COUNTRY NOTE

The Impact of the Transposition of the ATAD on the Greek Tax System

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In response to the Anti-Tax Avoidance Directive (ATAD), Greece has recently amended its legislation with L. 4607/2019 regarding interest deduction limitation rules, controlled foreign company (CFC) rules, and the General Anti-Abuse Rule (GAAR). In this article, the impact of the transposition of the ATAD in the aforementioned three rules will be analysed. In addition, a comparative survey between them and the respective provisions of the ATAD will occur in which it will be examined to what extent the aforesaid anti-tax avoidance rules have been changed by the transposition of the ATAD. Lastly, a critical analysis of each of them will take place concerning the issues that may arise and on their compatibility with ECJ case law.

Keywords: Transposition, Anti Tax-Avoidance Directive (ATAD), Interest Deduction Limitation Rules, General Anti-Abuse Rule (GAAR), Controlled Foreign Company Rules (CFC rules), EBITDA, Main Purpose Test, non-Genuine Arrangement, ECJ case law, Greece

1 Introduction

On 12 July 2016, the Anti-Tax Avoidance Directive[1] (hereinafter referred as the ATAD) laying down rules against tax avoidance practices that directly affect the functioning of the internal market was formally adopted by the twenty-eight Member-States. The ATAD forms part of the 'Anti-Tax Avoidance Package' that was introduced by the European Commission in January 2016 and is the 'answer' of the EU to the fifteen OECD's Action Items against Base Erosion and Profit Shifting (BEPS) that were released to the public on 5 October 2015.[2] The Council conclusions stressed the need to find common, yet flexible, solutions at the EU level that are consistent with OECD BEPS conclusions in order to '*discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion*'.

The ATAD provides for five anti-tax avoidance measures that all Member States should apply against common forms of aggressive tax planning.[3] These include interest deduction limitation rules, exit taxation rules, a general anti-abuse provision to counteract aggressive tax planning, when other rules do not apply, controlled foreign company rules and rules to tackle hybrid mismatches.[4] According to the ATAD, Member States should transpose the Directive in their national tax systems no later than 31 December 2018 and apply them beginning on 1 January 2019.[5] There is an exception for the exit taxation rules which should be incorporated into national tax systems by 31 December 2019[6] and interest deduction limitation rules which should be applied no later than 1 January 2024. This is relevant as long as the respective Member States had national targeted rules for preventing BEPS risks on 8 August 2016, which were equally effective as the interest limitation rule set out in the ATAD.[7]

Greece had already incorporated a number of anti-abuse and anti-avoidance measures in its national tax system, some

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

[2] *See* A. P. Dourado, *The EU Anti-Tax Avoidance Package: Moving Ahead of BEPS,* 44(6/7) Intertax 440–446 (2016).

[3] European Commission, *The Proposal for a Council Directive Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market*, COM (2016) 26 final (28 Jan. 2016), provided for six rules. However, the switch-over clause was not included in the final ATAD.

[4] The ATAD was amended by the Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144/1 (7 June 2017) (known as ATAD 2) which introduced detailed rules for the treatment of hybrid mismatches.

[5] ATAD, *supra* n. 1, Art. 11(1).

[6] *Ibid.*, Art. 11 (5).

[7] *Ibid.*, Art. 11 (6). Some commentators argue that the rules dealing with 'hybrid mismatch' situations set out in ATAD 2 to be transposed into domestic law by 1 Jan. 2020, completely superseded Art. 9 of ATAD 1 and, consequently, EU Member States do not have to implement any 'hybrid mismatch' measures before 1 Jan. 2020.

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of which were in accordance with the ATAD even before its transposition – as it will be analysed subsequently. More specifically, by the time that the ATAD was accepted by Greece, Greece had already introduced thin-cap rules, CFC rules, and the GAAR into the national tax system. However, it was only on 24 April 2019 that Greece incorporated three anti-tax avoidance measures of the ATAD, and more specifically its interest deduction limitation rules, CFC rules, and the GAAR by virtue of Law 4607/2019. The new rules will apply retroactively to 1 January 2019. Exit taxation and hybrid mismatch rules are also expected to be transposed into domestic law, even though Greek tax legislation has never provided for such measures in the past.

In this article, the impact of the transposition of the ATAD in the three rules incorporated into the Greek tax system by virtue of L. 4607/2019, specifically, interest deduction limitation rules, CFC rules, and the GAAR will be analysed. To do so, an overview of the established rules under the Greek tax system before and after the introduction of the ATAD will be provided following a presentation of the Directive's main features in the aforementioned three rules. Finally, the amendments that were enacted regarding each of these rules will be examined, while a critical analysis will be provided for each of them with regard to the extent to which they are consistent with the respective ATAD provisions and ECJ case law.

2 The interest deduction limitation rules

2.1 *The Interest Deduction Limitation Rules Provided Under the ATAD*

Article 4 of the ATAD provides for an interest deduction limitation rule based on the recommendations set forth in the Action 4 Final Report of the OECD. As such, this article constitutes the implementation of the G20/OECD BEPS Action 4 on the EU level and addresses the issue of 'excessive' interest payments (or equivalent)[8] through which groups of companies have increasingly engaged in BEPS in an effort to reduce their global tax liability. In this context, the aim of the interest deduction limitation rule is to discourage such practices by limiting the deductibility of taxpayers' exceeding borrowing costs.

The interest deduction limitation rule as stipulated under the ATAD is a structural one. The core provision of the said article prescribes that a taxpayer can only deduct exceeding ('net') borrowing costs incurred up to 30% of the taxable earnings before interest, tax, depreciation, and amortization (EBITDA)[9] in a stipulated tax period. In addition, the ATAD sets out a series of optional rules that provide relief from the aforementioned basic rule.

First and foremost, under Article 4 (3) of the ATAD, a safe harbour rule is provided by virtue of which the Member States have the discretion to allow taxpayers to deduct exceeding borrowing costs up to EUR three million (3,000,000) [in the event that the exceeding borrowing costs are up to EUR three million (3,000,000), they will be fully deductible] or 2) any amount higher than three million euros that corresponds to 30% of the EBITDA. It is noteworthy that a legal entity is not entitled to receive a deduction corresponding to 30% of the EBITDA in addition to the deduction of EUR 3 million.[10]

Additionally, standalone entities can be fully exempted from the interest deduction limitation rule as they do not bear a considerable risk of aggressive tax planning.[11]

Moreover, a grandfathering clause for loans granted before 17 June 2016[12] may be enacted; however, the said exclusion shall not be extended to any subsequent modification of such loans. Member States also have the right to exclude exceeding borrowing costs incurred on loans that are used to fund long-term public infrastructure projects considering that such financing arrangements present little or no BEPS risks.[13]

Moreover, in the case that the taxpayer is a member of a group that files consolidated statutory financial accounts, the indebtedness of the overall group at a worldwide level may be taken into account for the purpose of granting taxpayers the right to deduct higher amounts of exceeding borrowing costs up to a level corresponding to the indebtedness of the group. In addition, an equity escape clause based on the ratio of the taxpayer's equity over total assets, specifically, a rule that compares a corporate taxpayer's level of equity and assets to those held by its group, can be incorporated into the national tax systems. Under the latter rule, the interest deduction limitation rule is not applicable, provided that the legal entity can demonstrate that its equity over total assets ratio is broadly equal to or higher than the equivalent group ratio.[14]

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8 G. Ginerva, *The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at the EU level*, 45(2) Intertax 121 (2017).

9 Earnings before interest, tax, depreciation, and amortization, *see* ATAD, *supra* n. 1, Art. 4 (1) and (2).

10 A. Zalasinski, *EU report,* in *Interest Deductibility: The Implementation of BEPS Action 4*, Cahiers de droit fiscal international vol. 104(A), 48 (IFA, 2019).

11 ATAD, *supra* n. 1, Art. 4 (3) (b) according to which '*a standalone entity means a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment*'.

12 ATAD, *supra* n. 1, Art. 4 (4) (a).

13 *Ibid.*, Art. 4 (4) (b).

14 *Ibid.*, Art. 4 (5).

Member States may also allow taxpayers to carry forward and/or back the exceeding borrowing costs that could not be deducted in the current tax period and the unused interest capacity.[15] Lastly, Member States may exclude regulated financial undertakings from the scope of interest limitation rules.[16]

2.2 *The Greek Interest Deduction Limitation Rules Before the Transposition of the ATAD*

Before the introduction of the ATAD into the national tax system, Greece had already incorporated an interest deduction limitation rule entitled 'thin-capitalization rule',[17] in the aftermath of discussions that were undertaken at the EU and OECD level, while the guidelines for the application of the thin capitalization rules by legal entities were provided under the Ministerial Circular of the Independent Authority for Public Revenue (POL) 1037/2015. The aim of the aforesaid rule was to address thin-capitalization practices, under which legal entities seek to increase debt capital disproportionally to their own equity capital and shift debt to high-tax jurisdictions and profits to low-tax jurisdictions.[18]

The Greek thin-capitalization rule was provided under Article 49 of L. 4172/2013, which entered into force beginning on 1 January 2014 (current Greek Income Tax Code, hereinafter referred to as GITC).

