Implementation of the EU Anti-Tax Avoidance Directive (2016/1164) Exit Tax Measures in Finland

This article provides an overview of the Finnish implementation of article 5 of the EU Anti-Tax Avoidance Directive (2016/1164) and general remarks on other potential developments in the field of exit taxation in Finland.

1. Introduction
Exit tax, as such, is nothing new under the Finnish (midnight) sun; however, the amended rules should now finally be in line with EU law. Finland did not have a general exit tax rule in the past; instead there were provisions covering certain specific corporate taxation events, for example, closing down a permanent establishment (PE) and events falling under the Merger Directive (2009/133),1 such as cross-border mergers.

Whilst the preceding rules did not include, for example, a possibility to defer payment of exit tax and were hence deemed disproportionate in light of EU law, the new rules and their scope of application follow the exit tax measures laid down in the EU Anti-Tax Avoidance Directive (2016/1164)2 rather literally – although during the public consultation phase of drafting the law in June 2019, exceeding the minimum level of protection in certain respects was contemplated. The most crucial difference would have been an extension of the scope of application that would have also covered more than corporate taxpayers, such as limited partnerships (kommanditiyhtiöt), which are not separate taxpayers, and private entrepreneurs, who are subject to personal income tax. Although the scope of the final rules is not as broad as initially proposed, there is an ongoing debate regarding more exhaustive exit tax rules.

The new ATAD exit tax rules were approved by the Finnish parliament and ratified by the president in late December 2019, and are applicable from 2020 onwards.3

The aim of this article is to provide an overview of Finnish implementation of article 5 of the ATAD (section 3), including a description of certain questions that have been left on the table for further evaluation and legislative procedures. By way of background, the previous exit tax rules and their legislative and application issues are outlined (section 2.). Further, this article briefly touches upon the current political climate in the context of tax policy initiatives before the parliament, providing extra flavour on the types of developments that may be seen in the future in the field of exit taxation.

2. Disproportionate Pre-ATAD Exit Tax Rules

2.1. Merger Directive exit tax rule
The simplest way to categorize the preceding corporate exit tax rules in place in Finland is to look at their legislative origin; one such rule is based on the Merger Directive (2009/133) directly,4 and another was of domestic origin5 – henceforth referred to, respectively, as the Merger Directive exit tax rule6 and the domestic exit tax rule7 to make them distinct from the newly-transposed ATAD exit tax rules.8 Both rules were incorporated into the Business Income Tax Act9 as separate provisions.

The Merger Directive exit tax rule covers specific events that may result from a merger, division (demerger) and partial division, transfer of assets, as well as a transfer of registered office in respect of a Societas Europaea (SE) or Societas Cooperatora Europaea (SCE) as governed by the Merger Directive (2009/133) and transposed into domestic tax law accordingly.

The events are as follows:
- to the extent that the assets and liabilities being transferred are no longer effectively connected to a PE in Finland, any unrealized capital gains – i.e. the “market value” – connected to the transferring assets and liabilities (less their value for tax purposes) are taxable (article 4); and

5. Fl: Act 29.11.1996/926: applicable from the 1997 tax year onwards. The related government proposal, HE 83/1996 vp, explains that the domestic exit tax rule is to follow similar principles as the Merger Directive exit tax rule.
6. Fl: Business Income Tax Act [Laki elinkeinotulan verottamisesta], 24.6.1968/360 (as amended), sec. 52 e and 52 g, Primary Sources IBFD.
7. Id., at sec. 51 e.
8. Id., at sec. 51 e (amended), 51 f, 52 e (amended), 52 g (amended) and 52 i.
9. Id.
where the assets being transferred include a PE of the transferring company situated in another Member State, any unrealized capital gains connected thereto would be taxable in Finland (based on worldwide tax liability).\textsuperscript{10} A fictitious credit on tax that would have been charged in another Member State, in the absence of the Merger Directive (2009/133), would be granted (article 10 on the special case of a transfer of a PE).

In both cases, tax was to be collected immediately, whereas in an equivalent national situation, such capital gains are not taxed until the disposal of the transferred assets. The most likely reason for not originally introducing an option for deferral into the domestic tax law was that the Merger Directive (2009/133) contained no provisions on when the collection of exit tax is to take place. Neither was there applicable Court of Justice of the European Union (ECJ) case law providing further guidance at the time of implementation of the Merger Directive.

