

# The transposition of the ATAD into the Greek tax law

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## Abstract

The study focuses on the transposition of the “ATAD” into the Greek tax law, following the enactment of L.4607/2019, applicable for income and expenses derived from tax years as starting on 1 January 2019 and onwards. The analysis will indicate how the ATAD anti-abuse provisions were incorporated in the Greek tax legislation and how the new rules are interpreted and applied.

**Keywords:** ATAD; GAAR; tax avoidance; CFC; interest limitation.

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## 1. Introductory Remarks

The outburst of the severe financial crisis in Greece necessitated a significant tax reform, which finally took place in 2013 with the abolishment of the previous Income Tax Code (L.2238/1994)<sup>1</sup> and its replacement by the newly introduced L.4172/2013 (hereinafter referred to as “GITC”) as well as the enactment of a consolidated Greek Code of Tax Procedures (L.4174/2013) which gathered all scattered tax procedural provisions in one unified legislative act. As a result, Greece adopted the majority of anti-tax avoidance rules proposed within the international tax framework, such as interest limitation rules, thin capitalization, CFC rules, transfer pricing rules,<sup>2</sup> country-by-country

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1. K. Savvaidou, *The Effort to Confront International Tax Avoidance by the Provisions of Tax Bills 3842/2010 and 3943/2011: The Enactment of Limitations to Payments Towards Non – Cooperative States or States with Privileged Taxation Regime, in Triangular Transactions and Indirect Allocation of Profits to Foreign Countries*, supra n. 1, at 1107–37 & 1187–228; K. Savvaidou, *The Effort to Confront International Tax Avoidance by the Provisions Of Tax Bill 3842/2010*, supra n. 1, at 52–58; K. Savvaidou, *Tax Consequences of Transfer of Domicile to Non-Cooperative States or States with Preferential Tax Regimes: One More Ambiguous Effort by Greek Tax Law to Tackle Tax Avoidance*, supra n. 1 at 369–445, 979–1017 & 1139–63.
2. M. Tsirikos & P. Zafeiropoulos, *Transfer Pricing Issues in Greek and International Tax Law, Law of Enterprises and Companies (ΔΕΕ)* 2, pp. 178–192 (2004) (in Greek); Vasiliki Athanasaki, *The definition of associated parties according to the provisions of the Greek Income Tax Code and the concepts of “economic dependence” and “decisive influence”*, Epixeirisi 124 (2016) (in Greek); Vasiliki Athanasaki, *Transfer Pricing Issues following the OECD BEPS Action Plan*, Bulletin of Tax Legislation (ΔΦΝ, Deltio Forologikis Nomothesias), 1631/2018.

report<sup>3</sup> etc. and adhered to the European standards, especially the 2012 EU Commission Recommendation on Aggressive Tax Planning and the 2016 anti-avoidance package<sup>4</sup> and international standards of the OECD, in line with the BEPS guidelines.<sup>5</sup>

Meanwhile, there are a lot of developments at EU level for combatting tax avoidance. More pre-

3. Greece has incorporated provisions with regard to country-by-country (CbC) reporting into Law 4484/2017, which was published in the Official Gazette on 1 August 2017 and is effective from 5 June 2017. They cover, among other issues, automatic exchange of CbC Reports. In fact, Greece has transposed Council Directive (EU) 2016/881, as regards the exchange of CbC Reports into its domestic tax legislation. It should be noted that CbC reporting constitutes a new reporting requirement, provided for in Action 13 of the BEPS Action Plan. The Law specifically defines the scope and conditions of mandatory automatic exchange of information of CbC Reports, the respective procedure, as well as penalties for non-compliance. Such penalties amount to EUR 20,000 in respect of non-submission and EUR 10,000 in respect of late submissions or inaccurate reports. It should also be noted that the Director of the Independent Public Revenue Authority (IPRA) signed, on 27 Jan. 2016, the Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176.
4. The Anti-Tax Avoidance Package is part of the Commission's ambitious agenda for fairer, simpler and more effective corporate taxation in the EU. The Package contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU. It will help Member States take strong and coordinated action against tax avoidance and ensure that companies pay tax wherever they make their profits in the EU. Its key elements are enumerated as follows (see European Commission, [https://ec.europa.eu/taxation\\_customs/business/company-tax/anti-tax-avoidance-package\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en), visited 27.02.2020): - the Chapeau Communication, which outlines the political, economic and international context of the Anti-Tax Avoidance Package and gives an overview of the different elements; - the Anti-Tax Avoidance Directive, which proposes legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning. Such directive aims to create a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses; - the revision of the Administrative Cooperation Directive, which proposes country-by-country reporting between Member States' tax authorities on key tax-related information on multinationals operating in the EU. These new transparency provisions will allow all Member States the information that they need to detect and prevent tax avoidance schemes; - the Recommendation on Tax Treaties, which advises Member States how to reinforce their tax treaties against abuse by aggressive tax planners, in an EU-law compliant way. It covers the introduction of general anti-abuse rules in tax treaties and the revision of the definition of permanent establishment; - the Communication on an External Strategy for Effective Taxation which presents a stronger and more coherent EU approach to working with third countries on tax good governance matters. It also sets out a process to create a common EU list of third countries for tax purposes; - the Study on Aggressive Tax Planning which looks at Member States' corporate tax rules (or lack thereof) that can facilitate aggressive tax planning and key structures used by companies to avoid taxation. It includes factsheets with the main findings for each Member State and examples of tactics used by multinationals to lower their taxes.
5. Governments in the G20 and OECD have launched an international action plan on base erosion and profit shifting, in order to combat international tax planning structures used by multinationals to pay very little tax globally. The action plan released by the OECD in July 2013 (the "BEPS Action Plan") contained 15 action points aimed at addressing base erosion and profit shifting (BEPS) concerns by: establishing international coherence of corporate income tax systems, restoring the full effects and benefits of international standards, ensuring transparency while promoting increased certainty and predictability; and establishing a multilateral instrument to implement the responses to BEPS swiftly. The BEPS Action plan emphasizes the importance of substance, coherence and transparency of the tax systems worldwide. As prescribed in the relevant Preamble of the BEPS Action Plan, "Fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation ...that artificially segregate taxable income from the activities that generate it" and "a realignment of taxation and relevant substance is needed to restore the intended effects and benefits of international standards..." At the heart of the BEPS action plan, we can find the premise that various countries' international tax rules permit multinationals to erode the tax base in the countries where they should be paying more taxes, and shift profits from high-tax to low-tax jurisdictions, during their cross-border activity. According to the OECD, these rules must be fixed, in order for fairness and integrity of the tax system to be restored. Underlying the entire BEPS initiative is the premise that local country laws that permit the free movement of assets across borders among jurisdictions with different tax rates should not be tolerated. Actually, base erosion and profit shifting refers to aggressive tax planning strategies, which exploit gaps and mismatches in various tax rules to make profits "disappear" for tax purposes or to shift profits to locations where there is little or even no real activity but the taxation imposed is low, resulting in little or no overall corporate tax burden. The significance of the BEPS Project for the existing international tax system is vital, even though it has been stated that the compatibility of BEPS with EU law is "highly problematic". The interaction of various domestic tax systems, as a result of evolving cross-border activity, apart from leading to double taxation in some instances, can also leave gaps, resulting in the generation of income, not subject to tax anywhere. BEPS strategies take advantage of these gaps in order for double non-taxation to be achieved. These phenomena lead to the distortion of competition and investment decisions and create an issue of fairness. See Vasiliki Athanasaki, A Critical Approach to GAARs in the Greek and EU tax law, EC Tax Review, 2019, 4, Kluwer Law International, 183–195, OECD, Action Plan on Base Erosion and Profit Shifting (OECD 2013), avail-

