing the Directive

2.2.2.1. *Interest limitation rule*

The Finnish Business income act includes an article concerning the interest limitation. Article 18 a§ of EVL states the restrictions to interest limitation.¹⁰¹ According to the Article the borrowing costs can be deducted if they are equivalent to interest income. Exceeding borrowing costs can be nevertheless deducted if they have been in the current tax period not more than 500 000 euros. Exceeding borrowing costs which are more than 500 000 euros, cannot be deducted in certain circumstances. If the exceeding borrowing costs are more than 25 percent of the EBITDA, the exceeding borrowing costs cannot be deducted. Moreover, if the exceeding borrowing costs which are more than 30 percent of the EBITDA, is equal as related “vis-à-vis” third parties’ exceeding borrowing costs. Nevertheless, if a taxpayer presents that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group, the limitation to the right for the deduction will not be applied. The limitation to the right to the deduction will not either be applied to credit institution or credit institution which is a part of the consolidated group, insurance institution or to its parent company, financial and insurance parent company or to social insurance group.

The payer of the borrowing costs and the receiver of the interest payments are related and have a business tie, if a party has authority in another entity, or the third party has authority alone or together with its related party in the both entity parties of the debt ratio.¹⁰² If the debt has been taken from another than a party which is related or have business tie to the entity, the rule will be nevertheless the same in certain circumstances. If this entity has outstanding debt from the party to which it does not have relation and the outstanding debt is in relation to the debt which is debt

¹⁰⁰ Ikkala, J., et al. Navigating the Nordic Tax Arena, International Tax Review, Vol 13, Issue 13 (May 2002) p 11.

¹⁰¹ *Laki elinkeinotulon verottamisesta*, 24.6.1968/360.

¹⁰² *Ibid.*

ratio. In addition, if the guarantee of the debt is outstanding to the related party to the debt ratio. The exceeding borrowing costs which cannot be deducted can be deducted from the following years incomes until the allowed limit of deductibility. If the entities merger, the deductible exceeding borrowing costs will be transferred if it is obvious that exceeding borrowing cost has been created in the business activities including receiving entity. Otherwise, the borrowing costs will be transferred similar way as other net assets.

Thus, in the large scale the Finnish interest limitation rule includes many similar elements as the Article 4 of the ADAD. Nevertheless, the Directive sets the limit for the deductible exceeding borrowing costs much higher than current Finnish legislation. According to the Directive the taxpayer has a right to deduct its exceeding borrowing costs up to 3000 000 euros, when the limitation which the Finnish EVL sets is just 500 000 euros. Hence, in this case Finnish legislation has already regulated for stronger protection than the Directive obliges the Member States. In addition, the percentage which limits the deductible income in regards the exceeding borrowing costs is lower in the Finnish legislation. In Finland, the percentage is 25 when in the ATAD 30. As the main difference between the Directive and the Finnish legislation can be mentioned, that the Article 4 of the Directive is applicable also to the situations when another party of the debt ratio is not consolidated to the borrowing party.

2.2.2.2. *Exit taxation rule*

According to EVL 51 e§ if the asset of non-Finnish permanent establishment, is no longer closely connected to the permanent establishment in Finland, the market value of the transferred asset will be levied in the Finland.¹⁰³ Furthermore, according to 52e§ to the extent that funds are not effectively connected to a permanent establishment in Finland, or cease to actually interface with such permanent establishment, the probable sale price of assets will be levied. The asset which has been transferred to the permanent establishment abroad, the market value of the assets will be included to the taxable income of the tax year during which the permanent establishment ceases. If assets and liabilities which will be transferred are connected to the Finnish company which is situated in permanent establishment situated in other EU Member State, the tax will be levied by Finland just when the Double tax treaty between Finland and other Member State so states. Thus, it can be stated that the Finnish legislation contains similar measures set in the Article 5 of the Directive. Nevertheless, the Finnish legislation does not contain the possibility to defer the taxation of the transferred assets. In addition, the Finnish legislation does not determine

¹⁰³ *Laki elinkeinotulon verottamisesta*, 24.6.1968/360.

as broadly about all the possible situations and simply refers to Double tax treaties between other Member States.

2.2.2.3. *General anti-abuse rule*

According to Finnish General anti-abuse rule which has been laid down in 28§ of *Laki verotusmenettelystä*, if some business arrangement has been organised in artificial manner, the tax should be levied according to the real purpose of the arrangement.¹⁰⁴ If in the sales arrangements for instance the value of the trading object or other trading conditions has been applied just in purpose to avoid taxes, the real value of the taxable assets and income can be re-estimated. In the case of re-estimating the real rate of tax, all the circumstances have to be carefully taken into consideration. Furthermore, the taxpayer should have a possibility to point out the purpose behind arrangements. If the taxpayer is able to demonstrate that the form of arrangement corresponds the real purpose of the arrangements and arrangements has not been made in purpose to avoid taxes, there is no need for the re-estimation of the tax rate. Hence, the Finnish GAAR is much in line with the General anti-abuse rule of the Article 6 of the Directive. Nevertheless, in the Finnish legislation there is a mention that the taxpayer must have a possibility to testify that the arrangements has not been made artificially and in purpose to avoid tax liability, which is lacking from the Directive.

