

**ATP**

*AGGRESSIVE TAX PLANNING*

**IOTA Report for Tax Administrations**



Intra-European Organisation of Tax Administrations

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# ATP - AGGRESSIVE TAX PLANNING

## *IOTA Report for Tax Administrations*

Intra-European Organisation of Tax Administrations (IOTA)



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## PREFACE

Throughout history taxation has been a subject that has drawn a natural resentment from its contributors in all but the fewest of cases. It is an expectation that businesses and individuals will contribute towards the services and facilities provided by their government(s) in the form of taxes. However, this does not stop organisations wishing to pay as little as possible towards these amenities, whilst delivering the best dividend or return to their investors.

One approach to this conundrum is the application of Aggressive Tax Planning (ATP). This topic has plagued tax administrations for many years and is one which is not unique to any country or administration. By adopting an “almost legal” stance to the payment of taxes these organisations strive to find any loophole or advantage they can from the legislation and maximise it to their own advantage.

As part of the IOTA Area Group activities into Large Taxpayer Treatment and Audit it was decided that members should be approached to determine how their administrations were addressing the issues of Aggressive Tax Planning. Sixteen member administrations responded to a questionnaire on the subject and this report examines what Aggressive Tax Planning is, how to fight against it, what legislation is in place to help tax administrations’ counter its effect, summarises the findings of the team from the responses they received and makes recommendations as to how to tackle this ongoing problem.

Particular thanks for the work carried out must go to Mr. Jean Gourmandin from France who compiled the findings, as well as to the other task team members: Mr. Gentian Zoto from Albania, Mr. Gerhard Steiner from Austria, Ms. Mariana Toskova from Bulgaria, Ms. Tornike Kutchava from Georgia, Mr. Niels N.A.T. Smetsers from the Netherlands, Mr. Reidar Rasmussen from Norway, Ms. Dalila Kutišová-Luknárová from Slovakia, Mr. Eric Carlberg from Sweden and Ms. Daniela Tesic from the Republic of Srpska.

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## 1. EXECUTIVE SUMMARY

All the IOTA participating tax administrations recognise the economic impact of Aggressive Tax Planning (ATP), although in some countries this has been far more prevalent than in others. They also realise that ATP is one of the biggest revenue risks to collecting the correct tax due under their tax systems.

The Task Team considered the different approaches adopted by IOTA tax administrations to respond to ATP and how it was perceived by them. Was it a threat or not? What characteristics were indicative of ATP? They examined the various questions raised by its application and ways of fighting against its use by either implementing specific legislation or by the application of existing more general regulations. In examining the responses to their questionnaire the task team members were able to identify ways to combat ATP and make suitable recommendations to assist its members.

The authors of this Report suggest to:

- Adopt a proactive legislative framework rather than simply reacting to developing situations. To this end they propose the introduction of a trader-based registration process for new tax schemes so as to control their impact and ensure any new legislation is correctly appointed;
- Actively seek and involve tax intermediaries in the decision making process to ensure that there is an open and transparent exchange of information;
- Consider the use of disclosure schemes to force early compliance within the meaning and purpose of the law;
- Look at the implementation of an advance rulings system whereby taxpayers are made aware of the treatment the tax administration will apply to particular transaction types;
- Carry out more analysis of ATP transactions to see what effect the use of such schemes have on pre tax profit.

Based on the available information, the authors conclude that within the IOTA Membership any ATP that contains, even in part, an element of economic substance, is more often acceptable by both the revenue bodies and the judge.

It is seen that there is the potential to reduce the demand from large corporate taxpayers for ATP schemes and to provide the revenue bodies with much better information about ATP schemes. The Task Team further considers that the demand for ATP will not disappear in the future and that some large corporate taxpayers will still choose to apply it.

In conclusion, the report indicates that all tax administrations need strong strategic guidance in this area. Revenue bodies need to have an effective risk management processes in place to identify aggressive taxpayers and the different forms of ATP so as to be able to allocate the necessary resources to respond to them.

## 2. INTRODUCTION

This Report has been prepared by a Task Team comprised of members from the tax administrations of Norway, Albania, Slovakia and France. The Task Team also worked closely with other IOTA tax administrations, using casual meetings. There were three workshops at which the progress and direction of the Report were reviewed. An additional oversight was provided by a mid-term review.

This Report can be presented as a first step. It depicts the problems of ATP, the legislative tools available within IOTA's region and examines some of those used by other foreign administrations to fight against ATP and, lastly, proposes actions that can be taken to prevent or deter ATP.

In September 2006, in what is referred to as the "Seoul Declaration", the members of the Forum on Tax Administration of the Organisation for Economic Co-operation and Development (OECD), identified the non-compliance with tax legislation as one of the main challenges facing tax administrations in the coming years.