cisely, the most significant of these developments were the result of the anti-tax avoidance directive (EU)2016/1164<sup>6</sup> (hereinafter referred to as “ATAD” for simplification purposes) within the frame of the EU anti-avoidance package, which was launched in 2016. The ATAD has adopted in the EU the majority of the BEPS measures proposed within the frame of the OECD/G20 BEPS Action Plan on Base Erosion and Profit Shifting for combatting abusive practices aiming at tax avoidance. L.4607/2019,<sup>7</sup> applicable for income and expenses derived from tax years as starting on 1 January 2019 and onwards, transposed the ATAD into the Greek tax law. More specifically, articles 11 and 12 of L.4607/2019 modified the Greek interest limitation rules (article 49) and the Controlled Foreign Companies (“CFC”) Rules (article 66) of the Greek Income Tax Code (GITC) respectively, whereas article 13 of the said Law amended article 38 of the Greek Code of Tax Procedures (GCTP) on the Greek General Anti-Abuse Rule (“GAAR”), as renamed,<sup>8</sup> in order to fully comply with the EU secondary legislation and meet EU standards.

The present study focuses on the transposition of the “ATAD” into the Greek tax law, following the enactment of L.4607/2019, applicable for income and expenses derived from tax years as starting on 1 January 2019 and onwards. The below analysis will indicate how the ATAD anti-abuse provisions were incorporated in the Greek tax legislation and how the new rules are interpreted and applied.

## 2. Greek SAARs

At the present section, the Greek specific anti-avoidance rules (SAARs) that have been modified in order to be in line with the respective ATAD provisions are being thoroughly examined. These SAARs include the Greek interest limitation rules as well as the Greek CFC rules, which are analysed here below:

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able at [www.oecd.org/tax/beps.htm](http://www.oecd.org/tax/beps.htm), accessed 27 January 2018, Shee Boon Law, International Base Erosion and Profit Shifting – An Action Plan for Developing Countries, Bulletin for International Taxation, 2013 (Volume 68), No. 1, IBFD, Published online: 27 November 2013, Mindy Herzfeld, The CJEU Takes On the OECD, Highlights, New Analysis, Tax Notes International, Tax Analysts, JANUARY 13, 2014, pgs. 107–111, See also J. Prebble, Exploiting Form in Avoidance by International Tax Arbitrage – Arguments Towards a Unifying Hypothesis of Taxation Law, 17 Asia-Pacific Tax Bull. 1 (2011), Journals IBFD, as concerns the concept of international tax arbitrage. See also Aikaterini Savvaidou, Vasiliki Athanasaki, The assessment of application of the OECD BEPS Project on international tax avoidance and latest developments, Business and Company Law (Dikaio Epixeirisewn kai Etaireiwn 12/2019, Nomiki Bibliothiki, pgs 1556–1572 (Greek Language). The study refers to the monitoring of implementation of the OECD Action Plan on Base Erosion and Profit Shifting (BEPS Project) and the evaluation of the respective progress during the years following its publication up until now. It is mainly based upon recent OECD Reports (G20/OECD, OECD Secretary-General Report to the G20 finance ministers and central bank governors, Fukuoka, Japan, June 2019 and OECD/G20 Inclusive Framework on BEPS Progress report July 2018 – May 2019). The study focuses on the Reports’ results regarding BEPS minimum standards as concerns Action 5 on harmful tax practices, Action 6 on treaty abuse, Action 13 on the “Country by country report” or “CbCR” and Action 14 on the “Mutual Agreement Procedure” or “MAP”. Moreover, the study refers to issues pertaining to the common approach adopted as regards Action 2 on hybrids, Action 4 on interest limitation and Action 3 on CFC Rules. Last but not least, the study refers to Action 7 on permanent establishments, Actions 8–10 on transfer pricing as well as Actions 11, 12 and 15 of the BEPS Action Plan. See also Aikaterini Savvaidou, Vasiliki Athanasaki, OECD BEPS Action Plan on Base Erosion and Profit Shifting and application of BEPS measures in the EU, Deltio Forologikis Nomothesias (“DFN,” Bulletin for Tax Legislation) Issue 1655/2019 (in Greek language), Vasiliki Athanasaki, Transfer Pricing Issues following the OECD BEPS Action Plan, presentation given at the 3rd Symposium of E-themis (Association of Greek Lawyers) on Current Issues of Tax Law, Divani Caravel Hotel, 16–17 Dec. 2016 (in Greek), Vasiliki Athanasaki, The OECD BEPS Action Plan on Base Erosion and Profit Shifting, Epixeirisi (Business) Journal, Nomiki Bibliothiki, May 2014, pg. 435.

6. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, also referred to as BEPS Directive, given that it adopts the main concepts and actions of the OECD/G20 BEPS Action Plan on Base Erosion and Profit Shifting.
7. [Petros Pantazopoulos, Katerina Kalampaliki, ‘Country Note: The Impact of the Transposition of the ATAD on the Greek Tax System’ (2020) 48 Intertax, Issue 2, pp. 233–249]<http://www.kluwerlawonline.com/preview.php?id=TAXI2020019>.
8. Prior the enactment of L. 4607/2019, article 38 of the GCTP was titled “General anti-avoidance rule.”

## 2.1. Greek Interest Limitation Rules

Thin cap rules were introduced for the first time in Greece pursuant to L. 3775/2009, which provided for a debt-to equity ratio under article 3. Pursuant to the said provision, which inserted the thin cap rules into the former Greek Income Tax Code (L. 2238/1994), accrued interest on loans paid to affiliated companies was deductible on condition that the debt-to-equity ratio was 3:1.<sup>9</sup>

However, the above-mentioned rules have been modified several times, up until now.<sup>10</sup> Recent Law 4607/2019 transposed the Directive against tax avoidance practices (ATAD) in Greek law. Even though the pre-existing thin capitalization rules have been considered by the European Commission as equally effective to Article 4 of the ATAD and, thus, could remain unaltered until 31/12/2023, the provisions of article 49 of the ITC are restated, so as to transpose in full the relevant ATAD provisions into national legislation, with effect from 01/01/2019. So, article 49 of the Greek Income Tax Code (“GITC”) has been amended.