Pursuant to par. 1 of the aforementioned article, it was stipulated that, in the event that net interest expenses exceeding the amount of EUR 3,000,000, the excessive interest expenses deriving from loans granted by third parties should not exceed 30% of the taxpayer's EBITDA. However, under paragraph 3 of the same article, it was stipulated that the interest expenses were recognized as being fully deductible provided that the net interest expenses recorded in the taxpayer's fiscal books did not exceed the amount of EUR 3,000,000.[19]

It should be clarified that the term 'exceeding interest expenses' was defined as the excess amount of the interest expenses in relation to the income deriving from interests. The term 'interest expenses' was defined as the total amount of the interest paid by the legal entity or the financing institution in each separate fiscal year regarding the loans granted to it by a legal entity, associated enterprise, banking institution, or bond loans with the exception of the capitalized interests or loan expenses. Income deriving from interest was defined as the total amount of the gained income deriving from interest, that is to say, from every cause that the legal entity gained in each fiscal year.[20]

In regards to the excess borrowing expenses that could not be deducted in the current tax period, it was provided under paragraph 4 of Article 49 of the GITC that they could be carried forward indefinitely by the legal entity to the extent that these future years indicated an uncovered EBITDA amount. Moreover, financial undertakings, leasing companies as defined under L. 1665/1986, and factoring companies as defined under L. 1905/1990, licensed by the Bank of Greece or the respective regulatory authorities of other Member States were beyond the scope of the aforesaid EBITDA rule.[21]

As mentioned above, more clarification of the application of the thin capitalization rules by legal entities were provided in the Circular of the Independent Authority for Public Revenue (POL) 1037/2015. More particularly, according to the Circular, in the case of associated enterprises, the abovementioned provisions were applicable as long as the implementation of Article 50 with regard to the arm's length principle and the implementation of Article 23 (1) (a) of the GITC concerning loan interest

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[15] *Ibid.*, Art. 4 (6).

[16] *Ibid.*, Art. 4 (7).

[17] Thin-capitalization rules were initially introduced in the Greek tax system under GR: L. 3775/2009, Art. 3 that amended the already existing GR: L. 2238/1994, Art. 31 (1) (d) (previous Income Tax Code). Subsequently, GR: L. 2238/1994, Art. 31 (1) (d) was further amended by GR: L. 3842/2010, Art. 11 par. 7. It was later abolished by GR: L. 4110/2013, Art. 11 while its provisions were incorporated in the provisions of GR: L. 2238/1994, Art. 39 with regard to transfer pricing. According to the aforementioned provisions, the accrued interest on loans paid or credited to associated enterprises were deducted under the condition that the relationship of these loans to the net assets of the legal entity did not exceed the ratio of 3:1 on average per fiscal year. The aforesaid provisions were not applicable to leasing companies, factoring enterprises, legal entities of special purpose registered in Greece, financing institutions, and societes anonymes of investing services.

[18] A. P. Dourado, *The Interest Limitation Rule in the Anti-Tax Avoidance Directive (ATAD) and the Net Taxation Principle*, 26(3) EC Tax Rev. 112 (2017). More specifically, a legal entity has the possibility to finance its operations either through equity financing or through debt financing. In this respect, the equity financing, on one hand, may result in high taxation while the debt financing, on the other hand, allows it to deduct the interest paid. Therefore, many groups of companies take advantage of this possibility in an effort to reduce their global tax liability and realize BEPS through excessive interest payments. That is to say that the said group of companies in an effort to reduce the taxation of profits made by one of their subsidiaries –that usually resides in a State with high tax rate- elect to fund that subsidiary by means of debt capital rather than equity capital and thereby allow those subsidiaries to transfer profits to a parent company that usually resides in a State with low tax rate. They accomplish this in the form of interest that is deductible in the calculation of its taxable profits and not in the form of non-deductible dividends.

[19] According to GR: Income Tax Code, (L. 4172/2013), Art. 72 (9) (a), it is stated that *'the 30% rate of EBITDA is applicable for interest expenses incurred as from 1 Jan. 2017 and onwards, while in the transitional period the respective EBITDA rates were set at 60% as from 1 Jan. 2014, at 50% as from 1 Jan. 2015 and at 40% from Jan. 2016'.* Furthermore, according to GR: Income Tax Code, (L. 4172/2013), *Art. 72 (9) (b) it was explicitly specified that 'the aforementioned limit of EUR 3,000,000 is applicable to net interest expenses incurred as from 1 Jan. 2016, while in the transitional period from 1 Jan. 2014 to 31 Dec. 2015 the said amount was set at EUR 5,000,000'.*

[20] GR: Income Tax Code, (L. 4172/2013), before being amended by L. 4607/2019, Art. 49 (2); Ministerial Circular (POL) 1037/2.2.2015 Guidelines for the implementation of the provisions of Art. 9 and Art. 72 (9) of L. 4172/2013 with regard to thin-capitalization, para. 3.

[21] GR: Income Tax Code (L. 4172/2013), Art. 49 (5).

payable to affiliated companies[22] had first been examined.[23] However, the method of applying the limits provided under Articles 23 and 49 of the GITC in the event that the conditions of non-deductibility provided under the said article were met had not been clarified.

2.3 *The Greek Interest Deduction Limitation Rules Following the Transposition of the ATAD*

Article 4 of the ATAD has been introduced into the national tax system by virtue of Article 11 of L. 4607/2019, which amended the former Article 49 of the GITC, while more clarifications with regard to the interpretation and the application of the revised Article 49 are established under the Circular of the Independent Authority for Public Revenue (POL) 2071/2019.

More particularly, it should be first mentioned that the Article 49 that is currently in force is now entitled the 'Interest Deduction Limitation Rule'. In addition, the revised Article 49 in accordance with the wording of the ATAD provides that exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30% of the taxpayer's EBITDA.[24] Moreover, the safe harbour rule, by virtue of which the taxpayer has the right to deduct exceeding borrowing costs up to a fixed maximum amount of EUR 3,000,000 has been retained.[25] However, the excess borrowing costs that cannot be deducted in the current tax period can be carried forward by the legal entity without time limitations.[26]

In addition, the term exceeding borrowing expenses provided under the foregoing Article 49 (2) of the GITC has been replaced by the term exceeding borrowing costs. The terms 'exceeding borrowing costs' and 'borrowing costs' are defined under Article 49 (2) of the GITC.[27]

Further to this, the calculation of EBITDA is clarified under Article 49 (3) of the Greek ITC, which indicates that the EBITDA shall be calculated:

> *by adding back to the taxable income the tax-adjusted amounts for exceeding borrowing costs along with the tax-adjusted amounts for amortization, as stipulated following the tax adjustments provided under the Greek ITC. Tax exempt income shall be excluded from the EBITDA of a taxpayer.*

Furthermore, following the transposition of the ATAD, a new provision was added in Article 49 (5) of the GITC pursuant to which loans that are used to fund a long-term public infrastructure project for which the project operator, borrowing costs, assets, and income are all in the Union shall be excluded from the application of the 30% limitation on interest deduction.

Lastly, under the revised Article 49 (7) of the GITC, it is clarified that financial undertakings are excluded from the application of the EBITDA limitation regardless of their level of interest expenses, while the term financial undertakings is defined under the national tax law following the wording of Article 2 (5) of the ATAD.[28]

2.4 *Conformity of the Greek Interest Deduction Limitation Rules with the ATAD Model*

Considering the above, it follows that, in the aftermath of the transposition of the ATAD, the basic content of the Greek interest deduction limitation rule has remained the same regarding its basic provisions; however, those

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[22] According to GR: Income Tax Code (L. 4172/2013), Art. 23, it is stipulated that '*the interests expenses on loans undertaken by the legal entity from third parties, except for bank loans, inter-bank loans and bond loans issued by societe anonymes, are not deductible to the extent that they exceed the interests that would arise, if the interest rate was equal to interest rate of loans open deposit/withdrawal accounts provided to non-financial institutions, as indicated in a Statistical Bulletin of the Central Bank of Greece at the prior time period closest to the date such loan was undertaken*'.

[23] GR: Circular 1037/2015 paras 8 and 9.

[24] GR: Income Tax Code (L. 4172/2013), Art. 49 (1), as amended by Art. 11 of L. 4607/2019.

[25] GR: Income Tax Code (L. 4172/2013), Art. 49 (4).

[26] GR: Income Tax Code (L. 4172/2013), Art. 49 (6).

[27] *The term 'exceeding borrowing costs' means the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives according to the Greek law, while the term 'borrowing costs' means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance as defined under Greek law, including, without being limited to, payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortization of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds.*

[28] More specifically, GR: Income Tax Code (L. 4172/2013), revised Art. 49 (7) prescribes that '*financial undertaking' means any of the following entities: (a) a credit institution as defined in Art. 4(27) of L. 4514/2018 (A'14) or an investment firm as defined in Art. 4(1) (a) of L. 4514/2018 (A'14) or an alternative investment fund manager (AIFM) as defined in Art. 4(1b) (aa) of L. 4209/2013 (A' 253) or an undertaking for collective investment in transferable securities (UCITS) management company as defined in Art. 3 (b) of L. 4099/2012 (A' 250) (1) or as defined in Art. 2(1) (b) of Directive 2009/65/EC of the European Parliament and of the Council; (b) an insurance undertaking as defined in Art. 3 (1) of L. 4364/2016 (A'13); (c) a reinsurance undertaking as defined in Art. 3 (4) of L. 4364/2016; (d) an institution for occupational retirement provision falling within the scope of Directive 2003/41/EC of the European Parliament and of the Council, unless that Directive is not applicable in whole or in part to that institution in accordance with Art. 5 of that Directive or the delegate of an institution for occupational retirement provision as referred to in Art. 19(1) of that Directive; (e) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 Apr. 2004 (L. 166) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 Sept. 2009 (L. 284), as well as any legal entity set up for the purpose of investment of such schemes; (f) an alternative investment fund (AIF) managed by an AIFM as defined in Art. 4(1b) (aa) of L. 4209/2013 or an AIF supervised under the Greek law; (g) UCITS in the meaning of Art. 2(2) of L. 4099/2012; (h) a central counterparty as defined in Art. 2 (1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 23 July 2012 (L.257).*

provisions have been supplemented, while many terms have been replaced, and others have been further clarified.

