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Harmonizing EU Tax Policy: The Implementation and Impact of Art. 9, 9 b ATAD and DAC 6 on combating Tax Avoidance and Enhancing Transparency with regard of the German and Austrian legal order. Future European prospectives

di Filippo Luigi Giambrone

(Ricercatore a tempo determinato presso l'Università degli Studi del Sannio di Benevento)

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Abstract

The European Union's efforts to combat tax avoidance and enhance tax transparency through the Anti-Tax Avoidance Directive (ATAD) and the Directive on Administrative Cooperation (DAC), notably DAC 6, aim to unify tax policies and tackle BEPS issues. These initiatives introduce measures such as the General Anti-Avoidance Rule (GAAR) and Specific Anti-Avoidance Rules (SAARs), alongside mandates for disclosing aggressive tax planning schemes, to address and mitigate tax avoidance. In order to address tax mismatches caused by hybrid elements, Articles 9 and 9b of ATAD 2 require member states to take certain measures. These measures include preventing certain deductible payments from escaping taxation in the hands of the recipient and avoiding double deductions for expenses without corresponding taxable income. Germany and Austria exemplify how EU member states have adapted their national laws to align with these directives, focusing on hybrid mismatches and reporting obligations with particular regard of DD for cross-border arrangements to prevent tax avoidance. Despite progress, challenges in standardizing the application of these directives across the EU persist, primarily due to the flexibility in implementation and the complex diversity of member states' tax systems. This has led to varied implementation success and underscores the need for further harmonization and clarity in EU tax policy. The interaction between national laws and EU directives reflects the ongoing effort to balance national tax autonomy with collective EU tax reforms. As the EU continues to refine and integrate these directives into national legislation, it strives to develop a transparent, fair, and efficient tax system that reduces avoidance opportunities while respecting member states' sovereignty. The ATAD and DAC 6 represent significant steps toward a more cohesive and transparent tax framework in the EU, offering a roadmap for future tax policy and administration efforts aimed at minimizing tax avoidance and enhancing transparency across member states.

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1. Introduction and aims of the article.

The European Union has rolled out the Anti-Tax Avoidance Directive (ATAD) and the Directive on Administrative Cooperation (DAC)[1] as fundamental measures to boost tax fairness and transparency, aiming at the global challenge posed by Base Erosion and Profit Shifting (BEPS). These measures strive to create a uniform approach to tax policies across EU states by addressing practices that lead to tax avoidance and evasion. With the introduction of both General Anti-Avoidance Rule (GAAR) and Specific Anti-Avoidance Rules (SAARs), the ATAD mandates updates in national legislation to meet new standards. Despite strides towards a unified approach, divergences in how these directives are applied stem from the leeway member states possess, compounded by the varied and complex nature of their tax regimes.Alongside, the development of DAC, particularly the latest DAC 6 amendment, signals the EU's commitment to fostering administrative cooperation and sharing information about tax arrangements with the potential to circumvent tax duties. The requirement for intermediaries to disclose certain tax schemes represents a leap towards transparency, yet its deployment has shown unevenness across member states, highlighting the difficulty of achieving a standardized application. The interaction of ATAD and DAC within the legislative environments of Austria and Germany provides an insightful context for delving into how EU tax directives integrate with national laws. Both nations have initiated substantial legal reforms to align with ATAD and DAC, focusing on tackling hybrid mismatches, establishing reporting obligations, and curbing tax avoidance mechanisms, especially with regard of DD outcomes attributable to the dual residency of the payor. Nevertheless, putting these directives into practice raises intricate questions about their impact, the balance between national tax autonomy and EU-wide harmonization efforts, and the effect on tax planning and corporate taxation across the EU.

Specifically the article analyzes implementation of Article 9 of the Anti-Tax Avoidance Directive (ATAD) concerning double deductions within the German legal framework, specifically referring to § 4k (4) of the German Income Tax Act (EStG). This provision aims to prevent the double deduction of business expenses, particularly in cross-border scenarios, by stipulating that expenses cannot be deducted in Germany if they are also considered for deduction in another state. Exceptions apply if the expenses are offset by revenues subject to taxation in both Germany and the other state, or in cases where double taxation is avoided through foreign tax credits. The complexity of the rule-exception relationship in § 4k (4) EStG addresses the challenges in aligning national law with ATAD's provisions against

[1] G. Capristano Cardoso, *Balancing Tax Transparency and Tax Certainty: Reporting Obligations forUnilateral Safe Harbours Under DAC 6*, Intertax (2021).

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aggressive tax planning strategies involving hybrid mismatches and double deductions. Furthermore, the adaptation of DAC 6 into German law through the Act on the Obligation to Report Cross-Border Tax Arrangements is highlighted. This law mandates the reporting of potentially aggressive tax planning arrangements, defining the responsibilities of intermediaries and taxpayers in disclosing these arrangements to tax authorities. The short reporting period and potential penalties for non-compliance emphasize the strict approach Germany takes towards enhancing tax transparency and compliance.

A comparative overview with the Austrian legal order reveals similar efforts in implementing ATAD's measures against tax avoidance. Austria's § 14 KStG, introduced by the Tax Reform Act 2020, reflects a comprehensive approach to addressing hybrid mismatches, including double deductions, and ensuring that such discrepancies are neutralized in line with ATAD's objectives. Both Austria and Germany's efforts demonstrate the complex interplay between national tax laws and EU directives aimed at curbing tax avoidance and evasion through enhanced transparency and cooperation.[2]

Exploring Scientific Queries in the Austrian and German Legal Frameworks involves a detailed study into the alignment of ATAD's regulations on hybrid mismatches with the tax laws of Austria and Germany, unveiling the complexities involved in integrating ATAD's objectives into national legislation, with particular regard of DD outcomes. This exploration digs into the difficulties faced in the practical application of these rules. Investigating the reporting requirements of DAC 6 sheds light on the impact these obligations have on intermediaries and taxpayers in Austria and Germany. The focus of this analysis is on the obstacles encountered in enforcing these requirements, the extensive nature of the reporting duties, and the frameworks established to ensure compliance. Examining Austria's and Germany's endeavors to synchronize their tax policies with the overarching aims of ATAD and DAC reveals the complex negotiation between maintaining national tax autonomy and adhering to collective EU tax reforms. Assessing the effects of the modifications introduced by ATAD and DAC on tax planning practices in Austria and Germany anticipates future trends and the emergence of novel strategies that either comply with or circumvent these revised rules. Through an in-depth review of these relevant scientific questions concerning Austria and Germany, the intention is to provide a comprehensive understanding of the effects of ATAD and DAC on tax policy, compliance, and strategic planning throughout the European Union.

[2] O. Popa, *An Overview of ATAD Implementation in EU Member States*, European Taxation (2019).

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2. Background.

The ATAD1 represents a pivotal component of the European Union's response to the global Base Erosion and Profit Shifting (BEPS) initiative. It signifies a significant advancement in aligning direct tax policies across EU member states, with the aim of tackling base erosion and profit shifting by introducing a General Anti-Avoidance Rule (GAAR) and several Specific Anti-Avoidance Rules (SAARs). Member States have adjusted their national legislation to comply with the new minimum standards for combating tax avoidance, either by enacting new laws, amending existing ones, or interpreting current regulations to conform with ATAD provisions.[3] However, variations still exist in national regulations due to Member States' discretion to implement stricter anti-avoidance measures beyond what the Directive mandates, as well as the diverse options provided by it.

Over the past five decades, the EU has implemented various policy measures to enhance administrative cooperation among its members. The initial Directive on Administrative Cooperation (DAC 1), Council Directive 2011/16/EU, was introduced in 2011 to facilitate the exchange of tax information. DAC 1 has undergone several revisions, with the latest being on March 22, 2021, through Council Directive 2021/514/EU (DAC 7), which is yet to be enforced. The preceding significant amendment was DAC 6, adopted on May 25, 2018, under Council Directive 2018/288/EU, to be implemented by December 31, 2019. DAC 6 mandates intermediaries such as consultants, lawyers, or financial institutions to report specific tax arrangements to local tax authorities, who subsequently exchange this information across the EU. However, the reporting obligation extends to taxpayers in certain cases, such as when the intermediary asserts legal professional secrecy, is not an EU resident, or if no intermediary is involved in the transaction. Consequently, the enhanced disclosure requirements of DAC 6 could have extensive implications, necessitating increased reporting obligations for both individuals and corporations across various industries. Through DAC 6, Member State tax authorities gain comprehensive information on each cross-border transaction aimed at obtaining tax benefits. Early access to this information on potentially aggressive tax schemes should aid in closing loopholes not only within each Member State's tax framework but also in addressing gaps resulting from the lack of full harmonization within the EU's tax systems. However, the extent to which Member State governments will effectively utilize the data collected and exchanged under DAC 6 to prevent abusive tax practices remains uncertain.[4]

[3] W. Haslehner, K. Pantazatou, G. Kofler, A. Rust, (eds), *A Guide to the Anti-Tax Avoidance Directive*, 2020.

[4] Anti-Tax Avoidance Directive: Council Directive 2016/1164 of 12 July 2016 laid down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (19 July 2016). The Anti-

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2.1. Anti-Tax Avoidance Directive (ATAD).

All Member States have effectively and punctually executed the ATAD in almost all its facets. The Commission plans to release a detailed report in January 2022 evaluating the transposition's thoroughness and adherence. Among the infringement actions initiated, only a few pertain to the directive's accurate implementation, which is minimal considering the directive's detailed and complex nature.

