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*German Tax and Legal News*

## Lower house of parliament approves law to implement EU anti-tax avoidance directive into German tax law, along with other measures

Anti-hybrid rules to become effective retroactively as from 1 January 2020, including some changes from earlier proposals.

On 21 May 2021, Germany's lower house of parliament approved the "ATAD implementation law" to implement the EU anti-tax avoidance directive (including provisions of ATAD I and ATAD II) into domestic German tax law; the law also contains an extension of the 2020 tax return filing deadlines, as a response to the current COVID-19 environment. The approved version of the law includes several noteworthy amendments to the updated draft law proposal that was published by the German government on 24 March 2021 (see GTLN dated 25 March 2021), but retains provisions to implement the anti-hybrid rules within the law with retroactive effect for expenses incurred on or after 1 January 2020. Changes to the exit tax rules for individuals also would have retroactive effect (as described further below), while most other measures generally would apply as from 1 January 2022. The approved version of the law also includes provisions relating to the definition of a related person and the controlled foreign company (CFC) rules (which do not include a reduction of the low-taxation threshold for purposes of the CFC rules). The discussion below focuses primarily on the noteworthy amendments made by the approved law to the draft law that was published on 24 March 2021.

**Anti-hybrid rules**

The approved version of the anti-hybrid rules no longer includes the proposed limitation that would have prevented a dual inclusion of income (DII) from providing an exception to the denial of a deduction in the case of a deduction/non-inclusion (D/NI) situation where double taxation is avoided by means of the credit method. This change is important, in particular, for US multinational enterprises that rely on the "check-the-box" regime for US tax purposes and that have checked their foreign subsidiaries into the US. The limitation previously proposed would have gone beyond what is required as a minimum standard under the ATAD, and the change is in line with the implementation of the anti-hybrid rules in other EU member states. This should be a welcome development for taxpayers.

The rules for double-deduction (DD) scenarios have been slightly amended to take into account certain situations that involve dual resident taxpayers.

The rules for imported mismatches have been slightly amended and clarified to avoid situations where the rules would not be applicable based on a hypothetical comparison with a taxpayer that is subject to unlimited German tax liability. However, a comparison based on the German version of the anti-hybrid rules would remain applicable in the case of imported mismatches.

The approved version of the law also would introduce a new provision in the income tax code to implement article 9a of the ATAD (regarding reverse hybrid mismatches). The provision would introduce a limited German tax liability for foreign taxpayers in the case of a participation in a partnership that has its seat or place of management in Germany or that is registered in a German public register, provided that:

- The income generated by the partnership is not taxed at the level of the foreign partner as a result of different tax treatment of the partnership in the foreign partner's jurisdiction;
- The taxpayer (the foreign partner), on a standalone basis or together with other foreign related persons (as defined in section 1 (2) of the German Foreign Tax Act), holds at

least 50% of the interest in the partnership;
- The income generated by the partnership is not already taxed at the level of the foreign partner under a different provision of section 49 of the German income tax code; and
- The income generated by the partnership is not being taxed in any other country.

This provision is aimed at reverse-hybrid structures including German partnerships that result in nontaxation and would become effective as from 1 January 2022. A carve-out would be available for certain retirement pension schemes referenced in section 53 of the Investment Tax Act (in line with article 9a (2) of the ATAD). The law also includes a specific exception for a scenario in which, even if the partnership were treated in the same way as under the German rules, the income would not be taxed in the country where the partner is resident (hypothetical analysis). The explanatory statement to the law highlights the lack of causality between the hybridity and the nontaxation in such a scenario.

Despite strong concerns among tax practitioners regarding the retroactive effect of the anti-hybrid rules as from 2020, the effective date has not been changed in the approved version of the law. The anti-hybrid rules, therefore, would apply to expenses incurred as from 1 January 2020, with certain exceptions for expenses under long-term contracts that cannot be changed without significant disadvantages. Legal challenges to the effective date likely will be only a matter of time.

**CFC rules**

The reform of the CFC rules would follow the March 2021 proposals, including the retention of the current minimum threshold of an effective tax rate of 25%, below which “low taxation” is considered to exist. The revised rules would apply for fiscal years of CFCs that start on or after 1 January 2022.

**Exit tax rules**

The approved changes to the exit tax rules for individuals, which mainly include the abolition of unlimited deferral of taxation for taxpayers that transfer their tax residence to another EU/European Economic Area (EEA) member state, are included without any changes compared to the March 2021 draft version of the law. As proposed earlier, the amended rules in the approved law would apply to individuals that transfer their tax residence from Germany on or after 1 January 2022.

ATAD requires EU member states to allow for the deferral of the payment of any tax relating to a deemed gain from an exit event (e.g., the transfer of assets between an EU/EEA permanent establishment and its EU/EEA headquarters). The approved changes to the taxation of cross-border asset transfers/exit tax for business assets as a result of article 5 (5) of the ATAD mainly follow the directive and should apply retroactively for fiscal years ending after 31 December 2019.

**Extension of 2020 tax return filing deadlines**

As noted above, the approved law also includes an extension of the tax return filing deadlines for calendar year (CY) 2020, including the deadlines for income tax and VAT returns. (An extension of the deadlines for CY 2019 returns prepared by a professional tax service provider to 31 August 2021 was implemented in February 2021 (see GTLN dated 12 February 2021).) Based on the approved ATAD implementation law, the general tax return filing deadline for CY 2020 would be extended from 31 July 2021 to 31 October 2021. For taxpayers whose tax returns are prepared by a professional tax service provider, the tax return filing deadline for CY 2020 would be extended from 28 February 2022 to 31 May 2022. The approved law also would defer the date from which interest will accrue on underpayments of 2020 income tax and VAT, from 1 April 2022 to 1 July 2022. The interest is calculated based on a 0.5% interest rate per month (or part thereof) on the underpaid tax.

**Next steps**

The ATAD implementation law approved by the lower house of parliament still has to be approved by the upper house. It is expected that this will happen on 25 June 2021 without any further changes. After the approval by the upper house, the signature of the law by the president and the publication of the law in the federal gazette, which are necessary for the law to enter into force, should be mere formalities.

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