Considering the ECJ’s case law – for example, National Grid Indus (Case C-371/10),\textsuperscript{11} Commission v. Denmark (Case C-261/11)\textsuperscript{12} and DMC (Case C-164/12)\textsuperscript{13} – it is apparent that the immediate collection of tax in the first case above is disproportionate in light of EU law.\textsuperscript{14} Further clarity on the second case – and the application of article 10 in general – was first addressed in A Oy (Case C-292/16)\textsuperscript{15} wherein a Finnish company, A Oy, executed a transfer of assets pursuant to which all assets and liabilities of its Austrian PE were transferred to the Austrian group company in exchange for shares. Immediate collection of tax was also found to be disproportionate in this scenario. The case was exhaustively analysed by Van den Broek and Den Toom (2018), resulting in well-founded suggestions to amend the wording of the Merger Directive (2009/133).\textsuperscript{16}

It should also be noted that there is a separate exit tax rule applicable to an exchange of shares. The current provision\textsuperscript{17} in force concerns natural persons, who have received shares as part of an exchange of shares, moving their tax residency to a country outside the European Economic Area (EEA). The original wording of the provision was amended in 2011 on the basis of the ECJ’s decisions in de Lasteveire du Saillant (Case C-9/02),\textsuperscript{18} N (Case C-470/04)\textsuperscript{19} and National Grid Indus. Considering the ECJ’s decision in Jacob & Lassus (Joined Cases C-327/16 and C-421/16),\textsuperscript{20} there seems to be a need to amend the rule further to comply with EU law and secure taxing rights.\textsuperscript{21} Exit tax on share exchanges is not covered in this article in more detail, as the rule concerns the taxation of natural persons and is not subject to any amendments in connection to ATAD implementation.

2.2. Domestic exit tax rule

The domestic exit tax rule, in turn, was similar to the first case under the Merger Directive exit tax rule and was intended to secure Finland’s taxing rights where a transfer of assets from a Finnish PE was not a consequence of cross-border operations governed by the Merger Directive (2009/133). According to the rule: to the extent assets of foreign corporations are no longer effectively connected to a PE in Finland, any unrealized capital gains – i.e. the “market value” – connected to the assets (less their value for tax purposes) shall be regarded as taxable income of the PE.

The events that lead to an asset losing its connection to a Finnish PE were not separately described in the provision; however, the domestic exit tax rule was applicable to a transfer of individual assets abroad or even the closing down of an entire business of a PE.\textsuperscript{22} In terms of tax collection, no option for deferral was granted. The domestic exit tax rule was found to be disproportionate by the Administrative Court of Helsinki, which expressed, in its decision of 6 June 2013,\textsuperscript{23} that due to the immediate collection of taxes in the case at hand, the application of the provision led to a tax treatment that conflicted with EU law.\textsuperscript{24} To the author’s knowledge, this case, concerning a UK company that, on the basis of place of effective management, had a deemed PE in Finland that ceased to exist, would have been the only case wherein the domestic exit tax rules would have applied.
Regardless of the ECJ’s case law and, for example, the recommendations made by the Expert Working Group on Business Taxation in 2013, neither the Merger Directive exit tax rule nor the domestic exit tax rules were amended to provide for an option for deferral until now. Nevertheless, given that there has been, based on published case law, only a limited number of cases on the application of either of the rules, Finland has not suffered excessively from an inability to secure its tax base.

The domestic exit tax rule was rewritten and replaced by the ATAD exit tax rules in the course of transposing them. The Merger Directive exit tax rule remained generally the same but was supplemented by an option to apply for deferral for payment of tax, among other technical amendments.

