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# MO(O)RE NEWS

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Dear readers,

We recently celebrated the 100th anniversary of the end of the First World War. Politicians from around the world met in Prague and then Paris to demonstrate Europe's common values and cooperation.

Over the past 20 years, the European Union has striven to build the same in the area of tax, i.e. by limiting or completely eliminating obstacles to trade, labour mobility, company relocation within the EU, and even getting closer to direct taxation in individual Member States, by the application of fundamental freedoms through jurisprudence and directives. In the last couple of years, however, we have seen a departure from this principle from a tax perspective.

Soon, entrepreneurs will not be able to freely dispose of their assets within the EU without taxation. In principle, taxpayers in the EU have only a year to make use of their freedoms (namely the freedom of establishment). From 1 January 2020 (in the Czech Republic – in other countries it may be applied earlier) it will no longer be possible to move assets within the EU or to invest in any country outside the EU without taxation.

It is up to you to prepare for the new conditions. **It is advisable to take advantage of the beginning of the financial year from 1 January 2019 to do so.** We will also see whether some taxpayers challenge the ATAD Directive at the European Court of Justice. The reasons why taxpayers move certainly are not only due to questions of tax, but also to reduce risk, to protect investments, to improve international prestige, and others.

**Martin Houska**
Partner

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### Czech Republic: Tax avoidance – a modern phenomenon?

In recent years (perhaps decades), tax law as a specific, and it must be added fiscally very important, part of public law, has been experiencing strong legislative pressure from the outside. This is mainly at the initiative of EU or OECD institutions, whose efforts are determining the direction of tax systems not only in the Czech Republic, but in all other EU Member States, at the very least. Their aim is mainly to combat the aggressive tax practices of some entities in this territory. *more on page 2*

### Slovakia

The new EU directive known as ATAD (Anti-Tax Avoidance Directive) ensures that tax is paid where profits and values are generated. It lays down binding measures that the Slovak Republic must implement in order to prevent aggressive tax planning. *more on page 3*

### Implementation in France

Drafted in very general terms, this clause will allow the tax administration to challenge arrangements whose main objective is to obtain a tax advantage, in the context of an ordinary law procedure, without having to implement the abuse of rights procedure. Since the notion of „main objective" is also broader than the notion of „exclusively fiscal purpose", this mechanism should be easier to implement by the tax administration. *more on page 4*

### Austrian Implementation of ATAD Rules

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# Czech Republic: Tax avoidance – a modern phenomenon?

**In recent years (perhaps decades), tax law as a specific, and it must be added fiscally very important, part of public law, has been experiencing strong legislative pressure from the outside. This is mainly at the initiative of EU or OECD institutions, whose efforts are determining the direction of tax systems not only in the Czech Republic, but in all other EU Member States, at the very least. Their aim is mainly to combat the aggressive tax practices of some entities in this territory.**

One of the latest measures aiming at the full or at least partial elimination of the tax advantages obtained by businesses that engage in unfair practices is the legislative proposal for the transposition of Article 6 of EU Council Directive 2016/1164, laying down rules against tax evasion practices which have a direct impact on the functioning of the internal market (the "ATAD Directive"). As the title of the article suggests, it is about enshrining the principle of anti-tax avoidance in Czech law.

**Draft codification into Czech tax law**

1. **State of the legislative process**

The legislative draft law incorporating the anti-tax avoidance principles into domestic law is now in the Chamber of Deputies, where it awaits a second reading. In addition to anti-tax avoidance, Parliamentary Bulletin 206 also includes an amendment to other tax laws (for example, the Income Tax Act, Value Added Tax Act). In light of the current state of the legislative process, the proposed date of effectiveness of 1 January 2019 appears to be at risk. In any case, I do not think that the Czech Parliament or the president will veto the "anti-tax avoidance package" as a result. At most, the effectiveness of the law will be postponed until 2019.