Pursuant to the Greek provisions, the thin capitalisation (more precisely ‘interest limitation’) rules are determined in connection to the taxable profits before interest, tax, depreciation, and amortisation (EBITDA). More specifically, interest expenses are not deductible to the extent that the surplus of interest expenses compared to interest income exceeds a percentage of 30% of EBITDA. By way of derogation, the taxpayer may deduct exceeding borrowing costs up to EUR 3 million. Any excess amount of non-deductible interest expenses may be carried forward indefinitely to future years and will be deductible in future years to the extent that these future years indicate an uncovered EBITDA amount. The aforementioned rules do not apply to credit institutions, insurance and reinsurance companies, and pension institutions.<sup>11</sup>

Nevertheless, it is observed that there is no change to the limitation of maximum exceeding borrowing costs up to thirty per cent (30%) of EBITDA and the full interest deductibility limit remained at three million euro (3,000,000), as a safe harbor rule.<sup>12</sup> EBITDA is still calculated based on the taxable profits before taxes, interest, depreciation and amortization. It is also explicitly clarified that tax-exempt revenues should not be taken into account. Furthermore, the definition of ‘borrowing costs’ is expanded, including, apart from interest on loans, inter alia, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance (e.g. payments under profit participating loans, imputed interest on convertible bonds and zero coupon bonds) as well as the finance cost element of finance lease payments and the capitalized interest included in the balance sheet value of a related asset. The possibility to carry forward without time

9. This provision was amended by article 11(7) of L. 3842/2010, which extended the exceptions from the application of the respective anti-avoidance rules to banks, factoring companies and special purpose vehicle companies, as identified in L. 3156/2003 and L. 3601/2007 (an exception was already in force for leasing companies). Apart from the above, loans assumed by third parties, and in respect of which a guarantee had been issued by the affiliated companies mentioned, were to be added to the total amount of the loans assumed by the affiliated companies. Last, but not least, the corresponding provisions abolished a clause regarding non-application of thin cap rules to loans that were concluded prior to the publication of L. 3775/2009 (namely 21 July 2009) (the grandfathering clause). Thus, as of 2010, the debt-to-equity ratio also covered older loans. Pursuant to the provisions of the subsequent L. 3943/2011, the exemption from thin cap rules was extended to Investment Service Companies under L. 3606/2007. Under the new Greek thin cap rules, however, taxable profits before interest, tax and depreciation (EBITDA) are to be taken into account. More specifically, interest expenses are not deductible to the extent that the surplus of interest expenses over interest income exceeds 30% of EBITDA. The said limit does not apply to net interest expenses unless they exceed EUR 3 million. Moreover, an indefinite carry-forward of the excess amount of non-deductible interest expenses to future years is provided for. Such an excess amount will be deductible in future years to the extent that there is an amount of EBITDA that has not been covered. These rules, however, are not applicable in respect of credit institutions, leasing companies and factoring companies, licensed by the Bank of Greece or the respective regulatory authorities of other Member States.
10. For example, see laws 3842/2010, 3943/2011 and lastly 4607/2019, which has transposed the ATAD into the Greek tax law. For further details see also footnote 11 above.
11. PwC, *Worldwide Tax Summaries (WWTS)*, Greece, Group Taxation, <http://taxsummaries.pwc.com/ID/Greece-Corporate-Group-taxation> (visited 27.02.2020).
12. K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), *European Taxation IBFD*, March 2019 pgs. 169–176

limitation the exceeding borrowing costs, which cannot be deducted in the current tax period, has been retained.<sup>13</sup> The exception of financial undertakings is now also expanded to other companies of the financial sector, apart from credit institutions (e.g. insurance and reinsurance undertakings, pension institutions, credit institutions, UCITS etc etc.).<sup>14</sup> The exclusion of the exceeding borrowing costs incurred on loans used to fund long-term infrastructure projects<sup>15</sup> (as part of a concession contract or a Private Public Partnership), where the project operator, borrowing costs, assets and income are all in the EU is provided.<sup>16</sup>

## 2.2. Greek CFC Rules

Greek CFC rules were firstly introduced in the Greek Law in 2013 with the GITC (article 66 of L. 4172/2013). However, recent Law 4607/2019 modified such CFC rules in order to be in line with the Directive laying down rules against tax avoidance practices (ATAD) in Greek tax law. The CFC rules provide, broadly, that the undistributed passive income from affiliates of a foreign subsidiary satisfying certain conditions will attributed to and taxed in the hands of the Greek resident controlling shareholder (i.e. direct or indirect ownership exceeding 50%). The application of the CFC rules results in the taxation of the “deemed” income as business profits.<sup>17</sup>

13. Moreover, with regard to exceeding borrowing costs carried forward, article 4 of the ATAD provides for three different alternatives. Namely, Member States can establish rules either: (i) to carry forward, without time limitation, exceeding borrowing costs that cannot be deducted in the current tax period; (ii) to carry forward, without time limitation, and back, for a maximum of 3 years, exceeding borrowing costs that cannot be deducted in the current tax period; or (iii) to carry forward, without time limitation, exceeding borrowing costs and, for a maximum of 5 years, unused interest capacity that cannot be deducted in the current tax period. Greece has opted for the first alternative. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176.
14. Article 4 of the ATAD stipulates that Member States may exclude from the scope of paragraph 1 exceeding borrowing costs incurred on: (i) loans that were concluded before 17 June 2016, however, the exclusion shall not extend to any subsequent modification of such loans; and (ii) loans used to fund a long-term public infrastructure project<sup>15</sup> where the project operator, borrowing costs, assets and income are all in the European Union. It should be pointed out, however, that the ATAD stipulates that the taxpayer may be given the right: (i) to deduct exceeding borrowing costs up to EUR 3 million; and (ii) to fully deduct exceeding borrowing costs if the taxpayer is a standalone entity. The amount of EUR 3 million applies to the entire group. A standalone entity means a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or PE. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176. Furthermore, it is noteworthy that, where the taxpayer is a member of a consolidated group for financial accounting purposes, the taxpayer may be given the right to either: – fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group and subject to the following conditions: (i) the ratio of the taxpayer’s equity over its total assets. is considered to be equal to the equivalent ratio of the group if the ratio of the taxpayer’s equity over its total assets is lower by up to two percentage points; and (ii) all assets and liabilities are valued using the same method as in the consolidated financial statements referred to in paragraph 8; or – deduct exceeding borrowing costs at an amount in excess of what it would be entitled to deduct under paragraph 1. This higher limit on the deductibility of exceeding borrowing costs refers to the consolidated group for financial accounting purposes in which the taxpayer is a member and is calculated in two steps: (i) first, the group ratio is determined by dividing the exceeding borrowing costs of the group vis-à-vis third-parties over the EBITDA of the group; and (ii) second, the group ratio is multiplied by the EBITDA of the taxpayer calculated pursuant to paragraph 2. Last but not least, article 4 of the ATAD prescribes that Member States may exclude financial undertakings from the scope of thin cap rules, including where such financial undertakings are part of a consolidated group for financial accounting purposes. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176.
15. According to Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), EU Law IBFD, a long-term public infrastructure project means a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered to be in the general public interest by a Member State. Any income arising from a long-term public infrastructure project is to be excluded from the EBITDA of the taxpayer, and any excluded exceeding borrowing cost is not to be included in the exceeding borrowing costs of the group vis-à-vis third parties referred to in para. 5(b).
16. K. Savvaidou, V. Athanasaki, Greek Corporate Tax and European Tax Integration, Studi Tributari Europei – European Tax Studies, Vol.8 (2018), I – 93–105
17. K. Savvaidou, V. Athanasaki, Greek Corporate Tax and European Tax Integration, Studi Tributari Europei – European Tax Studies, Vol.8 (2018), I – 93–105, K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in