2.2.2.4. *Controlled Foreign Company rule*

According to the Finnish Act on the taxation of shareholders in Controlled foreign companies, a controlled foreign corporate is a corporate body which is a resident of a foreign country but under the ownership and control of Finnish tax residents. In addition, the CFC is liable in that foreign country less than 3/5 of the corresponding Finnish level of income taxation than if it were a Finnish corporate body.¹⁰⁵ Nevertheless, certain entities are excluded outside the determination of the subject of CFC, and are specified in the paragraph 2 of §2 of the Act. CFC body is under the ownership and control of a Finnish tax resident in certain circumstances.¹⁰⁶ If one or several Finnish resident shareholders directly or indirectly own at least 50 percent of the capital or 50 percent of the voting rights in the CFC, the resident of Finland is the controlling entity. In addition, if one or several Finnish resident shareholders are entitled to at least 50 percent of the yield of the net wealth of the CFC, is that company in the controlling position. The

¹⁰⁴ *Laki verotusmenettelystä*, 18.12.1995/1558

¹⁰⁵ *Laki ulkomaisten väliyhteisöjen osakkeiden verotuksesta*, 16.12.1994/1217.

¹⁰⁶ *Ibid*

taxpayer's share from CFC's profit is taxable income, if the taxpayer alone or together with the same related entity group owns at least 25 percent from the CFC's capital. In addition, if the taxpayer has a right to get 25 percent from the income of the CFC, the share will be taxable. The income of the CFC belongs to the entity and its shareholders, if the profits has been generated there.

The share of the CFC's profits corresponding to the ownership interest of the shareholder (together with associates) in the CFC will be taxable, if it is at least 10 percent from the total capital.¹⁰⁷ Furthermore, dividends and other distributions received by the shareholder are taxable in so far as they exceed the amount of profits that in the same year or five preceding years has been included in the taxable income of the shareholder. If the CFC has already paid income tax on the same income in another state, the CFC will receive credit from that tax payment.¹⁰⁸ The income tax which the CFC would have been liable to pay, will be reduced by the rate of the income tax which the CFC has already paid in another member state. If already paid taxes cannot be reduced totally from the tax ratio of the CFC, they can be reduced from the tax ratio during the following five years. If required, the rules laid down in the Double tax treaties will be applied in relation of the tax credit.

Comparing Finnish CFC rules and the CFC rules laid down in ATAD, the definition of the controlled foreign company is very similar. Both measures include for instance a determination, that the taxpayer must hold directly or indirectly, according to ATAD more than, or in case of Finnish legislation at least, 50 percent of the voting rights. The both measures also legislate that CFC owns more than or at least 50 percent of the capital. Nonetheless, the ATAD is in many points wider with its aspects. Particularly, the requirements for the rise of tax burden are different. Finnish legislation simply sets a limit of 10 percent of the gained profits. On the other hand, the ATAD has different taxation systems depending mainly on whether a company is carrying on a substantive economic activity or not. Furthermore, ATAD includes computation provision presented in Article 8, when Finnish law does not have them.

2.2.2.5. *Hybrid Mismatch rule*

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

Finnish legislation does not contain an Act or provision concerning the Hybrid Mismatch rule. Thus, this rule will be fully implemented inside the Finnish legislation as a new provision.

2.3. Anti-tax regulation in Ireland

2.3.1. Background of the taxation principles in Ireland

Ireland joined EU in 1973 and OECD in 1961.¹⁰⁹¹¹⁰ Euro zone Ireland joined in 2002.¹¹¹ Ireland focuses strongly by its tax regime to attract multinational companies to its territory.¹¹² Currently, these multinational companies employ around 10% of the country's workforce. In addition, the low corporate tax has helped Ireland to secure its investments.¹¹³ Especially, large companies from United States, like Apple, has especially been attracted to move its headquarters to Ireland.¹¹⁴ The legal system in Ireland is common law.¹¹⁵ The Companies in Ireland are governed by the Companies Acts 1963 to 2009, related EU legislation as well as case law. The Companies are subject to a single flat tax rate of 12,5 percent which is applied to trading income.¹¹⁶ The tax rate of 25 percent is applied to non-trading profits, as well as for the profits from mining, certain petroleum activities and dealing in or the development of the land. The tax residency status determines the tax applied to a company in Ireland. Non-resident companies which are carrying on a trade or business in Ireland through a branch or agency are taxable on the profits of the branch or agency. In addition, with some exemptions residents and non-residents are levied by withholding taxes on Irish-source dividends, interest and patent royalties. The Anti-tax avoidance measures of Ireland are regulated in the Tax Consolidation Act and its Part 33 is the main source for the most important measures.

2.3.2. Anti-tax avoidance measures in Ireland before implementing the Directive

¹⁰⁹ Ireland.

www.europa.eu/european-union/about-eu/countries/member-countries/ireland_en (2.05.2017).

¹¹⁰ List of OECD Member countries – Ratification of the Convention on the OECD *supra* nota 11.

¹¹¹ Ireland, *supra* nota 113.

¹¹² Cullen, Andrew, Corporate Tax Remains Central to Ireland's Strategy, *International Tax Review*, Vol.21, Issue 10, December 2010/January 2011 p 7.

¹¹³ Ireland, *International Tax Review*, Vol. 17, Issue 3, March 2006, p 27.

¹¹⁴ Hickson, John A., Ireland: Principal Irish Tax Aspects of U.S. Corporate Inversion into Ireland, *International Tax Journal*, Vol 38, Issue 4, July-August 2012, p 11.