More particularly, the former Greek interest deduction limitation rule had already been in accordance with the ATAD – as per its basic elements – and had generally been compatible with the minimum standard set by the Directive to the extent that it provided that exceeding borrowing expenses should be deductible in the tax period in which they were incurred only up to 30% of the taxpayer's EBITDA. Further to this, the safe harbour rule whereby the taxpayer has the right to deduct exceeding borrowing costs up to a fixed maximum amount of EUR 3,000,000 has been retained. The latter is of great importance considering that it can reduce the administrative and compliance burden for taxpayers with a low level of net interest expense/exceeding borrowing costs.[29] However, based on Article 2 of the ATAD, basic terms such as borrowing costs, exceeding borrowing costs, and financial undertakings as well as the calculation of EBITDA have been clarified under the revised Greek interest deduction limitation rules, which are key for the implementation of the basic rule envisaging the cap on deductibility of a corporate taxpayer's exceeding borrowing costs equal to 30% of the EBITDA. In addition, the foregoing title of Article 49 'Thin-Capitalization Rule' has been retitled 'Interest Deduction Limitation Rule'. The terms exceeding ('net') borrowing expenses and borrowing expenses that are provided under the foregoing Article 49 of the GITC have been replaced by the terms exceeding borrowing costs and borrowing costs, respectively. The abovementioned terms are broader and include both the costs and the exceeding borrowing expenses that have already been provided under the previous Article 49 of the GITC. Therefore, during the recalculation of their borrowing costs, legal entities are now entitled to include amounts that were not included under the former applicable provisions.

Regarding the optional rules contained in the ATAD that provide relief from the said interest deduction limitation rules, a new provision has been incorporated for the first time. It was included in the national law following the introduction of the Directive pertaining to the exclusion of the exceeding borrowing costs incurred on loans that are used to fund long-term public infrastructure projects from the scope of interest deduction limitation rules. In this context, it should be properly demonstrated that financing arrangements for public infrastructure projects present special features that justify such treatment vis-à-vis other financing arrangements subject to the restrictive rule.[30]

As for the other optional rules provided under the ATAD, it should be pointed out that the foregoing Greek provision providing for the possibility of the legal entities to carry forward the excess borrowing expenses that could not be deducted in the current tax period without time limitation was totally compatible with Article 4(6) of the ATAD but was not further supplemented following the transposition of the Directive. Thus, under the Greek interest deduction limitation rule, any excess interest expense can be carried forward but cannot be carried back. In any event, it should be stated that, although the said carry forward options are also allowed by the OECD Report,[31] the OECD has expressed a concern that an indefinite carry-forward could reduce the overall impact of an interest deduction limitation rule, afford planning opportunities, and increase the complexity of the rule.

Additionally, the exclusion of financial undertakings from the application of the EBITDA limitation provided under the former Article 49 of the GITC had also been compatible with the respective provision of the ATAD even before its transposition. However, following its transposition, the term financial undertakings was clarified. It is noteworthy that the Preamble of the ATAD states that, although it is generally accepted that financial undertakings, i.e. financial institutions and insurance undertakings, should also be subject to limitations to the deductibility of interest, it is equally acknowledged that these two sectors present special features that necessitate a more customized approach. Considering that the discussions in this field are not yet sufficiently conclusive in the international and Union context,[32] there are no specific rules in the financial and insurance sectors and, consequently, Member States shall be able to exclude them from the scope of interest limitation rules.

However, due to the absence of a Greek tax grouping regime, the Greek legislator has not provided for the application of the special rules for groups of companies nor for the exclusion of the standalone entities from the scope of the interest limitation rule. This is despite the fact that, according to the Preamble of the ATAD, it is prescribed that '*since BEPS in principle takes place through excessive interest payments among entities which are associated enterprises, it is appropriate and necessary to allow the possible exclusion of standalone entities from the scope of the interest limitation rule given the limited risks of tax avoidance*'.[33]

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[29] ATAD, *supra* n. 1, Preamble, para. 8.

[30] *Ibid.*, para. 8.

[31] OECD, *Limiting Base Erosion Involving Interest Deductions and other Financial Payments – Action 4: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing Oct. 2015), paras 159–167.

[32] ATAD, *supra* n. 1, Preamble, para. 9.

[33] *Ibid.*, para. 8.

In addition to the above, it should be noted that the Greek interest deduction limitation rule complies totally with the interest deduction limitation rule provided under the ATAD to the extent that they are both applicable to internal, intra-EU, and international transactions without any discrimination on the basis of the source of the debt or the taxpayer.[34] At this point, it should be specified that, by virtue of the TFEU, the Member States are prohibited from introducing domestic legislation that may discriminate against foreigners/non-residents or create restrictions on the exercise of the Internal Market fundamental freedoms. Such restrictions are understood as tax rules that envisage a difference in treatment of taxpayers involved in domestic and cross-border activities thereby making the latter less attractive without being justified by overriding reasons of general interest.[35] Under this framework, the interest deduction limitation rules must either apply without distinction to both domestic and cross border situations or target wholly or partly artificial arrangements.[36] In this respect, one of the reasons why the Commission proposed the implementation of the BEPS by means of a Directive was to ensure that Member States select options that are aligned with the fundamental freedoms as stipulated under the TFEU,[37] i.e. rules that apply in relation to a taxpayer's exceeding borrowing costs without a distinction on whether the costs originate from debt incurred nationally, cross-border within the Union, or with a third country, or whether they originate from third parties, associated enterprises, or intragroup.[38]

Thus, the Greek interest deduction limitation rule being in accordance with the respective rule of the ATAD complies with the TFEU and with ECJ Case law and more specifically with its *Lankhorst-Hororst,*[39] *Lasertec*,[40] *Test Claimants in the Thin Cap Litigation,*[41] *Lammers & Van Cleef* [42] and *Itelcar – Automóveis de Aluguer Lda, v. Fazenda Pública*[43] decisions to the extent that it is not in breach of fundamental freedoms. This is due to the fact that the aforesaid interest deduction limitation rule provides for the non-deductibility for both internal, intra-EU, and international transactions without any discrimination on the basis of the source of the debt or the taxpayer.[44]

Lastly, it should be pointed out that, as previously mentioned, Article 49 of the GITC envisages a fixed ratio rule limiting an entity's net interest deductions to a fixed percentage of its profit when measured using EBITDA based on tax numbers. Although the said measure is totally compatible with Article 4 of the ATAD which also provides for an EBITDA rule, it does not accord with the ECJ case law and, more specifically, its *Test Claimants in the Thin Cap Group Litigation* (C-524/04) decision providing for the implementation of an arm's length principle.[45]

Consequently, when considering the above, the interest deduction limitation rule is a structural measure envisaging a basic rule that is a cap on the deductibility of a taxpayer's exceeding borrowing costs and for a series of optional rules that provide relief from the abovementioned rule. In this respect, a certain degree of flexibility is allowed while the objective of addressing BEPS is not frustrated.[46]

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[34] G. Bizioli, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?,* 26(3) EC Tax Rev. 173 (2017).

[35] A. Zalasinski, *Conclusion of the BEPS Multilateral Instrument and Distribution of Competences between the EU and Its Member States*, 3 Brit. Tax Rev. 447 (2015).

[36] Zalasinski, *supra* n. 10, at 51.

[37] *Ibid.,* at 53.

[38] ATAD, *supra* n. 1, Preamble, para. 7.

[39] DE: ECJ, 12 Dec. 2002, Case C-324/00 *Lankhorst-Hohorst GmbH and Finanzamt Steinfurt,* ECLI:EU:C:2002:749.

[40] DE: ECJ, 10 May 2007, Case C- 492/04, *Lasertec Gesellschaft für Stanzformen mbH v. Finanzamt Emmendingen,* ECLI:EU:C:2007:273.

[41] UK: ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, ECLI:EU:C:2007:161.

[42] BE: ECJ, 17 Jan. 2008, Case C-105/07 *Lammers & Van Cleeff v. Belgische Staat,* ECLI:EU:C:2008:24.

[43] PT: ECJ, 3 Oct. 2013, Case C-282/12 *Itelcar – Automóveis de Aluguer Lda v. Fazenda Pública,* ECLI:EU:C:2013:629.

[44] However, according to an opposite perspective, even if the interest deduction limitation rule provided under Art. 4 of the ATAD is not discriminatory, it restricts the fundamental freedoms. Additionally, the said rule could be questioned in light of the principle of equal treatment while an issue of unconstitutionality may arise, *see* Dourado, *supra* n. 18, at 118–121.

[45] More particularly, in its *Test Claimants in the Thin Cap Group Litigation* decision *supra* n. 38 at paras 80–82, the ECJ ruled that '*legislation of a Member State may be justified by the need to combat abusive practices where it provides that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if, and in so far as, it exceeds what those companies would have agreed upon on an arms-length basis, that is to say, the commercial terms which those parties would have accepted if they had not formed part of the same group of companies. 81 The fact that a resident company has been granted a loan by a non-resident company on terms which do not correspond to those which would have been agreed upon at arm's length constitutes, for the Member State in which the borrowing company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State. In that regard, the question is whether, had there been an arms-length relationship between the companies concerned, the loan would not have been granted or would have been granted for a different amount or at a different rate of interest. 82 As the Advocate General stated at point 67 of his Opinion, national legislation, which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement*'.