Despite frequent scholarly debates on ATAD's legality from various perspectives, its effectiveness seems secure, given the Court of Justice of the European Union's (CJEU) legal precedents. The main issues lie in aligning the implementation of ATAD's rules with the primary EU law and national constitutions of Member States, yet no legislative changes are suggested as the EU courts are expected to address these issues.

The challenge of interpreting and applying ATAD's intricate rules within national laws remains, attributed to the intrinsic uncertainties of anti-avoidance regulations and a lack of relevant case law. Pursuing legislative measures to address these uncertainties seems premature. However, guidance from the Commission on interpreting and applying these rules would be beneficial. The influence of ATAD varies significantly across Member States and among the directive's different provisions, leading to some fragmentation. Although this fragmentation is less severe than it would be without the directive's effort to minimally harmonize, considering reducing the options to unify anti-avoidance measures across Member States is advisable. The effectiveness of certain provisions, especially the CFC rule, in limiting tax planning remains under scrutiny. With the CJEU's evolving jurisprudence and the over-inclusiveness of the rules potentially causing double taxation, further studies are essential for forming conclusive opinions. The implementation and application of Art. 9, 9a, and 9b ATAD's anti-hybrid rules represent a significant challenge for the legislative bodies, tax administrations, and taxpayers of Member States. These rules are intricate and encompassing, with their complexity further compounded by the extensive definitions in Art. 2 Nr. 9 ATAD and their interaction with the main provisions in Art. 9-9b ATAD. Additionally, the ATAD leaves several terms undefined and does not address some issues, including how to handle timing mismatches. In practice, interpretations often depend on the detailed OECD BEPS Action 2 Report and its examples, introducing uncertainty since this guidance does not constitute EU law and may not align entirely with ATAD's provisions.[5]

Tax Avoidance Directive 2: Council Directive 2017/952 of 29 May 2017 amended Directive (EU) 2016/1164 regarding hybrid mismatches with third countries, OJ L144/1 (7 June 2017).

[5] W. Haslehner, K. Pantazatou, G. Kofler, A. Rust A, (eds), *A Guide to the Anti-Tax Avoidance Directive*, 2020.

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The enforcement and management of these anti-hybrid rules are particularly challenging due to the necessity of understanding tax treatments in other jurisdictions, including those outside the EU. Questions remain about whether this imposes an unreasonable burden on taxpayers who might not have access to the requisite information, and whether such obligations are consistent with the fundamental rights and freedoms of taxpayers.[6]

2.2. Directive on Administrative Cooperation (DAC).

To date, six iterations of the Directive on Administrative Cooperation have been adopted by Member States, with the most recent, DAC 6, coming into effect in July 2020. This iteration stands out as the most progressive in facilitating the disclosure and exchange of tax-related information, aiming to reduce tax evasion and avoidance. Despite being newly implemented, DAC 6 has faced significant criticism for not ensuring an even operational field throughout the EU, potentially affecting its effectiveness.

This report points out the considerable flexibility given to Member States during the directive's implementation, attributed to either the lack of clear definitions for key terms and concepts or a strategic reliance on national legislation. These factors have led to a disjointed application of DAC 6 across the EU, with variations in the interpretation and application of its scope. As a result, there is inconsistency in the information reported and exchanged among Member States, and in the requirements for disclosure, depending on the local laws in place. Nonetheless, the core objective of DAC 6 remains intact; the mandate for disclosure is likely to deter, to some extent, the creation of aggressive tax strategies by intermediaries. Although there's potential for refining the directive to address these uncertainties and legal questions, when viewed within the broader context of global efforts and previous harmonization attempts, DAC 6 can still be regarded as a positive step forward.

3. Definition of Aggressive Tax Planning.

According to DAC 6, only those arrangements that constitute aggressive tax planning are subject to reporting obligations. The Commission's recommendations on aggressive tax planning, dated December 6, 2012, define it as "exploiting the intricacies of a tax system or discrepancies between two or more tax systems to reduce tax liability." Thus, this form of tax planning is characterized by a legal

[6] W. Haslehner, K. Pantazatou, G. Kofler, A. Rust A, (eds), *A Guide to the Anti-Tax Avoidance Directive*, 2020; C. Panayi, W. Haslehner, E. Traversa E. (eds), *Research Handbook on European Union Taxation Law*, 2020.

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reduction of tax liability that contradicts the intent of the legislator. The European Commission's impact assessment document on DAC 6 differentiates between aggressive and ordinary tax planning. According to this document, aggressive tax planning occurs when there is an "abuse of the tax system." If this is the case, such tax planning falls within the scope of DAC 6. In contrast, ordinary tax planning occurs when the taxpayer fully utilizes their legitimate interests and interprets the applicable tax laws of the state in which they reside in relation to their taxation matters. It should be noted that the arrangements covered by DAC 6 are generally legal but are constructed due to internationally non-harmonized tax laws. The distinction between these two forms of tax planning is extremely difficult. In the literature, aggressive tax planning is understood as the deliberate exploitation of national and international legal norms resulting in the lowest possible tax burden. While aggressive tax planning operates within the legal framework, it can result in abusive behavior.[7]

Under the teleological interpretation of the phrase "exploiting discrepancies between different tax systems," there must be an active search for tax loopholes, generally encompassing all tax planning arrangements. As mentioned earlier, DAC 6 subsequently differentiates between ordinary and aggressive tax planning. The reporting obligation is limited in that the directive covers only legal tax avoidance and illegal tax evasion. The utilization of tax benefits is not intended to be covered by the directive.[8] Purpose of the Directive DAC 6 aims at the early reporting of potentially aggressive tax planning arrangements. As a result, these arrangements are generally reported to the relevant tax authorities before their implementation. This enables tax authorities of the affected EU Member States to "act promptly against harmful tax practices and close loopholes by enacting legislation or conducting suitable risk assessments and tax audits." This indicates that the purpose of the directive is the early detection of harmful tax practices to timely develop appropriate measures against tax loopholes and market inefficiencies. To best achieve the purpose of DAC 6, implementation should be carried out through an automated exchange of information between EU Member States.

3.1 Implementation into National Law.

DAC 6 is a directive that falls under Article 288 TFEU and thus has general application. This means it is directed at all EU Member States and is binding in terms of its objective. How this implementation into national law is carried out is left to each EU Member State. The EU Mandatory Disclosure Rules have implemented DAC

[7] C. Osterloh-Konrad, *Die Steuerumgehung*, 2019.
[8] C. Panayi, W. Haslehner, E. Traversa E. (eds), *Research Handbook on European Union Taxation Law*, 2020.

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6 into national law, coming into force on July 1, 2020, and includes provisions on personal and material reporting obligations, the form and content of the report, the processing of information, and final provisions regulating the enforcement and effective date of the legislation. Failure to comply with the reporting obligations by the designated persons is sanctioned under § 49c of the Financial Penal Act. The EU Mandatory Disclosure Rules The aim of the EU Mandatory Disclosure Rules is to "increase transparency in the area of direct taxation" and thereby combat tax avoidance and tax evasion practices in the internal market. Both the European Commission and the national legislator have recognized the risk of eroding corporate tax bases through tax planning structures. Accordingly, the national legislator, in line with DAC 6, has set the goal to promptly close tax loopholes arising from aggressive tax planning arrangements through an international exchange of information. The national legislator followed the directive's guidelines in implementing DAC 6, which is why purely domestic arrangements are not within the scope of the EU Mandatory Disclosure Rules.

4. Legal Policy Background.

The Work of the OECD on BEPS Action 2 as a Starting Point Hybrid mismatch arrangements - as a general term for the use of hybrid financial instruments and hybrid entities - have been a focal point of tax policy discussions for some time. This is especially due to the tax advantages usually associated with these arrangements for the taxpayer, which are regularly deemed undesirable by the affected states. Thus, in cross-border situations, the differing tax treatment of hybrid arrangements in the involved states creates numerous possibilities to reduce the overall tax burden.[9] Against this backdrop, the OECD has recently addressed this issue within its project on combating Base Erosion and Profit Shifting (BEPS). Specifically, the outcomes of BEPS Action 2 include a set of recommendations for national tax legislatures to neutralize the effects of hybrid arrangements. Under the title "Neutralizing the Effects of Hybrid Mismatch Arrangements," the OECD thoroughly examines those unwanted tax incongruities resulting from the interaction of different national tax laws.[10] The Final Report contains a comprehensive collection of examples of hybrid arrangements along with regulatory proposals, directly targeting national tax legislatures. The OECD's aim is to provide tax legislators with a comprehensive toolkit for combating the effects of hybrid arrangements. The proposed regulations are designed to address the unwanted tax effects arising from differing legal

[9] Vgl dazu ausführlich Mechtler, *Hybrid Mismatches mi Ertragsteuerrecht* (2017) 16 f; M. Lang, G. Kofler, J. Schuch, *Die Anti Tax avoidence Richtlinie,* p. 134 ff.