¹¹⁵ OECD (2013), *Global forum on Transparency and Exchange of Information for Tax Purposes, Peer Reviews: Ireland 2013, Combined Phase 1 + Phase 2, incorporating Phase 2 ratings*, p 10.

¹¹⁶ Corporation tax.

www.revenue.ie/en/tax/ct/ (29.04.2017).

2.3.2.1. Interest limitation rule.

Part 8 and chapter 3 containing sections 244-255 of Irish Taxes Consolidation Act includes regulations related to the payment of interest.¹¹⁷ Namely Section 249 contains anti-avoidance provisions for the section 247 concerning “Relief to companies on loans applied in acquiring interest in other companies”. The Chapter 3 nevertheless contains in addition to section 249 several other sections which are restricting the right to deduct the interest. Thus, it can be states that Irish Interest limitation rules are relatively strict and broad already before the implementation of the ATAD.

The main rules concerning Irish companies’ rights to interest deduction can be summarized as following. According to the Irish legislation, an Irish company may deduct its interest in three circumstances.¹¹⁸ Firstly, when it is originated wholly or exclusively for the purposes of a trade. Secondly, an Irish company may deduct interest when it is incurred on loans used to acquire, improve or maintain a rental property. In this case, the deductibility is applicable only against the rental income and is subject to restrictions. Interest is deductible on an accruals basis in these two first occasions. Furthermore, the annual interest paid on loans which are used to achieve a shareholding in an Irish rental income company, a trading company, or the holding company of such companies, or in lending money to such companies, provided that the company controls more than 5 percent of the target company and has a common director. In this third alternative, the interest is deductible only in circumstances when it is paid. Moreover, annual interest which is paid after deduction of tax is deductible for corporation purposes, when the loan was used to acquire shares in or advance moneys to a trading or Irish rental income company or a holding company of such companies. In these situations, the investing company must have a greater than 5 interest and a common director. There are restrictions for the deductibility in certain circumstances when there are borrowings between connected companies. When intragroup borrowings are used to finance the intragroup acquisition of assets, the deduction of interest cannot mainly be applied. Furthermore, in certain circumstances where the loan is used to fund foreign connected parties there cannot be any relief made in relation to interest taxation. There is also a restriction on the amount of interest relief that may be claimed by an investing company which provides funds to a trading company for the purposes of expenses incurred by the trading

¹¹⁷ Taxes Consolidation Act 1997 Notes for Guidance (Finance Act 2016 Edition). www.revenue.ie/en/practitioner/law/notes-for-guidance/tca/ (29.04.2017).

¹¹⁸ Ireland: Taxation of Cross-Border Mergers and Acquisitions, p 8-9. www.home.kpmg.com/content/dam/kpmg/pdf/2014/05/ireland-2014.pdf (29.04.2017).

company on the provision of a specifies intangible asset.¹¹⁹ The restriction applies so as to ensure that the aggregate amount of interest relief claimed by the investing company and the capital allowances and interest deductions which the trading company has claimed does not exceed 80% of the trading company's income from the relevant trade in any accounting period.

When comparing the ATAD and the Interest deduction rules laid down in Irish law, it can be noticed that Irish law already has relatively strict regulation. Nonetheless, there are several details which are differing. For instance, the restriction to the amount of interest which can be deducted, will be amended as a totally new provision to the Irish legislation. Nonetheless, in case of Ireland the derogation set in Article 11(6) may be applicable to Ireland, if it will be concluded that Ireland's existing targeted rules are equally effective as the interest limitation rules.¹²⁰ Thus, it may be that the interest limitation rule presented in the ATAD must be implied to the Irish legislation by 1 January 2024.

2.3.2.2. *Exit taxation rule*

The Exit taxation rules of Ireland are included to the first chapter (sections 806-810) of Part 33 of Taxes consolidation act concerning Tax Avoidance.¹²¹ According to Irish law when a company ceases to be a tax resident in Ireland, all of its chargeable assets are deemed to be as disposed and re-acquired at market value.¹²² Hence, any gain or loss inherent in these assets are put together, whether they have been born in the time when Ireland was a tax resident or via its worldwide assets. Consequently, a capital gains tax charge will arise at the date of deemed disposal of assets. Nevertheless, according to the Irish legislation, a company is not seen to be ceased to be as a tax resident when there has been liquidation or strike-off. Furthermore, the charge laid down does not apply to an "excluded company". By a foreign company it is referred in the Irish legislation to one company with which Ireland has concluded a double tax agreement, and which is not controlled by a resident of Ireland. Moreover, the deemed disposal of assets is not applied to any assets which are situated in Ireland, which right after the change of tax residence are used by the company through a branch or agency for the purposes of a trade carried on Ireland. A company, which has transferred its tax residence, is entitled to pay any exit tax

¹¹⁹ Taxes Consolidation Act 1997 Notes for Guidance (Finance Act 2016 Edition), *supra* nota 119.

¹²⁰ Duffy, J (2016). et al., The Anti-Tax Avoidance Directive in Ireland: Winds of Change or an Easterly Breeze? Irish Tax Review, Vol.29 No.4, Irish Tax Institute 2016, p

¹²¹ Taxes Consolidation Act, 1997.