3. Implementation of Article 5 Exit Tax Measures

3.1. Triggering events

The events triggering exit tax under the newly-transposed ATAD exit tax rules strictly follow those laid down in article 5(1) of the ATAD. The events included in the Business Income Tax Act are as follows:

1. a transfer of assets from the head office to a PE in another state in so far as Finland no longer has the right to tax the transferred assets due to the transfer;
2. a transfer of assets from a Finnish PE to a head office or a PE in another state in so far as Finland no longer has the right to tax the transferred assets due to the transfer;
3. a transfer of tax residence – under the Finnish legislation or a tax treaty – to another state, except for those assets that remain effectively connected to a PE in Finland; and
4. a transfer of a business carried on by a Finnish PE to another state in so far as Finland no longer has the right to tax the transferred assets due to the transfer.

Some of the triggering events could be considered generally effective, while others may, in practice, rarely become applicable. For instance, the first case above – a transfer of assets from a head office to a foreign PE – could be regarded as a niche rule, as it would be applicable only where assets are transferred either to France or Egypt. The reason for this is that Finland commonly applies the credit method to eliminate double taxation according to its current tax treaty policy; hence, such a transfer does not result in Finland forfeiting its right to tax transferred assets. Further, where no tax treaty exists, the credit method is applied under the domestic tax law.

Both the second and fourth cases – a transfer of assets from or a business carried on by a Finnish PE – were previously covered by the domestic exit tax rule. In fact, the ATAD exit tax rules, technically speaking, supplement and replace the preceding domestic exit tax rule that was rewritten in connection with implementation of the ATAD measures.

The third case above – a transfer of tax residence – is again of a more limited nature, as Finnish company law currently recognizes a transfer of seat only in respect of an SE and SCE. As the provision covers a transfer of residence both under the Finnish legislation and tax treaties, it is possible that a Finnish company will be considered tax resident in another state, for example, on the basis of its place of effective management. This would, however, result in dual residency, as all companies incorporated and registered in Finland are generally treated as Finnish tax resident.

Further, the latest Government Programme contained an initiative to introduce a provision “stating that an entity or a benefit under joint administration is considered Finnish if it was established under the laws of Finland, if its domicile is in Finland, or if its place of effective management is Finland.” Accordingly, there is a law drafting project underway to amend the Finnish Income Tax Act such that a foreign company could be treated as Finnish tax resident where its place of effective management is in Finland. The government proposal is currently expected to be published in early 2020. Going forward, the scope of application of the third case above may, in practice, be extended accordingly.

Unlike some Member States, Finland has transposed article 5(7) of the ATAD concerning temporary asset transfers into its domestic tax law. As an exception to the triggering events, exit tax is not levied in the event the asset transfer relates to the financing of securities, assets posted as collateral or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management under the condition that the assets are set to revert to Finland within a period of 12 months. The Finnish legislator noted that temporary asset transfers were not outlined in detail in the ATAD but found some indicative support, for example, for the
financing of securities in the Regulation on Transparency of Securities Financing Transactions and of Reuse (2015/2365).30

The wording of article 5(7) can be seen as unconditional ("…this Article shall not apply to…") – especially as the exception has not been explicitly drafted as optional31 – it nonetheless appears that a number of Member States have "opted out" of the exception for temporary asset transfers as described above. Given that the ATAD is intended to establish a minimum level of protection for domestic corporate tax bases – and, according to article 3, does not preclude stricter provisions or a broader scope of application – such an interpretation may be justified. Nevertheless, the exception was perhaps not intended to be ignored in the implementation process, as this could lead to a potential inconsistency between the Member States resulting in double taxation, for example, in a situation in which the state of origin (departure state) applies the exception but the destination state does not. If a Member State were to apply the exception, it is possible that, on the one hand, no valuation would be carried out for the purposes of exit tax in the state of origin – and, on the other, the destination state would likely respect the transferring (book) value even if not equal to market value. Any increase in value of temporarily transferred assets would result in exit tax in the destination state at the time of returning the assets to the state of origin – resulting in a question as to whether such tax could effectively be credited and what the tax base of the assets in the state of origin should be. Assuming temporary asset transfers would primarily concern monetary assets, the conflict would be mitigated, as their market value is, in principle, their face value (meaning that a temporary transfer could result mainly in a foreign exchange gain or loss, if any). An inconsistency could result in undesired effects; however, given the rather narrow scope of application,32 the question may be somewhat irrelevant.