[10] M. Lang, G. Kofler, J. Schuch, *Die Anti Tax avoidence Richtlinie,* p. 133 ff

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assessments in various national tax systems. Such tax incongruities are intended to be neutralized by linking the tax treatment in one state with the tax treatment in another state. This results-oriented concept of the OECD is already evident in the title of the relevant OECD work, expressing the aim of neutralizing the "effects" of hybrid arrangements. However, these regulatory proposals are not binding due to the OECD's lack of sufficient democratic legitimacy to enact legally binding regulations. Therefore, they are not mandatory for implementation in the respective states. Rather, the OECD's specific regulatory proposals are merely non-binding recommendations for tax legislators at the national and Union law levels. Their actual implementation thus largely depends on the respective legal policy willingness of the tax legislators.[11]

4.1. The Genesis of Article 9 of the ATAD.

In addition to the OECD's BEPS project, significant work at the EU law level merits attention. In light of the OECD's final results presented in October 2015, the European Commission addressed the implementation of these regulatory recommendations within the EU.[12] Explicitly referencing these efforts, the European Commission targeted tax avoidance practices with direct implications for the functioning of the internal market and, among many other measures, focused on combating hybrid mismatches. The European Commission's Directive proposal[6] initially aimed at the root of hybrid mismatches[13] —the underlying qualification conflict in the involved jurisdictions—proposing the adoption of the legal classification of a hybrid instrument or entity by another state. Through this qualification linkage, the Directive sought to eliminate the hybrid mismatch itself, ensuring the deduction of the same expense only once and the taxation of payments in connection with hybrid entities or financial instruments once.The EU Anti Tax

[11] Siehe Kofler, Von BEPS (OECD) zur Anti-BEPS-RL (EU), in Kirchmayr/Mayr/Hirschler/Kofler (Hrsg) Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch? (2017) 2 (4 ff); Hofmann/Wenzl/Zehetmayer

[12] In this sense, for instance, the directive proposal already emphasized the need to "make rapid progress in reaching an understanding on regulations for a coordinated implementation of the BEPS conclusions in the EU," since "uncoordinated actions by individual Member States pose significant risks for fragmentation of the internal market"; see 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 (28.1.2016) 6; for this, see, for example, Jochimsen/Zinowsky, ISR 2016, 106 (108).

[13] The policy proposal included provisions for the deductibility of interest, taxation of departures, the switch from the exemption method to the credit method (switch-over clause), a general provision to prevent abuse, regulations for controlled foreign corporations, and a framework for combating hybrid mismatches; see policy proposal ATAD, COM(2016) 26 final (28.1.2016) 3; for an overview of the individual provisions, refer to Luka/Petutschnig, Die EU-Kommission im Kampf gegen BEPS -Das EU-Maßnahmen- paket zur Bekämpfung von Steuervermeidung, ÖStZ 2016, 358 (358 f); Kofler, Maßnahmenpaket der EU-Kommission zur Bekämpfung von Steuervermeidung, GES 2016, 11(f).

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Avoidance Directive (ATAD), adopted by the Council of the EU in July 2016 as a result of these efforts, also addresses the combat against hybrid mismatches. The ATAD's relevant regulations link the tax treatment of a payment to the tax treatment of the payment at another taxpayer, based on an inter-personal regulatory concept. The ATAD follows the OECD's recommendations, which propose linking the tax treatments of various taxpayers through so-called Linking Rules. The ATAD, adopted in July 2016, initially included only two succinct Linking Rules concerning the combat against the effects of hybrid mismatches in Article 9: (1) Where a hybrid arrangement leads to a double deduction, the deduction is only granted in the member state from which the payment originates. (2) Where a hybrid arrangement leads to a deduction without taxation, the member state of the payer denies the deduction of the payment.[14]The original version of the ATAD, to neutralize the undesired tax effects of hybrid mismatches, thus codified two prohibitions on deductions: In the case of a double deduction for business expenses, the deduction is only allowed in the member state from where the payment originates. The other member state denies the double deduction of the corresponding payment, insofar as the payment is also deductible in the source state. Additionally, a deduction for a payment at a taxpayer in a member state is denied if the corresponding payment is not taxed at the recipient in another member state. However, upon the adoption of the ATAD, the need for refinements and additional regulations regarding Hybrid Mismatches was evident, especially for hybrid arrangements in relation to third countries and those concerning permanent establishments. On 25 October 2016, the European Commission presented a first Directive proposal[15] to the Council for amending the ATAD as adopted in July 2016 regarding hybrid mismatches with third countries.[16] After several amendments, the ECOFIN reached a political agreement on this Directive proposal on 21 February 2017. Based on this ECOFIN draft, the ATAD amendment Directive (ATAD 2) was adopted on 29 May 2017 with

[14] Siehe Vorschlag für eine Richtlinie des Rates mit Vorschriften zur Bekämpfung von Steuervermeidungspraktiken mit unmittelbaren Auswirkungen auf das Funktionieren des Binnenmarkts, COM (2016) 26 final (28.1.2016).

[15] Der Richtlinienvorschlag umfasste Regelungen zur Abzugsfähigkeit von Zinsen, zur Wegzugsbesteue- rung, zum Wechsel von der Freistellungs- zur Anrechnungsmethode (Switch-over-Klausel), eine al- gemeine Vorschrift zur Verhinderung von Missbrauch,Vorschriften für beherrschte ausländische Unternehmen sowie eine Rahmenregelung für das Vorgehen gegen hybride Gestaltungen; vgl Richt- linienvorschlag ATAD, COM(2016) 26 final (28.1.2016) 3; siehe für einen Überblick über die einzelnen Regelungen Bz Luka/Petutschnig, Die EU-Kommission im Kampf gegen BEPS -Das EU-Maßnahmen- paket zur Bekämpfung von Steuervermeidung, ÖStZ 2016, 358 (358 f); Kofler, Maßnahmenpaket der EU-Kommission zur Bekämpfung von Steuervermeidung, GES 2016, 11(f).

[16] Vgl ATAD, ErwGr 13: „Es ist entscheidend, dass weitere Arbeiten zu hybriden Gestaltungen zwischen Mitgliedstaaten und Drittländern sowie zu anderen hybriden Gestaltungen (z.B. solchen, die Betriebsstätten betreffen) durchgeführt werden."; S. Kirchmayr, G. Mayr, K. Hirschler, G.Kofler (Hrsg), *Anti- BEPS-Richtlinie: Konzernsteuerrecht im Umbruch?* 137 f.

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a unanimous vote by the Council. Therefore, when referring to the ATAD herein, it refers to its version as amended by ATAD 2. Unlike the OECD's non-binding regulatory proposals, the ATAD's regulations on combating hybrid mismatches are notably characterized by their legally binding nature. EU member states are obliged to implement the ATAD's secondary legal provisions into national law. Against this backdrop, the following contribution first provides an overview of the aforementioned Directive provisions. Subsequently, the implementing Linking Rules are analyzed in the light of EU law, before then considering their implementation in Austria and in Germany.

4.2 Combatting Hybrid Mismatches under ATAD.

4.2.1 The Concept of Hybrid Mismatches as Defined in Article 2 Paragraph 9 of ATAD.

ATAD includes in Article 2 Paragraph 9 a set of legal definitions for hybrid mismatches, which are targeted by the specific provisions in Articles 9, 9a, and 9b. Compared to its original version and the directive proposal by the European Commission underlying ATAD 2, the now adopted ATAD 2 encompasses a significantly broader concept of "hybrid mismatches."[17]The scope is not limited - as in the original version of ATAD - to situations between EU Member States but also extends to hybrid mismatches in relation to third countries. Moreover, following the OECD's proposal suggestions, a variety of hybrid mismatches related to permanent establishments, dual-resident entities, hybrid transfers, and reverse hybrid mismatches are also covered. A hybrid mismatch is defined in Article 2 Paragraph 9 Subparagraph 1 of ATAD as a situation related to a taxpayer or, in reference to Article 9 Paragraph 3, to an entity, where: a) a payment under a financial instrument results in a deduction without corresponding inclusion for tax purposes, and i. such payment is not included within a reasonable period; ii. this discrepancy is due to differences in the recognition of the instrument or the payment made under it; b) a payment to a hybrid entity results in a deduction without corresponding inclusion for tax purposes, and this discrepancy is due to differences in the allocation of payments to the hybrid entity according to the tax laws of the jurisdiction where the hybrid entity is located or registered, and of the jurisdiction of a person with an interest in this hybrid entity; c) a payment to an entity with one or more permanent

[17] Siehe Ch.Schlager, *Hybride Gestaltungen*, in Kirchmayr/Mayr/Hirschler/Kofler (Hrsg), Anti-BEPS-Richtlinie: Konzernsteuerrecht mi Umbruch? (2017), p. 12 ss; Ch. Schlager, Änderung der Anti-BEPS-Richtlinie: Neue Bestimmungen für hybride Gestaltungen, SWI 2017, 352 (352).

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establishments results in a deduction without corresponding inclusion for tax purposes, and this discrepancy is due to differences in the allocation of payments between the head office and a permanent establishment or between two or more permanent establishments of the same entity according to the tax laws of the jurisdiction where the entity operates; d) a payment as a result of a payment to an disregarded permanent establishment leads to a deduction without corresponding inclusion for tax purposes; e) a payment by a hybrid entity results in a deduction without corresponding inclusion for tax purposes, and this discrepancy is due to the fact that the payment is not recognized under the tax laws of the jurisdiction of the recipient; f) a deemed payment between the head office and a permanent establishment or between two or more permanent establishments leads to a deduction without corresponding inclusion for tax purposes, and this discrepancy is due to the fact that the payment is not recognized under the tax laws of the jurisdiction of the recipient; g) a double deduction occurs.

The existence of a hybrid mismatch requires, according to Article 2 Paragraph 9 Subparagraph 2 lit c ATAD, additional conditions on a personal level. Besides situations between associated enterprises, between a taxpayer and an associated enterprise, between the head office and a permanent establishment, or between two or more permanent establishments of the same enterprise, cases of hybrid mismatches that are based on a "structured arrangement" are also covered.