¹²² Exit Taxes and Europe – where are we now?.

www.evershedssutherland.com/global/en/what/articles/index.page?ArticleID=en/Chemicals/Exit_taxes_and_Europe#ireland (25.04.2017).

charge within 6 months of the due date. If that company fails to pay the tax, the Irish tax authorities may issue a notice to a group company or a controlling director of the migrating company, and required sum has to be paid within 30 days. Any amount which is connected to such a notice, should be paid by that person as if it were due by that person. Furthermore, any this kind of payment cannot be deducted in computing any income, profits or losses for tax purposes.

In Irish regulation, there is also covered deferral of exit tax in respect of foreign assets.¹²³ By deferral of tax it is referred to situations where a taxpayer is able to delay paying taxes in upcoming period. Other than excluded companies may have an opportunity to defer part of the exit tax charge, which is arising on the deemed disposal of foreign trading assets. The deferral of exit tax is possible when right after the change of residence, the company is a direct 75% subsidiary of an Irish tax-resident company, so called the “principal company”. In addition, the deferral is possible when both companies jointly elect in writing to the Irish tax authorities in order to defer the exit tax charge in relation to foreign trading assets. This has to be done within 2 years of the change in tax residence. When the joint election has been performed, the foreign trading assets of the company who is changing its residence are excluded from the deemed disposal provisions. Thus, there will not be risen a chargeable gain or allowable loss in respect of these assets.

Nevertheless, the net gain on the foreign trading assets will be deemed to be under the responsibility of the principal company if, within ten years of transferring the residency firstly the moving company disposes of any of the foreign trading assets. Consequently, only a proportion of the original net gain is under the responsibility of the principal company. Secondly, if the migrating company is not anymore a direct 75% subsidiary of the Irish principal company and thirdly, if the principal company ceases to be a tax resident in Ireland. Nonetheless, if any of the three situations are not applicable within 10 years, there will be no exit tax charged. Accordingly, if any of the situations are occurring within 10 years of moving, the charge will crystallise. The postponed net gain is also deemed to accrue to the principal company. At that time, any unchallenged losses available to the principal company at that time can be used to reduce the net gain. By crystallisation of charge it is referred to process where money borrowed by a company is secured by a floating charge (as mortgage) over the company’s assets and

¹²³ *Ibid*

undertaking.¹²⁴ Because of this arrangement, a company may continue trading and dispose of any assets in the course of the business.¹²⁵ Nonetheless, if the company defaults on its obligations under the terms of the loan agreement charge will crystallize and thus immediately attach to the assets owned by the company at that time. The principal company may also use any qualified losses of the moving resident company which arose prior to it becoming non-resident jointly elect in writing to the Irish tax authorities to do so. The election in this case must be made within 2 years of the event which gives rise to the crystallisation of postponed gain.

The idea in Irish exit tax law, is that the tax charge that arises on the migration of a company from Ireland is designated to apply in just some limited cases. The Irish Exit taxation rule is with its structure and main principles similar with the rule in the ATAD. The exit tax will be levied when either the company is moving away from the Irish territory, or transferring its assets abroad. Furthermore, there is a possibility for deferral when the assets are transferred in certain situations.

2.3.2.3. General anti-abuse rule

In Ireland, the GAAR is regulated in section 811C titled “Transactions to avoid liability to tax” of the Taxes Consolidation Act.¹²⁶ In the 811C(1) there are given definitions for the concepts used in the section. According to section 811C(2) (a) transaction shall be a “tax avoidance transaction” when after observing the form or/and substance of that transaction, the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to connect with and the final outcome of that transaction, and any combination of those other transactions which are so related or connected, it is evident. In that observation, it should be also taken into account the results of the transaction, its use as a means of achieving those results, any other means by which the results or any part of the results could have been achieved. Furthermore, according to the 811C(2a) if it is reasonable to consider that the transaction gives rise to, or but for this section would give rise to, a tax advantage and the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

¹²⁴ Crystallization.

www.legal-dictionary.thefreedictionary.com/crystallization (25.04.2017).

¹²⁵ Exit Taxes and Europe – where are we now?, *supra* nota 124, p 111.

¹²⁶ Taxes Consolidation Act, 1997.

Nevertheless, according to 811C(2)(b)(i) a transaction shall not be a tax avoidance transaction if when considering the matters set out in 811(c)(2a) even though the purpose or purposes of the transaction could have been achieved by some other transaction, which would have caused heavier tax burden.¹²⁷ This main rule posed in paragraph i is applicable when a person who made the arrangement had directly or indirectly a view that the realisation of profits in the course of business activities of a business carried on by the person. Furthermore, the transaction has to be not engaged or arranged at the first point in order to gain tax advantage. Both of these requirements has to be fulfilled in order that the 811C(2)(b)(i) applies. Alternatively, according to the 811C(2)(b)(i) the Irish tax regulation sees that the taxpayers purpose is not to avoid tax, when the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other deduction provided by any provision of the Acts. Furthermore, in this case the transaction should not be directly or indirectly a result of a misuse of the provision or an abuse of the provision when considering the purposed for which it was provided.

The paragraph 3 of 811C points out that a person should not gain any tax advantage which origin is from the tax avoidance transaction.¹²⁸ Accordingly, paragraph 4 (a) describes that when a taxpayer submits any return, declaration, statement or account or makes any claim which proves to obtain the benefit of a tax advantage which is caused by a tax avoidance transaction, a Revenue officer has a right to deny or withdraw the tax advantage. In addition, according to paragraph 4(b) The Tax officer may have a right to do the following: make or amend an assessment, allow or disallow partly or wholly any credit, deduction or other amount which is relevant in estimating tax which has to be paid, or any part of such credit, deduction or other amount. The tax officer may also allocate or deny any credit, deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof. Furthermore, the officer may recharacterize for the tax purposes the nature of any payment or other amount.