"Enforcement of our respective tax laws has become more difficult as trade and capital liberalisation and advances in communications technologies have opened the global marketplace to a wider spectrum of taxpayers. While this more open economic environment is good for business and global growth, *it can lead to structures which challenge tax rules, and schemes and arrangements by both domestic and foreign taxpayers to facilitate non-compliance with our national tax laws.*"<sup>1</sup>

However, the challenge of tackling tax evasion and/or illegal tax avoidance is not new. Tax avoidance and tax evasion have threatened government revenues throughout the world for many years. In 2008, the US Senate estimated revenue losses amounted to \$100bn a year and more recently it was reported in the Financial Times<sup>2</sup> that the OECD had detected the use by banks and other financial institutions of using "losses accumulated since the financial crisis - calculated to be worth \$700bn - as a tool for ATP". It also reported the manipulation of cross-border ATP where the UK introduced laws to combat "contrived circular transactions" where hundreds of millions of pounds was seen at risk.

In response to the financial crisis, governments of the G20 member countries announced exceptional economic measures to balance their budgets. They decided to reduce their tax losses, in particular by strongly discouraging the use of tax havens and by tightening their legislation for fighting abusive tax avoidance.

The increasing cross-border flows and the global economy not only offer opportunities for companies to increase their profits and their competitiveness, but also generate non-compliance risks and encourage ATP. The gap between the tax rates applied by the various tax authorities, a risk-return ratio too favourable to

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<sup>1</sup> Final Seoul Declaration. Third Meeting of the OECD Forum on Tax Administration, 14- 15 September 2006. - <http://www.oecd.org/dataoecd/38/29/37415572.pdf>

<sup>2</sup> Financial Times Tuesday 27th September 2011 "Experts study need for global crackdown on tax arbitrage"

taxpayers and the increase of firms specialising in this area, can explain the expansion of ATP schemes.

The members of the Task Team consider that the phenomenon of ATP is not exclusive to specific countries. It is a global concern that constitutes a risk to the integrity of every tax system.

### 3. AGGRESSIVE TAX PLANNING

Tax planning is considered as one of the three components of tax practice: tax compliance, tax litigation and tax planning. Tax planning is currently designed to enable taxpayers, within the applicable rules, to organise their affairs so as to minimise their tax burden.

IOTA tax administrations agreed to recognise that, although the majority of tax planning occurs in the course of real and pure business transactions and is based on the legitimate minimisation of the tax burden on transactions which comply with both the letter and the spirit (meaning and purpose) of the law, tax practice in this field has changed over the years and not only in the western economies. The development of “aggressive” tax planning is now growing strongly worldwide in line with the growth of international business.

This Chapter tries to identify a common definition of ATP for IOTA Member administrations.

#### 3.1. The concept

- a) The term “aggressive tax planning” is understood, very broadly, to encompass a wide range of transactions from tax avoidance to tax evasion.

For the majority of IOTA tax administrations, a distinction has to be made between tax avoidance, in that the taxpayer does not directly break any specific rule of the law, and tax evasion which violates statutory provisions and, consequently, has to be considered as illegal. Because tax evasion and tax avoidance can be both a deviation from what is considered legal, fair and just, and because they frequently occur together they are often treated in a similar manner.

- b) ATP is more often presented as an illegal tax avoidance transaction that complies with but abuses the spirit of the law. Some countries still consider ATP as totally illegal.

The study of fiscal non-compliance such as tax evasion is documented in literature quite extensively and lawyers and/or tax administrations do not show much interest in these fiscal anomalies. Tax avoidance, which is usually interpreted as the problem of the form and substance, seems to be harder to understand for some IOTA tax administrations.

Consequently, while, at a technical level, ATP covers both tax avoidance and tax evasion, the focus of this Report is limited to issues of tax avoidance, and the expression “ATP scheme” refers to a specific tax avoidance plan.

- c) For the majority of tax administrations, the expression “aggressive tax planning” does not refer to a particular type of operation or transaction but rather to a result obtained in circumstances other than those provided for by the fiscal policy, or which give an unexpected result in terms of that intended by the legislation. Other expressions, such as “abusive tax planning”, are also used by administrations to describe this type of tax planning.

Accordingly, the concept of ATP for IOTA Members can be presented as a tax avoidance transaction that consists of reducing the effective tax rate of



a particular transaction to a level below the one sought by the fiscal policy for such events.

In addition, an ATP scheme is more often presented as a sophisticated transaction including a number of steps, making use of complex mechanisms. A majority of tax administrations think that, apart from the resulting tax benefits, the economic justification of an ATP scheme is generally very limited and may even be totally non-existent.

The examples provided by the IOTA Members show that ATP schemes usually exploit the shortcomings or weaknesses of tax laws. Currently, schemes involve the movement of funds and/or shell companies, the use of financial instruments or entities (hybrid instruments or entities) that are treated differently depending upon the tax jurisdictions they are subject to.