4.3 Detailed Provisions for Combatting Hybrid Mismatches.

4.3.1. Combatting Double Deduction Outcomes in connection with Hybrid Entities.

A hybrid mismatch can first lead to the same payment being deducted by two different taxpayers (Double Deduction, DD-outcome). Such a DD-outcome may be achieved, for example, through the use of a hybrid subsidiary that takes out a bank loan and makes deductible interest payments. From the perspective of the state of the resident parent company, the hybrid subsidiary is treated as transparent for tax purposes, and the deduction of interest payment is therefore allocated to the parent company. From the perspective of the other state, the hybrid subsidiary qualifies as an independent taxpayer, and the deduction of interest payment is thus claimed simultaneously by the subsidiary. As a result, the qualification conflict regarding the hybrid payee leads to a double deduction (DD-outcome) of the same payment by two different taxpayers. Furthermore, a DD-outcome can also occur in situations where a

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payment is allocated to a foreign permanent establishment.[18] In this case, the payment is deductible under the national laws of the location state of the permanent establishment. At the same time, deductibility may also exist under the unlimited tax liability in the company's state of residence if the existence of a foreign permanent establishment is denied by the state of residence. DD-outcomes in connection with dual-resident entities are targeted by a separate provision. Article 9 Paragraph 1 of ATAD prescribes the following regulation for combatting such DD-outcomes: "As far as a hybrid mismatch leads to a double deduction, a) the deduction is denied in the member state which is the tax jurisdiction of the investor; and b) if the deduction is not denied in the tax jurisdiction of the investor, the deduction in the member state, which is the tax jurisdiction of the payer, is denied. However, such a deduction may be offset against income that is doubly included for tax purposes, regardless of whether it arises in a current or a later period."

If a hybrid mismatch leads to a double deduction, according to Article 9 Paragraph 1 lit a ATAD, the deduction of the payment is denied by the state of residence of the member involved in the hybrid entity. In situations where the deduction is not denied in the tax jurisdiction of the investor, the member state that is the tax jurisdiction of the payer, according to Article 9 Paragraph 1 lit b ATAD, denies the deduction of the payment. Consequently, a double deduction of a payment is primarily prevented by a prohibition of deduction in the state of residence of the shareholder. However, if such a prohibition of deduction is absent in the state of residence of the shareholder, the member state of the paying hybrid entity is obliged to refuse the double deduction. Given the implementation obligation in the member states, the application of the restriction on deduction prescribed in Article 9 Paragraph 1 lit b ATAD in the state of establishment is only conceivable in third-country situations. Hence, if a DD-outcome occurs in relation to a third country and there is a lack of a restriction on deduction in the third country due to the absence of an implementation obligation, the respective member state denies the deductibility of the payment. However, the prohibition on deduction for DD-outcomes, as explicitly limited in the last sentence of Article 9 Paragraph 1 ATAD, only applies to the extent that the deductible payments are not offset by doubly included income (so-called dual inclusion income).[19]

[18] Vgl OECD, Action 2- Final Report (2015) 16 Rz 6; de Boer/Marres, BEPS Action :2 Neutralizing the Effects on Hybrid Mismatch Arrangements, Intertax 2015, 14 (16 f); Schnitger/Weiss, Empfehlungen der OECD zu „Hybrid Mismatches" für die nationale Steuergesetzgebung, IStR 2014, 508 (508).

[19] P. Pistone, D. Weber D. (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD, 2018.

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4.3.2 Combatting Imported Hybrid Mismatches.

ATAD further prescribes an explicit prohibition on deductions to combat the importation of the effects of hybrid mismatches from third countries. In these scenarios, the undesired tax outcome (DD or D/NI-outcome) is transferred from a third country to an EU Member State via a non-hybrid, i.e., uniformly classified, financial instrument. Several third countries are involved in the hybrid arrangement itself, while the resultant effect is then imported into an EU Member State through a uniformly assessed instrument (so-called indirect DD or D/NI-outcomes). For instance, a deductible payment could be made from a Member State to a recipient resident in a third country through an ordinary loan. The income is taxed in the third country; however, it is subsequently offset by a deduction due to a hybrid arrangement. The hybrid arrangement occurs between two third countries, resulting in the income ultimately not being taxed (so-called indirect D/NI-outcome). The offset at the recipient resident in a third country could also be done with a deduction that is double deductible (so-called indirect DD-outcome).

To combat such indirect hybrid mismatches, Article 9 Paragraph 3 of ATAD provides the following regulation: "A Member State shall deny the deduction for a payment by a taxpayer to the extent that this payment flows directly or indirectly into deductible expenses that lead to a hybrid mismatch through a transaction or a series of transactions between associated enterprises or as part of a structured arrangement, unless one of the tax jurisdictions involved in the transaction or series of transactions has made an equivalent adjustment in respect of this hybrid mismatch."

The Member State of residence of the payer denies the deductibility of payments if these payments directly or indirectly "lead to a hybrid mismatch through a transaction or a series of transactions between associated enterprises or as part of a structured arrangement." By denying the deductibility, the transfer of the tax-undesirable effect of a hybrid arrangement from third countries into an EU Member State is prevented.[20]

4.3.3 The fight against DD (Double Deduction) outcomes in the context of dual-resident entities.

The ATAD (Anti-Tax Avoidance Directive) also targets DD outcomes attributable to the dual residency of the payor. If the taxpayer making the payment is considered resident in more than one tax jurisdiction according to the respective national legal provisions, a payment may be allowed as a deduction for tax purposes in two states.

[20] P. Pistone, D. Weber D. (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD, 2018; M. Lang, G. Kofler, J. Schuch, *Die Anti Tax avoidence Richtlinie*, p. 143 ff.

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To combat these DD outcomes in connection with dual-resident entities, Article 9b ATAD prescribes the following rule: "To the extent that a deduction for a payment, or for expenses or losses, by a taxpayer who is tax resident in two or more tax jurisdictions is not deductible in both tax jurisdictions from the tax base, the Member State of the taxpayer shall deny the deduction to the extent that in the other tax jurisdiction the double inclusion of income, which is not subject to double consideration for tax purposes, is allowed. If both tax jurisdictions are Member States, the Member State in which the taxpayer is not considered a resident under the double taxation agreement between the two concerned Member States shall deny the deduction."

Should the undesirable tax effect of the DD outcome occur between a Member State and a third state, neutralization is achieved through a deduction ban in the respective Member State. The Member State denies the dual-resident taxpayer a double deduction to the extent that the payment in the other state is not considered double inclusion income.[21] In relationships between two Member States, the deduction ban is directed at the Member State that is not considered the state of residence under the respective double taxation agreement. In these cases, the specific treaty-based tie-breaker rule agreed upon becomes crucial.

5. The implementation of art. 9 Atad with regard of the German legal order in view of DD (Double deductions)

5.1 Double Deduction, § 4k (4) EStG (Income Tax Act).

§ 4k (4) EStG verbatim states: "To the extent that the conditions for the denial of the deduction of business expenses according to the preceding subsections are not already met, expenses are also not deductible as business expenses to the extent that the expenses are also taken into account in another state. The consideration of expenses in the sense of sentence 1 also occurs for unlimited tax liabilities when the other state does not allow the deduction of expenses according to its rules that correspond to this or the preceding subsections[22]; this does not apply if the deduction of expenses by a direct or indirect shareholder of an unlimited taxpayer in the sense of § 1 of the Corporate[23]Income Tax Act in another state is not allowed based on a

[21] Der Text ist auf der BMF-Homepage abrufbar unter https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_IV/19_Legislaturperiode/Gesetze_Verordnungen/ATADUmsG/1-Referentenentwurf.pdf.

[22] A. F. Uricchio, F. L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, 2020.

[23] Siehe bereits Richtlinienvorschlag ATAD 2, COM(2016) 687 final (25.10.2016) 13; siehe ATAD 2, ErwGr 26.

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rule corresponding to this paragraph. Sentence 1 does not apply insofar as these expenses are demonstrably offset by revenues of the same taxpayer, which are subject to actual taxation both domestically and in the other state. For unlimited taxpayers, where double taxation is avoided by crediting foreign tax, sentences 1 to 3 only apply to the extent that the expenses also reduce revenues in another state that are not subject to domestic taxation."[24]

§ 4k (4) EStG is the central norm for preventing the double deduction of expenses. The draft version opts for a quite complex rule-exception relationship, which (at least usually) leads to appropriate results. According to § 4k (4) sentence 1 EStG, a deduction for business expenses in Germany is denied to the extent that expenses are also considered in another state. The regulation thus addresses arrangements leading to a taxation incongruence in the form of a double deduction for business expenses (DD incongruences), often based on a payment by a hybrid entity or a credit operation branch to a third party abroad. However, a particular hybrid element is not a prerequisite. In the case of a hybrid entity [25]treated as opaque by the state of residence but transparent by the state of the shareholders, this can lead to the expenses being tax-deductible both in the state of the entity's residence and in the state of the shareholders, provided the shareholder's state does not allocate the expenses to a foreign exemption operation branch. A double deduction of business expenses may also result from the expenses being deductible in the state of a credit operation branch and, due to the principle of worldwide income, also reducing the tax base of the taxpayer (investor) in the state of residence. In this instance, according to the legislative reasoning, the tax treatment of expenses and revenues in the investor's state, regardless of tax considerations in another state, is inherent to the system. For this reason, sentence 4 provides an exception from the deduction prohibition when the expenses of unlimited taxpayers reduce income from a source for which double taxation is avoided by crediting the foreign taxes levied on such income (for exceptions from the deduction prohibition in other cases, refer to sentence 3). Sentence 2 of § 4k (4) EStG, in conjunction with sentences 1 and 3, dictates which state has the primary obligation to deny the deduction of business expenses in case of a DD incongruence. Sentence 2 stipulates that for unlimited taxpayers, a consideration of expenses in another state as per sentence 1 also occurs

[24] H. Weber-Grellet, *§ 4k para. 4 EStG*, in , L. Schmidt, *Einkommensteuergesetz*, 40 Auflage, 2021.