In addition, according to paragraph 4(c) the tax officer has also a right to make an adjustment connected to any act referred in paragraph 4(b).¹²⁹ Finally, the 4(d) points out that when any adjustment is made or act is done to deny or withdraw a tax advantage there should be also afforded relief from any double taxation which would or would because of the acts of paragraph 4 arise by virtue of any such adjustment made or act done pursuant to this subsection.

Furthermore, paragraph 5 concerns regulations of an alternative assessment, which means an

¹²⁷ *Ibid.*

¹²⁸ *Ibid*

¹²⁹ *Ibid*

assessment which is not connected to the actions described in paragraph 4 and which effect is to withdraw or deny, in whole or in part any tax advantage. According to section 6 the Revenue Officer should be prevented of making any enquiry, taking any action, making or amending an assessment or collecting or recovering any amount of tax at any time connection to the section 811C or section 811D titled “Transactions to avoid liability to tax: surcharge, interest and protective notifications”. According to paragraph 7 when a tax advantage is withdrawn from or denied to 2 or more persons the Revenue Commissioners are not obliged to maintain secrecy with respect to the making of any adjustment, the performance of any other acts or the discharge of any functions authorised by the 811C to be made, performed or discharged by a Revenue officer or to the making of any adjustment the performance of any other acts or the discharge of any functions so authorised. Finally, the paragraph 8 sets that a transaction is not considered as a tax avoidance if it has been commenced on or before 23 October 2014, when the section started to be applicable.

As it can be noticed the section 811C is relatively precise and long with its wording compared to the GAAR in ATAD. The section 811C consists of eight sub-sections and several subparagraphs. Thus, it can be stated that in regards of GAAR the Irish legislation already sets even stricter rules than it is required according to ATAD. Towards the ATAD there has been presented criticism that the GAAR regulated in Directive is too vague, and thus in practice it may cause negative effects as corruption of Tax Officers, who have the power to decide which acts are non-genuine. In case of Ireland, this may not happen, as its GAAR includes exact definitions for allowed and on the other hand for non-genuine corporate tax arrangements.

2.3.2.4. Controlled Foreign Company rule

Currently, there are no general CFC rules in the Irish regulation. Thus, the new provision will be implemented to its regulation.

2.3.2.5. Hybrid mismatch rule

The Irish legislation does not contain a provision which would have rules Hybrid Mismatch rules. Thus, this measure has to be implemented to the national legislation.

3. Comparison of effects of the Anti-Tax Avoidance Directive to Estonia, Finland and Ireland

3.1. Backgrounds of the tax legislations of the states

In regards the income tax rate, Ireland holds the lowest rate of 12,5 when on the other hand in Estonia the corporate income tax rate 20/80 concerns only profits which are distributed.¹³⁰ Finland has dropped its corporate tax rate among the years, within the Nordic example, and its currently 20%. Thus, it can be also stated that all these three Member States equally are under the average in regards the height of the corporate income tax rate. Estonia and Finland are both a part of the civil law system, when in Ireland there is common law system.¹³¹ The difference in the style of wording can be noticed between Ireland and two other states Estonia and Finland. When observing the tax legislation in Ireland, the style to write is long and highly precise.

Estonia has been many years in a row the most competitive tax law system of the OECD countries.¹³² Finland was in the comparison of the tax regimes 18th and Ireland 15th in the overall tax ranking in 2017. However, in case of corporate tax ranking, Ireland was third and Finland fifth. Estonia was the first in the corporate ranking. In regards international rules rank, Estonia is 14th, Finland 23th and Ireland 22nd. Thus, it can be concluded that in regards the corporate tax system that all the member states under the comparison are equally very competitive within the OECD states.

3.2. Differences in regards the Anti-Tax avoidance legislation

In regards the interest limitation rule only Finland and Ireland have it already in their legislation. In Finland, the Interest limitation rule is already in its basis stricter than the requirements set in the ATAD, as well as is the same law in Ireland. Thus, it will be probable that Finland will have a right to post-bone the implementation of the measure laid down in ATAD until 2024, according to Article 11(6) of ATAD. Nonetheless, it can be stated that the Finnish interest limitation rule is closer to the version presented in ATAD than Irish law. The Finnish law has similar main elements as the ATAD. For instance, amount limitations for the deductions, which do not vary especially in case of the allowed deductibility percentage, will not need any change when the Directive is implemented. Consequently, it can be concluded that the Irish law will probably meet more changes in regards the interest deduction rules than Finland.

¹³⁰ Tax rates, supra nota 95.

¹³¹ Field listing, legal system.

www.cia.gov/library/publications/the-world-factbook/fields/2100 (2.05.2017)

¹³² Pomerleu, K., International Tax Competitiveness Index 2016, Tax Foundation, Washington 2017.