### 3.2. Definition of ATP

No IOTA Member tax administration has a definition of ATP despite all tax authorities recognising the risks from ATP schemes. One definition of aggressive tax planning that can be used was provided by the OECD in their study into the role of tax intermediaries in 2008<sup>1</sup> as being:

*“This refers to two areas of concern for revenue bodies:*

*Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences. Revenue bodies’ concerns relate to the risk that tax legislation can be misused to achieve results which were not foreseen by the legislators. This is exacerbated by the often lengthy period between the time schemes are created and sold and the time revenue bodies discover them and remedial legislation is enacted.*

*Taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law. Revenue bodies’ concerns relate to the risk that taxpayers will not disclose their view on the uncertainty or risk taken in relation to grey areas of law (sometimes, revenue bodies would not even agree that the law is in doubt).”*

### 3.3. Reasons for not having any definition

The Task Team believes that the main reason for this situation is that tax planning schemes are not always illegal and not always abusing the legislation. The review of responses showed that it was not a consequence of the legal system.

### 3.4. Characteristics that indicate aggressive tax planning

Tax administrations use a variety of measures to detect and respond to ATP schemes, including risk assessment processes and administrative structures specifically designed to address ATP. Fiscal authorities detect ATP schemes through audits and investigations, ruling mechanisms, data analysis, registration and disclosure rules for ATP schemes, promoters and participating taxpayers, etc. They also use a number of response strategies including general anti-avoidance rules, public identification of schemes, taxpayer alerts, taxpayer penalties, promoter penalties and special enforcement programs. After a number of discussions with IOTA Members, even if it is not possible to have a clear definition of ATP, the Task

<sup>1</sup> Study Into The Role Of Tax Intermediaries - Isbn-978-92-64-04179-0 © Oecd 2008  
<http://www.oecd.org/dataoecd/28/34/39882938.pdf>

Team considers that it can demonstrate a number of important characteristics that indicate ATP. These include:

- Arrangements that are contrived and artificial in their method of execution;
- Schemes that involve fraud against the revenue;
- Schemes using tax havens;
- Circular movement of funds with non-recourse loans;
- Schemes not implemented as specified in contractual and other legal documentation;
- Abuse of specific matters or anti-avoidance provisions;
- Split timing between the booking of expenses and the registration of revenues;
- Permanent advantage as distinct from a timing advantage.

More simply, there is also an increasing number of tax planning techniques that exist which can indicate aggressive tax schemes, such as:

- Use of non-recourse debt (loan);
- Use of captives;
- Transfer pricing;
- Thin capitalisation;
- Manipulation of dividends/rebates/credits;
- Interest spinning, leveraged acquisition schemes;
- Hybrid instruments (preferred shares, PECs<sup>1</sup>, etc.);
- Conversion transactions;
- Use of tax-exempt status;
- Loss multiplication, loss companies, artificial loss schemes;
- Transfer of assets abroad;
- Use of trusts, foundations, re-invoicing centres, fronting companies;
- Kick back commission camouflaged as consultant expenses to foreign company;
- Schemes to avoid withholding tax;
- Deferred tax schemes;
- Employee benefits;
- Special benefits for the management.

There also exist a number of sensitive business operations that may indicate ATP. These operations include:

- Mergers and acquisitions;
- International restructuring;
- Increasing capital or renunciation to credit;
- Structured financing;
- International arrangements based on a multiplicity of cross-border transactions;
- Use of hybrid financing;
- Strategic alliances (joint ventures, partnerships, etc.);
- Use of derivatives - transfer of risks.

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<sup>1</sup> PEC - Preferred Equity Certificate

## 4. HOW TO FIGHT AGAINST ATP

### 4.1. Introduction

An ATP scheme is a specific tax avoidance plan that is designed to use the different legislative requirements in different countries and in doing so to use and abuse the different national and international fiscal rules to minimise the tax burden for the company or group of companies.

This phenomenon, recognised by most of IOTA tax administrations, is called by a number of different names (e.g., aggressive tax planning, abusive tax planning, tax avoidance or tax evasion), but the substance is the same - reduction of taxes by using the loopholes in the law.

### 4.2. Obvious approaches for tackling aggressive tax planning schemes

In general, ATP means any scheme where the main purpose or benefit comes from the reduction of income tax or capital gains tax and the tax advantage sought is not clearly sanctioned by the tax laws. Usage of aggressive tax planning schemes is not just a compliance issue as it can include situations where the result sought by the taxpayer may be available under the existing law - and legislative or other rule changes may be necessary to address it.

There are three fundamental vehicles to deal with ATP schemes:

- Creating a good anti-abuse legislation (legislative approach);
- Developing an effective organisational structure in the tax administration (organisational approach);
- Supporting these by the use of other tools.