It ensues that the modifications entered into force pursuant to L. 4607/2019 have extended the scope of the respective article 66 of the GITC. Foreign permanent establishments, whose profit is not taxed or is tax exempt in Greece, are also regarded as CFCs for purposes of application of the abovementioned article. Moreover, the newly introduced provisions abolished the exclusion of listed companies.<sup>18</sup> Pursuant to the minimum tax paid abroad rule, until recently only CFCs based in a country with preferential or non-cooperative regime were subject to tax. However, following the transposition of the ATAD, the sole criterion is the actual tax paid abroad to be less than half of the tax that would be payable in Greece based on the GITC, regardless of the country of establishment.<sup>19</sup> On the contrary, the new provisions are not applicable in case of E.U./E.E.A. located legal persons, legal entities and permanent establishments with a substantial economic activity,<sup>20</sup> i.e. supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances on an ad hoc basis (carve-out rule).<sup>21</sup>

It is also explicitly noted that for the determination of the taxpayer's participation percentage together with other related parties, the latter are firstly identified and then their percentages are added together, in order to cumulatively be taken into account. Regarding the categories of income forming the non-distributed income of CFCs, the thirty per cent (30%) condition is retained.<sup>22</sup> However, both income from financial leasing and income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value, are included. On the contrary, rental income from both movable and immovable property ceases to be taken into consideration. Following L. 4607/2019, it is expressly

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Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176, K. Savvaidou, «CFC rules and tax avoidance» Conference of the Franco-Hellenic Chamber of Commerce and Industry in cooperation with the Tax Committee of the Chamber, under the main subject “Key issues in business taxation,” Athens, May 2014 (in Greek language).

18. Article 7 of the ATAD prescribes that Member States may opt not to treat financial undertakings as CFCs if one third or less of the entity's income from the various categories of passive income comes from transactions with the taxpayer or its associated enterprises. Moreover, Member States may exclude from the scope of the said provisions an entity or PE: (i) with accounting profits of no more than EUR 750,000 and non-trading income of no more than EUR 75,000; or (ii) in respect of which the accounting profits amount to no more than 10% of the entity's operating costs for the tax period. Such a provision is not found in the Greek CFC rules. Such a possibility is subject to the discretion of individual Member States. From a best practice point of view, it would be better for Greece to adopt such an exemption, in order to rationalize its respective legal framework and to restrict tax audits to cases involving significant amounts.
19. PwC, Tax Flash, The Greek Parliament has adopted the Law, which transposes the Directive laying down rules against tax avoidance practices (ATAD) and expands L.128/1975 duty's scope, April 2019.
20. Article 7 of the ATAD also prescribes that “Where the controlled foreign company is resident or situated in a third country that is not party to the EEA Agreement, Member States may decide to refrain from applying the preceding subparagraph.” However, the Greek CFC rules, following the introduction of L. 4607/2019 did not adopt such a rule. As a consequence, even companies which are located in countries having a high nominal tax rate may be regarded as CFCs, if the actual tax paid abroad is less than half of the tax that would be payable in Greece based on the GITC provisions. See PwC, Tax Flash, The Greek Parliament has adopted the Law, which transposes the Directive laying down rules against tax avoidance practices (ATAD) and expands L.128/1975 duty's scope, April 2019.
21. As stressed out in the explanatory memorandum, the burden of proof that the CFC, which is located in a E.U./E.E.A. country, does not carry on a substantive economic activity, lies with the Tax Authorities. The categories of passive income are defined in the same way under both the ATAD and the Greek legislation. The ATAD distinguishes between two different scenarios, i.e. (i) where the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by the relevant facts and circumstances and (ii) where the non-distributed income of the entity or PE arises from non-genuine arrangements that have been put in place for the essential purpose of obtaining a tax advantage. It seems that a targeted anti-avoidance provision, similar to the functionality of a GAAR, has been interjected into the specific area of CFC legislation. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176.
22. The ATAD does not provide for any numerical/ arithmetical criterion, such as that provided for in article 66 of the GITC, according to which more than 30% of the net earnings before taxes of the foreign legal person/entity should consist, inter alia, in passive income, in order for the Greek CFC rules to apply. See K. Savvaidou, V. Athanasaki, Greece — Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, Vol.59: 4 (2019), European Taxation IBFD, March 2019 pgs. 169–176. Moreover, the Greek CFC provisions include the definition of the concept of “associated enterprises,” prescribing that the critical participation percentage is 25%. The respective definition of this concept in terms of transfer pricing legislation is 33% according to the provisions of the GITC.

stated that, in case the legal person or legal entity or permanent establishment incurs losses in a fiscal year, these are not included in the taxpayer's taxable base, but they may be set off against future profits, under the conditions set in par.4 of article 27 of the GITC.<sup>23</sup> Apart from the above, it is explicitly stipulated that the tax computation shall be based upon the GITC provisions, in order for the tax payable in Greece to be determined. In other words, taxpayers should re-calculate the CFCs' payable tax based on the GITC provisions in order to determine the tax payable in Greece, for comparison purposes.

Last but not least, the Greek CFC rules also include provisions for the elimination of double taxation, namely as regards profit distributions made by CFCs and the disposal of shares in CFCs. In addition, a tax credit is being provided for by the respective provisions for the tax paid abroad by related companies, in case of indirect participation and up to the amount of the Greek corresponding tax.