2. **Where will the anti-tax avoidance principle be enshrined?**

The submitter of the newly proposed legislation (the Czech Government, and by extension the Ministry of Finance of the Czech Republic) is counting on the anti-tax avoidance principle being enshrined in the general procedural rules governing tax administration – the Tax Code (new Section 8 (4)). The lawmaker elaborated on the reasons for choosing this approach in the explanatory report to the proposed amendment to the law, specifically: *"…the proposed amendment of Section 8 (4) of the Tax Code is not aimed only at income tax, but is designed so that anti-tax avoidance is applied in principle the same way to all types of tax. For this reason, a supplement to the general regulation is proposed for all such monetary performance, mainly for the sake of the uniformity and internal consistency of the law and for the purpose of maintaining certainty."* The submitter is aware that enshrining the anti-tax avoidance principle in the general regulations means an extension of the scope of this principle beyond the obligatory implementation of Art. 6 of the ATAD Directive, which only affects corporate income tax. Besides these reasons, the submitter added that with regard to current administrative and judicial practice, which I discussed above, in essence this is merely a legislative expression of the current state of this practice.

From the information available to me, the views on this issue within EU Member States are not uniform. A side-by-side comparison will certainly be interesting and enlightening.

3. **Legislative draft of anti-tax avoidance text**

The draft amendment of the Tax Code reads: "In tax administration, legal acts and other factors decisive for the administration of taxes, the overriding purpose of which is to obtain a tax advantage contrary to the intention and purpose of the tax legislation, are not taken into account."

In its proposal, the Czech Republic honours the foundation of Art. 6 of the ATAD Directive (subjective and objective criteria). Where small differences can be perceived is in the definition of subjective criteria – the "purpose" of the conduct. The ATAD Directive discusses the "main or one of the main" purposes (obtain a tax advantage), whereas the Czech draft uses the word "prevailing". The Czech lawmaker opted for the wording "prevailing purpose" so that the draft of the law adheres to the case law, which uses it in this way without further addition. The effort is therefore to preserve continuity with the terminology used in the case law, as any new attempt to express the rules in other words raises the risk of a different interpretation.

Concurrently with the material enshrinement of anti-tax avoidance in Section 8 (4) of the Tax Code, the lawmaker acceded to the express enshrinement of the obligation to prove facts decisive for the assessment of tax avoidance to the tax administrator. Now, not only is the burden of proof on the tax administrator to prove tax avoidance by the taxable person derived from the case law, but newly it will be explicitly enshrined in the Tax Code.

4. **Where the principle does not apply**

Neither tax avoidance as interpreted by Czech courts, nor the newly proposed codified regulation, address situations where the law allows a taxable person to choose between several paths leading to the realisation of his goals and he chooses one of the paths because its tax advantage is foreseen by law. If, therefore, the taxable person uses an advantage offered him in accordance with the intent and purpose of the tax regulation, this cannot under any circumstances be considered tax avoidance (absent objective criteria – conduct contrary to the intent and purpose of legal standards).

Read more.

vit.krivanek@moorestephens.cz

# Slovakia

**The new EU directive known as ATAD (Anti-Tax Avoidance Directive) ensures that tax is paid where profits and values are generated. It lays down binding measures that the Slovak Republic must implement in order to prevent aggressive tax planning**.

In addition, the aim of this Directive is to facilitate the exchange of information between Financial Intelligence Units in identifying and monitoring suspicious transactions.

The Slovak Income Tax Act in force contains certain measures protecting against tax fraud and stipulates rules designed to strengthen the level of protection against aggressive tax planning and tax base erosion and rules against shifting profits outside the territory of the Slovak Republic.

With a view of implementing rules laid down by ATAD, the Slovak Income Tax Act and the Slovak Tax Administration Act (the Tax Procedure Code) will be amended. The change of the Tax Procedure Code is a result of a new form of exemption for the commercial use of intangible assets stipulated by the Income Tax Act, obliging the Financial Directorate of the Slovak Republic to publish a list of taxpayers who apply this type of exemption.

On 1 January 2018, the Slovak Income Tax established special tax regime for the commercial use of intangible assets. This regime exempts profits (yields) from payments for the provision of rights to use or for the use of approved and registered patents and utility templates, as well as from the use or for the use of computer programmes (software).