Each of them should be used in unity with the others. For example, it is not sufficient to have well-developed anti-abuse legislation if there is not well-educated staff within the administration that can properly and effectively use this law. In addition, if they do not have at their disposal the proper information at the right time, despite all efforts, they would probably be unsuccessful.

However, international tax treaties and requirements should not be overlooked when reviewing the possibility of ATP schemes.

## 5. LEGISLATIVE APPROACH

As a consequence of the above issues, many of the IOTA Members have developed their own sophisticated legislative approach, which consists of specific as well as general anti-avoidance legislation.

### 5.1. Specific anti avoidance legislation

Specific anti-avoidance rules are an effective way of combating ATP. Legislation should be defined to address specific transaction types. Because this legislation is applied to a specific area it should not require any additional interpretation.

However, in reality, because it is impossible to foresee all situations and all techniques that taxpayers and their tax advisors would use to abuse the provisions of the Tax Act, tax authorities must respond to any abuse by sealing those cracks in the Act that have been exploited. Specific anti-avoidance rules are applied to specific situations whereas their effectiveness depends on the legislative bodies' ability to foresee and rapidly detect all tax planning that is contrary to the spirit of the law.

Many specific anti-avoidance rules have been introduced that apply to particular situations, e.g., CFC<sup>1</sup> legislation, thin capitalisation rules, exit tax, etc. Below are some further examples from the survey amongst IOTA tax administrations.

#### Belgium

There are several specific anti-avoidance laws in place. In contradiction to the general Anti-Avoidance Law (Article 344), these laws deal with specific transactions, and the administration only has to prove that the main purpose of the transaction is to acquire a tax advantage.

#### France

The French tax system consists of a variety of generic rules. Once the subject addressed by these rules has been identified, they stipulate what actions should follow. Taxpayers sometimes interpret these generic rules in a way not originally intended.

Accordingly, to prevent such interpretations and to protect the fairness and integrity of the tax system, special rules are sometimes needed that can be described as "specific anti-avoidance rules". These rules, which are defined in the legislation, set out in advance the consequences of any interpretation that is deemed to create an undesirable situation so as to ensure compliance with the tax policy.

#### Germany

In addition to the general clause (§ 42 AO) there are a lot of anti-avoidance rules in different specific tax laws (e.g. § 50d Abs. 3 EStG).

#### Netherlands

Specific anti-abuse legislation was introduced (e.g., the legislation that, under certain circumstances, denies deduction of interest or legislation on assets in trusts, etc.)

<sup>1</sup> CFC - Controlled Foreign Corporations

### 5.1.1. Conclusion

Specific anti-avoidance legislation has been introduced by several IOTA Members, but in practice, there are many situations where a specific anti-avoidance provision does not provide satisfactory protection against aggressive tax planning schemas. In such situations it is necessary to support this legislation by other tools.

### 5.2. General anti-avoidance legislation

General anti-avoidance legislation can be defined as anti-avoidance legislation based on general principles in law, codified and included in the legislation. This kind of legislation is used, where it is not possible to negate the ATP schemes directly through the legislation used in the schemes. Sometimes it is not sufficient to have just general anti-avoidance rules. They should be supported by relevant, specific anti-avoidance provisions.

Most of the IOTA Members have codified general anti-abusive rules into their domestic legislation. Some examples of responses from Members are described below.

#### Belgium

The Belgian tax legislation has several provisions to prevent tax avoidance, where one of the main objectives of a transaction is to create a tax advantage. The most important one is Article 344 of the Law Book of Income Tax, which can be defined as a general anti-avoidance rule. Article 344 can be applied to any transaction where the sole purpose is avoiding taxes.

#### Czech Republic

Under the Czech Administration Taxes Act No 337/1992 Coll., as amended, when applying the tax laws in tax proceedings, the actual content of an act in law (i.e., a legal transaction) and other facts necessary for the determination or collection of tax are taken into account where such an act appears on the face of it to be in accordance with the law while in fact deviating from it.

#### France

According to the view of the French tax administration, a specific anti-avoidance rule is not a legislative tool designed to counter an avoidance scheme that does not stem from a particular type of transaction and which results in an abusive tax position with regards to the objectives of the legislation. To counter such schemes, the tax administration tends rather to turn either to the approach based on the presence of a general anti-avoidance rule in the legislation and/or to that based on the recognition by the courts of legal doctrines on anti-abuse.

Since 7 August 1987: by the Finance Law n°87-502; Article 14 substitutes the Article L.64 of the French Tax Procedures Code for the Article 1649B of the General Tax Code. In 2003, the second Finance Law extended the scope of the provision to the local tax (*taxe professionnelle*<sup>1</sup>). In 2007, the general provision was completed. Now this provision can be used to fight against the abuse of the law, sham theory and fraud.