According to Senior Inspector of corporate tax issues *Tarja Koikkalainen* from Finnish Tax Administration, it is probable that the interest limitation rule will be the one of the rules laid down in ATAD, which will make the most effective changes to the Finnish legislation. According to her, the scope of the interest limitation rule in the ATAD is much wider than the current Finnish law concerning the rule. Similarly, according to Irish tax experts *Joe Duffy* and *Tomás Bailey* from Matheson Law Firm state that the interest limitation rule will be the most significant rule in regards the Irish taxation.¹³³ The Duffy and Bailey consider that the interest limitation rule will have the most effect to companies operating in Ireland which have a significant annual interest expense. They also assume that Ireland will use the discretion which is provided by the optionality under Article 4, because it would give a state possibility to limit any adverse impact on implementation. According to them, this would be important especially for the Irish Financial industry as it has been a key factor for the economic recovery in Ireland during recent years.

The Exit taxation rule can be found from the legislations of Finland and Ireland. In the Finnish law exit taxation rule is simplified version for what has been presented in ATAD. It does not include as wide wording and is also lacking the provision of deferral of the tax payment. Consequently, according to statement to the Finnish Ministry of Finance which the tax expert professor *Marjaana Helminen* provided, the exit taxation rule will cause the biggest change to the current Finnish legislation.¹³⁴ Nonetheless, she states that it will be necessary for the securing the Finnish tax accruing. On the other hand, the exit taxation law laid down in Irish legislation has much wider scope than Finnish law, and includes for instance a possibility for the deferral. Nonetheless, according to Duffy and Bailey Ireland should make some important changes in their tax regulation.¹³⁵ At the moment there is no general step-up in tax value when assets come to the Irish tax net. Thus, there can be realistic situation where the exit tax can result in imposition of a greater tax burden on assets which exit Ireland. Therefore, Irish tax law should be changed in a way that it provides a general step-up in tax value for assets which are entering Ireland. Therefore, in this point the critics stated towards the Directive is fair.¹³⁶

All three Member States which are under the observation are having GAAR in their current tax legislation. Furthermore, in regards all of these rules it can be stated that they are much in line

¹³³ Duffy (2016), *supra* note 124, p 111.

¹³⁴ Helminen M., *Ehdotus neuvoston direktiiviksi sisämarkkinoiden toimintaan suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta (COM (2016) 26 lopullinen)*, p 1.

¹³⁵ Duffy(2016), *supra* nota 124, p .

¹³⁶ Anti-Tax Avoidance Directive and Its Implications, *supra* nota 4.

with the rule laid down in the ATAD. The case of the Supreme Court of Estonia includes an important application of § 84 of Taxation Act concerning GAAR.¹³⁷ The Supreme Court stated in its decision that in order to apply Article 84 of the Taxation Act it is important to clarify whether a non-monetary contribution or a transfer of shares was conducted with the aim of avoiding income tax.¹³⁸ According to the Supreme Court the identifying such an aim is not always based on the taxpayer's subjective reasons, because such reasons are often not possible to establish. As contrary, the factual circumstances have to determine the avoidance of the income tax. In the Case KHO:2017:20 of Finnish Supreme Administrative Court, the court stated that it has to be obvious that there has been the purpose of tax avoidance in order that VML 28 § would be applicable.¹³⁹ Thus, the subjective aim to avoid the tax has to be visible from the facts or circumstances of the case. Therefore, it can be seen from the practise of the GAAR in national courts that its application may differ remarkably. According to Estonian case law the factual circumstances are enough to determine aim of tax avoidance, when according to Finnish case law the purpose has to be subjective. Furthermore, the wording of the Irish law describes that the claim for relief has to be done “not *for bona fide* commercial purposes—“. ¹⁴⁰ Thus, the content of Irish GAAR is similar with the Finnish GAAR.

Finland is the only state of the three Member States under comparison, which has currently CFC rules. Traditionally Estonia and Ireland has been seen as states which corporate tax measures are extremely competitive. It is typical for competitive corporate tax regimes, that their anti-tax avoidance measures do not contain CFC rules. ¹⁴¹ This is also the case of Estonian and Irish legislation. According to Koikkalainen the current Finnish CFC rules are with their structure significantly in contrast with the CFC rule laid down in ATAD. However, according to her, there will not be significant changes to the Finnish CFC law after the implication of the Directive. She points out that this is because Finnish legislation already corresponds with its contents and aim to the ATAD's rule. Thus, in this context there will be remarkable changes in regards the taxation regimes of Estonia and Ireland, but not towards Finland.

¹³⁷ 3-3-1-57-08, Riigikohtu halduskolleegiumi 6. Novembri 2008. A kohtuotsus Madis Kaalu kaebuses Maksu ja Tolliameti Põhja maksu- ja tollikeskuse 11. mai 2007. a maksuotsuse nr 12-5/292 tühistamiseks.

¹³⁸ Mailend, A. et al., Supreme Court Adjudicates on Tax Avoidance Rules When Selling Shares www.internationallawoffice.com/Newsletters/Corporate-Tax/Estonia/Law-Office-Paul-Varul-Attorneys-At-Law/Supreme-Court-Adjudicates-on-Tax-Avoidance-Rules-When-Selling-Shares# (30.04.2017).

¹³⁹ Korkein hallinto-oikeus, KHO:2017:20, 7.2.2017/456.

¹⁴⁰ Revenue Operational Manual, Tax Avoidance “Main purpose” tests.

¹⁴¹ Pomerleu (2017)., *supra* nota 136.