The special tax regime for the commercial use of intangible assets (the so-called patent box) creates incentives for tax entities to include research and development in their business activities, as the results of research and development and their commercial use will be subject to a more beneficial taxation than other types of business activities. Furthermore, this creates incentives to register the results of research and development activities with the Industrial Ownership Office of the Slovak Republic. Similarly to the increase in deductible costs for research and development, the establishment of this special tax regime can help to improve the employment rate in Slovakia.

In order to increase tax transparency, the Tax Procedure Code amended as **of 1 January 2019** will extend the publishing obligation of tax entities with new lists of tax entities in relation to their levy obligation. This relates to the publishing of selected financial institutions (banks, subsidies of foreign banks) and their payments of special levies on the basis of a special regulation per calendar year and the publishing of tax entities (natural or legal persons) acting as a regulated person on the basis of a special regulation.

The extension of the number of published lists of tax entities and their tax obligations and the payment of special levies of selected tax entities is one of the tools designed to fight against tax evasion. All lists of tax entities are published and will be published by the Financial Directorate of the Slovak Republic on its website.

martin.kino@bdrbb.sk

# Implementation in France

**On 24 September 2018, the French Government presented the Finance Bill draft for the year 2019. This draft will be discussed by the French Parliament over the next few weeks and may be subject to changes; the final version will be enacted before end of year, 2018.**

**Interest deduction limitation rules**

Article 13 of the Finance Bill draft for 2019 transposes into French law the rules provided for in the "Anti-tax evasion" Directive ("ATAD") adopted on 12 July 2016.

The following major changes to the current French interest deductibility limitation rules are planned:

- **Cap on the deduction of "net financial expenses":** net interest expenses would be deductible from the taxable income of a company only to the extent that they do not exceed the higher of the following two thresholds: (i) €3 million or (ii) 30% of the adjusted taxable income of the company ("EBITDA", i.e., taxable income before the offset of tax losses and without taking into account net financial expenses, depreciation, provisions and capital gains/losses). The cap of €3 million is be understood as per financial year, i.e. a twelve-month period.
- **Safe harbor provision:** 75% of net financial expenses that exceed the cap (as above), would still be tax deductible provided that the equity-to-asset ratio of the company is equal or higher than the equity-to-asset ratio of the consolidated group to which it belongs. The ratio between shareholders' equity and total assets of the company would be considered to be equal as to the equivalent ratio of the consolidated group in which the first ratio is not lower by more than two percentage points over the second ratio. The consolidated group refers to all French and foreign companies whose financial statements are fully consolidated for the preparation of consolidated financial statements.
- **New thin-capitalization rule:** in the event that the amount of debt granted by affiliated companies exceeds 1.5 times the amount of the company's equity at the beginning or end of the financial year, the net financial expenses of the company may only be deducted up to a maximum of 10% of the "EBITDA" or €1 million if higher.
- **Interest expense carryforwards:** Financial charges that are not deductible under the rules summarized above may be carried forward indefinitely for possible future allocation, provided that the company's ability to deduct these future financial charges is not already fully consumed by the financial charges incurred during these financial years.
- **Deduction capacity carryforwards:** if a company does not fully utilize its deduction capacity (i.e., the amount of net interest expense is lower than the above-mentioned thresholds of 30% of its EBITDA or €3 million), the unused portion of deduction capacity can be carried forward for the five following years.
- **Tax Group:** the above-mentioned new limitation rules also apply at the level of French tax-consolidated groups, subject to certain conditions.

These new rules would be applicable to financial years beginning on or after January 1, 2019. Financial expenses incurred as from financial years beginning on or after that date would therefore be affected, including those relating to borrowings set up before that date.

**Implementation of the general anti-abuse rule for corporate income tax**

Article 48 of the Finance Bill draft introduces a general anti-abuse rule for corporate income tax. This clause provides that for the purpose of establishing corporation tax, no account shall be taken of an arrangement or series of arrangements which, having been put in place to obtain, as a main objective or under one of the main objectives, a tax advantage contrary to the object or purpose of the applicable tax law, are not authentic considering all the relevant facts and circumstances.

This new system aims to transpose into French domestic law the general anti-abuse rule provided for by the ATAD Directive and is in line with the wishes of the Member States to fight tax evasion both at EU and international level. Drafted in very general terms, this clause will allow the tax administration to challenge arrangements whose main objective is to obtain a tax advantage, in the context of an ordinary law procedure, without having to implement the abuse of rights procedure. Since the notion of "main objective" is also broader than the notion of "exclusively fiscal purpose", this mechanism should be easier to implement by the tax administration.