According to this tax procedure, the French tax administration can tackle every act which misrepresents the real nature of a contract or of an agreement by using these specific

<sup>1</sup> Professional tax (*taxe professionnelle*) is levied on those using their property to work from home - The System of Tax in France, <http://france.overseas-homes-direct.com/tax-uk.html>

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clauses. A case for this would be when the arrangement of a taxpayer's affairs was intended principally to reduce their tax liability and that although the end arrangement could be seen as strictly legal, it is in contradiction with the spirit of the law it purports to follow.

### Germany

There is a general clause in the Tax Code (§ 42 AO). This law states that it shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes. An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non tax reasons for the selected option which are relevant when viewed from an overall perspective.

### Netherlands

A general approach is that a “substance over the form” approach is used to counteract aggressive schemas. Most schemes depend on the legal reality. In a “substance over the form” approach; an economic reality is taken as principle. Often the courts follow the tax administration in the “substance over the form” approach.

### Serbia

By the Law on Tax Procedure and Tax Administration, the tax facts are determined according to their economic essence. If a simulated legal business conceals some other legal business, the basis for assessing the tax liability shall be the dissimulated legal business. When income is generated, or property gained in a manner that is against these regulations, the tax authority will assess the tax liability in accordance with the law by which the appropriate kind of tax is regulated (Principle of Establishing Facts, Article 9).

### Slovak Republic

The Slovak Tax Code (No. 511/1992 Article 2 Paragraph 6) provides the general anti-avoidance rule “substance over the form”.

### Spain

The Spanish tax administration acts against ATP using anti-avoidance rules, both general anti-avoidance rules and specific rules like thin capitalisation or CFC.

### Switzerland

The concept of ATP is not known as such at the legal level, but the law foresees a general clause that allows the tax authorities to disregard a business structure set up by a taxpayer in order to prequalify it in a way that conforms to the correct interpretation of tax laws. It is more a specific approach, depending on the analysis of all the relevant facts and circumstances of a given case, but then the disregarding of the structure must be in line with the general clause provided for in the law.

### 5.2.1. Conclusion

General anti-avoidance legislation is normally used if it is not possible to negate the ATP schemes through the legislation used by the schemes. This kind of legislation has been introduced by the majority of IOTA Members. There are many comparable definitions, such as: “substance over the form”, the main object of the transaction is to enable tax advantages, and many others.

### 5.3. Other tools

Fighting against ATP requires administrations to actively explore other possible tools as well. The most important activities are in the detection and understanding of tax planning schemes. IOTA tax administrations use different tools.

#### Bulgaria

In the Bulgarian National Revenue Agency (NRA) a special unit carries out risk management activities. Following in-depth analysis, the prioritisation of the risks is made. The Risk Management Unit developed a program for compliance with both legislation and a minimisation of the risk levels in 2010. The program’s main goals were to:

- Arrange the risks from non-compliance with both the tax and social security legislation according to their ranking and importance;
- Prioritise the risks while taking into account their importance;
- Planning measures for treating the prioritised risks.

#### Denmark

The tax administration of Denmark has introduced a domestic disclosures system. It is a voluntary system with binding rulings. This system provides the tax administration with early information about certain schemes. Information about schemes, used by the companies for tax planning, is forwarded to the department responsible for legislation (including anti-avoidance rulings) in order to obtain a more effective response at both compliance and policy level.

Each time an employee in the tax administration detects a scheme, they are required to inform their manager to forward the scheme to the department responsible for legislation. The information about the scheme is also made available to other colleagues in the tax administration if they require it for their work.

The tax administration is always trying to find new ways of improving transparency and enhancing their relationship with the large corporate sector. Recently they have introduced a form of “co-operative compliance” as an incentive for large companies to be more open and transparent as well as in respect of ATP. If anybody in the organisation detects a scheme of ATP it is their duty to inform the competent persons about it. Firstly to their leader, who must take it further to the part of the organisation that is responsible for legislation and, secondly, the information has to be sent to the tax administration’s working group that deals with ATP.

#### Estonia

The Estonian administration introduced audit principles based on risk analysis - aimed at finding the most effective ways to reduce tax risks (pro-active vs. reactive). The administration attempts to create partnerships with different organisations, use notification letters, visits and phone calls. The objective of these activities is to influence the behaviour of taxpayers.



**Poland**

With regards to Article 9b of the Corporate Income Tax Act (15 February 1992) and Article 25a of the Personal Income Tax Act (PIT, 26 July 1991), taxpayers who make commercial transactions with entities from a tax haven are obliged to prepare special tax documentation. Moreover, Article 88 Paragraph 1 Point 1 of the Goods and Services Tax Act (GST, 11 March 2004) forbids them from deducting input tax from transactions made with entities from a tax haven.