[46] Zalasinski, *supra* n. 10, at 62.

3 The general anti-abuse rule

3.1 *The GAAR, as Stipulated Under the ATAD*

The ATAD contains a GAAR in its Article 6 that aims at preventing the abuse of discretions provided by EU law when formulating legal relations to the extent that this aims at tax avoidance and results in the partial or entire nonpayment of tax.[47] More specifically, the said provision is an attempt to combat abusive tax practices that have not yet been addressed with specifically targeted provisions. Therefore, the GAAR functions as a method to fill in gaps that should not affect the applicability of specific anti-abuse rules.[48] The ATAD GAAR is formulated in terms that are quite similar to the recently adopted GAAR of the Parent – Subsidiary Directive (PSD) that was introduced in January 2015.[49] It also accords with the Commission's call to Member States to introduce anti – abuse rules (contrary to the previous approach under which Member – States were authorized but not obligated to enact anti-abuse measures).[50]

A common EU GAAR was initially proposed by the European Commission in the context of its Common Consolidated Corporate Tax Base Initiative of March 2011[51] and later by virtue of its Recommendation of 6 December 2012 on aggressive tax planning.[52] Only three months later, a GAAR almost identical to that proposed by the Commission was included in the second Financial Transaction Test (FTT) proposal of 14 February 2013.[53]

Despite the fact that several Member States had already enacted not only GAARs but also SAARs (Specific Anti Abuse Rules) in their domestic tax systems, the introduction of a common EU GAAR is not of insignificant importance. The ATAD GAAR provides for the transposition of the EU law concept of abuse into domestic tax systems, while it is applicable in domestic situations, within the Union and vis-à-vis third countries. It must occur in a uniform manner so that their scope and results of the application in domestic and cross-border situations do not differ.[54] Additionally, considering that the ATAD GAAR appears to select terminology and tests that will detect abuse of law deviating from the ECJ's case law concept of abuse, the possibility that interpretation matters may arise in the future both in EU and in domestic level cannot be excluded.

The ATAD GAAR reads as follows:

> *1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.*
> *2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*
> *3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.*

Considering the above, it is feasible that the ATAD GAAR could be initiated provided that three conditions are cumulatively satisfied: 1) A non-genuine arrangement or series of arrangements, 2) The constitution of the said arrangement for the main purpose or one of the main purposes of obtaining a tax advantage, and 3) the circumvention of law.

More particularly, the ATAD GAAR provides for an arrangement or series of arrangements that have been established for the main purpose or one of the main purposes of obtaining a tax advantage (subjective test). Under this framework, the wording of the ATAD incites questions as to whether the 'sole purpose' test as employed by the ECJ in its case law in connection with abusive practices is still applicable under the ATAD or if the EU legislator has decided to set a lower requirement for considering a taxpayer's acts as abusive.

Additionally, in order for the ATAD GAAR to apply, the objective test must also be satisfied, specifically, it must be proven that the tax advantage that was obtained defeats the object or the purpose of the applicable tax law. At this point, it should be noted that the research of the applicable law should be in depth and attempt to identify the object or purpose of the law. The determination of the applicable law may be difficult especially due to the fact that the drafting

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[47] For an analysis on the concept of the abuse of law within the EU, *see* L. De Broe & D. Beckers, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on abuse of EU Law*, 26(3) EC Tax Rev. 133–144 (2017).

[48] ATAD, *supra* n. 1, Preamble para. 11.

[49] Council Directive (EU) 2015/121 of 27 Jan. 2015 amending Directive 2011/96/EU on the common system of taxation that is applicable in the case of parent companies and subsidiaries of different Member States, OJ L 21/1 (28 Jan. 2015).

[50] *See* European Commission, *Proposal for a Council Directive on a Common System of Financial Transaction Tax and Amending Directive 2008/7/EC*, COM (2011) 594 final (28 Sept. 2011).

[51] European Commission, *Proposal for a European Commission, on a Common Consolidated Corporate Tax Base (CCCTB),* COM (2011) 121 final (16 Mar. 2011).

[52] Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, 2012/772/EU, OJ L 338/41 (12 Dec. 2012), *See* also T. Franz, *The General Anti-Abuse Rule Proposed by the European Commission*, 43(11) Intertax 660–672 (2015).

[53] European Commission, *Proposal for a Council Directive, Implementing Enhanced Cooperation in the Area of Financial Transaction Tax*, COM (2013) 71 final (19 Sept. 2013).

[54] De Broe & Beckers, *supra* n. 47, at 140.

history or preparatory documentation of the legislation at issue that should be taken into account for the determination of the purpose of the law may be lacking, unclear, or ambiguous. Moreover, the determination of which court is competent for determining the object and the purpose of the applicable law is also based on the applicable law in question. Thus, in situations in which a purely national rule is at issue, the interpretation of the object and purpose of the national law remains with the national courts whereas, in the event that that a provision of EU law is at issue, the clarification of its object and purpose lies within the competence of the ECJ. However, the possibility that a matter of joint competence will arise may not be excluded (e.g. in the case of already existing national GAARs).[55]

Lastly, the authenticity of the arrangement or series of arrangements should be further examined, specifically, it should be substantiated (regarding all of the relevant facts and circumstances) that the activity that is performed is not genuine, namely, that it is not put into place for valid commercial reasons that reflect economic reality. It is noteworthy that, according to the Explanatory Memorandum of the initial Proposal of the ATAD, the proposed GAAR was designed to reflect the artificiality test of the CJEU in the event that it was applicable within the Union.[56] However, the EU legislator finally decided to use the term 'not genuine' instead of the term 'wholly artificial' that is used in the ECJ's case law.

Therefore, if the abovementioned three requirements for the application of the GAAR ATAD are fulfilled, the arrangement must be disregarded by the tax authorities of the Member States and, consequently, the tax liability must be recalculated in accordance with the national tax law, therefore, giving extensive discretion to Member States as to how the abusive act shall be reclassified and how the tax amount due shall be redefined.

3.2 *The Greek GAAR, Before the Transposition of the ATAD*

A Greek GAAR was introduced for the first time in the Greek tax system by virtue of L. 4174/2013 (Code of Tax Procedures hereinafter referred to as CTP), which was effective beginning 1 January 2014.[57] Prior to the entry into force of the said provision, any abusive acts, arrangements, etc. could only be addressed with the provisions pertaining to the detection and punishment of fictitious acts.

The initial terminology of the Greek GAAR was almost identical to that of the Commission's Recommendation on aggressive tax planning. More specifically, pursuant to Article 38 of the CTP, it was stipulated that:

> *1. During the tax assessment, the Tax Authority shall ignore any artificial arrangement or artificial series of arrangement which has been put in place for the purpose of avoiding taxation and leads to a tax benefit. The said arrangements shall be treated for tax purposes by reference to their economic substance. 2. For the purposes of paragraph 1, an "arrangement" means any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event. An arrangement may comprise more than one step or part. 3. For the purposes of paragraph 1, an arrangement or a series of arrangements is artificial in case it lacks economic or commercial substance. In determining whether the arrangement or series of arrangements is artificial, Tax Authority shall consider whether they involve one or more of the following situations: (a) the legal characterisation of the individual steps of which an arrangement consists shall be inconsistent with the legal substance of the arrangement as a whole; (b) the arrangement or series of arrangements shall be carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct; (c) the arrangement or series of arrangements shall include elements which have the effect of offsetting or cancelling each other; (d) transactions concluded shall be circular in nature; (e) the arrangement or series of arrangements shall result in a significant tax benefit but this shall not be reflected in the business risks undertaken by the taxpayer or its cash flows; (f) the expected pre-tax profit shall be insignificant in comparison to the amount of the expected tax benefit. 4. For the purposes of paragraph 1, the purpose of an arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply. 5. For the purposes of paragraph 1, a given purpose is to be considered essential where any other purpose that is or could be attributed to the arrangement or series of arrangements appears at most negligible, in view of all the circumstances of the case. 6. In order to determine whether an arrangement or series of arrangements has led to a tax benefit as referred to in paragraph 1, the Tax Authority shall compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s).*

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55 *Ibid.*, at 142.

56 European Commission, *supra* n. 3.

57 *See* K. Petoumenos, *What's Wrong with the Greek General Anti-Avoidance Rule?*, 56(7) Eur. Tax 285–291 (2016). *See also* V. Vizas, *The Gaar in Greek Law* (in Greek), Nomiki Vivliothiki (2017), V. Georgaki, *Abusive Tax Avoidance in Direct Taxation*, Nomiki Vivliothiki (2017), A. Savvaidou, *The Effort of Tackling the International Tax-Avoidance by Virtue of L. 3842/2010 & 3943/2011* (in Greek), Bull. of Tax Legis. (Deltio Forologikis Nomothesias), 1107, 1187 (2011), and P. Pantazopoulos, *The GAAR of the Greek Legislation, Origin and Regulatory Content – What Should Be Expected by the Greek Tax Authorities,* speech at the 3rd Symposium of E-themis [Conference of the Greek Jurists Union], 'Current Issues of Tax Law', Divani Caravel Hotel (Dec. 2016).

Considering the above, it indicates that the mere conclusion of the 'artificial' nature of an arrangement was not sufficient, but it should have co-existed with the intention of the taxpayer to achieve a tax benefit, in general, by circumventing the tax law.

More particularly, pursuant to the former Article 38 (1) of the CTP, the Greek tax authorities were entitled to ignore a specific artificial arrangement that aimed at tax avoidance and (cumulatively) led to a tax benefit through the circumvention of a certain tax provision. Otherwise stated, what should have been assessed was the intention of the taxpayer to circumvent a certain tax provision by exploiting an artificial arrangement in order to be granted a tax benefit that the said taxpayer would not otherwise have been entitled to receive.