[25] In German tax law, the term "hybrid financial instrument" is predominantly found in a different context. Here, "hybrid" sometimes simply refers to instruments that contain elements of both equity and debt capital (thus serving as a synonym for mezzanine capital, such as profit participation rights) and/or to instruments that are treated as equity in tax law but as debt in commercial law, or similar situations (see, for example, Kahlenberg, IStR 2019, 636). However, this is not the focus of the discussion that follows. Instead, "hybrid" is defined exclusively by the tax consequences it entails, namely, the tax treatment of payments as deductible in Germany and simultaneously tax-exempt in the recipient's country.

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when the other state already denies the deduction of expenses according to a rule equivalent to § 4k paragraphs 1 to 4 EStG.[26] This ensures that the application of § 4k (4) sentence 1 EStG for expenses of an unlimited taxpayer is not excluded merely because the foreign state, in implementing the ATAD, also provides for a deduction prohibition. Whether the business expense deduction is to be denied in this instance ultimately depends on whether the conditions of sentence 3 are met. This results in a scenario where, in the case of unlimited tax liability in Germany, § 4k (4) sentence 2 EStG could lead to a double non-deductibility of expenses if the deduction is also denied abroad. This double non-deductibility, however, is not considered if all states comply with the ATAD directives, allowing Germany, in this constellation, the right to first deny the deduction.

However, if countries are not subject to the ATAD, this regulation can lead to a double non-deductibility of business expenses. § 4k (4) sentence 2 clause 2 EStG provides an exception to the deduction prohibition if the state of the direct or indirect shareholder of the corporation with unlimited tax liability in Germany is permitted to deny the deduction. Therefore, it is primarily the investor's state or the "parent company's" state that should rectify the taxation incongruity, with the "payer's" state doing so subsequently. Further exceptions are contained in sentences 3 and 4. On one hand, sentence 1 does not apply insofar as the expenses are demonstrably offset by revenues of the same taxpayer, which are subject to actual taxation both domestically and in the other state. On the other hand, sentence 4 provides an additional exception to sentences 1 to 3 EStG to the extent that for taxpayers with unlimited tax liability, where double taxation is avoided by applying the credit method, sentences 1 to 3 only apply if the expenses also reduce revenues that are not subject to domestic taxation.[27]

Background of the Regulation § 4k (4) EStG serves as the central norm for preventing the double deduction of expenses and thus implements Article 9 (1) a) in conjunction with Article 2 (9) subparagraph 1 letter g and Article 9b ATAD. The essence of the directive's regulation is contained in Article 9 (1) of ATAD II, stating: "To the extent a hybrid mismatch results in a double deduction, the deduction shall be denied in the Member State of the taxpayer; and if not denied in the Member State of the taxpayer, the deduction shall be denied in the Member State of the payee." The "hierarchy" of the affected states is regulated by Article 9b ATAD II, stating: "To the extent a deduction for a payment, or for expenses or losses of a taxpayer, who is tax resident in two or more tax jurisdictions, is deductible in both tax jurisdictions from the tax

[26] A. Schnitger, J. Haselmann, *Die Anwendung des § 4k EStG und die erweiterten Mitwirkungspflichten, in ISR(Internationale Steuerplanung/Verrechnungspreise)*, 2022, 13-22.

[27] Vgl. etwa Beck'sches Steuer- und Bilanzrechtslexikon, Stand 01.10.2019, "*Anti Tax Avoidance Directive* (ATAD I und II); V. Emmerich, M. Habersack, (*Konzernrecht), Aktien- und GmbH-Konzernrecht*, 2022.

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base, the Member State of the taxpayer shall deny the deduction to the extent that in the other tax jurisdiction, the second deduction against income not subject to double taxation is allowed. If both tax jurisdictions are Member States, the Member State in which the taxpayer is not considered resident under the double taxation agreement between the two concerned Member States shall deny the deduction."

§ 4k (4) EStG closely follows the text of the directive but is challenging to understand due to the included rule-exception relationship.[28]

Example 2: Double Deduction – § 4k (4) sentences 1 and 4 The D-GmbH, which is subject to unlimited tax liability in Germany, is classified as a partnership for tax purposes in a foreign country (State B). The D-GmbH pays interest under a loan agreement to a third party. The interest reduces the tax base for both the D-GmbH and B Co. The conditions of § 4k (4) sentence 1 EStG are generally met. However, since the D-GmbH is considered an "unlimited taxpayer" from a German perspective, the exception of § 4k (4) sentence 4 EStG may apply if State B denies the business expense deduction according to a rule comparable to paragraph 4 (and potential double taxation is avoided by the credit method).

Preliminary Assessment § 4k (4) EStG implements the relevant ATAD provisions accurately and consistently, in our opinion. However, the chosen rule-exception relationship does not facilitate the readability of the norm. Only a look into the legislative justification, which vividly describes the scope of application, leads to greater clarity.[29]

5.2 Implementation of DAC 6 in Germany.

In Germany, the EU Directive was transposed into national law through the Act on the Obligation to Report Cross-Border Tax Arrangements, announced on December 21, 2019, and coming into force on January 1, 2020 (Federal Law Gazette I 2019, 2875), incorporating §§ 138d to 138k AO into the Fiscal Code.

The (tax authority's) interpretation and application of the law are supported by guidance from the Federal Ministry of Finance (BMF) dated March 29, 2021. This guidance was last amended by a BMF letter dated January 23, 2023. In addition to specific amendments to the existing regulations on the reporting obligation for cross-border tax arrangements (§§ 138d et seq. AO), the draft proposal envisages extending

[28] H. Weber-Grellet, *§ 4k para. 4 EStG*, in , L. Schmidt, *Einkommensteuergesetz*, 40 Auflage, 2021.

[29] S. Latrovalis, *Hybride Gestaltungen nach dem Entwurf des ATAD-Umsetzungsgesetzes Erste Überlegungen zu § 4k EStG-E in der Fassung des Referentenentwurfs vom 10.12.2019*,p. 48 ff.

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the already introduced reporting obligations to domestic tax arrangements (new §§ 138l to n AO-E). Is there a cross-border element? A cross-border element exists according to § 138d (2) AO when either more than one Member State of the European Union is involved or at least one Member State of the European Union and one or more third countries are affected. For instance, it suffices if not all parties involved in the arrangement are resident in the same tax jurisdiction or at least one of the parties is resident in multiple tax jurisdictions.[30]

All types of taxes are covered by the reporting obligation, with the exception of VAT, customs duties, and excise taxes. A "tax arrangement" as defined by § 138d AO exists, among other criteria, if it features at least one hallmark as per § 138e (1) AO and "a reasonable third party would expect, considering all relevant facts and circumstances, that the main benefit, or one of the main benefits, is the obtaining of a tax advantage as per § 138d (3) AO." It is common for lawyers involved in implementing arrangements to merely execute contractually what has been developed by other advisors, particularly tax advisors. Hence, the implementing lawyer may not be able to recognize whether it involves the implementation of a tax arrangement. In such cases, it is necessary to investigate with the client whether there is a tax-related background to the respective contract.

Moreover, the question is raised regarding the person, who is obligated to report. If the aforementioned investigation reveals a reportable cross-border tax arrangement, it must be clarified who is obligated to report. Generally, this is the "user," namely the client. Additionally, intermediaries are independently obligated to report (anonymously). If the client waives confidentiality obligations, the reporting obligation, including client-specific data, is fully transferred to the intermediary, and the "user" is exempted from the reporting obligation. In cases involving multiple intermediaries, § 138f (9) sentence 2 AO provides an exemption from the reporting obligation if the intermediary can prove that another intermediary has already transmitted the required information regarding the same tax arrangement. This may be particularly relevant for a lawyer who merely implements an arrangement developed by another advisor. However, coordination between the client and intermediaries should be documented as evidence of one's own exemption. According to para. 100 of the BMF guidance, it suffices if one of several intermediaries retains the registration number provided by another intermediary and reports it only upon request from the Federal Central Tax Office (BZSt) or the competent tax authority. The BZSt had already considered this facilitation before the

[30] S. Latrovalis, *Hybride Gestaltungen nach dem Entwurf des ATAD-Umsetzungsgesetzes Erste Überlegungen zu § 4k EStG-E in der Fassung des Referentenentwurfs vom 10.12.2019*,p. 48 ff.

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publication of the BMF guidance.[31]

At this very point the question is raised regarding the way reporting should be conducted. If previous examinations indicate that the advising lawyer is themselves obligated to report, the following procedure must be followed: Reportable cross-border tax arrangements must be reported exclusively in the officially prescribed dataset via the officially determined interface to the BZSt. Reporting must be done electronically according to §§ 87a, 87b AO. According to a BMF letter dated April 29, 2020 ("DAC 6 BMF Letter"), the officially prescribed dataset for these notifications is available for viewing and downloading on the BZSt website under the sections "Businesses," "International Information Exchange," "Exchange of Tax Arrangements," "The DAC 6 Procedure" or "Individuals," "Exchange of Tax Arrangements," "The DAC 6 Procedure". The DAC 6 BMF Letter further states that data transmission can occur via the ELMA interface for bulk data reporters or via the BZSt Online Portal (BOP) using the DAC-6 form for individual data reporters. Lawyers must assess on a case-by-case basis whether a reportable cross-border tax arrangement exists, based on legal criteria and the explanations in the BMF guidance. The outlined examination scheme can provide assistance for this assessment. The argument of "violating professional confidentiality" cannot be opposed, as the legislator deliberately accepted a potential violation of professional confidentiality obligations.[32]

6. A comparative overview to the Austrian legal order.

6.1 § 14 KStG - Implementation of ATAD in National Law.