### 3. Greek GAAR

Greece's general anti-avoidance rule (article 38 of L. 4174/2013, Greek Code of Tax Procedures, hereinafter referred to as "GCTP"), a provision in the Greek Code of Tax Procedures that took effect January 1, 2014, is based on the European Commission's Recommendation on Aggressive Tax Planning (EU GAAR), published on December 6, 2012 (C(2012) 8806 final). In drafting its recommendation, the commission considered input on GAARs from member states. Thus, the EU GAAR reflects the recent developments in the tax laws of the member states, especially changes made in the wake of the recent financial crisis, which led many countries to intensify measures for combating tax avoidance and evasion.<sup>24</sup>

Under the domestic GAAR, the Greek tax administration may disregard any artificial arrangement or series of arrangements that are aimed at tax avoidance and lead to a tax advantage. Such arrangements are treated based on their commercial substance. An arrangement or series of arrangements are considered artificial if they lack commercial substance. The goal of an arrangement or series of arrangements is perceived to be tax avoidance if, regardless of the taxpayer's subjective intention, it is contrary to the object, spirit and purpose of the tax provisions that would otherwise apply.<sup>25</sup>

Regarding GAAR,<sup>26</sup> article 13 of Law 4607/2019 transposed article 6 of the ATAD, amending article 38<sup>27</sup> of the GCTP accordingly. More specifically, following the modifications of L. 4607/2019, it is provided that Tax Authorities shall ignore any arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or the purpose of the applicable tax law, are not genuine, having regard to all relevant facts and circumstances.<sup>28</sup> According to the explanatory memorandum, the

23. See also Circular 2071/2019, issued by the Governor of IPRA, which provides guidance for the application of the modified CFC rules, following the provisions of Law 4607/2019. Given that article 27 par.4 provides that, under certain conditions, losses incurred by a foreign permanent establishment may be recognized when they become final (e.g. closure of a branch) it may be concluded that losses incurred by a CFC are not taken into account for the application of article 66. PwC, Tax Flash, The Greek Parliament has adopted the Law, which transposes the Directive laying down rules against tax avoidance practices (ATAD) and expands L.128/1975 duty's scope, April 2019.

24. Vasiliki Athanasaki, A Comparison of the Greek GAAR And the EU Anti-Tax-Avoidance GAAR, *Tax Notes International*, Volume 92, Number 13, December 24, 2018, pgs. 1291–1297.

25. K. Savvaidou, V. Athanasaki, Country note: General and specific anti-tax avoidance measures under recent tax reform in Greece, *Intertax (Kluwer Law) – Volume 47/2019 Issue 4*, March 2019.

26. For more information regarding GAAR, Vasiliki Athanasaki, A Comparison of the Greek GAAR And the EU Anti-Tax-Avoidance GAAR, *Tax Notes International*, Volume 92, Number 13, December 24, 2018, pgs. 1291–1297.

27. Article 38 of the GITC had been initially replaced by article 46 par.12 N.4223/2013, (Government Gazette ΦΕΚ Α 287).

28. K. Savvaidou, V. Athanasaki, Country note: General and specific anti-tax avoidance measures under recent tax reform in Greece, *Intertax (Kluwer Law) – Volume 47/2019 Issue 4*, March 2019. For further details regarding the Greek GAAR, see V. Athanasaki, *GAARs in European and International Taxation (Nomiki Vivliothiki 2018)* (forthcoming); B.

GAAR primarily aims at filling legislative gaps and mismatches and should not apply in case of application of a specific anti-avoidance rule (“SAAR”) or a targeted anti-avoidance rule (“TAAR”), even in case the latter proves to be ad hoc insufficient in combatting tax avoidance. Thus, it is explicitly clarified that the parallel application of GAAR and a SAAR is excluded.<sup>29</sup> In other words, the application of the GAAR does not affect the application of specific anti-abuse rules, such as the provisions regarding CFCs, the anti-abuse rule of the Parent – Subsidiary Directive etc.<sup>30</sup>

As an initial remark, it could be noted that, before the transposition of the ATAD into the Greek law, the terminology used was different between the two provisions. Namely, the EU ATAD GAARs refers to non-genuine arrangements, whereas the Greek GAAR used to refer to artificial arrangements.<sup>31</sup> Following the enactment of L. 4607/2019, the term “non-genuine” arrangement replaced the term “artificial.” However, the two terms should be regarded as conceptually identical from a legal and technical point of view. As per the scope of the relevant provision, it should be mentioned that, whereas the EU ATAD GAAR (article 6) applies only in case of direct, corporate taxation, the Greek GAAR of article 38 GCTP covers the whole ambit of the GCTP, namely not only direct but also indirect taxation (including VAT, stamp duty, etc.). This practically means that the Greek GAAR is applicable in almost all taxes provided for in the Greek tax law, thus having a wider scope in comparison to the EU ATAD GAAR. Moreover, the burden of proof as to whether a non-genuine arrangement exists, lies with the tax authorities. This clarification is very important and certainly moves to the right direction, in favor of the taxpayer, given the stringent, general and rather vague character of the said provision, since it seems to balance the extremely wide discretion by definition granted by the GAAR to the tax authorities, acting as an equalizer. This is also the reason for the additional clarification in the Explanatory Memorandum, according to which the GAAR should be narrowly interpreted and applied, only in exceptional cases of artificial schemes aiming at tax avoidance.

More generally, for the interpretation of the provision, the relevant jurisprudence of the European Court of Justice (“CJEU”)<sup>32</sup> and the Commission Recommendation on the Aggressive Tax Planning (2012/772/EU) will also be taken into account. Apart from the above, the Greek provision has retained the indicative list of arrangements that fall within the scope of the GAAR, which originates from the previously mentioned 2012 EU Commission Recommendation on Aggressive Tax Planning,<sup>33</sup> although such a list has been eliminated from the EU ATAD GAAR. These indicatively

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Georgaki, *Antitax avoidance in direct taxation* p. 257 (Nomiki Vivliothiki 2017); K. Savvaidou, *The introduction in the Greek tax law of a general provision against the abuse of the tax legislation in order to combat tax avoidance in light of the European and international developments (in Greek)*, *Bulletin of Tax Legislation*, pp. 259–296 and pp. 323–354 (2017).

29. E. Theocharopoulou, *Tax Avoidance: Exploring the Boundaries of Anti-Avoidance Rules in the EU BEPS Context*, *EATLP Congress Munich 2016*, *EATLP International Tax Series*, vol. 15, 385–98 (A. P. Dourado ed., IBFD 2017), ([ ... ] as far as it concerns the hierarchy or coordination between the different rules, the easy solution is to apply the SAARs and the [transfer pricing] rules and to apply the GAAR only when there is not an applicable SAAR.). See also E. Theocharopoulou, *Tax Transparency and Exchange of Information in Times of Fiscal and International Economic Crisis (in Greek)* 197–218 (Kyriakides Bros Publications S.A. 2016).

30. K. Savvaidou, V. Athanasaki, *Greek Corporate Tax and European Tax Integration*, *Studi Tributari Europei – European Tax Studies*, Vol.8 (2018), I – 93–105.

31. This term originated from the CJEU case law [see, for example, *Cadbury Schweppes case (C-196/04)*] and the 2012 Commission Recommendation on Aggressive Tax Planning.