**Slovak Republic**

Tax audits are generally based on risk analysis, but when it comes to tackling ATP schemes, selected taxpayers have been identified for audit. There is no special unit for tackling ATP schemes in Slovakia, but tax auditors involved in the auditing of cross-border transactions share information, knowledge and skills during their irregular meetings.

**Spain**

Detection and action against ATP is usually carried out during regular audits. Nevertheless, there is a specific risk analysis for the detection of particular schemes.

**Sweden**

The Swedish Tax Agency has a national project whose task is to find the most aggressive tax planners. One of the objectives of the project is to develop a proposal for a method to deal with ATP.

**Switzerland**

No special unit has been set up for specifically tackling ATP schemes, as existing units already deal with tax audits, and staff is regularly trained.

**United Kingdom**

Project management approach is adopted to deal with aggressive tax avoidance schemes. This enables resources to be allocated to the areas of highest risk and provides for consistency in dealing with users of the scheme.

***5.3.1. Conclusion***

IOTA tax administrations are using a variety of tools in the fight against ATP schemes. They can use the risk management process, by forwarding information about schemes used by the companies for tax planning to the department responsible for legislation, creating specialised national projects with the main task to find the most aggressive tax planners, sharing information about ATP schemes among specialised tax auditors or by introducing special tax documentation and “co-operative compliance” as an incentive for large companies to be more open and transparent with regards to aggressive planning. The effectiveness of each approach depends mainly on the global environment within the particular country. It should be remembered that apart from these approaches, all tax administrations have recourse to legislation or organisational changes in the fight against ATP.



## 6. ADMINISTRATION FOR TACKLING ATP

All tax auditors are able to deal with tax avoidance, tax evasion and tax fraud. However, where several tax schemes are used these cases are often very complex, so to deal with them some tax administrations have established special departments with highly trained and qualified tax auditors.

The majority of these departments do not only deal with ATP cases, but also cases related to large taxpayers and those with an international aspect. How the department or unit is organised can vary from country to country, but normally the units include auditors, economists and lawyers and they are able to audit the entire fiscal situation of a taxpayer. An alternative approach is where countries establish specific teams or working groups from time to time to deal with specific topics. This enables resources to be allocated to the areas of highest risk and provides for consistency in dealing with users of the scheme.

OECD has established a Working Party group where member countries can share non-taxpayer specific information on ATP schemes. These are often new schemes that may have ramifications for other countries. The information about these cases is very restricted, and only few persons have access to them.

IOTA also has a system for sharing and exchanging information through their Technical Enquiry Service which goes through each country's Principal Contact Person (PCP). All IOTA Members have the opportunity to pose questions about tax schemes and tax administration issues and within a few days or weeks, they will have answers from other Members on how they deal with a similar situation. However, if information is required for a specific case, each tax administration must pursue the issue through the competent authority.

### 6.1. Loss carry forward

In order to provide the necessary background and context, it is important to show the different rules that exist in several countries on the treatment of loss carry forward and the relevant filing years for accounting purposes. This information was obtained from the majority of countries in a previous IOTA questionnaire from 2008.

Country	Years of filing accounting materials	Limitation period for tax adjustments	Comments
Austria	7	5	Materials in juridical processes are kept until the end of the processes. Documents related to the purchase of real estate are kept for 12 years. Limitation of evaded tax: 7 years.
Azerbaijan	10	3	Period of recording can change from 5 to 10 years, depending on which category of document it is.
Belgium	10	3	In case of specific fraud, the 3-year

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			period for tax adjustments can be extended to 7 years back in time. (4 years more )
Bulgaria	10	5	The five-year limitation period shall not apply in the case of criminal proceedings being initiated, and the establishment of the tax dues depends on the outcome of the proceedings.
Czech Republic	5	5	10 years for main documents like balance sheets, ledgers, etc.
Denmark	5	3	Tax adjustments can go back 5 years in time if it is transfer pricing.
Estonia	7		
Finland	6	5	10 years of filing for main documents like balance sheets, ledgers, chart of accounts, etc. Readjustments in VAT - 3 years.
France	10	2	An accounting obligation to keep documents for 5 years, commercial obligation to keep documents for 10 years.
Greece	5		Period of recording is extended if the taxpayer is liable to a pending tax prosecution due to issuing fake or dummy invoices.
Hungary	8	5	10 years for main documents like balance sheets, ledgers, etc.
Iceland	7	6	-
Ireland	6	4	In certain circumstances, it is possible to go back indefinitely.
Italy	10	5	
Latvia	5	3	10 years of filing for documents like balance sheets, ledgers, chart of accounts, etc. The period of filing for salary documents is 75 years!
Lithuania	10		-
Malta	9	5	No time limit when no return, no declaration, by incomplete facts, or misleading on account of tax avoidance or gross/wilful neglect.
Netherlands	7	5	12 years (reassessment and stocking) for international cases. Period of filing starts when the document is not active any longer.
Norway	10	10	If taxpayer has given all information, the period of limitation is 2 years.
Poland	5	-	-
Portugal	10	4	-
Serbia	10	5 (10)	An accounting requirement to keep: Financial statements - 20 years;