The measures of ATAD and subsequently ATAD II[33] are more extensive than those regulated in national law up to the Tax Reform Act 2020. ATAD includes, besides the mentioned form of Deduction/Non-Inclusion cases, which are regulated in Art 9 (1) lit b, also hybrid mismatches causing double deduction of expenses. These Double Deduction cases were implemented in Art 9 (1) lit a ATAD. In addition, Art 9 (3) addresses hybrid mismatches involving third countries, and Art 9a ATAD covers reverse hybrid mismatches. Lastly, Art 9b ATAD determines the treatment of hybrid mismatches for dual-resident corporations.

Given the deadline for transposing ATAD provisions into national law by January 1, 2020, legislative action was required. The Tax Reform Act 2020 thus legislatively

[31] P. Eckl, F. Schill , *DAC6 Implementation in Germany, European Taxation* (2021).

[32] D. W. Blum, A. Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 2, European Taxation* (2019).

[33] I. Krause, *Umsetzung der ATAD II in Bezug auf hybride Gestaltungen mit Unternehmen*, DB (2019), 1097–1104.

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implemented the special provision for hybrid mismatches in § 14 KStG.

General – Scope of Application.

The general scope of application of § 14 KStG is defined in subsection 1. Accordingly, the special provision for hybrid mismatches applies when the factual elements of a tax discrepancy as defined in § 14 (2) KStG are met. §§ 14 (3) to (5) KStG subsequently outline the types of tax discrepancies in the form of hybrid mismatches. If such a form of arrangement exists, it must be neutralized according to the provisions of § 14 (6) to (10) KStG. The term "to neutralize" is understood as an umbrella term for measures according to § 14 (6) to (9) KStG, which, depending on the form of a hybrid mismatch, either deny a deduction for business expenses or prescribe inclusion as business income. § 14 (10) KStG specifies the procedural legal consequences for a hybrid mismatch that was neutralized domestically and subsequently neutralized abroad. The conditions of application are codified in § 14 (2) to (5) KStG. If these conditions are met, legal consequences to prevent a tax discrepancy occur. The legislature adopted the definition of "tax discrepancy" from Art 2 (9) ATAD and defined an identical expression in national law, corresponding to the incongruences of ATAD. ATAD or the law determines two forms of tax discrepancies resulting in undesired cross-border tax outcomes.

Deduction/Non-Inclusion This pertains to payments deductible under the national law of the payor but the resulting income is not taxed in the state of the payee.

Double Deduction This involves payments that justify a deduction for business expenses in multiple states.

From the perspective of proportionality, these forms of tax discrepancies should only be addressed if a hybrid arrangement according to the provisions of § 14 (3) to (5) KStG exists. Regarding proportionality, the legislature refers to ATAD, which specifies that a hybrid arrangement should only be neutralized if there is a "significant risk" of tax avoidance. This is the case for arrangements within a company between the headquarters and a permanent establishment, between two or more permanent establishments of the same company, between associated companies, or within a structured arrangement.[34]

6.2 Requirements for Hybrid Mismatches.

Tax discrepancies as defined in § 14 (2) KStG are only harmful if the application

[34] V. Kaminskiy, *Korrespondenzregelungen zur Neutralisierung von Besteuerungsinkongruenzen aufgrund hybrider Gestaltungen*, 2020.

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requirements according to § 14 (3) KStG are met. According to the law, a hybrid arrangement exists only if § 14 (3) Z 1 and 2 KStG are both present. This means a hybrid arrangement must exist between related companies or through a structured arrangement.The law categorically lists the forms of hybrid arrangements into two groups. § 14 (3) Z 1 lit a KStG describes Deduction/Non-Inclusion cases, and § 14 (3) Z 1 lit b KStG outlines Double Deduction configurations, following the definition in Art 2 (9) ATAD.§ 14 (3) Z 1 lit a TS 1 KStG covers hybrid financial instruments. For the definition of financial instruments, one must refer to Art 2 (9) lit j ATAD. According to this provision, a financial instrument must fit into categories that may lead to financing or equity income, or be classified as a debt, capital, or financial derivative of the payor or payee, also covering a hybrid transfer.[35]

In the explanatory memorandum to the initiative request of the Tax Reform Act 2020, the national legislator refers to ATAD concerning these Deduction/Non-Inclusion cases. A hybrid arrangement can result from payments related to a financial instrument if a tax-effective deduction in the payor's state does not result in corresponding taxable income in the recipient's state, solely due to the different classification "of the instrument or the payment within this instrument." If the classification of these payments in the recipient state's national law leads to a tax advantage through the avoidance of double taxation, this results in a hybrid arrangement in the payor's state to the extent of the under-taxed amount. Tax advantages to avoid double taxation include income exemptions, reductions in tax rates, tax credits, or tax refunds. However, in the payor's state, there is no hybrid arrangement if, in the recipient state, the tax reduction is based only on the recipient's tax status or if the income is subject to a separate tax regime, thus a preferential regime. To better understand this provision, it is illustrated with an example: In State A, the company A CO is resident, and in State B, its subsidiary B CO. A CO grants a loan to B CO, which is legally classified as equity in B CO in State A. The interest payments from B CO to A CO, due to the granted loan, are legally classified as deductible business expenses in State B. However, in State A, these interest payments, due to their classification as equity, fall under the exemption for participation income and thus do not constitute business income. The different classifications, equity in State A and loan in State B, and the resulting tax consequences constitute a tax discrepancy according to § 14 (2) Z 1 KStG in the form of a hybrid financial instrument according to § 14 (3) lit a TS 1 KStG. If the financial instrument triggers the same legal tax consequences in both the payer and recipient states, no hybrid financial instrument exists. This provision is to be considered independently of a tax exemption or low taxation of interest income in the recipient's

[35] P. Eckl, F. Schill , *DAC6 Implementation in Germany, European Taxation* (2021).

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state of residence.[36]

6.3 Double Deduction and Neutralization Measures.

Article 14(7) of the Corporate Tax Act implements the directive provision to neutralize double deduction scenarios as per Article 9(1) of the Anti-Tax Avoidance Directive (ATAD), as well as for dual-resident corporations under Article 9b ATAD into national law. The first clause enacts the primary measure, establishing a prohibition on domestic deductions for expenses that have been accounted for twice. This scenario arises when an Austrian corporation is involved in a foreign hybrid entity or establishes a foreign permanent establishment. If payments from either of these entities are made to the domestic company and these payments are deductible in both the investor's and the payee's states, a double deduction occurs. Building on the example of tax disparity due to special tax provisions (As initially explained, Article 14(3)(1)(b) of the Corporate Tax Act identifies tax discrepancies arising from double deduction scenarios. A hybrid arrangement exists when "special tax provisions lead to a double deduction of expenses by a hybrid company, a permanent establishment, or a dual-resident corporation."[37] These cases align with those identified in the context of the Anti-BEPS project discussions at the EU level, clarifying the specific focus of the regulation. The term "special tax provisions" is not further specified by law. The explanatory notes to the initiative petition cite Austrian group taxation as an example), tax discrepancies due to Article 14(7)(1) of the Corporate Tax Act are to be neutralized. The example is modified to show that A CO is resident in Austria. Consequently, due to the special tax provision for corporate groups in State B, the interest expenses in this state are deductible, and due to the double taxation treaty (DTT) credit method between State B and Austria, the losses of the permanent establishment can also be utilized for tax purposes in Austria. There exists a hybrid arrangement as per Article 14(3)(1)(b) of the Corporate Tax Act between A CO and the permanent establishment under Article 14(3)(2) of the Corporate Tax Act. In Austria, these interest expenses are not deductible as business expenses under Article 14(7)(1) of the Corporate Tax Act and are thus neutralized.[38]

The second clause of Article 14(7) of the Corporate Tax Act enacts the secondary measure in the sense of Article 9(1)(b) ATAD, which neutralizes double deduction scenarios in the second step if Austria is the paying state and the investor state does not implement a deduction prohibition, thus lacking an equivalent provision to

[36] M. Dettmeier, I. Dörr, N. Neukam, M. Prodan, Miodrag, *Die Anti-Tax-Avoidance-Richtlinie zur Bekämpfung von Steuervermeidungspraktiken, Waskommt auf die Steuerpflichtigen zu*?, in, *NWB* (2016), 3082–3092.

[37] P. Knesl, *Entwurf des StRefG I* 2019/20 - *Ausgewählte Änderungen des Körperschaftsteuergesetzes*, ÖStZ 2019, 311.

[38] K. Staringer, *Die Umsetzung der ATAD in Österreich durch das Jahressteuergesetz* 2018, SWI 2018, 574.