32. See – on an indicative and non-exclusive basis – ECJ, *Cadbury Schweppes case (C-196/04)*.

33. In determining whether the arrangement or series of arrangements is artificial, national authorities are invited to consider whether they involve one or more of the following situations: (a) the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole; (b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct; (c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other; (d) transactions concluded are circular in nature; (e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows; (f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.

enumerated conditions for the determination of a non-genuine arrangement or of a series of arrangements<sup>34</sup> have further been developed and elaborated in interpretative Circular 2167/2019 of the Governor of IPRA, which refers to the role of correct legal characterization of the arrangements under examination, as equity or debt as well as to the role of financing arrangements, especially in case of interposition of conduit companies for treaty shopping purposes (arrangements aiming at achieving lower or zero withholding tax rate through back-to-back loans).

Furthermore, the explanatory memorandum also clarifies that, in case a Double Tax Treaty (hereinafter referred to as “DTT”) contains a specific anti-avoidance rule, such as the Principal Purpose Test (“PPT”), proposed by the OECD/G20 BEPS Action Plan then, to the extent that the artificial arrangement was put into place for obtaining an advantage provided by the DTT, these provisions supersede the GAAR and apply exclusively. In any other case, the GAAR applies and a DTT’s benefits are not granted if it is found that an arrangement or a series of arrangements have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage.<sup>35</sup> This guideline as per the relationship of the internal tax law with the international contractual law, namely the DDTs, is rather innovative and in any case it is not as self-evident as it may seem to be, since, in the Greek legal order, there is an hierarchical relation, according to which international conventions, following their legal ratification, prevail over national law.

It should be highlighted that the Governor of IPRA issued circular 2071/2019, which notified the respective provisions as well as circular 2167/2019, which contained further guidance on the interpretation and application, among others, of the Greek GAAR, following the enactment of L.4607/2019 and the respective transposition of the ATAD into the Greek law.

For facilitation purposes, in order for the Tax Administration to be able to better assess each specific case on its own merits, considering the specific characteristics of each particular scheme under examination, circular 2167/2019 of the Governor of IPRA provides for an indicative and non-exhaustive list of arrangements that should not be regarded as artificial and tax avoidant, pursuant to CJEU case law. More specifically, these non-artificial arrangements are enumerated, as follows:

- The creation of a secondary establishment in another member state, either as an office, branch etc. or as a subsidiary<sup>36</sup>
- The fact that the activities of the secondary establishment in the other member state (host state) could also be undertaken by the taxpayer at the state of residence<sup>37</sup>
- The fact that the company has been established in a member state with the sole purpose to take advantage of the legislation in force in that other member state<sup>38</sup>
- The fact that lower taxation exists in another member state<sup>39</sup>
- The aim of reduction of the tax burden<sup>40</sup>
- The existence of a beneficial tax regime in another member state<sup>41</sup>

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34. Vasiliki Athanasaki, A critical approach to GAARs in the Greek and EU Tax Law, *EC Tax Review*, 2019, 4, Kluwer Law International, 183–195.

35. K. Savvaidou, V. Athanasaki, Greek Corporate Tax and European Tax Integration, *Studi Tributari Europei – European Tax Studies*, Vol.8 (2018), I – 93–105, Vasiliki Athanasaki, A critical approach to GAARs in the Greek and EU Tax Law, *EC Tax Review*, 2019, 4, Kluwer Law International, 183–195.

36. ECJ, *Imperial Chemical Industries (ICI)*, C-264/96, par. 26.

37. ECJ, *Cadbury Schweppes*, C-196/04, par. 69.

38. ECJ, *Cadbury Schweppes*, C-196/04, par. 37.

39. ECJ, *Eurowings Luftverkehr*, C-294/97, par. 44.

40. ECJ, *Eurowings Luftverkehr*, C-294/97, par. 44.

41. ECJ, *Cadbury Schweppes*, C-196/04, par. 36–38.

- The granting of state aid in another member state, even if the state aid is not compatible with the EU Treaties<sup>42</sup>
- The transfer of residence or company seat of the taxpayer to another member state.<sup>43</sup>

#### 4. A critical approach to the anti-abuse provisions in light of the single tax principle and the protection of the taxpayers' rights

The single tax principle states that income should be subject to tax only once, and thus rejects both double taxation and double non-taxation. Starting in the early twenty-first century, the OECD adopted the single tax principle as part of its model treaty. The rejection of double taxation was, of course, the inspiration for the entire international tax regime.<sup>44</sup> The single tax principle states that cross-border income should be taxed once at the rate determined by the benefits principle. In other words, cross-border income should be taxed only once at the source-country rate for active income and at the residence-country rate for passive income. But if the preferred country (i.e., source for active, and residence for passive) does not tax, it is incumbent upon the other country to do so because otherwise, double non-taxation would result, which is just as damaging as double taxation.<sup>45</sup>

For the effective implementation of both general and specific anti-avoidance rules, taxpayers and tax authorities should focus on the need for adequate and efficient specialization of the cases to be considered as falling under their scope of application, so as to reduce the ambiguity created and the resulting legal uncertainty. At the same time the key role of the judge for the interpretation and judicial implementation of GAARs and SAARs and for the protection of vital taxpayers' rights in case of tax disputes should also be highlighted.

Especially as regards the GAAR, the elimination of various disadvantages arising from its imple-

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42. ECJ, Cadbury Schweppes, C-196/04, par. 55–60.

43. ECJ Lasteyrie du Saillant, C-9/02, par. 51.

44. Reuven S. Avi-Yonah, Who Invented the Single Tax Principle?: An Essay on the History of US Treaty Policy, Volume 59, 2014/2015, 59 N.Y.L. SCH. L. REV. 305 (2014–2015), University of Michigan Law School University of Michigan Law School Scholarship Repository, 2015, pgs. 305–315, Available at: <https://repository.law.umich.edu/articles/1663> (visited 28/3/2020). See also Daniel Shaviro, The Two Faces of the Single Tax Principle, Brooklyn Journal of International Law, Volume 41, Issue 3, Article 12, 2016, pgs. 1293–1301, Avi-Yonah, International Taxation of Electronic Commerce, 52 TAX L. REV. 507, 517–23 (1997), at 509, E. Gil García, OECD/International - The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?, World Tax Journal, 2019 (Volume 11), No 3, Published: 7 August 2019, according to which, the international tax regime does not rise to the level of customary international law. In this regard, the international tax regime is based on competition rather than on coordination, being regarded as a non-comprehensive regime. See also Reuven S. Avi-Yonah, Advanced Introduction to International Tax Law, Second Edition, Edward Elgar Publishing 2019, where the author makes a distinction between the benefits principle (active income should be taxed primarily at source and passive income primarily at residence) and the single tax principle (all income should be subject to tax once at the rate derived from the benefits principle, i.e., active income at the consensus corporate rate and passive income at the residence rate for individuals). This formulation has been highly controversial. While most commentators would agree that the benefits principle has been the core of the ITR since 1923, many deny the validity of the single tax principle and some doubt its coherence. In particular, the single tax principle suggests that whenever the country that has primary jurisdiction under the benefits principle refrains from taxing cross-border income, the other country (residence for active income, source for passive) should tax it instead. This seemed to fly in the face of observed reality because residence countries typically exempt or defer active income, and source countries refrain from taxing many forms of passive income unilaterally without regard to whether it is taxed at residence.