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			Ledgers - 10 years (subsidiary ledgers - 5); Salary documents - permanently. Limitation period of tax adjustment is 5 years, and Absolute Tax Limitation period is 10 years.
Slovakia	5	5	10 years for main documents like balance sheets, ledgers, etc.
Slovenia	10	5	
Spain	6	4	15 years for statements and documents related to negative taxable amounts.
Sweden	10	6	Proposal to reduce the period of filing from 10 to 7 years. If criminal activities are involved there is a 10 year limit for reassessment.
The former Yugoslav Republic of Macedonia	10	5	5 years for cash flow and secondary documents.
Ukraine	3	3	Reassessment period can be longer in case of criminal prosecution. Time of filing for documents about salary is 70 years!
United Kingdom	6	6	21 years reassessment period when failure to take reasonable care or deliberate underpayment.

Table 1. Existing rules on loss carry forward and the filing years for accounting materials in IOTA Member tax administrations.

### 6.2. Organisational approach

The second method to deal with ATP schemes is the development of an effective organisational structure in the tax administration (“organisational approach”). Several approaches have been introduced by IOTA tax administrations.

#### Netherlands

The Dutch tax administration has formed expert groups on specific subjects, including the area of ATP. The members of these expert groups work not in a central location, but at the local tax offices. Their knowledge and best practices are, both centrally coordinated and available at local tax office level.

#### Belgium

Although each local audit office has to deal with tax avoidance and tax evasion, Belgium also has a Special Inland Revenue Service (roughly 500 persons), specialising mostly in (international) evasion and evasion schemas. They are also dealing with ATP. Their investigations can result in several audits, for which local offices can be partly responsible. In some rare cases, a central task team is created to deal with very specific topics. A task team has the advantage that they can focus on the one case and gain a lot of experience and knowledge.

France

The French tax administration has developed a variety of strategies to fight against tax avoidance and tax evasion, and an ATP strategy is included amongst these. Under this strategy, the French tax authorities have been active at two levels, namely the tax administration and that of fiscal policy. The tax administration has set up a national department specialised in fighting against non-compliant behaviour. To be able to address all issues, the administration also has legislative tools available to them.

Portugal

The tax administration has created a working group responsible for the analysis and classification of the reported schemes for audit purposes.

Spain

There is not a special unit to tackle ATP schemes, only in the Anti-Fraud Office where there is a specific unit for tax havens. This unit carries out investigations of serious fraud cases that come under their jurisdiction.

Sweden

The Swedish Tax Agency (STA) has not a special organisation to address ATP, having a project to develop a model of how the STA can resolve this. For previous cases, after a tax scheme has been identified, the STA formed teams to tackle these special tax arrangements. There is also a department that only works with international transactions.

*6.2.1. Conclusion*

Many of IOTA tax administrations have recognised the urgent need for specialisation and further co-operation in this area. However, they are doing it in different ways. They have created expert groups, special, units, departments or special offices.

## 7. CONCLUSION AND FINAL RECOMMENDATIONS

In the preceding chapters, said the authors pointed out that a favourable risk/reward ratio for the taxpayer and the increasing cross-border flows in a global economy offer opportunities to encourage ATP and tried to indicate how tax authorities can respond.

Accordingly, on the basis of these observations, this chapter summarises the findings of the Task Team and makes a number of recommendations (on the law, on the organisation and on the management) to improve the detection of ATP and to fight against ATP schemes.

The majority of tax laws are based on a formal and legal analysis of transactions and statutes which are generally interpreted by the court in a traditional way based on a “substance over the form” doctrine. The relatively poor success rate of some administrations probably explains why the income tax legislation of many countries contains an extensive range of specific anti-avoidance provisions in addition to their general anti-avoidance provisions.

In this context, it seems that the majority of countries consider that a reactive legislation would be more efficient than a general anti-tax avoidance rule. Nevertheless, IOTA Members must not forget that the efficiency of any law is dependant upon how strong the legislative procedures are and their ability to adapt it to meet new provisions.

In connection with this recommendation, the Task Team further proposes to the IOTA Members that their countries develop a system of trader registration for tax schemes so that the tax administrations can study them and propose to the legislature any changes necessary for updating specific anti-tax avoidance provisions.

It is important that tax administrations detect this type of planning early so as to ensure compliance with the object, the spirit and the purpose of the tax legislation. However, such early detection is hard to achieve in a self-assessment system.