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Article 14(7)(1) of the Corporate Tax Act. If a domestic permanent establishment is operated by a foreign shareholder or shares in a domestic hybrid entity are held, and there is a tax deduction of business expenses in both states, Article 14(7)(2) of the Corporate Tax Act counters this tax discrepancy. This form of neutralization is further explained through an example: A CO, resident in Austria, holds 100% of the shares of B CO, resident in State B. A CO and B CO form a tax group in Austria under Article 9 of the Corporate Tax Act. Thus, losses of the Austrian permanent establishment B BS of B CO can be offset against the income of A CO. B CO has taken out a loan from an Austrian bank, which is attributed to B BS, which also makes the interest payments leading to losses of the permanent establishment. The DTT between Austria and State B prescribes the credit method for profits or losses of permanent establishments. The losses of B BS can be utilized in State B, due to the credit method, and also in Austria due to group taxation. The special tax provision of group taxation leads to a double deduction scenario, creating a tax discrepancy under Article 14(2)(2) of the Corporate Tax Act. There is a hybrid arrangement in the sense of Article 14(3)(1)(b) of the Corporate Tax Act and the required connection between the domestic permanent establishment and its head office under Article 14(3)(2) of the Corporate Tax Act. If State B does not specify a deduction prohibition for the expenses of the permanent establishment, Article 14(7)(2) of the Corporate Tax Act prescribes a deduction prohibition regarding the interest expense in Austria.[39]

Article 14(7)(3) of the Corporate Tax Act addresses the neutralization of hybrid arrangements arising from dual-resident corporations, based on Article 9b ATAD, which prescribes a deduction prohibition for expenses domestically that are due to a double deduction scenario involving dual-resident corporations. If corporations are resident both domestically and in a third country, this deduction prohibition applies under Article 9b first sentence of ATAD, irrespective of whether Austria has a double taxation agreement with the country of residence or the source country. Article 14(6)(3) second sentence of the Corporate Tax Act limits the deduction prohibition regarding dual-resident corporations within EU member states. If a corporation is tax-resident in Austria and another member state, and according to the "tie-breaker rule" of Article 4(3) of the OECD Model Tax Convention, Austria is determined as the state of residence, the deduction prohibition does not apply. According to Article 9b second sentence of ATAD, the state deemed as the source state by the treaty is to implement the deduction prohibition domestically. Neither the legislator nor ATAD

[39] Siehe zu den Auswirkungen der Umsetzung der ATAD auf die nationalen Steuersysteme, D. Gutmann, A. Perdelwitz, E. de al Blétière, R. Offermanns, M. Schellekens, G. Gallo, A. Grant Hap, M. Olejnicka, *The Impact of the ATAD on Domestic Systems, A comparative Survey,* ET 2017, 2 (2); im Besonderen siehe für Österreich, Mechtler, *Hybrid Mismatches im Ertragssteuerrecht* (2017) 35 ff.

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has provided guidance on resolving conflicts when third countries also implement a deduction prohibition akin to Article 9b first sentence of ATAD. Applying the logic of the "tie-breaker rule," as exists between EU member states, appears appropriate for resolving conflicts of a double deduction prohibition. The provision to avoid a tax discrepancy due to a dual-resident company is further explained through the following example: A CO, due to its registered office in Austria and its place of management in State A, is dual-resident. In Austria, a tax group is formed between A CO as a group member and B CO as the group leader. The Austrian operation of A CO constitutes a permanent establishment, B BS, by treaty. The DTT between Austria and State A determines State A as the residency state of A CO. Austria is accordingly the source state. Furthermore, the DTT prescribes the credit method for permanent establishment income in State A. Through interest payments on a loan, A CO incurs losses domestically. These losses are offset against the profits of B CO due to the special tax provision of group taxation.[40] Given the credit method of the relevant DTT, these losses are also utilized in State A. Therefore, a tax discrepancy exists under Article 14(2)(2) of the Corporate Tax Act. This discrepancy is due to a hybrid arrangement in the sense of Article 14(3)(1)(b) of the Corporate Tax Act and the connection under Article 14(3)(2) of the Corporate Tax Act between A CO and its permanent establishment. Under Article 14(7)(3) of the Corporate Tax Act, these expenses of B BS in Austria are not deductible, leading to the neutralization of the tax discrepancy. In this example, it is irrelevant whether State A is a third country or an EU member state, as Austria is determined as the source state according to the relevant DTT. The final sentence of Article 14(7) of the Corporate Tax Act limits the aforementioned clauses of this provision to the extent that expenses "offset against double-counted income in the respective or a later fiscal year" are not subject to the deduction prohibition. This provision is significant for the utilization of foreign losses domestically. If the credit method, established by a DTT, applies to these losses, or if a national regulation like Article 2(8) of the Income Tax Act applies, the losses would fundamentally fall under Article 14(7) of the Corporate Tax Act. Article 14(7) last sentence of the Corporate Tax Act prevents these scenarios. The legislator focuses solely on "special tax provisions," as evident from Article 14(3)(1)(b) of the Corporate Tax Act.[41]

6.4 Application and Interpretation of the EU Mandatory Disclosure Rules.

In Austria, DAC 6 has been transposed into the EU Mandatory Disclosure Act (EU-

[40] P. Knesl, *Entwurf des StRefG I* 2019/20 - Ausgewählte Änderungen des Körperschaftsteuergesetzes, ÖStZ 2019, 311.

[41] M. Eckart, *Sondervorschriften zu hybriden Gestaltungen und ihrer Subsumtion unter die sachliche Meldepflicht*, p. 38 ff; Vgl Schlager, *Die neuen Regelungen zu hybriden Gestaltungen im Überblick*, SWI 2019, 239.

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MDR), while in Germany, the disclosure obligations have been incorporated into sections 138d et seq. of the German Fiscal Code (AO). The EU-MDR came into force on July 1, 2020 (section 27 EU-MDR) and applies (retroactively) to the exhaustively listed mandatory disclosure arrangements in sections 5 and 6 of the EU-MDR, whose first step was implemented between June 25, 2018, and June 30, 2020, as well as to those whose first step was implemented from July 1, 2020, onwards, or that have been designed, marketed, organized, made available for implementation, or managed since July 1, 2020 (section 4 EU-MDR). The reporting period is very short, set at 30 days. For intermediaries, the period begins either on the day of making the reportable arrangement available for implementation, the day following the day on which the relevant taxpayer is ready to implement it, or the day the first step in the implementation of the reportable arrangement has been taken (section 8(1) EU-MDR). The timing for auxiliary intermediaries and in cases where the relevant taxpayer releases the auxiliary intermediary from their statutory confidentiality, is separately regulated in sections 8(2) and (3) EU-MDR.[42]

Section 13 EU-MDR defines the deadlines relevant for the relevant taxpayer. Non-compliance triggers financial penalties up to 50,000 euros for financial administrative offenses, and up to 25,000 euros in cases of gross negligence, as per section 49c of the Financial Penal Act (FinStrG).

The EU-MDR largely aligns with the directive requirements. Terms relevant to the application of the EU-MDR are defined in section 3 EU-MDR. However, in practice, particularly regarding the interpretation of the hallmarks that trigger reporting obligations or the question of when a "risk of tax avoidance" exists, uncertainties remain that are not sufficiently clarified by the Federal Ministry of Finance's guidance on the application of the EU-MDR (hereinafter: BMF-Info). The same applies to the determination of a "risk of tax avoidance," which, according to the BMF, should serve as an additional verification step to prevent reporting of arrangements that are harmless or intended by the legislature. The lack of detailed guidelines and interpretative notes is justified by the BMF with the need for a uniformly European interpretation, which can only be conducted at the EU level, as explicitly mentioned in the introduction of the BMF-Info. An appropriate instrument for clarifications at the EU level would be "FISCALIS 2020," an EU cooperation program that allows tax administrations of the individual EU countries to exchange information and experiences. Currently, interpretation materials from the EU are not accessible to legal practitioners. Also, the BMF-Info on the EU-MDR has not been

[42] D. Gutmann, A. Perdelwitz, E. de al Blétière, R. Offermanns, M. Schellekens, G. Gallo, A. Grant Hap, M. Olejnicka, *The Impact of the ATAD on Domestic Systems, A comparative Survey*, ET 2017, 2 (2); im Besonderen siehe für Österreich, Mechtler, *Hybrid Mismatches im Ertragssteuerrecht* (2017) 35 ff.

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updated three years after its publication. Therefore, in practice, where the provisions of the EU-MDR correspond to sections 138d et seq. of the AO, the more comprehensive interpretative guidance from the German BMF is consulted.

7. Conclusions.

The European Union, through the Anti-Tax Avoidance Directive (ATAD) and the Directive on Administrative Cooperation (DAC), has made significant strides in combating tax avoidance and enhancing transparency within its member states. The ATAD introduces measures like the General Anti-Avoidance Rule (GAAR) and Specific Anti-Avoidance Rules (SAARs) to tackle Base Erosion and Profit Shifting (BEPS) challenges. Despite efforts towards uniformity, variations in the implementation of these directives across member states underscore the complexity of harmonizing national tax systems with EU-wide standards. The DAC[43], particularly its latest amendment, DAC 6, emphasizes the EU's commitment to transparency and cooperation, mandating intermediaries to disclose tax schemes. However, disparities in DAC 6's implementation across the EU highlight the challenges of standardization.[44]Germany's adaptation of Article 9 of ATAD in § 4k (4) of the Income Tax Act (EStG) [45]to prevent double deductions (DD) and the integration of DAC 6 into its national law exemplify the country's approach to aligning with EU directives. Similarly, Austria's legislative response under § 14 KStG demonstrates efforts to address hybrid mismatches and double deductions, reflecting a parallel approach to Germany's. These national legislations are geared towards neutralizing tax advantages arising from discrepancies in tax treatments across jurisdictions, following the comprehensive objectives of ATAD. In Germany, DAC 6 has been integrated through the Act on the Obligation to Report Cross-Border Tax Arrangements, which came into effect on January 1, 2020. This legislation has incorporated the directives into the German Fiscal Code, detailing the reporting obligations for cross-border tax arrangements that may facilitate tax avoidance or evasion. The German implementation emphasizes a comprehensive approach, including penalties for non-compliance, and is supported by guidance from the Federal Ministry of Finance (BMF) to aid in the interpretation and application of the law.