However, in accordance with Article 38 (4), such an intention was not required (or this was otherwise presumed by the wording of the provision) in the case that the selected arrangement was contrary to the subject, spirit, and purpose of the tax provisions which would otherwise be applicable.

In order to determine whether an arrangement led to a substantial tax benefit for the taxpayer, Greek tax authorities could compare the amount of the tax due under the examined arrangement to the amount that would have been charged under the same circumstances in the absence of the arrangement'.[58] [59]

The definition of the term 'arrangement' was provided under Article 38 (2) of the CTP. As previously mentioned, this arrangement should have been artificial for the application of the GAAR. An arrangement was considered as artificial provided that it pertained to at least one of the abovementioned situations established under Article 38 (3) of the CTP. It is noteworthy that the list of situations provided under paragraph 3 was exhaustive and, therefore, any situation other than those six (a-f) could not lead to the characterization of an arrangement as artificial even if it was fulfilled. Additionally, in order to evaluate whether an arrangement was artificial, it was necessary to examine the purpose of the constitution of an artificial arrangement. In this respect, for the characterization of an arrangement as artificial, the purpose of obtaining a tax advantage should have been essential while any other purpose that could have been attributed to the arrangement should have been deemed negligible.[60]

3.3 *The Greek GAAR, Following the Transposition of the ATAD*

Article 38 of the Greek CTP was amended retroactively beginning 1 January 2019 by virtue of Article 13 of L. 4607/2019 for the purpose of its harmonization with Article 6 of the ATAD.[61]

More specifically, it is prescribed under the revised Article 38 (1) of the Greek CTP that tax authorities shall ignore any artificial arrangement or artificial series of arrangement during the tax assessment that are not genuine and must regard all relevant facts and circumstances. The arrangements must have been made for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax provisions. According to paragraph 2 of the said article, for the purposes of paragraph 1, an 'arrangement' is defined as any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking, or event. An arrangement may comprise more than one step or component. Furthermore, for the purposes of paragraph 1, an arrangement or a series of arrangements is not genuine to the extent that it is not put into place for valid commercial reasons reflecting economic reality.[62] In order to determine whether the arrangement or series of arrangements is not genuine, the tax authorities shall take into account whether they involve one or more of the following situations: (a) the legal characterization of the individual steps of which an arrangement consists shall be inconsistent with the legal substance of the arrangement in its entirety; (b) the arrangement or series of arrangements shall be carried out in a manner that would not ordinarily be employed in what is expected to be a reasonable business conduct; (c) the arrangement or series of arrangements shall include elements that have the effect of offsetting or cancelling each other; (d) concluded transactions shall be circular in nature; (e) the arrangement or series of arrangements shall result in a significant tax benefit, however, this shall not be reflected in the business risks that are undertaken by the taxpayer or its cash flows; and (f) the expected pre-tax profit shall not be insignificant in comparison to the amount of the expected tax benefit. Further to the above, under paragraph 4 of Article 38 of the CTP, it is provided that, in the event that following the application of paragraph 1 an arrangement or series of arrangements are considered as non-genuine, then the tax liability and

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[58] GR: CTP, L. 4174/2013, before being amended by L. 4607/2019 at Art. 38 (6).

[59] For this comparison, the European Commission proposed to be considered whether one or more of the following situations occur: (a) an amount is not included in the tax base; (b) the taxpayer benefits from a deduction; (c) a loss for tax purposes is incurred; (d) no withholding tax is due; (e) foreign tax is offset. *See* Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, *supra* n. 52.

[60] GR: CTP, *supra* n. 58, at Art. 38 (3).

[61] *See also* A. Savvaidou & V. Athanasaki, *General and Specific Anti-Tax Avoidance Measures Under Recent Tax Reform in Greece*, 47(4) Intertax 402–413 (2019).

[62] GR: CTP, 38 (3), as amended by Art. 13 of L. 4607/2019.

any other relevant sanctions shall be calculated based on the provision that would have been applied in the absence of the arrangement(s). Lastly, paragraph 5 of Article 38 envisages a Decision by the Governor of the Independent Authority for Public Revenue to be issued that determines the implementation of the GAAR and any other relevant matters.

3.4 *Conformity of the Greek GAAR with the ATAD Model*

In view of the foregoing, it follows that a series of amendments have been enacted in the Greek GAAR following the transposition of the ATAD into domestic law, although the general framework has remained the same.

First and foremost, the former title of Article 38 of CTP 'General provision against tax-avoidance' was replaced by the title 'General Anti-Abuse Rule' that was provided under the revised Article 38 of the CTP following the wording of the respective provision of the ATAD.

Additionally, following the transposition of the ATAD, the amended Greek GAAR adopted the main purpose test instead of the essential purpose test that was stipulated under the previous provision. However, the revised provision has also adopted the economic reality test so that the GAAR is not applicable in the case of genuine schemes. Moreover, the term 'artificial arrangement' used under the previous Greek GAAR has been replaced by the term 'non-genuine arrangement' and adopts the respective wording of the ATAD provision. However, as clarified under the Explanatory Report of L. 4607/2019, the term 'artificial arrangements' that is contained in the former Article 38 (which followed the wording of the Commission Recommendation 2012/772/EC that had adopted the ECJ's case law[63]) and the term 'non-genuine' arrangements contained in the revised Greek GAAR that adopted the wording of the ATAD are considered identical for interpretation purposes.

In addition, more clarifications regarding the application of the revised GAAR are provided by virtue of the Ministerial Circular of the Independent Authority of Public Revenues n. 2071/2019. More specifically, according to the said Ministerial Circular, the Greek tax authorities bear the burden to prove that an arrangement is non-genuine while, for the interpretation of the provision, the relevant case-law of the European Court of Justice and the Commission Recommendation 2012/772/EC shall be supplementarily taken into account. Further to this, the Ministerial Circular no. 2071/2019 that is based on the Preamble of the ATAD pertaining to the GAAR[64] clarifies that the GAAR aims at dealing with abusive tax practices that are not handled by specific provisions and, consequently, do not affect the application of specific anti-abuse rules, such as the provisions regarding CFCs, the anti-abuse rule of the PSD, etc.

In addition, regarding the GAAR's applicability in relation to Double Taxation Treaties (hereinafter referred to as DTTs), the same Ministerial Circular stresses that, in the case of a DTT containing a specific rule against tax avoidance such as the Principal Purpose Test, then the said provisions shall supersede the GAAR and apply exclusively to the extent that the artificial arrangement was put into place for obtaining an advantage provided by the DTT. In any other case, the GAAR is applicable, and the DTT's benefits are not granted should it be assessed that an arrangement or a series of arrangements have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage.

However, even after the transposition of the ATAD into the domestic tax system, some differences can still be observed between the revised Greek GAAR and the respective ATAD GAAR. More specifically, contrary to the ATAD GAAR which is solely applicable to corporate taxation and not to other types of taxation such as indirect taxation, income taxation of private individuals, taxation of immovable property, etc.,[65] the Greek GAAR is included and remains part of the CTP and applies to all types of taxation falling into the scope of the said code such as VAT, stamp duties, property taxes, special tax on property owned by enterprises, etc. and not only to direct taxation schemes.[66]

Additionally, it can be observed that the provision pertaining to the GAAR under the Greek tax system is more extensive in comparison to the respective provision of the ATAD. Thus, the GAAR stipulated under Article 38 of the CTP includes a series of examples of non-genuine arrangements that were also included in the Commission's Recommendation 2012/772/EC, whereas such examples are not contained in the ATAD provisions regarding the GAAR.

Considering the foregoing, the conclusion can be drawn that, although the wording of the GAAR was amended following the transposition of the ATAD and some terms were replaced by others, the basic context in respect of 1) the substance of the arrangement and 2) the aim of

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[63] *See* UK: ECJ, 12 Sept. 2006, Case C-196/04*, Cadbury Schweppes pic, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:544.

[64] ATAD, *supra* n. 1, para. 11.

[65] The said conclusion is based on ATAD, *supra* n. 1, Art. 1 which defines the scope of the Directive and pursuant to which '*this Directive applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country*'. *See also* V. Athanasaki, *A Critical Approach to GAARs in the Greek and EU Tax Law*, 28(4) EC Tax Rev. 187 (2019).

[66] *See also* ATAD, *supra* n. 1, Art. 3 according to which the measures contained in the Directive provide a minimum level of protection for the domestic corporate tax base and do not preclude the application of other (domestic or agreement based) provisions aiming at safeguarding a higher level of protection.

obtaining a tax benefit 3) through the circumvention of the law has been retained. Moreover, the applicability of the GAAR in domestic situations within the Union and vis-à-vis third countries in a uniform manner already provided under the previous GAAR has also been retained, while it is in accordance with the Preamble of the ATAD. However, many issues may arise in the future due to the generality of the GAAR provisions, the conflicting terminology, the contradictory meanings, and the considerable discretion granted to tax administration that increases legal uncertainty.[67] Therefore, the interpretation provided on the matters that may arise by the administrative courts and the ECJ are expected to play a key role.