45. Reuven S. Avi-Yonah, Who Invented the Single Tax Principle?: An Essay on the History of US Treaty Policy, Volume 59, 2014/2015, 59 N.Y.L. SCH. L. REV. 305 (2014–2015), University of Michigan Law School University of Michigan Law School Scholarship Repository, 2015, pgs. 305–315, Available at: <https://repository.law.umich.edu/articles/1663> (visited 28/3/2020), Avi-Yonah, International Taxation of Electronic Commerce, 52 TAX L. REV. 507, 517–23 (1997), at 517.

mentation with a specific focus on the vagueness and legal uncertainty of such provision,<sup>46</sup> due to the number of general clauses included in this type of rules, is of vital importance. Moreover, the correct interpretation and application of the GAAR through appropriate procedures and necessary safeguards is crucial, in view of the particular difficulties faced by tax administration and tax justice in the process of invoking a GAAR and providing sufficient proof for the fulfillment of the conditions for its application due to the inherent uncertainty surrounding the use of a variety of vague concepts, taking also into account its drastic consequences.

It is undeniable that the legal framework for combating tax evasion in terms of tax policy should be further elaborated and improved, in particular to the direction of removing the adverse consequences inevitably resulting mainly from GAARs and mitigating their disadvantages and weaknesses. More specifically, legal certainty and stability should be safeguarded, pursuant also to the principle of protection of legitimate expectations of private individuals, which constitutes a general, fundamental principle of administrative law, while good administration and taxpayers' protection should be ensured. Thus, the prevention of creation of distortive conditions that imply disincentives to effective business activity should constitute a top priority. Last but not least, the key challenge will be the short-term and long-term measures to counter tax avoidance based on the "real" content, the true nature and the economic substance of transactions and arrangements in general, while the existing fundamental challenge is the fair balance between taxpayers' protection and the safeguarding of national tax bases as well as public revenues.

It is crucial to balance and control the wide discretion provided to the tax administration and to the courts pursuant to the GAAR by finding and activating appropriate and efficient safeguards. Such safeguards could be the following on an indicative basis: a) The establishment of a panel of tax experts, specialized in the interpretation and application of the GAAR, as an administrative body which could examine the arrangements in question ex ante and decide whether they fall within the scope of the GAAR, constituting artificial, tax avoidant arrangements and b) the introduction of a bidding advance agreement/tax ruling procedure, such as the APAs in the field of transfer pricing, with regard to the ex post assessment of a given scheme from a GAAR point of view. Apart from the above, the allocation of the burden of proof plays a significant role in this respect. Actually, the burden of proof should lie with the tax authorities, which should be able to establish and prove that the taxpayer's arrangement subject to a tax audit is not genuine. In any case, the taxpayer should not be deprived of the right to counter-argue and counter-prove the real economic substance of the arrangement in question.

It is a general assumption that legal uncertainty generated by granting wide discretion to tax authorities and courts cannot be completely eliminated when applying a GAAR, as this would probably give rise to tax evasion practices, given also the fact that such a discretion is an inherent feature of that category of legal provisions. However, a specific procedure of clear delimitation of the said discretion should be established.<sup>47</sup> In any case, taxpayers should have the right to effectively submit

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46. K. Savvaidou, The introduction in the Greek tax law of a general provision against the abuse of the tax legislation in order to combat tax avoidance in light of the European and international developments (in Greek), *Bulletin of Tax Legislation*, pp. 259–296 and pp. 323–354 (2017).

47. Bλ. M. Gammie, "Tax avoidance and the Rule of Law: The experience of the UK" in G. Cooper (ed.), *Tax Avoidance and the Rule of Law* (Amsterdam: IBFD, 1997), J. Freedman, "Defining Taxpayer Responsibility: In support of a General Anti-Avoidance Principle" [2004] *BTR* 331.

an administrative recourse, the so-called quasi judicial recourse<sup>48</sup> and a judicial recourse<sup>49</sup> against the tax assessment, expressing their arguments regarding the ad hoc application of anti-abuse provisions and supporting the validity and genuineness of their arrangements. Given also that the tax provisions should, in any case, be interpreted strictly,<sup>50</sup> the anti-avoidance provisions should apply only where there has been a genuine abuse of the provisions of tax law and always in the light of Article 5 (1) (a) of the Greek Constitution that underpin the economic freedom and the principle of freedom of contracts.<sup>51</sup>

As a conclusive remark, it should be stressed out that a proper balance between the taxpayers' rights and the interests of tax administration should be achieved. Combatting tax avoidance and double non-taxation is an imperative need, especially in light of the severe financial crisis that hit many countries around the world the previous years, given also that base erosion and profit shifting phenomena have given rise to significant loss of public revenues. However, taxpayers should be able to exercise their legal rights and have access to the proper and efficient dispute resolution mechanisms. In this respect, the single tax principle has indeed come to stay.<sup>52</sup> Provided that all the conditions enumerated above are cumulatively met, proper safeguards for taxpayers' rights exist and genuine tax planning is not obstructed, even in case it results in tax minimisation, it could be supported that the single tax principle, as a limit to double non taxation, could probably constitute an inevitable, sustainable solution, even though not the ideal-one. In other words, the

48. In Greece, the concept of the quasi judicial recourse was formally adopted as of 1.8.2013, through the entry into force of L. 4152/2013. The system remains the same after the entry into force of the Code of Tax Procedure (L. 4174/2013), regulating, among others, the procedure in case of dispute of the acts and omissions of the Tax Administration. As from 1.1.2014 (date of entry into force of the Code of Tax Procedure) the quasi judicial recourse constitutes an extra-judicial mandatory remedy for challenging any act or omission of the tax authority and it is a precondition for the admissibility of the judicial appeal lodged before the competent administrative court (article 63 of Law 4174/2013). By means of a quasi judicial recourse, and prior to any judicial review, a re-examination of the disputed act or omission is conducted by a special administrative authority particularly formed for this purpose, the Dispute Resolution Directorate. The Dispute Resolution Directorate is located in Athens. Further, a Sub-Directorate is located in Thessaloniki, competent for the review of tax acts and omissions of tax authorities of Northern Greece. The taxpayer through the quasi judicial recourse shall invoke against the disputed act or omission of the tax authority all arguments at its disposal either these referring to typical defects or on the merits. By means of a quasi judicial recourse of article 63 Code of Tax Procedure both acts and omissions of the Tax Authorities relating only to the taxes falling within the scope of the Code of Tax Procedure are challenged. Under the current tax legal framework, the quasi judicial recourse can be submitted against both explicit acts and tacit rejections of the Tax Administration. Such tacit rejections shall be challenged upon the expiry of the time granted to the administration by the law to perform an act (or, if such time is not granted, three-months following the submission of an application by the taxpayer). The submission of a quasi judicial recourse is mandatory for the review of the acts or omissions that it concerns. Therefore, the filing of any other administrative recourse, including a judicial recourse is inadmissible and as such shall not incur any legal consequences (i.e. interruption of time limit). For this reason it has been argued that the tax authority upon issuing an act shall be under the obligation to adequately inform the taxpayer for their right to file a quasi judicial recourse against the imputation act. See Petros Pantazopoulos, Disputing Acts and Omissions of The Tax Authority, Greek Law Digest, 07-06-2019, <http://www.greeklawdigest.gr/topics/tax/item/258-disputing-acts-and-omissions-of-the-tax-authority#startOfPageId258> (visited 30/3/2020).