**This clause would apply to fiscal years beginning on or after January 1, 2019.**

swiener@coffra.fr

# Austrian Implementation of ATAD Rules

**The European Anti Tax Avoidance Directive (ATAD) was issued in 2016. It tackles some of the Action Points which were included in the OECD's BEPS (Base Erosion and Profit Shifting) Action Plan. Generally, Member States shall implement the ATAD until 1 January 2019. A further development is ATAD II, which was issued in 2017 and changed some of the provisions of ATAD. Most items from ATAD II shall be implemented until 1 January 2020.**

Austria has already had relevant legal rules targeting parts of ATAD, when ATAD was issued. Therefore, not all points needed to be implemented in an entirely new form, but some could be kept or adapted.

**Interest Limitation**

Austria introduced a limitation of interest in 2014, which was not replaced by a rule conforming to Article 4 of the ATAD, but it was kept using the rule of Article 11 of the ATAD. Under the Austrian limitation rule, interest expense paid to associated companies is only deductible, if the interest income received by the other associated company is effectively taxed at a corporation income tax rate of not below 10%. By the way, the same applies to intercompany license fees. It remains to be seen, if and when Austria will replace this rule to match the regulatory standard of Article 4 of the ATAD.

**Exit Taxation**

Austria introduced exit taxation rules regarding the transfer of company assets some years ago. These remained largely unchanged, but some technical criteria were adapted and the possibility to pay tax amounts regarding fixed assets in instalments was reduced to a timeframe of 5 years conforming to Article 5 of the ATAD.

**GAAR (General Anti-Abuse Rule)**

Austria has been having a GAAR in its domestic tax law over a long period of time. As it was already very similar to the rules included in Article 6 of the ATAD, the existing wording was adapted to include ATAD conforming language and criteria. It remains to be seen, how significant the impact of these changes will be in practice and in the decisions of tax courts.

**CFC (Controlled Foreign Company) Rule**

CFC Rules were not part of the Austrian domestic tax law before Article 7 of the ATAD asked for it. So a CFC Rule was implemented for the first time into the Austrian Corporation Income Tax Act. It will apply to profits realized starting from 01 January 2019. Austria chose to exclude companies with relevant passive income of below or equaling one third of their total taxable income from the application of the CFC Rule, but Austria did not choose to implement a threshold for companies with small profits. The CFC Rule applies, if relevant passive income is taxed at a tax rate of not more than 12.5%. Therefore, the CFC Rule could apply even to companies in certain other EU Member Countries (e.g. Bulgaria, Cyprus, Hungary).

**Hybrid Mismatches**

Austria had already a rule restricting the deduction of interest and license fee expenses, if they were not effectively subject to a taxation of at least 10% at the recipient of the respective income. Furthermore, Austria disallows the application of the tax exemption for dividend income, if the dividend payment is a deductible expense in the subsidiary's country. So far, those rules were not changed on the basis of Article 9 of the ATAD.

f.wuerth@msct.at

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**PRAGUE**

Jiří Liberda
jiri.liberda@moorestephens.cz

Martin Houska
martin.houska@moorestephens.cz

Darina Dolanská
darina.dolanska@moorestephens.cz

**BRNO**

Tomáš Klíma
tklima@tcbrno.cz

Roman Kytlica
rkytlica@tcbrno.cz

Igor Pantůček
ipantucek@tcbrno.cz

**PILSEN**

Michal Daňsa
michal.dansa@moorestephens.cz

Hana Patočková
patockova@taxpartners.eu

Ivan Kovář
ivan.kovar@moorestephens.cz

**Č. BUDĚJOVICE/J. HRADEC**

Martin Tuček
martin.tucek@moorestephens.cz

**DOMAŽLICE**

Miroslav Jandečka, Man. Partner
miroslav.jandecka@moorestephens.cz

Jitka Fanturová
jitka.fanturova@moorestephens.cz

Věra Jankovcová
vera.jankovcova@moorestephens.cz

Jiří Jandečka