Hybrid Mismatch rule is the only rule of the ATAD which will be implemented as a new provision to all three Member States. Hybrid Mismatch rule is the only rule of the ATAD which will be implemented as a new provision to all three Member States. Of these three Member States Estonia will have the most changes to its tax legislation after the implementation of the ATAD. There will be four new antitax avoidance provisions which it has to include to its tax regime. In addition, also Ireland will face several changes in its tax provisions, when it has to implement two wholly new rules. Only Finnish tax acts are already including almost all the intended rules of the Directive.

Conclusions

European Union has followed the recent international development of tackling against tax evasion and tax avoidance. One purpose behind this has been to harmonize the anti-tax avoidance regulation within the Union on the basis of the OECD's BEPS package, which otherwise would not be applicable in all the Member States. Thus, the purpose of EU is to strengthen the single market. The aim of the Directive has those been to create more fair conditions to make business in EU, when the profits are obliged to be taxed primarily where there are originated from. The Author of the thesis sees this evolution of harmonisation within EU as advisable, taking into consideration the recent financial crisis in the EU area, which partly originated from the lack of the effective anti-tax avoidance measures.

However, there has been concerns about the breach of the fundamental principles of the EU, as like the sovereignty principle in regards the Member States. Traditionally, taxation has been seen as an area which should be wholly under the regulative power of the national governments. Nevertheless, the author of the thesis considers as the Directive does not aim to affect the tax rates of the Member States, it concluded that the principle of sovereignty has not been breached. Furthermore, the anti-tax measures of the ATAD include relatively many exceptions which allow the Member States to opt in which way to implement the provisions. Therefore, the Member States may choose the best suitable way to its tax regime and its purposes. Nonetheless, as the Member States still have relatively wide powers to control their Anti-Tax Avoidance measures, it has been stated that most probably instead of the ATAD it will be easier for the European Commission to tackle to aggressive tax planning by regulating the state aids, as like in the recent Apple-case.

On the other hand, there has been seen that the ATAD among the other international anti-tax avoidance measures restricts competition. The ability of the EU Member States to compete

within the outside world may weaken. The effects of the restriction have been estimated to be decrease of the amount of businesses, unemployment and lack of services. For instance, in Ireland multinational companies are offering a work place for a significant part of the population. Thus, if the attractiveness of the state decreases in the eyes of the investors, it will have significant effects to the economy of the state. The Author of the thesis agrees, that it is important until a certain point that the states can compete with their tax provisions. Nonetheless, the author also assumes that by effectively controlling anti-abuse rules can be mere improved the atmosphere to make the business as all the businesses have equal possibilities inside the territory of the state. Moreover, if the profits of the companies are not levied in the place where there are originated from, the losses of the tax revenue of the states, can be massive. Thus, by these tax accruals originated from for instance the resident companies' governments may support employment possibilities of the citizens.

Moreover, as the recent development has been, that the international anti-tax avoidance measures are harmonized, the competition conditions of the companies will be nevertheless slowly going to the same direction. For instance, depending on the magnitude of the effects of the BEPS package the OECD states over the world will have, the allowed ways to compete with the taxation will be more or less the same. In regards of European Union, it is also important to consider that the financial crisis of a one Member State will have strong effects to the other Member States, as the Union and its states are often obliged to aid the Member State in economic troubles. Thus, also in this point it is understandable that the level of the protection which the ATAD provides is relatively higher than in the OECD BEPS package. Furthermore, as the one of fundamental purposes is to create coherent market area, which is favouring equally all the Member States, it is understandable that the EU is considering the Anti-Avoidance rules also from its own point of view.

The fundamental rights and social services provided by the states are under the threat, if companies are allowed to use the most favourable taxation options. The one of the main purpose of taxes is to ensure that states can provide essential living standards to all of its citizens. Thus, it can be seen that the anti-tax avoidance measures are improving equality, when a state can for instance offer free education, affordable municipal health care system or social security system. Many of these services are also basis for the realization of the fundamental human rights, as right to education.

Furthermore, it can be stated that the Anti-tax avoidance rules are improving the mutual attitude among the citizens of EU. Therefore, they strengthen the idea of right and wrong actions. When something is stated to be wrong according to law, it in generally recreates the individuals and the society's values to that direction. The Author of the thesis agrees with this view of point. The overall insight of individuals will change against the tax evasion, when it is more reprehensible. The companies are now a day creating their brand leaning on ethical values, as fair trade or ecology, which are also widely regulated. Nonetheless, the same companies may be guilty of illegal tax evasion. Thus, the Author of the thesis sees that it would be crucial to inform the consumers about the illegal tax arrangements to which companies have been involved in. Therefore, the individuals could make their consumption decision based on ethical reasons which are originated from the fair tax arrangements. Nonetheless, it seems that the overall attitude has been that the tax avoidance is an allowed way to compete, without seeing its remarkable effects to the economies of the states and thus the living conditions of citizens. If the illegal tax avoidance would have more effect to the imago of a company, it could be also one factor to which they should pay more attention in order to be competitive.

The line between the tax mitigation, tax avoidance and tax evasion is in some cases extremely difficult to create. Tax mitigation is clearly legal planning of a company in regards the tax arrangements. Thus, the main purpose of the taxation decisions is not to avoid tax, but use the loopholes of the rules in a manner which is sound with the real purpose of the business. The tax avoidance on the other hand is including illegal or wrong tax arrangements, which are artificial in their nature. However, the mind of the taxpayer in that situation is not evidently wrong. Tax evasion on the other hand always includes also the elements of the tax avoidance, but in addition it has to have guilty mind. The main purpose of the taxpayer has been to avoid tax. As like other anti-tax avoidance measures also the ATAD is leaning on the division of these three concepts. The exceptions to the restricting tax rules are securing, that the legal tax planning of the companies is still possible. Therefore, the Directive is targeting to tackle to tax avoidance and evasion.