49. Upon a negative decision on or a tacit rejection of the quasi judicial recourse, a recourse shall be filed by the taxpayer within thirty (30) days following the notification of the decision or the lapse of the 120-days without the Dispute Resolution Directorate having issued decision. The 30-day time limit is suspended from 1 to 31 of August. For acts and omissions that are obligatory challenged by means of a quasi judicial recourse, only the decision or the tacit rejection of the Dispute Resolution Directorate, as the case may be, is challenged by the taxpayer and not the original act (or omission) of the tax authority itself. See Petros Pantazopoulos, Disputing Acts and Omissions of The Tax Authority, Greek Law Digest, 07-06-2019, <http://www.greeklawdigest.gr/topics/tax/item/258-disputing-acts-and-omissions-of-the-tax-authority#startOfPageId258> (visited 30/3/2020).

50. This is also in line with the jurisprudence of the Greek administrative courts, see for example decisions ΣτΕ 3968/1988, ΣτΕ 3305/1987, ΣτΕ 1790/1985, ΣτΕ 192/1983, ΣτΕ 1074/1961, ΣτΕ 211/1963 κ.α. ΣτΕ 1675/1968, ΣτΕ 4135/1977, ΣτΕ 2765/1979, ΣτΕ 2895/1981, ΣτΕ 192/1983, ΣτΕ 3113/1989 κ.α. ΣτΕ 2312/1992. of the Supreme Administrative Court of Greece.

51. See Circular 2167/2019 of the Governor of IPRA.

52. Reuven S. Avi-Yonah, Who Invented the Single Tax Principle?: An Essay on the History of US Treaty Policy, Volume 59, 2014/2015, 59 N.Y.L. SCH. L. REV. 305 (2014–2015), University of Michigan Law School University of Michigan Law School Scholarship Repository, 2015, pgs. 305–315, Available at: <https://repository.law.umich.edu/articles/1663> (visited 28/3/2020).

single tax principle could form a realistic approach in view of the tax systems as they currently stand, especially when it comes to cases where there is indeed abuse of law and real economic substance does not exist. The issue should further be revisited in view of a potential differentiated tax system based upon a common (consolidated) corporate tax base (“CCTB/CCCTB”).

## 5. Basic Conclusions

As already mentioned, following the severe economic crisis in 2008, Greece adopted the majority of anti-tax avoidance rules proposed within the international tax framework, such as interest limitation rules, thin capitalization, CFC rules, transfer pricing rules, country-by-country report etc. and adhered to the international standards of the OECD, in line with the BEPS guidelines.

Following the transposition of the ATAD provisions with regard to the CFC rules of article 66 CITC, interest limitation rules of article 49 GITC as well as the general anti-abuse rule (GAAR) of article 38 of the GCTP, the respective legal framework has been updated and modernized in order to meet the state’s obligations, as they ensue from the EU law. In essence, following the transposition of the ATAD, the rationale of interest deductibility limitation rules remains basically the same. Moreover, since no group taxation rules exist in Greece, therefore no group thin capitalisation rules can be provided.<sup>53</sup> On the contrary, Greece’s CFC rules have been significantly amended, by virtue of L. 4607/2019,<sup>54</sup> whereas important modifications have also been effected with regard to the Greek GAAR, which currently constitutes an interesting mixture of the ATAD provisions and the previous provisions, which were based upon the 2012 Commission Recommendation on Aggressive Tax Planning. As a conclusive remark, it could be pointed out that Greek anti-abuse rules have been significantly reinforced and enhanced in order to fully comply with the EU law.

However, pursuant to the ATAD, Greece should also comply with article 5 and transpose exit taxation rules into its tax legislation in line with the respective EU provisions, since exit taxation is currently not being provided in the Greek tax law.<sup>55</sup> Moreover, Greece should also enact tax provisions with regard to hybrid mismatch arrangements, which mainly arise, among others, from the different legal characterization of specific transactions, schemes, tools and arrangements in two different states, also according to ATAD II.<sup>56</sup> These anti-abuse rules should also be incorporated in the Greek tax law in due course, in order to better deal with different areas of interest as concerns tax avoidance and cover all potential aspects of abusive practices, as provided for by the EU law.<sup>57</sup>

In any case, it is of vital importance for member states, including also Greece, to safeguard the proper interpretation and application of the previously analysed tax provisions, since the core issue

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53. International Tax Review, Greece: Greece adopts EU ATAD I, <https://www.internationaltaxreview.com/article/blg7531dhggnh7/greece-greece-adopts-eu-atad-i> (visited 13/2/2020).

54. International Tax Review, Greece: Greece adopts EU ATAD I, <https://www.internationaltaxreview.com/article/blg7531dhggnh7/greece-greece-adopts-eu-atad-i> (visited 13/2/2020).

55. To be noted, though, that article 51 of the GITC on the application of the arm’s length principle and the transfer pricing legislation in case of business restructurings and reorganisations could act as a substitute of exit taxation in Greece.

56. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries

57. The Commission has recently sent corresponding letters to a number of Member States, including Greece, on the implementation of its anti-tax package presented in January 2016 and based on the three pillars of effective taxation at the source of profit, tax transparency achieved when the tax authorities provide the necessary information and combatting of double taxation so as not to overburden companies that are normally subject to fair taxation. In particular, Germany, Greece, Latvia, Portugal, Romania and Spain have received letters of warning on the implementation of the ATAD1 package of measures, while Cyprus, Germany, Greece, Latvia, Poland, Romania and Spain have received letters on the implementation of the ATAD2 Directive on hybrid mismatches with third countries. It should be noted that there is no further information as per the points of application, regarding which Commission appears dissatisfied with the Member States, but a potential concern is the failure to comply with the deadline for transposition or full implementation by the Member States.

at stake is the effective protection of the national tax base instead of the augmentation of the tax rates for purposes of maximization of tax revenues. Efficient tax legislation constitutes a *conditio sine qua non* for combatting tax avoidance through abusive schemes and arrangements. However, such anti-avoidance legislation should be properly balanced by respective development measures, in order for the economic growth to be achieved. Special emphasis should be placed, however, to real economic activity and economic substance, in this respect.

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