3.2. Deferral of payment, interest and guarantees

As described in section 2., the previous exit tax rules – the domestic and the Merger Directive exit tax rules – did not contain any stipulations concerning deferral of exit tax; instead, tax was to be collected immediately. The ATAD exit tax rules transposed the taxpayer's right to defer the payment of an exit tax as laid down in article 5(2) of the ATAD into domestic tax law in the event of the triggering events described herein – and supplements the Merger Directive exit tax rule with equivalent deferral rules.

From 2020 onwards, in the event of an exit, the taxpayer must be given the right to defer the payment of exit tax by paying it in annual instalments over 5 years instead of, for example, monthly payments.33 The right to a deferral requires that the assets, tax residence or business carried on by a PE be transferred either to another Member State or a third country that is a party to the EEA Agreement (1992)34 and fulfils certain conditions, i.e. in practice, Iceland or Norway. Literally, such a third country should have concluded an agreement on mutual assistance for the recovery of tax claims equivalent to the Mutual Assistance Recovery Directive (2010/24)35 with the Member State of the taxpayer or with the European Union. The taxpayer shall apply for deferral prior to the tax assessment for the tax year in question being closed.36

The deferral of payment is immediately discontinued in the event: the transferred assets or business is disposed of; the transferred assets, business or tax residence is transferred outside the European Union or the applicable EEA countries as described herein; the taxpayer goes bankrupt or is wound up; or the taxpayer fails to fulfil its obligations regarding the instalments and does not correct the situation within 12 months (or 6 months in the event of a consecutive failure). The transposition follows article 5(4) of the ATAD literally. One may, however, raise the question as to whether discontinuation of the deferral could, generally speaking, be disproportionate in respect of an event falling under the free movement of capital as laid down in article 63 of the Treaty on the Functioning of the European Union (2007).37

The legislator chose to transpose the optional right for tax authorities to require a guarantee as a condition for deferral, provided there is a demonstrable and actual risk of non-recovery. The government proposal explains that the risk assessment shall be based on a case-by-case analysis but – in accordance with the ATAD and ECJ's case law – does not identify the factors and criteria to be taken into account. Consequently, the tax authorities seem to have relatively wide discretion in requiring a guarantee. In the author's view, the risk assessment could, to a certain extent, rely on, for example, the taxpayer's credit rating and tax debt history, which would provide the taxpayer with transparency.38

Another optional measure concerning interest, as laid down in article 5(3) of the ATAD, was also transposed into the domestic tax law. The deferred payments are treated as


31. See art. 5(3) ATAD, which leaves it up to the Member States to choose whether interest is charged and/or a guarantee required (...interest may be charged [...] may also be required to provide a guarantee [...]. See also K. Spindler-Simader & V. Wohrer, Implementation of the EU Anti-Tax Avoidance Directive (2016/1164) in Austria, 58 EUR. Taxn. 7, p. 290 (2018), Journal Articles & Papers IBFD.


33. To comply with EU law literally, deferral also concerns annual public broadcasting tax (teleinfraovero) for corporate taxpayers.

34. Agreement on the European Economic Area, 2 May 1992, OJ L 1 (1994), Primary Sources IBFD.


36. In practice, taxation is closed within 1 month of the date of the annual tax assessment decision but no later than 10 months from the end of the tax year in question.


38. See Kananoja, supra n. 26, at p. 344. See also Kananoja, supra n. 14, at p. 427; and M. Tell, Exit Taxation within the European Union/European Economic Area – After Commission v. Denmark (C-261/11), 54 EUR. Taxn. 2/3, pp. 52-53 (2014), Journal Articles & Papers IBFD.
equivalent to residual tax payable from a tax year; in other words, where a taxpayer applies for a tax payment deferral, so-called relieved late payment interest (*huojennettu viivästyskorko*) is charged (instead of full late payment interest). Such interest is based on the reference rate published by the Bank of Finland plus two percentage points but is always at least 0.5%.[39]

### 3.3. Market value and tax base

According to article 5(1) of the ATAD, an amount equal to the *market value* of the transferred assets less their value for tax purposes is taxable at the time of exit. The Finnish ATAD exit tax rules follow this principle; however, the term “market value”, as such, is not used under Finnish tax law. Instead, a separate concept of “exit value” (*huutokaupan tapaistumisarvo* in Finnish) was introduced. In an annual tax assessment procedure, the *exit value* is included in the taxpayer’s income for the tax year in which the triggering event takes place. The concept of exit value, however, resulted in numerous comments during the public consultation phase of drafting the law due to the concept differing from the existing terminology, such as *fair value* and other phrases used under Finnish tax law (for example, in connection with the Merger Directive exit tax rule). Replacing established terminology may result in tax uncertainty.