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[43] G. Capristano Cardoso, *Balancing Tax Transparency and Tax Certainty: Reporting Obligations for Unilateral Safe Harbours Under DAC 6*, *Intertax* (2021).

[44] D. W. Blum and A. Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1*, European Taxation (2019).

[45] A. Schnitger, M. Oskamp, *Versagung des Betriebsausgabenabzugs bei Besteuerungsinkongruenzen nach § 4k EStG-E (Teil I)*, in *IStR*, 2020, 909 ff, Vgl. BFH v. 30.11.1989 - I R 14/87, BStBl. II 1990, 993, unter 3.c; BFH v. 15.10.1976 - VI R32/76, BStBl. II 1976, 767 = FR 1990, 122.32) Vgl. RFH v. 9.1.1934 - I A 344/32, RFHE 35, 133; BFH v. 15.10.1976 - VI R 32/76, BStBl. II 1976,767.

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Austria, on the other hand, has transposed DAC 6 into its national legislation through the EU Mandatory Disclosure Act (EU-MDR), which also took effect on July 1, 2020. Similar to Germany, the Austrian law outlines the reporting obligations for intermediaries and taxpayers involved in cross-border tax arrangements, with a focus on arrangements that exhibit certain hallmarks indicative of aggressive tax planning. The Austrian implementation aims to increase transparency in the area of direct taxation and aligns closely with the objectives set forth by DAC 6, including the imposition of penalties for non-compliance. Both Germany and Austria, in their legal frameworks, reflect the complexities and challenges of implementing EU tax directives nationally. While there has been progress in addressing tax avoidance and promoting transparency, the variations in national implementations highlight the need for further clarification and harmonization within the EU. The effectiveness of these directives in curbing tax avoidance and ensuring a fair tax system across the Union remains contingent on achieving greater uniformity and clarity in their application at the national level.Given that no such regulations existed before, it's clear that the ATAD was poised to positively impact the reduction of tax avoidance opportunities for corporate entities. Where similar regulations were already in place, the benefit might be less evident, although these scenarios should yield benefits in terms of certainty and manageability for taxpayers, thanks to increased rule conformity.

Nonetheless, the actual positive impact in this regard could be somewhat limited due to the directive offering numerous options, leading to less harmonization in anti-avoidance regulations. This is highlighted by academic observers who predict an increase in internal market fragmentation post-directive, a viewpoint supported by the significant variation in implementation approaches across Member States as documented in the Commission's 2020 Implementation Report. This criticism, however, needs to be weighed against the alternative scenario where a lack of coordinated development in anti-avoidance rules following the BEPS consensus could have led to even higher levels of fragmentation.[46]The ATAD is now a reality; the focus is on its implementation into national law. Therefore, today, there is no longer a need to zealously discuss the policy issues surrounding BEPS, but rather to concentrate on dissecting the content of the Directive to aid in national implementation efforts.

Nonetheless, a detailed policy analysis of the ATAD serves a purpose: With the ATAD, the EU has ventured into new territory in many areas, and the question arises whether the ATAD heralds a new era of harmonization in corporate taxation within the EU. In this case, the classic questions regarding the advisability of tax

[46] W. Haslehner, K. Pantazatou, G. Kofler, A. Rust A, (eds), *A Guide to the Anti-Tax Avoidance Directive*, 2020.

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harmonization by the EU will soon resurface. This article has attempted to shed light on some of these questions.[47]

DAC 6 has emerged as the latest development in EU legislation aimed at enhancing tax transparency, with its implementation phase now concluded. The final Member States to adopt DAC 6 were Cyprus and Spain, which implemented the directive in March and April 2021, respectively. Following their adoption of the directive, the European Commission closed infringement procedures previously initiated against these countries for not incorporating the Directive into their national laws.The directive officially came into force on July 1, 2020. However, the EU permitted Member States to postpone the initial DAC 6 reporting deadlines by six months in response to the disruptions caused by the COVID-19 pandemic. Before DAC 6, there was an absence of comprehensive regulations mandating Member States to share information about detected tax avoidance and/or evasion schemes.[48] While previous DAC iterations mandated that national tax authorities share information spontaneously or automatically under specific conditions, such as tax losses or artificial profit transfers within company groups, DAC 6 fills the gap by addressing specific transparency needs not covered by earlier directives. Thus, DAC 6 represents a significant step forward in the effort to report and automatically exchange a vast array of information on tax arrangements, marking a peak in the pursuit of tax transparency and the fight against tax avoidance.The rapid adoption of DAC 6 within just nine months underscores the collective approval by Member States of its approach to discouraging intermediaries from creating and promoting tax avoidance schemes. This goal is anticipated to be achieved through the mandate for early reporting of potentially aggressive tax planning arrangements and the ensuing EU-wide automatic exchange of this information.

While both the ATAD and DAC series, particularly DAC 6, aim to mitigate tax avoidance, they employ distinct methods. The ATAD focuses on arrangements primarily created to secure tax benefits contrary to the intent of tax laws and considers the genuineness of arrangements based on their factual context. Conversely, DAC 6 operates on a broader scope, acting as a foundational step for ATAD's effective implementation by requiring the disclosure of cross-border arrangements that meet any of the specific criteria outlined in Annex IV. Notably, many of these criteria do not necessitate demonstrating that obtaining a tax advantage is the primary or one of the main expected benefits.[49]The relationship

[47]K. Resenig K., *The Current State of DAC-6 Implementation in the European Union,* European Taxation,(2020).

[48] V. Kaminskiy, *Korrespondenzregelungen zur Neutralisierung von Besteuerungsinkongruenzen aufgrund hybrider Gestaltungen*, 2020.

[49] Article 8ab (13) provides that 'The competent authority of a Member State where the information was filed pursuant to paragraphs 1 to 12 of this Article shall, by means of an *automatic exchange*, communicate the information specified in paragraph 14 of this Article to the competent authorities of all other Member States

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between General Anti-Avoidance Rules (GAARs) and Mandatory Disclosure Rules (MDR), as detailed in the BEPS Action 12 Final Report (2015), is described as complementary in ensuring compliance. The MDR aims to inform tax authorities about various tax policy and revenue risks, extending beyond those associated with transactions considered avoidance under GAAR. Therefore, the scope of reportable schemes under MDR is broader than those targeted by GAAR, encompassing arrangements not specifically addressed by the ATAD's GAAR.[50]DAC 6 stands as a foundational element in the EU's broader strategy against tax avoidance, setting a baseline for regulatory standards in this arena. While its implementation varies across member states, it establishes a more cohesive legal framework when viewed against the backdrop of global efforts, such as those led by the OECD/BEPS, where the Mandatory Disclosure Rules (MDR) in Action 12 are not deemed a minimum standard. This positions the EU at the forefront of the fight against tax avoidance. Research in jurisdictions with pre-existing MDR suggests that DAC 6's mandate for reporting cross-border arrangements will unlikely affect intermediaries' location decisions. The effectiveness of DAC 6 must be evaluated within its broader context, despite uncertainties about its scope and technical issues that have resulted in its uneven application across the EU. From both an EU and global perspective, the swift adoption and establishment of DAC 6 as a minimum standard, despite its demanding requirements for intermediaries, taxpayers, and tax authorities, signify a successful move towards minimizing tax avoidance opportunities that would otherwise proliferate in its absence.DAC 6 serves as a key complement to ATAD, reflecting the EU's commitment to combatting tax avoidance and evasion. The directive's somewhat vague definitions, such as "aggressive tax planning" and "tax avoidance," allowed member states flexibility in their implementation process, facilitating the directive's rapid adoption. However, this flexibility has led to a fragmented implementation across the EU on both fundamental and more technical aspects, such as the interpretation of various hallmarks.Given that the deadline for the first reporting period in most member states only recently concluded in January 2021, it's premature to make definitive judgments about the directive's practical impact on intermediaries and member states. Nonetheless, the uniform transposition of DAC 6 into national laws across member states has highlighted that differing interpretations of the directive's terms will likely result in the provision of varied information in terms of quality and quantity to be reported and exchanged. The directive's effectiveness should also be considered in light of external factors, such as tax administrations' ability to process information and intermediaries' willingness to

[50]B. Peeters, L. Vanneste, *An Additional Common EU Reporting Standard?*,in, *World Tax Journal*, 2020,pp. 502 ff, correctly observe that the Directive appears to be motivated by a broad policy objective to combat various forms (potentially global) of aggressive tax planning, with the enhancement of the internal market serving merely as a secondary, supporting aim.

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report and organize relevant documentation.

Viewing the directive in a contextual lens, it's clear that member states have made significant progress in recent years by adopting such a stringent anti-tax avoidance framework.[51]

[51] R. Offermanns, R.Botelho Moniz, *DAC6 in a Selection of EU Member States: The PracticalApplication of the Main Benefit Test and Its Hallmarks,* European Taxation (2021); W. Schön, *Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit ShiftingAction Plan*, in, *Bulletin for International Taxation*, 2020; V. Kaminskiy, *Korrespondenzregelungen zur Neutralisierung von Besteuerungsinkongruenzen aufgrund hybrider Gestaltungen*, 2020.

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