



## Incorporation into the Greek legislation of ATAD II provisions for the elimination of mismatches in the treatment of “reverse” hybrid instruments

Council Directive (EU) 2017/952 of 29 May 2017, known as ATAD II, has introduced the mechanisms for eliminating the mismatches that arise from the application of “hybrid” financial instruments, which are due to the different treatment and the interaction of different taxation systems applicable for legal entities as well as for tax transparent entities in the different member states. The provisions of ATAD II for hybrid financial instruments came into force as of 1 January 2020 and were incorporated into Greek tax legislation with the introduction of article 66B of the Greek Income Tax Code (ITC) by virtue of law 4714/2020.

Exceptionally, in accordance with the relevant provisions of article 1 par.5 of ATAD II, the rules for the elimination of mismatches arising from the treatment of “reverse” hybrid instruments shall be applicable for tax years starting from 1 January 2022, and these rules were recently incorporated into Greek tax legislation by virtue of the new law 4949/2022 as addition of new paragraphs 10 and 11 in article 66B of the Greek ITC.

### Reverse Hybrid Instruments

In general, hybrid entities are entities that are regarded as taxable entities under the laws of one jurisdiction and whose income and expenses are treated as income and expenses of other person(s) under the laws of another jurisdiction (i.e. as tax transparent).

A “reverse” hybrid entity is generally considered to be an entity that is treated as tax transparent under the laws of the jurisdiction of its establishment, but as subject to taxation (i.e. as non tax transparent) under the laws of the jurisdiction of establishment of the investors that are participating in this hybrid entity.

Under the provisions of ATAD II, as incorporated in the new paragraph 10 of article 66B of the Greek ITC, a reverse hybrid mismatch requiring the application of a corrective mechanism in Greece will arise when the following circumstances occur simultaneously:

- There is an entity established in Greece that is treated as tax transparent in Greece, and
- One or more affiliated entities (within the meaning of article 66B of the ITC), which are tax resident of a

jurisdiction outside Greece, participate in aggregate, directly or indirectly, by a percentage of fifty percent (50%) or more in the voting rights, capital interests or share in the profits of the Greek hybrid entity, and

- One or more of the jurisdictions, where the entity or entities participating in the Greek hybrid entity are tax resident, consider such Greek hybrid entity to be subject to corporate income tax (i.e. to be non tax transparent) under their own laws for the income it receives.

When the above circumstances occur simultaneously and the income of the Greek hybrid entity is not taxed under any other provision of the Greek tax legislation or in any other jurisdiction, then the correction mechanism provided for in the newly introduced paragraph 10 of article 66B of the ITC shall apply.

### Corrective Mechanism

In general, under the relevant provisions of ATAD II that have been already incorporated in Article 66B of the ITC with effect from 1 January 2020, a mismatch in the treatment of hybrid financial instruments is deemed to exist where some payment is subject to either a double deduction (i.e. a deduction in both the country of establishment of the payer and that of the recipient) or to a deduction in the country of the payer without inclusion in the taxable basis of the recipient. Such mismatches arise, inter alia, due to the different legal characterization of the financial instruments/payments in the different jurisdictions involved (e.g. as debt/interest in the payer's jurisdiction and as equity/dividend in the recipient's jurisdiction) or due to the intermediation of hybrid entities, which are treated as taxable under the laws of one jurisdiction and as tax transparent under the laws of the other jurisdiction. As a mechanism for correcting such mismatches, the provisions of article 66B of the ITC introduce, in principle, the non-deduction of the payment from the investor's taxable income in the case of a double deduction and the non-deduction from the payer's taxable income in the case of a deduction with no inclusion.

In cases of “reverse” hybrid mismatches, the correction of the mismatch aims at rendering the entity, which is

(otherwise) considered tax transparent in Greece, as taxable in Greece for any payment falling within the scope of article 66B of the ITC, to the extent that such income is not otherwise taxed under any other provision of Greek tax law (or any other tax law of a jurisdiction outside Greece). Therefore, the corrective mechanism operates so as to modify the characterization of the reverse hybrid entity and consider it as a taxable entity for income tax purposes in Greece with respect to the treatment of the relevant income. As a result, this mismatch is being handled by treating the Greek hybrid entity as subject to tax in Greece for the relevant income and thus no deduction of the payment in the payer's country is required, (which would have been the general treatment of such a situation under the already existing provisions of par. 1 to 9 of article 66B of the ITC).

## Exceptions

The provisions of par. 10 of article 66B of the ITC on “reverse” hybrid mismatches do not apply to “collective investment undertakings”. Such collective investment undertakings are investment undertakings or portfolio companies with a large number of participants that hold a diversified portfolio of securities and are governed in Greece by appropriate regulations for the protection of investors.

## Contact us

### **Georgia Stamatelou**

Partner, Head of Tax and Legal

T: + 30 210 60 62 227

E: [gstamatelou@kpmg.gr](mailto:gstamatelou@kpmg.gr)

### **Christos Krestas**

Partner, Tax

T: + 30 210 60 62 394

E: [ckrestas@kpmg.gr](mailto:ckrestas@kpmg.gr)

## More information at

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)



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