The legislator justified the concept of exit value by highlighting that the value would be applied only in the event of an exit; hence, the existing terminology could not be used. It was further noted that the definition of market value in the ATAD does not explicitly correspond with the definition applied for transfer pricing purposes. Emphasis was, in addition, put on the definition of “associated enterprise” in the ATAD. The definition in article 2(4) of the ATAD is based on a 25% participation, whereas the transfer pricing rules refer to 50%. The government proposal still mentions that the above does not exclude the possibility of general (transfer pricing) principles that are used to determine the market price being used to calculate the exit value. From an economic point of view, one may ask whether or not the universal concept of market value could differ depending on varying participation definitions. Despite the nuances in terminology, ultimately, an equivalent meaning to that laid down in the ATAD should be given to the exit value, namely “market value of the transferred assets”.

Where assets, tax residence or the business carried on by a **PE** are transferred to Finland, the value established by the state of origin should be regarded as the starting value of the assets for tax purposes, provided that this is determined in accordance with the definitions in articles 2(4) and 5(6) of the ATAD.

The ATAD does not provide for a specific dispute resolution mechanism in the event the Member States disagree on the value of the transferred assets. In order to proactively guarantee symmetry in valuation and mitigate against the risk of the exit value being challenged, cross-border dialogue may provide a solution. In a nutshell, cross-border dialogue, as introduced recently by Finland, is initiated by the taxpayer and takes place between the taxpayer and tax authorities of the Member States involved in order to pre-emptively discuss and seek consensus on the potential area of conflict – in this instance the value of the assets being transferred.[40]

In this context, it should be noted that the “assets” are not determined under the ATAD. Instead, the Finnish legislator had to take a stand on the assets subject to exit taxation. On the one hand, in the tax praxis, goodwill generated by a company’s own operations has not been deemed taxable in the event of a dissolution (liquidation).[41] On the other hand, mergers (in the event they do not fulfil the conditions for tax neutrality) have been treated, for tax purposes, as being equivalent to a liquidation. The Supreme Administrative Court has also pointed out that the assets, in respect of an event falling under the Merger Directive exit tax rule, should not be given a broader meaning than they would in connection with a liquidation.[42] As goodwill generated by a company’s own operations has, in respect of domestic events, been excluded from the tax base, an equal treatment was adopted with regard to the ATAD exit tax rules to ensure the applicability of the rules in light of EU law. This is also reasonable from a practical point of view, as such goodwill could be rather hard to value. Nonetheless, the government proposal also pointed out that the existing tax praxis and whether there is a need for legislative changes in terms of the tax treatment of goodwill generated by a company’s own operations should be evaluated separately.

### 3.4. Scope of application

According to article 1 of the ATAD, the Directive applies solely to taxpayers that are subject to corporate tax. Further, preamble 4 emphasizes that extending the scope to entities not subject to corporate tax – i.e. transparent entities – would result in a need to cover a broader range of national taxes. During the public consultation phase of drafting the law, a broader national scope was considered and the draft government proposal suggested that the ATAD exit tax rules could be extended to cover, for example, limited partnerships (*kommanditiyhtiö*) which are taxed at the level of partners. Such a broader scope could, in addition, have applied to private partnerships (*avoim yhtiö*) and maybe even private entrepreneurs (sole proprietors). In other words, natural persons could also have fallen within the scope of application.

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[39] Currently, the relieved late payment interest is 2% and full late payment interest 7%.


[41] FI: KHO 1998:26, 25 June 1998. The Supreme Administrative Court’s case concerned liquidation of a limited liability company and whether goodwill generated as part of its own operations would be taxable.