4 CFC RULES

4.1 *The CFC Rules, as Stipulated Under the ATAD*

Another practice of multinational companies to reduce their group's tax liability is the creation of affiliates – wholly or partly for tax reasons rather than for non-tax business reasons – in low or no tax jurisdictions to which they shift profits from the parent company that is established in a high tax jurisdiction.[68] The aforesaid practice is favoured due to the fact that unilateral tax rules recognize that CFCs are normally treated as autonomous taxpayers and, therefore, the profits of the CFCs are not included in the tax base of the resident shareholder. Thus, the foreign income of the foreign company is subject to deferral until repatriation.[69] In order to address the aforesaid tax avoidance practice, the twenty-eight Member States followed the Recommendations set forth by the OECD in Action Item 3 of the BEPS Action Plan and introduced Controlled Foreign Company (hereinafter referred to as CFC) rules that provide for a method of re-attributing the non-distributed income of a low-taxed controlled subsidiary to its highly taxed parent company. CFC rules may target an entire low-taxed subsidiary, specific categories of income, or may be limited to income that has been artificially diverted to the subsidiary.[70]

CFC rules are stipulated under Articles 7 and 8 of the ATAD. It should first be mentioned that CFC rules provided under the ATAD distinguish CFCs located in an EU and EEA Member State from those located in a third country. More specifically, pursuant to Article 7 (1) of the ATAD, in the event that the CFC is located in a third country that is not a Member State of the EU or EEA, the non-distributed income of a legal entity or permanent establishment shall be included in the tax base of the parent company provided that the following conditions are cumulatively met:

a) the taxpayer, by itself or along with its associated enterprises, holds more than 50% of the voting rights either directly or indirectly, owns more than 50% of the capital, or is entitled to receive more than 50% of the profits of the controlled entity.
b) the controlled entity is subject to a low tax rate determined as 50% of the effective rate of the parent company.[71]

Regarding the definition of CFC income, the Directive affords Member States the discretion to select between two alternative approaches. In terms of the first approach,[72] the Member State of the parent company shall include the non-distributed income falling within one of the following categories in its tax base: (1) interest or any other income generated through financial assets; (2) royalties or any other income generated from intellectual property; (3) dividends and income from the disposal of shares; (4) income from financial leasing; (5) income from insurance, banking, and other financial activities; (6) income from invoicing companies that earn sales and services; and income from goods and services purchased from and sold to associated enterprises that add no or little economic value. In this case, the income to be included in the tax base of the parent company shall be calculated in accordance with the rules of the corporate tax law of the Member State where the parent company is tax resident or situated for tax purposes. Losses of the entity or permanent establishment shall not be included in the tax base of the parent company but may be carried forward – in accordance with the national law of the Member State where the parent company is tax resident – and taken into account in subsequent tax periods.[73]

It is noteworthy that an exception may be provided by the Member States in the case that the CFC carries on substantive economic activity supported by staff, equipment, assets, and premises, as evidenced by relevant facts and circumstances. However, in the event

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67 Petoumenos, *supra* n. 57, at 289.

68 OECD, *BEPS Action 3: Strengthening CFC Rules, Public Discussion Draft* 6 (OECD Publishing May 2015), https://www.oecd.org/ctp/aggressive/discussion-draft-beps-action-3-strengthening-CFC-rules.pdf (accessed 29 Oct. 2019).

69 A. P. Dourado, *The Role of CFC Rules in the BEPS Initiative and in the EU*, 2 Brit. Tax Rev., 341, (2015).

70 ATAD, *supra* n. 1, Preamble, para. 12.

71 Otherwise stated, the said provision is stipulated under ATAD, *supra* n. 1, Art. 7 (1) (b) as follows: «*b) the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the corporate tax that would have been charged on the entity or permanent establishment under the applicable corporate tax system in the Member State of the taxpayer and the actual corporate tax paid on its profits by the entity or permanent establishment*».

72 ATAD, *supra* n. 1, Art. 7 (2) (a).

73 *Ibid.*, Art. 8 (1).

that the CFC is a resident or situated in a third country that is not party to the EEA Agreement, the Member States have the discretion to refrain from the aforesaid exemption and to not apply this substantive economic activity test.

In terms of the second approach, the Member State of the parent company shall include the non-distributed income of the controlled entity or permanent establishment arising from non-genuine arrangements that have been put in place for the essential purpose of obtaining a tax advantage in the tax base of the latter.[74] It should be pointed out that an arrangement shall be regarded as non-genuine to the extent that the legal entity or permanent establishment would not have owned the assets or would not have undertaken the risks that generate all or part of its income if it was not controlled by a company where the significant people functions that are relevant to those assets and risks and are instrumental in generating the controlled company's income are performed. That is to say that the key point for the determination of a non-genuine arrangement is the State where most of the decision-making functions were conducted that generated diverted income.[75] In the event that significant people functions are carried out by the controlling company, the CFC is considered to be a non-genuine arrangement that does not own the assets and has not undertaken the risks that generate all or part of its income. In this case, the income diverted to the subsidiary is considered to have been generated by an artificial arrangement that has the essential purpose of obtaining a tax advantage. Therefore, the aforesaid income that has been artificially diverted to the CFC shall be taxable at the level of the controlling company.

Concerning the computation of the income to be included in the tax base of the controlling company under the abovementioned second approach, it should be pointed out that it shall be limited to the amounts generated through assets and risks that are linked to significant people functions performed by the controlling company. Additionally, the attribution of the income of the CFC shall be calculated according to the arm's length principle.[76]

Once the income has been computed in the forms explained above, it shall then be re-attributed to the parent company in proportion to the participation of the latter in the CFC and included in the tax period of the parent company in which the tax year of the CFC ends.[77] In addition, in order to eliminate double taxation, the Member State of the controlling company shall allow a deduction – according to its national law – of the tax paid by the entity or permanent establishment from the tax liability of the taxpayer in its State of tax residence or location.[78]

Furthermore, a number of additional provisions that allow Member States to limit the scope of CFC rules are established under Articles 7(3) (4) of the ATAD. More specifically, under the first approach, Member States may decide not to treat a subsidiary or a permanent establishment as a CFC if one third or less of its income consists of the predefined passive income categories while special rules are provided for financial undertakings.[79] Moreover, Member States may exclude from the scope of the second approach – related to reattribution of the non-distributed income arising from non-genuine arrangements for the essential purpose of obtaining a tax advantage – (1) an entity or a permanent establishment with accounting profits of no more than EUR 750,000 and non-trading income of no more than EUR 75,000; or (2) an entity or a permanent establishment for which the accounting profits amount to no more than 10% of their operating costs for the tax period.[80]

On the other hand, in order to comply with the fundamental freedoms, the CFC rules are not applicable in the case of a subsidiary located in an EU/European Economic Area (EEA) jurisdiction, unless the establishment of this entity is entirely artificial or is engaged in non-genuine arrangements that have been put in place for the essential purpose of obtaining a tax advantage.

At this point, it should be noted that the provision pertaining to the CFCs established in the Member States of the EU or EEA is based on the ECJ's case law and, more specifically, on its *Cadbury Schweppes*[81] and *Test Claimants in the Thin Cap Group Litigation* decisions.[82]

More particularly, in its Cadbury Schweppes ruling, the ECJ stressed the need to distinguish profits arising from

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74 *Ibid.*, Art. 7 (2) (b).

75 *Ibid.*, para. 12.

76 *Ibid.*, Art. 8 (2).

77 *Ibid.*, Art. 8 (3)–(4).

78 *Ibid.*, Art. 8 (7).

79 *Ibid.*, Art. 7(3).

80 *Ibid.*, Art. 7 (4).

81 *Cadbury Schweppes pic, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* (C-196/04), *supra* n. 63.

82 A. Kalampaliki, *A New Anti-Tax Avoidance Directive – The EU Takes a Step Closer to Combating BEPS*, 2 Theory & Practice of Administrative Law (Greek law bulletin)/Nomiki Vivliothiki 202 (2017).

artificial arrangements from those deriving from genuine economic activities.[83] It has also clarified that the assessment on whether a CFC has the intention to carry on genuine economic activity for an indefinite period must be based on objective factors that are ascertainable by third parties regarding the extent to which the CFC physically exists in terms of premises, staff, and equipment. In the event that checking those factors leads to the conclusion that the CFC is a fictitious establishment not carrying on any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. This may be the case of a 'letterbox' or 'front' subsidiary.[84]

Therefore, Article 7 (2) of the ATAD (according to which the ascertainment on whether a CFC has the characteristics of a wholly artificial arrangement that does not carry on substantive economic activity must be based on the existence of staff, equipment, assets and premises) is based on the ECJ's case law as it envisages the three objective factors that are ascertainable by third parties provided under *Cadbury Schweppes,* while one more is added in the ATAD, specifically, the assets.

It should also be pointed out that the ECJ ruled that CFC rules restrict the freedom of establishment. However, the said restriction may be justified by the overriding reason of preventing tax avoidance that is realized through the creation of wholly artificial arrangements that do not reflect economic reality but aim at circumventing the application of the legislation of the Member State, where the profits are actually generated, in order to escape the tax normally due on the profits generated by activities that are performed in the controlling company's territory. Therefore, the aforesaid CFC rules are applicable regarding the CFCs located in other EU or EEA Member States only in the case of wholly artificial arrangements and not of genuine economic activities even if there is a tax motive, specifically, an intention of obtaining tax relief.[85]

In terms of its *Test Claimants in the Thin Cap Group Litigation* decision, the ECJ ruled that, in order to determine whether a transaction represents a purely artificial arrangement either wholly or partly, the essential purpose of which is to circumvent the tax legislation of the Member State where the profits are actually generated, it should be questioned whether the loan would not have been granted or would have been granted for a different amount or at a different rate of interest had there been an arms-length relationship between the concerned companies. In other words, the fact that a resident company has been granted a loan by a non-resident company with terms that do not correspond to those that would have been agreed upon at arm's length constitutes an objective and verifiable element for the Member State, where the borrowing company is resident. With this element, it can be determined whether the transaction in question represents, in whole or in part, a purely artificial arrangement entered into solely for tax reasons.[86] Therefore, the computation of the income re-attributed by virtue of the second approach provided under Article 7 (2) (b) of the ATAD is aligned with *Test Claimants in the Thin Cap Group Litigation* decision of ECJ.[87]

4.2 *The Greek CFC Rules Before the Transposition of the ATAD*

CFC rules were first introduced into the Greek tax system by virtue of Article 66 of the Greek Income Tax Code (L. 4172/2013)[88] when the proposals and guidelines contained in the Council Resolution of 8 June 2010 on the coordination of the CFC and thin capitalization rules within the European Union were incorporated into the national tax system,[89] More clarification and guidelines regarding the interpretation and application of the Greek CFC rules were first provided under Ministerial Circular 1076/2014 issued by the Secretary General for Public Revenue as amended by Circular 1211/2014.