If the majority of countries, directly or indirectly, consider that an ATP requires the involvement of tax intermediaries, such as accounting firms, law firms, other tax advisory bodies or financial institutions, in the process, only a few are trying to respond to this involvement.

It is interesting to observe that, in recent years, a number of countries including amongst others the United Kingdom, Portugal and Ireland have introduced in their tax code an early disclosure system, while, during the same period the United States also introduced substantial changes to their system. According to these disclosure systems, tax intermediaries who are involved in ATP are obliged to declare the schemes.

Taxpayers need certainty and safety rules. Some taxpayers develop unconsciously tax planning schemes that do not correspond to the intent of the tax legislation but

comply with its wording. These disclosure systems can help them to reduce any uncertainty and develop compliant behaviour.

They can also make it possible to obtain information on transactions that carry a risk of avoidance, more quickly. These disclosure mechanisms can reduce the time required for tax administrations to respond to ATP schemes by changing the law and as a consequence reduce the attractiveness of ATP.

The Task Team also proposes that the IOTA Members develop an “advance ruling system” which consists of a statement that the tax administration makes to an individual (or an entity) informing in advance the tax treatment they will apply to the transaction (specific or not, complex or not) that a taxpayer intends to carry out.

Often presented as a last resort against ATP, the general anti tax-avoidance provision is probably now the most current provision used by IOTA administrations. Even so, all the IOTA Members interviewed by the Task Team about the concept of economic substance introduced in their tax legislation, directly or indirectly, complain of its lack of clarity.

They regret the lack of clarification, on one hand because the economic, financial or commercial purpose of a transaction is not always easy to identify, and on the other hand because, without guidance, this concept can be interpreted in different ways by the judges.

All the IOTA Members interviewed recognise that the economic substance is, however, clearly used for fighting against ATP in two situations which are: the lack of economic substance of a transaction, and the real economic substance of a transaction.

The Task Team also observed that, currently, no countries have introduced an analysis of transactions on the basis of a comparison of the pre-tax profit and the tax benefits (of the ATP) as a kind of economic balance of the consequences of the relevant transaction. In the IOTA Membership the ATP that represents a part of an economic substance is more often acceptable than not by both the revenue bodies and the judge.

In the IOTA region, the period of reassessment offered to the tax administrations to audit and to propose changes to the original income tax return, is usually limited to 3 or 4 years.

The Task Team proposes that, when a tax administration is facing a scheme which can be considered as an ATP, an additional period of time is allowed for the tax administration to study the case, or, that the limitation period provision does not apply to allow time for the tax administration to study the scheme.

Even if no countries have talked about penalties, it is important for the Task Team that the anti avoidance tax system also includes a system of penalties, not only for the taxpayers but also for the promoters involved in any tax avoidance transactions.

As was mentioned before, a favourable risk/reward ratio for the taxpayer encourages ATP. A system of penalties created specifically for ATP can act on and/or change the ratio, and, can reduce the attraction for ATP.

It is also clear to the Task Team that the fight against ATP will be more efficient if every tax administration created a team specialised in tackling ATP.

Located at a regional or national or federal level, this unit could be focused on the following objectives:

- Coordination of all activities concerning efforts to fight against ATP for the entire organisation;
- Management and development of specific risk analyses for ATP;
- Management and research into new methods to detect ATP and determining the groups at risk;
- Providing to the audit department or to the services in charge of tax audits, information about registered tax schemes or new tax schemes received from external sources (from international institutions or other ministries);
- Provision of legislative amendments to tackle ATP more efficiently;
- Management and coordination of international co-operation.

As referred to above, because the detection of an ATP scheme needs additional information from both domestic institutions and administrations and also from international institutions and/or administrations, this can impose significant limits on the action of the tax administration. It is important that tax administrations try to develop free flowing channels of communication and encourage the exchange and harmonisation of practices to detect ATP schemes and to deal with them and their users. If possible, administrations should be encouraged to develop common processes.

### 7.1. Final Remarks

ATP is a global trend that can touch every country, just because it has a tax system. It would be far from the truth and probably a fault to think that a country is immune to this phenomenon and believe that the revenue bodies do not have to manage this risk.

The Report has demonstrated that, even if every country in the IOTA region tries to deal with this phenomenon, the system is far from efficient due to the lack of resources, weakness of legislative tools and partial organisation. The Task Team hopes that it is clear that ATP is a complex issue that cannot be eradicated by marginal changes in enforcement practices. This study shows that administrations have to focus on two enforcement tools: the law and the organisation.

The proposals and recommendations defined in this Report take all these factors into account but cannot be considered as a proposal for an optimal organisation, rather as a guide to IOTA Members who would like to propose to their administration some changes.

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Much work remains to be done, for example, to analyse the impact on economic “substance over the form” doctrine developed by tax administration of the court’s jurisprudence.