Given that the ATAD codifies the ECJ’s extensive case law in the field of corporate exit taxation, a question that might arise is whether or not the ATAD measures could be applicable to natural persons considering, in particular, that in National Grid Indus a clear distinction was drawn between legal persons and natural persons (as was at issue in de Lasteyrie du Saillant and N). In Commission v. Portugal (Case C-503/14), however, the ECJ appeared to reverse this line of reasoning when it stated that: ‘although it is true that the judgment of … National Grid Indus (C-371/10), was adopted in the context of the taxation of capital gains on companies, the Court subsequently transposed the principles laid down in that judgment also to the taxation on capital gains of natural persons …’. Taking this into account, introducing a broader national scope for the ATAD exit tax rule should not be disproportionate – at least insofar as the provisions concern business assets.

Ultimately, based on feedback from the public consultation and in consideration of the potential impact on natural persons, which had previously not been extensively examined, the scope of application was not extended to non-corporate taxpayers. The Finnish parliament, however, adopted its Finance Committee’s suggestion for further evaluation by the end of 2020 on whether the scope should be extended to cover partnerships.

In this context, it should be noted that, to the extent that the Merger Directive (2009/133) covers the specific company forms listed in the annex, which are subject to corporate tax, the scope of application of domestic provisions concerning a merger has been extended to cover limited partnerships and general partnerships. This was done in connection with the preceding domestic merger rules being replaced by the provisions transposing the Merger Directive in 1995. As the Merger Directive exit tax rule was not abolished but supplemented by deferral rules, there is a de facto exit tax rule in place covering partnerships in certain events.

The possibility to introduce, in addition, a separate exit tax for natural persons was also raised in the parliamentary debate and stems from a political debate regarding taxation before the latest governmental elections. In fact, Prime Minister Sanna Marin’s Programme (10 December 2019) mentions that “opportunities will be examined for introducing a taxation model that would prevent tax avoidance relating to sales, gifts and inheritance of people who are living abroad but liable to pay taxes in Finland”. This entails examining whether some sort of exit tax for private individuals should be introduced. To the author’s knowledge, such an evaluation is already well underway and should be published in early 2020.

4. Conclusions

Ultimately, Finnish transposition of the ATAD exit tax measures does not exceed the minimum level of protection in any respect. Finland did, however, implement options for interest and guarantees under domestic tax law. In addition to transposing the ATAD exit tax rules, legislative and application issues in respect of the exit tax rules derived from the Merger Directive (2009/133) were resolved by amending the existing rules. Prior to implementation of the ATAD, Finland was actually the only Nordic country that had not amended its exit tax provisions, regardless of the fact that they were deemed to be disproportionate in light of EU law.

As a separate course of action, Finland is to amend its domestic tax law such that a foreign company can be treated as a Finnish tax resident if its place of effective management is Finland. This would, in practice, impact the scope of application of the ATAD exit tax rules in the future.

The share exchange exit tax provision was not amended in connection with ATAD implementation. Considering the ECJ’s recent case law there may, however, be a need for certain refinements to secure taxing rights going forward. Finally, it remains to be seen how the government will tackle parliament’s desire to extend the rules to cover partnerships – and whether an examination of a potential exit tax for natural persons will lead to legislative initiatives. Also, the question of whether goodwill generated by a company’s own operations shall be subject to tax in the event of an exit was left for further evaluation. Although the domestic tax legislation is now in good shape for the next decade, further development in the area of exit tax is expected.

43. Kananoja, supra n. 26, at pp. 340-346. See also V. Kananoja, Verotusval- lan tasapuolinen jakautuminen poikkeuksellisesti, 48 Oikeus 3, p. 258 (2019); and, for example, R. Collier et al., Dissecting the EU’s Recent Anti-Tax Avoidance Measures: Merits and Problems, EconPol Policy Report 8, pp. 16-17 (2018).
46. Commission v. Portugal (Case C-503/14), para. 33.
47. See Report by the Finance Committee, VäVM 18/2019, p. 14; and the Parliament’s response EV 77/2019 vp.
48. Companies under Finnish law known as an osakeyhtiö (limited liability company), osuuskunta (cooperative), säästöpankki (savings bank) or vuokatusyhtiö (insurance company).
49. Supra n. 27.