More specifically, pursuant to the former Article 66 (1) of the Greek Income Tax Code, the non-distributed income of legal persons/entities that are foreign tax residents is included in the taxable income of a Greek taxpayer provided that the following conditions are cumulatively satisfied:

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[83] *See also* A. Armenia & A. Zalasinski, *EU Report*, in *The Taxation of Foreign Passive Income for Groups of Companies*, Cahiers de droit fiscal international, vol. 98a, 62 (IFA 2013).

[84] *Cadbury Schweppes pic, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* (C-196/04)*, supra* n. 63, paras 67, 68.

[85] *Ibid.*, paras 51, 55, 65.

[86] *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue* (C-524/04), *supra* n. 41, para. 81.

[87] It should also be pointed out that, according to the aforesaid ruling, the ascertainment of whether a transaction represents a purely artificial arrangement based on the aforesaid objective element is considered not to go beyond what is necessary to prevent abusive practices, as long as the taxpayer is given the opportunity to provide evidence of any commercial justification that there may have been for that arrangement without being subject to undue administrative constraints. In addition, '*in order for such legislation to remain compatible with the principle of proportionality, it is necessary, in the second place, that, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the re-characterization of interest paid as a distribution is limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties or between those parties and a third party been one at arm's length*' in *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue* (C-524/04), *supra* n. 41, paras 82, 83.

[88] K. Savvaidou, *CFC Rules and Tax Avoidance* (in Greek), Conference of the Franco-Hellenic Chamber of Commerce and Industry in cooperation with the Tax Committee of the Chamber, under the subject heading 'Key issues in business taxation', (May 2014).

[89] Council Resolution of 8 June 2010 on coordination of the Controlled Foreign Corporation (CFC) and thin capitalization rules within the European Union, OJ C 156/01 (16 June 2010).

(a) the taxpayer itself or along with other associated enterprises owns more than 50% of shares either directly or indirectly, voting rights, or participation in the capital or is entitled to more than 50% of the profits of the non-resident legal entity.

(b) the CFC is subject to taxation in a non-cooperative State or in a State with a preferential tax regime [90]

(c) more than 30% of the net income before taxes that is generated by the CFC consists of passive income falling within the scope of one or more of the following categories: (1) interest or any other income generated from financial assets; (2) royalties or any other income generated from intellectual property; (3) dividends and income from the disposal of shares; (4) income generated from movable assets; (5) income generated from the immovable property, unless the State of the CFC would not be entitled to tax the said income by virtue of an agreement concluded with a third-country; and (6) income generated from insurance, banking, and other financial activities. It is noteworthy that the aforesaid categories of income are taken into account under the condition that more than 50% of the relevant category of income of the CFC arises from transactions between the latter and the Greek resident taxpayer or its associated enterprises.[91] Besides, as clarified under Circular no. 1076/2014, Article 66 of the GITC shall be applicable and, consequently, the non-distributed income of the CFC shall be re-attributed to the Greek resident taxpayer, when even one of the aforementioned passive income categories derives from transactions between the CFC and the Greek taxpayer or its associated enterprises.

Regarding the computation of the undistributed income of the CFC to be re-attributed to the Greek resident taxpayer, it should be pointed out that the aforesaid categories of income shall be calculated on the basis of the tax year and the tax rate that is applicable to the business profits arising from the activities of individuals and legal entities, as the case may be.

d) the principal class of shares of the CFC are not traded on a regulated market.

In addition, it is noteworthy that the aforesaid CFC rules are not applicable in the event that the foreign legal person/entity is a tax resident of an EU Member State or of an EEA State that has concluded an information exchange agreement (equivalent to the exchange of information upon request provided under the EU Mutual Assistance Directive (2011/16) with Greece), unless the economic activity of the said legal person/entity constitutes an artificial arrangement being created for the essential purpose of avoiding the corresponding tax obligations in Greece.[92]

4.3 *The Greek CFC Rules Following the Transposition of the ATAD*

Following the transposition of the ATAD by virtue of Article 12 of L. 4607/2019, the terminology of Article 66 of L. 4172/2013 has been amended, while more clarifications and guidelines regarding the interpretation and application of the revised Greek CFC rules are presented under Ministerial Circular no. 2071/2019.

According to the revised Article 66 (1) of L. 4172/2013, the definition of the Controlled Foreign Company is introduced. More particularly, a Controlled Foreign Company is defined as a foreign legal person/entity or foreign permanent establishment for which profits are not subject to taxation or are excluded from the taxation in Greece should the following conditions be cumulatively met:

a) in the case of a legal person/entity, the taxpayer itself or with other associated enterprises holds more than 50% of the voting rights either directly or indirectly, owns more than 50% of the capital, or is entitled to more than 50% of the non-resident profits of the non-resident legal entity.

b) the actual corporate tax paid on the profits of the foreign legal entity or the permanent establishment abroad is less than 50% of the corporate tax that would have been charged on such profits in Greece.

c) More than 30% of the net income before taxes that is generated by the legal entity or the permanent establishment abroad falls within the scope of one or more of the following categories: (1) interest or any other income generated from financial assets; (2) royalties or any other income generated from intellectual property; (3) dividends and income generated from the disposal of shares; (4) income from financial leasing; (5) income from insurance, banking, and other financial activities; and (6) income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises that add no or little economic value.

Should the aforesaid conditions be cumulatively satisfied and, consequently, a legal entity or permanent establishment is treated as a CFC, the controlling company located in the Greek territory should include the aforesaid predefined categories of non-distributed passive income in its tax base in Greece.[93]

Moreover, a new definition of associated enterprises is introduced[94] pursuant to which an affiliated company is defined as:

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[90] The requirements to be met for the non-cooperative State/preferential tax regime state are provided under GR: Income Tax Code (L. 4172/2013), Art. 65.

[91] GR: Income Tax Code, (L. 4172/2013), Art. 66 (3) before being amended by Art. 12 of L. 4607/2019.

[92] GR: Income Tax Code, (L. 4172/2013), Art. 66 (2).

[93] GR: Income Tax Code, (L. 4172/2013), Art. 66, (3), as amended by Art. 12 of L. 4607/2019.

[94] GR: Income Tax Code, (L. 4172/2013), Art. 66 (2).

a) a legal person/entity for which the taxpayer directly or indirectly holds voting rights or participation in capital or is entitled to profits at a rate of 25% or more.

b) a physical or legal person/entity directly or indirectly holding voting rights or participation in capital or is entitled to the profits of a taxpayer at a rate of 25% or more.

Should a physical or legal person/entity directly or indirectly hold voting rights or participation in capital or be entitled to participate in profits of a taxpayer and one or more legal persons/entities at a rate of 25% or more, all of the respective legal persons/entities, including the taxpayer, shall be regarded as associated enterprises.

Concerning the computation of the income to be re-attributed by the CFC to the Greek resident taxpayer,[95] it should be stated that the said income shall be calculated on the basis of the tax rates that are applicable to the business profits arising from the business activities of individuals and legal entities, as the case may be. Furthermore, the said income shall be calculated in proportion to the taxpayer's participation in the entity and shall be included in the tax year of the taxpayer during the tax year that the CFC ends. Should the legal person/entity or the permanent establishment incur losses in a tax year, the said losses shall not be included in the taxpayer's tax base, but may be carried forward and taken into account in subsequent tax periods.

In order to eliminate double taxation, the new Greek CFC rules contain provisions pertaining to the tax treatment of any profit distributions made by the CFC and its disposal of shares and provide for the possibility of the associated enterprises to credit the tax paid abroad in the case of indirect participation and up to the amount of the Greek corresponding tax.[96] More particularly, when the CFC distributes profits to the taxpayer and those distributed profits are included in the taxable income of the parent company in Greece, the amounts of income previously included in the tax base of the Greek parent company pursuant to Article 66 (3) of the Greek ITC shall be deducted from the tax base, when calculating the amount of tax due on the distributed profits in order to avoid the double taxation.[97]

It should be noted that the aforesaid provisions are not applicable to legal persons/entities or permanent establishments that are tax residents in the EU or EEA Member States, under the condition that they carry on substantive economic activity that is supported by staff, equipment, assets, and premises as evidenced by relevant facts and circumstances.[98] In this event, as clarified by the explanatory memorandum of L. 4607/2019 regarding CFC rules – by virtue of which the ATAD has been incorporated in the Greek tax system – the tax authorities bear the burden to prove that the controlled foreign person/entity or permanent establishment that is a tax resident in a Member State of the EU or EEA does not carry on substantive economic activity.

