

# Real Estate Tax Services News

Keeping you informed

PwC Germany | March 2021

## ATAD Implementation Act: German government draft bill for the implementation of the Anti-Tax Avoidance Directive submitted

### In brief

On 24 March 2021, a government draft bill aiming to implement the Anti-Tax Avoidance Directive (ATAD) passed the cabinet (in this NewsAlert referred to as “Draft”) after lengthy political efforts.

### Previous efforts to implement the European Anti-Tax Avoidance Directive

On 10 December 2019, the German Ministry of Finance published an initial draft bill for the implementation of the ATAD. A second draft bill (dated 24 March 2020) was published in September 2020. There had also been efforts to include the ATAD rules in the 2020 annual tax bill, but such recommendations were not adopted. Finally, on 24 March 2021 the Draft passed the cabinet.

Under the Draft, the ATAD rules on hybrid mismatch arrangements shall be implemented and the existing German controlled foreign company (CFC) and exit taxation rules shall be adjusted – inter alia – in the light of ATAD. The decisive aspects of the provisions included in the Draft are briefly described with respect to hybrid mismatch arrangements only below.



# Hybrid mismatch arrangements

Under the Articles 9 and 9b of the ATAD, EU Member States are – inter alia – obliged to disallow the tax deductibility of expenses that arise from hybrid mismatch arrangements. The tax deductibility of expenses shall be denied (i) if the corresponding income is not effectively taxed (deduction/no inclusion, or D/Ni outcome), or (ii) if the expenses are tax deductible in another jurisdiction (double deduction, or DD outcome). An exception may apply to the extent the taxpayer has so-called “dual inclusion income” (ie, income that is included in the ordinary income of two jurisdictions).

Furthermore, the tax deductibility of expenses shall be disallowed in case of an imported hybrid mismatch. An imported hybrid mismatch can arise, if a hybrid mismatch between two foreign jurisdictions is shifted (“imported”) into another jurisdiction via the use of a non-hybrid instrument (eg, normal loan).

The aforementioned shall be implemented into German law by the introduction of a new section 4k in the German Income Tax Act (*Einkommensteuergesetz*, or ITA). Section 4k ITA is accompanied by amendments in other sections of the German ITA and Corporation Tax Act (*Körperschaftsteuergesetz*, or CTA) that shall ensure an inclusion as ordinary income in case of hybrid mismatch arrangements (eg, by the disallowance of the application of the German domestic participation exemption). Paragraphs 1 to 3 of section 4k ITA relate to D/Ni outcomes. DD outcomes are covered by paragraph 4. Paragraph 5 deals with imported hybrid mismatches and paragraph 6 defines the scope of the rules to transactions between affiliates and so-called “structuring arrangements”. Paragraph 7 establishes a general “treaty override”.

Contrary to the previous draft from March 2020, the legislative materials of the Draft, inter alia, clarify that the inclusion of expenses for foreign CFC taxation purposes shall generally not give rise to a DD outcome under the new section 4k(4) ITA, if the German entity is seen as being non-transparent.

The effective date of the new section 4k ITA is generally 1 January 2020 (ie, retroactive application). A grandfathering rule exempts certain expenses that were already legally incurred before 1 January 2020.

## Our view

The further legislative process needs to be closely monitored but it can be expected that the Draft will be passed before the election in September.

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