The Anti-Tax Avoidance Directive includes five main measures. The author of the thesis considers that the general anti-abuse rule is the most well-known provision of the Directive within the EU, according to the study made related to the thesis. Moreover, it seems that many Member States are lacking hybrid mismatch rule in their current anti-tax avoidance provisions. On the other hand, the interest limitation rule and the CFC rule has been seen to have the most actual effect to the tax arrangements of the companies, in the light of the current tax practises.

The author of the thesis agrees with the critics that the wording of the GAAR can be too vague in practise. It does not determine strictly what will be the actual non-genuine arrangement, and this may cause uncertainty in regards the national courts' decisions. Moreover, if the national legislations are providing differing views related to the non-genuine taxation arrangements and transfers, it may cause uncertainty in regards the outcomes of the rule.

In this thesis, the three Member States which were under the study in regards the effects of the ATAD are Estonia, Ireland and Finland. Each of the states are having different backgrounds in their tax regimes. Nonetheless, the approach to the tax legislation of Estonia and Ireland has been traditionally seen to be more competitive than Finnish tax law. Furthermore, Ireland is a common law state, which legislation relies on rulings of the courts. When Finland and Estonia are part of civil law system, where acts of book are the main legal resource. The difference can be seen in the wording of the tax legislations. Irish texts of tax acts, compared to Estonian and Finnish tax laws, are relatively long and have broader aspects. In regards of the interest limitation rule Finland had the most similar version of it in its legislation, when Ireland has to set much lower limits for the deductibility of the interest. Furthermore, in Estonia this provision has to be wholly implemented as a new provision in its legislation. Exit taxation rule will be probably be the rule from the ATAD which will change the Finnish law the most and again for Estonia it will become as a new provision to the legislation. Ireland as contrary has already relatively similar exit taxation rule as the ATAD. Even though, there can be problems in regards the lack of general step-up tax value in Ireland. The lack of this provision may cause that the assets may face greater tax burden when they exit Irish territory. Therefore, there has been presented criticism for the Exit taxation rule presented in the ATAD, as it does not take this possibility into account. Thus, there has been seen a threat for the free movement of capital and also for the freedom of establishment.

In regards the GAAR of the ATAD, the rule exists already in the legislations of Estonia, Finland and Ireland. Nonetheless, from the court practise it can be noticed that the determination of the "aim of tax avoidance" is applied differently within these three Member States. In Estonia it is enough in generally if the aim can be seen just from the factual circumstances of the case, when in Finland and Ireland it has to be visible from the subjective perspective. According to the ATAD on the other hand non-genuine and aim which has tax avoidance in its purpose, has to be concluded according to all valid economic reasons, which includes financial activities. Therefore, the wording of the ATAD seems to correspond with the court practice of Estonia – the aim of tax avoidance shall be concluded from the factual circumstances of the case. Only

Finland has currently CFC rules in its legislation. The rule laid down to the Finnish legislation is with its content and aim in line with the rule laid down in the ATAD. Thus, there may not be any remarkable changes in regards of that. Hybrid mismatch rule will be the only one which will become as a new provision to all of these Member States tax regimes.

When comparing the current anti-tax avoidance regimes of the states, Finland has been the one state which legislation will change the least. It has been also one of the Member States which has been supporting the Directive and its measures. As contrary Estonia is lacking many of the provisions which has been presented in the ATAD. Thus, the Author of the thesis considers that the effects of the Directive will be the strongest in Estonia, among these three Member States. Ireland is already having three measures of the ATAD included in its acts. Nonetheless, there will still be several details which has to be taken into account when the implementation of the Directive begins, as like on relation to exit taxation rule and the lack of step-up tax value.

In the study of the competitiveness of the tax regimes within OECD states, it can be concluded that Estonia is the most competitive of the three states under the comparison in this thesis. Estonia also has the most competitive tax provisions of all the OECD states. In regards of these three countries, Ireland is second and Finland third when measuring the competitiveness of the tax regimes. Considering, the anti-competitive rules which the states have before the implementation of the ATAD, Estonia had the most provisions which have to be wholly newly implemented. Ireland has second least the anti-tax avoidance rules, and Finland had the most of them already its legislation. Thus, it may be that after the implementation of the ATAD Estonia might lose its first place in the comparison within the OECD states, as it does not yet have required anti-tax avoidance provisions in its tax laws. The real effects of the ATAD to the national regulations will be visible just after the final deadlines from its implication has past, which is at latest in 2024. Furthermore, the effects of the Directive to the national and overall EU economy can be seen even after longer time. The opinion of the author of the thesis is that the Directive will have diverse effects to the Member States, according to their prior anti-tax avoidance rules. Moreover, it is probable that the states which do not have before the implementation of the Directive strong anti-tax avoidance rules in their legislation will try to use as many exceptions provided by the Directive as possible. However, for instance, Finland has already stronger protection than the ATAD requires in some of its provisions. Thus, it can be that the harmonisation will not have that equal effects to all the EU Member States. In regards the competitiveness of the EU compared to the third countries, the effects are also depending on the future international developments and the application of the OECD BEPS package for instance.

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