4.4 *Conformity of the Greek CFC Rules with the ATAD Model*

Considering the foregoing, Greek CFC rules had already been generally compatible with Articles 7 and 8 of the ATAD even before the transposition of the Directive into the Greek tax system. However, a series of significant amendments have been enacted in the Greek CFC legislation following the transposition of the ATAD.

First and foremost, the conditions that should be cumulatively satisfied for the re-attribution of the income of the CFC to the parent company that is a Greek tax resident have been amended. More particularly, although the participation condition with a percentage of over 50% of voting rights, capital, or profits has been retained, the current Greek CFC legislation prescribes that, for the determination of the taxpayer's participation percentage along with other associated enterprises, the latter are firstly identified and then their percentages are combined given that the definition of the associated enterprises is introduced under the current Article 66 (2) of the GITC. It should be pointed out that the definition of associated enterprises as stipulated under Article 66 (2) of the GITC deviates from Article 2 (4) of the ATAD. Consequently, its scope has been expanded in comparison to the definition of associated enterprises as provided under Article 2 (d) of the GITC. Thus, the minimum threshold for a legal entity to be considered as an associated enterprise for the determination of CFC is specified at 25% instead of the 33% that is set out under Article 2 of the GITC. Therefore, it is possible that legal entities that are not regarded as associated enterprises for the application of other provisions (such as transfer pricing) are regarded as such for the application of the CFC rules.

Another important amendment is related to the minimum tax paid abroad rule. More particularly, pursuant to the Greek CFC rules before the transposition of the ATAD, only the income deriving from CFCs established in a non-cooperative country or in a country with a preferential tax regime was subject to taxation in the Greek territory. However, according to the revised Greek CFC rules, the sole criterion is the actual tax paid abroad that

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[95] GR: Income Tax Code, (L. 4172/2013), Art. 66 (4).

[96] GR: Income Tax Code, (L. 4172/2013), Art. 66 (5), (6), (7).

[97] GR: Income Tax Code, (L. 4172/2013), 66 (5).

[98] GR: Income Tax Code, (L. 4172/2013), Art. 66 (8).

should be less than 50% of the corporate tax that would have been charged on such profits in Greece irrespective of the country of establishment of the CFC. Moreover, the provision regarding the exclusion of the listed companies has been abolished. Therefore, listed companies that were excluded from the CFC rules under the previous tax regime fall within the scope of the revised CFC rules following the transposition of the ATAD.

However, the 30% condition that should be also met for the inclusion of the non-distributed income of legal persons/entities that are foreign tax residents in the taxable income of a Greek taxpayer that was provided under the former Greek CFC legislation has been retained under the revised CFC rules. Thus, contrary to the ATAD that does not provide for a numerical criterion for the characterization of a legal entity as a CFC, the Greek CFC rules provided under Article 66 (2) (c) of the Greek ITC prescribe that more than 30% of the net earnings before taxes of the foreign legal person/entity should derive from passive income in order for the CFC rules to apply.[99]

Additionally, it should be pointed out that Greece has adopted the first approach pertaining to the inclusion of the undistributed passive income of the CFC in the tax base of the Greek resident taxpayer. According to OECD BEPS Action 3, this choice is particularly consistent with the aim of the CFC rules themselves, which is to address the erosion of the parent jurisdiction's tax base while reducing compliance and administrative costs.

At this point, it should be noted that the term passive income has been amended following the transposition of the ATAD, although the 30% condition of the passive income forming the non-distributed income of the CFC has been retained, as previously mentioned. More specifically, following the wording of Article 7 (2) (a) of the Directive, the definition of the term passive income was extended to include the income generated from financial leasing and invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises that add no or little economic value. However, rental income deriving from both movable and immovable property that was provided for under the previous Greek CFC rules was not listed in the new Greek provision of the CFCs; they are also not provided for under the ATAD.

However, Greece has not adopted the exemption from the scope of CFC rules that is stipulated under Article 7 (3) of the ATAD, pursuant to which the Member States that opted for the first approach had the discretion to not treat an entity or permanent establishment as a controlled foreign company should one third or less of the income accruing to the entity or permanent establishment be ensconced within the predefined passive income categories. It is noteworthy that, according to the explanatory memorandum of the Directive, the exemption of certain entities with low profits or a low profit margin can result in fewer risks of tax avoidance by Member States. Consequently, this may result in limiting the administrative burden and compliance costs.[100] However, pursuant to the OECD, the adoption of the said exemption could easily be exploited by multinational enterprises in order to escape the application of CFC rules by splitting the income among multiple subsidiaries with each of them falling below the threshold.[101]

Concerning the computation of the undistributed income of the CFC that is to be included in the tax base of the Greek resident taxpayer, it should be noted that the respective Greek CFC rules adopting the first approach of reattribution of the passive income were in accordance with the ATAD even before its transposition especially due to the analytical content of Circular no. 1076/2014. However, in the respective revised provisions of Article 66 of the GITC, adopting the exact wording of the ATAD has enriched the rules, in order to incorporate the provisions regarding the tax treatment of the foreign losses and the tax credit relief mechanism for the elimination of double taxation.

In addition, it should be pointed out that the difference in treatment between CFCs located in third countries and those located in other Member States of the EU or EEA that have concluded the information exchange agreement with Greece that was provided under the former Greek CFC rules has been retained. Therefore, under the revised Greek CFC rules, it is prescribed that, contrary to CFCs located in third countries, CFCs that are tax residents in the EU or EEA Member States may be excluded from the application of the Greek CFC rules under the condition that they carry on substantive economic activity that is supported by staff, equipment, assets, and premises, as evidenced by relevant facts and circumstances.

Considering the above, it is obvious that the revised Greek CFC rules contain specific elements according to which it can be determined whether a legal person/entity or permanent establishment carries on substantive economic activity. The said elements, specifically, the existence of premises, staff, equipment, and assets, are objective factors that are ascertainable by third parties, which are also provided for under Article 7 (2) (a) of the ATAD, while they are based on the *Cadbury Schweppes* decision of the European Court of Justice (ECJ) as already analysed above (**see above** 4.1). Therefore, the revised

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[99] K. Savvaidou & V. Athanasaki, *Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era*, 59(4) Eur. Tax'n 174 (2019).

[100] ATAD, *supra* n. 1, Preamble, para. (12).

[101] OECD, *Designing Effective Controlled Foreign Company Rules, Action 3: 2015 Final Report*, OECD/G20Base Erosion and Profit Shifting Project (OECD Publishing Oct. 2015), para. 54, *see also* Ginerva, *supra* n. 8, at 130.

Greek provisions on CFCs are compatible not only with Articles 7 and 8 of the ATAD but also with the ECJ's case law regarding *Cadbury Schweppes.*

Lastly, it should be pointed out that the issue of the burden of proof that the CFC carries on genuine economic activity has been resolved by virtue of the explanatory memorandum of L. 4607/2019. Thus, according to the aforesaid explanatory memorandum, the tax authorities bear the burden to prove that the controlled foreign person/entity or permanent establishment that is a tax resident in a Member State of the EU or EEA does not carry on substantive economic activity.

The aforesaid clarification is of great significance considering that it was not clear under the previous tax regime, who bore the burden of proof.[102] This is due to the fact that, pursuant to the previous Circular No. 1076/2014 that provided guidelines on the application of the former Article 66 of the GITC, it was stated that, in order for the CFC rules not to be applicable in case of a legal person/entity that is resident or situated in another EU or EEA Member State, it must be proved that the CFC carries on genuine economic activity in the State, where it is located. In view of the foregoing, it follows that, although it was not specifically mentioned, who bore the burden of proof, the terminology that was used under the previous tax regime led to the conclusion that the taxpayer must prove the pursuit of genuine economic activity in order not to fall within the scope of CFC rules.

Considering the foregoing, the revised Greek CFC rules are accordingly aligned with the ATAD and with ECJ case law. However, it is noteworthy that the proper implementation of CFC legislation depends on the effective implementation of exchange of information agreements to a great extent, given that certain difficulties may arise in the application of CFC rules, especially due to the fact that no or little information is available from low tax jurisdictions, where CFCs are usually situated.[103]

5 Conclusion

Greece has made large steps forward for combating tax avoidance and aggressive tax planning over the past years. In this respect, Greece had already adopted certain anti-tax-avoidance rules corresponding to EU legislation and to the Recommendations set forth by OECD before the transposition of the ATAD into domestic law.

Following the transposition of the Directive by means of L. 4607/2019, the current Greek interest deduction limitation rules, the GAAR, and the CFC rules are aligned with the ATAD regarding its basic provisions. Concerning the optional provisions contained in the ATAD providing relief from the implementation of the interest deduction limitation rules and the CFC rules, it can be noted that only some of them have been adopted under Greek legislation. Additionally, exit taxation and hybrid mismatch rules are expected to be transposed into domestic law.

Acknowledging the positive developments in Greece's tax landscape, it remains to be seen how the abovementioned rules will be implemented by the tax administration and the administrative courts especially due to the fact that some measures, such as the GAAR, have not yet been implemented in practice in Greece. Therefore, it is plausible that many issues may arise regarding the implementation and the interpretation of the anti-tax avoidance measures, inter alia, due to the fact that the Directive does not always accord with the reasoning and the terminology of the Court. In any event, emphasis should be given to combating artificial arrangements that do not carry on substantive economic activity without impeding the pursuit of substantive economic activity that is carried out for valid commercial reasons that reflect economic reality. The interpretation that will be provided by the ECJ on the issues that may arise will play a key role.

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[102] K. Perrou, *New CFC Rules*, 55(4) Eur. Tax'n, 174 (2015).

[103] Perrou, *supra* n. 102, at 176.